

NO. 38784-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROY BRANDENBURG,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
09 NOV -2 PM 2:39  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 08-1-00811-6

BRIEF OF RESPONDENT

RUSSELL D. HAUGE  
Prosecuting Attorney

JEREMY A. MORRIS  
Deputy Prosecuting Attorney

614 Division Street  
Port Orchard, WA 98366  
(360) 337-7174

SERVICE

James Reese  
612 Sidney Ave.  
Port Orchard, WA 98366

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED November 2, 2009, Port Orchard, WA \_\_\_\_\_  
**Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.**

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

    A. PROCEDURAL HISTORY.....1

    B. FACTS .....2

    Findings of Fact ..... 10

    Conclusions of Law ..... 12

III. ARGUMENT .....14

    A. THE TRIAL COURT DID ERR IN FINDING THAT DOC OFFICER VALLEY HAD A WELL FOUNDED SUSPICION THAT REICHERT WAS LIVING AT THE RESIDENCE IN QUESTION IN VIOLATION OF HIS CONDITIONS OF SUPERVISION BECAUSE THE RECORD CONTAINS SUBSTANTIAL EVIDENCE SUPPORTING THE TRIAL COURT’S FINDING OF FACT. ....14

    B. THE TRIAL COURT DID ERR IN REJECTING BRANDENBURG’S CLAIM THAT DOC OFFICER VALLEY’S CONTACT WITH REICHERT AT THE RESIDENCE WAS A MERE PRETEXT OR AN EFFORT TO AVOID THE WARRANT REQUIREMENT BECAUSE THE RECORD CONTAINS SUBSTANTIAL EVIDENCE SUPPORTING THE TRIAL COURT’S FINDING OF FACT THAT OFFICER VALLEY DID NOT ACT AS A STALKING HORSE AND THAT OFFICER VALLEY ENLISTED THE POLICE TO ASSIST HIM IN HIS OWN LEGITIMATE OBJECTIVES. ....22

IV. CONCLUSION.....26

**TABLE OF AUTHORITIES**  
**CASES**

*American Nursery Prods., Inc. v. Indian Wells Orchards*,  
115 Wn. 2d 217, 797 P.2d 477 (1990).....23

*New Jersey v. T.L.O.*,  
469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).....16, 20

*Smith v. Rhay*,  
419 F.2d 160 (9th Cir.1969) .....23, 25

*State v. Camarillo*,  
115 Wn. 2d 60, 794 P.2d 850 (1990).....15

*State v. Fisher*,  
145 Wn. 2d 209, 35 P.3d 366 (2001).....16, 20

*State v. Graffius*,  
74 Wn. App. 23, 871 P.2d 1115 (1994).....23

*State v. Hill*,  
123 Wn. 2d 641, 870 P.2d 313 (1994).....23

*State v. Lucas*,  
56 Wn. App. 236, 783 P.2d 121 (1989).....15

*State v. Mendez*,  
137 Wn. 2d 208, 970 P.2d 722 (1999).....15

*State v. Patterson*,  
51 Wn. App. 202, 752 P.2d 945 (1988).....15

*State v. Simms*,  
10 Wn. App. 75, 516 P.2d 1088 (1973).....12, 18, 24

*State v. Smith*,  
84 Wn. 2d 498, 527 P.2d 674 (1974).....15

*State v. Winterstein*,  
140 Wn. App. 676, 166 P.3d 1242 (2007).....16, 17, 18, 19, 20

*Terry v. Ohio*,  
392 U.S. 1 (1968).....12

*United States v. Jarrad*,  
754 F.2d 1451 (9th Cir. 1985) .....10, 22, 23, 24, 25

*United States v. Harper*,  
928 F.2d 894 (9th Cir. 1991) .....10, 24

*United States v. Merchant*,  
760 F.2d 963 (9th Cir.1985) .....22

**STATUTES**

RCW 9.94A.631 .....15

## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the trial court erred in finding that DOC Officer Valley had a well-founded suspicion that Reichert was living at the residence in question in violation of his conditions of supervision when the record contains substantial evidence supporting the trial court's finding of fact?

2. Whether the trial court erred in rejecting Brandenburg's claim that DOC Officer Valley's contact with Reichert at the residence was a mere pretext or an effort to avoid the warrant requirement when the record contains substantial evidence supporting the trial court's finding of fact that Officer Valley did not act as a stalking horse and that Officer Valley enlisted the police to assist him in his own legitimate objectives?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Roy Brandenburg was charged by an amended information filed in Kitsap County Superior Court with unlawful possession of a firearm in the first degree, possession of marijuana with intent to manufacture or deliver, and possession of a controlled substance (MDMA). CP 98. After the trial court denied Brandenburg's motion to suppress, Brandenburg agreed to submit the case to the trial court on stipulated facts. CP 102. The trial court then found Brandenburg guilty of the charged offenses and imposed a standard range sentence. CP 105, 108-117. This appeal followed.

