IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28360-7-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
DEAN ALLEN BENNETT,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Kulik, C.J. — Dean Allen Bennett appeals his conviction for possession of methamphetamine. He contends the police unlawfully entered his backyard after a complaint that Mr. Bennett and his neighbor were fighting. The trial court refused to suppress the evidence found in the backyard.

We review findings of fact for substantial evidence and the conclusions of law de novo. Having done that here, we affirm the trial court and the conviction.

FACTS

At around 10:30 p.m., on June 13, 2007, police received a call reporting that two neighbors on East Rowan Drive had been involved in a neighborhood dispute. Officers

were dispatched to the scene and first arrived at 2511 East Rowan. The officers spoke with the residents, who stated that they had been in an argument with the residents at 2507 East Rowan. The officers walked to 2507 East Rowan to hear the other side of the argument.

The officers asked a man in the backyard for his version of the events. The man replied that the neighbors at 2511 East Rowan had instigated the incident and that the altercation solely involved a verbal argument. Next, the officers asked the man for some identification, at which point he replied, "'I don't have any on me'" and identified himself as Dean Bennett. Clerk's Papers (CP) at 80. He then stated, "'I probably have a warrant for my arrest.'" CP at 80. The officers ran a search on Mr. Bennett's name and noticed that he appeared to be under the influence of drugs or alcohol. The officers questioned him regarding this, and Mr. Bennett responded that he had used methamphetamine a few days prior. The officers then received confirmation that Mr. Bennett had a warrant for his arrest and took him into custody. An officer then asked Mr. Bennett if he had any weapons on him. Mr. Bennett replied that he had a large knife in his jacket pocket.

Next, because the backyard was "extremely dark," the officers walked Mr. Bennett over to their squad car to search him. CP at 80. In searching Mr. Bennett, the officers

found a large hunting knife and two plastic baggies containing a white, crystal-like substance. Mr. Bennett stated, without provocation, that the substance was methamphetamine. The officers then placed Mr. Bennett in a patrol car and transported him to jail.

The State charged Mr. Bennett with possession of a controlled substance. Mr. Bennett then moved to suppress the evidence that resulted from the officers' entry into his backyard. At the suppression hearing, there was no testimony and the only evidence considered was the police report of the incident. The issue at the hearing was whether the officers lawfully entered Mr. Bennett's backyard. The court entered findings of fact and conclusions of law and ultimately denied the suppression motion. The court based its analysis on *State v. Jesson*, 142 Wn. App. 852, 858, 177 P.3d 139 (2008), which held that a lawful entry into the curtilage of one's home is determined by examining the totality of the circumstances.

Mr. Bennett argues that the following findings of fact are not supported by substantial evidence:

> 5. Officers saw the neighbor from where they were and approached him.
>
> . . . .
>
> 7. The backyard was . . . open, so the officers could see the male that the other neighbors had identified as being involved.
>
> 8. Under the totality of circumstances, the officers were involved in legitimate police business in obtaining the other side of the story.

> 9. The officers acted in a reasonable manner in walking onto the curtilage; the backyard and approaching the male.

CP at 94. The court utilized these findings of fact, along with 11 others, and entered the following conclusions of law:

> 1. This Court examined *State v. Jesson*, 142 Wn. App. 852 and concludes that, under the totality of the circumstances, the entry into the backyard is a lawful entry.
> 2. This Court concludes that the officers asking the name of the Defendant was lawful and it was a lawful seizure under *State v. Vanderpool*, [145 Wn. App. 81, 184 P.3d 1282 (2008)] in that the officer had a right to ask for identification.
> 3. The lawful seizure was followed by a lawful arrest and everything seized incident to the arrest is a lawful seizure.
> 4. This Court rules based on the FINDINGS OF FACTS and CONCLUSIONS OF LAW the Defendant's MOTION TO SUPPRESS is denied.

CP at 95. Mr. Bennett challenges all of the conclusions of law.

After the court ruled on the suppression motion, Mr. Bennett waived his right to a trial by jury and stipulated to facts in lieu of live testimony. Stipulation 5 stated that an officer was able to observe Mr. Bennett standing in an "open back yard." CP at 108. The court found Mr. Bennett guilty of possession of a controlled substance and sentenced him to 18 months followed by 9 to 12 months of community custody.

ANALYSIS

In reviewing a motion to suppress, we determine whether substantial evidence exists to support the trial court's findings of fact. *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Findings of Fact 5 and 7. Findings of fact 5 and 7 are supported by evidence from the police report and reasonable and logical inferences from that report. When the officers arrived at the scene, they first spoke with Mr. Bennett's neighbors at 2511 East Rowan. The neighbors told the officers that an argument occurred and the officers determined that they needed to contact the person at 2507 East Rowan—Mr. Bennett. The officers walked next door and contacted a white male in the backyard at 2507 East Rowan.

