NO. 53362-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JORDEN D. KNIGHT,

Appellant.

BRIEF OF APPELLANT, JORDEN D. KNIGHT

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY
THE HONORABLE GREGORY M. GONZALES, JUDGE

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I. INTRODUCTION

In March 2016, Dropbox, Inc., a digital cloud storage company, filed a cybertip with the National Center for Missing and Exploited Children (NCMEC). Dropbox sent NCMEC files stored by one of its users that allegedly contained child pornography. NCMEC sent the cybertip to Seattle police, who sent it to Vancouver police. Without a warrant, Vancouver police reviewed three of the Dropbox files. Based on this evidence, Vancouver police obtained warrants for Comcast, Dropbox, Google, and the home of Jorden Knight. After searching Mr. Knight's home, police confiscated a cell phone containing sexual images of children.

Based on the images from the cell phone, Jorden Knight was charged with five counts of possession of depictions of a minor engaged in sexually explicit conduct. Mr. Knight moved to suppress the evidence derived from Dropbox's initial cybertip, but the trial court denied his motion. After a bench trial, the court convicted him of all five counts.

This Court should reverse because the warrantless search of Mr. Knight's Dropbox files by Vancouver police violated article I, section 7 of the Washington Constitution. Additionally, the trial court imposed conditions of community custody that were impermissibly vague and outside the scope of the court's authority.

II. ASSIGNMENTS OF ERROR

Assignment of Error 1: The trial court erred by concluding that Vancouver police lawfully obtained the cybertip and files submitted to NCMEC by Dropbox. CP 507-08, 692-93.

Assignment of Error 2: The trial court erred by prohibiting Mr. Knight from entering into certain "romantic relationships" as a condition of community custody. CP 883.

Assignment of Error 3: The trial court erred by requiring Mr. Knight to submit to urine and breath testing as a condition of community custody. CP 882.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Did Vancouver police violate article I, section 7 of the Washington Constitution by searching Mr. Knight's Dropbox files without a warrant and with no valid exception to the warrant requirement?

Issue 2: Did the trial court impose an unconstitutionally vague condition of community custody by prohibiting Mr. Knight from entering into certain "romantic relationships"?

Issue 3: Did the trial court exceed its authority by requiring Mr. Knight to submit to urine and breath testing for alcohol as a condition of community custody when alcohol had nothing to do with his charges?

IV. STATEMENT OF THE CASE

Jorden Knight is a Washington resident who resided in the Vancouver area. CP 9. In March 2017, Mr. Knight was charged with five counts of possession of depictions of a minor engaged in sexually explicit conduct. CP 8-11. The charges resulted from an investigation into a cybertip filed by Dropbox, Inc. CP 2.

Dropbox is an internet service provider (ISP) that provides cloud storage services. CP 644. Users can store files—such as documents, pictures, and videos—with Dropbox and access these files through the internet from different platforms, such as phones, laptops, or computers. *Id*.

ISPs, including Dropbox, are required by federal law to monitor their users and report certain crimes. 18 U.S.C. § 2258A. ISPs must report suspected sexual exploitation of children to the National Center for Missing and Exploited Children (NCMEC). 18 U.S.C. § 2258A(a)(1)(B). Failure to report can result in hundreds of thousands of dollars in fines. 18 U.S.C. § 2258A(e).

On March 23, 2016, Dropbox contacted NCMEC to report suspected child pornography stored by one of its users. CP 2. Dropbox provided files allegedly containing sexually explicit images of children, as well as data about the account user. *Id*. NCMEC determined that the account originated near Vancouver, Washington, and contacted the Seattle

Internet Crimes Against Children (ICAC) task force. *Id*. ICAC forwarded the cybertip to the Vancouver Police Digital Evidence Cybercrime Unit (DECU). *Id*.

