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41705-7-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

State of Washington
Respondent

v.

KATHRYN A. LORAN
Appellant

41705-7

On Appeal from the Superior Court of Clallam County

10-1-00214-5

The Honorable Ken Williams

BRIEF OF APPELLANT

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II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. The trial erroneously denied Appellant's motion to suppress evidence obtained in violation of Wash. Const. art. 1, § 7 and the Fourth Amendment.
2. The court's CrR 3.6 Findings 3 and 4 are actually erroneous conclusions of law.

B. Issues Pertaining to Assignments of Error

1. Does the diminished expectation of Fourth Amendment protection of the sanctity of the home applicable to convicted felons on probation in lieu of a suspended sentence also extend to a juvenile has not been convicted but who is under the court's supervision subject to a deferred disposition in which no finding of guilt has been entered or will be entered provided the defendant complies with the terms of the deferment?
2. Even supposing the Court extends the diminished expectation of privacy to community supervisees who have not been convicted or sentenced, do all probationers retain their constitutional rights regarding new charges as distinct from probation revocation proceedings?

III. STATEMENT OF THE CASE

In 2009, as a juvenile, Appellant, Kathryn A. Loran, came before the court for misdemeanor possession of a legend drug. Findings 1, 2, CP 58. She stipulated to the allegations and received a deferred disposition, whereby the charge would be dismissed if she obtained treatment and complied with the order of deferment. 9/21 RP 28.¹ Otherwise, the court would enter a finding of guilt based on the stipulated facts. 9/21 RP 35; Finding 1. CP 58.

Pursuant to the Juvenile Justice Act (JJA), the court imposed community supervision for the duration of the deferment period. RCW 13.40.127(4); Exhibit 1, Supp. CP. The deferred disposition supervisor was juvenile probation officer Joleen Goodrich. 9/21 RP 26.

Loran got off to a rocky start. She failed to show up for treatment and did not maintain contact with Goodrich. Finding 6, CP 59; Memorandum Opinion, CP 51. The system worked, however. Pursuant to statute and the terms of the order of deferment, Goodrich reported Loran's non-compliance and the court issued a bench warrant. 9/21 RP 29, 49;

¹ The verbatim reports of proceedings are in two volumes. The hearings of interest are the Suppression on September 21, 2010 (blue), and the Stipulated Trial and Sentencing on January 19, 2011 (green).

Finding 8, CP 59. Goodrich was able to obtain Loran's current address from the department of child protective services.² 9/21 RP 30.

On May 20, 2010, Goodrich called the Port Angeles Police Department and requested officer support in serving her warrant. RP 30. Two officers accompanied Goodrich to the apartment where Loran — now an adult³ — was living with her boyfriend, her baby's father, Scott Horn. CP 51; 9/21 RP 30.

While Goodrich waited in the parking lot, the officers approached the apartment and knocked. 9/21 RP 31. Loran opened the door, and the officers arrested her and took her into custody. 9/21 RP 50. Officer Andrew Heuett handcuffed Loran and removed her to a patrol car where she was confined in the back seat. 9/21 RP 32. Heuett did a protective sweep of the apartment in conjunction with the arrest, but found nothing of interest. 9/21 RP 49, 51.

Having successfully completed her court-appointed mission, Goodrich did not leave. Instead, she approached Loran where she was handcuffed in the police car and questioned her. 9/21 RP 39. Goodrich asked if Loran would be able to produce a clean UA sample at that moment. Loran said she would not, because she had used heroin within

² Loran had a 2-month-old infant. RP .

³ Date of birth 04-30-1991. CP 63.

the past couple of days. 9/21 RP 32-33; Finding 10, CP 59.⁴ Loran may or may not have been advised of her Miranda rights. All Heuett could say for sure was that he Mirandized her at some point before transporting her to the police station. 9/21 RP 53. While they were en route, the officer in the apartment informed Heuett about the pills Goodrich had found concealed in the dresser. Heuett asked Loran about them, and she told him they were Vicodin and Percocet. 9/21 RP 50, 54. Goodrich would later pass along to the police the incriminating statement Loran had made to her in the patrol car. 9/21 RP 36, 38.