## **B. FACTS**

The charges in the present case stemmed from items that were found when law enforcement executed a search warrant on a residence shared by Brandenburg and his co-defendant, Joseph Reichert. CP 1-4. During that search law enforcement found several pounds of marijuana, a large quantity of ecstasy pills, packaging materials, scales and other paraphernalia, as well as thousands of dollars in U.S. currency. A consent search was later conducted of Brandenburg's vehicle where more marijuana, a scale and more packaging material as well as a nine-millimeter handgun were found.

The cases against Brandenburg and Reichert were consolidated for trial below. CP 5. Prior to trial, both Brandenburg and Reichert filed motions to suppress. Brandenburg's motion to suppress raised two arguments concerning the search. First, that DOC officer Steve Valley was acting as a "stalking horse" for Detectives from the Kitsap County Sheriff's Office and that the probation search was thereby used to evade the warrant requirement. CP 8. Secondly, that DOC lacked a well-founded suspicion that a parole violation had occurred and that the DOC search, therefore, was unreasonable. CP 9. Both of these arguments were rejected by the trial court following a hearing on the motion to suppress.

At the suppression hearing, the trial court stated that it had read the briefing from all of the parties and noted that the court had also been

provided with a copy of the transcript from the hearing in front of Judge Roof on July 28, 2008 (where the State had applied for the search warrant). RP (12/17/08) 3-4; See CP 42-52. The court also heard testimony from numerous witnesses, as outlined below.

Officer Steve Valley of the Department of Corrections worked as a community corrections specialist and as a part of his job he served DOC warrants and made field contacts with offenders. RP (12/17/08) 49-51. Detective Ronald Trogdon of the Kitsap County Sheriff's Office explained that he has often worked with Steve Valley of the Department of Corrections, and that Officer Valley would occasionally ask KCSO to assist him in contacting an offender. RP (12/17/08) 6-7.

Detective Trogdon explained that in May of 2008 he had been contacted by a confidential informant who said that Reichert had been dealing drugs and that he had seen a substantial amount of marijuana at Reichert's residence on Sunde Road, just north of Silverdale. RP (12/17/08) 8-9, 31, 34.<sup>1</sup> This residence was a mobile home. RP (12/17/08) 25. The informant showed Detective Trogdon the residence in question, and Detective Trogdon later obtained a license number from a vehicle at the residence, and found that this vehicle was registered to Mr. Reichert. RP (12/17/08) 9.

---

<sup>1</sup> Detective Trogdon stated that he had previously used the informant on various occasions and that the informant had done work for him in the past. RP (12/17/08) 8.

Detective Trogdon contacted Officer Valley who stated that Mr. Reichert was DOC active, but that the address DOC had for him was not the Sunde Road address. RP (12/17/08) 10. Officer Valley was also informed that KCSO had been told that Reichert was selling marijuana and living at the unapproved residence. RP (12/17/08) 54. Detective Trogdon then checked the address that DOC had for Mr. Reichert, but found that the residence at that address was vacant. RP (12/17/08) 10. Detective Trogdon relayed this information to Officer Valley, and Officer Valley then gave Detective Trogdon another address and indicated that it appeared that Reichert had actually recently changed his registered address. RP (12/17/08) 10. Detective Trogdon then checked that address but did not find anyone around. RP (12/17/08) 10. At that point KCSO's investigation "fizzled out," and Detective Trogdon did not actively investigate Reichert until July 22. RP (12/17/08) 10-11.

Prior to July 22, Officer Valley also reviewed the DOC records or "chronos" which indicated that CCO K.C. Butler had gone to Reichert's registered address and found that it "was either lightly furnished or unoccupied." RP (12/17/08) 83-84.

On July 22, Officer Valley contacted KCSO and asked them to accompany him to the residence on Sunde Road, as Officer Valley was going to do a compliance check on Mr. Reichert. RP (12/17/08) 11-13, 56; RP

(1/6/09) 132. Officer Valley, Detective Trogdon, and another KCSO Detective then went to the Sunde Road residence. RP (12/17/08) 13. When they arrived they found a Ford Probe registered to Reichert in the driveway. RP (12/17/08) 13. Officer Valley then approached the residence and knocked on the door while the KCSO Detective's stood down off the porch. RP (12/17/08) 13, 58. Detective Trogdon explained that this was a DOC contact and that he was just there for officer safety reasons. RP (12/17/08) 13.

A person inside the residence eventually came to the door and spoke to Officer Valley through the door. RP (12/17/08) 14. Officer Valley recognized this person as Reichert. RP (12/17/08) 59. Reichert indicated that he didn't want to come outside, and said he thought the officers were there to arrest him. RP (12/17/08) 14, 59. Officer Valley responded that he needed to talk to him about his address and to verify that he was living there and that he needed Reichert to show him where he was staying. RP (12/17/08) 59. Reichert did not give a response. RP (12/17/08) 105. Officer Valley also said that the officers were not going to leave. RP (12/17/08) 14. Reichert then retreated into another part of the residence. RP (12/17/08) 14, 61.

