

NO. 42691-9-II

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

STATE OF WASHINGTON, Respondent

v.

MICHAEL JAMES MANNING, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-00946-9

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENT OF ERROR

I. THE MOTION TO SUPPRESS WAS PROPERLY DENIED.

B. STATEMENT OF THE CASE

Flo Frost was on probation with the Department of Corrections as a result of a conviction for assault in the third degree. Exhibit 2, RP 2-3. She signed conditions of her probation which provided that she would be subject to search and seizure of her person, residence, automobile or other personal property if there is reasonable cause on the part of DOC to believe that she has violated a condition or requirement of her probation. Exhibit 1, RP p. 7. The conditions also prohibited her from owning or possessing firearms. Exhibit 1. However, she was permitted to have guns in her residence provided that she could not access them—meaning that she could not access the interior of the safe in which they were stored and didn't have access to the code, combination or key that would open it. RP 6.

Ms. Frost reported to the Department of Corrections that she was living at 12812 Northeast 17th Street in Vancouver, Washington. RP 8, 11. In February of 2010 Ms. Frost committed a violation of her probation by failing to report to the Department upon her release from inpatient treatment. RP 9, 19. A warrant was issued for Ms. Frost's arrest and it was

executed on February 8, 2010 by the Criminal Apprehension Team, which is composed of officers from various agencies such as the Department of Corrections and the Vancouver Police Department. RP 23-24, 37. As the team approached Ms. Frost's residence, Community Corrections Officer Fili Matua approached the southeast corner of the house and looked inside the window of the southeast bedroom. RP 26. In that window he saw Ms. Frost. RP 26. He and fellow officer Brian Ford then went to the door and Ms. Frost answered it. RP 27. They told her about the warrant and entered the home. RP 27. While Officer Ford spoke with Ms. Frost officers Matua and Harris began both a "safety sweep" to search for other persons and a search of the home based on Ms. Frost's violation of the conditions of her probation. RP 27. The search included the southeast bedroom where Ms. Frost was just prior to the officers arriving at her door. RP 27-28. The door to the southeast bedroom was propped open. RP 39. When Matua and Harris entered the southeast bedroom they saw a safe along the east wall. RP 28-29. It was a large safe; the type of safe where one would store rifles and other types of long guns (not handguns). RP 29.

On top of the safe the officers saw ammunition and a prescription pill bottle belonging to Ms. Frost. RP 39. Matua asked Harris to check the safe. RP 40. Detective Harris hit the door and it immediately opened up, as it was not locked. RP 40. Inside the safe Harris saw firearms, including a

double-barreled, short-barreled shotgun. RP 40. It was immediately apparent to Harris that the shotgun was short-barreled as it was smaller than his boot. RP 40. Harris seized the shotgun. RP 41. Frost denied owning the shotgun. CP 27. Mr. Manning admitted that the shotgun belonged to him. CP 51.

Manning was convicted of possession of a short-barreled shotgun, contrary to RCW 9.41.190, after a non-jury trial. CP 61. The case was tried on stipulated facts. CP 48-52. This timely appeal followed entry of the judgment and sentence. CP 61-71.

C. ARGUMENT

I. THE MOTION TO SUPPRESS WAS PROPERLY DENIED.

Manning assigns error to findings of fact two, four, and six and conclusions of law two, three, four, and five on the CrR 3.6 hearing. The appellate court reviews findings of fact for substantial evidence in the record. *State v. Parris*, 163 Wn.App. 110, 116, 259 P.3d 331 (2011). “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” *Parris* at 116, *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Provided there is substantial evidence to support them, the appellate court views the trial court’s findings as verities. *Hill* at 647.

