
CITY OF WHITEFISH,

Plaintiff and Appellee,

v.

JOSHUA THOMAS ZUMWALT,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, the Honorable Amy Eddy, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
JOSHUA JAMES THORNTON
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
joshua.thornton2@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
CHRISTINE HUTCHISON
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

ANGELA JACOBS
Whitefish City Attorney
MARY BARRY
Deputy City Attorney
P. O. Box 158
Whitefish, MT 59937

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
ARGUMENT	1
I. Zumwalt raised his home search claim under the Montana Constitution.....	1
II. The government violated zumwalt’s right to privacy.....	2
A. Zumwalt held an actual expectation of privacy in his home which common law has always held reasonable.	4
B. The government violated Zumwalt’s expectation of privacy by intruding on his property.	6
1. The State has not asserted a compelling government interest for invading Zumwalt’s privacy.	7
2. Plain view warrant exception not applicable because officers were not lawfully present.....	9
III. The municipal court abused its discretion in admitting testimony with insufficient foundation.....	11
CONCLUSION.....	12
CERTIFICATE OF COMPLIANCE.....	13

TABLE OF AUTHORITIES

Cases

<i>City of Bozeman v. McCarthy</i> , 2019 MT 209, 397 Mont. 134, 447 P.3d 1048.....	7
<i>City of Whitefish v. Large</i> , 2003 MT 322, 318 Mont. 310 80 P.3d 427.....	10
<i>Duran v. Buttrey Food, Inc.</i> , 189 Mont. 381, 616 P.2d 327 (1980)	8
<i>Florida v. Jardines</i> , 569 U.S. 1, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013)	5
<i>Katz v. United States</i> , 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)	3
<i>Minnesota v. Carter</i> , 525 U.S. 83, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998)	5
<i>Silverman v. United States</i> , 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)	5
<i>State v. Allen</i> , 2010 MT 214, 357 Mont. 495, 241 P.3d 1045.....	3, 6
<i>State v. Bassett</i> , 1999 MT 109, 294 Mont. 327, 982 P.2d 410	3, 10
<i>State v. Brecht</i> , 157 Mont. 264, 485 P.2d 47 (1971)	4
<i>State v. Carlson</i> , 198 Mont. 113, 644 P.2d 498 (1982)	8
<i>State v. Elison</i> , 2000 MT 288, 302 Mont. 228, 14 P.3d 456.....	4
<i>State v. Goetz</i> , 2008 MT 296, 345 Mont. 421, 191 P.3d 489.....	3, 6

<i>State v. Graham</i> , 2004 MT 385, 325 Mont. 110, 103 P.3d 1073.....	5
<i>State v. Hubbel</i> , 286 Mont. 200, 951 P.2d 971 (1997)	3, 10
<i>State v. Loh</i> , 275 Mont. 460, 914 P.2d 592 (1996)	4, 10
<i>State v. Long</i> , 216 Mont. 65, 700 P.2d 153 (1985)	4
<i>State v. Nobach</i> , 2002 MT 91, , 309 Mont. 342, 46 P.3d 618.....	11
<i>State v. Pastos</i> , 269 Mont. 43, 887 P.2d 199 (1994)	7
<i>State v. Sawyer</i> , 174 Mont. 512, 571 P.2d 1131 (1977)	8
<i>State v. Siegal</i> , 281 Mont. 250, 934 P.2d 176 (1997)	1
<i>State v. Solis</i> , 214 Mont. 310, 693 P.2d 518 (1984)	4
<i>State v. Staker</i> , 2021 MT 151, 404 Mont. 307, 489 P.3d 489.....	3, 4, 6, 7
<i>State v. Wood</i> , 205 Mont. 141, 666 P.2d 753 (1983)	8, 9
<i>State ex rel. Zander v. District Court of Fourth Judicial District Court</i> , 180 Mont. 548, 591 P.2d 656 (1979)	6, 7, 9
<i>United States v. Cusumano</i> , 67 F.3d 1497 (10th Cir. 1995).....	1
<i>Welsh v. Pritchard</i> , 125 Mont. 517, 241 P.2d 816	4, 5

WLW Realty Partners, LLC v. Continental Partners VIII, LLC,
2015 MT 312, 381 Mont. 333, 360 P.3d 1112..... 2

Rules

M. R. App. P. 12(3) 2

Constitutional Authorities

Montana Constitution

Art. II, § 3..... 7
Art. II, § 10..... 1, 2, 3, 7
Art. II, § 11..... 1, 2, 3

United States Constitution

Amend. IV 1, 4, 5

Other Authorities

Warren, Samuel and Louis Brandeis, *The Right to Privacy*,
4 Harv. L. Rev. 193 (1890)..... 5

“The contours of the privacy expressly guaranteed the home by the Fourth Amendment are not, however, determined by the outcome of a game of hide-and-seek played by the government and the people.”

