No. 98622-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF KENT,
Respondent,

v.

RICHARD JENKINS,
Appellant.

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND KING COUNTY DEPARTMENT OF PUBLIC DEFENSE

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I. IDENTITY AND INTEREST OF AMICI CURIAE

The identities and interests of Amici are set forth in the Motion for Leave to File Amicus Curiae Brief and in Support of Review on the Merits, which is being filed at the same time as this Brief.

INTRODUCTION

For peacefully asserting his constitutional right to privacy at home, appellant Richard Jenkins was arrested, charged with "Obstructing a Public Officer," and convicted of that criminal offense. The office that prosecuted Mr. Jenkins now concedes it lacked authority to do so, but that concession comes four years too late for Mr. Jenkins.

Two factors contributed to this injustice.

First, Mr. Jenkins is Black, so he is far more likely to be arrested for an offense such as obstruction—a vague charge known colloquially as "contempt of cop"—than is a member of any other racial group. See Br. of Ctr. For Civil and Human Rights at Gonzaga Law as Amici in Support of Appellant, Section I.

Second, this Court's split, non-precedential decision in City of Shoreline v. McLemore, 193 Wn.2d 225, 438 P.3d 1161 (2019), created confusion about the legitimate reach of obstruction laws. That confusion has facilitated the criminal prosecution of passive, constitutionally privileged non-conduct in Washington, to an extent not permitted by any

other jurisdiction that has considered the question. And it has made it impossible for individuals to either know their rights or stand on them.

This case presents a long overdue opportunity to right these wrongs. This Court should hold, once and for all, that no government may arrest and prosecute a person for peacefully asserting a constitutional right.

II. STATEMENT OF THE CASE

On June 22, 2017, three Kent police officers demanded entry to Mr. Jenkins's apartment to investigate reports of a domestic disturbance. CP 58. The officers had no warrant, but it is undisputed they could lawfully enter pursuant to their community caretaking function.[1] CP 56. Mr. Jenkins nevertheless refused their commands to open his door. CP 55-56. Through his kitchen window, he told officers truthfully and repeatedly that he was alone in the apartment. CP 55-56. When officers eventually broke down his door, he complied with all their instructions. CP 56.

Based on this incident, the City of Kent charged Mr. Jenkins with "Obstructing a Public Officer." CP 6; see RP 135-38. The City contended he violated subsection 1 of the Kent obstruction ordinance, which provides:

[1] See State v. Schultz, 170 Wn.2d 746, 754-55, 248 P.3d 484 (2011) (officers may invade constitutionally protected privacy interests when (1) they subjectively believe that a specific person or property likely needs assistance for health or safety reasons; (2) that belief is objectively reasonable; (3) there is a reasonable basis to associate the need for assistance with the place being searched; (4) there is an imminent threat of substantial injury to persons or property; and (5) the claimed emergency is not mere pretext for a search).

"A person is guilty of the crime of obstructing a public officer if, with knowledge that the person is a public officer, he or she . . . [i]ntentionally and physically interferes with a public officer." KCC 9.02.630; CP 48.

Mr. Jenkins moved to dismiss under State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986), arguing his peaceful refusal to acquiesce in the officers' warrantless entry did not fall within the ordinance and was, in any event, constitutionally privileged. CP 27-35.

The trial court agreed that Mr. Jenkins's conduct did not fall within subsection 1 of the ordinance, since "no evidence was presented that . . . [he] performed a *physical* task intended to thwart the officers' entry." CP 59 (emphasis added). But it concluded his disobedience could violate subsection 3, which criminalizes the "[i]ntentional[] refus[al] to cease an activity or behavior that creates a risk of injury to any person when ordered to do so by a public officer." CP 59 (quoting KCC 9.02.630(3)).

The court reasoned:

> Giving the words "activity" or "behavior" their ordinary meaning does not necessarily exclude verbal refusal of a command to take action at the direction of the officers. The verbal refusal is an activity and this provision does not narrow it to physical activity. Behavior could also plainly be read to encompass a refusal.