Officer Valley knocked on the door repeatedly and explained he was there to do a compliance check and that Reichert needed to come out. RP (12/17/08) 14. Detective Trogdon could hear things moving in the residence, but did not know how many people were in the residence at that time. RP

(12/17/08) 15. Eventually, after 15 to 20 minutes, Reichert came outside and shut the door behind him. RP (12/17/08) 14, 62. Officer Valley contacted Reichert and Reichert said, “Take me to jail.” RP (12/17/08) 62.

At the suppression hearing Officer Valley was asked if he had asked Reichert whether he was living in the residence. RP (12/17/08) 62. Valley’s response at the hearing was that he did ask, but he didn’t recall what Reichert’s response was. RP (12/17/08) 62. Valley, however, explained that he kept telling Reichert that he wasn’t there to arrest him and that he only needed him to, “Show me around the house, show me your bedroom.” RP (12/17/08) 62. Reichert, however, refused. RP (12/17/08) 62-63. Detective Trogdon, however, stated that Reichert admitted he was staying at the residence and that he still had a few items at his previous residence but that he had been living at this residence. CP 46.<sup>2</sup>

---

<sup>2</sup> Detective Trogdon’s testimony that Reichert admitted to living at the residence came during the testimony he gave at the hearing on July 22, 2008 where the State sought the search warrant for the residence. CP 42-52. The transcript from this hearing, however, was before the trial court as the court specifically noted that she had been provided a copy of the transcript. See RP (12/17/08) 3-4. The issue of whether Reichert admitted he was living at the residence was only briefly addressed in the evidentiary hearing, and was not seriously contested, perhaps due to the fact that Reichert’s brief in support of the motion to suppress repeatedly admits that Reichert resided at the residence and that he was a “cohabitant” or “cotenant” at the residence. See CP 13-30 in *State v Reichert*, 38954-1-II (Reichert’s Motion to Suppress). Similarly, during argument, Reichert’s counsel only noted that when Reichert was asked about who else was in the residence, Reichert “would not tell them *who else* was living there.” RP (1/6/09) 176. Further, during the argument the trial court asked several questions and noted that Reichert had admitted living at the residence, yet neither defense counsel ever contested or denied that Reichert had made such an admission. See RP (1/6/09) 199-202. Finally, Exhibit 1A was admitted at that hearing and that exhibit confirms Detective Trogdon’s prior testimony that Reichert had admitted that he lived at the residence, as Exhibit 1A shows that Office Valley called CCO Butler and told him that Reichert had

Officer Valley secured Reichert for officer safety reasons, as the officers still did not know whether anyone else was in the residence. RP (12/17/08) 16, 62; RP (1/6/09) 133. Reichert was checked for weapons and advised of his rights, and a set of keys was found on Reichert's person at this time. RP (1/6/09) 133-34.

Officer Valley then tried the door of the residence, but found that it was locked. RP (12/17/08) 17. The officer again asked Reichert who else was inside, but Reichert responded by telling them that they were detectives and that they would figure it out. RP (12/17/08) 17.

Officer Valley then took Reichert's keys and found that one of them fit the door. RP (12/17/08) 17, 63; RP (1/6/09) 134. Officer Valley then opened the door but did not go inside. RP (12/17/08) 17, 63. Officer Valley said that he smelled a strong odor of marijuana. RP (12/17/08) 17, 63. Detective Birkenfeld went on the porch and confirmed that he smelled marijuana as well. RP (12/17/08) 17, 63-64; RP (1/6/09) 135.<sup>3</sup> The door was then shut and secured while the officers obtained a search warrant. RP (12/17/08) 17-18.

A telephonic search warrant was obtained, but the officers did not

---

admitted that he had been living at the residence for two weeks. See Exhibit 1A.

<sup>3</sup> Detective Trogdon also checked to see if he could smell marijuana, but he was unable to do so. Detective Trogdon, however, stated that he had a cold. See RP 12/17 17, 135.

immediately enter the residence since it appeared there was someone else still inside the residence. RP (12/17/08) 18. A number of other officers then responded to the scene and attempted to get the other person in the residence to come out. RP (12/17/08) 19. Eventually, after a considerable period of time, the other subject, Mr. Brandenburg, came out of the residence. RP (12/17/08) 18-19. No other occupants were found in the house, and the officers then went ahead with the execution of the search warrant. RP (12/17/08) 20. Multiple pounds of marijuana were found, as was a large amount of cash. RP (12/17/08) 20.

