No. 47444-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

CURTIS LAMONT CORNWELL,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 13-1-04618-2
The Honorable Jack Nevin, Judge

OPENING BRIEF OF APPELLANT

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3. The trial court erred when it ruled that Curtis Cornwell's community corrections officer could search any and all of Cornwell's property whenever the officer believed Cornwell violated the terms of his community custody.

4. The State failed to meet its burden of establishing that a valid exception to the warrant requirement justified the search of Curtis Cornwell's car and personal possessions.

5. Curtis Cornwell was denied his constitutional right to effective assistance of counsel.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where Curtis Cornwell's corrections officer believed Cornwell violated the terms of his community custody by failing to report to a meeting with his corrections officer, but where parolees are still entitled to some privacy protections and where a reasonable nexus must exist between the

searched personal property and the alleged violation, did the trial court err when it ruled that Cornwell had no expectation of privacy in his car and personal possessions and that Cornwell's community corrections officer had statutory authority to search any and all of Cornwell's property regardless of whether it might contain evidence of the alleged violation? (Assignments of Error No. 1, 2, 3 & 4)

2. Where trial counsel argued several unsuccessful grounds for suppression of items collected during a search of Curtis Cornwell's car and personal possession, but did not argue the ground that was likely to be successful and result in suppression, was Cornwell denied his constitutional right to effective assistance of counsel? (Assignment of Error 5)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Curtis Lamont Cornwell by Information with three counts of unlawful possession of a controlled substance with intent to deliver (RCW 69.50.401(1)(2)) and one count of resisting arrest (RCW 9A.76.040). (CP 1-2) The trial court denied Cornwell's CrR 3.6 motion to suppress evidence found during a search of the vehicle he had been driving at the time of his arrest.

(CP 79-90; TRP1 135-45)[1] A jury convicted Cornwell as charged. (CP 207-13; TRP2 201) The trial court imposed a standard range sentence totaling 87 months and both mandatory and discretionary legal financial obligations. (SRP 23; CP 125, 126) This appeal follows. (CP 239)

B. SUBSTANTIVE FACTS

1. *Facts from CrR 3.6 Motion to Suppress*

Tacoma police officer Randy Frisbie and Community Corrections Officer (CCO) Thomas Grabski were conducting surveillance of a home suspected of being used for drug sales and prostitution. (TRP1 15) Officer Frisbie observed a black Chevrolet Monte Carlo pull alongside CCO Grabski's vehicle and its driver appeared to roll down a window to look at Grabski. (TRP1 15) Officer Frisbie noted the license plate number of the Monte Carlo so that they could later determine the name of its registered owner. (TRP1 15) A few days later, Officer Frisbie saw the Monte Carlo again, and saw an unknown man get out of the driver's side of the car and walk into a pawn shop. (TRP1 15) The officers were unable to learn the identity of the man at that time. (TRP1 15)

[1] The trial transcripts, labeled volumes I and II, will be referred to as "TRP#." The transcript of sentencing will be referred to as "SRP" and the remaining transcript will be referred to by the date of the proceeding.

However, they were able to learn that the registered owner was named Janet Lamb. (TRP1 15-16) The officers contacted Lamb, who confirmed that she was the registered owner of the Monte Carlo. (TRP1 16) She told the officers that she had given the car to Curtis Cornwell, but now wanted it back.[2] (TRP1 16, 105, 106)

CCO Grabski learned that Cornwell was on community custody and had a Department of Corrections (DOC) warrant issued for his arrest because he had violated the terms of his release. (TRP1 16, 17, 83, 88) Grabski believed that the warrant was issued based on Cornwell's failure to report for a scheduled check-in with his CCO. (TRP1 113) Grabski shared this information with Officer Frisbie. (TRP1 16, 17)

On November 28, 2013, while on patrol with Officer Patrick Patterson, Officer Frisbie saw the Monte Carlo drive past, and assumed Cornwell was the driver. (TRP1 17, 19, 48) Officer Frisbie turned his patrol car to follow the Monte Carlo, but before he was able to activate his emergency lights to initiate a stop, the Monte Carlo pulled into a driveway and Cornwell began to exit the

