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Supreme Court No.: 95829-7
Court of Appeals No.: 49306-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BERNARD LEE YONKER,

Petitioner.

PETITION FOR REVIEW

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Bernard Yonker, petitioner here and appellant below, asks this Court to grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals in *State v. Yonker*, No. 49306-3-II, filed February 21, 2018. A copy of the opinion is attached as Appendix A. Mr. Yonker's motion to reconsider was denied on April 9, 2018; a copy of the order is attached as Appendix B.

B. ISSUES PRESENTED FOR REVIEW

1. As a limited exception to the warrant requirement, community custody officers (CCOs) may require a probationer to submit to a warrantless search only if there is reasonable cause to suspect the probationer violated a condition of community custody. RCW 9.41.045 prohibits probationers from using or possessing firearms or ammunition. But neither the statute nor the condition are mentioned in Mr. Yonker's judgment and sentence. Whether the Court should accept review to determine if RCW 9.41.045 authorizes community corrections officers to conduct warrantless searches on every probationer without regard to whether the condition was made part of the individual's judgment and sentence? RAP 13.4(b)(2), (4).

2. Where the trial court ruled on the issue after it arose in the briefing and at the evidentiary hearing, does the record sufficiently permit

this Court to review whether Mr. Yonker was prohibited from possessing ammunition as a condition of community custody? RAP 13.4(b)(1), (2), (4).

3. Whether the Court should accept review of the trial court's finding the CCOs had reasonable cause to suspect Mr. Yonker violated his community custody conditions based on an empty shell casing observed lying on the ground a few feet from the front door of his residence where multiple people were frequently present? RAP 13.4(b).

4. Whether the Court should accept review to determine if there was a nexus between the suspected violation, possession of a firearm or ammunition, and the property searched, an extensive search of Mr. Yonker's personal residence and property, including outbuildings and vehicles? RAP 13.4(b).

C. STATEMENT OF THE CASE

Two CCOs went to Mr. Yonker's home for a routine field visit in September 2015. CP 25. Mr. Yonker was under the Department of Corrections' (DOC) supervision. 2/1/2016 RP 11; CP 25. The community custody terms did not prohibit him from owning or using a firearm. Ex. 5, pp.5-6.

When CCO Frank approached Mr. Yonker's house, he saw an empty 9mm bullet casing lying outside, a few feet from the front door.

2/1/2016 RP 12, 14. At the time, there were several people inside the house, and CCO Frank knew that there were often multiple people in the house. CP 25, 29. Without further investigation, CCO Frank contacted his supervisor and asked for permission to search the house. 2/1/2016 RP 13.

From that single, empty casing, CCO Frank suspected that Mr. Yonker was in violation of a statute prohibiting probationers from possessing firearms or ammunition. 2/1/2016 RP 12. This statute is not incorporated into Mr. Yonker's probation conditions. Ex. 5, pp.5-6.

Nevertheless, permission to search was granted and CCO Frank assembled a team of CCOs and officers from the Lacey Police Department. 2/1/2016 RP 13. The team handcuffed Mr. Yonker before searching his entire house, including out-buildings and cars. CP 29; 2/1/2016 RP 14.

Two CCOs, Gregory Tuitele and Mike Foster, searched Mr. Yonker's bedroom. CP 22; 2/1/2016 RP 22. His bed was in the middle of the room covered with numerous blankets, pillows, and other items. CP 22. CCO Tuitele removed all the blankets from the bed, under which there was a box about the size of "something you might put a ring in." 2/1/2016 RP 22. The CCO opened the box and found a little plastic bag containing a crystallized substance later confirmed to be methamphetamine. CP 22.

Mr. Yonker was charged with one count of unlawful possession of a controlled substance with aggravating circumstances. CP 6. He moved to suppress the methamphetamine, arguing that the search was unlawful because the CCOs did not have reasonable cause to suspect he was in violation of his probation conditions. CP 7-19. The trial court found that the presence of an empty casing outside of a "single family dwelling" established a basis to conduct a broad search and denied the CrR 3.6 motion. CP 42; 2/1/2016 RP 35-36, 38-39.

Mr. Yonker was convicted of unlawful possession of a controlled substance after a stipulated-facts bench trial. CP 5, 48-50. He appealed the order denying his suppression motion, but the Court of Appeals affirmed and denied Mr. Yonker's motion to reconsider. Appendices A, B.

D. ARGUMENT

The State violated Mr. Yonker's right to privacy by searching his home, nearby buildings, and cars based on the ambiguous presence of a single shell casing outside a home frequented by many people, particularly where the conditions of community custody did not include a condition related to firearms and ammunition. The Court should accept review.

1. The Court should grant review and hold that, before a CCO can conduct a warrantless search of a probationer or his home, the suspected violation must be of a condition included among the conditions of community custody set forth in the judgment and sentence.

a. Mr. Yonker's judgment and sentence did not authorize his CCO to conduct a warrantless search for suspected possession of a firearm or ammunition.

