

71522-4

71522-4

NO. 71522-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

LISA LIPPINCOTT,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

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**BRIEF OF RESPONDENT**

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**A. ISSUES**

1. Evidence is sufficient to support a conviction, if viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the elements of the crime contained in the “to convict” instruction. Here, the “to convict” instruction contained an unnecessary element, specifically that Lippincott did not obtain anything of value with the victims’ financial information and means of identification. The State presented evidence that Lippincott had thousands of personal and financial documents stored in her apartment in hundreds of people’s names. No evidence was presented that Lippincott used the documents to obtain something of value. Given these facts, was there sufficient evidence that Lippincott did not obtain anything of value?

2. Washington courts have long recognized that article I, section 7 allows for the warrantless search of probationers, and their homes and effects, based on an officer’s well-founded or reasonable suspicion of a probation violation. Here, a corrections officer testified that he arrested Lippincott on two warrants, including one for failing to report to probation. When the officer arrested Lippincott, he knew that she had a history of identity theft convictions and activity, and had likely provided the Department of

Corrections with an invalid address. Further, the officer had experience supervising other identity theft probationers who had failed to report because they had returned to committing financial crimes. The officer searched Lippincott's purse and found multiple prepaid credit and gift cards, despite the fact that she was unemployed. The officer knew from his experience that identity thieves frequently use prepaid credit and gift cards to commit financial crimes, and keep additional evidence of their fraudulent activity at their homes. Based on these facts, did the officer have a reasonable suspicion that Lippincott had violated the terms of her probation, thus justifying his warrantless search of her purse and home?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged Lisa Lippincott with ten counts of Identity Theft in the Second Degree, and one count of Possession of Stolen Property in the Third Degree. CP 15-20. A jury convicted Lippincott of nine counts of second-degree identity theft, and one count of third-degree possession of stolen property. CP 133-42;

8RP 635-36.<sup>1</sup> The jury deadlocked on the remaining count of second-degree identity theft. 8RP 633-35. The trial court imposed a standard range sentence of 50 months. CP 146-58; 10RP 29.

## 2. SUBSTANTIVE FACTS<sup>2</sup>

On September 8, 2011, Department of Corrections (DOC) Officer Kristoffer Rongen and two King County Sheriff's detectives drove to Seattle's Southpark neighborhood in search of Lippincott, who had two warrants for her arrest. 2RP 9-10. One of Lippincott's warrants was a DOC community escape warrant for failing to report to probation, while the other warrant was on a pending felony matter. 2RP 10. As part of her probation, Lippincott had signed an agreement with DOC obligating her to report to probation, follow the law, and provide a valid address. Pretrial Ex. 5. The same DOC document notified Lippincott that her "person, residence, automobile, or other personal property" were subject to search and seizure if DOC had "reasonable cause" to believe that she had violated the terms of her probation. Id.

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<sup>1</sup> The Verbatim Report of Proceedings consists of ten volumes designated as follows: 1RP (8/19/13), 2RP (10/10/13), 3RP (10/14/13), 4RP (10/15/13), 5RP (10/15/13 voir dire), 6RP (10/16/13), 7RP (10/17/13), 8RP (10/18/13), 9RP (11/15/13), and 10RP (1/10/14).

<sup>2</sup> These facts were elicited at a pretrial hearing under CrR 3.6 unless stated otherwise. The Findings of Fact and Conclusions of Law from that hearing are attached to this brief in Appendix A.

The officers saw someone who looked like Lippincott get into a car with another woman and drive away. 2RP 11-12. They followed the car to a nearby gas station, where one of the detectives positively identified Lippincott as the driver. 2RP 12. Rongen arrested Lippincott on the outstanding warrants and immediately began searching her purse. 2RP 13, 133-34. Rongen found multiple prepaid gift and credit cards inside Lippincott's purse that did not bear any individual names on them. 2RP 13, 15, 85. Rongen also found several keys in Lippincott's purse, including one solitary key at the bottom of her purse. 2RP 20. Additionally, Rongen searched Lippincott's car but did not report finding anything of evidentiary value. 2RP 13.

Based on his training and experience working with fugitives, Rongen believed that Lippincott might be using the cards fraudulently. 2RP 16-17. Rongen testified that people "load" or purchase gift cards and prepaid credit cards to "wash" fraudulently obtained credit card information.<sup>3</sup> 2RP 16. Further, Rongen explained that probationers who are "on the run" often stop reporting because "they're back to the same behavior that landed

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<sup>3</sup> Another detective who was present for the arrest echoed this experience, testifying that people will use prepaid gift and credit cards to "hold[] money that came from a fraudulent source." 2RP 135.

them typically on probation.” 2RP 17. Rongen knew at the time of Lippincott’s arrest that she was unemployed, and had identity theft convictions. 2RP 18-19. Further, the first time Rongen met Lippincott, she was in a bedroom full of fraudulent documents and printers to create false documents and checks. 2RP 18. In Rongen’s experience, probationers who, like Lippincott, had failed to report, had previously been convicted of identity theft, and were found in possession of prepaid gift and credit cards, kept additional evidence of fraudulent activity at their homes. 2RP 21-24.