After obtaining an unwarned custodial statement from Loran about an uncharged current offense, Goodrich still did not leave. Instead, she entered Loran and Horn's apartment where a second officer was waiting with the baby until CPS arrived. 9/21 RP 34, 54. It occurred to Goodrich that while she was there she might as well search the place. 9/21 RP 41. "And I was standing there with [the officer and the baby], and then all of a sudden I just decided to go into her room because I was looking for the drugs that she had claimed she had done." 9/21 RP 34. Goodrich's sole rationalization for doing this was the custodial statement she had just obtained from Loran. *Id.* "[I]t's something that we do on probation, if we have reason to believe that there could potentially be something there, and

⁴ Goodrich already had an unfounded suspicion that Loran was using drugs. 9/21 RP 49.

she had just admitted to me that she had done drugs. So I was there, it was part of my job, so I did it.” 9/21 RP 44.

Loran had not told Goodrich where she had used drugs. Specifically, she did not say she used drugs in the apartment. Moreover, Goodrich knew another adult, Scott Horn, also lived in that apartment. 9/21 RP 40.

The only bedroom appeared to be occupied by two adults. 9/21 RP 42. Goodrich spotted a dresser with “girl-stuff” on it. She started opening the drawers. 9/21 RP 42. In a closed drawer, Goodrich found a small closed box. She opened the box and found some pills inside. 9/21 RP 34, 43. The box was definitely closed until she opened it. 9/21 RP 43-44.

These pills resulted in charges against Loran of two counts of possession of a controlled substance other than marijuana. CP 52; 93-94. Count I was dismissed for lack of evidence. 1/19 RP 3. Loran was convicted on Count II after a stipulated facts trial and sentenced to 30 days. 1/19 RP 4. In recognition of her successful commitment to recovery — and because she was a first time offender — the court converted the jail time to 240 hours community service. 1/19 RP 11, 12, 13; CP 63, 66.

On appeal, Loran seeks to reverse her conviction because Goodrich's warrantless search of her home violated Washington Constitution article 1, § 7 and the Fourth Amendment. CP 8.

Loran moved under CrR 3.6 to suppress the physical evidence, alleging the warrantless search of her home was unlawful. At the suppression hearing on September 21, 2010, the State argued that a juvenile who receives a deferred disposition on a misdemeanor is subject to warrantless searches of her home. 9/21 RP 57. The court requested additional briefing. 9/21 RP 70. Ultimately, the court was persuaded that a juvenile order of deferred disposition was equivalent to probation, such that Loran was subject to the same diminished expectation of privacy as a convicted adult felon whose sentence of incarceration was suspended. The court denied the motion to suppress. CP 58-60.

Loran filed this timely appeal. CP 8.

IV. **ARGUMENT**

1. **THE SEARCH OF LORAN'S HOME VIOLATED WASH. CONST. ART 1, § 7 AND THE FOURTH AMENDMENT.**

A. **Summary of the Argument:** The State characterized Loran as a "juvenile probationer" subject to warrantless arrest under RCW

9.94A.631.⁵ CP 53. This was erroneous and led the court to overlook the dispositive fact that distinguished Loran’s case from the “diminished expectation of privacy” line of cases upon which the court erroneously relied.

The critical factor was not that the court was supervising Loran as a juvenile rather than an adult. It was that Loran was not in fact a “probationer.” As distinguished from the defendants featured in the “diminished expectation” cases, Loran had never been convicted of a crime and was never sentenced to a term of imprisonment that was suspended and in lieu of which she was serving “probation.” Loran was not “on probation” in that sense. This was critical, because the sole justification for depriving a convicted felon of his right to the constitutional protection of the sanctity of his home is that he has been convicted of a crime and is serving a sentence, albeit a suspended one.

⁵ RCW 9.94A.631 Violation of condition or requirement of sentence — Security searches authorized — Arrest by community corrections officer — Confinement in county jail.

