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COURT OF APPEALS

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No. 34068-2-II

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

CMM
CITY

STATE OF WASHINGTON,

Respondent,

vs.

THOMAS PAUL WILLIAMS,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 05-1-00774-7
The Honorable John A. McCarthy, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred when it denied Appellant's CrR 3.6 motion to suppress.
2. The trial court erred when it ruled that Appellant's diminished privacy rights while confined under civil commitment excused the need for a warrant or permission before the State seized and searched Appellant's personal property.
3. The State failed to present sufficient evidence to establish every essential element of the crime charged.

B. Issues Pertaining to the Assignments of Error

1. Where persons confined under civil commitment retain more constitutional rights than persons committed under criminal penalties, and where State law provides that persons committed under the relevant special commitment statute retain all their legal rights, did the trial court err when it found that Appellant did not have a privacy right in his computer, and that the State did not need a warrant or permission before seizing and searching the contents of the computer?
(Assignments of Error 1 & 2)
2. Where the evidence did not establish that Appellant ever

accessed the illegal image located on his computer's secondary hard drive, did the State fail to prove that Appellant knowingly possessed the illegal image? (Assignment of Error 3)

II. STATEMENT OF THE CASE

A. Substantive Facts

In 2002, the Kitsap County Superior Court found probable cause to support the detention of Thomas Paul Williams to determine if he is a sexually violent predator. (CP 21) The court ordered that Williams be detained at the Special Commitment Center (SCC) on McNeil Island pending trial on the State's sexually violent predator petition. (CP 21)

In December of 2004, Williams resided in the Alder Unit of the SCC. (RP 28-29, 93) Like other SCC residents, Williams had a private room that could be entered only by unlocking the door using an access key card. (CP 21; RP 26-27) When locked, only Williams and SCC staff had access to his room. (RP 27)

SCC residents are allowed to possess computers in their rooms. (RP 30) It is against SCC policy to have access to the Internet, and inmates are not allowed to file-share or add components to their computers. (RP 30, 40, 95) When a resident

purchases a computer, SCC staff must first inspect the computer before the resident can possess and use it. (RP 120-22) Computer technician Joel Eussen testified that he verifies that there are no unauthorized programs, files or components on the computer before he hands it over to a resident. (RP 120-22)

On December 20, 2004, a resident found a day planner in the common area, and turned it over to SCC staff. (CP 22; RP 31, 95) When the staff opened the planner, they discovered a computer disk and two photographs of a woman naked from the waist up. (RP 95) SCC staff also viewed the contents of the disk, and discovered nine additional photos of the same female. (RP 105) SCC residents are not allowed to keep sexually explicit materials on their computers, and are not allowed to possess pornographic materials of any kind. (RP 94, 95-96; CP 21)

Staff members believed the planner belonged to Williams, so they confronted him, and he admitted that the planner, disk and photos belonged to him. (RP 33, 113; CP 22) SCC Investigator Darold Weeks was concerned that Williams might have additional images on his computer, and SCC policy allows computer searches at any time, so he ordered that Williams' computer be seized and

searched.¹ (RP 40, 103, 105, 106-07) Staff members seized Williams' computer on December 28, 2004, without first obtaining permission from Williams. (CP 22, RP 43, 46-47)

Eussen conducted a search of the computer's contents. (RP 128) He found a total of 16,613 images on the computer. (RP 144) He also noticed that a second non-factory hard drive had been installed sometime after Williams first received the computer. (RP 135) On this second hard drive, Eussen discovered a file titled Angel12.JPG. The file contained a single photograph of what appeared to be a young girl engaged in a sex act with an adult male. (RP 72-75, 128-29) Eussen printed the photo and copied it onto a disk, and then provided the photo to Weeks, who passed the photo to law enforcement personnel. (RP 56, 131, 110, 112)

B. Procedural History

The State charged Williams by Amended Information with one count of Possession of Depiction of a Minor Engaged in Explicit Conduct, in violation of RCW 9.68A.070. (CP 4) Williams moved pursuant to CrR 3.6 to suppress any evidence of the computer file