Rongen decided to search Lippincott’s residence based on his training and experience, the prepaid gift and credit cards he found in Lippincott’s purse, Lippincott’s prior criminal history, and her failure to report to probation and provide a valid address. 2RP 22.

Rongen believed that Lippincott lived in an apartment in Federal Way, based on recent information that his partner, Detective Wheeler, had received from a reliable, confidential informant. 2RP 25, 28, 136-37, 168-72. Although Lippincott maintained that she lived with her father in Renton, as she had previously reported to DOC, Rongen did not believe her based on his prior experience working with fugitives. 2RP 28-30, 77, 136;

3RP 196-97. Rongen thought that Lippincott had lied about living in Renton to prevent DOC from searching her true residence and finding evidence of new criminal activity. 2RP 29-30.

When Rongen told Lippincott that they were going to search the Federal Way residence, Lippincott admitted to living there, and asked that they not search it because her 16-year-old daughter would be present. 2RP 30-31. Rongen and Wheeler went to the apartment and found the door ajar with a young woman, who later identified herself as Lippincott's daughter, inside. 2RP 32, 34. They also saw an older gentleman inside the apartment who told them that he was "crashing" at the apartment, and that Lippincott lived there with a roommate. 2RP 35-37.

Lippincott's daughter showed the officers Lippincott's bedroom, where they found court paperwork bearing Lippincott's name, as well as "a very, very large amount" of documents, checks, cards, and identification bearing other people's names. 2RP 37, 41, 43, 148-50. Rongen estimated that "well past" 50 people's names were on the documents they found. 2RP 43. Rongen found a box of blank checks belonging to Good Time Ernie's (a Burien bar) in the kitchen, and numerous boxes with passports and documents in other people's names in the dining room. 2RP 44.

Before leaving the apartment, Rongen tried the single key that he had found at the bottom of Lippincott's purse and learned that it secured the apartment's front door. 2RP 44-45.

At a pretrial hearing, Lippincott argued that all of the evidence obtained against her should be suppressed because Rongen did not have a reasonable belief of criminal activity to justify searching her purse, or a reasonable belief that she lived in the Federal Way apartment. 3RP 214-25; CP 81-85. In response, the State argued that Rongen lawfully searched Lippincott's purse incident to arrest, and based on his reasonable belief that Lippincott had violated the terms of her probation. 3RP 226-27; CP 47. The State contended that Rongen had probable cause to believe that Lippincott lived in Federal Way based on the information provided by the confidential informant, Lippincott's admission to living there prior to the search, and the confirming statements of her daughter and housemate. 3RP 227-31; CP 51-52.

The court found that Rongen justifiably searched Lippincott's purse after placing her under arrest for the outstanding warrants, although it did not specify under which search exception argued by the State. CP 164. The court also found that Rongen had probable cause to believe that Lippincott lived at the Federal Way address

based on her admission to living there, and the confidential informant's statements to Wheeler. 3RP 232, 251-52; CP 164-65. The court concluded that Rongen had a reasonable suspicion that Lippincott had violated the terms of her probation, and that further evidence of fraudulent activity would be found at her residence, reasoning:

[W]hether or not the officers had cause here to believe that Ms. Lippincott had violated the terms of probation cannot be determined simply by looking at what was found. If these same items had been found in the purse of somebody who had no prior convictions for identity theft, then it might be a stretch to say that this indicated any possible criminal activity, but the fact is that Ms. Lippincott had been convicted of identity theft, the officers knew that, and therefore when she was found with these cards in her presence the court concludes that they had at least a reasonable suspicion based on her possession of those items that she had violated the terms of probation, which included not violating any criminal laws.

3RP 251; CP 164-65. The court also relied on Rongen's "training and experience and knowledge of identity theft suspects and things they commonly possess" to reach its conclusion. CP 164.

At trial, Rongen testified similarly to the pretrial hearing, although he identified himself only as an "officer," and did not reference his DOC work or Lippincott's prior identity theft convictions. 6RP 368. Rongen explained that the "well over a

hundred” documents that he found consisted of passports, bank statements, birth certificates, checks, and job applications in other people’s names. 6RP 381-82. All of these documents were packed in boxes in Lippincott’s dining room. 6RP 382. Wheeler testified that the “thousands of documents” that he found included identification cards, copies of identification cards, passports, blank checks, completed checks, check stock paper, rental and job applications, and birth and marriage certificates in “hundreds of different names.” 6RP 402-03. Most of these documents were located inside a large suitcase in Lippincott’s bedroom closet. 6RP 405.