(1) If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant, pending a determination by the court or a department of corrections hearing officer. 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. ...

(3) A community corrections officer may also arrest an offender for any crime committed in his or her presence. The facts and circumstances of the conduct of the offender shall be reported by the community corrections officer, with recommendations, to the court or department of corrections hearing officer.

B. Warrantless Searches Are Unlawful: The Fourth

Amendment provides in part: “The right of the people to be secure in their persons [and] houses . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation.” U.S. Const. amend. IV. Our state constitution likewise provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7.

Subject to a few “jealously and carefully drawn exceptions” warrantless searches and seizures are unreasonable per se under art. 1, § 7 of the Washington Constitution. *State v. Neth*, 165 Wn.2d 177, 182-83, 196 P.3d 658 (2008). The burden is on the prosecutor to show that a warrantless search is reasonable under one of the recognized exceptions. *State v. Hendrickson*, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996).

All evidence derived from government illegality must be excluded from Washington courts for all purposes. *State v. Chenoweth*, 160 Wn.2d 454, 473, 158 P.3d 595 (2007); *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Suppression must inevitably follow whenever there is a meaningful causal connection between the State’s unlawful activity and the acquisition of the evidence. That is, if the evidence is “the fruit of the poisonous tree.” *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

C. *The Search Violated Several Statutes*: In Washington, protection of the people's privacy is paramount:

The federal exclusionary rule is a judicially-created prophylactic measure designed to deter police misconduct. It applies only when the benefits of its deterrent effect outweigh the cost to society of impairment to the truth-seeking function of criminal trials. In contrast, the state exclusionary rule is constitutionally mandated, exists primarily to vindicate personal privacy rights, and strictly requires the exclusion of evidence obtained by unlawful governmental intrusions.

Chenoweth, 160 Wn.2d at 472, n.14, citing *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). Accordingly, mandatory suppression is not limited to constitutional violations. It applies equally evidence obtained in violation of statute. See *State v. Bartels*, 112 Wn.2d 882, 886-90, 774 P.2d 1183 (1989). Questions of statutory interpretation are reviewed de novo. *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 456, 219 P.3d 686 (2009).

The sole legislative authority for both the granting and revocation of probation by the superior court judges of this state is found in RCW 9.92.060, RCW 9.95.200 and RCW 9.95.220. *State v. Riddell*, 75 Wn.2d 85, 87, 449 P.2d 97 (1969).

RCW 9.92.060 says that "whenever a person is convicted of a crime," the court may suspend the sentence. RCW 9.95.200 says that "[a]fter conviction by plea or verdict of guilty of any crime," the court may

impose probation. RCW 9.95.220 authorizes “the state parole officer or other officer under whose supervision the probationer has been placed” to “cause the probationer to be brought before the court wherein the probation was granted,” if the parole officer has “reason to believe such probationer is violating the terms of his or her probation, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life[.]” The court may then revoke and terminate the probation and impose the suspended sentence. If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed.

RCW 9.95.220(2) permits the department of corrections to issue an arrest warrant for a probationer under DOC supervision who violates a condition of community custody.

Under these statutes, it is the conviction that is the prerequisite for the diminished expectation of privacy. *Riddell*, 75 Wn.2d at 87.

Probation is constitutionally indistinguishable from parole, because sentence has previously been imposed. *State v. Simms*, 10 Wn. App. 75, 79, 516 P.2d 1088 (1973) (emphasis added.)

Loran, by contrast, had not been convicted and sentence had not been imposed.

D. *A Deferred Disposition Does Not Follow a Conviction*: The State erroneously relied on RCW 9.94A.631, which by its terms, applies solely to convicted offenders who have violated the conditions of a sentence. RCW 9.94A.631(1). The State relied on *State v. Campbell*, 103 Wn.2d 1, 23, 691 P.2d 929 (1984), for the proposition that Loran had a diminished expectation of privacy in her home. CP 53. But Campbell was a convicted felon. He was a prison inmate on work release. *Campbell*, 103 Wn.2d at 22-23.

