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Supreme Court of the State of Washington

Opinion Information Sheet

Docket Number: 75915-4

Title of Case: State of Washington v. Robert John Morse

File Date: 12/01/2005

Oral Argument Date: 06/09/2005

SOURCE OF APPEAL

Appeal from Superior Court,

County

Honorable Gerald L Knight

JUSTICES

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STATE OF WASHINGTON,)

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Respondent,) No. 75915-4

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v.) En Banc

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ROBERT JAMES MORSE,))

Petitioner.) Filed December 1, 2005

)

CHAMBERS, J. -- Under article I, section 7 of the Washington Constitution, warrantless searches are per se unreasonable. Exceptions to the warrant requirement are jealously and carefully drawn. Properly obtained, consent to a warrantless search is one of those carefully drawn exceptions.

Although Robert James Morse was at home, police gained entry into his apartment by obtaining the consent of a houseguest who, with her husband, had been at Morse's apartment for only five days. The police did not have a search warrant, were looking for another person, and did not obtain

Morse's permission to search his apartment until after they found contraband in his bedroom. The State argues (1) that the houseguest had actual and apparent authority to consent and (2) that the police had no duty to obtain Morse's consent until they came upon him and then only if he objected to the search. We disagree. One who has equal or lesser control over a premises does not have authority to consent for those who are present and have equal or greater control. 'Presence' is used in accordance with its ordinary meaning. Persons are not absent merely because the police do not know they are present, nor are they absent until police have come upon them during a warrantless search. 'Authority' to consent is a matter of status or control and a question of law. The subjective beliefs and understandings of law enforcement officers are irrelevant to the question of 'authority.' Law enforcement officers, who seek to conduct a warrantless search based upon the exception of consent, are well advised to ask for the woman and/or man of the house before seeking consent to search a home. If the man or woman of the house is not present, a brief inquiry could determine the identity of the person present and their authority to give consent; this would give police officers the information needed to properly proceed and to assure protection of constitutional rights. The search of Morse's apartment was unlawful and we reverse.

FACTS

On January 29, 2002, two City of Everett police officers contacted the property manager for the Deer Creek Apartments. The officers had

information that Sarah Wall, who was wanted on multiple outstanding felony warrants, was staying in the apartment complex. The manager told the officers that while Wall may have stayed there in the past, she did not believe that Wall was there anymore because bounty hunters had unsuccessfully searched for her in apartment C-108 a few days earlier. She also told officers that she did not recognize Wall from a picture that they showed her. The manager told the officers that Morse was the only tenant on the lease for apartment C-108 and that she was not aware of anyone else living in that apartment.

The officers then went to Morse's apartment and knocked on the door. A woman, Pam Dangel, answered the door and told the officers that Wall was neither in the apartment, nor had she been there in over a week. While standing at the door, the officers did not ask Dangel if she lived at the apartment, nor did they inquire as to the nature of her relationship to Morse. Police asked only whether they could enter to search for Wall.

According to the police, Dangel agreed to let them enter to look for Wall.¹

After police entered, they learned that Dangel and her husband had been staying at Morse's apartment for only a few days. Dangel and her husband planned to stay for one additional night while their apartment was being painted. As one of the officers talked to Dangel, the other proceeded directly to the master bedroom. From outside the bedroom he saw Morse, who was sitting on his bed. The officer identified himself, indicated that he was looking for Wall, and entered the room. As he entered the bedroom, the officer looked toward a closet where he saw a scale, packaging material and

a large bag with bluish powder sitting on a desk. Morse claimed that what appeared to be drug paraphernalia was his, but that what appeared to be drugs were not. Morse was then arrested and only after his arrest was his consent to search the rest of his bedroom sought and obtained.

Morse was convicted of possession of methamphetamine. On appeal, Morse argued that the warrantless search of his bedroom violated article 1, section 7 of the state constitution. He argued that Dangel lacked authority to consent to the search. He also argued that because he was present and able to object to the search, the police erred by failing to get his permission prior to entering and searching his bedroom. In an unpublished opinion, the Court of Appeals rejected both arguments, finding that Dangel had both actual and apparent authority to consent to the search, and that because Morse did not explicitly object to the search, the police did not have to secure his consent before entering his bedroom. We granted review. *State v. Morse*, 153 Wn.2d 1023, 110 P.3d 213 (2005).