Although the officers found a trove of victims’ personal and financial information in Lippincott’s apartment, the State charged Lippincott with only ten counts of second-degree identity theft. Eight of the ten counts involved rent checks written by tenants to the Garden Villa apartments. CP 15-19. The Garden Villa apartment property manager testified at trial that they kept copies of the tenants’ rent checks in the apartment office, and that Lippincott did not live or work at the apartment complex. 7RP 567-68, 572. The other two counts involved copies of driver’s licenses found in Lippincott’s apartment. CP 19. None of the victims who testified

knew Lippincott, or gave her permission to possess their property.  
6RP 465-69, 473-76; 7RP 525-27, 528-30, 531-32, 534-35, 538-39,  
557-59.

**C. ARGUMENT**

**1. SUFFICIENT EVIDENCE SUPPORTS  
LIPPINCOTT'S IDENTITY THEFT CONVICTIONS.**

Lippincott argues that her second-degree identity theft convictions should be reversed because the State failed to prove that she obtained (1) nothing of value, or (2) credit, money, goods, services, or anything else less than \$1,500 in value. Viewing the evidence in the light most favorable to the State, Lippincott's argument fails. There was sufficient evidence from which a rational trier of fact could reasonably infer that Lippincott obtained nothing of value with the victims' rent checks and driver's licenses.

A person is guilty of second-degree identity theft if she knowingly possesses another person's financial information or means of identification with the intent to commit a crime, in circumstances not amounting to first-degree identity theft, which is defined as obtaining credit, money, goods, services, or anything else of value in excess of \$1,500. RCW 9.35.020(1)-(3). For purposes of the identity theft statute, "financial information" includes

an individual's account number, and "means of identification" includes a person's name and driver's license. RCW 9.35.005(1)(a), (3). A defendant need not use the person's financial information or means of identification to be convicted of second-degree identity theft. State v. Sells, 166 Wn. App. 918, 924, 271 P.3d 952 (2012).

At trial, the State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). In criminal cases, the State must prove every element not objected to in the "to convict" instruction beyond a reasonable doubt, even if the element is otherwise unnecessary. See State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (reversing and dismissing the defendant's conviction because the State failed to prove venue, an unnecessary element that was included in the "to convict" instruction without objection).

Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be

drawn therefrom.” Id. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).

A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. The reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

Here, the “to convict” instructions for second-degree identity theft required the State to prove an unnecessary element, specifically that Lippincott “obtained credit or money or goods or services or anything else that is \$1500 or less in value from the acts described in element (1); or did not obtain any credit or money or goods or services or other items of value.” CP 116-25.

This element was included even though it is typically reserved for cases where second-degree identity theft is submitted to the jury as a lesser offense. 11A Washington Practice: Pattern Jury Instructions Criminal, WPIC 131.06, Note on Use; see also State v. Ward, 148 Wn.2d 803, 813-14, 64 P.3d 640 (2003) (holding that where a defendant is charged solely with the lesser

degree of an offense, the State is not required to prove that the offense “does not amount to” the higher degree of the offense). Given that this unnecessary element was included without objection in the “to convict” instruction, the State was required to prove it beyond a reasonable doubt. 7RP 551; Hickman, 135 Wn.2d at 102.

Nonetheless, there is substantial evidence that Lippincott did not obtain anything of value with the victims’ financial information and means of identification. The identity theft counts against Lippincott involved rent checks and photocopied driver’s licenses. CP 15-19, 116-25. The ten charged items were seized among “thousands” of rent checks to Garden Villa apartments, “thousands” of blank checks and blank check stock paper, and “well over a hundred” passports, birth certificates, job applications, and other personal documents in “hundreds of different names.” 6RP 402-03, 452-54.

The bulk of the documents were packed inside a large suitcase in Lippincott’s bedroom closet, and in boxes in her dining room. 6RP 382, 405. There was no evidence that any of the documents that were found were spread out on a table, or in any other circumstances suggesting apparent use. The State did not

present any evidence that Lippincott had used the stacks of documents stowed away in her apartment to obtain anything of value. Indeed, the State could not link any of the prepaid gift and credit cards in Lippincott's purse to any victims because the cards did not bear any individual names. 2RP 85. Given the sheer number of documents, their location, and the lack of evidence suggesting that Lippincott had used them to obtain anything of value, a rational trier of fact could reasonably infer that Lippincott "did not obtain any credit or money or goods or services or other items of value," as required by the unnecessary element.

CP 116-25.

Lippincott argues that her convictions must be reversed and dismissed because the "absence of evidence of fact is not evidence of the absence of the fact." Appellant's Br. at 7. Lippincott does not cite any authority for this argument, which misses the mark. If there was no evidence that Lippincott obtained anything of value, then there was no evidence from which a rational jury could determine that she did. Viewing the evidence in the light most favorable to the State, and drawing all reasonable inferences therefrom, there is sufficient evidence from which a rational trier of fact could find that Lippincott did not obtain anything of value with

the victims' rent checks and driver's licenses. Salinas, 119 Wn.2d at 201. Lippincott's claim should be rejected.