When Mr. Brandenburg came out of the house he was detained and placed in handcuffs and placed in a patrol vehicle. RP (1/6/09) 136. Detective Birkenfeld advised Brandenburg of his rights. RP (1/6/09) 136-37. Brandenburg waived his rights and gave a taped statement to Detective Birkenfeld. RP (1/6/09) 137, Exhibit 12. In the statement, Brandenburg stated that he and Reichert were roommates and that each had a separate room in the residence. Exhibit 12, page 2. Brandenburg also stated that the two had been living at the residence for about six months. Exhibit 12, page 3. Brandenburg admitted that there were approximately six to ten pounds of marijuana in his room. Exhibit 12, page 2. Brandenburg later gave written consent allowing the officers to search his vehicle. CP 4. In the vehicle officers found a scale, processed marijuana buds, and a 9mm handgun. CP 4.

At the conclusion of the suppression hearing the trial court gave an oral ruling denying the motions. RP (1/6/09) 206-214. Specifically, the trial court found that Officer Valley was not a “stalking horse,” but rather, Officer Valley was the one who initiated the plan to go to the residence on July 22 and requested KCSO to come with him. RP (1/6/09) 207. Further, the court found that the contact at the residence was not a pretext to obtain evidence to support a search warrant. RP (1/6/09) 207-08. The trial court also found that the Officer Valley had a specific and articulable factual basis to believe that Reichert was not residing at the address he had registered with DOC, but rather was living at the Sunde Road residence. RP (1/6/09) 209. Specifically, Officer Valley was aware that a confidential informant had told KCSO that Reichert was living at the residence and that KCSO had observed Reichert’s car at the residence previously. RP (1/6/09) 209. In addition, Reichert’s car was again at the residence on July 22. In addition, the trial court noted that Reichert was at the residence on July 22 and refused to come outside. RP (1/6/09) 209. Finally, the court found that Reichert admitted he had been living there and was also found to have a key to the residence. RP (1/6/09) 209-10.

The trial court also entered written findings of fact and conclusion of law regarding the motions to suppress. These written findings stated that:

## FINDINGS OF FACT

### I.

That Joseph A. Reichert was on active supervision with the Department of Corrections (hereinafter DOC), and was required to report his residential address. That Officer Valley had a specific and articulable factual basis to believe that Joseph Reichert was not living where he had reported and was in fact living at 3340 NW Sunde Road in Silverdale, Washington.

### II.

That on or about July 21, 2008, Officer Steve Valley contacted Kitsap County Sheriff's Office Detectives Ron Trogdon and Chad Birkenfeld to accompany him on a residential compliance check of probationer Joseph A. Reichert at the Sunde Road address. Officer Valley initiated the plan to go conduct the compliance check and requested law enforcement presence for officer safety reasons. The Court finds that Officer Valley did not act akin to a "stalking horse"<sup>4</sup> to help law enforcement evade Fourth Amendment warrant and probable cause requirements, but rather Officer Valley enlisted the police to assist his own legitimate objectives. *United States v. Harper*, 928 F.2d 894, 897 (9<sup>th</sup> Cir. 1991).

### III.

That Officer Valley announced his presence and spent some time talking to Mr. Reichert through the closed door. That after approximately twenty-five minutes Joseph Reichert exited the home on his own accord. That when Joseph Reichert exited the home he locked the door behind him and refused entry to Officer Valley but admitted that he was living there at the Sunde Road residence. Mr. Reichert's admission confirmed Officer Valley's belief that Mr. Reichert was living at the Sunde Road residence in violation of the terms of his community custody.

### IV.

Officer Valley obtained the key, tried it in the lock, unlocked the door and pushed it open. Since Mr. Reichert admitted he was living there, Officer Valley could have entered the residence to confirm, and could also have

---

<sup>4</sup> As used in the case of *U.S. v. Jarrad*, 754 F.2d 1451 (9<sup>th</sup> Cir. 1985).

searched the common areas, but could not have searched another tenant's bedroom.

**V.**

That upon opening the door, Officer Valley could smell the overwhelming odor of fresh marijuana coming from inside the residence. Detective Birkenfeld then stepped up onto the porch to confirm and he was also able to smell marijuana from at least one foot away from the threshold of the open door.

**VI.**

That the Detectives then told Officer Valley to close the door and that they would take over from that point. That Detective Trogdon applied for and obtained a telephonic search warrant for the residence.

**VII.**

That law enforcement could hear at least one other person moving about inside the residence. That Joseph Reichert refused to identify the other person or persons. The detectives read Mr. Reichert his Miranda warnings. Several additional patrol units responded to the scene and it took several hours before the other subject, later identified as Roy Brandenburg, Jr., finally came out of the house.

**VIII.**

That after the residence was cleared, the search warrant was executed and police found and seized over nine pounds of marijuana, nearly \$12,000.00 in U.S. currency, some ecstasy pills, two bulletproof vests, several calibers of ammunition, digital scales, drug smoking paraphernalia, lots of used and unused drug packaging materials, and paperwork establishing dominion and control.

**X.**

That the officers advised Mr. Brandenburg of his Miranda rights, after which he gave a confession and also provided consent to search his vehicle parked outside the residence. Inside Mr. Brandenburg's vehicle, the officers found more marijuana, more cash, a handgun, and paperwork establishing dominion and control.