[2] Grabski testified that he did not interpret this statement to mean that Cornwell had stolen the Monte Carlo, only that Cornwell was likely the person seen driving the Monte Carlo. (TRP1 107)

car. (TRP1 18, 38-39, 48) Officer Frisbie ordered Cornwell to stay in the vehicle, but he did not comply. Cornwell instead lowered himself to the ground, then jumped up and began to run away. (TRP1 19-20, 49) Officers Frisbie and Patterson tased Cornwell, then took him into custody. (TRP1 20, 21, 49) The officers confirmed Cornwell's identity and warrant status, then called Grabski who, as a CCO, can conduct a warrantless "compliance check" search of property when an offender is suspected of violating the terms of community custody. (TRP1 21, 22, 51, 57-58, 80)

Grabski arrived and contacted Cornwell, then decided to search the Monte Carlo because Cornwell was driving the car when he was arrested. (TRP1 22, 90) On the front seat, Grabski found a black nylon bag containing what appeared to be prescription pills. (TRP1 22, 52-53, 90, 91)

2. *Facts from Trial*

In addition to the facts testified to at the CrR 3.6 hearing, Officers Frisbie, Patterson and Grabski testified at trial that the black nylon pouch contained three different types of pills, a lighter, a spoon, and unused ziplock baggies. (TRP2 60, 64-66, 67, 73, 74, 102, 104) Cornwell also was in possession of three cellular phones

and $1,573 in mixed denomination bills. (TRP2 56, 83, 105) The officers testified that these items were commonly associated with the sale of narcotics and that the amount of pills found was inconsistent with an amount likely needed for personal use. (TRP2 49, 94-96, 111)

The three types of pills found in the black pouch were analyzed. (TRP2 139) One type contained oxycodone, one type contained amphetamine, and the third type contained methamphetamine. (TRP2 142, 144, 145) Cornwell told the officers that he had the pills because he suffered from migraine headaches. (TRP1 53; TRP2 100)

IV. ARGUMENT & AUTHORITIES

1. CORNWELL'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED BECAUSE PROBATIONERS DO NOT SACRIFICE ALL OF THEIR PRIVACY RIGHTS WHEN ON COMMUNITY CUSTODY AND BECAUSE CCO GRABSKI'S SEARCH WAS NOT RELATED IN ANY WAY TO THE SUSPECTED VIOLATION OF THE TERMS OF CORNWELL'S RELEASE.

CrR 3.6(b) requires that the trial court enter written findings of fact and conclusions of law following its decision on a motion to suppress brought pursuant to CrR 3.6(a). The trial court failed to enter these required findings in this case, which makes it impossible for Cornwell to assign error to findings of fact. However,

it is clear from the testimony at the hearing that the Officers believed that DOC had issued a warrant for Cornwell's arrest because he had failed to report and this was the entire and only basis for the contact and arrest on November 28, 2013; that the Monte Carlo had been seen near a suspected drug house at some unspecified date and time prior to Cornwell's arrest; that the Monte Carlo was registered to Janet Lamb; that Lamb had at one point given Cornwell permission to drive the Monte Carlo but had since changed her mind; and that the search of the Monte Carlo was conducted under the statutory authority that allows a CCO to conduct a compliance check of an offender suspected of violating the terms of his or her release. (TRP1 12-13, 15, 16, 17, 22, 24, 57-58, 60, 63, 64, 80, 90, 93, 106, 107, 113)

The trial court denied Cornwell's motion to suppress the items found in the Monte Carlo during the search. The trial court concluded that CCO Grabski had reasonable grounds to believe that Cornwell violated the terms of his release because of the existence of the warrant. (TRP1 142) The court upheld the search stating, in relevant part:

> Cornwell may indeed have had a subjective expectation of privacy in his personal effects in the car. But that expectation was not a reasonable, an

> objectively reasonable expectation in these circumstances. His status as probationer means that his effects and his personal belongings . . . and other personal property, was continuously subject to searches and seizures by law enforcement officials. His expectation of privacy in his personal effects fails the reasonable test in my opinion . . . because there has been a legislative determination that probationers do not have a reasonable expectation of privacy in residences, vehicles, or personal belongings, even including closed containers. And our appellate courts have acknowledged that, otherwise, our laws and society demand a warrant for such searches but not for those who are on community custody. So part of my holding is that Mr. Cornwell did not have a reasonable expectation of privacy in the inside of that vehicle[.]

(TRP1 140-41) (A copy of the trial court's full oral ruling is attached in the Appendix.)

