

No. 49306-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

BERNARD LEE YONKER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Erik Price, Judge  
Cause No. 15-1-01293-6

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether a person on community custody is prohibited from possessing an expended shell casing.

2. Whether the presence of a shell casing from a bullet, observed a few feet from the front door of a person on community custody, constituted reasonable cause to search the residence of that person without a warrant.

3. Whether there was a sufficient nexus between the expended shell casing and a suspected violation of his conditions of community custody to permit a search of Yonker's residence.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the case.

C. ARGUMENT.

1. Yonker was prohibited from possessing firearm ammunition. The presence of an expended shell casing on the ground outside the front door of his residence gave reasonable cause to search his residence for evidence of additional violations, as well as for the protection of the community.

Yonker did not argue to the trial court that possession of guns or ammunition were not violations of his conditions of community custody. 02/01/16 RP 26-29; CP 11-18. It is not of constitutional magnitude and this court is not required to consider it. In general, appellate courts will not consider issues raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5(a). But a party can raise an error for the

first time on appeal if it is a manifest error affecting a constitutional right. Kirkman, 159 Wn.2d at 926; RAP 2.5(a)(3). The defendant must show the constitutional error actually affected his rights at trial, thereby demonstrating the actual prejudice that makes an error "manifest" and allows review. Kirkman, 159 Wn.2d at 926-27. Yonkers has not made that showing.

The general rule is that the State may not search the person or property of a person without first obtaining a search warrant. Both the Fourth Amendment of the United States Constitution and art. I, § 7 of the Washington Constitution protect privacy rights. State v. Parris, 163 Wn. App. 110, 117, 259 P.3d 331 (2011), *review denied*, 173 Wn.2d 1008, 268 P.3d 942 (2012). "The purpose of article 1, section 7, is to protect an individual's right to privacy rather than curb governmental actions." State v. Patterson, 51 Wn. App. 202, 204, 752 P.2d 945 (1988), *review denied*, August 31, 1988, September 1, 1988.

Persons on probation, however, have a diminished right of privacy that allows warrantless searches based on probable cause. State v. Jardinez, 184 Wn. App. 518, 523, 338 P.3d 292 (2014). Probationers have been convicted and sentenced, but are serving at least a portion of their time out of custody. "[T]he State may

supervise and scrutinize a probationer of parolee closely.” Id.  
These individuals do not lose all expectation of privacy; warrantless intrusions must be limited by the “legitimate demands of the operation of the parole process.” Id.

RCW 9.94A.631(1) provides:

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 by the department. 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.

A warrantless search of a person on community custody is based on a standard of reasonable and articulable suspicion, more similar to a Terry<sup>1</sup> stop than an arrest. State v. Parris, 163 Wn. App. 110, 119, 259 P.3d 331 (2011), *review denied*, 173 Wn.2d 1008, 268 P.3d 942 (2012). “‘Articulable suspicion’ is defined as a substantial possibility that criminal conduct has occurred or is about to occur.” Id.

a. Yonker was prohibited from possessing firearms, ammunition, or explosives.

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<sup>1</sup> Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)

The judgment and sentence in Thurston County cause number 15-1-00141-1 includes a notice that says:

FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record.

Exhibit 5 at 7.

RCW 9.41.045 states, in pertinent part:

As a sentence condition and requirement, offenders under the supervision of the department of corrections pursuant to chapter 9.94A. RCW shall not own, use, or possess firearms or ammunition. . . .Firearms or ammunition owned, used, or possessed by offenders may be confiscated by community corrections officers and turned over to the Washington state patrol for disposal as provided in RCW 9.41.098.

By operation of the statute, the prohibition against owning firearms or ammunition becomes a condition of the judgment and sentence even if it is not explicitly stated in the document itself.

In addition, RCW 9.94A.706(1) provides:

No offender sentenced to a term of community custody under the supervision of the department may own, use, or possess firearms, ammunition, or explosives.