**XI.**

That an additional search warrant was obtained for Joseph Reichert's business, Underground Ink, where cash was seized that the narcotics K-9 alerted upon, as well as business

records, bank records, and other documentary evidence.

## CONCLUSIONS OF LAW

### I.

That the above-entitled Court has jurisdiction over the parties and the subject matter of this action.

### II.

That Joseph Reichert was on active supervision with DOC and was required to report his residential address to his CCO. That Officer Valley suspected that Mr. Reichert was not residing at the address at which he was registered. The contact between Officer Valley and the KCSO detectives was not a pretext to carry out an unlawful search nor was it a pretext to obtain evidence to support a search warrant; rather, it was a valid and supported request for back-up to conduct a residential compliance check.

### III.

Washington recognizes a warrantless search exception, when reasonable, to search a probationer and his home or effects. A probation 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. *State v. Winterstein*, 140 Wash.App 676 at 691. A well founded suspicion is analogous to the cause requirements of a *Terry* stop. *State v. Simms*, 10 Wn. App. at 87, *Terry v. Ohio*, 392 U.S. 1 at 9 (1968). Reasonable suspicion for a *Terry* stop must be based upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the search]." *Terry*, 392 U.S. at 21. Here, there were specific and articulable facts to support the belief that a violation of probation occurred, including Mr. Reichert's own admission that he was residing at an address different than the one he had reported to the DOC.

### IV.

That a person on community custody such as Mr. Reichert does not enjoy the same protection under the Fourth Amendment as someone not under supervision. Mr. Reichert admitted to residing at the Sunde Road residence and under *Winterstein* Officer Valley could have entered the residence to confirm that and could have searched the

common areas but not Mr. Brandenburg's bedroom. Further, that using the key found in Mr. Reichert's pocket to check to see whether it opened the door was not a violation of the Fourth Amendment.

**V.**

Under the case law such as *Winterstein* and *State v. McKague*, 143 Wn. App. 531 (2008), the applicable standard for a warrantless search is whether there is a well-founded suspicion that a violation of probation had occurred. In the present case, Officer Valley had a well founded suspicion that a violation of probation had occurred based on the information from other law enforcement officers that Reichert was living at the Sunde Road residence and from the fact that there was at least one vehicle outside the residence that was registered in Mr. Reichert's name. Officer Valley's suspicions were then confirmed when Reichert admitted that he was living at the Sunde Road residence.

**VI.**

That Officer Valley met this constitutional test based on the information he had from law enforcement, the fact that there was at least one vehicle outside the residence that was registered in Mr. Reichert's name, and Mr. Reichert's own admission to living at a different residence from the one at which he was registered.

**VII.**

That because Officer Valley had a well founded suspicion that a violation of probation had occurred, he was authorized under Washington law to conduct a warrantless entry and search of the residence. Officer Valley, therefore, was authorized to open the door to the residence and his actions in this regard were lawful and did not violate Reichert's or Brandenburg's Fourth Amendment rights.

**VIII.**

Therefore, the Defendants' motions to suppress are hereby denied.

CP 120-25.

Following the trial court's denial of the defense motions to suppress,

Brandenburg entered a stipulation to facts to a second amended information and was found guilty by the trial court. CP 30-97, 98, 102-05.

### III. ARGUMENT

**A. THE TRIAL COURT DID ERR IN FINDING THAT DOC OFFICER VALLEY HAD A WELL FOUNDED SUSPICION THAT REICHERT WAS LIVING AT THE RESIDENCE IN QUESTION IN VIOLATION OF HIS CONDITIONS OF SUPERVISION BECAUSE THE RECORD CONTAINS SUBSTANTIAL EVIDENCE SUPPORTING THE TRIAL COURT'S FINDING OF FACT.**

Brandenburg argues that the trial court erred in finding that Officer Valley had a well-founded suspicion that Reichert was living at the residence in violation of the terms of his supervision. App.'s Br. at 38-43. This claim is without merit because the trial court's findings were supported by substantial evidence and because the findings of fact supported the court's conclusions of law.

In reviewing a trial court's decision on such a matter, this Court is to apply a substantial evidence test in its review of a defendant's challenge to the trial court's finding of facts following his motion to suppress. *State v. McKague*, 143 Wn. App. 531, 542 (2008), citing *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006). "Substantial evidence is 'evidence sufficient to persuade a fair-minded, rational person of the truth of the

finding.” *McKague*, 143 Wn. App. at 542, citing *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (quoting *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). Where findings of fact and conclusions of law are supported by substantial but disputed evidence, an appellate court is not to disturb the trial court's ruling. *State v. Smith*, 84 Wn.2d 498, 505, 527 P.2d 674 (1974). Credibility determinations are for the trier of fact and not subject to appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Finally, the appellate court reviews de novo the trial court's challenged conclusions of law. *McKague*, 143 Wn. App. at 542, citing *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

Under the federal and state constitutions, an exception to the warrant requirement exists for searches of probationers. *State v. Patterson*, 51 Wn. App. 202, 204-07, 752 P.2d 945, review denied, 111 Wn.2d 1006 (1988). Parolees and probationers have a diminished right of privacy because of the State's continuing interest in the defendant and supervision of the defendant as a probationer. *State v. Lucas*, 56 Wn. App. 236, 240, 783 P.2d 121 (1989) review denied, 114 Wn.2d 1009, 790 P.2d 167 (1990).

