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

STATE OF WASHINGTON,	)	No. 66564-2-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
TERESA DIANE ORT,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: August 20, 2012
	)	

Leach, C.J. — Teresa Ort appeals her hit and run fatality conviction, challenging the trial court's denial of her motion to suppress. Police conducting legitimate business may enter those areas of the curtilage of a residence impliedly open to the public without first obtaining a warrant. When doing so, their observation of items in open view does not constitute a search within the meaning of the Fourth Amendment.[1] Here, an officer investigating a hit-and-run collision stepped off Ort's driveway to look at a damaged vehicle parked in her backyard next to the driveway. No search occurred, however, because this area was impliedly open to the public, and the vehicle was therefore in open view. And even if the officer's actions constituted a search, after excising any tainted information, probable cause still supports the search warrant the officer

[1] State v. Seagull, 95 Wn.2d 898, 901-02, 632 P.2d 44 (1981).

ultimately obtained. We affirm.

FACTS

On the evening of October 9, 2009, a vehicle struck and killed Paula Stierns as she walked across the 311th Avenue bridge in Sultan.[2] Witnesses said the vehicle slowed down but did not stop. Detective Alan Baker of the Snohomish County Sheriff's Office investigated the crime. Evidence from the scene included a piece of plastic and some zip ties believed to have come off the vehicle. After consulting several automobile parts dealers and mechanics, Baker determined that the plastic fragment came from the wheel well liner of a Chevrolet Tracker or a Suzuki Vitara.[3] Baker began canvassing the area closest to the bridge, using a list of the 1,200 Trackers and Vitaras with registered owners residing in Snohomish County. Officers also distributed flyers to cars accessing the bridge.

Toward the end of October, Baker received information that a damaged vehicle had been seen in Sultan's Sky View Estates neighborhood. At 9 a.m. on October 29, as Baker drove through the neighborhood in an unmarked van, he noticed a green Suzuki Vitara at Teresa Ort's house. He could see it had front-end damage from the road. Baker parked his van in the driveway, which ran

[2] The bridge is not accessible by a pedestrian walkway. Stierns was walking near the road's centerline when she was hit.

[3] Baker also placed the vehicle within a specific range of manufacture dates.

next to the house and curved behind it. The front end of the Vitara faced out toward the driveway. Baker, dressed in plain clothes, parked his van in the driveway, where it begins to curve around the house, and walked 20 feet to the Vitara. Baker entered Ort's property to inspect the car, and he passed the front entrance without attempting to contact Ort.[4]

The Vitara and a red van were parked immediately adjacent to the driveway in a grassy area behind the house. While standing about 10 feet from the Vitara, Baker noticed dents in the hood and "extensive front end damage." To Baker, the dented hood indicated that the Vitara had been involved in "a car pedestrian strike."

After observing the Vitara's front end, Baker "walked over to the driver's side and peered into the wheel well and noticed that there was a piece missing." While Baker did not have the plastic fragment with him, he was familiar with its tear pattern and thought the damage to the wheel well looked like a close fit. His entire examination lasted about a minute. Baker returned to his van and reported his findings to Detective Joseph Goffin for inclusion in a search warrant affidavit.

As Baker waited for a search warrant to arrive, Ort came walking down

[4] Baker testified at the suppression hearing that he did not notice the front entrance to the house, stating, "I didn't see that when I came in. I was focused on the Vitara."

the road towards her home. She approached Baker to ask if she could help and agreed to an interview. Baker recorded the interview, during which the following discussion occurred:

> Baker: Did you hear about the lady who got hit on the 311th bridge there and killed?
>
> Ort: Yeah I sure did, and I saw the flyers and everything.
>
> Baker: Okay. Your car is the one that hit him.
>
> Ort: Okay.
>
> Baker: The one that hit her.
>
> Ort: How do you know that?
>
> Baker: Because I have those zip ties and I have part of the car that matched, that probably matches up to your car that was left at the scene.
>
> Ort: Okay.