Under RCW 9.94A.631 ("authorization statute"), a CCO may require a probationer to submit to a warrantless search only if the CCO has reasonable cause to suspect the probationer has violated a condition of his or her community custody. *State v. Cornwell*, __ Wn.2d __, ¶ 16, 412 P.3d 1265 (2018). This authorization must be limited to comport with the presumption that warrantless searches are unreasonable. *Id.* at ¶ 15; *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009). Although probationers have a diminished expectation of privacy, their privacy is still protected by the requirement of reasonable cause to search. *U.S. v. Conway*, 122 F.3d 841, 842 (9th Cir. 1997). Washington courts have analogized this reasonable cause standard to the reasonable suspicion standard required for an officer to conduct a *Terry* stop. *State v. Jardinez*, 184 Wn. App. 518, 524, 338 P.3d 292 (2014); *State v. Parris*, 163 Wn. App. 110, 119, 259 P.3d 331 (2011); *see U.S. v. Most*, 789 F.2d 1411, 1415 (9th Cir. 1986) (equating "reasonable cause" with "reasonable

suspicion" in cases where law enforcement is permitted to make "a limited intrusion on less than probable cause").

Under the authorization statute, CCOs may conduct a search only if they have reasonable cause to believe a probationer has violated a community custody condition. RCW 9.94A.631. "Individuals' privacy interest can be reduced only to the extent necessitated by the legitimate demands of the operation of the community supervision process." *Cornwell*, 412 P.3d 1265, ¶ 21 (internal quotation and alteration marks omitted).

In Mr. Yonker's case, the CCOs suspected he had violated a condition prohibiting him from possessing firearms or ammunition. 2/1/2016 RP 12. However, the record shows Mr. Yonker was not under such a condition. The judgment and sentence controlling at the time does not mention any prohibition on firearms or ammunition under his community custody conditions. Ex. 5, at 5-6. Mr. Yonker cannot be searched for a suspected violation of a community custody condition that was not imposed and of which he was not notified.

At the suppression hearing, the State relied on RCW 9.41.045, which prohibits probationers from using or possessing firearms or ammunition. CP 78-79 (Response in Opposition). However, this statute is not mentioned anywhere in the judgment and sentence establishing Mr.

Yonker's community custody terms. Ex. 5, pp.5-6. The judgment also does not authorize Mr. Yonker to be monitored more broadly.

Apparently, the form judgment and sentence language has since been changed to include monitoring for possession of firearms or ammunition as a community custody condition. CP 58-59 (recent judgment and sentence contains boilerplate language missing from community custody conditions at issue here). This change in the form's language supports the argument the firearm prohibition must be explicitly imposed as community custody condition. *See, e.g.*, *State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003) (subsequent amendment cannot be read into prior legislation); *State v. Wilcox*, 196 Wn. App. 206, 212, 383 P.3d 549, (2016) (courts presume that legislative amendments apply only prospectively). Because that language is absent in the community custody terms at issue here and because any authorization for warrantless searches must be read restrictively, the community custody conditions did not prohibit Mr. Yonker from possessing firearms or ammunition.

Although Mr. Yonker's May 2015 original judgment and sentence has a separate section prohibiting convicted felons from possessing or using firearms, that prohibition is irrelevant to whether Mr. Yonker was in violation of his community custody. Ex.5, p.7. The statute prohibiting felons from possessing firearms is distinct from a community custody

condition prohibiting Mr. Yonker from possessing firearms, and is not a condition DOC was authorized to monitor here. *See* RCW 9.41.040; Ex. 5, p.5-6.

The State justified its search under the reasonable cause standard set out in the authorization statute. *See* RCW 9.94A.631. To access the statute's lower standard, a CCO must show reasonable cause to believe a probationer violated a community custody condition. RCW 9.94A.631. Mr. Yonker was not subject to community custody monitoring for owning or using firearms or ammunition. Therefore, the CCOs could not search him for violating such a condition.

CCOs do not have general law enforcement authority; they are permitted to search a probationer only under the circumstances contemplated by the authorization statute. The reasonable cause standard provides a limited exception to the general warrant requirements. Here, the CCOs were not acting under the authorization statute, so they had no authority to search Mr. Yonker's house. Additionally, law enforcement officers would have needed a warrant supported by probable cause to search Mr. Yonker's house— a higher standard than the reasonable cause required under the authorization statute. *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994); *State v. Fisher*, 145 Wn.2d 209, 227, 35 P.3d 366 (2001). No exception to the warrant requirement applied.

b. The issue was ruled on by the trial court and adequately preserved for review.

The Court of Appeals declined to review this issue, claiming the record was insufficient to determine the merits of the claim under RAP 2.5(a)(3). Slip Op. at 6-7. Consistent with this Court's recent opinion in *Cornwell*, the record is adequate for this Court's review. 412 P.3d 1265, ¶¶ 12-14.

