Cause No. 56129-8-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant

v.

DAVID W. TURNER,

Respondent.

ON APPEAL FROM THE
SUPERIOR COURT OF THURSTON COUNTY

Before the Honorable Sharonda Amamilo, Judge

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

In ***State v. Cornwell***, 190 Wn.2d 296, 412 P.3d 1265 (2018), the Washington Supreme Court held the warrantless search of a probationer is permitted only where there is a nexus between the property searched and the alleged probation violation. Did the trial court err when it ruled there was an insufficient nexus between David Turner's DOC warrant for failure to report and the search of a car he was driving when stopped by a community corrections officer?

B. STATEMENT OF THE CASE

1. Facts related to discovery of the firearm and drugs in the car

David Turner, Jr. had a Department of Corrections warrant for failure to report to his Community Corrections Officer as required by the terms of his judgment and sentence. Report of Proceedings (RP) at 20, 22.[1]

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[1] The record of proceedings consists of the following hearings: June 28, 2021, August 5, 2021, August 20, 2021 (motion to dismiss), and July 16, 2021

Community Corrections Specialist (CCS) Brett Curtright was looking for a fugitive from Las Vegas called "Kermit," who was believed to be in contact with Sarah Emery. RP at 14, 15. While investigating "Kermit," CCS Curtright learned from neighbors that there was activity in and out of Ms. Emery's house, which he believed was indicative of drug trafficking. RP at 23. While looking for Ms. Emery at her house on March 29, 2021, CCS Curtright and Thurston County Detective Shekel saw Ms. Emery sitting in a maroon sedan with Mr. Turner. RP at 14, 15, 20. CCS Curtright was familiar with Mr. Turner and had arrested him three times between September 2020 and June 2020. RP at 16-19. Each time CCS Curtright arrested Mr. Turner, the arrest involved drugs. RP at 20.

Although he was looking for "Kermit," CCS Curtright decided to arrest Mr. Turner on the DOC warrant if he left Ms. Emery's house. RP at 20. CCS Curtright stopped his vehicle in

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(court's ruling).

a nearby cul-de-sac and saw a silver BMW driven by Ms. Emery go past his position, followed by the maroon sedan driven by Mr. Turner. RP at 20-21. CCS Curtright pulled in behind the sedan and after the car entered a main arterial road, CCS Curtright activated emergency lights on his unmarked F-150 Ford pickup truck. RP at 23-24. CCS Curtright testified that he saw Mr. Turner "in the cab moving around like he was moving something or making some type of moves like he was trying to conceal something from being seen." RP at 25-26. After traveling approximately a quarter mile Mr. Turner pulled into a parking lot and stopped the car. RP at 26, 45. Ms. Emery also pulled into the parking lot. RP at 27. Detective Shekel searched Mr. Turner and he was put in handcuffs. RP at 27.

CCS Curtright searched the maroon sedan and found suspected drugs on the rear floorboard of the car in a blue bag. RP at 29. CCS Curtright searched the trunk and found a handgun in a black bag and a small amount of suspected methamphetamine. RP

at 30. CCS Curtright testified that he searched the car because Mr. Turner failed to immediately stop after he activated the emergency lights on the F-150. RP at 30-31.

The State charged Mr. Turner in Thurston County Superior Court with three counts of unlawful possession of a controlled substance with intent to deliver and unlawful possession of a firearm. Clerk's Papers (CP) at 4-5. Mr. Turner was also charged by special allegation that he was armed with a firearm in the three controlled substance counts. CP at 4-5.

2. Suppression hearing and court's ruling

Counsel for Mr. Turner moved to suppress the evidence discovered during the vehicle search that resulted from the traffic stop and arrest on the DOC warrant. CP at 6-64.