ANALYSIS

Common Authority

Under article I, section 7 of the Washington Constitution, warrantless searches are per se unreasonable. *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Article I, section 7 provides that '{n}o person shall be disturbed in his private affairs, or his home invaded, without authority of law.' Under this provision, the warrant requirement is especially important as it is the warrant which provides the requisite 'authority of

law.' *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

Exceptions to the warrant requirement are to be "jealously and carefully drawn." *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004) (quoting *Hendrickson*, 129 Wn.2d at 72). The burden of proof is on the State to show that a warrantless search or seizure falls within one of the exceptions to the warrant requirement. *State v. Acrey*, 148 Wn.2d 738, 746, 64 P.3d 594 (2003) (quoting *State v. Kinzy*, 141 Wn.2d 373, 382, 5 P.3d 668 (2000)).

In search and seizure cases involving cohabitants, this court has adopted the common authority rule. *State v. Thompson*, 151 Wn.2d 793, 92 P.3d 228 (2004); *State v. Walker*, 136 Wn.2d 678, 965 P.2d 1079 (1998); *State v. Leach*, 113 Wn.2d 735, 582 P.2d 1035 (1989). Because a person's expectation of privacy is necessarily reduced when authority to control a space is shared with others, *Leach*, 113 Wn.2d at 739, such persons necessarily assume some risk that others with authority to do so will allow outsiders into shared areas. We have said that the authority does not rest upon the law of property, with its attendant legal refinements, but rests rather on mutual use of the property. *Id.* We have, thus, justified the common authority rule based upon the theories of 'reasonable expectations of privacy' and 'assumption of risk.' *State v. Christian*, 95 Wn.2d 655, 659-60, 628 P.2d 806 (1981); *Leach*, 113 Wn.2d at 739. In the context of a search, consent is a form of waiver. Ordinarily, only the person who possesses a constitutional right may waive that right. Cf. *Walker*, 136 Wn.2d 678 (wife's consent not effective as waiver of husband's

constitutional right to be free from invasion of privacy). Common authority under article I, section 7 is grounded upon the theory that when a person, by his actions, shows that he has willingly relinquished some of his privacy, he may also have impliedly agreed to allow another person to waive his constitutional right to privacy.

The United States Supreme Court, interpreting the Fourth Amendment to the federal constitution also applies the doctrine of common authority in searches involving cohabitants. Because of differences in the text of the Fourth Amendment and article I, section 7 discussed below, the United States Supreme Court adopted the apparent authority doctrine. This doctrine is grounded upon the reasonableness of the search rather than on reasonable expectations of privacy and the appropriate scope of consent. See *Illinois v. Rodriguez*, 497 U.S. 177, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990).

Authority to Consent

The narrow issue in this case is whether a temporary guest has authority to authorize a search of the private areas of her host's home while the host is present. More broadly, this case involves the differing analytical frameworks used in applying two different constitutional provisions: the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution.²

The Fourth Amendment

The Fourth Amendment to the United States Constitution prohibits 'unreasonable searches and seizures.' U.S. Const. amend. IV. The Fourth

Amendment does not prohibit 'reasonable' warrantless searches and seizures.

The analysis under the Fourth Amendment focuses on whether the police have acted reasonably under the circumstances. The following is illustrative of the analytical approach taken under the Fourth Amendment:

The upshot was that the officers in good faith believed Miller was Hill and arrested him. They were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time.

Hill v. California, 401 U.S. 797, 803-04, 91 S.Ct. 1106, 28 L. Ed. 2d 484 (1971).

In Rodriguez, Justice Scalia, writing for the Court, observed that 'what is at issue when a claim of apparent consent is raised is not whether the right to be free of searches has been waived, but whether the right to be free of unreasonable searches has been violated.' Rodriguez, 497 U.S. at 187. Thus, since there may be circumstances where a police officer's reasonable good faith belief that a person authorizing a search has the authority to do so, such a good faith belief may mean the search itself is reasonable under the Fourth Amendment.