**2. RONGEN LAWFULLY SEARCHED LIPPINCOTT'S PURSE AND RESIDENCE.**

Lippincott argues that the trial court erred by failing to suppress the evidence obtained from the warrantless search of her purse and residence.<sup>4</sup> She contends that there is no probation search exception to article I, section 7 of Washington's constitution. Lippincott is incorrect. Washington courts have long recognized an exception under the state constitution that permits the warrantless search of probationers, and their homes and effects, based on a well-founded or reasonable suspicion. The Legislature codified this exception in RCW 9.94A.631 as part of the Sentencing Reform Act of 1984. The Washington Supreme Court has continued to recognize and endorse the exception in later jurisprudence. Given the circumstances of Lippincott's arrest, and Rongen's experience working with identity theft probationers, Rongen had a reasonable suspicion that Lippincott had violated the terms of her probation by

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<sup>4</sup> Lippincott also challenges the warrantless search of her car, albeit in passing, likely because nothing appears to have been seized from her car. The same analysis that justifies Rongen's search of Lippincott's purse and residence applies with equal force to the search of her car.

failing to report and engaging in new criminal activity, which justified the search of her purse and residence.

Article I, section 7 provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. art. I, § 7. In State v. Gunwall, the Washington Supreme Court identified six nonexclusive criteria for determining whether, in a given situation, a state constitutional provision should be interpreted independently from its corresponding federal constitutional provision, and if so, whether the state constitutional provision provides broader protection than the federal constitution. 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

Although it is now well settled that the protections guaranteed by article I, section 7 are “qualitatively different” from those provided by its federal counterpart, the Fourth Amendment<sup>5</sup>, the determination that article I, section 7 affords greater protection “in a particular context does not necessarily mandate such a result in a different context.” State v. McKinney, 148 Wn.2d 20, 26, 60 P.3d 46 (2002) (citation omitted). When determining whether

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<sup>5</sup> The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV.

article I, section 7 provides enhanced protection in a specific context, courts engage in a two-part analysis: (1) does the state action disturb a person's private affairs, and (2) if so, is the intrusion justified by authority of law. York v. Wahkiakum School Dist. No. 200, 163 Wn.2d 297, 306-07, 178 P.3d 995 (2008) (plurality); State v. Puapuaga, 164 Wn.2d 515, 522, 192 P.3d 360 (2008). In general, the "authority of law" required by article I, section 7 includes the authority granted by a search warrant, a valid (*i.e.* constitutional) statute, or a recognized common law exception to the warrant requirement. Gunwall, 106 Wn.2d at 68-69; City of Seattle v. McCready, 123 Wn.2d 260, 272-74, 868 P.2d 134 (1994).

Washington law recognizes a warrantless search exception to search a parolee or probationer<sup>6</sup>, including her home and personal effects, when there is a well-founded or reasonable suspicion of a probation violation, and there is probable cause to believe that the probationer lives at the residence to be searched.

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<sup>6</sup> A parolee's and a probationer's interests in due process and privacy are the same. State v. Lampman, 45 Wn. App. 228, 233 n.4, 724 P.2d 1092 (1986) (relying on Washington and United States Supreme Court jurisprudence to this effect).

State v. Campbell, 103 Wn.2d 1, 22-23, 691 P.2d 929 (1984);

State v. Winterstein, 167 Wn.2d 620, 630, 220 P.3d 1226 (2009).<sup>7</sup>

Early Washington cases recognizing the probation search exception analyzed it under the Fourth Amendment, and reasoned that such searches are excepted from the warrant requirement because “a person judicially sentenced to confinement but released on parole remains in *custodia legis* until expiration of the maximum term of his sentence; i.e., he is simply serving his time outside the prison walls.” State v. Simms, 10 Wn. App. 75, 82, 516 P.2d 1088 (1973); State v. Keller, 35 Wn. App. 455, 460, 667 P.2d 139 (1983). These courts recognized that the Fourth Amendment protection against *unreasonable* searches and seizures still applied, and held that a probationer search must be based on a well-founded, or reasonable suspicion that a probation violation has occurred. Simms, 10 Wn. App. at 84-88; Keller, 35 Wn. App. at 459; State v. Coahran, 27 Wn. App. 664, 666, 620 P.2d 116 (1980).

The Washington Supreme Court first recognized the probation search exception under article I, section 7 in

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<sup>7</sup> In State v. Winterstein, the court held that a probation officer must have probable cause to believe that a probationer lives at a particular residence prior to searching it. 167 Wn.2d at 630. The parties agreed in Winterstein that probationers have a “lesser expectation of privacy,” and may be searched based on a well-founded or reasonable suspicion of a probation violation. Id. at 628.

State v. Campbell, 103 Wn.2d 1, 22-23, 691 P.2d 929 (1984).

Campbell, an inmate serving time on work release, challenged the warrantless search of his car under both the Fourth Amendment and article I, section 7. Id. at 22. The court upheld the warrantless search of his car, declaring “Washington recognizes a warrantless search exception, when reasonable, to search a parolee or probationer and his home or effects.” Id.