The appellate court reviews the trial court's conclusions of law de novo. *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009). A review of Manning's brief reveals no argument as to how the court's findings of fact are not supported by substantial evidence. Manning does not even restate the challenged findings in his brief. He only mentions one finding of fact during his argument—a truncated portion of finding of fact number four in which the court stated “While DOC Ford was talking with Frost, DOC Matua and Detective Harris checked the residence for any other persons/for safety purposes and **most importantly to conduct a standard DOC check of the DOC probationer's residence** (Frost had violated her probation by not reporting.)” See Brief of Appellant at 9. However, Manning doesn't argue that this finding is not supported by substantial evidence. Rather, he quibbles with the legal conclusion the court drew and argues that the police in this case used the DOC officers as a “stalking horse” to “evade” the warrant requirement. In sum, Manning does not support his assignments of error pertaining to the trial court's findings with argument and they should be deemed verities in this appeal because this Court should not consider assertions which are not supported by argument and citation to authority. *State v. Corbett*, 158 Wn.App. 576, 597, 242 P.3d 52 (2010) (“We do not review assigned errors where arguments for them are not adequately developed in the brief.”)

Even if the challenged findings of fact in this case were not verities it would have no bearing on the outcome of this case. For the reasons set forth below, the search of this residence did not need to be justified on the basis of a “protective sweep,” nor did the officers need additional justification to open the safe containing the gun because the safe was located in a room Flo Frost was known to occupy, in a house in which there was probable cause to believe she lived, during a search that was based on a well-founded suspicion that she was in violation of the conditions of her probation. No additional justification to search was needed. Manning’s entire argument appears to assume that Flo Frost was a regular citizen who was subjected to a search within her home rather than a probationer or parolee. She was not, however, a regular citizen and the rules are different for Flo Frost because she was under post-conviction supervision with the Department of Corrections.

“Washington courts have recognized an exception to the search warrant requirement to search parolees or probationers and their homes or effects.” *State v. Massey*, 81 Wn.App. 198, 913 P.2d 424 (1996); *State v. Campbell*, 103 Wn.2d 1, 22, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 105 S.Ct. 2169 (1985). Probationers and parolees enjoy a diminished expectation of privacy because “they are persons whom a court has sentenced to confinement but who are simply serving their time

outside the prison walls; therefore the State may supervise and scrutinize a probationer or parolee closely.” *Parris*, supra, at 117; *State v. Lucas*, 56 Wn.App. 236, 240, 783 P.2d 121 (1989), review denied, 114 Wn.2d 1009 (1990). The home of a probationer or parolee, as well as his personal effects, may be searched on the basis of a well-founded suspicion of a probation violation. *Winterstein*, supra, at 628; *State v. McKague*, 143 Wn.App. 531, 545, 178 P.3d 1035 (2008). RCW 9.94A.631 provides:

(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.

However, non-probationers living with probationers retain their full privacy rights under the Fourth Amendment and Article 1, §7. *Hocker v. Woody*, 95 Wn.2d 822, 826, 631 P.2d 372 (1981); *McKague* at 544-45. In order to search a probationer or parolee’s home on the basis of a well-founded suspicion of a probation violation there must be probable cause to believe that the residence in question is the probationer’s residence. *Winterstein* at 630; *Motley v. Parks*, 432 F.3d 1072, 1080 (9th Cir. 2005); see also *State v. Hatchie*, 161 Wn.2d 390, 166 P.3d 698 (2007). Where non-probationers share a residence with a probationer the search must be

limited to common areas and areas the probationer is known to occupy.

McKague at 545.

Here, Manning complains that the search of Flo Frost's home was conducted without authority of law. He claims (1) that the arrest warrant for Flo Frost allowed the officers to effectuate the arrest of Frost and nothing more; (2) that the officers had no authority to look inside the safe because there was no evidence Frost "'exercised dominion and control"' over the safe, such as by opening or closing it or removing items from it" and that the plain view exception did not justify seizure of the gun; and (3) that a protective sweep was not warranted in this case because the officers lacked articulable facts which would lead them to believe that a person posing a danger to them was in the home.