This warrant exception is codified in (former) RCW 9.94A.631, which states in 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.<sup>5</sup>

The Washington Supreme Court has defined “reasonable cause” as a well-founded suspicion of a probation violation; probable cause is not required. *State v. Fisher*, 145 Wn.2d 209, 224-28, 35 P.3d 366 (2001). This Court also reasoned that a “well founded suspicion” is analogous to the “reasonable suspicion” requirement of a *Terry* stop. *State v. Winterstein*, 140 Wn. App. 676, 690-92, 166 P.3d 1242 (2007). A reasonable suspicion requires only sufficient probability, not absolute certainty. *New Jersey v. T.L.O.*, 469 U.S. 325, 346, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).<sup>6</sup>

This court has recently addressed the requirements for entry and search of a suspected probationer's residence. *See State v McKague*, 143 Wn. App. 531, 541-42, 178 P.3d 1035 (2008); *State v. Winterstein*, 140 Wn. App. 676, 690-92, 166 P.3d 1242 (2007).

---

<sup>5</sup> Effective July 26, 2009 this section was amended to read:

“If 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.”

<sup>6</sup> Although *Brandenburg* does not appear to seriously contest this point on appeal, Washington law also provides that when conducting a search of a probationer's residence that is shared with other occupants, the DOC officers may search the common areas of the residence as well as the private areas controlled by the probationer. *See e.g., State v. Winterstein*, 140 Wn. App. 676, 692 (2007) (search should have been limited to those rooms known to belong to the offender and the common areas of the residence); *State v McKague*, 143 Wn. App. 531, 545, 178 P.3d 1035 (2008)(same). The search at issue in the present case involves only the act of opening the front door to the residence shared by *Brandenburg* and *Reichert* and thus clearly involved a common living area. The question before this court is

In *Winterstein*, the defendant had shown his CCO his residence and his room at 646 Englert Road. Later the defendant notified DOC, but not his CCO, that he had a new address of 646 1/2 Englert Road. This address change, however, was a ruse as the defendant still lived at 646 Englert Road and the 646 1/2 Englert Road residence was a storage trailer. *Winterstein*, 140 Wn. App. at 680-84.

Thereafter, the CCO reasonably suspected that the defendant had violated his probation conditions and the CCO went to 646 Englert Road to search it. While searching the common areas of the home for, the officers observed chemicals used to manufacture methamphetamine. The officers then applied for a search warrant and seized the contraband, charging the defendant and one of his roommates with unlawful manufacture of a controlled substance. *Winterstein*, 140 Wn. App. at 679-81.

The Defendant challenged the search, arguing that the CCO lacked the legal authority to search the 646 Englert Road residence because it was not his. *Winterstein*, 140 Wn. App. at 690. This Court noted that:

Washington recognizes a warrantless search exception, when reasonable, to search a parolee or probationer and his home or effects. 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.

---

thus limited to whether Officer Valley acted lawfully in opening the door of the residence.

*Winterstein*, 140 Wn. App. at 691 (citations omitted). This Court also reasoned that “[a] ‘well founded suspicion’ is analogous to the cause requirement of a Terry stop.” *Winterstein*, 140 Wn. App. at 691 (internal quotation marks omitted) (*quoting State v. Simms*, 10 Wn. App. 75, 87, 516 P.2d 1088 (1973)). In addition, because “Washington caselaw does not appear to address the lengths to which an officer must go to ensure that the address he or she is searching is, indeed, the probationer's residence,” this Court chose “to apply *Terry's* ‘specific and articulable facts’ standard to [determine] whether officers are searching an appropriate address.” *Winterstein*, 140 Wn. App. at 691-92 (*quoting Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

Similarly, in *McKague* this Court reiterated that 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. *McKague*, 143 Wn. App. at 541 (*citing Winterstein*, 140 Wn. App. at 691). Furthermore, this Court held that officers may search an offender’s home so long as the search was reasonable and the officers had “specific and articulable facts which, taken together with rational inferences from those facts,” support that the searched residence was the offender’s residence. *McKague*, 143 Wn. App. at 542, *citing Terry v. Ohio*,