Finding of fact 5 states: "Officers saw the neighbor from where they were and approached him." CP at 94. This finding is entirely consistent with the police report. The police officers' stated objective in walking over to Mr. Bennett's property was to make contact with the resident there. The officers accomplished this objective by walking to the backyard of the residence and, in fact, speaking with the resident. Further,

the police report does not mention any obstacles, such as a fence, that the police had to maneuver around in order to find Mr. Bennett. Finding of fact 7 states: "The backyard was . . . *open*, so the officers could see the male that the other neighbors had identified as being involved." CP at 94 (emphasis added). A rational, fair-minded person would be persuaded by the evidence to find that the backyard was open, that police saw Mr. Bennett from where they were, and that they then approached him in the backyard.

Finding of Fact 8. Finding of fact 8 states: "Under the totality of circumstances, the officers were involved in *legitimate police business* in obtaining the other side of the story." CP at 94 (emphasis added). An officer is on legitimate police business when investigating a possible crime. *Jesson*, 142 Wn. App. at 859. Here, the police report indicates that the officers were dispatched to investigate a "fight/neighborhood disturbance type incident." CP at 80. Such a call to officers would prompt them to investigate a number of possible crimes, including an assault or public disturbance. The officers began this investigation by questioning the residents at 2511 East Rowan. Police routinely obtain multiple sides of a story before concluding whether a crime has occurred. Therefore, at this point in time, police had been dispatched to the scene of a "fight/neighborhood disturbance type incident" and had been informed by one party that an argument occurred. Under these combined circumstances, a rational, fair-minded

person would be persuaded that the officers were involved in legitimate police business in seeking to obtain Mr. Bennett's version of the events.

Finding of Fact 9.[1] In determining whether an officer has entered the curtilage of a person's land in the manner of a reasonably respectful citizen, the circumstances surrounding the entry must be examined. *State v. Ross*, 141 Wn.2d 304, 313-14, 4 P.3d 130 (2000). Entry during the nighttime hours is generally inconsistent with that of a reasonably respectful citizen. *Id.* at 314. However, under certain circumstances, entering the curtilage at night may be in accord with the actions of a reasonably respectful citizen. *State v. Poling*, 128 Wn. App. 659, 667, 116 P.3d 1054 (2005). Also, what is deemed reasonable is determined by considering the totality of the circumstances and facts regarding the entry. *Jesson*, 142 Wn. App. at 858.

In *Ross*, police officers entered the curtilage of the defendant's residence at around 12:10 a.m. *Ross*, 141 Wn.2d at 308. In doing so, the officers' sole purpose was to search for evidence of a marijuana grow operation. *Id.* at 314. The officers made no attempt to contact the resident of the home. *Id.* The court noted that no reasonably respectful

[1] While finding of fact 9 reads, "The officers acted in a reasonable manner," the discussions at the suppression hearing pertaining to this topic all used the standard of a "reasonable, respectable citizen." Report of Proceedings (Feb. 19, 2009) at 23. Thus, in order to determine if the officers were acting reasonable, the "reasonably respectful citizen" standard will be used.

citizen would be welcome at 12:10 a.m. without an invitation or emergency, that the officers were not on legitimate business, and held that the officers were not lawfully present on the property. *Id.*

Here, the situation is dissimilar in fact from that in *Ross* because the officers' sole purpose in entering the curtilage of Mr. Bennett's residence was to make contact with him. They did not enter the property in search of any evidence. Further, as discussed above, the officers here were on legitimate police business. Thus, while the court in *Ross* noted that a nighttime entry into the curtilage is not normally in accord with the actions of a reasonably respectful citizen,[2] the facts in that case differ significantly from the facts here.

However, in *Poling*, officers entered the curtilage of the defendant's property at 9:00 p.m. to investigate "'some sort of manufacturing activity.'" *Poling*, 128 Wn. App. at 663. The officers proceeded through an open gate and then made contact with the defendant to inform him of their reason for being there. *Id.* at 667. The court held that the officers were lawfully present and that entry under these circumstances was in accord with that of a friend or reasonably respectful citizen. *Id.*

Here, the facts are similar to those in *Poling* because the officers entered Mr.

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

Bennett's backyard around 10:30 p.m., just an hour and one-half later than the officers' entry in *Poling*. *Poling*, 128 Wn. App. at 663. Further, the officers here immediately informed Mr. Bennett of the reason for their entry onto his property. Under these circumstances, the officers were acting as a reasonably respectful citizen when entering onto Mr. Bennett's property. *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981).

