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Court of Appeals
Division II
State of Washington
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No. 50236-4-II

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

STATE OF WASHINGTON, Respondent

v.

DARIAN LIVINGSTON, Appellant

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY

The Honorable Judge Helen G. Whitener

REPLY BRIEF OF APPELLANT

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I. STATEMENT OF FACTS

Mr. Livingston relies on the facts provided in the appellant's opening brief.

II. ARGUMENT IN REPLY

A. Under *Cornwell*, The Trial Court Erred When It Found A Sufficient Nexus Between The Alleged Failure To Report And The Search Of Mr. Livingston's Vehicle.

Mr. Livingston incorporates the arguments from appellant's opening brief and adds the following in reply.

In its response brief, the State makes two arguments that stand in direct contrast to the Supreme Court's ruling in *State v. Cornwell*, 190 Wn.2d 296, 412 P.3d 1265 (2018).

The first argument is that a DOC warrant for alleged failure to report shows the individual has not complied with DOC directives; therefore, evidence of suspected failure to report may be found in a search of the individuals' property or person. (Br. of Resp. at 14). This would mean that any time the DOC issues a warrant, a community corrections officer can assume there has been wrongdoing, and on that basis, search the probationer and his property. This rationale for an unfettered search is precisely what

the Supreme Court found to be impermissible. *Cornwell*, 190 Wn.2d at 306.

In *Cornwell*, the Court drew a constitutional perimeter around the search of a probationer: “[A]rticle I, section 7 of the Washington Constitution requires a nexus between *the* property searched and *the* suspected probation violation.” *Cornwell*, 190 Wn.2d at 297.

Here, the probation officer testified:

Sir, the only thing that I was aware of was that he had the warrant – he has to give UAs, he was in a known drug area, and he was distancing himself from that vehicle; that was it.

4/6/17 RP 44.

To illustrate a well-founded suspicion for a search of a probationer’s property, *Cornwell* cited to *State v. Parris*, 163 Wn. App. 110, 259 P.3d 331 (2011). Parris failed to register as a sex offender. His community custody prohibited him from having contact with minors, possessing pornography, or possessing or using alcohol or illegal drugs. He had to engage in substance abuse treatment and comply with a curfew. He violated numerous probation conditions.

His urinalysis tested positive for methamphetamine, he failed to participate in the treatment program, and he was arrested for driving with a suspended license with a minor female in his car.

And his mother told the CCO she was concerned about his drug use, uncontrolled behavior, and her fear he had obtained a firearm. *Parris*, 163 Wn. App. at 113-12, 120. The Court concluded the search of Parris's room and property was "tethered to a particular probation condition" and not an arbitrary fishing expedition. *Cornwell*, 190 Wn.2d at 305.

The Court disapproved of the wholesale search in *Jardinez*, even though there were two known violations of his conditions of release. *State v. Jardinez*, 184 Wn. App.518, 338, P.3d 292 (2014). Jardinez failed to report as directed and admitted use of marijuana. During the search of his room, the CCO viewed Jardinez's Ipod photos and saw a photo of him posed with a firearm. The trial court suppressed the evidence of the firearm. *Id.* at 520-21, 528. The reviewing Court affirmed and held **the search of the Ipod did not relate to the suspected parole violations.**

Here, the trial court relied on a notion no longer approved under *Jardinez* and *Cornwell*. The trial court reasoned that a DOC warrant allows for a "compliance check" of a "wide range." 2RP 82-83. The court used the words "compliance check" to justify a wholesale search. This is error.

To justify the wide range “compliance check” vehicle search the trial court here relied on the CCO's knowledge and experience that probationers may not use narcotics. The court further reasoned that because Mr. Livingston had failed to report, narcotics might be found in his vehicle. The court then concluded there was reasonable cause to believe evidence of failure to report might be found in his car. 2RP 82. Aside from being an error, this is a particularly troubling assumption because Mr. Livingston had not had a positive urinalysis during the time of his probation. 2RP 24.

If the court's reasoning were to stand, it would directly oppose the Supreme Court's ruling in *Cornwell*. The finding of a sufficient nexus based on CCO's experience and suspicion that a probationer might have violated another probation condition and a search might confirm the guess, is precisely what the Court found unconstitutional. A failure to report does not, in and of itself, authorize an unfettered search of property to look for other probation violations. Under *Cornwell*, looking for further violations of probation is an unlawful fishing expedition. *Cornwell*, 190 Wn.2d at 306.