Although the Campbell court did not analyze the warrantless search separately under the Fourth Amendment and article I, section 7, the Washington Supreme Court has continued to reaffirm and endorse the probation search exception under article I, section 7 in later jurisprudence. See Puapuaga, 164 Wn.2d at 523 (citing Campbell as “holding State’s search and seizure of work release inmate’s car did not violate the U.S. Const. amend. IV or Const. art. I, § 7”); York, 163 Wn.2d at 312-13, 313 n.20 (recognizing the “probationers” exception to the warrant requirement under article I, section 7).

Further, as part of the Sentencing Reform Act of 1984, the Legislature codified the judicially created probation search exception in RCW 9.94A.631. Laws of 1984, ch. 209, § 11 (formerly RCW 9.94A.195). RCW 9.94A.631(1) provides in

relevant part: “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.*”<sup>8</sup> (Emphasis added). The Ninth Circuit has held that the “reasonable cause” requirement satisfies the demands of the Fourth Amendment. U.S. v. Conway, 122 F.3d 841, 842 (9th Cir. 1997). No Washington court has ever considered the constitutionality of RCW 9.94A.631 under either the Fourth Amendment or article I, section 7.

In any event, all three divisions of the Court of Appeals have recognized the probation search exception under article I, section 7. State v. Patterson, 51 Wn. App. 202, 208, 752 P.2d 945 (1988) (“We conclude that under our Washington Constitution there exists an exception to the warrant requirement which allows a search based on reasonable suspicion.”) (Division Three); State v. Lucas, 56 Wn. App. 236, 242-43, 783 P.2d 121 (1989)

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<sup>8</sup> The current statute is substantially the same as the original enactment. Compare Laws of 1984, ch. 209, § 11 (providing an “offender may be required to submit to a search and seizure of the offender’s person, residence, automobile, or other personal property” if there is “reasonable cause” to believe the offender has “violated a condition or requirement of the sentence”), with Laws of 2009, ch. 390, § 1 (amending the statute to clarify “a community corrections officer” may search an offender), and Laws of 2012, 1<sup>st</sup> Spec. Sess., ch. 6, § 1 (amending different provisions of the statute).

(Division One); State v. Reichert, 158 Wn. App. 374, 386-87, 242 P.3d 44 (2010) (Division Two). Indeed, Division Two noted that Washington courts have been presented with “myriad opportunities” to establish greater protections for probationers and have “routinely” refused to do so, recognizing that probationers are entitled to “reduced privacy expectations.” State v. Olson, 164 Wn. App. 187, 193, 262 P.3d 828 (2011).

Most of these cases rest on the theory that probationers have a diminished right of privacy because of the State’s continuing interest in supervising them as convicted offenders. Lucas, 56 Wn. App. at 240 (suggesting probationers “can expect state officers and agents to scrutinize them closely”); Reichert, 158 Wn. App. at 386 (recognizing that probation is one point “on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service”) (quoting Griffin v. Wisconsin, 483 U.S. 868, 874, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987)).

A recent case from Division Three of the Court Appeals, State v. Jardinez, recognized the probation search exception under article I, section 7, and held that a corrections officer did not have reasonable cause to search a probationer’s iPod where the

probationer failed to report for a week and a half, and then appeared and nervously handed over an iPod at the officer's direction. \_\_\_ Wn. App. \_\_\_, 338 P.3d 292, 293-94 (2014). The officer testified that he searched the iPod because parolees "occasionally" take pictures of themselves "doing something they shouldn't be doing," and admitted that he had no other reason specific to the defendant, besides his nervousness, to believe that the iPod would contain evidence of a crime or probation violation. Id. at 293.

The court concluded that the officer unlawfully searched the iPod, holding that RCW 9.94A.631 requires "a nexus between the searched property and the alleged crime." Id. at 297. The court based its holding on the official comment by the Sentencing Guidelines Commission to the statute, suggesting that the search and seizure authorized by the statute "should relate to the violation which the Community Corrections Officer believes to have occurred." Id. The court did not address whether article I, section 7 or the Fourth Amendment required such a nexus, or whether the well-founded or reasonable suspicion requirement incorporated this nexus.

Nevertheless, even assuming that article I, section 7 requires a nexus between the alleged probation violation and the searched property, that requirement was satisfied here by Rongen's reasonable suspicion that Lippincott had violated the terms of her probation by failing to report and engaging in new criminal activity. At the time of Lippincott's arrest, Rongen knew that she had an outstanding DOC warrant for failing to report, and another warrant on a pending felony case, suggesting potentially new criminal activity. 2RP 10. Rongen testified that based on his experience working with fugitives, probationers who fail to report are often "on the run" because they have returned to the same behavior that landed them on probation. 2RP 17.