Yonker argues, without citation to authority, that community correction officers (CCOs) do not have general law enforcement authority. Appellant's Opening Brief at 11. Even assuming that this

is true, the prohibition against owning firearms and ammunition is a condition of community custody. Yonker was sentenced to a term of community custody. Exhibit 5 at 5. Yonker also argues, without citation to authority, that the addition of the language prohibiting firearm possession in later judgment and sentence forms proves that he was not prohibited from possessing them. Appellant's Opening Brief at 10. It does not follow that the law becomes unenforceable because of a possibly inadvertent omission in a court form.

Yonker's judgment and sentence includes the requirement that he "comply with the instructions, rules and regulations of DOC for the conduct of the defendant during the period of community custody . . ." Exhibit 5 at 5. CCO Matt Frank testified at the suppression hearing that people under supervision are not allowed to have firearms, ammunition, or explosive devices. 02/01/16 RP 12. Neither party questioned Frank further about the source of this condition, but Yonker makes no argument that it was not part of any separate rules imposed by DOC.

Yonker was prohibited from owning, using, or possessing firearms or ammunition because he was on community custody.

Community Corrections Officers may enforce that prohibition.  
RCW 9.41.045.

Yonker assigns error to the trial court's Conclusion of Law 4, finding that "RCW 9.41.045 prohibits offenders under the supervision of DOC to own, use or possess firearms and/or ammunition" because that statute was not cited in the judgment and sentence. He does not explain why the statute ceases to be enforceable because it is not specifically identified in the sentencing document.

2. A spent shell casing near the front door of Yonker's residence gives reasonable cause to suspect that, at a minimum, he possessed ammunition, and gives rise to a reasonable conclusion that he possessed at least one firearm.

Yonker maintains that the spent shell casing near the front door of his residence is such an innocuous item that it cannot support reasonable cause for the CCO to search his residence. At the suppression hearing, counsel argued that it could have been "an empty cookie container." 02/01/16 RP 27.

To support reasonable cause, the CCO must have "a well-founded suspicion that a violation has occurred." Jardinez, 184 Wn. App. at 524, quoting State v. Massey, 81 Wn. App. 198, 200, 913 P.2d 424 (1996). Analogizing reasonable cause to the level of

suspicion that would justify a Terry stop, the court in Jardinez defined articulable suspicion as a “substantial possibility that criminal conduct has occurred or is about to occur.” Id. at 524. A well-founded suspicion is less than probable cause. Massey, 81 Wn. App. at 201. This follows from the diminished right of privacy that a person serving a criminal sentence possesses. Patterson, 51 Wn. App. at 204-05.

A 9 mm shell casing is not an empty cookie container. A spent shell casing comes from a fired bullet. A fired bullet can cause serious injury or death. An empty cookie container could at most indicate poor dietary habits that may lead to health problems. Nor is a person on community custody prohibited from possessing cookies. It is common sense to recognize that some items lying on the ground, particularly outside the residence of a convicted felon on community custody, are going to reasonably lead to suspicion of criminal activity—hypodermic syringes, for example, or shell casings. Simply pretending that a shell casing is another piece of trash that could have come from anywhere is not reasonable.

Yonker claims that there was no evidence to indicate he even knew the shell casing was there and he repeats six times that there were “multiple people” or “several people” in the residence

and that the casing could have been left by one of them. Appellant's Opening Brief at 13-14, 18. Police reports indicated that in the past, "several people" had been in the residence with Yonker, and on the day of the search there were three others. CP 29. This is hardly a crowd such that an item like a firearm or even a bullet was likely to go unnoticed. This was not the Tacoma Dome during a sporting event or even an electronics store during a sale on flat screen TVs. It was a private residence, a single family home, where the CCOs could justifiably assume that Yonker controlled what happened on the premises. And although it is possible that a visitor dropped the casing outside the front door, the standard is reasonable cause, not certainty or proof beyond a reasonable doubt.