Vancouver police began an investigation of the Dropbox cybertip. CP 2-6. Without a warrant, police opened three of the Dropbox files. CP 2-3. According to police, the files contained sexually explicit images of children. *Id*. Police reviewed the Dropbox account username and email address and focused their investigation on Jorden Knight. CP 3-4. Based on the three files opened without a warrant, police obtained search warrants for information on Mr. Knight from Comcast, Dropbox, and Google. CP 4-5. Police also obtained a search warrant for Mr. Knight's residence in Camas, Washington. CP 5.

On March 15, 2017, police executed the search warrant of Mr. Knight's residence. RP at 162. The lead investigator was Detective Robert Givens. *Id*. Police announced their presence at the home. RP at 164. Approximately five minutes later, Mr. Knight came upstairs from his room in the basement. RP at 164. Police questioned Mr. Knight and seized his electronics, including a cell phone from his pocket. RP at 166.

The cell phone was examined by Christopher Prothero, a digital forensic investigator with the Vancouver Police Department. RP 189, 192. Mr. Prothero found numerous files in unallocated space, which meant that

the files had been deleted from the cell phone. RP 204-05. These files included five images of children engaged in sexually explicit conduct. RP 211-12, 215-16, 218. The files also included videos, additional images, and messages from an application called Kik. RP 219, 232-35. The Kik messages appeared to show discussions about sharing sexually explicit images of children. Ex. 16.

In March 2017, Mr. Knight was charged with five counts of possession of depictions of a minor engaged in sexually explicit conduct. CP 8-11. Mr. Knight filed numerous motions to suppress evidence. CP 30-345. He filed an initial motion to suppress all evidence derived from the Dropbox cybertip. CP 30-172. Specifically, he argued that Dropbox acted as a government agent when it searched his files and sent them to NCMEC without a warrant. CP 34-37.

The trial court disagreed and denied this motion to suppress. CP 693. The court determined that Dropbox was a private entity, not a government agent. RP 20; CP 692. The trial court concluded that NCMEC was a federal agency. CP 692. However, the court found that NCMEC's warrantless search was consistent with the Fourth Amendment because it did not expand the private search conducted by Dropbox. *Id*. Relying on the "silver platter doctrine," the court determined that NCMEC properly passed the evidence from Dropbox on to state officials, and state officials

did not coordinate with NCMEC prior to obtaining the cybertip. RP 105-06; CP 692-93.

The case proceeded to a bench trial in May 2019. RP 145. Four witnesses testified. Detectives Robert Givens and David Jensen testified about executing the search warrant of Mr. Knight's residence and seizing evidence from the home. RP 159-175, 182-188. Matthew Carroll, one of Mr. Knight's roommates in March 2017, testified that no one else accessed Mr. Knight's room or used his electronics. RP 178-181. Christopher Prothero, the digital forensic investigator, testified about his examination of Mr. Knight's cell phone. RP 189-280.

Based on this evidence, the trial court found Mr. Knight guilty of all five counts of first-degree possession of depictions of a minor engaged in sexually explicit conduct. CP 837-51. The court sentenced Mr. Knight to 77 months confinement and 36 months of community custody. CP 871-72.

The court also imposed conditions of Mr. Knight's community custody. CP 882-83. The court required Mr. Knight to refrain from drinking or possessing alcohol and to "submit to urine, breath, PBT/BAC, or other monitoring whenever requested to do so by your community corrections officer to monitor compliance with abstention" from alcohol. CP 882. The court also required Mr. Knight to "not enter into a romantic relationship with another person who has minor children in their care or

custody" without approval from DOC and his sexual deviancy treatment provider. CP 883. Mr. Knight appeals. CP 887.

V. ARGUMENT

Vancouver police in this case conducted an illegal warrantless search of Mr. Knight's Dropbox files. The evidence derived from this search began this investigation and formed the basis for the subsequent warrants issued in this case. All evidence derived from the warrantless search of Mr. Knight's Dropbox files must be suppressed. Additionally, the trial court's conditions of community custody were unconstitutionally vague and unrelated to Mr. Knight's convictions.

A. Vancouver Police Illegally Searched Mr. Knight's Dropbox Files Without a Warrant, Required Suppression of All Evidence Derived from Dropbox's Cybertip.

