IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 66443-3-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
RENE SANTIAGO,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: March 26, 2012
	)	

Ellington, J. — Absent consent or emergency, police may not enter a private home without a warrant, even to conduct a routine health and safety check. Mere acquiescence is insufficient to convey consent. We vacate Rene Santiago's conviction because the only evidence was unlawfully obtained.

BACKGROUND

In early 2008, the Drug Enforcement Agency (DEA) and Washington State Child Protective Services (CPS) each received information about Rene Santiago's home. First, the DEA received an anonymous tip that someone was selling methamphetamines out of the house. The DEA referred the matter to the Des Moines Police. Des Moines Detective Bob Tschida "watched the house looking for activity," but observed nothing suspicious.[1]

[1] Report of Proceedings (RP) (Sept. 27, 2010) at 83.

A month or two later, CPS received a confidential referral that Santiago's two-year-old daughter, L.S., was potentially being exposed to methamphetamine. The person who called indicated that L.S.'s mother, Ruby Santiago, had seen drugs in the house, torches and scales in the garage, and had seen Rene sort drugs into bags while L.S. was present. She sometimes smelled burning plastic when she woke in the night. The CPS referral indicated that Ruby had arrived recently from the Philippines, spoke little English, had no family or friends here, and did not know what to do. The CPS screener concluded the child was in danger of "immediate," but not "imminent" harm.[2]

The matter was assigned a 72-hour response time and assigned to CPS worker Tabitha Pomeroy. Because the allegations involved drugs and criminal activity, and because people get "very emotional when you're dealing with their children," Pomeroy requested assistance from the Des Moines Police Department before visiting the home.[3] Pomeroy testified it helps to have law enforcement in such situations to "go check the area to make sure that there's no weapons and just ensure our safety."[4]

Des Moines Police Detective Mike Thomas received the CPS request and referred it to Detective Tschida. He chose Tschida because "I knew that he had been involved with narcotics investigations."[5]

Tschida and Pomeroy went to the Santiago house on the afternoon of

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[2] RP (Sept. 28, 2010) at 177.

[3] Id. at 151.

[4] Id.

[5] RP (Sept. 27, 2010) at 60.

February 28, 2008, along with a cadre of two officers, three detectives, a sergeant and two more CPS workers. The purpose of the visit was "[t]o check on the welfare of the child and make sure she wasn't being exposed to drugs and to make sure it was a safe environment for her in the house."[6] Tschida testified he brought so many law enforcement officers because of "the possible drug implications."[7]

As Tschida, Pomeroy, and two officers approached the home, the garage door opened. Inside was Anthony Santiago, Rene's brother. Tschida explained they were there "to check on the child and then talk to Ruby."[8] According to Tschida, Anthony then "invited us in. He turned around and walked into the house."[9] The officers then "followed in the door and we just walked right in."[10] Tschida could not recall "what words [Anthony] said or if he said words at all" to convey the invitation to enter.[11]

As soon as Tschida entered the home, he saw a woman, later identified as Teri Tindall, sitting on the couch. Tindall tried to push something down into the cushions. Officers recovered the item, which turned out to be methamphetamine, and arrested Tindal. Anthony then became agitated and asked the officers to leave.

Anthony provided a very different version of the facts. He testified that about six plainclothes officers stormed into his garage without permission. Anthony asked if they had a search warrant and tried to put his hands up to block them, but they

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[6] Id. at 91.

[7] Id.

[8] Id. at 95.

[9] Id.

[10] Id. at 96.

[11] Id. at 95.

walked right by. He immediately called his lawyer, Eric Shurman, and put Shurman on speakerphone so that he could tell the officers not to enter the house. The detectives would not speak to Shurman and walked inside the house.

Anthony said he called Shurman a second time after Tindal was arrested. This time, Tschida agreed to talk to him. Shurman testified that he told Tschida that Anthony had not consented to the officers' entry, and if Tschida believed otherwise, the consent "is specifically revoked."[12] Shurman demanded Tschida permit Anthony to leave. Tschida said Anthony was free to leave, but could not take his car, which would be subject to the search warrant for which Tschida was about to apply.