CP 59.

The trial court also rejected Mr. Jenkins's constitutional challenge, finding it foreclosed by Division Two's decision in State v. Steen, 164 Wn. App. 789, 265 P.3d 901 (2011). CP 61-62.

The parties proceeded to trial and a jury convicted Mr. Jenkins of "obstructing public officers." CP 99, 128-29. The superior court affirmed his conviction. Decision on RALJ Appeal, at 1.

III. ARGUMENT

The lower courts interpreted Steen, 164 Wn. App. 789, to hold that the government may criminalize the mere refusal to open one's door when an officer demands warrantless entry, provided there is a valid exception to the warrant requirement. CP 63-64, Decision on RALJ Appeal, at 1, 3. In doing so, they adopted the reasoning in the dissent to this Court's decision in McLemore, 193 Wn.2d 225. The lower courts erred.

The McLemore dissent would make Washington the only State in which a person may be criminally prosecuted for peacefully refusing a warrantless entry to his home. The dissent is inconsistent with decades of state and federal precedent limiting the reach of obstruction statutes and recognizing the unique constitutional right to privacy in the home. This Court should instead adopt the reasoning in the lead McLemore opinion and hold that no State or local government may criminalize the peaceful assertion of a basic constitutional right.

A. The Lower Courts Adopted the Interpretation of Steen Advanced by the McLemore Dissent

Division Two's decision in Steen, 164 Wn. App. 789, is distinguishable from Mr. Jenkins's case in two significant respects. CP 112-13. First, the officers in Steen *did not seek entry to Mr. Steen's home*; instead, they merely asked him to come outside to speak with them. 164 Wn. App. at 795. Second, and perhaps because the officers did not demand entry, Mr. Steen did not challenge his conviction under the Fourth Amendment or article I, section 7. Id. at 794. The Steen opinion therefore contains no holding on the constitutional right to privacy whatsoever. See id. at 802, n.9 (distinguishing Fourth Amendment holding in United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978), on ground that, "[h]ere . . . the officers did not pressure Steen to consent to a warrantless search; rather . . . the officers lawfully ordered any occupants of the trailer to exit with their hands up").

Here, the trial court expressly recognized this distinction, noting that "Steen did not address any claim of privilege as raised by Mr. Jenkins." CP 64. Nevertheless, the trial court concluded that this court's split, non-precedential decision in McLemore, 193 Wn.2d 225, precluded any consideration of that claim. CP 65.

By refusing to distinguish Steen, both lower courts in this case necessarily adopted the reasoning of the McLemore dissent. CP 65; Decision on RALJ Appeal, at 3. According to this reasoning, "Steen is . . . a correct application of our precedent recognizing that failure to obey a lawful order constitutes conduct sufficient for an obstruction conviction," no matter where that order takes place and what that order entails. McLemore, 193 Wn.2d at 243-45 (Stephens, J., dissenting).

The lead McLemore opinion rejected this interpretation of Steen. McLemore, 193 Wn.2d at 231-32, 236. It concluded that, where officers demand warrantless entry to a person's home—the place where we enjoy the strongest constitutional protection against government intrusion—"conduct that amounts to passive delay will not sustain an obstruction charge." Id. at 231-32. To the extent any of Steen's reasoning implied a contrary conclusion, the lead opinion disavowed it. Id. at 236 ("To the extent Steen suggests it is obstruction to not open the door to a home in response to a warrantless knock, it is inconsistent with Washington law and is overruled.").

B. By Adopting the McLemore Dissent, this Court Would Make Washington the Only State in Which a Person May Be Criminally Prosecuted for Peacefully Refusing a Warrantless Entry to His Home

The constitutional protection recognized by the lead McLemore opinion is narrow for two reasons. First, it applies only in the home, as distinguished from relatively public places such as cars. Id. at 231-32, 235-36. Second, it protects only "passive delay," as distinguished from active efforts like physically struggling with officers or placing additional barriers in their way. Id. at 233-35.

