IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28910-9-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
RILEY JAY KALK,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, A.C.J. — Riley Kalk challenges his convictions for first degree unlawful possession of a firearm, contending that law enforcement wrongly entered his rural property. We agree with the trial court that the officer's observations were within the purview of the open view doctrine and affirm the convictions.

FACTS[1]

Mr. Kalk lived in rural Douglas County outside of Mansfield. On Monday, October 19, 2009, Child Protective Services (CPS) received a report from the Mansfield

[1] The facts are derived from the trial court's CrR 3.6 findings. Clerk's Papers at 70-74.

School District alleging that 14-year-old S.W. was lacking prescription medication that he needed, that he always arrived at school dirty, and that he was forced to walk three miles from his residence to catch a school bus. The report was faxed to the Douglas County Sheriff's Office the same day. Included with the report was a hand-drawn map describing how to get to Mr. Kalk's property where S.W. resided.[2]

The next day, Detective David Helvey and CPS employee Kathie Pete traveled to Mr. Kalk's property. They traveled over McNeil Canyon Road and Columbia Bluffs Road, which are county roads. From Columbia Bluffs Road, they turned off onto a private dirt road that led through an open gate. Next to the gate was posted an old, weathered sign that read "no trespassing," although the detective did not see the sign as he drove through the gate. The road and the gate sit upon property owned by Donald Erickson, a bus driver for the Mansfield School District. Mr. Erickson was the person who drew the map included with the report given to CPS and the Sheriff's office.

After turning onto the private road, Helvey and Pete proceeded for approximately two miles until reaching Mr. Kalk's property. As they drove along the private road, they did not observe anything that restricted access. Eventually they arrived at Mr. Kalk's property. It consisted of an unfenced dirt lot with a motor home, a travel trailer, and a

[2] It appears that S.W.'s mother had left him with Mr. Kalk approximately 18 days earlier.

few other vehicles sitting on it; there were no indications that uninvited visitors were not welcome. There were also some kennels with some half-starved dogs in them; the dogs did not have food or water. The only approach to the property consisted of a dirt path leading to the area where both the motor home and the travel trailer were parked.

The detective and Ms. Pete walked down this dirt path and knocked on both the doors. No one answered, as Mr. Kalk had gone to the store for a few minutes. While knocking on the travel trailer's door, Detective Helvey observed a 12-gauge shotgun through the window. Detective Helvey took some photos, and then he and Ms. Pete left the way they had come. They then traveled to the Mansfield School where they contacted S.W. Two days later, S.W. was taken into custody by CPS pursuant to an emergency placement order.

Detective Helvey performed a criminal history search and determined that Mr. Kalk was a felon who was not permitted to possess a firearm. Based upon this information and his observation at the travel trailer, Detective Helvey applied for, and received, a search warrant. Execution of the warrant recovered 17 firearms. Mr. Kalk was charged with three counts of first degree unlawful possession of a firearm.

Mr. Kalk moved to suppress the firearms, alleging that Detective Helvey's observations constituted an unlawful search. The court denied the motion, finding

Detective Helvey's observations to be permissible under the "open view" doctrine. After a stipulated facts trial, Mr. Kalk was found guilty as charged.

The trial court imposed concurrent 31-month prison sentences, but stayed imposition of the incarceration while Mr. Kalk appealed to this court.

ANALYSIS

The sole issue presented by this case is whether the detective's observations were properly included in the search warrant under the open view doctrine. Mr. Kalk raises two specific challenges to the open view doctrine's application here. We will consider each in turn.

Warrantless searches and seizures are generally *per se* unreasonable under both the federal and state constitutions. U.S. Const. amend. IV; Wash. Const. art. I, § 7; *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). One exception to the constitutional protection against warrantless searches is the community caretaking function. *Cady v. Dombrowski*, 413 U.S. 433, 37 L. Ed. 2d 706, 93 S. Ct. 2523 (1973). This police function is "totally divorced from a criminal investigation." *State v. Kinzy*, 141 Wn.2d 373, 385, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104 (2001). Officers may perform routine checks on an individual's health and safety and courts will assess those encounters by balancing the individual's privacy interest against the public's

interest in having police perform the caretaking function. *Id.* at 386-388, 394.

Whether under the caretaking function or conducting a criminal investigation, police must respect private property. Under the open view doctrine, "police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house." *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981) (footnote omitted). Officers must, however, conduct themselves in the same manner as a "reasonably respectful citizen." *Id*. Courts will look to the particular facts of each case in deciding what is reasonable. *Id*. Furthermore, "an officer's observation of evidence from a lawful vantage point is not, standing alone, a search subject to constitutional restrictions." *State v. Ferro*, 64 Wn. App. 181, 182, 824 P.2d 500 (citing *Seagull*, 95 Wn.2d at 901), *review denied*, 119 Wn.2d 1005 (1992).

Mr. Kalk disputes whether two aspects of the *Seagull* standard were satisfied here. He argues that Detective Helvey was not involved in legitimate police business and that there was no impliedly open way to his property.

