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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

Andrea Nasarow,

Appellant,

v.

City of Renton,

Respondent.

No. 04-1-09419-1SEA

BRIEF OF APPELLANT
ANDREA NASAROW

(Review from Renton Municipal
Court No. CR 34226)

I. RELIEF REQUESTED

Andrea Nasarow seeks review of the Renton Municipal Court's decision denying her Motions to Dismiss and Reconsideration entered respectively August 18, 2004 and September 7, 2004. Andrea Nasarow also seeks review of the court's findings that there was factual sufficiency forming the basis of the conviction of Assault 4th Degree, DV, a gross misdemeanor, entered at the Stipulated Trial on September 9, 2004.

II. ASSIGNMENTS OF ERROR

Pursuant to RALJ 9.1, the superior court must review the decision of the court of limited jurisdiction to determine whether that court has committed any errors of law.

Andrea Nasarow asserts the following errors of law:

BRIEF OF APPELLANT - 1

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STAFFORD FREY COOPER

PROFESSIONAL CORPORATION

601 Union Street, Suite 3100

Seattle WA 98101.1374

TEL 206.623.9900 FAX 206.624.6885

1 A. The district court erred when it denied Defendant's Motions to Dismiss and
2 for Reconsideration.

3 B. The district court erred in finding that there was factual sufficiency forming
4 the basis for the conviction of Assault 4th Degree DV.

5 III. STATEMENT OF THE CASE

6 On January 1, 2004, police officers from the City of Renton were dispatched via 9-1-
7 1 call to the home of Andrea Nasarow. Following an argument, Nasarow's boyfriend,
8 Ben Whited, had called the police. Both parties conceded that Andrea and Ben got into
9 an argument at Andrea's home and Ben decided to leave the home. (Mr. Whited did
10 not reside there). Andrea became upset and took Mr. Whited's wallet. At some point,
11 Mr. Whited called 9-1-1 and left the house. When officers arrived at Andrea's home, Mr.
12 Whited was outside. After speaking with Mr. Whited, police officers approached the
13 home of Ms. Nasarow. It was undisputed that Renton police had no warrant to enter
14 Ms. Nasarow's house. The police officers went to the side door of Ms. Nasarow's
15 home. Tiffany Williams, a tenant residing in basement quarters, opened the door. After
16 speaking with Ms. Williams, the officers entered the home and made their way upstairs
17 to where Ms. Nasarow lived.¹ After entering Ms. Nasarow's portion of the home, Ms.
18 Nasarow was arrested, taken into custody and subsequently charged with Assault 4th
19 Degree, DV, a gross misdemeanor.

20 On June 15, 2004, counsel for plaintiff City of Renton and counsel for the
21 defendant, Andrea Nasarow, appeared before the municipal court to argue defendant's

22 _____
23 ¹ The circumstances surrounding the officers' entry into the home, and whether they had Ms. Williams' permission to do so, were disputed by the parties.

1 Motion to Dismiss. Defendant's Motion asserted that the warrantless entry into Andrea
2 Nasarow's home was conducted in the absence of any warrant and there were no
3 exigent circumstances requiring the police to enter her home without a warrant.
4 Therefore, Andrea's subsequent arrest was invalid. *Declaration of Krista Mirhoseini,*
5 *Exhibit A-1 (Defendant's Motion to Dismiss).* The City argued that the officers who
6 entered Ms. Nasarow's home and subsequently placed her under arrest were
7 authorized under RCW 10.31.100 to enter Ms. Nasarow's home without a warrant, in
8 order to investigate an alleged domestic abuse incident. The court asked the parties to
9 brief the issue as to whether RCW 10.31.100 permits a warrantless entry absent
10 independent exigency and continued the hearing to August 18, 2004. *See Mirhoseini*
11 *Decl., Exhibit A-2 (Defendant Andrea Nasarow's Brief Relating to RCW 10.31.100).*

12 At the August 18, 2004 hearing, counsel for the defendant asserted that,
13 notwithstanding RCW 10.31.100, the warrantless entry into Ms. Nasarow's home
14 violated the Fourth Amendment of the U.S. Constitution and, therefore, the subsequent
15 arrest was invalid. The Court entered findings of fact, finding that the law required,
16 absent exigent circumstances, a warrant to effectuate an arrest in a private dwelling
17 notwithstanding the Domestic Violence Statute. The Court further found that there was
18 no warrant and that "the arrest of Andrea Nasarow was unlawful." *Mirhoseini Decl.,*
19 *Exhibit B (Transcript of Electronic Record of August 18, 2004 Hearing)*(emphasis
20 added).