Rongen also testified that he knew that Lippincott was a repeat offender who had a history of identity theft convictions, and that the first time he met her was in a bedroom full of fraudulent documents and printers to create false checks and other documents. 2RP 18-19. Given Lippincott's history, failure to report, and multiple warrants, and Rongen's experience working with identity theft probationers, Rongen had a reasonable suspicion that Lippincott was failing to report because she was engaged in

new criminal activity, and that evidence of that activity might be in her purse.<sup>9</sup>

When Rongen discovered that Lippincott had multiple, prepaid gift and credit cards in her purse, despite being unemployed, Rongen's reasonable suspicion grew to justify searching Lippincott's residence. 2RP 15, 19. Rongen knew from his experience that people will "wash" fraudulently obtained credit card information by purchasing prepaid gift and credit cards. 2RP 16. Further, Rongen had experience supervising probationers like Lippincott who had been convicted of identity theft, failed to report, possessed fraudulently obtained prepaid gift and credit cards, and kept additional evidence of fraudulent activity at their home. 2RP 21-24.

Rongen had a reasonable suspicion that Lippincott's home contained additional evidence of criminal activity based on his experience supervising other identity theft probationers, the contents of Lippincott's purse, and her history. The fact that

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<sup>9</sup> Rongen also likely searched Lippincott's purse incident to her lawful arrest on the outstanding warrants, although it is unclear from the record where Lippincott's purse was located at the time of her arrest. See State v. Byrd, 178 Wn.2d 611, 614, 310 P.3d 793 (2013) (upholding the warrantless search of the defendant's purse because it was in her lap at the time of arrest); State v. MacDicken, 179 Wn.2d 936, 319 P.3d 31 (2014) (upholding the warrantless search of the defendant's bags because he was carrying them at the time of arrest).

Lippincott had reported living in Renton, after having been notified that DOC could search her residence, and after Rongen had received reliable information to the contrary, further increased Rongen's reasonable suspicion. 2RP 25, 28; Pretrial Ex. 5. Rongen justifiably searched Lippincott's residence based on the nexus between (1) the alleged probation violations, specifically Lippincott's failure to report and suspected new criminal activity, and (2) the property to be searched, Lippincott's true and unreported residence.

Lippincott argues that a probation search exception does not exist under article I, section 7. Although she argues that article I, section 7 affords probationers greater protection from warrantless searches than the Fourth Amendment, she does not conduct a Gunwall analysis, or attempt to explain why one is unnecessary in this context. See McKinney, 148 Wn.2d at 26 (recognizing that the determination that article I, section 7 provides "enhanced protection in a particular context does not necessarily mandate such a result in a different context"). This Court should not grant the extraordinary remedy of suppression of this evidence without such an analysis.

Moreover, Lippincott's argument runs contrary to well established Washington Supreme Court precedent holding and reaffirming the existence of a probation search exception under article I, section 7. Campbell, 103 Wn.2d at 22-23; Puapuaga, 164 Wn.2d at 523; York, 163 Wn.2d at 312-13. Lippincott does not address this precedent, but appears to suggest that the state supreme court has recognized such an exception only under the Fourth Amendment. Appellant's Opening Br. at 14 ("Applying the Fourth Amendment, the Supreme Court has applied a probation exception to the warrant requirement to Washington probationers."). Lippincott's failure to acknowledge this precedent is at best an oversight, and at worst misleading.

Further, Lippincott makes no attempt to reconcile her claim with RCW 9.94A.631, the statute authorizing the warrantless search of probationers. She does not argue that the statute is unconstitutional under article I, section 7, nor does she attempt to meet the high burden of proving it unconstitutional beyond a reasonable doubt. State v. Wadsworth, 139 Wn.2d 724, 734, 991 P.2d 80 (2000) ("A statute is presumed constitutional and the party challenging the statute has the burden of establishing it is unconstitutional beyond a reasonable doubt.").

Division Three's decision in Jardinez was announced after Lippincott filed her opening brief, but it does not compel a different result. The facts of this case are strikingly inapposite to the facts of Jardinez where the corrections officer admitted to having no reason to search the defendant's iPod other than his nervousness, and the officer's general experience that parolees "occasionally" take pictures of themselves "doing something they shouldn't be doing." 338 P.3d at 293.

Here, Rongen knew Lippincott had failed to report, had two warrants for her arrest, including one on a pending felony matter, had a history of identity theft convictions and activity, and had likely given a false address. 2RP 10, 18-19, 25, 28. This knowledge, combined with Rongen's experience supervising similarly situated identity theft probationers who had failed to report, returned to committing financial crimes with fraudulently obtained prepaid credit and gift cards, and kept additional evidence of their criminal activity at home, distinguish this case from Jardinez. 2RP 16, 21-24. This Court should reject Lippincott's claim and affirm the trial court's decision upholding the warrantless search of Lippincott's purse and residence under the probation search exception to the warrant requirement.

D. CONCLUSION

For the foregoing reasons, the Court should affirm  
Lippincott's convictions.

