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COURT OF APPEALS

NO. 34068-2

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS PAUL WILLIAMS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John A. McCarthy, Judge

No. 05-1-00774-7

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
ALICIA BURTON
Deputy Prosecuting Attorney
WSB # 29285

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly deny defendant's motion to suppress evidence obtained from defendant's computer?

(Appellant's Assignment of Error Nos. 1 and 2).

2. Did the State present sufficient evidence to prove beyond a reasonable doubt that defendant committed the crime of possession of depictions of minor engaged in sexually explicit conduct?

(Appellant's Assignment of Error No. 3).

B. STATEMENT OF THE CASE.

1. Procedure

On February 14, 2005, the State filed an information charging THOMAS PAUL WILLIAMS, (hereinafter defendant), with one count of possession of depictions of minor engaged in sexually explicit conduct. CP 1-2.

On September 29, 2005, the parties appeared before the court for a CrR 3.6 motion to suppress evidence obtained from his computer. Defendant claimed that his computer was improperly seized without a warrant or defendant's consent. CP 5-8. The parties stipulated to the facts that the court should consider in deciding the motion to suppress. CP 21-

23; RP 5. After hearing evidence and argument from counsel, the court denied the defendant's motion to suppress, stating:

I think under the authority that the State has cited, particularly the In re Young in 1993 and In re Paschke of 1996, I think the conclusion of the courts is clear that there is a lessened privacy right due to the need to confine residents in a maximum security facility, and also I think there is a need to act immediately to either correct behavior or protect the other people within such a facility.

Based on the stipulated facts in this case, there was preliminary information and facts known to the treatment center and, in essence, a good cause to act immediately based on the facts that have been stipulated to. There was some immediacy with regard to the concerns. Under that authority, you know, I believe the Special Commitment Center is authorized, without consent, and without a warrant, to conduct a search within the room. That would include a search and seizure of the computer, based on the information they had. I'm going to deny the motion to suppress at this time.

RP 14-15. The court entered written findings of fact and conclusions of law on October 3, 2005. CP 24-27.

Trial began on October 3, 2005. RP 20. The jury returned a verdict of guilty to one count of possession of minor depicted in sexually explicit conduct. RP 231. The court sentenced defendant to six months in the Pierce County Jail. SRP¹ 11.

This timely appeal follows. CP 76-87.

¹ "SRP" refers to the report of proceedings from the sentencing hearing. All other proceedings will be referred to as "RP" throughout this brief.

2. Facts

Defendant is detained at a secure residential facility on McNeil Island. RP 26-28. Residents at this facility are allowed to have computers, but they must submit a formal request for one. RP 39. Once the request is approved and the computer is received, the Information Technology Department checks the computer to make sure that it complies with facility policy (i.e., there are no internet capabilities and that there are no user-created files on the computer). RP 121-126. It is also against policy to share computer equipment with other residents. RP 95. Defendant received a computer in August, 2002. RP 123.

On December 20, 2004, a day planner was found in the common room of the facility. RP 30. The day planner was found to contain a computer diskette and two nude photos of an adult female. RP 32, 41. The diskette contained nine additional images of a nude female. RP 105. It is contrary to facility rules to possess pornography of any kind. RP 40, 94.

Defendant admitted that he owned the day planner that contained the nude photos and diskette. RP 33. Concerned that defendant had additional pornographic images on his computer, the staff at the facility decided to confiscate defendant's computer. RP 41, 105. The computer was located in defendant's room. Defendant was the sole occupant of this

room. RP 26. Other residents could not access the defendant's room if it was locked. RP 27.

Joel Eussen, an Information Technology employee at the facility, examined the computer and found that the computer contained two hard drives – one factory installed and one that was installed at a later date. RP 134. Euseen located an image entitled Angel12.jpg on the non-factory hard drive. Ex. 1; RP 135. The image depicted an adult male lying in a supine position with an erect penis. Ex. 1; RP 72. There was a female child straddling the adult male. Ex. 1; RP 72. The child's mouth was on the adult male's penis and the child's genitalia were in the adult male's face. Ex. 1; RP 72. The file was created on November 18, 2004, and located in a folder that contained music files. RP 136. Eussen found other documents personal to the defendant that were created around that same time. RP 136.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS BECAUSE THE SEIZURE OF DEFENDANT'S COMPUTER WAS LAWFUL, REASONABLE AND WITH THE AUTHORITY OF LAW.