Later in the interview, Ort said she did not think she hit Stierns but admitted she had been driving on the bridge that night and thought she ran over a bag of garbage when she felt her car go "plump-plump." She said she was scared to

call the police after hearing about the hit and run because she did not want to go to jail.

Baker called Goffin to include Ort's "admission" in the affidavit of probable cause. Based on that affidavit, a search warrant issued and deputies seized Ort's vehicle. The State charged Ort with a hit and run fatality.[5]

Before trial, Ort moved to suppress evidence obtained from the search of the Vitara on the ground that the warrant issued without probable cause. She contended that the warrant was invalid because it relied on Baker's entry into her backyard, which, she maintained, was an unlawful intrusion into her private affairs. After an evidentiary hearing, the trial court entered findings of fact and conclusions of law and denied the suppression motion. The trial court concluded,

> The defendant's driveway leads directly from the street to the back of the defendant's house. This constitutes an invitation to the public to use the driveway to access the back of the house. The defendant made no effort to hide the Vitara from public view. Baker did not stray from this driveway and therefore remained in an area impliedly open to the public throughout his short time on the property. The fact that his intent was to investigate does not alter this conclusion.

A jury convicted Ort as charged. Ort appeals, challenging the trial court's conclusion that Baker did not stray from the areas of her property impliedly open

[5] RCW 46.52.020.

to the public.

STANDARD OF REVIEW

This court reviews the denial of a motion to suppress by determining whether substantial evidence exists to support the trial court's findings of fact, and whether those findings support the trial court's conclusions of law.[6] This court reviews conclusions of law de novo.[7] A finding of fact is reviewed as such, even if erroneously labeled a conclusion of law.[8] On appeal, we treat unchallenged findings of fact as verities.[9]

ANALYSIS

Ort claims Baker's examination of her car in her backyard violated her right to privacy under article I, section 7 of the Washington State Constitution.[10] Article I, section 7 prohibits a warrantless search, subject to a limited set of exceptions.[11] Information obtained through an unconstitutional search may not

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[6] State v. Ross, 106 Wn. App 876, 880, 26 P.3d 298 (2001). Substantial evidence exists if it is sufficient to persuade a fair-minded, rational person of the truth of the matter asserted. State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

[7] State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

[8] State v. Ross, 141 Wn.2d 304, 309-10, 4 P.3d 130 (2000).

[9] Acrey, 148 Wn.2d at 745.

[10] Ort also cites the Fourth Amendment, but makes no separate argument on that basis.

[11] State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). Article I, section 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Exceptions to the warrant requirement include: exigent circumstances, searches incident to a valid arrest, inventory

be used to support a search warrant.[12]

Although an individual maintains an expectation of privacy in his or her home's curtilage, police with legitimate business may enter those curtilage areas impliedly open to the public without first obtaining a warrant.[13] In doing so, an officer must act as a "reasonably respectful citizen" would.[14] Under the open view doctrine, when an officer is lawfully present in an area, his detection of items using the senses does not constitute a search.[15] "However, 'a substantial and unreasonable departure' from an area of curtilage impliedly open to the public will be deemed to exceed the scope of the implied invitation and to intrude on a constitutionally protected expectation of privacy."[16]

Before determining if the curtilage areas at issue here were impliedly open to the public, we must first address whether Baker was on legitimate police

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searches, plain view searches, and investigative stops. State v. Garvin, 166 Wn.2d 242, 249-50, 207 P.3d 1266 (2009). The State bears the burden of establishing that an exception to the warrant requirement applies. State v. Kirwin, 165 Wn.2d 818, 824, 203 P.3d 1044 (2009).

[12] Ross, 141 Wn.2d at 311-12.

[13] Seagull, 95 Wn.2d at 902. "The curtilage is that area 'so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection.'" State v. Ridgway, 57 Wn. App. 915, 918, 790 P.2d 1263 (1990) (quoting United States v. Dunn, 480 U.S. 294, 301, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987)).

[14] Seagull, 95 Wn.2d at 902.

[15] Seagull, 95 Wn.2d at 901.

