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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By.....

No.313085

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Appellant,

vs.

FELIPE RONALDO JARDINEZ,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY, WASHINGTON

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THE HONORABLE BLAINE GIBSON, JUDGE

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BRIEF OF APPELLANT

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**I.**  
**ASSIGNMENTS OF ERROR**

1. The trial court erred in granting a defense CrR 3.6 motion, suppressing evidence that the defendant Felipe Jardinez was unlawfully in possession of a firearm. **(CP 37-41)**
  
2. The trial court erred in concluding that a viewing of a video stored on the defendant's iPod, by his Community Corrections Officer ("CCO"), was not justified, since the officer did not have a reasonable suspicion, based upon articulated facts, that the device contained evidence of a past, present or future criminal violation or violation of community custody. **(CP 40-41)**
  
3. The trial court further erred in concluding that the defendant's violations of his community custody conditions, which included a failure to

report to his CCO, and self-admitted use of marijuana, did not constitute reasonable suspicion justifying the search of the device.

**(CP 40-41)**

4. The court erred in applying an incorrect standard, that being whether the CCO had a reasonable suspicion that the device contained evidence that criminal activity had occurred or was about to take place, rather than whether than a reasonable suspicion that it contained evidence of community custody violations .

**(CP 40)**

## **II.**

### **ISSUES PRESENTED BY ASSIGNMENTS OF ERROR**

1. Whether a Community Corrections Officer is justified in viewing a video stored on an electronic device found on a probationer or parolee's person, when the probationer has violated conditions of his community custody?

2. Whether articulable facts support a CCO's reasonable suspicion that such a device contains evidence of community custody violations, where the probationer has failed to appear as required to meet with his CCO, and has also admitted illegal drug use?

## **III.**

### **STATEMENT OF FACTS**

Felipe Jardinez was convicted of the offenses of drive-by shooting and second degree unlawful possession of a firearm under Yakima County Superior Court cause number 09-1-01465-1. As part of the sentence in that matter, he was placed

on community custody. The conditions of community custody included prohibitions on the possession of firearms, the use or possession of illegal drugs, and association with gang members.

**(Ex. A; 10-10-12 RP 5-6)**

CCO Roger Martinez was assigned to supervise Jardinez.

In November of 2011, Jardinez missed an appointment with Martinez. At Martinez's direction, Jardinez appeared in his office on November 15, 2011. At that time, Martinez asked Jardinez to provide a urine sample on which a test would be conducted to monitor his compliance with the prohibition on drug use. Jardinez instead told Martinez that such a test would be positive for marijuana, which would be a violation of the terms of the community custody. **(10-10-12 RP 8-9)**

Martinez then instructed Jardinez to empty his pockets, as it was necessary to determine whether he had any weapons or drugs on his person. Martinez noticed that among the contents of Jardinez's pockets was an MP3 player, (later determined to be an iPod Nano player). Martinez was

interested in the device, as it had the capability to store videos, and it had been his experience that gang members sometimes kept videos or photographs of themselves or other gang members. **(10-10-12 RP 9)**

Jardinez appeared visibly nervous when Martinez looked at the player, and claimed that it was only used to store music. Martinez found, and played, a video he found on the player, which was dated the same day he was in the office, November 15<sup>th</sup>. **(10-10-12 RP 10; Ex. D, E)**

The video portrayed an individual who appeared to be Jardinez, in a room which Martinez recognized to be Jardinez's bedroom. Jardinez was pumping and "racking" what appeared to be a shotgun. **(10-10-12 RP 12; Ex. C)**

While Jardinez claimed that the weapon was a BB gun, Martinez determined that he had reason to believe a firearm was present in Jardinez's home, a criminal violation, and a violation of the terms of his community custody. He performed a home

visit at the residence, with the assistance of the Toppenish Police Department. **(10-10-12 RP 14)**

In the residence, Martinez first searched Jardinez's bedroom, then found a shotgun which matched the one in the video, in a couch located elsewhere in the residence. **(10-10-12 RP 15-16; Ex. F, G)**

The address where the gun was found was the same one Mr. Jardinez had been reporting as his, 706 Adams Avenue in Toppenish. **(10-10-12 RP 17, 18)**