The court here entered findings of fact that a finding of guilt is a prerequisite to granting a deferred disposition under RCW 13.40.127 and to suspending the juvenile's driver's license. Findings 3 & 4, CP 58-59. These are not facts but erroneous conclusions of law.⁶

First, when granting a deferred disposition, the court has discretion to impose any conditions of supervision that it deems appropriate. RCW 13.40.127(5). Second, under RCW 13.40.127(3)(a), the juvenile stipulates to the facts alleged in the police report. But the stipulated report will be entered (in the future) and used to support a finding of guilt and to impose a disposition only if the juvenile fails to comply with terms of supervision. RCW 13.40.127(3)(b).

⁶ Incorrectly labeled findings will be reviewed by the appropriate standard. *State v. Evans*, 80 Wn. App. 806, 820, 820 n.35, 911 P.2d 1344 (1996).

But RCW 13.40.127(4) says: “Following the stipulation, acknowledgment, waiver, and entry of a finding or plea of guilt, the court shall defer entry of an order of disposition of the juvenile.” Thus, RCW 13.40.127(4) contradicts RCW 13.40.127(3)(b), whereby the stipulated facts will be used to find guilt only if the juvenile does not comply. If the stipulation will not be used to find guilt so long as the juvenile complies with the terms of the disposition, then the court must enter the order deferring disposition before a finding of guilt.

“If a statute is ambiguous, the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary.” *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005). Any part that is susceptible to more than one meaning must be strictly construed against the State and in favor of the defendant. *State v. Gore*, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984).

Lenity requires reading the RCW 13.40.127 as instructing the court not to enter a finding of guilt so long as the juvenile complies with the terms of the deferment. This is consistent with the adult deferred prosecution scheme.

The corresponding adult statute is chapter 10.05 RCW. It permits the court to enter an order deferring prosecution conditioned on the accused’s waiver of his trial rights and his stipulation to the admissibility

and sufficiency of the facts contained in the written police report which will be entered and used to support a finding of guilty if the court finds cause to revoke the order granting deferred prosecution. RCW 10.05.020(3). As a condition of granting deferred prosecution, the court may order supervision of the petitioner during the period of deferral. RCW 10.05.170. In a jurisdiction with a probation department, the court may appoint the probation department to supervise the petitioner. In a jurisdiction without a probation department, the court may appoint an appropriate person or agency to supervise the petitioner. A supervisor appointed under this section shall be required to do at least the following:

...(2) At least once every month make contact with the petitioner or with any agency to which the petitioner has been directed for treatment as a part of the deferral.

E. **Diminished Rights Limited to Revocation Proceedings**: The full protection of the Fourth Amendment is not the only constitutional rights convicted probationers lose. They also are not entitled to a jury trial or to face their accusers when brought before the court in a probation revocation proceeding. *Riddell*, 75 Wn.2d at 87, citing Const. art. 1, 22.

But it is well established that “[b]eing on probation does not deprive the probationer of his basic constitutional rights, including protection from illegal searches and seizures.” *U.S. v. Rushlow*, 385 F.

Supp. 795, 797 (D.C.Cal. 1974). Thus, evidence seized in a warrantless search that violates the Fourth Amendment not admissible in a new prosecution for possession of the items seized. Rather, such evidence is admissible solely in proceedings to revoke the probation.

In *U.S. ex rel. Lombardino v. Heyd*, 318 F. Supp. 648 (D.C.La. 1970), a probationer was subjected to an unconstitutional warrantless search of his person, and he was charged with possession of marijuana found in his pocket. The marijuana was suppressed in the possession prosecution. It was admissible, however, to prove a probation violation at his revocation proceedings. *Lombardino*, 318 F. Supp. at 650.