21 Significantly, however, after the Court entered its findings of fact, counsel for the
22 City of Renton asked the Court, for the first time, to grant suppression of the evidence
23

1 gained after the entry into Andrea's home, but not dismiss the case². Despite defense
2 counsel's strong objections to the City's request, the Court agreed. The court then
3 found:

4 I am going to find that dismissal is an extraordinary remedy and I
5 am going to suppress any evidence that follows after the police officer
6 breached the threshold of this dwelling. I'm not going to dismiss and
7 both parties can file their motions for reconsideration . . . That's the
8 fair thing to do . . . that will be this court's order.

9 *Mirhoseini Decl., Exhibit B.* Andrea Nasarow subsequently filed a Motion for
10 Reconsideration of her motion to dismiss.³ *Mirhoseini Decl., Exhibit C (Defendant*
11 *Andrea Nasarow's Motion for Reconsideration)*. Defendant's Motion was denied and
12 the parties had a Stipulated Trial on September 9, 2004. At the Stipulated Trial, the
13 court found Andrea Nasarow guilty of assault in the 4th degree over defendant's
14 objections of factual sufficiency. *Mirhoseini Decl., Exhibit D (Renton Municipal Court's*
15 *sentencing of Andrea Nasarow, dated September 9, 2004)*. Defendant Andrea
16 Nasarow appeals.

17 IV. AUTHORITY AND ARGUMENT

18 **A. An unlawful arrest cannot form the basis of a conviction. There were**
19 **insufficient facts in evidence prior to the arrest to support a finding of**
20 **assault. Therefore, the conviction must be overturned.**

21 The Renton Municipal Court concluded that the arrest of Andrea Nasarow was
22 "unlawful" at the August 18, 2004, hearing, but declined to dismiss the charges against
23 her. Subsequently, at the Stipulated Trial in September, Andrea was found guilty of

² The defendant's motion was to dismiss. The State never raised suppression until that time.

³ Defendant's motion asked the court to dismiss the case on the basis that, prior to the hearing and the court entering findings of fact, the City of Renton never asked for suppression of the evidence as an alternative means of relief to dismissal of the charges against Andrea Nasarow.

1 Assault in the 4th Degree DV. Although the mere fact of an unlawful arrest does not
2 necessarily vitiate a conviction (State v. Melrose, 2 Wn. App. 824, 828, 470 P.2d 552,
3 555-556 ((1970))), an unlawful arrest cannot form the basis of a conviction.

4 The standard for reviewing a claim of insufficiency of the evidence is whether,
5 after viewing the evidence in the light most favorable to the State, any rational trier of
6 fact could find **each element of the offense** has been proved beyond a reasonable
7 doubt. State v. Green, 94 Wn. 2d 216, 221, 616 P.2d 628 (1980) (emphasis added).

8 “On the other hand, **evidence is insufficient if the inferences that may be drawn do**
9 **not establish the relevant elements of the crime charged beyond a reasonable**
10 **doubt.**” State v. McIntosh, 2003 Wash. App. LEXIS 2727, citing State v. Baeza, 100
11 Wn. 2d 487, 491, 670 P.2d 646 (1983)(emphasis added).

12 In this case, the court suppressed all evidence relating to the police entry—and
13 thereafter—into Andrea Nasarow’s home, based upon the warrantless entry and
14 unlawful arrest. *Mirhoseini Decl., Exhibit B.* At the Stipulated Trial, the court also
15 refused to consider photographs taken of Ben Whited as they had not been brought
16 forth previously by either party. *Mirhoseini Decl., Exhibit E.* Therefore, any evidence
17 the police obtained after their entry should not have been considered by the court at the
18 Stipulated Trial. The only admitted evidence at the Stipulated Trial was the police
19 report. The police report, submitted by Officer Quint Tibeau, stated in pertinent part:

20 I spoke to Benjamin Whited who told me that he has dated Andrea
21 Nasarow on and off for the past two years. This evening they got
22 into an argument and he decided to leave. Nasarow did not want
23 him to leave and she grabbed his wallet and blocked his way so
that he could not leave. She refused to give him his wallet back.
Whited told Nasarow he would call 911 if she did not return his
wallet and step out of the way. This upset Nasarow even more.

1 She walked up and started punching him in the head. Whited told
2 me that she hit him at least twice in the head with a closed fist. She
3 hit him one time in the temple and the other time she punched him
4 [sic] the lip. Whited admitted that it did hurt a little when she hit
5 him. He had a busted lip. It was swollen and bleeding from the
6 inside. See attached digital photographs. Whited was then able to
7 get a line through to 911 and Nasarow threw his wallet back at him.
8 He then walked out of the residence to wait for Police.