¹ SCC Policy 212, which addresses computer ownership and use, states that "[a]ll equipment and computer files are subject to search at any time." (CP 17)

and photo. (CP 5-8; 9/29/05 RP 10-14)² The trial court denied the motion, and entered written Findings of Fact and Conclusions of Law, which are attached in the Appendix to this brief. (CP 24-27; 9/29/05 RP 14)

A jury convicted Williams as charged. (CP 50; RP 231) The trial court sentenced Williams to a six-month standard range sentence, and this appeal follows. (CP68, 70, 76; 11/10/05 RP 10-11)

III. ARGUMENT & AUTHORITIES

A. Williams had a privacy interest in his computer and its contents under both Constitutional and Statutory law, and the SCC staff's seizure and search of his computer, with neither a warrant nor consent, violated his privacy rights.

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 But a defendant may challenge a search or seizure only if he or she has

² Citations to the transcript from the pretrial hearing on September 29, 2005 will be to the date of the proceeding followed by the page number. Citations to the trial proceedings contained in volumes numbered 2, 3, and 4 will simply be to RP followed by the page number. Citations to the sentencing hearing on November 10, 2005 will be to the date of the proceeding followed by the page number.

³ It is now settled that Art. I, § 7 is more protective than the Fourth Amendment, and a *Gunwall* analysis is no longer necessary. *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) (citing *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)).

a personal privacy interest in the area searched or the property seized. *State v. Goucher*, 124 Wn.2d 778, 786, 881 P.2d 210 (1994). The defendant has the burden of establishing an expectation of privacy. *State v. Jones*, 68 Wn. App. 843, 850, 845 P.2d 1358 (1993). In this case, Williams had an expectation of privacy in the contents of his room and his computer.

In general, criminal inmates do not have a reasonable expectation of privacy in their prison cell. *See Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 393 (1984). But persons who have been involuntarily committed on civil grounds are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish. *See Youngberg v. Romeo*, 457 U.S. 307, 321-22, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).

In fact, RCW 71.09.080(1) specifically provides that:

Any person subjected to restricted liberty as a sexually violent predator pursuant to this chapter shall not forfeit any legal right or suffer any legal disability as a consequence of any actions taken or orders made, other than as specifically provided in this chapter.

(Emphasis added.) Moreover, administrative regulations governing persons committed under RCW 71.09 specifically provide a wider

range of privileges than those associated with a prison setting:

A person the court detains for evaluation or commits to the SCC shall:

...
(b) Be permitted to wear the person's own clothing except as may be required during an escorted leave from the secure facility, and to keep and use the person's own possessions, except when deprivation of possessions is necessary for the person's protection and safety, the protection and safety of others, or the protection of property within the SCC;

...
(d) Have access to reasonable personal storage space within SCC limitations;

...
(f) Have reasonable access to a telephone to make and receive confidential calls within SCC limitations[.]

WAC 388-880-050(2). This language clearly shows that the Legislature intended for persons detained or committed at the SCC to retain their privacy interest in their personal belongings. The Legislature did not intend to strip residents of the SCC of all their privacy and other constitutional rights.

Based on the language of the statute, the WAC, and the State and Federal Constitutions, Williams had a legitimate expectation of privacy in his room and, more specifically, in the contents of his computer. He had a legitimate expectation that the contents of his computer would remain private, unless a search

was conducted pursuant to a warrant or his own consent.

The trial court ruled that the compelling state interest of evaluating and treating suspected sexually violent predators, “and the need to run a maximum security facility efficiently, create a lessened Fourth Amendment expectation of privacy for the residents of the SCC and further allow staff to take immediate action to conduct searches when needed.” (Conclusion of Law 4; CP 26) The court further found that “SCC policies and procedures that allow for warrantless, nonconsensual searches of resident property do not violate the 4th Amendment.” (Conclusion of Law 5; CP 26)⁴

The trial court was incorrect. In a non-prison setting, such actions by authorities would clearly violate a citizen’s constitutionally protected privacy rights. And both case law and RCW 71.09.080(1) specifically state that persons in Williams’ position (as opposed to criminal inmates confined for punishment) are not stripped of their constitutional and legal rights. *Romeo*, 457

⁴ The trial court relied in part on *Matter of Paschke*, 80 Wn. App. 439, 447, 909 P.2d 1328 (1996), a Division 3 case that states in dicta that “[t]he Center has a duty to provide a safe environment for its confinees. To do so, it must have the authority to take immediate action to search or confine persons.” (CP 26) To the extent that *Paschke* implies that SCC residents have no privacy rights or protection from unreasonable search and seizure, the decision is incorrect, for the reasons argued in the body of this brief.