Defendant claims that the trial court erred in denying his motion to suppress evidence obtained from his computer. Defendant claims that he

had a privacy interest in his computer and that his constitutional rights were violated when his computer was seized without a warrant or his consent.

In reviewing findings of fact on a motion to suppress, an appellate court "will review only those facts to which error has been assigned." State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) (citing In re Riley, 76 Wn.2d 32, 33, 454 P.2d 820, cert. denied, 396 U.S. 972, 90 S. Ct. 461, 24 L. Ed. 2d 440 (1969)); State v. Christian, 95 Wn.2d 655, 656, 628 P.2d 806 (1981). Defendant has not assigned error to the findings of fact entered after the suppression motion; thus, they are verities. An appellate court reviews "conclusions of law in an order pertaining to suppression of evidence de novo." State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

The United States Constitution protects citizens against "unreasonable searches and seizures." U.S. Const. amend 4. Similarly, the Washington Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. article 1, section 7. A search and seizure in Washington is not unlawful unless it was either "unreasonable" under the Fourth Amendment, or, if it was, "without authority of law" under the Washington Constitution. Here, the search at issue was entirely reasonable under the circumstances, and was pursuant to "authority of

law” as evidenced by statute, regulations, rules, and case law supporting the legality of the search.

A state law that impinges upon a fundamental right is constitutional only if it furthers a compelling state interest and is narrowly drawn to serve that interest. In re Young, 122 Wn.2d 1, 26, 857 P.2d 989 (1993).

The Community Protection Act of 1990 was passed in response to citizens’ concerns about the laws and procedures regarding sexually violent offenders. In re Young, 122 Wn.2d 1, 11, 857 P.2d 989 (1993). Parts of the Community Protection Act relating to treatment and confinement of sexually violent predators are codified at RCW 71.09. Under RCW 71.09, those offenders who are determined to be sexually violent predators can be involuntarily committed after they have served their sentences; and they must further be detained at a “secure facility.” RCW 71.09.060.

Sexually violent predator commitment proceedings are initiated by the filing of a petition by the State. RCW 71.09.030. When the petition is filed, a judge makes an ex parte decision based upon the petition as to whether “probable cause exists to believe that the person named in the petition is a sexually violent predator.” RCW 71.09.040. If the judge finds probable cause, the law requires that the person be taken into

custody and transferred to a DSHS facility for evaluation and pending trial. RCW 71.09.050.

Searches and seizures of the property of residents confined following a determination that they are probably sexually violent predators is required in order to provide meaningful treatment to sexually violent predators, and to protect the public from sexually violent predators. The Washington Legislature has identified a compelling state interest in both treating sexually violent predators and in protecting the community from them:

The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act, chapter 71.05 RCW, which is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under chapter 71.05 RCW, sexually violent predators generally have personality disorders and/or mental abnormalities which are unamenable to existing mental illness treatment modalities and those conditions render them likely to engage in sexually violent behavior. The legislature further finds that sex offenders' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment act, chapter 71.05 RCW, is inadequate to address the risk to reoffend because during confinement these offenders do not have access to potential victims and therefore they will not engage in an overt act during confinement as required by the involuntary treatment act for continued confinement. The legislature further finds that the prognosis for curing sexually violent offenders is

poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act.

RCW 71.09.010.

RCW 71.09 authorizes the SCC to promulgate rules. The regulations governing the SCC provide in part:

A person the court commits to the SPP [sexual predator program] shall:

...

(b) Be permitted to wear the committed person's own clothes and keep and use the person's personal possessions, except when deprivation of possessions is necessary for the person's protection and safety, the protection and safety of others, or the protection of property within the SPP;

WAC 388-880(3)(b). Pursuant to this regulation, SCC staff may search resident rooms. The SCC itself also adopted Policy 212, which prohibits residents from having sexually explicit material on their computers. RP 40.

In 1993 the Washington Supreme Court specifically held that the State has a compelling interest in both treating sex predators and protecting society from sex predators. In re Young, 122 Wn.2d at 26. The court further held that all of the provisions of RCW 71.09 and its

associated regulations were narrowly drawn to serve that state interest and the entirety of the statute and scheme was facially valid. In re Young, 122 Wn.2d at 25-35.

In re Young further held that detaining suspected sexually violent predators in a special commitment center, a maximum-security facility, was related to the purpose of treating sex predators and protecting the public from sex predators. In re Young, 122 Wn.2d at 34. The court recognized it could not place “undue limitations on the administration of state institutions.” Id. Courts have therefore recognized that the SCC must have authority to search persons, or their rooms, in order to take immediate action related to either treatment of the resident or protection of the community. In re Paschke, 80 Wn. App. 439, 447, 909 P.2d 1328 (1996). Persons detained at the SCC therefore have lessened privacy rights due to the need to confine residents in a maximum-security facility, and the need of the institution to act immediately to either correct behavior or protect the community.