This investigation began with a cybertip from Dropbox. CP 691. Dropbox, a private entity, determined that a user was storing child pornography. CP 691-92. Dropbox filed a cybertip with NCMEC, a nonprofit receiving federal funding. CP 691. The cybertip contained over 300 files as well as user account information. *Id*. NCMEC forwarded the cybertip and files to Seattle police, who forwarded them to Vancouver police. *Id*.

Without a warrant, Vancouver police searched three of Mr. Knight's Dropbox files and determined that they contained sexually explicit

depictions of minors. CP 2-3. Vancouver police then applied for, and received, warrants for Dropbox, Google, Comcast, and Mr. Knight's residence. CP 4-5. The search of Mr. Knight's residence led to the confiscation of his cell phone, which contained the images underlying his convictions. CP 837-41.

This Court must reverse because the initial warrantless search of Mr. Knight's Dropbox files by Vancouver police violated article I, section 7 of the Washington Constitution. Police needed a warrant to search Mr. Knight's private files and communications. Additionally, no exception to the warrant requirement applies. The "silver platter doctrine" does not apply to private searches of Washington residents that were merely funneled through a nonprofit receiving federal funding. All evidence derived from this illegal search must be suppressed.

1. The warrantless search of Mr. Knight's Dropbox files violated article I, section 7.

Vancouver police searched Mr. Knight's Dropbox files without a warrant, violating article I, section 7 of the Washington Constitution. This search was initially conducted by a private entity, Dropbox. However, Washington has soundly rejected the private search doctrine. Unlike the Fourth Amendment, private searches do not obviate the need for a warrant under article I, section 7.

Although they protect similar interests, "the protections guaranteed by article I, section 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution." *State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d 46 (2002). The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. If a government action intrudes on an individual's "reasonable expectation of privacy," a search occurs under the Fourth Amendment. *Illinois v. Rodriguez*, 497 U.S. 177, 187, 110 S.Ct. 2793 (1990).

By contrast, the Washington Constitution provides greater protection of a person's privacy rights than does the Fourth Amendment. Article 1, section 7 states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7. The Washington Constitution is "unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not." *State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008).

Under article I, section 7, there is an almost absolute bar to warrantless seizures, with only limited, "jealously guarded exceptions." *State v. Valdez*, 167 Wn.2d 761, 773, 224 P.3d 751 (2009). The burden is

always on the state to prove one of these narrow exceptions. *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). If the state fails to meet this burden, "violation of [an individual's] right of privacy under article I, section 7 automatically implies the exclusion of the evidence seized." *State v. Afana*, 169 Wn.2d 169, 179, 233 P.3d 879 (2010).

No exception to article I, section 7's warrant requirement applies in this case. Initially, the trial court determined that the warrantless search of Mr. Knight's Dropbox files was permissible because it did not exceed the private search conducted by Dropbox. CP 505-07. However, Washington has soundly rejected the private search doctrine.

Under the private search doctrine, a warrantless search by a state actor does not offend the Fourth Amendment if the search does not expand upon the scope of a prior search by a private entity. *Walter v. United States*, 447 U.S. 649, 662, 100 S.Ct. 2395 (1980). Courts reasoned that an individual's reasonable expectation of privacy was destroyed when the private actor conducted a search. *United States v. Jacobsen*, 466 U.S. 109, 119, 104 S.Ct. 1652 (1984). The state's subsequent search did not violate the individual's reasonable expectation of privacy and thus did not offend the Fourth Amendment. *Id*.

However, article I, section 7 provides greater protection from state action than does the Fourth Amendment. *State v. Simpson*, 95 En.2d 170,

178, 622 P.2d 1199 (1980). The analysis under article I, section 7 determines whether the state has intruded into a person's private affairs, not whether the person had a reasonable expectation of privacy. *State v. Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990).