DATED this 11<sup>th</sup> day of February, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
KRISTIN A. RELYEA, WSBA #34286  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

# **APPENDIX A**

**FILED**  
SUPERIOR COURT OF WASHINGTON

JAN 17 2014

SUPERIOR COURT CLERK  
BY JOSEPH MASON  
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
	)	No. 13-1-10096-3 SEA
	)	
vs.	)	
	)	WRITTEN FINDINGS OF FACT AND
LISA MARIE LIPPINCOTT,	)	CONCLUSIONS OF LAW ON CrR 3.6
	)	MOTION TO SUPPRESS PHYSICAL,
	)	ORAL OR IDENTIFICATION
	)	EVIDENCE
	)	
	)	

A hearing on the admissibility of physical, oral, or identification evidence was held on October 10 and October 14, 2013 before the Honorable Judge Bruce Heller. After considering the evidence submitted by the parties and hearing argument, to wit: testimony by Washington Department of Corrections Officer Kris Rongen, King County Sheriff's Detective Benjamin Wheeler, and King County Sheriff's Detective Kurt Litsjo, as well as testimony by the defendant, the court makes the following findings of fact and conclusions of law as required by

CrR 3.6:

1. FACTS:

On September 8, 2011, Washington Department of Corrections (DOC) Officer Kris Rongen, assisted by King County Sheriff's Deputies (KCSO) Benjamin Wheeler and Kurt Litsjo,

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 1

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1 contacted and arrested the defendant on an outstanding Department of Corrections warrant. In  
2 addition to the DOC warrant, the defendant also had an active felony warrant on an unrelated  
3 case. DOC Officer Rongen searched the defendant's purse and located several gift cards and  
4 prepaid credit cards as well as several keys.

5 At the time of this incident, the defendant was being supervised by the Department of  
6 Corrections as a result of a conviction for the crime of Identity Theft. The defendant signed a  
7 "Conditions, Requirements, and Instructions" form acknowledging that as a result of her  
8 probation, she was subject to search and seizure of her person, residence, automobile, or other  
9 personal property if there is reasonable cause on the part of the Department of Corrections to  
10 believe that she has violated her conditions or requirements of probation.

11 Officer Rongen believed that the defendant possessed these cards for fraudulent purposes  
12 and thus was in violation of her probation, and that additional evidence of fraudulent activity  
13 would be found at the defendant's residence. This belief was based on Officer Rongen's  
14 knowledge of the defendant, the defendant's criminal history involving identity theft crimes, and  
15 Officer Rongen's training and experience that prepaid credit cards and gift cards are often  
16 possessed by identity theft suspects for fraudulent purposes.

17 KCSO Detective Wheeler had previously received information from a confidential  
18 informant that the defendant was living at the residence located at 31220 28<sup>th</sup> Ave South #G202  
19 in Federal Way. Detective Wheeler testified that he had found this Confidential Informant to be  
20 reliable. Detective Wheeler relayed information to Officer Rongen regarding having received  
21 information that the defendant resided at the Federal Way address. Officer Rongen made the  
22 decision that a search would be conducted of the defendant's residence pursuant to DOC  
23 authority. Officer Rongen, Detective Wheeler, Detective Litsjo, and the defendant, then  
24

1 proceeded back to the precinct to obtain separate patrol vehicles prior to going to the defendant's  
2 residence in Federal Way. En route to the precinct, Detective Wheeler advised the defendant of  
3 her Miranda rights.

4 Officer Rongen testified that while at the precinct, and prior to arriving at the listed  
5 residence in Federal Way, the defendant requested to speak to Officer Rongen at which time the  
6 defendant told Officer Rongen that she did in fact live at the residence in Federal Way and that  
7 she did not want the officers to go there to search it because her daughter would be there.

8 Officer Rongen, Detective Wheeler, Detective Litsjo, and the defendant subsequently  
9 arrived at 31220 28<sup>th</sup> Ave South #G202 in Federal Way. Upon arriving at the residence, the  
10 defendant elected to remain inside the patrol car with Detective Litsjo while Officer Rongen and  
11 Detective Wheeler went up to apartment #G202. Officer Rongen and Detective Wheeler found a  
12 female and male at the apartment. The female identified herself as being the defendant's  
13 daughter, Kelsey Lippincott, and confirmed that her mother lived at that apartment. Kelsey  
14 Lippincott then proceeded to show Officer Rongen and Detective Wheeler where her mother's  
15 room was.

16 Officer Rongen, assisted by Detective Wheeler, then proceeded to search the defendant's  
17 bedroom and the common living areas of the apartment. Inside the bedroom that Kelsey  
18 Lippincott had identified as belonging to her mother (the defendant), Officer Rongen and  
19 Detective Wheeler located court documents bearing the defendant's name, letters written to and  
20 by the defendant, credit cards in the defendant's name, and bags full of thousands of documents  
21 in different individual's names (i.e. checks, bank statements, social security cards, credit cards,  
22 passports, birth certificates, and other personal documents). Also, in this same bedroom, officers  
23 located thousands of blank check making paper.