The dissent rejected both distinctions, and it characterized the latter as "metaphysical" and "nowhere to be found in our precedent." Id. at 250 (Stephens, J., dissenting). In doing so, the McLemore dissent articulated a rule that would make Washington the only state to criminalize the passive assertion of the constitutional right to privacy in one's home. It also departed from decades of precedent, both state and federal, construing obstruction statutes consistent with constitutional protections.

Roughly two years after its split decision in McLemore, this court struck down Washington's drug possession statute, holding that it punishes "the sort of innocent, passive nonconduct that falls beyond the State's police power to criminalize." State v. Blake, 197 Wn.2d 170, 183, 481 P.3d 521 (2021). While Blake is not a Fourth Amendment holding, it does illustrate

that, contrary to the McLemore dissent, the distinction between action and inaction is neither meaningless nor unprecedented. Compare McLemore, 193 Wn.2d at 250 (Stephens, J., dissenting) with Blake, 197 Wn.2d at 179-81 (collecting cases applying "rule against criminalizing 'essentially innocent' conduct . . . or nonconduct"). Instead, that distinction is one means by which courts must sometimes curtail legislative or executive overreach, consistent with their singular obligation to interpret and uphold the constitution. Id.

In the Fourth Amendment context, courts around the country have used this distinction—between active, physical resistance and the passive, verbal assertion of the constitutional right to privacy at home—to limit the reach of obstruction laws.[2] Indeed, Amici are aware of no case, from any jurisdiction, holding that a resident can commit obstruction merely by

[2] Compare, e.g., Prescott, supra, 581 F.2d at 1350-51 (when officers demand entry to home but present no warrant, occupant may "presum[e] . . . officer has no right to enter" and refuse admission, provided she does not "forcibly resist the entry") and Ballew v. State, 245 Ga. App. 842, 842-43, 538 S.E.2d 902 (2000), overruled on other grounds in Stryker v. State, 297 Ga. App. 493, 495 n.1, 677 S.E.2d 680 (2009) (obstruction conviction unconstitutional where predicated on mere "verbal exchange," in which defendant ordered officer to leave his property, "not accompanied by verbal or physical threat of violence") with State v. Line, 121 Haw. 74, 87-88, 214 P.3d 613 (2009) (defendant's conduct not constitutionally privileged when she braced herself against door and then assaulted officers once they broke through); State v. Wiedenheft, 136 Idaho 14, 27 P.3d 873 (2001) (defendant committed obstruction when she struck two police officers with her door); Dolson v. United States, 948 A.2d 1193, 1202 (D.C. Cir. 2008) (even if closing and locking gate does not constitute obstruction, holding it closed against officers attempting entry can support conviction).

refusing to acquiesce when an officer demands warrantless entry to a home. And numerous courts have reached the opposite conclusion, including where exigent circumstances or community caretaking excused the lack of a warrant.

In New Jersey v. Berlow, 284 N.J. Super. 356, 360-65, 665 A.2d 404 (1995), the court held that, even if police suspect that a gravely injured person is inside a residence, federal and state constitutional protections bar the prosecution of an occupant for closing and locking the door in response to officers' request to enter. The court explained that it made no difference whether an exception to the warrant requirement in fact applied:

> to require citizens to yield to police demands for entry into private dwellings in all circumstances would unfairly relegate the exercise of their constitutional right to an after-the-fact judicial process and would place upon them an undue burden to undertake litigation in order to seek redress. To qualify the exercise of a Fourth Amendment right in that fashion would essentially eviscerate the purpose of that amendment, which is to stop governmental intrusion at the door.

Id. at 364.

Similarly, in Ballew v. State, supra, 245 Ga. App. at 842-43, officers investigating a 911 report of a knife fight arrived at a residence and found a man disheveled, a woman bleeding, and blood at various locations around yard. The officers requested to search inside the home for another, possibly injured, person and the man refused. Id. The appellate court held that the

man could not be charged with obstruction for this refusal because "[c]ertainly the assertion of one's constitutional rights cannot be an obstruction of an officer, or every assertion of such rights would lead to obstruction charges." Id. at 843. See also Harris v. State, 314 Ga. App. 816, 821, 726 S.E.2d 455 (2012) (citing Ballew, 245 Ga. App. at 843) (obstruction statute would be invalid if it allowed defendant to be "arrested for peaceably asserting his constitutional rights as he understood those rights").