State v. Siegal, 281 Mont. 250, 273, 934 P.2d 176, 189 (1997) (citing *United States v. Cusumano*, 67 F.3d 1497, 1505-06 (10th Cir. 1995)).

ARGUMENT

I. Zumwalt raised his home search claim under the Montana Constitution.

The State asserts that the “Court should decline to reach the merits of whether the Montana Constitution provides additional protection for Zumwalt beyond the United States Constitution in this context because Zumwalt did not address the claim on appeal.” (State Response, p. 27). The State boldly asserts that Zumwalt “does not even cite Montana Constitution article II, § 10, let alone argue that Montana’s heightened privacy protection provides greater protections under the specific circumstances of this case.” (State Response, p. 29). The State’s argument misstates Zumwalt’s briefing. Besides explicitly invoking Art. II, §§ 10-11 at District Court and Municipal Court, (DC Doc. 4, p.4; DC Doc. 0.12, p. 1-2), Zumwalt twice invoked the broader Montana constitutional provisions in the opening brief. (See Zumwalt Opening,

p. 19) (citing Mont. Const. art. II, § 11) and (Zumwalt Opening, p. 21-22) (citing broader privacy protections under the Montana constitution).

While Zumwalt’s Opening focused on federal jurisprudence, the State extensively discussed Montana constitutional law in its response arguing that Zumwalt failed to establish a subjective expectation of privacy and in the alternative, that such expectation is unreasonable. (State Response, p. 29-34). The State offered no compelling government interest for violating Zumwalt’s privacy. “The purpose of a reply brief is to respond to arguments raised in a response brief; we will not fault a party for waiting until the reply brief to respond to an argument or evidence that was first raised in a response brief.” *WLW Realty Partners, LLC v. Continental Partners VIII, LLC*, 2015 MT 312, ¶ 20, 381 Mont. 333, 360 P.3d 1112. *See also* M. R. App. P. 12(3). While reasserting Zumwalt’s federal constitutional and exclusionary rule arguments, Zumwalt takes this opportunity to address the State’s constitutional arguments under our state constitution.

II. The government violated Zumwalt’s right to privacy.

Often, Article II, §§ 10-11 of Montana’s Constitution work in tandem, providing “robust protection to people in Montana against government

intrusions.” *State v. Allen*, 2010 MT 214, ¶ 47, 357 Mont. 495, 241 P.3d 1045 (citing *State v. Goetz*, 2008 MT 296, ¶ 14, 345 Mont. 421, 191 P.3d 489). Both constitutional provisions, read together, grant Montana citizens “the right of individual privacy” and the right to “be secure in their persons, papers, homes and effects from unreasonable searches and seizures.” Mont. Const. art. II, §§ 10-11. For the government to lawfully infringe on these rights, the constitution requires a “compelling state interest” and/or a warrant supported by probable cause. Mont. Const. art. II, §§ 10-11. This Court assesses the following factors to determine whether “there has been an unlawful government intrusion into one’s privacy[]”:

- (1) whether the person has an actual expectation of privacy;
- (2) whether society is willing to recognize that expectation as objectively reasonable;^[1] and
- (3) the nature of the state’s intrusion.

State v. Bassett, 1999 MT 109, ¶ 24, 294 Mont. 327, 982 P.2d 410 (citing *State v. Hubbel*, 286 Mont. 200, 208, 951 P.2d 971, 975-76 (1997)).

When an expectation of privacy is breached, a search occurs. *State v.*

¹ Essentially *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (holding fourth amendment privacy trespass not limited to property rights).

Staker, 2021 MT 151, ¶ 11, 404 Mont. 307, 489 P.3d 489 (citations omitted). Further, warrantless searches are per se unreasonable, only permissible upon a showing of “few carefully drawn exceptions.” *State v. Elison*, 2000 MT 288, ¶ 39, 302 Mont. 228, 14 P.3d 456 (citing *State v. Loh*, 275 Mont. 460, 468, 914 P.2d 592, 597 (1996)). Both constitutional provisions afford greater protection of rights than the federal Fourth Amendment counterpart. *State v. Solis*, 214 Mont. 310, 316, 693 P.2d 518, 521 (1984).