In *Cornwell*, the Court held defense counsel adequately preserved the issue for review where he "did raise the nexus argument" in a conclusory statement and in response to a hypothetical situation and both parties discussed the meaning of RCW 9.94A.631, even though Cornwell "primarily relied on [a different] theory." 412 P.3d 1265, ¶¶ 12-14.

Here, the trial court ruled that RCW 9.41.045 authorized the CCOs' search, and the parties discussed the matter in the briefing and at the suppression hearing. First, the prosecution raised RCW 9.41.045 in its opposition brief as a basis to authorize its search of Mr. Yonker's residence. CP 78-79. Then, at the suppression hearing, defense counsel examined the corrections officer about the legal basis for his suspicion:

> Q. Now, how does an empty shell casing violate or is a violation for Mr. Yonker?
>
> A. Well, you can't have explosive devices --
>
> Q. Let me rephrase that question. **Is there an RCW I can**

look at that tells me a shell casing is a violation?

A. **I'm not exactly sure** if the shell casing is a violation, but it could lead to reasonable suspicion that would constitute the search.

MR. CABRERA: I'm sorry –

MR. JONES: Your Honor, if I could object to Mr. Cabrera's continual interruption of Mr. Frank's attempt to answer his questions.

THE COURT: Thank you, Mr. Jones. Mr. Cabrera?

BY MR. CABRERA:
Q. Is your answer, no, there is no RCW that says a shell casing is a violation?

A. That is not my answer, because **I don't know the RCWs.**

Q. So if you don't know the RCW where a shell casing is a violation, how did you have basis to ask your supervisor to search Mr. Yonker's home?

A. Because a shell casing can lead to reasonable suspicion that he is in violation of his supervision.

Q. How do you connect that shell casing to Mr. Yonker?

A. Because it's on his residence on his property.

RP 15-16 (emphasis added).

Defense counsel specifically asked the corrections officer if he could provide a statutory justification for his suspicion. In response, the corrections officer did not provide authority for his belief Mr. Yonker violated a condition of his community custody. RP 15-16. Nonetheless,

the trial court concluded that RCW 9.41.045 prohibits offenders from possessing firearms or ammunition. CP 42 (conclusion 4).

The issue was also addressed in the State's oral argument at the conclusion of the trial court suppression hearing. The prosecutor argued, "People who are under the supervision of the Department of Corrections are not allowed to possess firearms or ammunition." RP 25. This argument is virtually a verbatim quote of RCW 9.41.045, which the State cited in its briefing. CP 78-79.

Defense counsel also argued that there was an issue whether the corrections officer had "reasonable suspicion that any type of activity violated Mr. Yonker's community custody." RP 26. Counsel continued that RCW 9.94A.631 requires reasonable cause to believe an offender violated a condition or requirement of the sentence. *Id.*

Even if Mr. Yonker or the State had not specifically raised this issue below, a conclusion belied by the trial court's ruling, appellate courts can address the issue for the first time on review. *See, e.g.*, *State v. Littlefair*, 129 Wn. App. 330, 338, 119 P.3d 359 (2005) (appellant did not waive error based on bad search warrant because it involved constitutional issue); *State v. Contreras*, 92 Wn. App. 307, 314, 966 P.2d 915 (1998) (where adequate record exists, appellate court can review suppression issue, even in the absence of motion or trial court ruling thereon).

As in *Cornwell*, the Court should grant review, find the issue adequately raised, and hold the CCO lacked authority to search Mr. Yonker for violating a condition to which he was not subject.

2. The rulings below should be reviewed because, even if Mr. Yonker's conditions prohibited him from possessing ammunition, the CCOs did not have reasonable cause to suspect he had violated that condition based on observation of a single shell casing a few feet from the entry to Mr. Yonker's home.

Even if Mr. Yonker's community custody conditions authorized a warrantless search for firearms or ammunition, the CCOs did not have reasonable cause to suspect he had violated that condition. An empty casing found on the ground outside Mr. Yonker's house is insufficient to generate reasonable cause for an extensive warrantless search.

Because the casing itself was not a violation, the CCOs had to extrapolate to connect the empty casing to a suspicion that Mr. Yonker was in violation of his probation. There was no evidence that Mr. Yonker was involved with, or even knew about, the empty casing. Without more evidence to support the CCOs' chain of inferences, a single empty casing was insufficient to generate "specific, articulable facts" as required under the reasonable cause standard; thus, the CCOs' search of Mr. Yonker's house was unlawful. *See Jardinez*, 184 Wn. App. at 524.

First, there were multiple people in the house when the CCOs conducted the search; this invalidates the CCOs' assumption that the casing reasonably belonged to Mr. Yonker. CP 25. Additionally, the CCOs knew from past visits that there were often several people in the house; the casing could have belonged to any of those visitors. CP 29.

