No. 93845-8

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

CURTIS LAMONT CORNWELL,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 47444-1-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 13-1-04618-2
The Honorable Jack Nevin, Judge

STEPHANIE C. CUNNINGHAM
Attorney for Petitioner
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

I. IDENTITY OF PETITIONER

The Petitioner is CURTIS LAMONT CORNWELL, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 47444-1, which was filed on September 20, 2016. The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court. Cornwell's Motion to Reconsider regarding the issue of appellate costs was granted on October 13, 2016.

III. ISSUES PRESENTED FOR REVIEW

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?

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?

IV. 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) Cornwell timely appealed. (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

[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.

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)

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

[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)

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 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)

V. ARGUMENT & AUTHORITIES

The issues raised by Curtis Lamont Cornwell's petition

should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2). Division 2 specifically rejected Division 3's interpretation of RCW 9.94A.631, as stated in the published decision of State v. Jardinez, 184 Wn. App. 518 (2014). RAP 13.4(b)(2).

A. 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)

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] 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.

[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).

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

[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.

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).[5] Jardinez is good law and was well reasoned, and Division 2's failure to follow its holding was error. (Opinion at 6-7)

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

---

[5] Division 3 noted that multiple Federal and Washington State court decisions, cited in Jardinez's briefing, limit the scope of a search to be commensurate with, but not exceed, the suspicion that instigated it: Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009); Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967); State v. Hudson, 124 Wn.2d 107, 874 P.2d 160 (1994); and State v. B.A.S., 103 Wn. App. 549, 13 P.3d 244 (2000). Jardinez, 184 Wn. App. at 525.

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.[6] 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.[7]

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

---

[6] 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.

[7] 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).

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.[8] 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.

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

[8] "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.

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.

VI. 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. Cornwell therefore respectfully requests that this Court grant his petition and reverse his convictions.

DATED: November 7, 2016

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Petitioner Curtis L. Cornwell

CERTIFICATE OF MAILING

I certify that on 11/07/2016, 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, Larch Corrections Center, 15314 N.E. Dole Valley Road, Yacolt, Washington 98675

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

November 07, 2016 - 1:13 PM

Transmittal Letter

Document Uploaded: 1-474441-Petition for Review.pdf

Case Name: State v. Curtis L. Cornwell
Court of Appeals Case Number: 47444-1

Is this a Personal Restraint Petition? Yes ● No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

● Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: S C Cunningham - Email: sccattorney@yahoo.com

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us

Filed
Washington State
Court of Appeals
Division Two

September 20, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CURTIS L. CORNWELL, Appellant.	No. 47444-1-II UNPUBLISHED OPINION

SUTTON, J. — Curtis L. Cornwell appeals his convictions for three counts of unlawful possession of a controlled substance with intent to deliver and one count of resisting arrest. We hold that the trial court did not err in denying Cornwell's motion to suppress drug possession evidence found in his vehicle. As part of his sentence, Cornwell had consented to certain conditions that included a search of his personal property if there was a reasonable suspicion that he had violated the terms of his probation. Thus, Cornwall had a diminished expectation of privacy. Because a Community Corrections Officer (CCO) had reasonable cause to believe that Cornwell had violated his probation, we hold that the search of the vehicle was lawful under RCW 9.94A.631(1). We also hold that Cornwell's ineffective assistance of counsel claim fails because

he cannot establish that he was prejudiced as a result of his counsel's failure to cite *State v. Jardinez*[1] to the trial court. We affirm Cornwell's convictions.

FACTS

On November 28, 2013, Tacoma Police Department (TPD) Officers Randy Frisbie and Patrick Patterson initiated the traffic stop of a black and red Monte Carlo because of a Department of Corrections' (DOC) arrest warrant for Cornwell for failing to report. Sometime in the weeks before November 28, Officer Frisbie and DOC CCO Thomas Grabski, both members of the TPD gang unit, were surveilling a known drug house when a man driving the Monte Carlo pulled up beside Grabski, rolled down his window, and looked at him as Grabski sat in an unmarked vehicle. Grabski wrote down the Monte Carlo's license plate number.