“Lombardino was afforded protection from the unlawful search and seizure when the marijuana was suppressed and the possession charge dropped. Lombardino’s right to be free from ‘unreasonable searches and seizures’ was recognized to this extent.” *Id.*

The Washington case of *State v. Kuhn*, 7 Wn. App. 190, 191, 499 P.2d 49 (1972) cites *Lombardino* and recognizes that the abrogation of fundamental constitutional protections is limited to probation revocation proceedings. *Kuhn*, 7 Wn. App. at 193. “Clearly, probationers are entitled to all of the basic constitutional rights, including protection from illegal searches and seizures, where the probationer is an accused in a criminal prosecution.” *Id.*

Moreover, Goodrich had sufficient cause to arrest Loran based on her failure to engage in treatment and make herself available for supervision. The warrantless search of the home was entirely gratuitous. *See, e.g., Martin v. U.S.*, 183 F.2d 436, 439 (C.A.4 1950).

Besides not being a convicted probationer, Loran, was not facing revocation proceedings. She was facing new charges regarding which she did have the right to a jury trial and to face her accusers. Accordingly, the court explicitly advised her on the record that she possessed those rights. She had to waive them in open court on the record in order to proceed with a stipulated facts trial. 1/19 RP at 4. This circumstance further distinguishes this case from those discussed in the State's authorities.

Thus, even if Loran's deferred disposition diminished her Fourth Amendment rights to the same extent as a conviction, sentence and probation, any evidence unlawfully seized would be admissible solely in proceedings to revoke her probation.

F. **No Articulate Reason to Search the Home:**

(i) *Loran's Custodial Statement Was Not Grounds to Search:*

Goodrich testified that she searched Loran's home because Loran had said she had used heroin recently. 9/21 RP 44. This was not a valid reason. Had Goodrich attempted to obtain a warrant to search the domicile, no magistrate would have granted it. A warrant to search a home requires a

showing of a nexus between a specific crime and the place to be searched.

State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

Goodrich had no reason to imagine proof of any offense involving heroin would be found in the apartment and could articulate no nexus whatsoever between Loran's statement and her home. At best, Loran's statement might have provided probable cause for Goodrich to seek a warrant to search the home. But the particular statement Loran made did not even do that. Loran did not say she used heroin in the apartment. She gave no details about when or where she used.

The only evidence Goodrich could arguably have been justified in seeking was evidence that Loran had not complied with the juvenile court's order to obtain treatment and did not maintain contact with Goodrich. No such evidence could possibly have been found in a closed box in a closed underwear drawer in the bedroom of Loran's apartment.

(ii) *The Search Cannot Be Justified as Incident to Arrest*: Loran was securely in custody in the police car and well removed from the search scene. There was no question of exigent circumstances.

(iii) *No Exigent Circumstances*: For the same reason, no exigent circumstances justified a search of Loran's home.

(iv) *No Open View*: There can be no suggestion that the "open view" doctrine justified this search. A law enforcement officer lawfully

present may seize items that are in open view. *Campbell*, 103 Wn.2d at 23, citing *State v. Seagull*, 95 Wn.2d 898, 632 P.2d 44 (1981). Goodrich might conceivably be called a law enforcement officer, but she was not lawfully present in Loran's home. Her lawful participation in the events of May 20 consisted solely in bringing the police to the police and informing them of the arrest warrant.

G. **The Remedy is to Reverse the Conviction:** Community supervision provider Goodrich violated Kathryn Loran's right to be free from warrantless searches of her home. Goodrich had no business being in Loran's home in the first place. She had performed her duty to the court by reporting Loran's non-compliance with the deferred disposition and obtaining an arrest warrant. Once she turned that over to the police, she had no rights beyond those of any other civilian spectator.

H. **The Court Should Also Dismiss the Prosecution:** After suppressing the unlawfully obtained evidence, the remaining evidence is insufficient to establish the essential elements of the crime. "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998), quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

IV. **CONCLUSION**

For the foregoing reasons, the Court should reverse Ms. Loran's conviction, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

Respectfully submitted this 22nd day of April, 2011.



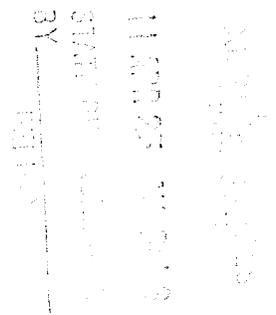
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Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

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