The Honorable Sharonda Amamilo heard a motion to suppress evidence found as a result of the search on June 28, 2021. RP at 4-90. The court ruled that the search of the passenger area of the car was lawful, but that the search of the trunk was not

lawful because the officers did not have a reasonable articulable suspicion of criminal activity that would allow a warrantless search of the trunk. RP (July 16, 2021) at 8.

The court entered findings and conclusions on August 5, 2021, and the State filed a notice of appeal on August 13, 2021. CP at 86-90, 91-98. The court granted a defense motion to dismiss without prejudice under CrR 8.3 on August 20, 2021. RP at 114; CP at 99-100, 105.

C. ARGUMENT

1. THE COURT CORRECTLY FOUND THAT THERE WAS AN INSUFFICIENT NEXUS BETWEEN A SUSPECTED PROBATION VIOLATION AND SEARCH OF THE CAR

The State argues that the trial court erred by granting the suppression motion because CCS Curtright had a reasonable articulable suspicion of a probation violation and there was a nexus between the sedan and that CCS Curtright's search of the car did not exceed his authority under RCW 9.94A.631. Brief of Appellant at 13-15.

a. Standard of review

Challenged findings of fact from suppression hearings are reviewed to determine if they are supported by substantial evidence. ***State v. Mendez***, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Findings are generally viewed as verities if there is substantial evidence to support the findings. ***State v. Hill***, 123 Wn.2d 641, 644-45, 857 P.2d 313 (1994). Substantial evidence exists where there is sufficient evidence in the record to persuade a fair minded, rational person of the truth of the finding. ***Mendez***, 137 Wn.2d at 214; ***State v. Halstein***, 122 Wn.2d 109, 129, 857 P.2d 270 (1993).

Conclusions of law from a suppression hearing are reviewed *de novo*. ***State v. Carneh***, 153 Wn.2d 274, 281, 103 P.3d 743 (2004). "[C]onclusions entered by a trial court following a suppression hearing carry great significance for a reviewing court.", ***State v. Collins*** 121 Wn.2d 168, 174, 847 P.2d 919 (1993). Conclusions are affirmed if they are supported by the

trial court's factual findings. ***State v. Alvarez***, 105 Wn. App. 215, 220, 19 P.3d 485 (2001).

b. A probation officer may search a probationer's vehicle without a warrant only if a nexus exists between the vehicle and the alleged probation violation the officer is investigating

A community corrections officer may conduct a warrantless search of a probationer's vehicle only if a nexus exists between the vehicle and the suspected community custody violation. Here, at the time of the warrantless search of the sedan, CCS Curtright knew only that Mr. Turner had a DOC warrant for failure to report. The officer was aware of no actual, articulable facts to suggest Mr. Turner had drugs in the car or trunk, or that drugs or a gun would be found in the car. The court correctly found that no nexus existed between Mr. Turner's alleged probation violation of failing to report and the search of the trunk.

Absent an exception to the warrant requirement, a warrantless search is presumed unconstitutional under the Fourth Amendment of the United States Constitution and article I, § 7 of

the Washington Constitution. ***State v. Gaines***, 154 Wn.2d 711, 716, 116 P.3d 993 (2005); ***State v. Acrey***, 148 Wn.2d 738, 754, 64 P.3d 594 (2003). The State bears the burden to prove a warrantless search falls under one of the "few jealously and carefully drawn exceptions" to the warrant requirement. ***State v. Cornwell***, 190 Wn.2d 296, 301, 412 P.3d 1265 (2018) (internal quotation marks and citations omitted).

There is no unconditional "probation exception" to the warrant requirement under either article I, § 7 or the Fourth Amendment. ***Cornwell***, 190 Wn.2d at 301-02; see also United ***States v. Lara***, 815 F.3d 605, 607 (9th Cir. 2016). Persons on community custody have a lesser expectation of privacy than the general public, but are still entitled to protections of article I, § 7 of the Washington Constitution and the Fourth Amendment of the United States Constitution. ***State v. Winterstein***, 167 Wn.2d 620, 628-29, 220 P.3d 1226 (2009); ***Griffin v. Wisconsin***, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987).

