

NO. 46236-2-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

NORMAN G. ROONEY,

Appellant.

RESPONDENT'S BRIEF

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I. ISSUES PRESENTED

- 1) Whether DOC officers had probable cause to believe an offender resided at a location when another resident identified the residence as the offender's home, the offender's belongings were in the room, and she was in the room at the time of contact.
- 2) Whether there was sufficient basis for a protective frisk of Rooney, when there were multiple weapons visible and present in the room, he was angry, and he requested a pair of pants.

II. SHORT ANSWER

- 1) Yes
- 2) Yes.

III. PROCEDURAL HISTORY

On January 2, 2014, Norman Granvel Rooney was charged with Unlawful Possession of a firearm in the first degree, and VUCSA for possession of methamphetamine, heroin, and clonazepam on December 30, 2013. CP 5. On April 3, 2014 Rooney's attorney filed a Motion to Suppress, and on April 29, 2014 filed an Amended Motion to Suppress. CP 16, 21. The State responded on May 1, 2014. CP 23.

An evidentiary hearing for the Motion to Suppress was held on May 1, 2014. RP 1-114. The Motion to Suppress was denied. RP 110-

110. On May 2, 2014 the court entered the Findings of Fact and Conclusions of Law Re: Motion to Suppress and Stipulation, Findings of Fact, and Conclusions of Law. CP 25, 26. The Judge found Rooney guilty upon entry of the Stipulation. RP 118.

IV. STATEMENT OF FACTS

In December 2013, Alexandria White was under supervision with the Department of Corrections (DOC) for Unlawful Possession of a stolen firearm and VUCSA possession with intent to deliver. RP 5, CP 25. As part of her supervision, Ms. White signed off on her required conditions and supervision terms. RP 6, CP 25. DOC required Ms. White to obey all laws and to be available for supervision as requested, including keeping DOC apprised of her current address. RP 7. Ms. White received notice of and acknowledged these requirements, signing her Conditions, Requirement, and Instructions on December 20, 2013. RP 6.

On December 26, 2013, Oxford house notified Corrections officer Chris Napolitano that Ms. White had moved, thereby violating her DOC conditions. RP 7. Officer Napolitano requested and received an arrest warrant for Ms. White for violations of her community custody. RP 8-9, CP 25. On December 30, 2013, Officer Napolitano spoke to another supervised offender, Thomas Declue. As a standard question, Officer Napolitano asked Declue who else resided in the home. Mr. Declue

informed Officer Napolitano he lived with Norman Rooney, Alex White, their children, and his mother. RP 8-9.

Later on December 30, 2013, DOC Officers Napolitano and Keenan Harvey went to the residence. Officer Napolitano knocked on the door to the residence. Declue answered and Officer Napolitano asked if Ms. White was home. Declue opened the door, gesturing to a bedroom just inside. RP 11. Officers Napolitano and Harvey entered and encountered White standing in the bedroom with Rooney and her newborn child in bed. RP 12,15,42, 58-59. On the floor of the bedroom, Officer Napolitano saw a pink backpack, baby carrier, and a purse he believed belonged to Ms. White. RP 12. He also observed swords and axes on the walls and a couple knives on the shelves of the bedroom in which Rooney slept. RP 15.

Upon contacting White, Officer Napolitano told her she was in violation of her DOC conditions for failing to report her change of address. White acknowledged that she failed to update her address and understood she would be taken into custody. RP 13. She asked to make arrangements for child care and was allowed to do so. RP 14. She was then handcuffed and seated on the living room couch and was told they would be searching the bedroom. RP 16, 20. Officer Napolitano asked Ms. White if she was still in a relationship with Rooney. Ms. White

replied that they were trying to work it out. RP 20. From prior contacts, Officer Napolitano knew that Ms. White and Rooney lived like a married couple and always lived in the same room together. RP 10. Ms. White said that she was sleeping in the living room. Officer Napolitano did not see signs of her sleeping there. RP 22.

Officers Napolitano and Harvey then asked Rooney to leave the bedroom as it was going to be searched. Rooney objected to the search and said he was not on supervision and did not need to get up. RP 22. Officer Napolitano then told him that the police were with him and he would be charged with Obstruction if he did not get up and leave the room. RP 22. Rooney was dressed in boxer shorts and specifically requested to put on pants. RP 22. Rooney then picks up a pair of pants and Officer Napolitano tells him “ok, but before they leave the room, they’re going to be searched. I’m not going to get shot here.” RP 22, 43. Officer Napolitano was concerned with having a weapon drawn on him given all of the weapons in the room. RP 23, 25. Rooney then cursed and pulled the pants away from Officer Napolitano. Napolitano immediately felt what he thought was a gun in the pants. RP 23. He grabbed the gun while Rooney still had a hold of the top of the pants. He then asked Rooney if there was a gun in the pants. Rooney confirmed there was a gun and that

it was his. RP 24. Rooney was placed in cuffs by Officer Harvey. Longview Police assisted DOC and were given the gun. RP 25.