In its response brief, the State has erroneously labeled the *Cornwell* Court's citation to *State v. Patton*, as dicta. The Court

wrote: “This Court has already determined that there is no nexus between property and the crime of failure to report.” *Cornwell*, 190 Wn.2d at 306. However, the warrant for failure to appear and the lack of evidence that contraband would be found in the vehicle search were central to the Court’s decision in *Patton* and *Cornwell*. *Patton*, 167 Wn.2d 379, 395, 219 P.3d 651 (2009).

The second argument the State raised in its response brief to justify the untethered search relies on the concept of the “fellow officer rule.” (Br. Of Respondent pp. 16-21). The State presented a similar argument at the suppression hearing, which was rejected by the trial court. 2RP 34-35. The trial court found the Chronos and closure of supervision notes inadmissible because the officers were unaware of their contents. The State has not presented an argument that the trial court's ruling was incorrect.

The State has cited to a federal case, *U.S. v. Ramirez*, 473 F.3d 1026, 07 Cal. Daily Op. Serv. 539 (9th Cir. 2007), for the proposition that if one officer knows facts constituting reasonable suspicion or probable cause, and he communicates an order, another officer may conduct a stop, search, or arrest without violating the Fourth Amendment. This argument is inapplicable to the facts at hand.

In *Ramirez*, a pre-*Gant*¹ case, officers stopped a car and placed the driver under arrest. They searched the vehicle and discovered a secret compartment containing drugs. About two weeks later, police conducted surveillance at an unrelated address and saw the same car. They followed it, saw a second vehicle arrive, and watched the occupants place an item into what police thought was the secret compartment. The officer deduced the car was transporting narcotics and requested a patrol officer to conduct a traffic stop.

That officer stopped the driver for an infraction and then arrested him for driving without a license. Police discovered drugs in the secret compartment. The issue on appeal was whether the officer who conducted the traffic stop, at the request of another, could rely on the probable cause of the observing officer's knowledge. *Id.*

The Court agreed the stop was lawful but added a caveat:

The case would, of course, be quite different if an officer who had *no* probable cause or reasonable suspicion were to conduct (or direct another officer to conduct) a traffic stop in the hope of finding something illegal or delaying the suspect. *That* kind of pretextual traffic stop is clearly prohibited by the Fourth Amendment. See *United States v.*

¹ *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 1718-19 173 L.Ed.2d 485 (2009).

Wallace, 213 F.3d 1216, 1220–21 (9th Cir.2000)(emphasis added).

The facts of *Ramirez* are remarkably different than the facts in this case. The officers were in an active investigation and providing real-time information to a fellow-officer. Additionally, under *Gant*, the search performed in *Ramirez* was unjustified.

Article I, § 7² places discernible and strict limits on law enforcement officers. If this Court were to adopt the State’s “fellow officer rule” reasoning, it would cause an erosion and progressive distortion of the *Cornwell* Article I, §7 protections for probationers. Such erosion would once again authorize a CCS to conduct a wholesale fishing expedition search of a probationer for whom DOC has issued a warrant, with the option of potentially justifying the search later.

Here, the CCS’s information was limited:

Sir, the only thing that I was aware of was that he had the warrant – he has to give UAs, he was in a known drug area, and he was distancing himself from that vehicle; that was it.

4/6/17 RP 44.

² Article I, § 7 mandates that no person shall be disturbed in his private affairs, or his home invaded, without authority of law.

CCS Grabski did not know what violation occasioned the DOC warrant. Mr. Livingston, like every probationer, must follow certain directives from DOC. The search was an undisputable fishing expedition to look for further violations of probation. Officers attempted to justify the search after the case had been remanded by relying on documents they had never seen, and which provided no information that Mr. Livingston had or drugs or was actually not living at his authorized housing site. This Court should not allow the convictions to stand.

III. CONCLUSION

Based on the foregoing facts and authorities, Mr. Livingston respectfully asks this Court to reverse the trial court's ruling and remand with direction to vacate the convictions.

Respectfully submitted this 28th day of January 2019.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Darian Livingston, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Reply Brief was sent on January 28, 2019 to:

Darian Livingston
c/o Marie Trombley at marietrombley@comcast.net

And I electronically served, by prior agreement between the parties, a true and correct copy to the Pierce County Prosecuting Attorney (at pcpatcecf@co.pierce.wa.us).

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