Janet Lamb, the vehicle's registered owner, gave Frisbie and Grabski a description of the Monte Carlo, told them that she owned the vehicle, but informed the officers she had given the vehicle to her ex-boyfriend, Cornwell, to drive. Lamb also told Frisbie and Grabski that she wanted the vehicle returned.

At the time, Cornwell was subject to probation conditions imposed as a result of a prior drug possession conviction. As with any offender released into the community and under DOC supervision, Cornwell had consented to DOC's authority to search his "person, residence, automobile, or other personal property" so long as there was reasonable cause to believe that he had violated any conditions or requirements of his probation. Exh. 4 at 3.

[1] *State v. Jardinez*, 184 Wn. App. 518, 523, 338 P.3d 292 (2014).

On November 28, Frisbie and Patterson were on patrol together when they saw the same Monte Carlo pass in front of them. Frisbie and Patterson believed that Cornwell was driving the vehicle and they were aware that there was an outstanding arrest warrant for Cornwell for alleged violations of his probation.

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. Frisbie ordered Cornwell to stay in the vehicle, but Cornwell did not comply. The officers then drew their Tasers[2] and ordered Cornwell to the ground. Cornwell acted as if he was going to comply, but then started to run away. Frisbie and Patterson deployed their Tasers on Cornwell and arrested him. Cornwell did not have a passenger, and neither officer entered the vehicle. The officers confirmed Cornwell's identify and warrant status, then contacted Grabski, who, as a CCO, was authorized to conduct a warrantless search of property belonging to an offender who is suspected of violating probation. Grabski searched the Monte Carlo.

In the front seat of the Monte Carlo, Grabski found a small, black nylon bag. The bag contained a number of pills: oxycodone, amphetamine, and ecstasy, small spoons, sim cards for cell phones, and a cell phone. Cornwell also had $1,573 in his wallet. Cornwell told the police officers that the pills were for his migraines.

---

[2] Tasers are electronic weapons that temporarily incapacitate targets with propelled wires or direct contact to conduct energy which affects the sensory and motor functions of the nervous system. *See Michelbrink v. State*, 191 Wn. App. 414, 435 n.1, 363 P.3d 6 (2015).

The State charged Cornwell with three counts of unlawful possession of a controlled substance with intent deliver and one count of resisting arrest. Pre-trial, pursuant to CrR 3.6, Cornwell moved to suppress the evidence found during Grabski's search of his vehicle.[3] The trial court denied Cornwell's motion to suppress and found that the search was valid and lawful because Cornwell had agreed to the probation conditions, including a search of his personal property, and that the CCO had reasonable cause to search the vehicle under RCW 9.94A.631(1). After a jury trial, the jury convicted Cornwell as charged. Cornwell appeals.

ANALYSIS

I. CrR 3.6 Motion to Suppress

Cornwell argues that the trial court erred when it denied his motion to suppress because Grabski's search of the vehicle exceeded his lawful authority under RCW 9.94A.631(1). Cornwell further argues that the trial court should have suppressed the evidence found in his vehicle because there was no nexus between his alleged violations and Grabski's search of the vehicle as required. We disagree.

We review a trial court's denial of a motion to suppress evidence to determine whether substantial evidence supports the trial court's findings of fact, and whether those findings support the trial court's conclusions of law, which we review de novo. *State v. Rooney*, 190 Wn. App. 653, 658, 360 P.3d 913 (2015), *review denied*, 185 Wn.2d 1032 (2016). Substantial evidence is

[3] The trial court conducted a combined CrR 3.5 and CrR 3.6 hearing on Cornwell's statements to police after his arrest and on the suppression of the evidence seized during Grabski's search. Cornwell's statements to police are not at issue in this appeal.

evidence sufficient to persuade a fair-minded person of the truth of the stated premise. *State v. Russell*, 180 Wn.2d 860, 866-67, 330 P.3d 151 (2014).