Tschida asked Pomeroy and Officer Jiminez, who spoke Tagalog, to talk to Ruby outside. Ruby told them she lived in the house with her husband Rene and his brother Anthony. She said that her husband was selling drugs out of the house and explained how the drugs were packaged and where they were stored. She indicated she was afraid of what Rene and Anthony would do if they learned she was cooperating with police. Ruby was willing to leave the home with the child and Pomeroy assisted her in trying to find a shelter. L.S. was taken to a hospital and evaluated for exposure to toxins.

Tschida thereafter obtained a warrant to search the Santiago home. According to the State's brief,[13] police found in Rene's master bathroom a box with 32 baggies of methamphetamine and a Tupperware container with 16 additional baggies of

[12] RP (Sept. 28, 2010) at 277.

[13] The State cites trial exhibits that have not been provided. Santiago does not complain or dispute the content of the exhibits.

methamphetamine, an electronic scale, and a large quantity of unused baggies, spoons and containers.[14]

The State charged Rene Santiago with one count of possession with intent to manufacture or deliver methamphetamine. Santiago moved to suppress the evidence discovered in his home. After four days of testimony and argument, the court denied the motion. Following trial, the jury convicted Santiago as charged. He appeals.

DISCUSSION

We review the denial of a motion to suppress by independently evaluating the evidence to determine whether substantial evidence supports the findings and the findings support the legal conclusions.[15] There is substantial evidence when sufficient to persuade a fair-minded, rational person of the truth of the finding.[16] Conclusions of law pertaining to suppression of evidence are reviewed de novo.[17]

The court found that Anthony invited the officers in and concluded he gave them "limited consent to enter the home to check on the welfare of L.S."[18] Additionally, the court concluded the warrantless entry was justified under the community caretaking exception to the warrant requirement. Santiago contends neither conclusion is sound. We agree.

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[14] In various other locations, police also found a safe with $3,680, a 30-30 rifle, a 9 mm pistol, some methamphetamine residue, paraphernalia, and a gun safe with several additional guns.

[15] State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001).

[16] State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

[17] Id.

[18] Clerk's Papers at 123.

Seen in the light most favorable to the State, the evidence is that police walked into Santiago's garage and told Anthony they wished to see L.S. and speak with Ruby, that Anthony turned around and walked into the house, and that the officers simply followed him inside. The trial court's finding that Anthony's conduct conveyed limited consent for police is necessarily based upon Anthony's failure to object to their entry.

A decision of our Supreme Court, issued after trial in this case, makes clear that acquiescence alone is insufficient to establish consent. In State v. Schultz, police responded to reports of two people loudly arguing.[19] When they knocked on the door, Schultz answered and denied that anyone else was present. When one officer told Schultz she had heard a male voice, Schultz called for the man, who emerged from a nearby bedroom. "Schultz then stepped back, opened the door wider, and the officers followed Schultz inside."[20] From this, the trial court found "the defendant acquiesced to their entry."[21]

Our Supreme Court reversed and held that failure to object does not constitute consent for purposes of article I, section 7 of the Washington Constitution:

> Individuals do not waive this constitutional right by failing to object when the police storm into their homes. Nor do they waive their rights when the police enter their homes without their consent just because they are too afraid or too dumbfounded by the brazenness of the action to speak up.[22]

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[19] 170 Wn.2d 746, 750, 248 P.3d 484 (2011).

[20] Id. at 751.

[21] Id.

[22] Id. at 757 (footnote omitted).

Schultz's conduct in silently stepping aside as the police walked in was insufficient evidence of consent.[23]

The facts here are indistinguishable. Anthony's conduct in failing to object when police followed him inside does not establish consent.

Nor does the community caretaking exception apply. That exception to the warrant requirement encompasses situations involving emergency aid and "routine check[s] on health and safety."[24] For the emergency aid exception to apply, a true emergency must exist.[25] The State expressly declines to rely upon the emergency aid exception in this case.[26] Rather, the State contends the warrantless entry here is justified under the exception for routine checks on health and safety, and that the "public's interest in having the police check on the welfare of a vulnerable two-year-old child" outweighs any privacy interest.[27]

But the State does not explain why a routine safety check required entry into the home. The officers did not request that the child be brought to them; they simply walked inside. Washington courts have never applied the community caretaking exception to permit intrusion into a private home absent a genuine emergency.[28]

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[23] Id. at 761-62.