When reviewing the denial of a motion to suppress, the trial court's conclusions of law are reviewed *de novo*. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citing State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)). In this case, a de novo review shows that the trial court was incorrect.

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution protect citizens against warrantless searches and seizures.[3]

[3] It is now settled that Art. I, § 7 is more protective than the Fourth Amendment. State v. Jackson, 150 Wn.2d 251, 260, 76 P.3d 217 (2003); State v. Vrieling, 144 Wn.2d 489, 495, 28 P.3d 762 (2001).

Warrantless searches and seizures are per se unreasonable. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). Because this is a strict rule, courts limit and narrowly construe exceptions to the warrant requirement. Parker, 139 Wn.2d at 496. Whether a search is justified by a warrant or by some exception to the warrant requirement, the scope and manner of the search itself must be reasonable. *See* New Jersey v. T.L.O., 469 U.S. 325, 337, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).

Washington courts have recognized an exception to the warrant requirement allowing for a search of parolees or probationers. State v. Campbell, 103 Wn.2d 1, 22, 691 P.2d 929 (1984), *cert. denied,* 471 U.S. 1094, 85 L. Ed. 2d 526, 105 S. Ct. 2169 (1985). RCW 9.94A.631 provides, in relevant part:

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

However, while persons on community custody have a lesser expectation of privacy than the general public, they are still entitled to some constitutional protections. Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987); State v. Winterstein, 167 Wn.2d 620, 628-29, 220 P.3d 1226 (2009).

Accordingly, there are limits to warrantless searches of offenders on community custody, and CCO Grabski exceeded those limits.

"[A] diminution of Fourth Amendment protection can only be justified 'to the extent actually necessitated by the legitimate demands of the operation of the parole process.'" State v. Simms, 10 Wn. App. 75, 86, 516 P.2d 1088 (1973) (quoting In re Martinez, 83 Cal. Rptr. 382, 463 P.2d 734, 738, n. 6 (1970)). "[A] balancing of the parolee's privacy interest with the societal interest in public safety is necessary to determine the proper scope of the warrantless search condition in [the offender's] parole agreement[.]" State v. Patterson, 51 Wn. App. 202, 208, 752 P.2d 945 (1988). Thus, even in the context of a search by a CCO, the scope of a search must be reasonable.

For example, in Patterson, witnesses identified probationer Patterson as the person who committed an armed robbery, and police received separate tips that the weapon used would be found in Patterson's car. Division 3 held that this constituted reasonable suspicion for a parole officer to search Patterson's car without a warrant. 51 Wn. App. at 209.

Conversely, in State v. Parris, a CCO searched the residence of probationer Derek Parris, whose community custody

conditions included prohibitions on contact with minors, possession of sexually explicit materials, and use of drugs or alcohol. 163 Wn. App. 110, 120, 259 P.3d 331 (2011). Parris had been spotted in his car with an underage girl, had failed a urinalysis drug test, and Parris' mother told the officers that Parris might have obtained a firearm. 163 Wn. App. at 120. During a search of his residence, which Parris did not challenge, officers found memory cards and other digital storage devices. 163 Wn. App. at 120.

Parris challenged the seizure and viewing of the contents of the memory cards, but this Court ruled that the CCO had a well-founded and reasonable suspicion that the memory cards might contain evidence of the suspected and additional violations. 163 Wn. App. at 120. Accordingly, "the requirements of community custody necessitated the search [of the memory cards] both for Parris' safety and for the safety of others." 163 Wn. App. at 120.

The Parris opinion suggested, but did not explicitly hold, that perhaps an offender on community custody has no expectation of privacy in any of his or her property and is not entitled to any protections afforded under the Fourth Amendment:

> RCW 9.94A.631(1) operates as a legislative determination that probationers do not have a reasonable expectation of privacy in their residences,

> vehicles, or personal belongings (including closed containers) for which society is willing to require a warrant. The statute itself diminishes the probationer's expectation of privacy. We hold, therefore, that Parris had no reasonable expectation of privacy in his portable memory cards and, thus, no separate warrant was required to search the memory cards' contents.