9 *Mirhoseini Decl., Exhibit F (Renton Police Department Police Report filed by Q.*
10 *Tibeau, dated January 1, 2004).* Benjamin Whited remained outside the home until the
11 police arrived and remained there when the officers approached and went into the home.

12 RCW §9A.36.041 defines assault in the fourth degree as:

13 (1) A person is guilty of assault in the fourth degree if, under
14 circumstances not amounting to assault in the first, second, or third
15 degree, or custodial assault, he or she assaults another.

16 (2) Assault in the fourth degree is a gross misdemeanor.

17 RCW §10.99.020 defines "domestic violence" as including,

18 but not limited to any of the following crimes when committed by
19 one family or household member against another:

20 ... (d) Assault in the fourth degree (RCW 9A.36.041)

21 Therefore, the elements of a crime of Assault in the 4th degree DV (Domestic Violence)
22 necessarily includes the element of an assault against one family or household member
23 against another. RCW §10.99.020 defines "family or household members" as:

Spouses, former spouses, persons who have a child in
common regardless of whether they have been married or have
lived together at any time, adult persons related by blood or
marriage, adult persons who are presently residing together or who
have resided together in the past, persons sixteen years of age or
older who are presently residing together or who have resided
together in the past and who have or have had a dating

1 relationship, **persons sixteen years of age or older with whom a**
2 **person sixteen years of age or older has or has a dating**
3 **relationship**, and persons who have a biological or legal parent –
4 child relationship, including stepparents and stepchildren and
5 grandparents and grandchildren.

6 (Emphasis added).

7 Ben Whited and Andrea Nasarow were not married and never lived together. It
8 was undisputed that they had a dating relationship. However, the only evidence the
9 police had obtained of their relationship *prior to arresting Andrea* of was Ben's
10 statement to them that he and Angela had been dating. *Mirhoseini Decl., Exhibit F.*
11 The police had **no identification** of Andrea prior to entry into her home. They had no
12 additional statements **from Andrea** or other corroborating evidence prior to entering her
13 home, as any and all such evidence was **suppressed** by the court. The important
14 element of identity was **not** present.

15 Even with the evidence construed in the light most favorable to the City, a
16 rational trier of fact could not have found guilt beyond a reasonable doubt based upon
17 the state of the evidence. There was no admissible evidence as to *Andrea's* physical
18 condition, any admissible statements from her regarding the events (including any
19 statements whether she had been defending herself), no evidence of identification of
20 Andrea, nor was there any corroborating evidence by Andrea of the nature of the
21 relationship between her and Ben Whited. The evidence obtained by the police prior
22 to entering Andrea's apartment was not sufficient to establish assault in the 4th Degree,
23 DV, beyond a reasonable doubt. To satisfy due process, the city must prove, beyond
a reasonable doubt, **every fact necessary to constitute the crime charged.** *State v.*
Baeza, 100 Wn. 2d 487, 491, 670 P.2d 646 (1983)(emphasis added). At best in this

1 case, the evidence obtained by the police established that Ben Whited had an
2 argument with a girlfriend, she allegedly hit him, and he called the police. No rational
3 trier of fact could have found that the city established without a reasonable doubt that
4 Andrea Nasarow committed Assault in the 4th degree, DV, based on the admissible
5 evidence. Therefore, the conviction should be reversed.

6
7 **B. It was error for the municipal court to allow suppression of the evidence,
rather than dismissal of the case.**

8 A trial court has the express authority to test whether there are sufficient facts to
9 bring a defendant to trial. State v. Knapstead, 107 Wn. 2d 346, 351, 729 P.2d 48, 52
10 (1986).

11 CrRLJ 8.3 provides that

12 The court, in the furtherance of justice, after notice and hearing,
13 may dismiss any criminal prosecution due to arbitrary action or
14 governmental misconduct when there has been prejudice to the
rights of the accused which materially affect the accused's right to a
fair trial.

15 At the hearing for reconsideration of defendant's motion to dismiss, defendant
16 argued that the proper remedy was a dismissal of the case, rather than suppression of
17 the evidence obtained after the police unlawfully entered Andrea Nasarow's home. Prior
18 to the hearing, the City never asked for suppression of the evidence as an alternative
19 means of relief to dismissal of the charges against Andrea Nasarow. The City never
20 filed a response to defendant's Motion to Dismiss and, *even after* the court continued
21 the hearing so that the parties could submit briefing relative to RCW 10.31.100, the City
22 still failed to ask for such relief in the briefing it eventually submitted. It wasn't until the
23

1 court entered its ruling that that there were no exigent circumstances justifying entry into
2 Ms. Nasarow's home without a warrant that the City raised the issue of suppression of
3 the evidence. Counsel for Ms. Nasarow immediately objected to the request for relief,
4 citing the City's untimely request. Because the City never briefed the issue of
5 suppression, the City should have been estopped from raising the issue at the hearing.
6 Moreover, the issue was not raised during argument at the hearing but rather after the
7 Court entered its findings, when it was clear how the judge would rule.