Under article 1, § 7, individuals have "a robust privacy right" that protects them from being disturbed in their private affairs or having their home invaded without authority of law. ***Cornwell***, 190 Wn. 2d at 301. Although their protections are diminished, persons "on probation do not forfeit all expectations of privacy in exchange for their release into the community." ***Cornwell***, 190 Wn.2d at 303. Under article I, § 7, a probationer's "privacy interest can be reduced only to the extent necessitated by the legitimate demands of the operation of the community supervision process." ***Cornwell***, 190 Wn.2d at 303-04. (internal quotation and brackets omitted). Consequently, "authority of law must still justify the intrusion into their reduced expectation of privacy," even when the court is enforcing a valid probation condition. ***State v Olsen***, 189 Wn.2d 118, 126, 399 P.3d 1141 (2017).

To protect the privacy interests of those on supervision, a CCO must first have reasonable cause to believe a probation

violation has occurred before conducting a search. ***Cornwell***, 190 Wn.2d 296, 304, 412 P.3d 1265 (2018) citing RCW 9.94A.631(1). Where there is reasonable cause to believe an offender has violated a condition of sentence, a CCO may require that offender to submit to a search of his person, residence, automobile or personal property. RCW 9.94A.631.[2] The statute provides:

> If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

This statute is intended to codify the general rule that a community corrections officer can constitutionally search a person based on a "'well-founded or reasonable suspicion of a probation violation,' rather than a warrant supported by probable cause." ***Cornwell***, 190 Wn.2d at 302 (quoting ***Winterstein***, 167 Wn.2d at

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[2] "'Community corrections officer' means an employee of the department who is responsible for carrying out specific duties in supervision of sentenced offenders and monitoring of sentence conditions." RCW 9.94A.030(4).

628). A probation officer must first have "reasonable cause to believe" a probation violation has occurred before he or she may conduct a warrantless search of the probationer's property. ***Cornwell***, 190 Wn.2d at 304.

The threshold requirement of "reasonable cause" protects an individual from random, suspicion less searches. ***Cornwell***, 190 Wn.2d at 304. "Reasonable cause" is analogous to the reasonable suspicion standard of ***Terry***,[3] requiring specific articulable facts and rational inferences that a violation has occurred or is about to occur. ***State v. Jardinez***, 184 Wn. App. 518, 524, 338 P.3d 292 (2014). "'Articulable suspicion' is defined as a substantial possibility that criminal conduct has occurred or is about to occur." ***Jardinez***, 184 Wn.App. at 524 (citing ***State v. Kennedy***, 107 Wn.2d 1, 6, 726 P.2d 445 (1986)).

Article I, § 7 mandates "that an individual's privacy right be reduced only when and to the extent necessary." Cornwell, 190

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[3] ***Terry v. Ohio***, 392 U.S. 1, 88 S.Ct 1868, 20

Wn.2d at 305. Search of an individual's property requires a CCO to reasonably believe that the property has a nexus with the suspected probation violation. ***Cornwell***, 190 Wn.2d at 306. A warrantless search of a probationer's property requires more than a reasonable, articulable basis to believe a probation violation has occurred. ***Cornwell***, 190 Wn.2d at 304. The location to be searched must be limited, "to property reasonably believed to have a nexus with the suspected probation violation." ***Cornwell***, 190 Wn.2d at 306. Requiring a nexus between the suspected probation violation and the property searched, "protects the privacy and dignity of individuals on probation while still allowing the State ample supervision." ***Cornwell***, 190 Wn.2d at 306.