In re Young is consistent with the long-established rule that convicted "prisoners have no legitimate expectation of privacy and . . . the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells . . ." Hudson v. Palmer, 468 U.S. 517, 530, 104 S. Ct.

3194, 82 L. Ed. 2d 393 (1984). Although “residents” at the SCC are not “prisoners” detained pursuant to a criminal conviction, it has been conclusively established that a maximum-security setting is needed to house the residents, and the security concerns dictate that the same rules apply as in a prison, including searches for contraband.

In the present case, a judicial determination was made that there is probable cause to believe that the defendant is a sexually violent predator. CP 24-27 (Finding of Fact “FOF” 1). The Legislature has determined that such persons can only be treated and confined in secure facilities designed for the treatment of sex offenders in a maximum security setting. The courts have recognized that restricting the liberties of sexually violent predators is necessary to achieve the goals of treating such persons and protecting society. Treatment of sex predators obviously requires restrictions on pornography and other things detrimental to their progress.

Here, the defendant was found, by his own admission, to be in possession of adult pornography, a violation of SCC rules. CP 24-27 (FOF 6). The pornography was contained within a day planner that also contained a computer disk. CP 24-27 (FOF 7-8). SCC staff were obviously concerned that the defendant had additional pornography on his computer. RP 41, 105. SCC staff seized the defendant’s computer

pursuant to established policy and found, not only additional images of pornography, but at least one image of child pornography. CP 24-27 (FOF 12-15).

The search and seizure was entirely “reasonable” for Fourth Amendment purposes given the relationship between treating sex offenders and protecting society from them, as well as the information that was known to SCC staff at the time they determined to search the defendant’s computer. Similarly, the search and seizure was with “authority of law” pursuant to the Washington Constitution as the searches were authorized by statute, regulation, rule, and case law.

2. THE STATE PRESENTED SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT COMMITTED THE CRIME OF POSSESSION OF DEPICTIONS OF A MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT.

In reviewing a challenge to the sufficiency of the evidence, the court views the evidence in the light most favorable to the State and asks whether any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Hepton, 113 Wn. App. 673, 681, 54 P.3d 233 (2002), review denied, 149 Wn.2d 1018, 72 P.3d 762 (2003). Circumstantial and direct evidence are equally reliable. State v. McNeal, 98 Wn. App. 585, 592, 991 P.2d 649 (1999), affd, 145 Wn.2d 352, 37

P.3d 280 (2002). All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are made by the trier of fact and are not reviewable on appeal. State v. McPherson, 111 Wn. App. 747, 756, 46 P.3d 284 (2002).

A person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct when he or she knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct. RCW 9.68A.070.

Like he did at the jury trial, defendant claims that there is insufficient evidence to show that he knowingly possessed the image. The jury has already rejected defendant's claim and this court should too. The evidence at trial established that an image depicting child pornography was found on the hard drive of a computer that defendant possessed. Ex. 1. The image was entitled Angel12.jpg and was contained in a folder with other files that were created by the user, suggesting that the user had also placed the Angel12.jpg file in the folder. RP 140, 146. The image Angel12.jpg was created on November 18, 2004, and there were other documents personal to defendant that were created around that same time. RP 135-137. In addition, defendant admitted to SCC personnel that he possessed at least nine photos of a nude female in violation of SCC policy so it is not a stretch to assume that he also possessed this child

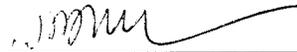
pornography. RP 105. When viewed in the light most favorable to the State, there is more than sufficient evidence for the jury to find that the defendant knowingly possessed child pornography. The evidence was sufficient to support the conviction.

D. CONCLUSION.

The trial court properly denied defendant's motion to suppress evidence and the State presented sufficient evidence to support the defendant's conviction. For the foregoing reasons, the State respectfully requests this court affirm the defendant's conviction.

DATED: May 31, 2006.

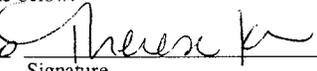
GERALD A. HORNE
Pierce County
Prosecuting Attorney

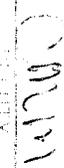


ALICIA BURTON
Deputy Prosecuting Attorney
WSB # 29285

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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