8 Equitable estoppel is based on the notion that "a party should be held to a
9 representation made or position assumed where inequitable consequences would
10 otherwise result to another party who has justifiably and in good faith relied thereon."
11 Lybbert v. Grant County, 141 Wn. 2d 29, 35, 1 P.3d 1124, 1127 (2000)(citations
12 omitted).

13 Likewise, the rules of civil procedure set forth deadlines for the filing and
14 response to motions to ensure judicial fairness. It is improper for a party to introduce
15 new facts or different legal arguments in a reply brief, for example, than presented in the
16 moving papers. See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 881; 894-895, 110 S.
17 Ct. 3177, 3185; 3191-3192 (1990).

18 It is clear that where relief is not requested in the pleadings, relief shall not be
19 granted where there will be substantial prejudice to the opposing party. *Harding v. Will*,
20 81 Wn. 2d 132, 500 P.2d 91 (1972). Civil Rule 15(b) provides that:

21 When issues not raised by the pleadings are tried by
22 express or implied consent of the parties, they shall be treated in all
23 respects as if they had been raised in the pleadings. . . If
evidence is objected to at the trial on the ground that it is not within
the issues made by the pleadings, the court may allow the

1 pleadings to be amended and shall do so freely when the
2 presentation of the merits of the action will be subverted thereby
3 and the objecting party fails to satisfy the court that that admission
4 of such evidence would prejudice him in maintaining his action or
5 defense upon the merits.

6 In this instance, defense counsel immediately objected to the court's decision to
7 suppress the evidence rather than dismiss the case. Defense counsel gave no "implied
8 or express consent" to the City's raising suppression at such a late hour. Indeed,
9 defense counsel strongly objected to the City asking for suppression of the evidence.
10 The City had ample opportunity to argue for suppression of the evidence in its briefing
11 and during oral argument of two separate hearings. The City failed to do so. Andrea
12 Nasarow was substantially prejudiced by the court granting suppression of the evidence
13 as an alternative to dismissal of the case. The court had already ruled that there were
14 no exigent circumstances justifying the warrantless entry into Ms. Nasarow's home.
15 Therefore, the City subjected her to false arrest.

16 Moreover, it should be noted that courts have limited courts' discretion in granting
17 relief to parties where the party has failed to request it. See CR 54, providing that a
18 court may grant relief where a party is "entitled" to said relief. Courts have granted
19 relief in situations where a statute provides for the recovery of attorney's fees, but a
20 party did not request fees in his pleadings. See, e.g., *Hos Bros. Bulldozing, Inc. v.*
21 *Ferguson Co*, 8 Wn. App. 769, 508 P.2d 1377 (1973) and also awarded double
22 damages pursuant to statutory authority even when not requested. See *Allstot v.*
23 *Edwards*, 114 Wn. App. 625, 60 P.3d 601 (2002).

1 In this case, the furtherance of justice requires that the dismissal of the
2 charges against Andrea Nasarow. The municipal court found that there were no
3 exigent circumstances leading to the warrantless entry and subsequent arrest of
4 Andrea Nasarow. Ms. Nasarow waited over eight months, appeared for several
5 hearings and endured thousands of dollars in legal fees to defend herself against
6 a warrantless arrest. Justice requires that the charges against her be dismissed
7 for insufficient evidence and her conviction be vacated.

8 V. CONCLUSION

9 For the above stated reasons, Andrea Nasarow respectfully asks the court
10 to vacate Andrea Nasarow's conviction of Assault in the 4th Degree, DV, in
11 Renton Municipal Court and dismiss the City of Renton's case against her. A
12 proposed order is submitted herewith.

13 Respectfully submitted this 24th day of January, 2005.

14
15 STAFFORD FREY COOPER

16
17 By 

18 Anne M. Bremner, WSBA #13269
Krista S. Mirhoseini, WSBA #22134

19 DECLARATION OF SERVICE

20 I declare, under penalty of perjury under the laws of
the United States and of the State of Washington, that
a true and correct copy of this document was

- 21 1) mailed first class postage prepaid
2) delivered via messenger
3) sent via facsimile

22 to: RESPONDENT CITY OF RENTON

23 on the 24th day of JAN 20 05

Signed: 