There is substantial evidence to support findings of fact 5, 7, 8, and 9.

Conclusions of law are reviewed de novo. *Ross*, 106 Wn. App. at 880. Under both the United States Constitution and the Washington Constitution, warrantless searches are presumed to be unreasonable. U.S. Const. amend. IV; Const. art. I, § 7; *State v. Myers*, 117 Wn.2d 332, 337, 815 P.2d 761 (1991). However, the presence of an officer within the curtilage of a residence does not automatically amount to an unconstitutional invasion of privacy. *Seagull*, 95 Wn.2d at 902. While people have a reasonable expectation of privacy in the curtilage surrounding their homes, "'police with legitimate business may enter areas of the curtilage which are impliedly open.'" *Jesson*, 142 Wn. App. at 858 (quoting *Seagull*, 95 Wn.2d at 902). However, in doing so, police must act in accordance with the standard of a "reasonably respectful citizen." *Seagull*, 95 Wn.2d at 902. In order to determine whether the curtilage is impliedly open, the totality of the circumstances must be examined. *Jesson*, 142 Wn. App. at 858. If there is no

clear indication that the owner does not want uninvited visitors, the curtilage will be deemed impliedly open. *Id.*

The threshold issue here is whether the officers were on legitimate police business when they entered Mr. Bennett's backyard. The analysis here mirrors that above for finding of fact 8 and, thus, this element is satisfied. The second issue is whether the officers were acting within the standard of a "reasonably respectful citizen." Again, the analysis here mirrors that for finding of fact 9 and, thus, the element is satisfied.

The final issue is whether the curtilage around Mr. Bennett's home was impliedly open. In *Jesson*, an officer entered the defendant's remote property and traversed a long, secluded driveway. *Jesson*, 142 Wn. App. at 859. While travelling down the driveway, the officer opened an unlocked gate, which had a "'No Trespassing'" sign attached to it. *Id.* Further, the property surrounding the driveway also had "'Keep Out'" and "'No Trespassing'" signs. *Id.* The court held that under these circumstances, the property was not impliedly open to the public. *Id.* at 859-60.

Here, the situation is factually distinguishable from *Jesson* because there is no indication that Mr. Bennett's property had any barriers or signage to deter members of the public from entering his property. Also, the findings of fact indicate that the backyard was open, and that officers could see Mr. Bennett as they walked from his neighbors'

property over to his property. There is no evidence that Mr. Bennett sought to deter uninvited visitors. Furthermore, Mr. Bennett stood in his backyard as officers approached his property. Under the totality of these circumstances, Mr. Bennett's backyard was impliedly open to the public. Thus, the officers' entry into the backyard was lawful.

Mr. Bennett also asserts that his counsel was ineffective. In order to prevail on a claim of ineffective assistance of counsel, Mr. Bennett must prove that his counsel provided ineffective representation and that such representation resulted in prejudice. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Ineffective representation occurs when counsel's performance falls "below an objective standard of reasonableness." *Id.* In order to establish prejudice, Mr. Bennett must prove that if not for his counsel's ineffective assistance, a different result would have occurred. *Id.* However, in analyzing these issues, strong deference is given to counsel's decisions at trial. *Id.* Also, any tactic than can be characterized as a strategic decision will not be a basis for an ineffective assistance claim. *Id.*

Here, the action giving rise to Mr. Bennett's claim is his counsel's stipulation to the fact that an officer could see Mr. Bennett in his open backyard. As discussed above, there is substantial evidence to support the fact that the backyard was open and that the

officer could see Mr. Bennett as he approached Mr. Bennett's property. Furthermore, the court had already considered these issues before it entered the findings of fact at the suppression hearing. There is no reason to believe that the court would have changed its view on this issue had Mr. Bennett raised this challenge before the stipulated facts were entered. When these factors are examined as a whole, one can see that defense counsel's performance did not fall below an objective standard of reasonableness. *Id.* Thus, Mr. Bennett's counsel did not provide ineffective assistance.

Furthermore, this stipulated fact had no bearing on the outcome of the case. After the hearing on the suppression motion, the issue of whether the officers were lawfully present in the backyard had been decided. At the stipulated facts trial, the sole issue before the court was whether Mr. Bennett was guilty of the crime of possession of a controlled substance—methamphetamine. Therefore, even if Mr. Bennett's counsel was deficient in not contesting this stipulated fact, it had no effect on the outcome of the case. Thus, there was no resulting prejudice. *Id.*

We affirm the conviction.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, C.J.

WE CONCUR:

_____ _____
Sweeney, J. Siddoway, J.