[16] State v. Hoke, 72 Wn. App. 869, 874, 866 P.2d 670 (1994) (quoting Seagull, 95 Wn.2d at 903).

business when he entered Ort's property. Ort claims that Baker was not conducting legitimate police business, relying on State v. Ross.[17] In Ross, a four-justice plurality of our Supreme Court held that officers did not conduct legitimate police business when they entered the defendant's driveway to confirm an odor of marijuana to prepare a search warrant affidavit.[18] The court described the following pivotal facts: the officers' entered the property for the sole purpose of gathering evidence to support a warrant; the officers did not intend to contact the property owners; and the officers walked up the driveway at 12:10 a.m., "when no reasonably respectful citizen would be welcome absent actual invitation or an emergency."[19] A three-justice concurrence would have held that police do not conduct legitimate police business unless they are performing either "knock and talks" or community caretaking functions.[20]

Attempting to align her case with Ross, Ort characterizes Baker's purpose as gathering information in order to prepare an affidavit of probable cause and notes that he did not attempt to contact her. But Ort mischaracterizes Baker's

[17] 141 Wn.2d 304, 4 P.3d 130 (2000).

[18] Ross, 141 Wn.2d at 314-15. Ross involved the conduct of two officers. During a previous visit to the residence, one of the officers had smelled marijuana, but the other officer had not. The second officer would not sign the affidavit of probable cause unless he was able to confirm the smell with a second visit to Ross's property. Ross, 141 Wn.2d at 307-08.

[19] Ross, 141 Wn.2d at 314.

[20] Ross, 141 Wn.2d at 317-19 (Talmadge, J. concurring).

purpose. The Ross plurality distinguished between investigating a crime (legitimate) and entering an individual's property solely to obtain information to support a warrant (illegitimate). Here, Baker was investigating a crime when he drove through Ort's neighborhood looking for the suspect vehicle. The record does not support a finding, as it did in Ross, that Baker had a preconceived plan to enter Ort's property solely to gather evidence he needed to complete an affidavit. As long as police behave as reasonably respectful citizens in entering open areas, they are conducting legitimate police business even though they enter to investigate criminal activity.[21] While Baker did not attempt to contact Ort, Washington law does not support the conclusion that this fact alone renders Baker's activity unlawful.[22]

Next, we determine whether Ort's driveway and backyard parking area were impliedly open to the public. Whether a portion of the curtilage is impliedly open to the public depends on the facts of each case.[23] However, it is well established that an access route to a residence, such as a driveway or walkway, is impliedly open to the public, absent a clear indication that the owner does not

[21] See Ross, 141 Wn.2d at 313-14; State v. Rose, 128 Wn.2d 388, 393, 396, 909 P.2d 280 (1996).

[22] Additionally, Ort makes the argument that Baker did not conduct legitimate police business on her property for the first time in reply. Generally, arguments and authority raised for the first time in reply come too late to warrant consideration. RAP 10.3; State v. Wilson, 162 Wn. App. 409, 417 n.5, 253 P.3d 1143, rev. denied, 173 Wn.2d 1006, 268 P.3d 943 (2011).

[23] Seagull, 95 Wn.2d at 903.

expect uninvited visitors.[24] Here, Ort's driveway was impliedly open to the public, even though it curved around the back of the house. The driveway was the unobstructed direct access route to Ort's house. A reasonably respectful citizen would believe he or she could follow the path of the driveway to the area behind Ort's house.

Ort argues that Baker exceed the scope of the implied invitation by walking into her backyard. We disagree. Even though Baker entered Ort's backyard, he did not stray from the house's parking area.[25] Given the presence of two other parked cars and the complete absence of parking along the driveway, a reasonably respectful citizen would believe he or she could enter that part of Ort's curtilage. Therefore, Ort's Vitara was in open view.