A. Zumwalt held an actual expectation of privacy in his home which common law has always held reasonable.

Right to privacy, at common law, generally is recognized as the “absolute right to be let alone.” *Welsh v. Pritchard*, 125 Mont. 517, 523, 241 P.2d 816, 819 (citing “1 Cooley on Torts, 444, § 135”). “[C]ommon to all the [privacy] cases, [a pervading element] of outraging one’s feelings by depriving [them] of the privacy which most normal persons desire and have a right to demand[.]” *State v. Brecht*, 157 Mont. 264, 271, 485 P.2d 47, 51 (1971) (overruled in *State v. Long*, 216 Mont. 65, 700 P.2d 153 (1985) on separate grounds, requiring state interests to violate individual privacy rights, not private persons). “The common law has always recognized a [person’s] house as [their] castle, impregnable,

often, even to its own officers engaged in the execution of its commands.” *Welsh*, 125 Mont. at 523, 241 P.2d at 819 (citing Warren, Samuel and Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890)). See also *Minnesota v. Carter*, 525 U.S. 83, 94, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (Scalia, J., concurring).

But when it comes to the Fourth Amendment, the home is first among equals. At the Amendment’s “very core” stands “*the right of a [person] to retreat into [their] own home and there be free from unreasonable governmental intrusion.*” *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961). This right would be of little practical value if the State’s agents could stand in a home’s porch or side garden and trawl for evidence with impunity; *the right to retreat would be significantly diminished if the police could enter a [person’s] property to observe [their] repose from just outside the front window.*

Florida v. Jardines, 569 U.S. 1, 6, 133 S.Ct. 1409, 1414, 185 L.Ed.2d 495 (2013) (emphasis added). “[T]he home, nonetheless, is historically the *raison d’être* [*i.e.*, the most important reason or purpose for someone or something’s existence] for the constitutional protection [to be free from unreasonable searches or seizures].” *State v. Graham*, 2004 MT 385, ¶ 22, 325 Mont. 110, 103 P.3d 1073. Common Law has long held privacy in one’s home as an objectively reasonable expectation.

Here, Zumwalt desired to be left alone. He retreated into his home. Curtains were drawn, Sergeant Veneman testified as such. (5/6/21 Trial 2021050604 at 1:01:30-1:02:42). Zumwalt clearly asserted an expectation of privacy in his home.

B. The government violated Zumwalt’s expectation of privacy by intruding on his property.

Individual privacy is not absolute, however, and must yield to a compelling state interest. *State ex rel. Zander v. District Court of Fourth Judicial District Court*, 180 Mont. 548, 556, 591 P.2d 656, 660 (1979). Generally, the State has a “compelling interest in ‘enforc[ing] its criminal laws for the benefit and protection of other fundamental rights of its citizens,’ [internal citations omitted], warrantless searches and seizures must be narrowly tailored to serve the particular compelling state interest at issue under the circumstances of each case.” *Staker*, ¶ 12 (citations and footnote omitted). An invasion of privacy is lawful if “state action was justified by a compelling state interest or was undertaken with ‘procedural safeguards such as a properly issued search warrant or other special circumstances.’” *Allen*, ¶ 47 (citing *Goetz*, ¶ 27).

1. The State has not asserted a compelling government interest for invading Zumwalt’s privacy.

“Depending upon the circumstances, [the] ‘compelling state interest’ required by Article II, Section 10 ‘may be the recognition of furtherance of a competing state or federal constitutional right, a statutory right or duty, or [] other government interest.’” *Staker*, ¶ 12, n. 13 (citing *City of Bozeman v. McCarthy*, 2019 MT 209, ¶ 17, 397 Mont. 134, 447 P.3d 1048). For example, in *Zander*, the Court found a compelling interest in “[p]rotection of a person’s property” as guaranteed under Mont. Const. art. II, § 3. 180 Mont. at 556, 591 P.2d at 660. There, officers responded to a report of a burglary in progress. A deputy responded to the scene, and after observing no one inside the supposed burgled residence, entered the home and came across illegal marijuana plants. *Zander*, 180 Mont. at 551, 591 P.2d at 658. The Court held that a compelling state interest – investigation of a potential active burglary to protect the home and property – justified violating the petitioner’s right to privacy, ironically the same person. *Zander*, 180 Mont. at 556, 591 P.2d at 661. In *State v. Pastos*, 269 Mont. 43, 51, 887 P.2d 199, 204 (1994), the Court held that a state compelling

interest – police station house safety of law enforcement and arrestees – justifies an inventory search of an arrestees’ person and property at police stations. *C.f.*, *State v. Sawyer*, 174 Mont. 512, 519, 571 P.2d 1131, 1134 (1977) (holding individual privacy interest outweighed law enforcement inventorying impounded, custodial vehicles). Further, individual right to privacy yields to the enforcement of criminal laws in law enforcement arresting felony suspects, but not misdemeanor traffic offenses found at home, on warrants. *State v. Wood*, 205 Mont. 141, 143, 666 P.2d 753, 754 (1983); *State v. Carlson*, 198 Mont. 113, 644 P.2d 498 (1982). *See also Duran v. Buttrey Food, Inc.*, 189 Mont. 381, 393-94, 616 P.2d 327, 334 (1980) (holding merchant arrest statute unconstitutional, lacking compelling government interest).