Martinez testified that since Jardinez had been involved in gang activity, he was being watched to make sure he was not associating with gang members, or possessing firearms. **(10-10-12 RP 26)**

Martinez further testified that it was "common nowadays with the new electronic devices" that gang members would take pictures depicting their gang associations. In his experience, as well, drug users and sex offenders were known to keep photos. **(10-10-12 RP 29-30)**

Under Yakima County Superior Court cause number 11-1-01662-1, Jardinez was charged with a single count of first degree unlawful possession of a firearm. **(CP 1)**

He moved to suppress the shotgun, arguing, in part, that the CCO's search of Jardinez's person and residence was not justified. **(CP 3-12)** The State responded that the search was proper and based upon reasonable suspicion. **(CP 13-22)**

Testimony was taken on October 10, 2012.

In a letter opinion dated October 12, 2010, the trial court granted the motion to suppress the firearm, concluding, in part, that the search of the residence was "fruits of the poisonous tree", as the CCO lacked reasonable suspicion that the device contained evidence of crimes or violations of the terms of community custody. **(CP 37-41)**

The State moved for reconsideration. **(CP 23-31)**

The reconsideration motion was denied, and the case dismissed as the State was unable to proceed without the suppressed evidence. **(CP 32-33)**

The State timely appealed. (CP 34-36)

#### IV.

#### STANDARD OF REVIEW

The validity of a warrantless search is reviewed *de novo*. State v. Kypreos, 110 Wn. App. 612, 616, 39 P.3d 371 (2002). Conclusions of law relating to the suppression of evidence are also reviewed *de novo*, and findings of fact are reviewed for substantial evidence. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).

#### V.

#### ARGUMENT

- A. **The search of the iPod was justified, since the search of a parolee's personal effects or residence merely requires reasonable suspicion that a probation violation has occurred.**

Unless an exception is present, a warrantless search is impermissible under both article I, section 7 of the Washington Constitution as well as the Fourth Amendment to the United

States Constitution. State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005); WASH. CONST. art. I, s. 7; U.S. CONST. amend IV.

It is well-settled under Washington law that parolees and probationers have a diminished right of privacy, which permits a warrantless search based upon reasonable cause. CCO's have a sufficient basis to conduct a warrantless search a probationer's residence and "other personal property" when the officer has reasonable cause to believe the probationer has violated release conditions. RCW 9.94A.631(1); State v. Massey, 81 Wn. App. 198, 199, 913 P.2d 424 (1996).

A search is reasonable if an officer has a well-founded suspicion that a violation has occurred. Massey, 81 Wn. App. at 200, *cited in* State v. Parris, 163 Wn. App. 110, 118-19, 259 P.3d 331 (2011). *See, also*, State v. Campbell, 103 Wn.2d 1, 22, 691 P.2d 929 (1984); State v. Rainford, 86 Wn. App. 431, 438, 936 P.2d 1210 (1997); State v. Coahran, 27 Wn. App. 664, 666-67, 620 P.2d 116 (1980).

Reasonable suspicion is analogous to the requirements of a *Terry* stop and must be based upon specific and articulable facts and rational inferences. State v. Simms, 10 Wn. App. 75, 87, 516 P.2d 1088 (1973). “Articulable suspicion” is defined as a substantial possibility that criminal conduct has occurred or is about to occur. State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

The trial court misapplied the authorities cited, and incorrectly framed the issue before it as whether the CCO had a reasonable suspicion that the iPod “contained evidence that criminal activity had occurred or was about to take place.” (CP 40) Instead, the case law authority is clear that the standard is whether the officer had a reasonable suspicion of a probation violation, and the “articulable suspicion” definition is applied by way of analogy.

The court’s reliance upon State v. Patterson, 51 Wn. App. 202, 752 P.2d 945 (1988), is misplaced. As the State argued below, Patterson does not support the court’s conclusion that

there must be reasonable suspicion of evidence of a crime to justify a search. In that case, the defendant was a parolee whose conditions of parole included “not possessing firearms and submitting to a search of his person, residence, vehicle, and possession whenever requested by his probation and parole officer.” Id., at 204. A suspect was seen running from the scene of an armed robbery with a gun in his hand. After investigation, the defendant was tentatively identified as the suspect, and an anonymous tip indicated that a gun was in the defendant’s car. A warrantless search was conducted of the car, and a firearm found. A motion to suppress was denied. Id.