DOC then proceeded to search the room as Alex White's residence. During the search of a night stand near where Rooney slept, officers located a small bag of methamphetamine and other drugs. RP 26.

V. ANALYSIS

1. **Corrections Officers had probable cause to search Alex White's room based upon evidence this was her residence.**

Warrantless searches are presumed invalid under article 1, section 7 unless the State can establish that the search falls under one of the carefully drawn exceptions to the warrant requirement. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). One such exception provides that a Community Corrections Officer may require an offender to submit to a warrantless search of their person, residence, automobile, or other personal property if the CCO has reasonable cause, i.e., a well-founded suspicion, to believe that the offender has violated a condition or requirement of his community supervision. RCW 9.94A.631; *see also State v. Lucas*, 56 Wn. App. 236, 240, 783 P.2d 121 (1989). This type of warrantless search of a probationer and their property is permissible because probationers have a diminished right to privacy. *Lucas*, 56 Wn.

App at 240 (quoting *State v. Lampman*, 45 Wn. App. 228, 724 P.2d 1092 (1986)).

While probationers have diminished expectations of privacy, third parties who live with them do not. The Washington Supreme Court adopts the common authority rule in search and seizure cases involving cohabitants. *State v. Morse*, 156 Wn. 2d 1, 7, 123 P.3d 832 (2005). This means a person who shares authority over spaces with others has a reduced expectation of privacy and reasonably assumes the risk that others with authority will allow outsiders into shared areas, in this case DOC officers. *Id.*

In order to protect the privacy rights of the third parties, a CCO must satisfy two different tests before searching a probationer's residence. First, to conduct any search, a CCO must have reasonable cause to believe that the probationer has violated a condition or requirement of their sentence. RCW 9.94A.631. Second, if the area to be searched is a residence, the CCO must have probable cause to believe that the probationer lives at the residence they seek to search. *State v. McKague*, 143 Wn. App. 531, 540, 178 P.3d 1035 (2008); *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009). In this context, probable cause exists when a CCO has facts before them that would lead a person of reasonable caution to believe that the probationer lives at the place to be searched. *Id.*

The facts relied upon by the CCO to establish the probationer's residence must be reasonably trustworthy and only the facts and knowledge available to the CCO at the time of the search should be considered. *State v. Mance*, 82 Wn. App. 539, 541-42, 918 P.2d 527 (1996).

The first factor is clearly met in the present matter. At the time of DOC contact, Alex White had an active warrant for a violation of her community custody and the DOC officers had reasonable cause to believe she had violated a condition of her sentence. RP 7 To put it another way, DOC was permitted to conduct a warrantless search because they had a "well-founded suspicion" that a probation violation has occurred. *State v. Lampman*, 45 Wn. App. at 232-33.

Rooney's argument is squarely focused on the second factor, that there must be probable cause to believe the home was the residence of Alex White. His argument requires a narrow reading of the language of RCW 9.94A.631. In doing so, the Rooney ignores what "facts and knowledge [were] available to the CCO at the time of the search." *Mance*, 82 Wn. App. at 541-42. DOC had probable cause to believe that Alex White lived at the residence.

At the time of the contact, DOC officers knew Alex White was no longer at Oxford house. RP 7. They heard from Declue, another offender that he lived with Alex, Rooney, their children and Rooney's mother. RP

8-9. When they went to the residence and asked for Alex White, they were allowed in the home, and after Declue pointed them in the right direction, she was located in the bedroom with Rooney and her child. RP 12, 15, 42, 58-59. She acknowledged she lived at the residence when she confirmed she was in violation for not updating her address. RP 13. Moreover, a purse, a baby carrier, pink backpack and Alex White's baby were located in the very bedroom she occupied with Rooney. Lastly, White told Officer Napolitano that they were still in a romantic relationship and Officer Napolitano knew that she had a romantic relationship with Rooney in the past and had shared a bedroom with him. RP 10, 20. These facts would lead a person to conclude there was probable cause to believe she lived at the residence. Moreover, she, a women's personal effects, and her baby occupied the very room searched, leading to the conclusion she had access and control over the items in the room.

2. DOC reasonably searched Rooney in a protective search.

A protective search is justified when the officer can point to "specific, objective facts" leading an officer to believe a person poses a danger to that officer. *City of Seattle v. Hall*, 60 Wn. App. 645, 651, 806 P.2d 1246 (1991). "Generally, courts are reluctant to second-guess the judgment of officers in the field and will uphold the validity of most frisks

that arise from a ‘founded suspicion’ that is neither arbitrary nor harassing.” *State v. Lennon*, 94 Wn. App. 573, 580, 976 P.2d 121 (1999).