Article I, Section 7

Unlike in the Fourth Amendment, the word 'reasonable' does not appear in

any form in the text of article I, section 7 of the Washington Constitution. We have also long declined to create 'good faith' exceptions to the exclusionary rule in cases in which warrantless searches were based on a reasonable belief by law enforcement officers that they were acting in conformity with one of the recognized exceptions to the warrant requirement. *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982) ('the language of our state constitutional provision . . . shall not be diminished by . . . a selectively applied exclusionary remedy.'). We have also repeatedly held that article I, section 7 provides greater protection of individual privacy than the Fourth Amendment. E.g., *State v. Jackson*, 150 Wn.2d 251, 259, 76 P.3d 217 (2003); *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002); *State v. Vrieling*, 144 Wn.2d 489, 495, 28 P.3d 762 (2001); see also Charles W. Johnson, *Survey of Washington Search and Seizure Law: 2005 Update*, 28 *Seattle U. L. Rev.* 467, 587 (2005).

Under article I, section 7, whether a person can consent to the search of a premises is based upon that person's independent authority to so consent and the reasonable expectation of his co-occupant about that authority.

First, the consenting party must be able to permit the search in his own right. Second, it must be reasonable to find that the defendant has assumed the risk that a co-occupant might permit a search. *State v. Mathe*, 102 Wn.2d 537, 543-44, 688 P.2d 859 (1984). 'In essence, an individual sharing authority over an otherwise private enclave inherently has a lessened expectation that his affairs will remain only within his purview, as the other cohabitants may permit entry in their own right.' *Leach*, 113

Wn.2d at 739. In short, while under the Fourth Amendment the focus is on whether the police acted reasonably under the circumstances, under article I, section 7 we focus on expectations of the people being searched and the scope of the consenting party's authority.

In *Leach*, we analyzed common authority in terms of 'control' over the premises. *Leach*, 113 Wn.2d at 739. The right of control may be based upon consent by one with an equal or superior interest in the premises or upon some independent authority. The touchstone of the inquiry is that the person with common authority must have free access to the shared area and authority to invite others into the shared area. That access must be significant enough that it can be concluded that the nonconsenting co-occupant assumed the risk that the consenting co-occupant would invite others into the shared area. When a guest is more than a casual visitor and has "run of the house," her lesser interest in the property is sufficient to render consent to search effective only as to the areas of the home 'where a visitor would normally be received.' 4 Wayne R. LaFare, *Search and Seizure* sec. 8.5(e), at 235 (4th ed. 2004). Cf. *State v. Hoggatt*, 108 Wn. App. 257, 30 P.3d 488 (2001) (defendant assumed the risk that cohabitant would allow entry to others into common areas of the apartment, such as the living room, but not into private areas such as the bedroom). Likewise, the scope of consent given must not exceed the scope of the consenting person's authority. A person may have free access to some areas of the premises but not all areas. For example, the possessor of a home may share control and access to areas such as the kitchen, the

dining room, the living room, and the bathroom but not other, private areas such as the possessor's bedroom, office, basement, or attic. The existence and scope of common authority is a legal question which must be determined by the court based upon the facts of each case.

This court has never used the words 'apparent authority' in the context of a cohabitant's authority to consent to a search. However, the Court of Appeals based its opinion below, in part, on an earlier case of that court interpreting the Fourth Amendment. See *State v. Holmes*, 108 Wn. App. 511, 519, 31 P.3d 716 (2001). In *Holmes*, the court stated that a person has apparent authority to consent to search if he or she 'appears to have authority, so long as police have a reasonable belief in the authority of the person giving consent.' *Id.* (emphasis added). Finding that the officers' subjective belief about the consenting party's authority was unreasonable, the *Holmes* court determined that even if the doctrine of apparent authority existed under the Washington Constitution, a question the court explicitly declined to answer, *Holmes*, 108 Wn. App. at 518 n.20, that subjective belief did not validate the objectively unreasonable warrantless search. We pick up where the *Holmes* court left off by holding that, standing alone, a police officer's subjective belief made in good faith about the scope of a consenting party's authority to consent cannot be used to validate a warrantless search under article I, section 7.