Both article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution prohibit warrantless searches unless an exception exists. WASH. CONST. art I, § 7; U.S. CONST. amend. IV; *Rooney*, 190 Wn. App. at 658. Washington law recognizes that probationers and parolees have a diminished right of privacy that permits warrantless searches based on reasonable cause to believe that a violation of probation has occurred. *Jardinez*, 184 Wn. App. at 523. RCW 9.94A.631 states

> [i[f 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.

Under RCW 9.94A.631(1), a CCO may require a person subject to probation conditions to submit to the search of his or her property if the CCO has a well-founded suspicion that the person has violated a condition of his or her probation. *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).

"Reasonable cause" requires the CCO to have "a well-founded suspicion that a violation has occurred." *State v. Massey*, 81 Wn. App. 198, 200, 913 P.2d 424 (1996). Further, a person under community supervision has a diminished expectation of privacy in their residences, vehicles, or personal belongings, and may be searched on the basis of a well-founded or reasonable suspicion of a violation of probation conditions. RCW 9.94A.631(1). Requiring a person subject to community supervision to consent to a warrantless search is reasonable because a person subject to probation conditions has a lesser expectation of privacy. *Winterstein*, 167 Wn.2d at 628.

Under CrR 3.6(b), the trial court is required to enter written findings of fact and conclusions of law. We begin by acknowledging that although the trial court erred here by failing to enter written findings of fact after the CrR 3.6 hearing, any such error here is harmless because the trial court's oral findings in the record are sufficient for our review. *See State v. Miller*, 92 Wn. App. 693, 703-04, 964 P.2d 1196 (1998). Cornwell did not challenge the oral findings of fact; thus, they are verities on appeal. *State v. O'Cain*, 108 Wn. App. 542, 547-48, 31 P.3d 733 (2001).

Regarding the merits of Cornwell's contention, it is undisputed that a DOC warrant had been issued for Cornwell's arrest. At the time of the search, Grabski knew that Cornwell was alleged to have violated his probation terms and he searched the Monte Carlo based on his knowledge of the alleged violation. Grabski's awareness that Cornwell had an active warrant for his arrest constituted reasonable cause to believe that Cornwell had violated a condition or requirement of his sentence and therefore, Grabski had the authority to compel Cornwell to submit to a search of the vehicle that he was driving pursuant to RCW 9.94A.631(1). Accordingly, the trial court properly denied the suppression of the drug evidence found in the bag on the front seat.[4]

Cornwell further argues that the trial court should have suppressed the evidence found in his vehicle because there was no nexus between his alleged violations and Grabski's search of the vehicle as required. Cornwell relies on an opinion from Division Three of our court, *State v. Jardinez*, 184 Wn. App. 518, 338 P.3d 292 (2014), in support of this proposition. We disagree that the evidence should have been suppressed.

[4] We are aware of the recent case, *Utah v. Streiff*, ___ U.S. ___, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016) addressing attenuation. Because the parties do not address this issue, we also decline to do so.

In *Jardinez*, Division Three quoted the following portion of the Sentencing Guidelines Commission's comment about 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.*"

Jardinez, 184 Wn. App. at 529 (alteration in original) (quoting DAVID BOERNER, SENTENCING IN WASHINGTON: A LEGAL ANALYSIS OF THE SENTENCING REFORM ACT OF 1981, at app. 1-13 (1985)). The court interpreted the last sentence to require "a nexus between the search property and the alleged crime." *Jardinez*, 184 Wn. App. at 529. Cornwell depends on this apparent nexus requirement in support of his argument that the evidence found in the vehicle should have been suppressed.