Consistent with this requirement, our Supreme Court has narrowly interpreted RCW 9.94A.631 and read into the statute what article I, § 7 demands. ***Cornwell***, 190 Wn.2d at 303. In ***Cornwell***, the court held the statute does not permit searches of

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L.Ed.2d 889 (1968).

property where there is no nexus between the property and the alleged probation violation. ***Cornwell***, 190 Wn.2d at 306; accord ***Jardinez***, 184 Wn. App. at 529-530. In other words, article I, § 7 does not permit fishing expeditions into a probationer's property even if there is reasonable cause to believe there has been a probation violation. ***Cornwell,*** 190 Wn.2d at 306. The scope of the search must be limited to property reasonably believed to have a nexus with the particular probation violation giving rise to the search. ***Cornwell***, 190 Wn.2d at 304, 306.

c. The trial court correctly found no nexus between the probation violation for failing to report and the search of the car

CCS Curtright's search of the trunk on the vehicle was unlawful. While CCS Curtright may have suspected that Mr. Turner violated other probation conditions, the only probation violation that CCS Curtright was certain about was Mr. Turner's failure to report.

In ***Cornwell***, a sufficient nexus did not exist to justify a

search of ***Cornwell***'s car where the only suspected probation violation supported by the record was Cornwell's failure to report to his probation officer. ***Cornwell***, 190 Wn.2d at 306. Likewise, in ***Jardinez***, a sufficient nexus did not exist to justify a search of Jardinez's iPod where the only suspected probation violations were his failure to report and his admitted marijuana use, and no particular facts suggested the officer would find evidence of those violations on the iPod. ***Jardinez***, 184 Wn. App. at 521.

Here, as in ***Cornwell*** and ***Jardinez***, a sufficient nexus did not exist to justify a warrantless search of the car. The only suspected probation violation supported by the record was Mr. Turner's failure to report to his probation officer. Therefore, as a matter of law, "there is no nexus between property and the crime of failure to report." ***Cornwell***, 190 Wn.2d at 306.

Moreover, CCS Curtright was aware of no specific facts to suggest he would likely find evidence of drug possession or use in the car. Although Mr. Turner was driving the car, no actual,

articulable facts suggested Mr. Turner was storing drugs or a gun in the car. CCS Curtright saw only what he described as "some type of movements" by Mr. Turner, "like he was trying to conceal something from being seen." RP at 26. Even assuming *arguendo* that a search of lunge area was justified due to the movement in the car that CCS Curtright testified that he observed, any such furtive movements by the driver could physically not involve the trunk area of the car.

There was no nexus to Mr. Turner's suspected probation violation of failure to report and the search of the car. CCS Curtright was not aware of any "specific and articulable facts" to suggest that he would likely find evidence of drug possession or use in the car. ***Jardinez***, 184 Wn. App. at 524. The open-ended probation search in this case was precisely the type of fishing expedition condemned by ***Cornwell***. The search was contrary to the constitutional mandate that a probationer's property "which has no nexus to the suspected violation, remains free from

search." See e.g. ***Cornwell***, 190 Wn.2d at 304.

Because the State could not establish a nexus between the car and the suspected probation violation, the trial court correctly ruled that the gun and drugs found in the car were obtained as the direct result of the unlawful search and must be suppressed. ***Cornwell***, 190 Wn.2d at 307.

D. CONCLUSION

Based on the foregoing arguments and authorities, the respondent respectfully asks this Court to affirm the judgment of the Superior Court that the search was unlawful and to affirm the trial court's ruling denying admission of the contents of the car and order dismissing the case.

I certify under RAP 18.17(b), the word count in this document is 2560 words, excluding the parts of the document exempted from the word count by RAP 18.17(b).

DATED: February 28, 2022.

Respectfully submitted,
THE TILLER LAW FIRM

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 28, 2022, that this Appellant's Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 909 A Street, Ste. 200, Tacoma, WA 98402, a copy was emailed to Joseph J.A. Jackson, Thurston County Prosecuting Attorney and a copy was mailed by U.S. mail, postage prepaid, to the appellant at the following address:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on February 28, 2022.

PETER B. TILLER