In *Hall*, police were in a high drug-trafficking area and observed a “huddle” of four men, which included a man that one officer recognized from a previous arrest for burglary and auto theft. *Id.* at 646-47. Upon seeing a marked police car, the men disbanded. *Id.* at 647. The officers spoke with one of the men. *Id.* While the officers were speaking with this man, another man from the huddle, John Hall, walked toward the officers. *Id.* One of the officers then initiated a conversation with Hall, telling him the area was known for its drug activity. *Id.* Hall stopped walking and the officer asked him what had been going on in the huddle and why he had returned. *Id.* At this point, Hall became “‘sort of hostile,’ ‘antsy,’ and ‘nervous’ and kept his hands in his pockets.” *Id.* Because his actions caused the officer to become concerned for his safety, he frisked Hall for possible weapons. *Id.* The frisk revealed an open-blade steel knife and a razor blade. *Id.*

Hall was charged with carrying concealed weapons. *Id.* Hall’s motion to suppress the weapons was denied by the Seattle Municipal Court, and he was found guilty as charged. *Id.* Hall appealed to King County Superior Court, and the superior court judge found that during a voluntary encounter with police, an officer has a limited right to conduct a

pat-down for weapons. *Id.* at 647-48. Hall appealed to the Court of Appeals, claiming that under *Terry*, an officer's right to conduct a protective search was limited to instances where a person had first been lawfully detained for questions, reasoning that a search for weapons was not permitted unless it was during the course of a "*Terry* Stop." *Id.* at 651.

The Court of Appeals explained that *Terry* was only relevant in that it specified "the circumstances under which a frisk is permissible." *Id.* The court noted that by acting antsy, hostile, nervous, and keeping his hands in his pockets, the officer had objective reasons to be concerned for his safety. *Id.* The court stated that Hall's claim that a "*Terry* stop" was necessary before a search for weapons could be conducted was incorrect. *Id.* at 652. The court clarified:

Terry was not intended to abolish an officer's right to self-protection when that officer is reasonably convinced that an individual is armed and dangerous prior to an investigative detention of that person. Rather, *Terry* authorizes officers to protect themselves and others from a potentially dangerous individual.

Id. The court held that if "specific, objective facts" led an officer to believe a person poses a danger to that officer, the officer is permitted to conduct a frisk for weapons. *Id.* The court reasoned that "a person's demeanor and actions during police questioning may provide a sufficient basis for an officer to believe the person is armed and dangerous." *Id.* at

652-53. The court analyzed whether Hall's actions had provided the officer with sufficient facts to indicate the existence of a reasonable and articulable suspicion that Hall was armed and dangerous. *Id.* The court found that because Hall became "hostile and antsy," responded "defensively" to questions, and kept his hands in his pockets, the frisk for weapons was justified. *Id.* at 653.

In *State v. Lomax*, 24 Wn. App. 541, 544 603 P.2d 1267 (Div 1 1979), Division One upheld the search of a defendant when officers entered a home in the execution of a search warrant under a *Terry v. Ohio* analysis. Even though officers announced their presence, and could hear sounds indicating someone was home, they had to force entry. *Id.* at 543-44. When they forced entry, officers saw Lomax standing in the living room with her hand in her robe pocket. *Id.* at 543. Division One held there was sufficient facts to establish a reasonable belief Lomax was armed to search her for weapons. *Id.* at 544

In the present case, Officer Napolitano had specific and objective facts to warrant a frisk for weapons. When Napolitano first entered the room, he noticed swords and axes on the walls and knives on the shelves. RP 15. He also knew Alex White was on supervision for unlawful possession of a gun and drug charges and that she had access to the room. RP 5. When Napolitano originally contacted Rooney, Rooney was clad

only in boxer shorts and did not appear to have any weapon on him. RP 22. Rooney then asked to put on a pair of pants, and grabbed a specific pair off of the floor. When Napolitano reached out for the pants and told Rooney the pants would be searched for protective reasons because he was concerned about getting shot, Rooney's response was to pull the pants and loudly curse his objection. RP 22, 23, 25. Even if Rooney was not sleeping in a room with axes, swords and knives, his actions of pulling the pants away from Officer Napolitano and cursing, provides a sufficient basis for the officer to believe Rooney was possibly armed and dangerous. The officer's concern about the pants containing a weapon was well founded, as Napolitano felt a gun when he took the pants from Rooney. Officer Napolitano was well within the need for a protective frisk of Rooney at this point.

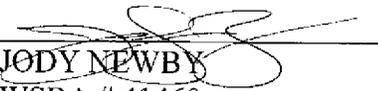
VI. CONCLUSION

For the above stated reasons, the convictions should be affirmed.

Respectfully submitted this 15 day of January.

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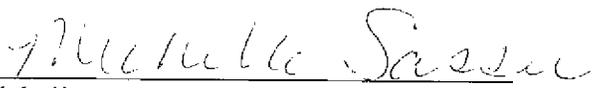
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Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on January 15th, 2015.


Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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