In this case, the court below erroneously applied the doctrine of 'apparent authority' to article I, section 7. This may have been done because in *Mathe*, we adopted the 'common authority' test used under the Fourth

Amendment, see *United States v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974), as the proper guide for determining questions of consent under article I, section 7. *Mathe*, 102 Wn.2d at 543. *Matlock*, however, did not involve the doctrine of apparent authority, but rather whether a wife who was a cohabitant with her husband had actual authority over the marital residence. Because our constitution focuses on the rights of the individual, rather than on the reasonableness of the government action, the apparent authority doctrine, as articulated in *Rodriguez* and applied in the Fourth Amendment context is not appropriate to any analysis under article I, section 7.3

Common Authority Where a Cohabitant is Present

The State argues that Dangle had common authority to consent to a search of the premises and that when they came upon Morse, the police officers had no duty to obtain his consent. The State argues that it was Morse's affirmative duty to explicitly object to the search. It is essentially the State's position that Morse was not present in his own apartment until police found him. While such a suggestion may make sense from the perspective of the Fourth Amendment's 'reasonableness' requirement, simply inquiring into whether a police officer's subjective beliefs are reasonable is not sufficient under article I, section 7.

We have been quite explicit that under our constitution, the burden is on the police to obtain consent from a person whose property they seek to search. In obtaining that consent, police are required to tell the person from whom they are seeking consent that they may refuse to consent, revoke

consent, or limit the scope of consent. *State v. Ferrier*, 136 Wn.2d 103, 116, 960 P.2d 927 (1998). We have never held that a cohabitant with common authority can give consent that is binding upon another cohabitant with equal or greater control over the premises when the nonconsenting cohabitant is actually present on the premises. We have never held that a person is not present in her home unless and until the police come upon her. We decline to do so now.

In *Leach*, we held that where the police have obtained consent to search from an individual possessing, at best, equal control over the premises, 'that consent remains valid against a cohabitant, who also possesses equal control, only while the cohabitant is absent.' *Leach* 113 Wn.2d at 744. In *Walker*, Mrs. Ellen Walker consented to a search of her home. Before the search began, however, Mr. Gus Walker, Mrs. Walker's husband, arrived. The police failed to obtain Mr. Walker's consent to search and he did not affirmatively object to the search. Contraband was found in the couple's bedroom. Only Mrs. Walker was convicted and she argued, relying on *Leach*, that without her husband's consent, the search was invalid as against her. While we rejected her argument, we concluded the following about *Leach*: 'It follows from {*Leach*} that because Ellen and Gus were cohabitants and both present during the search, Ellen's consent to the search was invalid as to Gus.' *Walker*, 136 Wn.2d at 684.

In the case before us, Morse was the sole signatory on the lease and the sole tenant in the apartment searched. As guests in Morse's apartment for five days, Dangel and her husband had limited control and, therefore,

limited authority over that portion of the apartment they shared with Morse. The record, however, is unclear as to the precise scope of their authority. There is certainly insufficient evidence in the record to support a conclusion that the Dangel's shared control over Morse's bedroom. Moreover, since Morse was at all times present in his apartment,⁴ the State must prove that Dangel had greater authority over the areas of the premises searched in order to consent to a search that would bind Morse. We hold that the State has failed to meet its burden and that Dangel's consent to search was ineffective as to Morse. Since there is insufficient evidence to support the conviction without the fruits of the unlawful search we reverse Morse's conviction.