In denying Mr. Yonker's CrR 3.6 motion, the trial court explained the fact that the casing was found near a single-family residence, and not in the parking lot of an apartment complex, made it more probable that the casing belonged to Mr. Yonker. 2/1/2016 RP 35-36, 38-39. However, the trial court did not consider that there were multiple people in the house at the time of the search and the CCOs knew from past visits that there were often multiple people there. The casing could have belonged to any of those people. The CCOs' assumption that the casing belonged to Mr. Yonker was unreasonable considering their knowledge that there were many other potential owners of the casing in the vicinity.

Second, because the casing could have belonged to any of the multiple people at the house, a previous visitor to the house, or even someone discarding it from afar, the CCOs needed to investigate further to link the casing to Mr. Yonker to establish reasonable cause. They did not do so. At the hearing, the CCOs admitted they did not test the casing for fingerprints, nor could they recall if they had taken pictures of it for

evidence. 2/1/2016 RP 15. CCO Frank also admitted that he did not know whether the casing was garbage. 2/1/2016 RP 16. The CCOs could not establish the casing belonged to Mr. Yonker.

Instead, they assumed both that the casing was Mr. Yonker's and that he therefore possessed live ammunition or a firearm. But assumptions, unsupported by articulable facts, are not enough to generate reasonable cause. For example, in *State v. Doughty*, an officer saw the defendant approach a suspected drug house at 3:20 am, stay for two minutes, and leave. 170 Wn.2d 57, 59, 239 P.3d 573 (2010). Based on those facts alone, the officer stopped him for "suspicion of drug activity." *Id.* The officer did not see any of the defendant's actions at the house or whether he interacted with anyone in the house. *Id.* The Court held the investigative detention was unlawful because the officer's suspicion was based on nothing more than his "incomplete observations" of the defendant. *Id.* at 64. Because the officer had not personally observed the defendant's conduct at the house, the officer "had no idea what, if anything, [the defendant] did at the house," and so the officer did not have reasonable suspicion to justify his intrusion into the defendant's private affairs. *Id.*

Similarly, here, the CCOs never observed Mr. Yonker interact with the casing in any way, nor did Mr. Yonker ever admit to having done so. The CCOs also had no way of knowing how long the casing had been on

the property before they found it that day. The only fact the CCO cited to link the casing to Mr. Yonker specifically was that he had found it on Mr. Yonker's land. 2/1/2016 RP 16. That fact alone is insufficient.

Like in *Doughty*, the CCOs "had no idea what, if anything," Mr. Yonker had to do with the empty casing. Relying solely on an empty bullet casing, which, in itself, is not a violation, is precisely the type of "incomplete observations" this Court has made clear are not enough to establish reasonable cause.

Third, the CCOs did not interact with Mr. Yonker to further develop any suspicion they had before searching his house. They also never saw Mr. Yonker interact with the casing outside of his house. *See State v. Lampman*, 45 Wn. App. 228, 234-35, 724 P.2d 1092 (1986) (finding reasonable cause after an officer's probationer fled when she saw him, coupled with his knowledge of her history and the conditions of her probation); *State v. Lucas*, 56 Wn. App. 236, 244-45, 783 P.2d 121 (1989) (finding reasonable cause when officers saw a bag of marijuana inside the probationer's house and then noticed the probationer was particularly nervous when he answered the door, asking the officers if they had a warrant even though the officers had not asked to search the house).

Here, the CCOs did not see Mr. Yonker interact with the casing, nor did they observe Mr. Yonker behave in any way to suggest anything

suspicious. Furthermore, the State presented no evidence to suggest that Mr. Yonker even knew that there was a casing on the ground outside of his house.

The Court should accept review and hold the CCOs' search was not supported by reasonable cause.

3. The Court should accept review because, even if the CCOs had authority and reasonable cause, there was insufficient nexus between the suspected violation and the CCOs' extensive search.

When a CCO has reasonable cause to believe a probationer has violated a condition of his or her probation, there must be a nexus between the search conducted and the suspected violation. *Cornwell*, 412 P.3d 1265, ¶¶ 20-27 (adopting nexus requirement from *Jardinez*, 184 Wn. App. at 529). A CCO's suspicion that a probationer has violated a condition of his or her probation does not subject the probationer to a warrantless search of everything he or she owns.

For example, in *Jardinez*, the court held that a probation officer's search of a probationer's iPod was unlawful because the officer did not expect the search to yield evidence related to the specific alleged probation violations. 184 Wn. App. at 523, 528, 529.

In that case, the probationer had missed a probation meeting and then, when he eventually met with his probation officer, admitted that a

urinalysis test would test positive for marijuana. *Id.* at 521. Therefore, the two probation violations were failure to appear and drug use, both of which the probation officer knew had actually happened. *Id.* The officer directed the probationer to empty his pockets. *Id.* When the probationer handed over an iPod, the officer searched it solely because the probationer appeared to be nervous. *Id.* The iPod contained a video of the probationer pumping a shotgun, another violation of his probation terms. *Id.* The trial court granted the probationer's motion to suppress the evidence found on the iPod, explicitly ruling there must be a "reasonable nexus between the suspected criminal activity and the search." *Id.* at 522. The Court of Appeals affirmed, holding there was no nexus between the alleged violations, failure to appear and marijuana use, and the property searched. *Id.* at 529.