Patterson restated the rule that a probationer has a diminished right of privacy, and a warrantless search of the probationer is reasonable when based upon a “well founded suspicion that a probation violation has occurred.” Id., at 204-05, *citing* Coahran, Simms, infra.

A probationer is not afforded any greater protection under art. I, s. 7, than he or she would under the Fourth

Amendment. State v .Olson, 164 Wn. App. 187, 194, 262 P.3d 828 (2011).

That the standard for warrantless searches of probationers is less than probable cause is also reinforced by the holding in Coahran, infra. In that case, it was reported that a parolee had made a threat against another individual. Based upon the report, a probation officer decided to arrest the parolee and search both his vehicle and his home. The parolee defendant was later observed driving his vehicle, which was stopped and searched. Drugs were found which were attributed to a passenger, who was then arrested. In upholding the search of the truck, the court held that:

We find the search was valid on other grounds. James, the truck owner, was a parolee. Parolees' homes-and trucks-may be searched by parole officers, or the police as their agents, upon less than probable cause, given well founded suspicions. State v. Simms, 10 Wn. App. 75, 516 P.2d 1088 (1973). Here, a citizen-informant provided the necessary well founded suspicion. The entire truck was properly subject to search.

Coahran, 27 Wn. App. at 666.

It is important to note, that this Court's analysis in Coahran hinged not upon whether the probation officer had a suspicion that evidence of the threat would be contained in the vehicle, but only whether there was a well-founded suspicion that a probation violation had occurred.

A similar result was reached in State v. Winterstein, 140 Wn. App. 676, 166 P.3d 1242 (2007), where a CCO received a tip that the probationer/defendant was engaged in the manufacture of methamphetamine. The defendant had previously failed to report to his CCO, and had tested positive for meth. The defendant on appeal that the CCO had a reasonable belief that a probation violation occurred, the sole issue that was resolve was whether there was a reasonable belief that the residence was indeed that of the probationer. Id., at 692.

A case, which was not cited below, would be appear to be directly on point. In State v. Parris, 163 Wn. App. 110, 259 P.3d 331 (2011), Division Two of this Court upheld a CCO's

warrantless search of a memory card found in a probationer's residence. After restating the rule that a warrantless search is reasonable if an officer has a well-founded suspicion that a violation has occurred, citing RCW 9.94A.631(1) which authorizes searches of a probationer's "person, residence, automobile, or other personal property" without a warrant, the court allowed that:

"Washington case law does not provide a clear answer to whether the law affords portable electronic storage drives the same reasonable expectectations of privacy as closed containers.

Id., at 121.

The court relied upon a Ninth Circuit case which interpreted Washington law in holding that a search of a shoebox located in a probationer's residence was reasonable.

United State v. Conway, 122 F.3d 841, 843 (9<sup>th</sup> Cir. 1997):

The State persuasively argues that once a CCO establishes reasonable cause, her search lawfully encompasses the offender's residence and personal property, *including electronic storage media*. Even adopting Parris's attempted analogy to a locked box, the Conway rationale would also apply

to the content of Parris's memory card seized as part of the personal possessions in his room: In our view, opening a shoebox to look inside at its contents is not qualitatively different from looking at data stored as "contents" on a memory card.

Parris, 163 Wn. App. at 122.

Here, the court misinterpreted case law, requiring, incorrectly, that CCO had to have reasonable suspicion that evidence of criminal activity would be located on the iPod, not just evidence of community custody violations. Further, in light of Parris, as well as the other cases cited, the viewing and retrieval of the video of the shotgun was justified, as CCO Martinez had a reasonable suspicion that evidence of further violations would be found on the device. The court erred.

## VI.

### CONCLUSION

For all the foregoing reasons, this court should reverse the trial court's order suppressing evidence, and remand this case to the superior court for further proceedings.

Respectfully submitted this 7<sup>th</sup> day of June, 2013.



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