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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 383~~77~~-6-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN M. WENTZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon, Trial Court Judge
Cause No. 07-1-00505-6

BRIEF OF RESPONDENT

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 (a) AS A PROBATIONER/PAROLEE, HE HAS A DIMINISHED RIGHT OF PRIVACY;

 (b) THIS PROVISION IS JUSTIFIED IN ORDER TO EFFECT REHABILITATION; AND

 (c) WHILE ON COMMUNITY CUSTODY, WENTZ SIMPLY SERVES THE BALANCE OF HIS SENTENCE OUTSIDE PRISON WALLS UNTIL IT IS COMPLETE.....2-5

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A. ASSIGNMENT OF ERROR

1. The trial court erred when it ordered Kevin Wentz as a condition of community custody to allow DOC or a CCO to monitor compliance with the conditions of his community custody by way of warrantless searches of Mr. Wentz' home without any basis to believe that violations of the conditions would be found in his home.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Did error occur when the trial court ordered Wentz to comply with the community custody provision permitting the Department of Corrections or a community custody officer to search his residence to assess his compliance with supervision when:
 - (a) as a probationer/parolee, he has a diminished right of privacy;
 - (b) this provision justified in order to effectuate rehabilitation; and
 - (c) while on community custody, he serves the balance of his sentence outside prison walls until his sentence is complete?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Clerk's Papers shall be referred to as "CP."

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Wentz' recitation of the procedural history and facts.

3. Summary of Argument

Error did not occur when the trial court ordered Wentz to comply with the community custody provision permitting the Department of Corrections or a community custody officer to search his residence to assess his compliance with supervision because: (a) as a probationer/parolee, he has a diminished right of privacy; (b) this provision is justified in order to effectuate rehabilitation; and (c) while on community custody, Wentz simply serves the balance of his sentence outside prison walls until it is complete. The judgment and sentence of the trial court is complete, correct and should be affirmed.

E. ARGUMENT

1. ERROR DID NOT OCCUR WHEN THE TRIAL COURT ORDERED WENTZ TO COMPLY WITH THE COMMUNITY CUSTODY PROVISION PERMITTING THE DEPARTMENT OF CORRECTIONS OR A COMMUNITY CUSTODY OFFICER TO SEARCH HIS RESIDENCE TO ASSESS HIS COMPLIANCE WITH SUPERVISION BECAUSE:
 - (a) AS A PROBATIONER/PAROLEE, HE HAS A DIMINISHED RIGHT OF PRIVACY;
 - (b) THIS PROVISION IS JUSTIFIED IN ORDER TO EFFECT REHABILITATION; AND
 - (c) WHILE ON COMMUNITY CUSTODY, WENTZ SIMPLY SERVES THE BALANCE OF HIS SENTENCE OUTSIDE PRISON WALLS UNTIL IT IS COMPLETE.

Error did not occur when the trial court ordered Wentz to comply with the community custody provision permitting the Department of

Corrections or a community custody officer to search his residence to assess his compliance with supervision because: (a) as a probationer/parolee, he has a diminished right of privacy; (b) this provision is justified in order to effectuate rehabilitation; and (c) while on community custody, Wentz simply serves the balance of his sentence outside prison walls until it is complete.

Article 1, section 7 of the Washington State Constitution provides broader protections than the United States Constitution's Fourth Amendment. State v. Patterson, 51 Wash.App. 202, 204, 752 P.2d 945 (1988). The emphasis of Article 1, section 7, is on protecting the individual's right to privacy, while the emphasis of the Fourth Amendment is on curbing governmental actions. State v. Lampman, 45 Wash.App. 228, 231-232, 724 P.2d 1092 (1986). A probationer or parolee, however, has a diminished right to privacy because "the State has a continuing interest in the defendant and its supervision of him [her] as a probationer" such that the defendant can expect state officers and agents to scrutinize him [her] closely. Lampman, 45 Wash.App. at 233 (emphasis in the original).

Searches without a valid warrant are generally "unreasonable" per se unless it is demonstrated that public interest justifies creation of an exception to the general warrant requirement. State v. Simms, 10

Wash.App. 75, 85, 516 P.2d 1088 (1973). Under the Fourth Amendment and article I, section 7, of the Washington State Constitution, probationers and parolees have a diminished right of privacy permitting a warrantless search if reasonable. Patterson, 51 Wash.App. at 204.

The rationale for excepting parolees and probationers from the general requirement that a residential search be conducted pursuant to a warrant and upon probable cause, is that a person judicially sentenced to confinement but released on parole remains in custodia legis until expiration of the maximum term of his [her] sentence, i.e., he [she] is simply serving his [her] time outside the prison walls. State v. Lucas, 56 Wash.App. 236, 240, 783 P.2d 121 (1989). This exception is also justified in order to effectuate rehabilitation. Simms, 10 Wash.App. at 85.

Washington recognizes a warrantless search exception, when reasonable, to search a parolee or probationer and his [her] home or effects. State v. Winterstein, 140 Wash.App. 676, 691, 166 P.3d 1242 (2007). A probation or parole officer may search the probationer's home without a warrant so long as the search is reasonable and is based upon a well founded suspicion that a violation of probation has occurred. Lucas, 56 Wash.App. at 244.

The condition that Wentz' references on page 1 of his brief is both lawful and reasonable. This condition is limited to "visual inspection" of

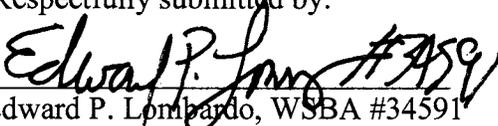
“all areas” of his residence and goes no further. CP 114: Conditions of Community Placement-1. A reasonable reading of this condition could in no way find it to be excessive. As a probationer/parolee following his convictions for: (a) possession of a controlled substance with intent to deliver-marijuana; and (b) unlawful possession of a firearm in the second degree, Wentz has a diminished right of privacy until his supervision is complete; rationale that rings especially true because a goal of community custody is rehabilitation. The trial court did not err by imposing this condition as part of Wentz’ judgement and sentence.

F. CONCLUSION

The State respectfully requests the Court to affirm Wentz’ judgement and sentence.

Dated this 12TH day of FEBRUARY, 2009

Respectfully submitted by:


Edward P. Lombardo, WSBA #34591
Deputy Prosecuting Attorney for Respondent
Gary P. Burleson, Prosecuting Attorney
Mason County, WA

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 KEVIN M. WENTZ,)
)
 Appellant,)
 _____)

No. 38377-6-II

DECLARATION OF
FILING/MAILING
PROOF OF SERVICE

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

I, EDWARD P. LOMBARDO, declare and state as follows:

On THURSDAY, FEBRUARY 12, 2009, I deposited in the U.S.

Mail, postage properly prepaid, the documents related to the above cause
number and to which this declaration is attached, BRIEF OF

RESPONDENT, to:

Bruce Finlay, Attorney at Law
P.O. Box 3
Shelton, WA 98584

I, EDWARD P. LOMBARDO, declare under penalty of perjury of
the laws of the State of Washington that the foregoing information is true
and correct.

Dated this 12TH day of FEBRUARY, 2009, at Shelton, Washington.

[Signature]
Edward P. Lombardo, WSBA #34591