An officer lawfully present at a vantage point does not conduct a search by detecting something with one of his senses, unless the means of detection are particularly intrusive.[26] In State v. Graffius,[27] for example, officers did not

[24] See Ross, 141 Wn.2d at 312; Ridgway, 57 Wn. App. at 918-19 (holding that defendant's curtilage was closed to uninvited visitors where the house was located in an isolated setting, hidden from the road, the long driveway was blocked by a closed gate, and barking dogs were stationed at the door); State v. Jesson, 142 Wn. App. 852, 859, 177 P.3d 139 (2008) (concluding that defendant's driveway was not impliedly open to the public in the presence of a "no trespassing" sign, a closed gate, a primitive road, and a secluded location).

[25] One of the court's undisputed findings described the location where the Vitara was parked as "a field in the back where they appear to use the forward portion or the east end of it as a parking area." This finding is a verity on appeal. Acrey, 148 Wn.2d at 745.

[26] Ross, 141 Wn.2d at 313.

violate the defendant's right of privacy by intentionally looking into a partially open garbage can located on a gravel parking area because the marijuana sitting on top of the garbage was in open view. Here, even though Baker intended to look at the car, he did not employ particularly intrusive means to do so. Baker observed everything included in the probable cause affidavit from a standing position. He did not get on the ground or touch the car in order to see that a portion of the wheel well liner was missing.

Finally, Ort contends that the trial court should have also excluded her statements to Baker as fruit of the poisonous tree, tainted by the search.[28] Because no search occurred, Ort's argument fails.

Even if we were to conclude that Baker's entry into the parking area constituted a search, reversal is not required if the untainted evidence in the affidavit supports the warrant.[29] "Probable cause exists where the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location."[30] Mere

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[27] 74 Wn. App. 23, 25, 31, 871 P.2d 1115 (1994).

[28] Evidence derived from an illegal search may be subject to suppression as fruit of the poisonous tree. Gaines, 154 Wn.2d at 717.

[29] Ross, 141 Wn.2d at 314-15. Probable cause must exist before a search warrant will issue. State v. Jackson, 150 Wn.2d 251, 264, 76 P.3d 217 (2003).

[30] Jackson, 150 Wn.2d at 264-65.

suspicion or personal belief that evidence of a crime will be found at the place to be searched is insufficient.[31] "[I]f information contained in an affidavit of probable cause for a search warrant was obtained by an unconstitutional search, that information may not be used to support the warrant."[32] The court must excise the illegally gathered information and then determine if the remaining facts establish probable cause.[33] If the warrant, viewed in this light, fails for lack of probable cause, the court must exclude the evidence seized pursuant to that warrant.[34]

After excising the challenged language from the affidavit, probable cause supports the search warrant. The affidavit submitted in support of the warrant contained the following untainted information: (1) a witness to the hit and run "reported that the vehicle involved in the collision was a late 80s to early 90s green (possibly blue) hatchback car"; (2) the plastic car part found on the scene "was common to three different vehicles, a 1999-2004 Chevrolet Tracker, a 1999-2005 Suzuki Vitara/Grand Vitara, or a 2001-2006 [Suzuki] XL7"; (3) Baker received information from someone living in Sultan that "he had seen a Green Tracker at a house up the hill from his house"; and (4) Baker drove through the

[31] Jackson, 150 Wn.2d at 265.

[32] Ross, 141 Wn.2d at 311-12.

[33] Ross, 141 Wn.2d at 314-15.

[34] Ross, 141 Wn.2d at 315.

development, where he "located a green over silver Suzuki Grand Vitara" with "damage which was consistent with what I would expect from this hit and run collision. The damage included a dent to the hood that was not caused [by] contact with another vehicle." The untainted evidence established that Baker located the kind of car involved in the collision nearby with consistent impact damage. These facts provide a sufficient basis for a reasonable conclusion that evidence of a crime would be found on Ort's property. Because the untainted evidence establishes probable cause, the search warrant remains valid.

CONCLUSION

Baker did not violate Ort's right to privacy when he looked into the wheel well of her car. And even if he did, after excising the challenged language, probable cause still supports the search warrant Baker ultimately obtained. We affirm.

Leach, C.J.

WE CONCUR:

Dwyer, J.

Appelwick, J.