Similarly, here, even if the CCOs had reasonable cause to search, there was no nexus between the suspected violation of firearm possession and the extensive search the CCOs conducted. A probationer's limited expectation of privacy does not extend to those non-probationers around him. *State v. Rooney*, 190 Wn. App. 653, 661, 360 P.3d 913 (2015). The CCOs searched the entire house, as well as outbuildings and cars on the property, which could have belonged to visitors present in the house at the

time, or to people who had been at or near the house any time prior to the search.

Also, the CCOs found the casing outside the house, which should have confined the parameters of the search to outside the house. There was no nexus between the alleged violation and the extensive search the CCOs conducted inside the house.

Even if they were permitted to search inside the house, the nexus requirement restricted the CCOs to searching only for evidence related to the alleged violation of possessing firearms or ammunition. Ammunition is, by definition, plural, defined as “the various projectiles together with their fuzes, propelling charges, and primers that are fired from guns.” *See Webster’s Third New International Dictionary* 71 (1993). These “projectiles” are typically stored together as ammunition, not separately as independent bullets. According to the CCOs’ stated objective, “we were looking for ammunition,” their search was restricted only to places where ammunition could have reasonably been kept. CP 18.

However, the CCOs’ search was overbroad, even including removing all the coverings from Mr. Yonker’s bed. CP 22. The State presented no evidence showing that probationers tend to keep firearms or ammunition under their blankets. The CCOs’ intrusion into Mr. Yonker’s bed was outside the scope of the search for firearms or ammunition.

Yet, the CCOs did not stop there. Upon removing the blankets, the CCOs found a small wooden box, the size of "what most people would put a ring of some sort in." CP 22. At that point, the CCOs should have ended the search and left the box undisturbed. The small ring box could not have contained either a firearm or multiple bullets, and would not be a reasonable place to expect ammunition, so opening the ring box impermissibly extended the scope of the warrantless search allowed by the authorization statute.

The CCOs' actions show that they were actually searching for anything that could be a violation, not merely evidence of the suspected violation of firearm possession. This limitless search is exactly the kind of intrusion the nexus requirement is meant to guard against. *Cornwell*, 412 P.3d 1265, ¶30.

The Court should accept review and hold the search was without nexus to the suspected violation and the evidence it produced should have been suppressed.

E. CONCLUSION

The Court should accept review and hold a CCO cannot conduct a warrantless search for firearms or ammunition unless the probationer is subject to a condition of community custody prohibiting possession of such objects. Further, the Court should accept review and hold, even if Mr.

Yonker was subject to such a condition, the officers lacked reasonable cause to suspect a violation where a single spent casing was observed a few feet from Mr. Yonker's front door. Finally, the Court should accept review and hold, even if there was reasonable cause, the extensive search of all of Mr. Yonker's residential and personal property was without nexus to the alleged violation.

DATED this 7th day of May, 2018.

Respectfully submitted,

s/ Marla L. Zink______________
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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

February 21, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BERNARD LEE YONKER, Appellant.	No. 49306-3-II UNPUBLISHED OPINION

JOHANSON, J. — Bernard Lee Yonker appeals from the trial court's denial of his suppression motion and his unlawful possession of a controlled substance conviction. Yonker argues that the trial court erred because (1) his community custody conditions did not prohibit firearm and ammunition possession, (2) there was no reasonable cause to believe he violated a community custody condition, and (3) there was no nexus between the suspected violation and the search. We hold that the search was lawful and affirm Yonker's conviction.

FACTS

I. BACKGROUND

On September 4, 2015, Community Corrections Officer (CCO) Matt Frank made a home visit to offender Yonker's residence. Frank found a spent shell casing right outside Yonker's front door. Suspecting Yonker had violated his conditions of community custody by possessing a

firearm or ammunition, Frank obtained permission to search Yonker's home. During the search, CCOs found methamphetamine in Yonker's bedroom. The State charged Yonker with one count of unlawful possession of methamphetamine with aggravating circumstances.

II. Suppression Hearing

Yonker filed a motion to suppress the methamphetamine seized during the search of his residence. On February 1, 2016, the trial court held a suppression hearing. Two CCOs testified consistently with the above facts. Frank testified that people under community custody are not allowed to have firearms, ammunition, or explosive devices and that possession of such items was a "violation" of custody conditions. Verbatim Report of Proceedings (VRP) (Feb. 1, 2016) at 12. Yonker presented no testimony.

Yonker argued that the suppression motion should be granted because the spent shell casing found outside his home did not provide reasonable cause to believe Yonker possessed live ammunition and there was no nexus between the search and the suspected violation. Yonker did not dispute Frank's testimony that possession of live ammunition would violate Yonker's community custody conditions.