The Washington Supreme Court examined and rejected the private search doctrine in *Eisfeldt*. 163 Wn.2d 628. In that case, the Court held that an "individual's privacy interest protected by article I, section 7 survives the exposure that occurs when it is intruded upon by a private actor." *Id*. at 638. Unlike the Fourth Amendment and its reasonability determination, article I, section 7 protections are not "confined to the subjective privacy expectations of modern citizens." *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). Instead, article I, section 7 protects "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *Id*. For this reason, the Court "adopted a bright line rule" holding the private search doctrine "inapplicable under article I, section 7 of the Washington Constitution." *Eisfeldt*, 163 Wn.2d at 638.

Under article I, section 7, Vancouver police intruded on Mr. Knight's private affairs by searching his Dropbox files without a warrant. To determine whether governmental conduct intrudes on a private affair, courts look at the "nature and extent of the information which may be

obtained as a result of the government conduct" and at the historical treatment of the interest asserted. *State v. Miles*, 160 Wn.2d 236, 244, 156 P.3d 864 (2007) (citing *McKinney*, 148 Wn.2d at 29); *see also, e.g.*, *State v. Jorden*, 160 Wn.2d 121, 156 P.3d 893 (2007) (finding random, suspicionless searches of a motel guest registry unconstitutional because those searches may provide "intimate details about a person's activities and associations").

Digital documents and communications are protected by article I, section 7. *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014). In *Hinton*, the Washington Supreme Court held that text messages were private affairs afforded constitutional protection. *Id*. at 869-70. Electronic files, like text messages, expose a "wealth of detail about [a person's] familial, political, professional, religious, and sexual associations." *United States v. Jones*, 565 U.S. 400, 415, 132 S.Ct. 945, 955 (2012) (Sotomayor, J., concurring) (discussing GPS (global positioning system) monitoring). These documents "encompass the same intimate subjects as phone calls, sealed letters, and other traditional forms of communication that have historically been strongly protected under Washington law." *Hinton*, 179 Wn.2d at 869-70. Mr. Knight's private electronic documents should be afforded similar protections.

The *Hinton* Court also rejected the argument that text messages lost their privacy protections because they were stored by a third party (the recipient). 179 Wn.2d at 873. "Given the realities of modern life, the mere fact that an individual shares information with another party and does not control the area from which that information is accessed does not place it outside the realm of article I, section 7's protection." *Id*. Washington courts have "consistently declined to require individuals to veil their affairs in secrecy and avoid sharing information in ways that have become an ordinary part of life." *Id*. at 874 (citing *State v. Gunwall*, 106 Wn.2d 54, 67, 720 P.2d 808 (1986) (finding that "[a] telephone is a necessary component of modern life" and "[t]he concomitant disclosure" to the telephone company of the numbers dialed by the telephone subscriber "does not alter the caller's expectation of privacy")).

The Court in *Hinton* analogized to other instances where private affairs were protected despite third-party access or hosting, including motel registries and banks. *Id*. at 873-74. For example, checking names in a motel registry without individualized suspicion violates article I, section 7. *Id*. (citing *Jorden*, 160 Wn.2d at 129-30). Information contained in a motel registry is "personal and sensitive," and is thus a "private affair notwithstanding the fact that the area searched belongs to the motel and that

an individual has no control or possessory interest in a motel's registry." *Id*. (citing *Jorden*, 160 Wn.2d at 129-30).

Similarly, banking records are private affairs, notwithstanding the fact that an individual voluntarily shares financial information with a bank and has no property or possessory interests in the bank's files. *Id*. at 874 (citing *Miles*, 160 Wn.2d at 246). Article I, section 7 protects banking records because they "may disclose what the citizen buys [and] what political, recreational, and religious organizations a citizen supports." *Miles*, 160 Wn.2d at 246.

Like text messages, hotel registries, and banking records, the fact that Mr. Knight stored his files with a third party—Dropbox—does nothing to lessen their protection as private affairs under article I, section 7. Vancouver police violated Mr. Knight's rights under the Washington Constitution by viewing these documents without a warrant. As explained below, the fact that these files were filtered through a nonprofit, NCMEC, does nothing to cure this violation.