U.S. at 321-22. Accordingly, SCC policy 212, which allows cell and computer searches at any time for any reason interferes with residents' protected privacy interests, and is clearly improper. The search in this case, done without any probable cause to believe a criminal act had taken place, and without Williams' permission, violated Williams' expectation of privacy and was not justified.

Moreover, the court's findings directly contradict the plain language of RCW 71.09.080(1)—which states that SCC residents do not lose their legal rights as a result of being detained—and of WAC 388-880-050(2)(b)—which states that residents will only be deprived of their personal possessions “when deprivation of possessions is necessary for the person's protection and safety, the protection and safety of others, or the protection of property within the SCC.”

There is no evidence or testimony that possession of the computer threatened Williams safety, the safety of others, or SCC property. SCC staff did not have any reason to believe that there were any illegal items or files on the computer, and even admitted as much at trial. (RP 139)⁵ In addition, SCC staff waited eight days before confiscating the computer, which shows that there was

⁵ Staff members believed there might be additional unauthorized images on the computer. (RP 105) While possession of general, adult pornography is against SCC rules, its possession is not a crime.

absolutely no urgency, and the staff did not consider the computer or its contents to be an immediate risk to persons or property. (RP CP 22; RP 107)

Williams retained his privacy rights to the contents of his computer while a resident at the SCC. The State did not establish that a valid exception to the warrant requirement existed, which would have permitted the warrantless search and seizure of Williams' computer. As a result, the trial court erred when it denied Williams' motion to suppress, and Williams' conviction must be reversed.

B. The State provided insufficient evidence to establish that Williams had knowledge that an illegal image was stored on his computer's secondary hard drive.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." *City of Tacoma v. Luvone*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v.*

Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

In this case, the State charged Williams under RCW 9.68A.070, which provides that “[a] person who knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct is guilty of a class C felony.” Mere possession is not sufficient, rather the State must prove that the defendant knowingly possessed the material. RCW 9.68A.070.

In this case, the State presented testimony that the computer belonged to Williams, that the computer was scanned and cleared of any inappropriate materials before being put into Williams’ possession, and that residents were not supposed to network or file-share. (RP 30, 46-47, 95, 105, 120-22). However, Eussen, a State’s witness, testified that a second after-factory hard drive had been installed onto Williams’ computer, and that the Angel12.JPG file was found on that drive. (RP 135) He did not know when the drive was installed, but the oldest file on the drive was created on March 24, 2004. (RP 135, 137) A letter written by Williams was created on the hard drive on October 22, 2004. (RP 136) The

Angel12.JPG file was created on the hard drive on November 18, 2004. (RP 136)

Eussen could not tell who created the file, whether it existed on the hard drive before the drive was installed onto Williams' computer, or whether it had ever been accessed from Williams' computer. (RP 156) Because Eussen did not make a copy of the hard drive contents before opening the Angel12.JPG file, he was unable to determine the last time that the file had been accessed. (RP 139-40)

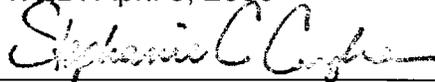
In addition, Fellow SCC resident Richard Broten testified that it is common for SCC residents to share files and upgrade their computers with used parts from other residents' computers. (RP 169)

This evidence does not establish that Williams was aware that the Angel12.JPG file had been saved on his secondary hard drive, that he ever accessed that file, or that he was aware of the contents of the file. Eussen failed to preserve any evidence that would have shown when, if ever, the file had been accessed and viewed by Williams. The State therefore failed to prove that Williams knowingly possessed the Angel12.JPG file, and Williams' conviction must be reversed.