The State argued that people under the supervision of the Department of Corrections (DOC) are not allowed to possess firearms or ammunition, the presence of a shell casing near Yonker's front door provided reasonable cause that he violated his custody conditions, and the subsequent search of his residence was lawful.

The trial court stated,

> I think both parties would agree that Mr. Yonker would be violating his conditions and his requirement of his sentence if he were to possess a firearm or ammunition. That's not really the dispute. Rather, the dispute is whether the

> observation . . . of a shell casing outside the residence does or does not lead to reasonable suspicion of a violation.

VRP (Feb. 1, 2016) at 33.

The trial court made the following relevant findings of fact:

On September 4, 2015, Frank conducted a routine visit at Yonker's single-family residence in a neighborhood composed of single-family homes. At the time, Yonker was under community custody supervision.

When Frank approached Yonker's residence, he found a 9mm spent shell casing near Yonker's front door. Frank was concerned that the shell casing might indicate that Yonker was in possession of firearms or ammunition. Frank contacted his supervisor, who directed Frank to search Yonker's home with other CCOs and law enforcement.

CCOs arrived at Yonker's home and searched for firearms and ammunition. A CCO found additional spent shell casings in the home. And in a small wooden jewelry box located in Yonker's bedroom, a CCO found a plastic baggy containing methamphetamine.

Based on those findings, the trial court made the following relevant conclusions of law:

> 2. The above Findings of Fact are incorporated herein as conclusions of law.
> 3. RCW 9.94A.631(1) authorizes a CCO to search an offender's residence if there is reasonable cause to believe the offender has violated a condition or requirement of sentence.
> 4. RCW 9.41.045 prohibits offenders under the supervision of DOC to own, use or possess firearms and/or ammunition.
> 5. When CCO Frank found a spent shell casing near the front door of defendant's residence, a single family dwelling, CCO Frank had reasonable cause to believe defendant may be in violation of the terms and conditions of defendant's sentence.
> 6. CCO Frank's search of defendant's residence by himself and other CCO[s] was lawful pursuant to RCW 9.94A.631(1).
> 7. Defendant's Motion to Suppress . . . is denied.

Clerk's Papers (CP) at 42.

Second, we determine whether the alleged error is "manifest," which requires a showing of actual prejudice. *O'Hara*, 167 Wn.2d at 99. To demonstrate actual prejudice, there must be a "'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" *O'Hara*, 167 Wn.2d at 99 (internal quotation marks omitted) (alteration in original) (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. *O'Hara*, 167 Wn.2d at 99. "'If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.'" *O'Hara*, 167 Wn.2d at 99 (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

2. ISSUE NOT RAISED

Here, Yonker asserts that the trial court violated his Washington Constitution article I, section 7 privacy rights because it improperly admitted evidence from an unlawful search based on an erroneous understanding of Yonker's community custody conditions. Yonker does not attempt to explain why the error is manifest or why we should reach the claim under RAP 2.5(a)(3). Because he failed to raise the issue before the trial court, it is unpreserved. RAP 2.5(a).

3. CONSTITUTIONAL IN NATURE

To determine whether we reach the merits of Yonker's unpreserved claim, we first consider whether his claim is constitutional in nature. *O'Hara*, 167 Wn.2d at 98; RAP 2.5(a)(3).

If true, Yonker's claim would implicate his privacy rights under article I, section 7 because a warrantless search of an offender conducted without reasonable suspicion of a community custody condition violates constitutional privacy rights. *State v. Winterstein*, 167 Wn.2d 620, 628-

29, 220 P.3d 1226 (2009). Thus, the claim is constitutional in nature and satisfies the first prong of the RAP 2.5(a)(3) analysis. *Bonds*, 174 Wn. App. at 568-69 (holding that the defendant raised a constitutional claim when he raised a new argument under article I, section 7 to support his suppression motion for the first time on appeal); *State v. Fenwick*, 164 Wn. App. 392, 399, 264 P.3d 284 (2011) (holding that appellant's claim that his article I, section 7 privacy rights were violated was "constitutional in nature").

4. MANIFEST ERROR

The next question is whether Yonker has established that his alleged error is "manifest," which requires that the error is identifiable in the trial record. *O'Hara*, 167 Wn.2d at 98-99. For the error to be identifiable, the trial record must be sufficient to determine the merits of the claim. *O'Hara*, 167 Wn.2d at 99.

During the suppression hearing and trial, there was minimal factual development regarding Yonker's community custody conditions. Yonker did not object when the trial court stated that the parties agreed that Yonker's community custody conditions prohibited firearm and ammunition possession. And Yonker offered no evidence regarding the nature of his community custody conditions.

