

No. 71499-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FRED MYERS, JR.,

Appellant.

2016 FEB 17 AM 10:50
COURT OF APPEALS
STATE OF WASHINGTON
[Signature]

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. Sufficient evidence did not prove that Officer Young was assaulted while exercising his “official duties,” requiring reversal of the conviction for third degree assault.

Even where police have probable cause to arrest a person within a home, the state and federal constitutions prohibit warrantless entry into a person’s home unless there is an exception to the warrant requirement, such as an exigency. Payton v. New York, 445 U.S. 573, 587-88, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); State v. Holeman, 103 Wn.2d 426, 429, 693 P.2d 89 (1985). Officers who disregard this fundamental, long-standing constitutional rule act unlawfully.

In this case, without a warrant or exception to the warrant requirement, police entered Myers’ home to arrest him. During the arrest, Myers purportedly kicked one of the arresting officers, Officer Young, in the shin. Myers was charged with third degree assault, which required proof beyond a reasonable doubt that the officer was performing his “official duties” at the time of the assault. RCW 9A.36.031(1)(g). Official duties do not include bad faith performance of job-related duties or officer “frolics.” State v. Mierz, 127 Wn.2d 460, 479, 901 P.2d 286 (1995). Because the police did not act in good-faith when entering Myers’ home, the State failed to prove that the any assault that occurred thereafter

in the home was against an officer performing his “official duties.” The conviction should be reversed.

Myers raises a challenge to the sufficiency of the evidence, not a challenge to the admissibility of the evidence. Sufficiency of the evidence may be raised for the first time on appeal. State v. Hickman, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998). In asserting that, “[e]vidence favoring the defendant is not considered,” the State misunderstands the standard of review in a sufficiency of the evidence challenge. Br. of Resp’t at 9. While the State is entitled to all favorable inferences in a challenge to the sufficiency of the evidence, appellate courts are not required to ignore unfavorable facts. State v. Davis, ___ Wn.2d ___, 340 P.3d 820, 827-28 (2014) (Stephens, J. dissenting).¹

This case is distinct from State v. Hoffmann, 116 Wn.2d 51, 804 P.2d 577 (1991) and Mierz because neither case involved an entry into a residence without a warrant or exception to the warrant requirement. The State fails to grapple with this distinction. It makes all the difference because the home is afforded special protection and officers are charged with knowing this. Payton, 445 U.S. at 590; State v. Young, 123 Wn.2d

¹ This portion of Justice Stephens’s dissent received four concurring votes, making it precedent. Davis, 340 P.3d at 826 (Wiggins, J. concurring in part, dissenting in part) (concurring with dissent in that evidence was insufficient to sustain firearm possession convictions).

173, 185, 867 P.2d 593 (1994). No competent officer would think he or she has authority to enter a home without a warrant or exception to the warrant requirement. Osborne v. Seymour, 164 Wn. App. 820, 862, 265 P.3d 917 (2011); Hopkins v. Bonvicino, 573 F.3d 752, 759-60 (9th Cir. 2009).

The State's argument that exigent circumstances justified the warrantless entry should be rejected. Br. of Resp't at 12. The State does not argue that fourth degree assault, a misdemeanor, is a "grave offense." Neither does the State argue that the police could not wait and get a warrant. Further, the evidence did not establish that Myers was endangering anyone. There was no evidence that others were in the home with Myers. His wife was with police about 100 yards away. Myers himself was initially cooperative and readily spoke with law enforcement. While there was evidence that Myers was intoxicated and that he became agitated upon being questioned about allegations of domestic violence, the evidence did not establish an exigency. See State v. Hinshaw, 149 Wn. App. 747, 755, 205 P.3d 178 (2009) (exigent circumstances did not justify warrantless entry into home of man suspected of driving under the influence).

The State bore the burden to prove beyond a reasonable doubt that Officer Young was acting in accordance with his official duties at the time

of the alleged assault. The State failed to meet its burden. Officer Young's official duties did not include violating the fundamental and clearly established constitutional rule forbidding warrantless entry into a person's home. The evidence failed to prove that he was acting in good-faith. This Court should reverse the conviction for third degree assault and order it dismissed with prejudice.

2. Alternative Issues

Concerning the ineffective assistance of counsel claim, Myers rests on the arguments presented in his opening brief. Br. of App. at 16-25. This Court should accept the State's concession that the sentencing court lacked authority to order, as a condition of community custody, that Myers participate in a mental health evaluation and comply with any recommended treatment. Br. of Resp't at 19.

B. CONCLUSION

An officer's official duties do not include warrantless entry into a home to effect an arrest. Officers who violate this long-standing and clear constitutional prohibition act in bad faith. Because Officer Young entered Myers' home without authority of law, he was not acting in accordance with his official duties when he was purportedly assaulted inside the home. This Court should reverse for lack of sufficient evidence or, alternatively, for ineffective assistance of counsel.

DATED this 13th day of February, 2015.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Richard W. Lechich". The signature is written in black ink and is positioned above a horizontal line.

Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorneys for Appellant

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DIVISION I**

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Respondent,)	
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FRED MYERS,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF FEBRUARY, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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