Legitimate Police Business. Mr. Kalk first argues that the detective had no business visiting the property because if he wanted to talk to S.W., the proper place to go was to see him at school since Tuesday was a school day. This argument takes too narrow a view of what the appropriate police business was in this case.

Law enforcement and CPS both have the obligation to investigate complaints of child neglect and abuse. RCW 26.44.050. Both have legislative authorization to interview the child at home or other locations. RCW 26.44.030(12)(a). In the case of the allegations here, where S.W. arrived dirty to school and had to walk long rural distances, it was a legitimate decision to visit Mr. Kalk's property to check S.W.'s living conditions.

It also made sense to investigate the scene first. Detective Helvey testified that he and Ms. Pete started out from offices in East Wenatchee. They would have to pass the area to travel to Mansfield. While they also could have stopped there on the return journey, we know of no authority requiring them first to stop at the school before visiting the home. Information about the housing conditions might well have informed their interview with S.W.

Law enforcement had legitimate reasons to visit where S.W. was staying. This aspect of the *Seagull* test was satisfied.

Impliedly Open to the Public. Mr. Kalk strenuously argues that the way to his home was not impliedly open to the public. Once again, we disagree.

Mr. Kalk relies upon several cases where courts have found that rural property owners had demonstrated that their privacy expectations precluded any uninvited visitors to their property. *State v. Jesson*, 142 Wn. App. 852, 177 P.3d 139 (rural property,

posted "no trespassing" signs, and closed gate on private road), *review denied,* 164 Wn.2d 1016 (2008); *State v. Thorson*, 98 Wn. App. 528, 990 P.2d 446 (1999) (rural property reached by footpath only after trespassing on two neighboring properties), *review denied*, 140 Wn.2d 1027 (2000); *State v. Johnson*, 75 Wn. App. 692, 879 P.2d 984 (1994) (furtive use of access road at night after circumventing closed gate with no intention of visiting house), *review denied*, 126 Wn.2d 1004 (1995); *State v. Ridgway*, 57 Wn. App. 915, 790 P.2d 1263 (1990) (isolated house hidden from road with closed gate and guard dogs); *State v. Crandall*, 39 Wn. App. 849, 697 P.2d 250 (no trespass when officer ventured on to rural fields used by hunters), *review denied*, 103 Wn.2d 1036 (1985).

Only *Jesson* and *Ridgway* are similar enough to be helpful here. *Crandall* involved open hunting fields rather than access to a house. *Johnson* dealt with officers who were not attempting to visit the house while *Thorson* involved a hidden property without a road that could only be reached by trespassing through two other properties. Central to both *Jesson* and *Ridgway* was the fact that officers had to navigate a closed gate to use the driveway and other indicia of privacy—posted no trespassing signs or guard dogs—were present. This case does not present those same indicia. The gate controlling the road was open, not closed, and it was located on another person's property.[3] There was a single weathered "no trespassing" sign on the Erickson property.

There were no indications that a respectful visitor could not use the open access road.

Because of those distinctions, this case is closer to the facts of either *Seagull* or *State v. Rose*, 128 Wn.2d 388, 390, 909 P.2d 280 (1996). In *Rose*, an officer responded to the defendant's residence following a report of the odor of marijuana coming from a shed on the property. *Id*. The primary issue in the case involved observations made on the porch of the residence, which was located in a rural area. Concerning the question of whether the curtilage was impliedly open to the public, the court reasoned "[n]othing in the record indicates that any attempt was made to prevent people from approaching the residence." *Id*. at 393. Specifically, although the defendant's residence "was at the end of a private driveway off a private road . . . there was no 'private' sign posted, and the property was not fenced." *Id*. Under those circumstances, it was permissible for the officer to visit the property and step on to the porch. *Id*.

Similarly, *Seagull* involved an officer checking out rural homes in an area near an abandoned car that had been in an accident. 95 Wn.2d at 899-900. He drove up the driveway to an old farmhouse, parked, and walked to the main door. When no one answered, he started walking along the side of the house to the other door before deciding

[3] In light of our resolution, we need not address whether Mr. Erickson gave permission for use of the road across his property by providing the map authorities used to find the home.

that no one was home. *Id*. at 900. He then observed what he believed to be marijuana plants in a greenhouse and left to obtain a warrant. *Id*. The court concluded that the officer acted properly in using an impliedly open way to visit the farmhouse. *Id*. at 905.

This case is in a similar posture. The two investigators had legitimate police business in checking out the neglect allegation. They followed the only road to the premises. The gate was open and the only sign was on another person's property. The area was rural, but there was no indication that Mr. Kalk actively discouraged respectful visitors to his property.

The trial court did not err in concluding that the open view doctrine applied to the detective's observations. The judgment is affirmed.

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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Korsmo, A.C.J.

WE CONCUR:

_____ _____
Brown, J. Siddoway, J.