[24] State v. Acrey, 148 Wn.2d 738, 749, 64 P.3d 594 (2003) (citing State v. Kinzy, 141 Wn.2d 373, 386, 5 P.3d 668 (2000)).

[25] Schultz, 170 Wn.2d at 754.

[26] See Br. of Resp't at 32. Accordingly, we do not consider whether Detective Tschida's concerns that the toddler was being exposed to methamphetamine manufacturing would justify entry under the emergency aid exception.

[27] Br. of Resp't at 29.

[28] See, e.g., State v. Thompson, 151 Wn.2d 793, 802-03, 92 P.3d 228 (2004) (declining to excuse warrantless entry where "there was no immediate need for

Even under the less protective Fourth Amendment, the Supreme Court has never applied the community caretaking exception to justify search of a home; and the federal circuits are divided on the question.[29]

The warrantless entry was unlawful.

Without the information obtained during the unlawful initial entry police lacked

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assistance for health or safety concerns"); State v. Hos, 154 Wn. App. 238, 247-48, 225 P.3d 389 (2010) (warrantless entry justified under community caretaking function exception when officer had a reasonable belief that unresponsive resident was not breathing and in need of immediate medical attention), review denied, 169 Wn.2d 1008, 234 P.3d 1173 (2010); State v. Williams, 148 Wn. App. 678, 687, 201 P.3d 371 (2009) (applying community caretaking exception to search of hotel room, but concluding the search was illegal because no one in the room "was in immediate danger"); State v. Ibarra–Raya, 145 Wn. App. 516, 523, 187 P.3d 301 (2008) ("[n]o immediate risk to health or safety [was] shown" to justify officers' warrantless entry into allegedly vacant house); State v. Link, 136 Wn. App. 685, 697, 150 P.3d 610 (2007) (community caretaking exception did not apply to search of home because officer's primary motivation was to investigate a possible methamphetamine lab and "not to immediately render aid" to the children living inside); State v. White, 141 Wn. App. 128, 143, 168 P.3d 459 (2007) (community caretaking exception does not apply where claimed emergency is pretext for an evidentiary search"); State v. Schlieker, 115 Wn. App. 264, 271, 62 P.3d 520 (2003) (emergency aid exception did not apply to search of trailer because officers were there to investigate crimes and had no information that anyone in the trailer was injured); State v. Menz, 75 Wn. App. 351, 353-54, 880 P.2d 48 (1994) (applying emergency exception to excuse warrantless entry upon report of domestic violence where "a reasonable person . . . would have thought that someone inside needed assistance"); State v. Downey, 53 Wn. App. 543, 545-46, 768 P.2d 463 (1989) (warrantless search of home justified under emergency exception when there was danger of explosion and officers did not know if someone incapacitated by ether fumes remained inside).

[29] The Third, Seventh, Ninth, and Tenth circuits have held that the community caretaking doctrine cannot be used to justify warrantless searches of a home, while the Sixth and Eighth Circuits allow such intrusions with additional caveats tending to make the question into one of exigent circumstances. See Ray v. Township of Warren, 626 F.3d 170, 175-177 (3rd Cir. 2010) (citing United States v. Erickson, 991 F.2d 529, 533 (9th Cir. 1993); United States v. Pichany, 687 F.2d 204 (7th Cir. 1982); United States v. Bute, 43 F.3d 531, 535 (10th Cir. 1994); United States v. Quezada, 448 F.3d 1005 (8th Cir. 2006); United States v. Rohrig, 98 F.3d 1506 (6th Cir. 1996)).

probable cause to obtain the search warrant. Thus, the evidence seized in execution of the warrant should have been suppressed.[30] Absent that evidence, there is insufficient support for Santiago's conviction. Accordingly, we vacate his conviction and remand for entry of an order of dismissal.[31]

WE CONCUR:

[30] State v. Gaines, 154 Wn.2d 711, 716-20, 116 P.3d 993 (2005).

[31] Our resolution of this issue makes it unnecessary for us to address the other issues Santiago raises.