1           Officer Rongen also discovered that a key recovered from the defendant's purse fit the  
2 lock to the front door of the apartment.

3           2.       CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE  
4                SOUGHT TO BE SUPPRESSED:

5           The Court finds that Officer Rongen's search of the defendant's purse was justified,  
6 Officer Rongen had reasonable suspicion that the defendant was in further violation of her  
7 conditions of supervision and that evidence of further violation would be found at the  
8 defendant's residence, and Officer Rongen had probable cause to believe that the defendant lived  
9 at the residence searched.

10           The defendant was under DOC supervision at the time, and had outstanding warrants for  
11 which she was arrested. After contacting the defendant and placing her under arrest, Officer  
12 Rongen searched the defendant's purse. As a result of the search of the defendant's purse,  
13 Officer Rongen located prepaid credit cards and gift cards, as well as a key (which was later  
14 found to be the key to the front door of the listed residence). Based on the totality of the facts  
15 known to Officer Rongen at the time (including his knowledge of the defendant, the defendant's  
16 criminal history which included convictions for Identity Theft, as well as his training and  
17 experience and knowledge of identity theft suspects and things they commonly possess), Officer  
18 Rongen had a reasonable suspicion that the defendant was in violation of her terms of probation  
19 and that further evidence of fraudulent activity would be found at the defendant's residence.

20           Officer Rongen was justified in relying on Detective Wheeler's information that Detective  
21 Wheeler had received from a Confidential Informant stating that the defendant lived at the  
22 address of 31220 28<sup>th</sup> Ave South #G202 in Federal Way. In addition, prior to arriving at the  
23 listed Federal Way residence, Officer Rongen was informed by the defendant that the defendant  
24 did in fact live at the Federal Way address and that the defendant did not want the officers to go

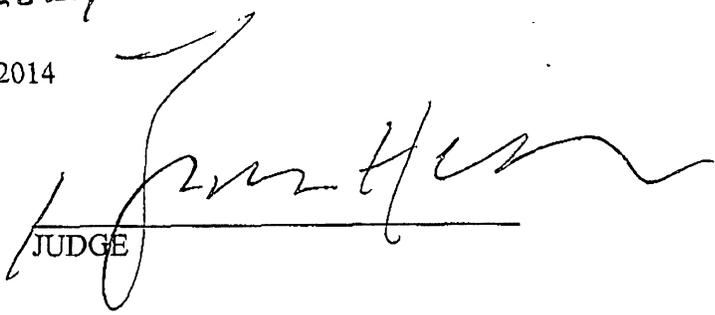
1 to that address because the defendant's daughter would be there. Upon arriving at the Federal  
 2 Way address, Officer Rongen discovered that the defendant's daughter (Kelsey Lippincott) was  
 3 at the address. Prior to searching the residence, the defendant's daughter confirmed that the  
 4 defendant did in fact live at the residence and proceeded to show the officers which room  
 5 belonged to the defendant. Officer Rongen then proceeded to search the defendant's residence  
 6 pursuant to DOC authority. It was later discovered that the key found in the defendant's purse  
 7 was the key to the listed Federal Way residence.

8 Officer Rongen had reasonable suspicion that the defendant was in violation of her  
 9 conditions of probation and that further evidence of fraudulent activity would be found at the  
 10 defendant residence, Officer Rongen had probable cause to believe that the defendant lived at the  
 11 residence in Federal Way, and Officer Rongen was justified in conducting a search of the  
 12 residence pursuant to DOC authority. The defendant's motion to suppress evidence obtained as  
 13 a result of the search of the defendant's purse and the search of the residence is denied.

14 In addition to the above written findings and conclusions, the court incorporates by  
 15 reference its oral findings and conclusions.

16 **\*\*All material facts and all conclusions of law are disputed by defense.\*\***

17 Signed this <sup>January</sup> 15<sup>th</sup> day of, 2014

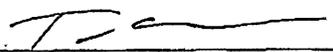


JUDGE

**Judge Bruce E. Heller**

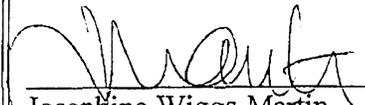
1 Presented by:

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3 Trinh Norsen WSBA #29437  
4 Deputy Prosecuting Attorney

4



5 Josephine Wiggs-Martin  
6 Attorney for Defendant

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D objects / approves to notice / form  
D will present separate objection's  
file

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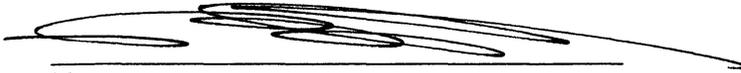
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Gregory Link, the attorney for the appellant, at Greg@washapp.org, containing a copy of the Brief of Respondent, in State v. Lisa Marie Lippincott, Cause No. 71522-4, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 12 day of February, 2015.



Name:  
Done in Seattle, Washington

RECEIVED  
FEBRUARY 12 11 05 AM  
COURT OF APPEALS  
DIVISION I