392 U.S. at 21, 88 S. Ct. 1868; *Winterstein*, 140 Wn. App. at 691-92.

In the present case DOC Officer Valley had been informed that a confidential informant had told KCSO that Reichert had been dealing drugs and that he had seen a substantial amount of marijuana at Reichert's residence on Sunde Road. RP (12/17/08) 8-9, 31, 34, 54. In addition Officer Valley knew that KCSO had checked another address that DOC had for Reichert but found that the residence at that address was vacant. RP (12/17/08) 10. DOC Officer Valley also reviewed the DOC records which indicated that CCO K.C. Butler had previously gone to a second address that DOC had for Reichert, but CCO Butler had found that the residence at this address "was either lightly furnished or unoccupied." RP (12/17/08) 83-84.<sup>7</sup>

Further, when DOC Officer Valley and the other officers arrived at the Sunde Road residence on July 22, Reichert's car was found to be at the residence. RP (12/17/08) 58. In addition, when Officer Valley knocked at the door, Reichert eventually came to the door and Officer Valley recognized him. RP (12/17/08) 14, 59. Reichert indicated that he didn't want to come outside, and said he thought the officers were there to arrest him. RP (12/17/08) 14, 59. Officer Valley responded that he needed to talk to him

---

<sup>7</sup> Officer Valley also informed Detective Trogdon that DOC had a second address for Reichert. RP (12/17/08) 10. Detective Trogdon, however, checked this second address but did not find anyone around. RP (12/17/08) 10.

about his address and to verify that he was living there and have Reichert show him where he was staying. RP (12/17/08) 59. Reichert, however, did not give a response and eventually retreated into another part of the residence. RP (12/17/08) 14, 61, 105.

Eventually, after 15 to 20 minutes, Reichert came outside and shut the door behind him. RP (12/17/08) 14, 62. Officer Valley contacted Reichert and Reichert said, "Take me to jail." RP (12/17/08) 62. Reichert was also found to have several keys in his pocket, one of which fit the front door of the residence. RP (12/17/08) 17, 63; RP (1/6/09) 134.

These facts, when taken together, supported the trial court's finding that Officer Valley had a well-founded suspicion that Reichert was living at the address (which was not the address registered with DOC) and that a violation of probation, therefore, had occurred.

As the trial court noted, Officer Valley's reasonable suspicion was "confirmed" by Reichert's admission that he was living at the residence. CP 121. This "confirmation," however, was not necessary. The legal requirement is only that Officer Valley had a well-founded suspicion. Neither probable cause nor absolute certainty is required. See, *Fisher*, 145 Wn.2d at 224-28, *Winterstein*, 140 Wn. App. at 690-92, and *New Jersey v. T.L.O.*, 469 U.S. 325, 346, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).

In sum, Officer Valley had a well founded suspicion that Reichert was living at the residence based upon: (1) The confidential informant's tip that Reichert was living at the residence (which was independently corroborated by the other factors below); (2) that Reichert's two previous residence were checked by either KCSO or DOC and found to be either vacant or sparsely furnished; (3) Reichert's car being present at the residence; (4) Reichert himself being present at the address; (5) Reichert's behavior and statements which indicated that he was aware of the violation and fearful of being arrested; and (6) Reichert's possession of a key to the residence.

As the record contained substantial evidence that supported the trial court's finding that Officer Valley had a well-founded suspicion that Reichert was living at the residence in violation of the terms of his supervision, the trial court did not err.

**B. THE TRIAL COURT DID ERR IN REJECTING BRANDENBURG'S CLAIM THAT DOC OFFICER VALLEY'S CONTACT WITH REICHERT AT THE RESIDENCE WAS A MERE PRETEXT OR AN EFFORT TO AVOID THE WARRANT REQUIREMENT BECAUSE THE RECORD CONTAINS SUBSTANTIAL EVIDENCE SUPPORTING THE TRIAL COURT'S FINDING OF FACT THAT OFFICER VALLEY DID NOT ACT AS A STALKING HORSE AND THAT OFFICER VALLEY ENLISTED THE POLICE TO ASSIST HIM IN HIS OWN LEGITIMATE OBJECTIVES.**

Brandenburg next claims that the trial court erred in denying his claim that DOC was merely acting as a "stalking horse" for law enforcement. App.'s Br. at 37. Brandenburg argues that the DOC impermissibly conducted the search of his residence on behalf of law enforcement to evade the warrant requirement, in violation of the Fourth Amendment. This claim is without merit because the trial court's findings were supported by substantial evidence and because the findings of fact supported the court's conclusions of law.

Although parole officers may conduct supervisory searches without a warrant, they may not act on the request of and in concert with law enforcement officials to evade the warrant requirement. *United States v. Merchant*, 760 F.2d 963, 969 (9th Cir.1985) (search condition imposed on probationer cannot be used as law enforcement tool), *cert. dismissed*, 480 U.S. 615, 107 S. Ct. 1596, 94 L. Ed. 2d 614 (1987); *United States v. Jarrad*,

754 F.2d 1451, 1453 (9<sup>th</sup> Cir. 1985)(parole officer may not act as “stalking horse” for police investigation); *Smith v. Rhay*, 419 F.2d 160, 162 (9<sup>th</sup> Cir.1969).