2. The "silver platter doctrine" does not apply to private searches filtered through a federal agency.

The trial court relied on the silver platter doctrine to conclude that Vancouver police properly accessed Mr. Knight's Dropbox files without a

warrant. CP 692-93. The court erred because the silver platter doctrine does not apply in this case.

Under the silver platter doctrine, evidence lawfully obtained under the laws of another jurisdiction is admissible in Washington courts even if the manner the evidence was obtained would violate Washington law. *State v. Mezquia*, 129 Wn. App. 118, 132, 118 P.3d 378 (2005). Courts apply a two-step test. "Evidence is admissible under this doctrine when (1) the foreign jurisdiction lawfully obtained evidence and (2) the forum state's officers did not act as agents or cooperate or assist the foreign jurisdiction." *Id*. at 132.

The roots of the silver platter doctrine lie in federalism. The silver platter doctrine developed in federal courts when federal standards for lawful searches and seizures were usually more protective than state standards. *State v. Gwinner*, 59 Wn. App. 119, 124-25, 796 P.2d 728 (1990) (citing *State v. Mollica*, 114 N.J. 329, 346-47, 554 A.2d 1315 (1989)). Consistent with federalist principles, courts concluded that state constitutions do not control the actions of federal officials. *Mollica*, 554 114 N.J. at 350 (citing *State v. Bradley*, 105 Wn.2d 898, 902-03, 719 P.2d 546 (1986)).

In other words, the silver platter doctrine "is based upon the idea that because state constitutions have inherent jurisdictional limits, it would

disserve the principles of federalism and comity to subject foreign law enforcement officers to state constitutions." *State v. Gimarelli*, 105 Wn. App. 370, 380, 20 P.3d 430 (2001) (citing *In re Teddington*, 116 Wn.2d 761, 774, 808 P.2d 156 (1991)). This doctrine has also been applied to evidence seized in other states by state officials. *See State v. Martinez*, 2 Wn. App. 2d 55, 64-65, 408 P.3d 721 (2018) (video seized in Texas by Texas law enforcement and sent to Washington); *Mezquia*, 129 Wn. App. at 132-33 (DNA sample obtained in Florida by Florida law enforcement and sent to Washington).

The silver platter doctrine should not apply in this case. The trial court found that Dropbox acted as a private entity, not an agent of federal law enforcement. CP 692. Principles of "federalism and comity" have no bearing on evidence seized by a private entity in Washington, from a Washington resident.

Filtering Dropbox's search through NCMEC also did not trigger the silver platter doctrine. NCMEC is a nonprofit organization. *United States v. Cameron*, 699 F.3d 621, 628 (1st Cir. 2012). It receives the bulk of its funding from the federal government and is required by federal law to "operate the official national clearinghouse for information about missing and exploited children." *United States v. Ackerman*, 831 F.3d 1292, 1296, 1299 (10th Cir 2016). Courts have held that NCMEC is a government entity

for the purposes of the Fourth Amendment. *See Id*., 831 F.3d at 1297; *Cameron*, 699 F.3d at 645.

However, NCMEC did not conduct a federal investigation in this case. NCMEC received the cybertip and files from Dropbox. CP 2. It viewed only two files before forwarding all 322 to Washington law enforcement. *Id*. NCMEC "does not investigate" crimes, and "cannot verify the accuracy of the information submitted by reporting parties," nor did it attempt to do so in this case. CP 357. This case does not raise the danger of "subject[ing] foreign law enforcement officers to state constitutions." *Gimarelli*, 105 Wn. App. at 380.

Article I, section 7 is not so easily evaded. Washington residents should not be stripped of their constitutional protections by merely funneling evidence through a federal entity. This Court should reverse and hold that the silver platter doctrine does not apply to private searches of Washington residents just because the evidence passed through a clearinghouse created by federal law.