CONCLUSION

The Washington Constitution guarantees to its citizens that they will neither be disturbed in their private affairs, nor have their homes invaded, without authority of law. Const. art. I, sec. 7. Warrantless searches are per se unreasonable. *Hendrickson*, 129 Wn.2d at 70. While consent is a recognized exception to the warrant requirement, all such exceptions are narrowly drawn. *Reichenbach*, 153 Wn.2d at 131. Common authority to consent to a search is based upon authority to control the premises. A cohabitant who has common authority to use and control the premises has authority to consent to a search that is within the scope of that authority. Authority to control is determined by the shared use of the premises, the reasonable expectations of privacy, and the degree to which a cohabitant has assumed the risk that others will consent to a

search. The scope of the authority of a cohabitant to consent extends only to areas shared by the cohabitants. When a cohabitant who has equal or greater authority to control the premises is present, his consent must be obtained and the consent of another of equal or lesser authority is ineffective against the nonconsenting cohabitant. 'Presence' is used according to its ordinary meaning. A person is not absent just because the police fail to inquire, are unaware, or are mistaken about the person's presence within the premises. If the police choose to conduct a search without a search warrant based upon the consent of someone they believe to be authorized to so consent, the burden of proof on issues of consent and the presence or absence of other cohabitants is on the police.⁵ *Acrey*, 148 Wn.2d at 746.

Robert Morse was present in his home when police arrived at his door without a search warrant and looking for someone else. Despite his actual presence, police failed to get Morse's consent to search his apartment. Instead, they relied upon the consent of a houseguest who lacked the authority to consent to a search of Morse's home that would bind Morse under the Washington Constitution. Because the search of Morse's apartment did not satisfy the requirements of article I, section 7 of the Washington Constitution, nor did police obtain valid waiver of those requirements by an effective consent, the search of Morse's home was unlawful, and the fruits of that search should have been suppressed. We therefore reverse the courts below and reverse the conviction.

WE CONCUR:

1 Dangel disputed this fact. She claimed that she attempted to prevent the police from entering but that they forced their way in. The trial court found the police officers' testimony that Dangel told them to 'come on in' more credible. Clerk's Papers at 47.

2 The State filed a motion to strike portions of Morse's supplemental brief. That motion is denied.

3 We note that 'apparent authority' as used to analyze common authority under the Fourth Amendment, is quite different than 'apparent authority' as used in agency law. Under principles of agency, an agent can bind a principal when he or she has either actual or apparent authority to do so. *King v. Riveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994). Actual authority is based on the principal's objective manifestation to the agent, and apparent authority stems from the principal's objective manifestation to a third party. A party asserting apparent authority must prove that he or she actually believed that the agent had authority to bind the principal and that his or her belief is objectively reasonable. *Id*

The United States Supreme Court's analysis under the Fourth Amendment seems to focus only on the second prong of apparent authority--that a party asserting apparent authority has a reasonable objective belief that the agent has authority. While we are reluctant to inject the words 'apparent authority' into our article I, section 7 jurisprudence, we note that the application of the first prong of apparent authority according to agency

principles may be useful in analyzing a cohabitant's authority under article I, section 7. For example, it might be appropriate to ask whether the principal, by his conduct, objectively manifested to third parties (the police) that that person had common authority over the premises. Evidence of such objective manifestations might include, for example, permitting a person to live at the premises, giving the person a key to the premises, permitting the person to share in the expenses of the premises, or permitting the person to invite guests into the premises.

4 'Present' is defined as 'being in one place and not elsewhere: being within reach, sight, or call or within contemplated limits.' Webster's Third New International Dictionary at 1793 (1993). Since the door to Morse's bedroom was 'less than ten feet' from the front door of the apartment, RP at 10, Morse was certainly within 'reach' or 'call' of the officers while they stood at his front door.

5 We recognize that issues of 'common authority' and 'presence' will not always be simple and straightforward. It may be difficult to determine, for example: (1) whether a child has 'common authority' over her parent's home sufficient to authorize that child to consent to a warrantless search, (2) whether a farmer operating a tractor on his back forty is 'present' when the police arrive at the front door of his farmhouse, or (3) whether an employee at a factory has authority to consent for an employer who is on the factory's campus, but in a another building at the time. However, such difficulties may be avoided by the police by obtaining either a search warrant or the consent of the person whose property is to be searched.

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