163 Wn. App. at 123 (footnotes omitted). The trial court in this case seemed to come to the same conclusion, holding that Cornwell had absolutely no expectation of privacy in his car or the personal items within. (TRP1 140-41)

But such a broad reading of RCW 9.94A.631(1) was subsequently rejected by Division 3 in State v. Jardinez, 184 Wn. App. 518, 338 P.3d 292 (2014). At issue was whether Jardinez's CCO had legal authority to search the content of his iPod when the CCO did not expect the search to yield evidence related to either of the known parole violations (Jardinez's failure to appear and his marijuana use). 184 Wn. App. at 523. The State argued that "any parole violation justifies any search for any other violation [and] that the statute allows a search of '**other** personal property,' which, according to the State, implies property other than the property with a nexus to any criminal activity." 184 Wn. App. at 525 (emphasis in original).

The Jardinez court rejected the State's invitation to read RCW 9.94A.631(1) so broadly, and emphasized that there must be a reasonable nexus between the searched personal property and the alleged crime or violation.[4] 184 Wn. App. at 529. In reaching this conclusion, the court relied on well-established search and seizure law, and on the Sentencing Guidelines Commission's official comment regarding RCW 9.94A.631(1):

> "The Commission intends that Community Corrections Officers exercise their arrest powers sparingly, with due consideration for the seriousness of the violation alleged and the impact of confinement on jail population. Violations may be charged by the Community Corrections Officer upon notice of violation and summons, without arrest.
>
> **The search and seizure authorized by this section should relate to the violation which the Community Corrections Officer believes to have occurred.**"

184 Wn. App. at 529 (quoting David Boerner, SENTENCING IN WASHINGTON: A LEGAL ANALYSIS OF THE SENTENCING REFORM ACT OF 1981, at app. 1-13 (1985)) (emphasis added).

In this case, CCO Grabski testified that the violation underlying Cornwell's warrant was likely a failure to report. (TRP1

[4] The Jardinez court noted that, if read broadly, Parris could be interpreted as supporting a search of any offender's property upon violation of community custody conditions, but noted that the Parris court "did not expressly rule that all property of the offender may be searched." 184 Wn. App. at 527-28.

85, 101, 102, 113) There would be no need to search the Monte Carlo or the black nylon bag to find proof of this suspected violation. In fact, Grabski testified that the purpose of the search was to "to make sure there's no further violations of his probation." (TRP1 93) Grabski was not looking for evidence of the suspected violation, but instead expanded the scope of his search beyond its proper limits in order to look for evidence of additional violations.

RCW 9.94A.631 does not strip probationers of all of their Fourth Amendment privacy rights, and does not authorize CCO Grabski's warrantless search of the Monte Carlo or the contents of the nylon bag. The trial court incorrectly interpreted and applied the statute when it found this statutory exception to the warrant requirement justified the search. The State also failed to meet its burden of establishing that any other exception to the warrant requirement applies.[5] Accordingly, the trial court's denial of Cornwell's motion to suppress must be reversed and the evidence collected as a result of the search must be suppressed.[6]

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[5] The State bears the heavy burden of proving that a warrantless search falls within an exception to the warrant requirement. Parker, 139 Wn.2d at 496.

[6] The remedy for a violation of article I, section 7 is suppression of the evidence obtained either during or as a direct result of an unconstitutional search or seizure. State v. Buelna Valdez, 167 Wn.2d 761, 778, 224 P.3d 751 (2009).

B. CORNWELL'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE A CLEARLY MERITORIOUS GROUND FOR SUPPRESSION OF EVIDENCE.

Cornwell's trial counsel brought a motion to suppress the evidence found in the Monte Carlo and nylon bag, and argued several grounds in support of the motion, including that the officers lacked sufficient reliable facts to justify detaining Cornwell; that the Monte Carlo belonged to Lamb and Grabski does not have authority to search items belonging to third parties; and that the State did not prove the existence of the DOC warrant. (CP 82-89; TRP1 118-34) Though the Jardinez opinion was issued about one month before the suppression hearing, trial counsel did not bring it to the attention of the judge and did not specifically argue that CCO Grabski's search exceeded the proper scope of a search under RCW 9.94A.631 because there was no nexus between the alleged violation and the items searched.

The trial court did address the question of whether RCW 9.94A.631 extends to any and all personal property, and concluded based on its review of the case law (including Parris) that it does. (TRP1 137-41) However, if this Court declines to reach the issue briefed in the prior section because trial counsel did not raise that specific ground below, then Cornwell's convictions must still be

reversed because counsel's failure amounted to ineffective assistance.