3. All evidence derived from this illegal search must be suppressed, and Mr. Knight's convictions reversed.

Finally, all evidence derived from this unlawful search must be suppressed. "The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." *State v. Duncan*, 146 Wn.2d

166, 176, 43 P.3d 513 (2002). "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion." *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407 (1963). Where evidence is obtained as a direct result of an unconstitutional search, that evidence must also be excluded as "fruit of the poisonous tree." *Id*. at 487-88.

Here, the warrantless search of Mr. Knight's Dropbox files started the investigation that led to the discovery of all of the evidence in this case. Vancouver police viewed three of his Dropbox files and used that as the basis to get warrants for Dropbox, Google, Comcast, and Mr. Knight's residence. CP 2-5. The search of his residence led to police obtaining his phone, and the pictures on the phone formed the basis for his convictions. CP 837-41. There is a "causal link" between the unlawful search and the evidence obtained from Mr. Knight's phone, requiring suppression. *State v. Moreno*, 173 Wn. App. 479, 493, 294 P.3d 812 (2013) (citing *State v. Rothenberger*, 73 Wn.2d 596, 600-01, 440 P.2d 184 (1968)).

Suppression of this evidence also requires reversal of Mr. Knight's convictions. "'The State must prove every element of a crime beyond a reasonable doubt for a conviction to be upheld.'" *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (quoting *State v. Byrd*, 125 Wn.2d 707, 713,

887 P.2d 396 (1995)). Without the evidence obtained from his phone, Mr. Knight could not have been convicted. This Court must reverse.

B. The Trial Court Imposed Impermissibly Vague and Unconstitutional Conditions of Community Custody.

This Court should also reverse two of the trial court's community custody conditions. Condition 11 prohibits "romantic relationships" with persons who have children in their care and custody. CP 883. This Court should reverse because this condition is impermissibly vague. Condition 5 requires Mr. Knight to submit to urine and breath testing for alcohol. CP 882. This Court should reverse because there is no connection between alcohol and the charges in this case.

1. The condition prohibiting certain romantic relationships is impermissibly vague.

Due process requires that sentencing conditions provide "fair warning of proscribed conduct." U.S. Const. amend. XIV; Wash. Const. art. I, § 3; *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). A sentencing condition is unconstitutionally vague if it "does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed" or if it "does not provide ascertainable standards of guilt to protect against arbitrary enforcement." *Bahl*, 164 Wn.2d at 752-53 (internal quotations omitted).

Here, condition 11 states: "You shall not enter into a romantic relationship with another person who has minor children in their care or custody without prior approval of DOC and your sexual deviancy treatment provider." CP at 883. Courts have struck down similar conditions. For example, the Second Circuit held that a condition requiring the offender to notify the probation department "when he establishes a significant romantic relationship" was unconstitutionally vague, reasoning:

> We easily conclude that people of common intelligence (or, for that matter, of high intelligence) would find it impossible to agree on the proper application of a release condition triggered by entry into a "significant romantic relationship." What makes a relationship "romantic," let alone "significant" in its romantic depth, can be the subject of endless debate that varies across generations, regions, and genders. For some, it would involve the exchange of gifts such as flowers or chocolates; for others, it would depend on acts of physical intimacy; and for still others, all of these elements could be present yet the relationship, without a promise of exclusivity, would not be "significant." The history of romance is replete with precisely these blurred lines and misunderstandings. *See, e.g.*, Wolfgang Amadeus Mozart, *The Marriage of Figaro* (1786); Jane Austin, *Mansfield Park* (Thomas Egerton, 1814); *When Harry Met Sally* (Columbia Pictures 1989); *He's Just Not That Into You* (Flower Films 2009).

*United States v. Reeve*s, 591 F.3d 77, 80-81 (2d Cir. 2010).

Washington courts have reached the same conclusion. Even absent the "significant" qualifier, Washington courts have struck down prohibitions on "romantic relationships." *See State v. Casimiro*, 8 Wn. App.

2d 245, 251, 438 P.3d 137 (2019). The Court in *Casimiro* held that the term "romantic relationship" was "highly subjective and problematic." *Id*. This Court should strike condition 11 because it lacks sufficient definiteness and fails to protect against arbitrary enforcement.