Each of these arguments wholly misses the point. Because Manning does not challenge the trial court's finding that the residence in question was Flo Frost's residence or that the officers had a well-founded suspicion that she was in violation of her probation (findings of fact numbers one and three on the CrR 3.6 hearing), the search of the common areas and rooms she was known to occupy at 12812 NE 17th Street in Vancouver was conducted with the authority of law under Article 1, §7 and the Fourth Amendment. The southeast corner bedroom in which the gun at issue was found was a room that Frost was known to occupy, as

evidenced by the unchallenged fact that Officer Matua saw Frost in that bedroom as they approached the house. The conclusion that Frost was known to occupy that room was confirmed by the presence of a prescription pill bottle bearing her name on top of the safe (the pill bottle was discovered *prior* to officers opening the unlocked safe). Although Manning assigns error to finding of fact number six, that particular finding is large and there are many facts within it. A review of Manning's brief reveals that he does not take issue with the finding that Detective Harris observed a large safe when he entered the southeast bedroom, or with the finding that Detective Harris saw a bottle of Clonazepam prescribed to Flo Frost on top of the safe next to some ammunition. See Brief of Appellant. To the extent that his complaint is clear at all, the disagreement Manning has with finding of fact number six is the court's finding that:

The officers had an obligation to see if there were any other probation violations on the part of the defendant. Inside of the safe, based on his training and experience, Detective Harris observed in plain view and immediately recognized an obvious short barreled double barrel shotgun...

See Brief of Appellant at pages 16 and 17.

In any event, substantial evidence clearly supports the finding that Detective Harris saw a large gun safe in the southeast bedroom and saw a prescription bottle bearing Flo Frost's name on top of the safe, and that he saw these things prior to checking the unlocked safe to see if it was

secured. See RP at 39. These facts, combined with Officer Matua seeing Frost in the bedroom as the officers approached the house, gave the officers probable cause to believe the southeast bedroom was a room Frost was known to occupy and they consequently had the authority of law to search that room based on her status as a probationer and their well-founded suspicion that she was in violation of the terms of her probation.

It simply doesn't matter that an arrest warrant only authorizes an arrest; it doesn't matter whether the officers had an objective basis (beyond Flo Frost being on probation for assault in the third degree and the fact that she had been given prior permission to keep locked guns in her home) to fear for their safety; and it doesn't matter whether the guns were in "plain view" inside the safe. The search of the southeast bedroom was justified on the basis that (1) Frost is a probationer; (2) DOC had a well-founded suspicion that Frost was in violation of her probation; (3) the officers had probable cause to believe that the residence in question was Frost's residence; and (4) the southeast bedroom was a common area and/or a room Frost was known to occupy. No further justification is needed under the Fourth Amendment or Article 1, §7 and the search in this case, as well as the seizure of the gun found during the search, was lawful.

Regarding Manning's inexplicable focus on the plain view doctrine, the trial court's finding and conclusion that there was a sufficient

basis to check the gun safe was both correct and superfluous. Again, the search of the room was authorized without further justification based on the above factors. Frost signed conditions of probation that told her she was prohibited from possessing firearms. See Exhibit 1. Frost was given permission to have firearms in her house so long as she couldn't access them or access the interior of the safe where they are stored (meaning knowledge of the code or combination to the safe or access to the key that would open it). See RP at 6. The purpose of this type of search (the search of a probationer's residence based on a well-founded suspicion of a probation violation) is to search for evidence that the probationer is either in compliance or not in compliance with his or her probation. Contrary to Manning's baseless claim that the officers were entitled to do no more than arrest Flo Frost, they were permitted to conduct a search of her premises and her effects and Washington law does not require the search to be necessary to confirm the suspicion of impermissible activity, or require that the search cease once the suspicion has been confirmed. *United States v. Conway*, 122 F.3d 841 (9th Cir. 1997), *cert. denied*, 522 U.S. 1065, 118 S.Ct. 730 (1998). It is axiomatic that the officers would have to look inside the safe to determine whether she was in compliance with the requirement that she not have access to firearms. Just seeing the safe tells the officers nothing. Likewise, merely confirming that the safe is

unlocked tells them nothing. An unlocked safe is of no consequence to Frost's probation if it's empty. It's what's inside the safe that determines whether she has violated her probation. The officers had authority of law to search inside the safe. The illegal short-barreled shotgun recovered from the safe belonged to Manning. See Stipulated Facts on Non-jury Trial, CP 50-51.

The motion to suppress was properly denied and Manning's conviction should be affirmed.

D. CONCLUSION

The motion to suppress was properly denied and Manning's conviction should be affirmed.

DATED this 11th day of June, 2012.

Respectfully submitted:

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