Effective assistance of counsel is guaranteed by both U.S. Const. amd. VI and Wash. Const. art. I, § 22 (amend. x). Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant claiming ineffective assistance of counsel must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

As to the first Strickland prong, counsel's representation is ineffective if no legitimate strategic or tactical reason for a particular trial decision can be found. State v. Rainey, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001); State v. McFarland, 127 Wn. 2d 322, 336, 899 P.2d 1251 (1995). Failure to bring a plausible motion to

suppress is deemed ineffective if it appears that a motion would likely have been successful if brought. Rainey, 107 Wn. App. at 136.

As argued in detail above, the record clearly shows that the search conducted by CCO Grabski exceeded the scope permitted under the Fourth Amendment and RCW 9.94A.631. If trial counsel argued this ground for suppression below, and brought the trial court's attention to the Jardinez opinion, the motion would have been successful.

In State v. Meckelson, 133 Wn. App. 431, 135 P.3d 991 (2006), trial counsel moved to suppress evidence found during a search of the defendant's car on the basis of a pretextual stop, but he evidently misunderstood what was required to establish a pretextual stop and failed to challenge the grounds that the officer gave to justify the traffic stop.[7] The Court of Appeals found that counsel was ineffective because he "walked away" from the true inquiry—whether the officer stopped the vehicle for the failure to signal or whether the purpose, as the officer candidly suggested, was to look for evidence of another crime. 133 Wn. App. at 437.

[7] "Meckelson's trial lawyer misapprehended the principle set out in State v. Ladson and its proper application in this case." Meckelson, 133 Wn. App. at 436.

Similarly here, trial counsel evidently misunderstood the proper scope and limitations of a search pursuant to RCW 9.94A.631, and failed to challenge the search on the grounds that there was no connection between the items searched and the suspected violation. There is no tactical reason to argue for suppression of evidence on one ground but not on another, especially where, as here, no additional or incriminating testimony was necessary to fully develop the alternative unraised ground.

In Meckelson, the court found that a possession of methamphetamine charge would have been dismissed without the evidence found during the unlawful search, and counsel's ineffective assistance was, therefore, prejudicial. 133 Wn. App. at 438. Similarly here, the unlawful possession charges would have been dismissed without the pills found during the unlawful search. Counsel's ineffective assistance was prejudicial, and Cornwell's convictions must be reversed.

V. CONCLUSION

The constitution does not permit an unrestricted search of a probationer's person and property based on a reasonably suspected community custody violation, without regard to whether the CCO has any reason to believe that evidence related to the

suspected violation will be found. CCO Grabski had no reason to believe that evidence of Cornwell's suspected violation (failure to report) would be found in the search. There was no nexus between the search and the suspected violation. Trial counsel's failure to raise this clearly meritorious ground for suppression was ineffective and prejudicial. Cornwell's convictions for unlawful possession of a controlled substance with intent to deliver must be reversed.

DATED: October 12, 2015

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Curtis Lamont Cornwell

CERTIFICATE OF MAILING

I certify that on 10/12/2015, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Curtis L. Cornwell, DOC# 792343, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

ATTACHMENT

TRIAL COURT'S ORAL RULING ON CrR 3.6 MOTION TO SUPPRESS

didn't matter?

MR. JURSEK: I don't believe that's the legal standard. I don't think it has been defined as dominion and control. And, again, possession or dominion and control, is it exclusive, were other people using it, had access to that vehicle other than Mr. Cornwell. I don't believe the dominion and control is the test. I think the statute is written in such a way as to protect property and third party's interest in property and automatic standing gives Mr. Cornwell the ability to assert that.

THE COURT: Since Mr. Curtis is asking me to consider the document that was marked but not admitted as Exhibit 6, do you request more time to bring Officer Grabski back to cross examine him on that?

MR. JURSEK: No.

THE COURT: All right. Are you?

MR. CURTIS: No.

THE COURT: Very well. In that case, I'll be at recess, and render a decision.

(Recess taken)

THE COURT: Be seated, please. Couple of observations as I render my decision. When I started practicing law a long time ago, a long, long time ago, this was a relatively clearcut area of the law. You had

probation officers, which they actually called probation or parole officers, which not only was less ambiguous, it was easier to say than community corrections officer. That was before the Sentencing Reform Act and all these nuances of how we no longer have parole but now we have community custody. Don't ask me what the difference is between the two, although I'm sure there is. The law was clear. Probation officers, parole officers, they wore civilian clothes. They didn't necessarily carry weapons, they might, but it would be because they had a concealed weapons permit and felt a need to. They didn't wear police uniforms, they didn't wear uniforms that had police emblazoned across the back. They didn't wear a full complement of equipment that law enforcement wears. They didn't ride with law enforcement or they didn't have law enforcement ride with them, at least not as part of a regular standard operating procedure. Instead, they were relatively separate, save the instances where it was alleged that they were being used as an agent of law enforcement.