2. The trial court lacked authority to require monitoring for alcohol consumption.

The trial court also imposed two alcohol-related conditions of community custody. Condition 4 prohibits Mr. Knight from consuming alcohol. CP 882. Condition 5 requires him to submit to urine and breath testing to confirm abstention. *Id*. The trial court had the authority to require Mr. Knight to refrain from consuming alcohol. RCW 9.94A.703(3)(e). However, the court lacked the authority to require breath and urine testing because alcohol did not contribute to Mr. Knight's charged crimes.

Under the Sentencing Reform Act, trial courts have the authority to order an offender to "refrain from possessing or consuming alcohol." RCW 9.94A.703(3)(e). Courts can also order an offender to "comply with any crime-related prohibitions." RCW 9.94A.703(3)(f). A "'[c]rime-related prohibition' . . . prohibit[s] conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). "Directly related" includes conditions that are "reasonably

related" to the crime. *State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870 (2014).

Appellate courts review a trial court's crime-related community custody conditions for abuse of discretion. *State v. Cordero*, 170 Wn. App. 351, 373, 284 P.3d 773 (2012). A sentencing court abuses its discretion if its decision is manifestly unreasonable or if exercised on untenable grounds or for untenable reasons. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

Washington courts have struck crime-related community custody conditions when there is "no evidence" in the record that the circumstances of the crime related to the community custody condition. *See State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008) (reversing condition that defendant not have a cell phone after finding "no evidence in the record" that defendant used cell phones to facilitate drug possession or distribution); *State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (striking condition that prohibited defendan's Internet use after finding "no evidence that [the defendant] accessed the Internet before the rape or that Internet use contributed in any way to the crime").

Additionally, urine and breath testing affect an offender's private affairs under article I, section 7. Washington courts have consistently held that the nonconsensual removal of bodily fluids implicates privacy interests.

York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 307, 178 P.3d 995 (2008) (plurality opinion) (urine testing); *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 90, 847 P.2d 455 (1993) (HIV testing); *State v. Olivas*, 122 Wn.2d 73, 83, 856 P.2d 1076 (1993) (DNA samples). Testing implicates privacy interests in two ways. First, the act of providing a sample is fundamentally intrusive, particularly when urine samples are collected under observation to ensure compliance. *See York*, 163 Wn.2d at 308. Second, "chemical analysis of urine, like that of blood, can reveal a host of private medical facts about [a person], including whether he or she is epileptic, pregnant, or diabetic." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617, 109 S.Ct. 1402 (1989).

Article I, section 7 is meant to protect these types of privacy interests. *See Jorden*, 160 Wn.2d at 126 ("[A] central consideration [under article I, section 7] is . . . whether the information obtained via the governmental trespass reveals intimate or discrete details of a person's life."). Persons serving a criminal sentence have a reduced expectation of privacy. *State v. Jardinez*, 184 Wn. App. 518, 523, 338 P.3d 292 (2014). However, "this diminished expectation of privacy is constitutionally permissible only to the extent necessitated by the legitimate demands of the operation of the parole process." *State v. Parris*, 163 Wn. App. 110, 117, 259 P.3d 331 (2011) (internal quotation marks omitted).

Here, there was no connection between Mr. Knight's charged crimes and alcohol. There was no testimony at trial about alcohol consumption and no allegation that alcohol contributed to the case. Here, like in *Zimmer*, there was "no evidence in the record" that alcohol facilitated the charged crimes. *See Zimmer*, 146 Wn. App. at 413. The trial court erred by imposing a significant intrusion into Mr. Knight's private affairs absent any connection to his convictions. This Court should strike condition 5.

VI. CONCLUSION

For the foregoing reasons, Mr. Knight respectfully requests that this Court exclude the evidence obtained from this illegal search and reverse his convictions. Mr. Knight also requests that this Court remand with instructions to strike the challenged conditions of community custody.

RESPECTFULLY SUBMITTED this 14th day of November, 2019.

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