Here, the State has offered no compelling interest for Whitefish City Police to circle Zumwalt’s apartment and pry on his internal activities through his back, obscured window. Prior to approaching Zumwalt’s front door and subsequent search through his back window, Whitefish City Police were responding to a parking lot crash report where the reporting party stated the driver had “staggered that way” into his apartment. (8/18/20 Hr’g at 5:13-5:21 and City’s Trial Ex. B at

0:30-1:07). Sergeant Veneman walked to a “grassy area behind the complex[.]” (State’s Response, p 4-6) (citing 8/18/20 Hr’g at 42:22-42:34, 5:05). The State characterizes this location as a “common area” for the residents. Just because an apartment complex utilizes shared spaces among the tenants, those spaces are not open to non-tenants and their guests. The State’s interest in enforcing the criminal law in violation of Zumwalt’s privacy rights did not rise to the level in *Zander*, where law enforcement was investigating an active burglary report to protect property, or *Wood*, where law enforcement arrested felony suspects on warrants. Whitefish PD were not investigating anything felonious or violent in nature, nor was there an active threat to justify their prying into Zumwalt’s affairs. Instead, the means employed involved creeping around private property. The State has failed to demonstrate a compelling government interest in violating Zumwalt’s right to be left alone in his home.

2. Plain view warrant exception not applicable because officers were not lawfully present.

The State argues that the plain view warrant exception is applicable to this case. (State’s Response, p. 30-32). The State leans on *State v. Hubbel*, 286 Mont. 200, 951 P.2d 971 (1997) and *City of*

Whitefish v. Large, 2003 MT 322, 318 Mont. 310 80 P.3d 427. There, the Court found no expectations of privacy – thus no search – of the front driveway and porch area of a home, as well as a carport of a private condominium complex. Unlike *Hubbel*, any casual visitor to the Zumwalt residence would not be greeted warmly by a reasonable person if found peering into any window on Zumwalt’s residence, let alone one on the opposite side of the front entrance. Likewise, this case is not analogous to *Large*, where the Court found no expectation of privacy in a common-area parking lot. Sergeant Veneman and Officer Stahlberg pressed their faces to Zumwalt’s window glass with the sole purpose of tracking him down for a misdemeanor. They ignored the publicly available information, like running the license plate on the truck parked near where the damage happened, and instead chose to intrude upon the privacy of his back window with the blinds drawn. Further, the plain view warrant exception requires law enforcement to “be lawfully at the place from which [they] could plainly view the evidence.” *Bassett*, ¶ 52 (citing *Loh*, 275 Mont. at 473, 914 P.2d at 600). As articulated earlier, Whitefish Police Department were not lawfully present at the rear of Zumwalt’s apartment. Thus, the plain view

warrant exception is not applicable, reaffirming that conclusion that the State's search was unreasonable.

III. The municipal court abused its discretion in admitting testimony with insufficient foundation.

Greater weight is generally given to officer testimony based upon training, such as training in DUI certification courses and applying such training in numerous DUI investigations. However, previous training and observations of individuals at differing BAC levels is irrelevant to the considerations behind the rate of intoxication from consuming different quantities of alcohol during different periods of time. In *State v. Nobach*, 2002 MT 91, ¶¶ 23-26, 309 Mont. 342, 46 P.3d 618, the Court found insufficient foundation for an officer to provide expert testimony to the effects of prescription drug consumption. Like *Nobach*, here, the officers failed to testify to any scientific foundation about how the body absorbs alcohol, how long it takes to be eliminated, and the factors that impact those calculations. Likewise, the officers failed to testify to Zumwalt's alcohol consumption, such as what was consumed, when it was consumed, and under what circumstances. As a result, the Municipal Court abused its discretion in permitting the

officers to offer an expert opinion on when Zumwalt became intoxicated, not whether Zumwalt was intoxicated.

CONCLUSION

Zumwalt requests this Court to reverse and suppress all information and evidence obtained from the illegal, privacy invading, search. Alternatively, the Court should reverse this matter to remand for a new trial based upon the Municipal Court allowing expert opinion testimony without adequate foundation.

Respectfully submitted this 13th day of October, 2023.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Joshua James Thornton
JOSHUA JAMES THORNTON
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2,343, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Joshua James Thornton
JOSHUA JAMES THORNTON

CERTIFICATE OF SERVICE

I, Joshua James Thornton, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 10-13-2023:

Angela Jacobs (Attorney)
PO Box 158
Whitefish MT 59937
Representing: Whitefish, City of
Service Method: eService

Christine M. Hutchison (Govt Attorney)
215 N. Sanders
Helena MT 59601
Representing: Whitefish, City of
Service Method: eService

Electronically signed by Kim Harrison on behalf of Joshua James Thornton
Dated: 10-13-2023