IV. CONCLUSION

Because persons confined under civil commitment retain more constitutional rights than persons committed under criminal penalties, and because State law provides that persons committed at the SCC retain all their legal rights, the trial court erred when it found that Williams did not have a privacy right in his computer, and that the State did not need a warrant or permission before seizing and searching the contents of the computer. In addition, the State failed to establish that Williams had knowledge of the presence and contents of the Angel12.JPG file. As a result, on either or both of these grounds, Williams' conviction must be reversed.

DATED: April 3, 2006



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CERTIFICATE OF MAILING

I certify that on April 3, 2006, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to:

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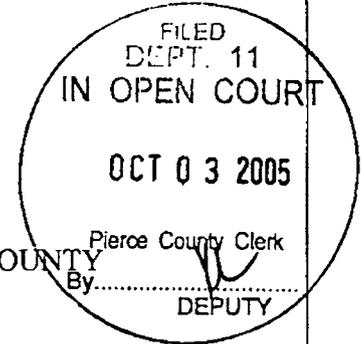
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APPENDIX

Findings of Fact & Conclusions of Law



05-1-00774-7 23857117 FNFL 10-11-05



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-00774-7

vs.

THOMAS PAUL WILLIAMS,

FINDINGS AND CONCLUSIONS ON
ADMISSIBILITY OF EVIDENCE CrR
3.6

Defendant.

THIS MATTER having come on before the Honorable John A. McCarthy on the 29th day of September, 2005, and the court having rendered an oral ruling thereon, the court herewith makes the following Findings and Conclusions as required by CrR 3.6.

THE UNDISPUTED FACTS

1. In 2002, the Kitsap County Superior Court found probable cause to believe that the defendant is a sexually violent predator.
2. The defendant was ordered to be detained at the Special Commitment Center on McNeil Island pending his trial on the State's sexually violent predator petition.
3. Each resident at the SCC has his own private room. Only the resident of that room and SCC staff have access cards to unlock the door.
4. Residents are allowed to own computers and keep them in their rooms.
5. SCC Policy 212 provides that all computers are subject to search.
6. It is a violation of SCC rules to possess pornography of any kind.

REASONS FOR ADMISSIBILITY OR INADMISSIBILITY OF THE EVIDENCE

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1. There are compelling state interests to treat sexually violent predators and to protect society from them. In re Young, 122 Wn.2d 1 (1993). These compelling state interests justify interfering with the fundamental rights of such persons. In re Young, 122 Wn.2d 1 (1993).

2. Where probable cause has been established, a person alleged to be a sexually violent predator must be detained pending trial at a Department of Social and Health Services facility, such as the Special Commitment Center (SCC) on McNeil Island. RCW 71.09.050.

3. The compelling state interests of evaluating and treating suspected sexually violent predators, and of protecting other residents and the community from them, requires that such persons be housed at a maximum-security facility such as the SCC. In re Young.

4. These same compelling interests, and the need to run a maximum security facility efficiently, create a lessened Fourth Amendment expectation of privacy for the residents of the SCC and further allow staff to take immediate action to conduct searches when needed. In re Paschke, 80 Wn. App. 439, 447 (1996).

5. SCC policies and procedures that allow for warrantless, nonconsensual searches of resident property do not violate the Fourth Amendment. In re Paschke.

6. The search at issue in this case was reasonable and pursuant to lawful authority. SCC staff had reason to suspect that there may be inappropriate materials on the defendant's computer. Defendant had a lessened expectation of privacy in his room at the SCC, and little to no expectation of privacy in his computer. It was reasonable for SCC staff to seize and search the defendant's computer.

7. Any and all evidence gained from the SCC search and seizure of the defendant's computer is admissible at trial and the defendant's motion to suppress evidence is denied.

DONE IN OPEN COURT this 3rd day of ~~September~~ ^{October}, 2005.

John A. McCarthy

JUDGE

JOHN A. MCCARTHY

Presented by:

John Hillman

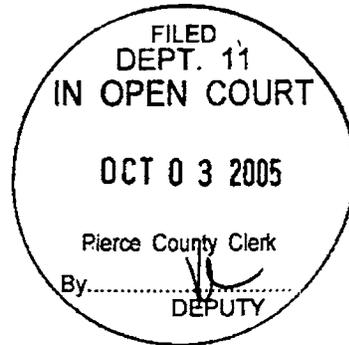
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