Whether a parole officer initiated a search in performance of his or her parole-officer duties or acted as a “stalking horse” for police is a question of fact. *Jarrad*, 754 F.2d at 1454 (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 288, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982)). Here, the trial court found that the DOC initiated and oversaw the search and the KCSO detectives merely assisted, and the trial court thus concluded that the search was lawful. CP 121, 123.

Appellate review of a conclusion of law based upon findings of fact is limited to determining whether the trial court's findings are supported by substantial evidence and, if so, whether those findings support the conclusions of law. *State v. Graffius*, 74 Wn. App. 23, 29, 871 P.2d 1115(1994) (citing *American Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990)). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Graffius*, 74 Wn. App. at 29, 871 P.2d 1115. Where there is substantial evidence in the record supporting the challenged facts, those facts are binding on appeal. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

As a search warrant was obtained before any of the officers actually walked into the house, the only search at issue in the present case is the search that occurred when DOC Officer Valley opened the door to the residence and thereby noticed the odor of marijuana. Thus, the question is whether Officer Valley was merely acting as a stalking horse for KCSO when he opened the door of the residence.

Substantial evidence supports the trial court's finding that the DOC conducted the search for supervisory purposes. Officer Valley testified that he contacted the detectives and asked for their assistance. RP (12/17/08) 11-13, 56; RP (1/6/09) 132. Although Officer Valley initially received the information about Reichert from KCSO, nothing in the record indicates that KCSO sought out Valley as a means of conducting a warrantless search. *See United States v. Harper*, 928 F.2d 894, 897 (9th Cir.1991) (appropriate inquiry is whether probation officer used the probation search to help police evade Fourth Amendment warrant and probable cause requirements or whether probation officer enlisted police to assist his own legitimate objectives); *Jarrad*, 754 F.2d at 1454 (parole officers often receive information about their parolees from police-prior police involvement does not indicate that police initiated search); *Simms*, 10 Wn. App. at 86, 516 P.2d 1088 (parole officer may enlist aid from law enforcement in conducting

legitimate parole search).<sup>8</sup>

In the present case the evidence before the trial court was that it was Officer Valley who initiated the idea to go to the residence on July 22 and that it was Valley who contacted KCSO and asked them to accompany him to the residence while he conducted a compliance check on Mr. Reichert. RP (12/17/08) 11-13, 56; RP (1/6/09) 132. In addition, it was Officer Valley who approached the residence and knocked on the door while the KCSO Detective's stood down off the porch. RP (12/17/08) 13, 58. Detective Trogdon explained that this was a DOC contact and that he was just there for officer safety reasons. RP (12/17/08) 13.

This evidence represents substantial evidence that supported the trial court's finding that Officer Valley initiated the plan to go and conduct the compliance check and requested that the KCSO detectives accompany him for officer safety reasons. This factual finding in turn supported the trial

---

<sup>8</sup> Brandenburg also cites *Smith v. Rhay*, 419 F.2d 160 (9th Cir.1969), in support of his argument that Officer Valley acted solely as the agent of the KCSO detectives. See App.'s Br at 26-28. The situation in the present case, however, is distinguishable from that in *Smith*. In *Smith*, the parole officer was enlisted by the police to locate the parolee as part of their criminal investigation. *Smith*, 419 F.2d at 162-63. The police officers then accompanied the parole officer on the search at their own request. *Id.* at 162-63. In contrast, the KCSO detectives in the present case were asked by Officer Valley to accompany him to the residence while he conducted a compliance check. RP (12/17/08) 11-13, 56; RP (1/6/09) 132. Furthermore, the Ninth circuit in *Jarrad* also rejected a similar argument and noted that the mere fact that a parole search followed after the police had already initiated an investigation (and shared this information with the parole officer) did not in itself indicate that the parole search was initiated by the police officers. See *U.S. v. Jarrad*, 754 F.2d 1451, 1454 (9<sup>th</sup> Cir. 1985).

court's legal conclusion that the contact was not a pretext to carry out an unlawful search nor was it a pretext to obtain evidence to support a search warrant. Brandenburg's argument to the contrary, therefore, must fail.

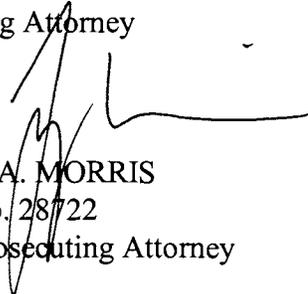
#### IV. CONCLUSION

For the foregoing reasons, Brandenburg's conviction and sentence should be affirmed.

DATED November 2, 2009.

Respectfully submitted,

RUSSELL D. HAUGE  
Prosecuting Attorney



JEREMY A. MORRIS  
WSBA No. 28722  
Deputy Prosecuting Attorney

DOCUMENT2