However, no other Washington court has required a nexus between the property to be searched and a specific violation. Rather, it is well settled that an officer searching a parolee under RCW 9.94A.631(1) must have a well-founded suspicion that *a* violation has occurred. *Massey*, 81 Wn. App. at 201; *see also State v. Parris*, 163 Wn. App. 110, 119, 259 P.3d 331 (2011) (stating that a well-founded suspicion is similar to the "articulable suspicion" requirement of a *Terry*[5] stop, a substantial possibility that criminal conduct has or is about to occur).

[5] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Even if RCW 9.94A.631(1) requires that a CCO suspect a specific probation violation to conduct a lawful search of a probationer, here, there was a sufficient nexus between the suspected probation violation and the search of the vehicle. CCO Grabski saw Cornwell in the vehicle near a known drug house that was under surveillance, a valid DOC arrest warrant had been issued for Cornwell,[6] Cornwell attempted to flee from the vehicle when stopped, and based on his criminal history, CCO Grabski suspected that Cornwell was involved in drug-dealing. Therefore, CCO Grabski had reasonable cause to believe Cornwell had violated his probation and had authority under RCW 9.94A.631(1) to search the vehicle. Thus, we hold that the vehicle search was lawful under RCW 9.94A.631(1) and the trial court properly denied the motion to suppress.

II. Ineffective Assistance of Counsel

Cornwell argues that he was denied effective assistance of counsel because his counsel failed to argue that, under *Jardinez*, there was no nexus between Cornwell's suspected violation and Grabski's search of the vehicle. We disagree. Cornwell's claim of ineffective assistance of counsel fails because he fails to show prejudice.

To succeed in a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's representation was deficient, and (2) the deficient representation resulted in prejudice to the defendant. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Deficient

[6] Although the parties do not address whether attenuation applies, and we do not address this issue further, the United States Supreme Court recently held that a pre-existing arrest warrant created an attenuated connection between an unlawful investigatory stop and the evidence seized incident to arrest. *Utah v. Strieff*, No. 14-1373, 2016 WL 3369419 (Sup. Ct. June 20, 2016); *see also State v. Rothenberger*, 73 Wn.2d 596, 440 P.2d 184 (1968) (holding that information acquired from an independent source during an illegal stop could be used to affect a lawful arrest and search).

performance requires a showing that counsel's performance fell below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 334-35. To satisfy the prejudice prong of the *Strickland* test, the defendant must show that "'there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014) (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)).

We strongly presume that counsel's performance was effective. *State v. Brown*, 159 Wn. App. 366, 371, 245 P.3d 776 (2011). Counsel has a duty to research relevant law, and failure to do so is deficient performance. *See Brown*, 159 Wn. App. at 373. Here, the *Jardinez* opinion was issued approximately one month before Cornwell's suppression hearing. There is no information in the record regarding whether counsel decided to ignore *Jardinez*, or whether counsel failed in his duty to research the relevant law. Regardless, Cornwell's claim fails because he fails to show prejudice.

Even if counsel had argued for suppression under *Jardinez*, the outcome of the proceeding likely would have been the same. Grabski observed Cornwell drive up to a known drug house that Grabski and Frisbie were surveilling. Based on that observation and Cornwell's status of being on community supervision for a drug offense, Grabski suspected that Cornwell was engaged in drug dealing. Cornwell was the only known driver of the Monte Carlo, was the only occupant in the vehicle when it was stopped, and he attempted to flee from the vehicle when Frisbie and Patterson stopped him. Given these facts, Cornwell cannot show there is a reasonable probability that had counsel argued *Jardinez*, the outcome of the proceedings would have been different.

Thus, we hold that Cornwell's claim of ineffective assistance fails because Cornwell cannot show prejudice.

CONCLUSION

We hold that the trial court did not err in denying Cornwell's motion to suppress. We also hold that Cornwell's claim of ineffective assistance of counsel fails because he fails to show prejudice. Thus, we affirm Cornwell's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

J.
LEE, P.J.

Melnick, J.
MELNICK, J.