Likewise, in United States v. Prescott, supra, 581 F.2d at 1346-47, officers demanded entry to an apartment where they believed a mail fraud suspect had fled. The apartment's occupant refused, asked officers whether they had a warrant (they did not), and locked her door. Id. The Ninth Circuit held that, even if exigent circumstances justified the officers' warrantless entry to her home, evidence that the defendant "passively assert[ed]" her Fourth Amendment right to refuse could not be used against her at trial for assisting a federal offender: "passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing." Id. at 1351. The court noted that forcible resistance might yield a different result, but it concluded that locking the door to one's home was constitutionally protected activity. Id.

It is well established that article I, section 7 provides even stronger protections against government intrusion into a residence than the Fourth Amendment does. See State v. Eisfeldt, 163 Wn.2d 628, 634-36, 185 P.3d 580 (2008). In light of these stronger protections, it makes no sense that Washington would be the only jurisdiction in which a citizen may be prosecuted merely for failing to facilitate a warrantless entry to his home.

C. The Lead McLemore Opinion is Consistent with Decades of State and Federal Precedent Construing Obstruction Laws So as to Avoid Constitutional Violations

A court's fundamental purpose in construing a statute is to carry out the legislature's intent. State v. Bigsby, 189 Wn.2d 210, 216, 399 P.3d 540 (2017). Where possible, however, courts construe statutes so as to preserve their constitutionality. Jones v. United States, 529 U.S. 848, 851, 120 S. Ct. 1904, 146 L. Ed. 2d 902 (2000); State v. Williams, 171 Wn.2d 474, 476-77, 251 P.3d 877 (2011) (citing PRP of Matteson, 142 Wn.2d 298, 307, 12 P.3d 585 (2000) (quoting Addleman v. Bd. of Prison Terms, 107 Wn.2d 503, 510, 730 P.2d 1327 (1986))).

The latter rule frequently comes into play where obstruction laws are concerned because, by their nature, these statutes regulate private individuals' interaction with law enforcement (or government agents more generally) in broad, generic terms. Thus, courts all over the country have

applied limiting constructions to these laws, interpreting them so as not to sweep up constitutionally privileged activity. E.g., District of Columbia v. Little, 339 U.S. 1, 6-7, 70 S. Ct. 468, 94 L. Ed. 2d 599 (1950) (applying principle of constitutional avoidance; construing statute that penalized "interfering with or preventing" a health inspection so as not to encompass defendant's refusal to unlock her door and consent to warrantless entry); State v. Krawsky, 426 N.W.2d 875, 877-78 (Minn. 1988) (saving obstruction statute from overbreadth by construing it to penalize only "intentional physical obstruction or interference"); Harris, supra, 314 Ga. App. at 817-21 (construing obstruction statute so as to avoid constitutional questions arising where defendant was prosecuted for refusing to answer officers' questions); City of Columbus v. Michel, 55 Ohio App. 2d 46, 47-48, 378 N.E.2d 1077 (1978) (construing obstruction statute criminalizing "any act which hampers or impedes a public official in the performance of a lawful duty" so as not to penalize omission, such as failure to open door upon officer's command).

Washington courts have construed RCW 9A.76.020, our State's obstruction statute, in similar limiting fashion. Williams, 171 Wn.2d at 478-82 (tracing history of Washington's obstruction statute and opinions narrowing its scope so as to avoid First, Fourth, and Fourteenth amendment concerns). To date, this court has articulated two specific limits on that

statute: it may punish neither pure speech nor the refusal to submit to questioning. State v. E.J.J, 183 Wn.2d 497, 507, 354 P.3d 815 (2015), Williams, 171 Wn.2d at 484 (citing State v. Contreras, 92 Wn. App. 307, 316, 966 P.2d 915 (1998)), because these are constitutionally privileged activities immune from government sanction.