The limited evidence in the record addressing Yonker's community custody conditions supports that Yonker was prohibited from possessing firearms and ammunition and does not support Yonker's contention that no such conditions existed. The trial court, at the suppression hearing, was aware that under RCW 9.41.045, "[a]s a sentence condition and requirement, offenders under the supervision of the [DOC] . . . shall not own, use, or possess firearms or

ammunition." In addition, Frank testified that it was a "violation" for Yonker to possess firearms or ammunition. VRP (Feb. 1, 2016) at 12.

Furthermore, although his judgment and sentence was not considered at the suppression hearing, it provides additional support that Yonker was prohibited from firearm and ammunition possession. Yonker's sentence explicitly prohibits firearm possession. And the judgment and sentence required that he comply with DOC instructions, rules, and regulations. Frank's testimony supports that the DOC prohibited both firearm and ammunition possession, and Yonker was required to comply with that condition.

Here, the record fails to plausibly show that the asserted error had practical and identifiable consequences. *O'Hara*, 167 Wn.2d at 99. As such, Yonker fails to demonstrate actual prejudice and thus has not shown manifest error. *O'Hara*, 167 Wn.2d at 99. Because Yonker has not established that his unpreserved argument raises a manifest error affecting a constitutional right, he is not entitled to appellate review of this issue. *O'Hara*, 167 Wn.2d at 98; RAP 2.5(a)(3).

We hold that this issue is waived.

II. Reasonable Cause

Next, Yonker argues that even if he was prohibited from possessing ammunition, the trial court erred when it concluded that reasonable cause supported the search of his residence. We reject this claim.

A. Principles of Law

Unchallenged findings are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). "We review conclusions of law from an order pertaining to the suppression of evidence de novo." *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

A CCO may search an offender's residence or other personal property "[i]f there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence." RCW 9.94A.631(1). To have reasonable cause of a violation, the CCO must have a "'well-founded suspicion that a violation has occurred.'" *State v. Jardinez*, 184 Wn. App. 518, 524, 338 P.3d 292 (2014) (quoting *State v. Massey*, 81 Wn. App. 198, 200, 913 P.2d 424 (1996)). The reasonable cause standard is analogous to the requirements of a *Terry*[1] stop and requires specific and articulable facts and rational inferences to support that a violation occurred. *State v. Parris*, 163 Wn. App. 110, 119, 259 P.3d 331 (2011).

B. REASONABLE CAUSE SUPPORTED SEARCH

Yonker assigns error to conclusion of law 5, which states that by finding a spent shell casing near the front door of Yonker's single-family dwelling, "CCO Frank had reasonable cause to believe defendant may be in violation of the terms and conditions of defendant's sentence." CP at 42.

Frank conducted a routine visit at Yonker's single-family residence and found a 9mm spent shell casing near Yonker's front door. These facts are unchallenged findings and thus are verities on appeal. *O'Neill*, 148 Wn.2d at 571. The CCO's observation of a spent shell casing located near the front door of Yonker's single-family home provides specific and articulable facts giving rise to the reasonable inference that Yonker had ammunition and a firearm on the premises in violation of his community custody conditions. *Jardinez*, 184 Wn. App. at 524; *Parris*, 163 Wn.

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

App. at 119. As such, the findings of fact support the conclusion that the CCO had reasonable cause to search Yonker's home.

Yonker argues that the CCO lacked reasonable cause to search his residence because there were multiple people in the house when the CCOs conducted the search, so it was unreasonable to infer that the shell casing belonged to Yonker without additional facts connecting the shell casing to him. To support this argument, Yonker cites *State v. Doughty*, 170 Wn.2d 57, 239 P.3d 573 (2010). In *Doughty*, our Supreme Court concluded that law enforcement had no reasonable suspicion for an investigative stop when the officer had only observed the defendant enter a suspected drug house, remain inside for several minutes, and then leave. 170 Wn.2d at 60. The court held that a person's mere presence or association with people or places suspected of criminal activity was not sufficient to create reasonable suspicion of criminal activity. *Doughty*, 170 Wn.2d at 60, 65.

As the State asserts, Yonker's situation is distinguishable from *Doughty*. Unlike the officer there, who only observed innocent conduct and association with people and places suspected of criminal activity, Yonker's CCO observed an empty shell casing near Yonker's front door that connected Yonker himself to a suspected community custody violation. It was reasonable for Yonker's CCO to infer that a shell casing is the result of the discharge of a firearm and such an action would violate Yonker's community custody conditions prohibiting firearm and ammunition possession. As the State asserts, the CCO was not required to be *certain* that the casing belonged to Yonker to further investigate the violation; he needed only reasonable suspicion. *Jardinez*, 184 Wn. App. at 524. The shell casing was at the entrance to Yonker's private residence, and it was

reasonable to infer that the casing belonged to him. Thus, the findings of fact support the conclusion that reasonable cause supported the search of Yonker's home.[2]

III. NEXUS BETWEEN SUSPECTED VIOLATION AND SEARCH

Yonker argues that even if the CCOs had reasonable cause to search, the trial court erred when it concluded that there was a nexus between the suspected violation and the search of Yonker's home. In arguing that there was no nexus, Yonker appears to challenge conclusion of law 6—that the search was lawful. We disagree.