Yonker cites to State v. Doughty, 170 Wn.2d 57, 239 P.3d 573 (2010), where the court held that the police lacked sufficient evidence to stop the defendant who was seen entering a suspected drug house in the early morning hours and leaving after two minutes. Appellant's Opening Brief at 15. That is an entirely different circumstance. The shell casing was on Yonker's own property, where he had control of the premises, and where he had been contacted on at least a few previous occasions. CP 29.

The CCOs had reasonable suspicion that, because there was a spent shell casing on the ground within a few feet of the door to Yonker's house, he may have had firearms and/or ammunition in the house. He was prohibited from possessing either of those items.

3. There was a nexus between the suspected violation and the scope of the search of Yonker's house.

Yonker argues, without explaining why, that there was no nexus between the shell casing and the extensive search of his property. The officer searched the residence, outbuildings, and vehicles. CP 29.

A trial court's denial of a motion to suppress is reviewed for substantial evidence to support the findings of fact and de novo for the conclusions of law. State v. Rooney, 190 Wn. App. 653, 658, 360 P.3d 913 (2015), *review denied*, 185 Wn.2d 1032, 377 P.3d 731 (2016). "Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth of the stated premise." Id. The validity of a warrantless search is reviewed de novo. Parris, 163 Wn. App. at 116.

"[A] valid search under RCW 9.94A.631(1) requires that there be a nexus between the alleged violation and the searched

property.” State v. Livingston, 197 Wn. App. 590, 598, 389 P.3d 753 (2017). Here, the shell casing was found on Yonker’s property, and only his property was searched.

Yonker also argues that the search exceeded a permissible scope, although again it is not clear why. There is no evidence that any of the property searched belonged to anyone other than Yonker. He does not explain why it would be unreasonable to look for firearms and ammunition in outbuildings or vehicles. The only evidence offered against him in this proceeding was the methamphetamine found in a box in a bedroom that was identified as his. He claims that without evidence that probationers tend to keep firearms or ammunition under blankets on their beds, there was no reason to search his bed. That simply makes no sense at all. If an item the size of a firearm or ammunition could be concealed under blankets, then the search was proper. And while he argues that ammunition is plural and apparently too big to fit in a box that might be used to hold a ring, there is no logical reason that a single bullet ceases to be ammunition because it may be separated from other bullets.

In this case, the searching officers were primarily looking for ammunition. 02/01/16 RP 18, 22. They were looking for

ammunition because the CCOs found a 9 mm bullet casing a few feet from the front door of Yonker's home. Id. at 14. It was a one story residence. Id. at 19. The evidence offered against Yonker was found in his bedroom. Id. at 22. The CCO who found the methamphetamine in the small box testified that in his experience, bullets can end up in many places. Id. at 22.

While Yonker expresses concern for the privacy rights of other people present in his house, he has not offered any evidence that those rights were, in fact, invaded. Nor has he explained how he has standing to assert the rights of third parties who may have such a claim, or that such claims make the search of his own property overbroad.

D. CONCLUSION.

The trial court did not err when it denied Yonker's motion to suppress. The State respectfully asks this court to affirm his conviction for possession of a controlled substance, methamphetamine.

Respectfully submitted this 5 day of June, 2017.

  
\_\_\_\_\_  
Joseph Jackson, WSBA# 37306  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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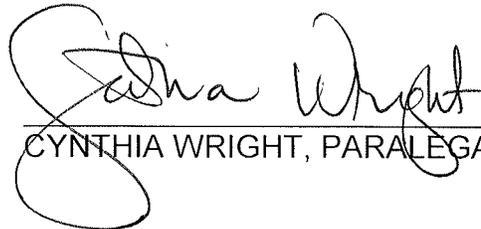
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 5<sup>th</sup> day of June, 2017, at Olympia,

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CYNTHIA WRIGHT, PARALEGAL

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

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