The activity at issue in this case—an occupant's passive, verbal refusal to open his home to police officers demanding warrantless entry—is equally privileged, as recognized in the numerous cases detailed above.[3] The court should interpret the ordinance at issue here so as not to criminalize this assertion of a basic constitutional right.

D. The Lead McLemore Opinion is Consistent with Decades of State and Federal Precedent Recognizing the Unique Constitutional Right to Privacy in the Home

Under both article I, section 7, and the Fourth Amendment, an individual's right to privacy is strongest at home, so that "'the closer officers come to intrusion into a dwelling, the greater the constitutional protection.'" State v. Ferrier, 136 Wn.2d 103, 112, 960 P.2d 927 (1998) (citing State v.

[3] E.g., Little, 339 U.S. at 6-7 (statute does not reach refusal to unlock door to residence upon officer's command); Prescott, 581 F.2d at 1346-47, 1350-53 (statute does not reach act of locking door to residence in response to officers' repeated demand for entry); Beckom v. Georgia, 286 Ga. App. 38, 41-42, 648 S.E.2d 656 (2007) (even court that affirmed obstruction convictions for flight or lying to officers would not permit obstruction charge for mere refusal to open the door of a residence); Berlow, 284 N.J. Super. at 364 (statute does not reach act of closing and locking the door to residence in response to officers' demand for entry).

Young, 123 Wn.2d 173, 185, 867 P.2d 593 (1994) (quoting State v. Chrisman, 100 Wn.2d 814, 820, 676 P.2d 419 (1984)) and Miller v. United States, 357 U.S. 301, 307, 78 S. Ct. 1190, 2 L. Ed 2d 1332 (1958)). The primary means of affording this protection is the requirement—subject to only a few limited exceptions—that law enforcement obtain a warrant before entering a private residence. Eisfeldt, 163 Wn.2d at 635; Kyllo v. United States, 533 U.S. 27, 31, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001). While the warrant requirement applies more broadly under article I, section 7 than under the Fourth Amendment, Eisfeldt, 163 Wn.2d at 636-38 (collecting cases), it is fundamental to both state and federal concepts of privacy.

Consistent with these principles, the United States Supreme Court has held that police do not create an exigency (triggering the exclusionary rule) by knocking and loudly announcing their presence at a private home, *because the occupants may always refuse a request for warrantless entry*:

> When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do . . . [and] the occupant has no obligation to open the door or to speak. . . . And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time.
>
> Occupants who choose not to stand on their constitutional rights but instead elect to attempt to

> destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue.

Kentucky v. King, 563 U.S. 452, 456, 469-70, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011).

King rests on the premise that individuals know, and must either assert or forfeit, their right against warrantless intrusions into the home. In this case, that is exactly what Mr. Jenkins did. It is fundamentally unfair—and unconstitutional—to hold that this is both Mr. Jenkins's duty and a crime punishable by law.

IV. CONCLUSION

Where a law plainly exceeds the legislature's authority, the court must strike it down. E.g., Blake, 197 Wn.2d at 188. But where the law is amenable to interpretation, the court may construe it so as to avoid a constitutional problem. E.g., id. at 201-02 (Stephens, J., concurring in part). Here, Mr. Jenkins seeks only the latter, more limited remedy.

The activity at issue in this case—an occupant's assertion of his basic right to refuse officers' warrantless entry to his home—is constitutionally privileged. The court should interpret the crime of obstruction so as not to criminalize this peaceful, constitutionally protected

nonconduct.

Respectfully submitted this 22nd day of June, 2021.

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CERTIFICATE OF SERVICE

I certify that on the 22nd day of June, 2021, I caused a true and correct copy of this document to be served on all parties by e-filing this document through the Washington State Appellate Courts' Secure Portal.

Signed this 22nd day of June, 2021, at Seattle, WA.

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