Now, law enforcement, just like society, has evolved. It's evolved technologically, it's evolved organizationally as has Department of Corrections. So now you have people like Mr. Grabski, who is otherwise seemingly assigned to a gang unit of a police

department. And what that does is it has a tendency to blur that which used to be relatively clear. And it is probably worthy of somebody taking a look at that. It's probably worthy of that given that sort of melding of the roles. I'm going to try to be as thorough as I can here and this may take a moment so bear with me. I'm going to try to touch on as much as I can here.

The analysis here as a matter of fact begins with the requirements placed upon Mr. Cornwell. Mr. Cornwell signed an agreement subject to his community custody which says, among other things, I am subject to a pat down search or other limited security search without reasonable cause when I am in or on or about to enter Department premises. I am aware that I am subject to search and seizure of my person, residence, automobile or other personal property. Other personal property, witness the language in the *Paris* decision at 163 Wn. App. can be pretty broad. According to Division 2, it can include memory cards.

So we start with, first of all the, document in which Mr. Cornwell agrees to this, but he doesn't agree to this in a vacuum. What he's doing is agreeing to the terms contained in RCW 9.94A.631 et seq. Now, to the law, first of all, the law of the land. *Griffin v. Wisconsin* at 483 US 868, Warrantless search of

probationer's residence is reasonable within the meaning of the Fourth Amendment where conducted pursuant to a regulation that is itself a reasonable response to the special needs of the probation system. *United States versus Knight*, K-n-i-g-h-t, 534 US 112, As condition of probation, the defendant was unambiguously instructed to submit to warrantless search at any time. Fourth Amendment satisfied by reasonable suspicion in the probationary conditions, defendant's reasonable expectation of privacy was significantly diminished, not necessary to distinguish between investigatory rather than probationary purposes. Last case from the Supreme Court, at least the last case I'm going to cite to, *Sampson v. California*, 126 Supreme Court Order 2193, Prisoner eligible for release on parole is required to agree in writing to be subject to search or seizure by a parole officer or other peace officer with or without probable cause. Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee. Parolees are on a continuum of State imposed punishment and have fewer expectations of privacy.

Now, are any of those precisely down to every dotted I and crossed T applicable to the case at hand, maybe, maybe not. But the point is we go now from the fact that he agreed to this pursuant to statute, which

was admittedly based on law, to the law of the land. Depends on the different state. But it is helpful to note that nationwide, federal or state, parolees, those who are on probation, community custody, have a reduced expectation of privacy. Washington law recognizes this, specifically, they recognize that probationers and parolees have a diminished right of privacy permitting warrantless searches based on probable cause. *State v. Lucas*, 56 Wn. App. review was denied, that's an early case of 1990, Parolees and probationers have diminished privacy rights because they are persons whom a court has sentenced to confinement but who are simply serving their time outside the prison walls.

Now, given the evolution of determinant sentencing in Washington, we can probably argue the applicability of that sentiment to the Sentencing Reform Act, and we can probably do that until the cows come home and still not have a precise answer. Therefore, the State may supervise and scrutinize probation or a parolee closely -- *Lucas* tells us that at page 240 -- nevertheless, this diminished expectation of privacy is constitutionally permissible only to the extent necessitated by the legitimate demands of the operation of the parole process. That's the *Simms* case at 10 Wn. App. which is quoting a case out of California that went

to the U.S. Supreme Court called *Martinez* at 400 US 351. It is also important I think to note that RCW 9.94A.631, which provides for the search of a probationer's person, residence, automobile, or other personal property without a warrant, extends to other personal property.

Now, in *Paris* they talk about other personal property as memory cards and so on, whether it would extend to that. And what we see from the appellate courts is a broad reading of other personal property. And once we have the officer inside that car, then we need to know as a means of analysis how this officer's search exceeded the parameters necessitated by the legitimate demands of the operation of community custody.