When a CCO conducts a search based on reasonable cause that a probationer has violated a community custody condition, there must be a nexus between the property searched and the suspected violation. *Jardinez*, 184 Wn. App. at 529; *State v. Livingston*, 197 Wn. App. 590, 598, 389 P.3d 753 (2017). A "nexus" is a "connection or link, often a causal one." BLACK'S LAW DICTIONARY 1205 (10th ed. 2014).

Yonker relies on *Jardinez*. In *Jardinez*, a probation officer suspected the probationer of failure to appear at a meeting and drug abuse. 184 Wn. App. at 521. Despite the fact that the officer admitted he had *no facts* indicating that the probationer's electronic device would contain evidence of these violations, the officer searched the device because the probationer appeared

[2] Yonker cites to *State v. Lippincott*, noted at 188 Wn. App. 1032, 2015 WL 4095289. In *Lippincott*, Division One of this court held that reasonable suspicion did not justify law enforcement's search of the appellant's purse immediately upon seeing her after she failed to report to her CCO. 2015 WL 4095289, at *5. The officer conducted the search because based on only the appellant's prior criminal record and her failure to report, the officer believed that there could be evidence of identity theft in her purse. *Lippincott*, 2015 WL 4095289, at *5. The court stated that "[t]he officer's reasoning . . . is too attenuated to be considered a well-founded or reasonable suspicion." *Lippincott*, 2015 WL 4095289, at *5. In contrast, Yonker's CCO had well-founded and reasonable suspicion to search Yonker's home because he observed an empty shell casing near Yonker's front door. *Lippincott* is easily distinguishable from Yonker's situation.

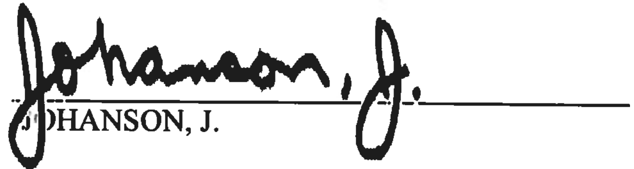
nervous. *Jardinez*, 184 Wn. App. at 521. The court held that the officer's search of the probationer's electronic device had no nexus to the suspected violation. *Jardinez*, 184 Wn. App. at 529-30.

Yonker's situation is distinguishable. The officer in *Jardinez* conducted a general search to determine if the defendant's electronic device contained any evidence of criminal activity. But here, the officers searched Yonker's home for evidence of ammunition or firearm possession, which was related to the criminal activity suspected based on the empty shell casing. In addition, the officer in *Jardinez* "had no reason to believe" that he would find evidence of suspected crimes on the defendant's device. 184 Wn. App. at 528. In contrast, here, based on the close proximity of the shell casing to Yonker's front door, there was a connection between the evidence of ammunition or firearm possession and Yonker's home.

Yonker also argues that the search was "overbroad" because the CCOs looked under Yonker's bed coverings and inside the wooden box containing drugs and the State failed to present evidence that firearms or ammunition would typically be hidden in these places. However, as the State asserts, the search of Yonker's home was calculated to search places where firearms or ammunition could be hidden, and under bed coverings and inside boxes in Yonker's bedroom fell within this scope. We note that because Yonker was on community custody he was motivated to hide any evidence of contraband. Although ammunition may not normally be stored inside a small jewelry box, the box was a place where ammunition could have been hidden. Because officers searched Yonker's home and places and personal property that could contain firearms or ammunition, there was a nexus between the suspected activity of possessing ammunition or firearms and the search conducted.

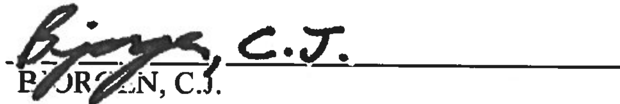
We affirm.

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.



JOHANSON, J.

We concur:



BJORGEN, C.J.

SUTTON, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

April 9, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

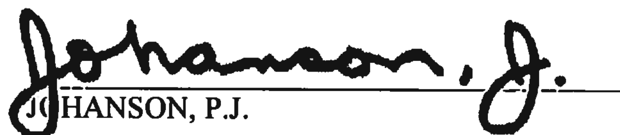
STATE OF WASHINGTON, Respondent, v. BERNARD LEE YONKER, Appellant.	No. 49306-3-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the Court's February 21, 2018 opinion. Upon consideration, the Court denies the motion for reconsideration. Accordingly, it is

SO ORDERED.

PANEL: Jj. Johanson, Bjorgen, Sutton

FOR THE COURT.



JOHANSON, P.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 49306-3-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Joseph Jackson
[jacksoj@co.thurston.wa.us]
Thurston County Prosecuting Attorney

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: May 8, 2018

WASHINGTON APPELLATE PROJECT

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