Now, I haven't got to *Winterstein* yet, I'm going to back up to the issue of probable cause which gets him to the car. I think that I agree with the State, and I'm inclined to believe that the defense agrees with this notion as well, that getting in the car is probable cause in the same way that *Winterstein* says that getting in the house is probable cause, and once you're in the car, you're talking about that reasonable articulable suspicion.

Now, Mr. Cornwell may indeed have had a subjective expectation of privacy in his personal effects in the

car. But that expectation was not a reasonable, an objectively reasonable expectation in these circumstances. His status as probationer means that his effects and his personal belongings -- notice the legislative mandate of, and other personal property, was continuously subject to searches and seizures by law enforcement officials. His expectation of privacy in his personal effects fails the reasonable test in my opinion of *Gocken*, 71 Wn. App. because there has been a legislative determination that probationers do not have a reasonable expectation of privacy in residences, vehicles, or personal belongings, even including closed containers. And our appellate courts have acknowledged that, otherwise, our laws and society demand a warrant for such searches but not for those who are on community custody. So part of my holding is that Mr. Cornwell did not have a reasonable expectation of privacy in the inside of that vehicle, which takes us to getting in the vehicle in the first place.

Now, taking from the *Winterstein* case, and more precisely taking from the *Motley v. Parks* case, M-o-t-l-e-y v. Parks at 432 Fed Third, which is a Ninth Circuit case, the Court held that before conducting a warrantless search of a parolee's residence, the law enforcement official must have probable cause to believe

that they are at the parolee's residence because that protects the interest of third parties. I think it is important to bear in mind that *Motley*, and there's also a case called *Hachi* 161 Wn.2d recognize the protection of the third party privacy interests when there is a question about, for example, the residence of a person who is the target of a search.

Now, the defense raises an argument here that you can't get to the point where the officer can stop this car -- there is some question about what was in effect, what was not in effect -- I'm satisfied, despite the fact that it's a little unclear with the submission of evidence, I'm satisfied that there was a warrant out there. I'm satisfied there was a DOC warrant. I'm satisfied that the police officers were acting in good faith. I'm satisfied the police officers called the DOC officer, and I'm satisfied that he had probable cause, first, to stop that car based upon, among other variables, that which he had been told by Ms. Lamb. Here, you have a citizen who is the registered owner. She has the right to ownership. Yes, she makes a comment that she gifted it to him.

Now, looking at the relatively low standard of probable cause, relatively speaking, looking at the reasonable suspicion standard once he's in the car, what

is the officer supposed to do with that information. Is the officer, irrespective of everything else the officer had, is the officer supposed to say, well, let's see, was there really donative intent, did they really intend to divest yourself of all dominion and control, something akin to what we had in law school when you learned about personal property and that small section of the real property curriculum. What is his statutory mandate. I think his statutory mandate, pursuant to the provisions of the statute, pursuant to the provisions of the case law, is to move forward. I think he had probable cause, probable cause for the stop, I think probable cause to go in that car, and I think he was within the parameters of what he is entitled to do. So I'm going to deny the motions of the defense.

Does that mean I like the current state of the law, at least as it's configured in relation to the evolution of law enforcement in these, I don't want to say ambiguous relationships, but they're not clearly as clear as they were 25 years ago when I started doing this stuff, no, I don't. I believe I am following the law. But I also believe that we need to do some tinkering down in Olympia to recognize the evolution of law enforcement and the roles they play in these collaborative roles. And someone needs to fish or cut

bait to say which way is it going to be because you can't have it both ways. But I believe that we're following the current state of the law. And I readily acknowledge that this case may change the current state of the law, but I believe it is consistent, my decision is consistent with what the law has been to this point. That's my decision.

MR. CURTIS: Thank you, your Honor. Your Honor, one thing that we did not address were the statements that were attributed to the defendant.

THE COURT: I know.

MR. CURTIS: So I don't know when the Court wants to address that.

THE COURT: Well, I'll go ahead. I was going to separate that, but I'll just go ahead into that. I find that the statements attributed to the defendant were knowing, intelligent, were voluntarily. I find that any statements attributed to him prior to being Mirandized were not subject to Miranda, and that those statements made subsequent to that were the result of knowing, intelligent, and, accordingly, I'm going to find that his statements are admissible.

MR. CURTIS: Thank you, your Honor.

THE COURT: Okay. Gentlemen, I don't know exactly where that leaves us. If you'd like me to take

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