

NO. 35336-9-II

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

STATE OF WASHINGTON,
Respondent,

v.

KEN D. MCKAGUE,
Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 06-1-00228-1

HONORABLE GARY R. TABOR and RICHARD D. HICKS, Judge

RESPONDENT'S BRIEF

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A. STATEMENT OF THE ISSUES

1. Whether Detective Rudloff had probable cause to believe Jay McKague resided at 13903 Solberg Road SE at the time he attempted to serve an arrest warrant on Jay McKague at that location.

2. Given Jay McKague's status as a probationer, and the existence of a DOC arrest warrant for Jay due to a probation violation, whether Detective Rudloff acted lawfully in searching the shed for Jay McKague based on a reasonable suspicion that Jay was hiding there.

B. STATEMENT OF THE CASE

On November 3, 2005, Thurston County Sheriff's Detective Tim Rudloff and other Sheriff's Deputies went to the residence at 13903 Solberg Road SE to assist Community Corrections Officers from the Department of Corrections (DOC). A warrant had been issued by DOC for the arrest of Jay McKague for violating the terms of his DOC supervision, and DOC Officers were attempting to serve that warrant on McKague. 8-14-06 Hearing RP 6-7, 9-10.

A flyer from the Department of Corrections to provide notification that a warrant had been issued for Jay McKague listed his last known address as 13849 Solberg Road SE. However, the

law enforcement officers involved in attempting to contact Jay McKague on this occasion were aware that the address for the McKague family home was actually 13903 Solberg Road SE. In the past, Jay McKague had lived at that location with his brother, Ken, and his mother. Rudloff had assisted DOC Officers on two prior occasions in arresting Jay McKague at this latter address. 8-14-06 Hearing RP 6-7.

Upon arrival, Rudloff accompanied DOC Officer Matt Frank to the front door of the residence, where they spoke to Patricia Schultz, the mother of Jay and Ken McKague. 8-14-06 Hearing RP 7-8, 24. Frank explained that they were there to contact Jay. Schultz responded that he was not there at that moment. 8-14-06 Hearing RP 8. Schultz also told Rudloff that there should not be anyone in the travel trailer on the property, but that Ken McKague might be in the shed because he stayed out there. 8-14-06 Hearing RP 8.

In four out of Rudloff's five prior contacts with Jay McKague, Jay had tried to either run or

hide from law enforcement. Two of those occasions had been at the residence at 13903 Solberg Road SE. On one of those occasions, Rudloff had entered the residence to serve a warrant on Jay, and ultimately found Jay hiding under a pile of clothes in a back bedroom. On another occasion, Rudloff had entered the residence to place Jay in custody, and Jay had run out a side door, requiring officers to chase Jay in order to apprehend him. 8-14-06 Hearing RP 8-9.

Based on this prior experience, Rudloff and the DOC Officers present suspected that Jay was on the property but was hiding to avoid arrest. Therefore, a search of the residence was conducted. When Jay was not found there, officers proceeded to a 10-foot by 10-foot wood shed on the property. 8-14-06 Hearing RP 9-11.

Rudloff opened the door of the shed and looked inside. He observed a couch, dresser television, microwave, and clothing, all indicating someone was residing inside the shed. 8-14-06 Hearing RP 11, 27. There was a space

between the end of the couch and the wall, approximately a foot and a half in length, that was covered by two blankets which rested on the arm of the couch. 8-14-06 Hearing RP 11, 14.

Rudloff perceived that if that side of the couch was open, Jay could have been lying under the couch with a portion of his body extending into the covered space. 8-14-06 Hearing RP 14-15, 19-20. Therefore, he lifted up the blankets to look underneath. Rudloff observed two plastic garbage bags that were partially open. Inside the bags was green vegetable matter which Rudloff recognized as marijuana, based on his training and experience. He also noted an obvious odor of marijuana at that point. 8-14-06 Hearing RP 15.

Rudloff went to the other end of the couch and lifted it up to be sure that Jay was not hiding under the couch. 8-14-06 Hearing RP 17. Rudloff then contacted a Superior Court Judge by telephone to request authorization for a search warrant based on the discovery of the marijuana. 8-14-06 Hearing RP 28-29. The request for the

search warrant was granted. 8-14-06 Hearing RP 17-18.

In the search of the shed that followed, in addition to the bags of green vegetable matter seen by the couch, officers located a PVC pipe capped on both ends. Trial RP 39. During the search, Ken McKague arrived at the property. Trial RP 68. The defendant expressed a willingness to saw open the PVC pipe. Trial RP 72. Rudloff observed the defendant saw off the end of the pipe. Trial RP 72-74. Inside was green vegetable matter which the defendant acknowledged was marijuana. Trial RP 74. Later testing of the substance in the PVC pipe confirmed that it was marijuana, and that the weight of the marijuana in the PVC pipe was 113.7 grams. Trial RP 11.

The defendant admitted he was the one living in the shed. Trial RP 69. Personal papers and pill bottles were found in the shed with the defendant's name on them. Trial RP 97-98. However, he denied having any knowledge that there

was marijuana in the shed. Trial RP 99.

On February 6, 2006, the defendant was charged by Information in Thurston County Superior Court Cause No. 06-1-00228-1 with one count of unlawful possession of a controlled substance, to wit: more than 40 grams of marijuana. CP 3. On August 14, 2006, a CrR 3.6 hearing was held before the Honorable Judge Gary Tabor. The court ruled that Detective Rudloff was lawfully in the shed searching for Jay McKague when he inadvertently encountered the marijuana in plain view. The defendant's motion to suppress evidence was denied. 8-14-06 Hearing RP 35-39. Written Findings of Fact and Conclusions of Law with regard to this CrR 3.6 hearing were entered on February 28, 2007. CP 70-72.

The defendant proceeded to jury trial on this charge in August 2006. A First Amended Information was filed during the trial simply to change the RCW reference from RCW 69.50.4013(1) to RCW 69.50.4013. CP 16; Trial RP 132. The defendant was convicted as charged.

A sentencing hearing was held on September 13, 2006. A standard range sentence of 18 months in prison was imposed. CP 41-51.

C. ARGUMENT

1. In attempting to serve the arrest warrant on Jay McKague at 13903 Solberg Road SE, Detective Rudloff had probable cause to believe that Jay resided at that location.

The trial court found that Rudloff's observation of the marijuana between the couch and the wall, which led to the issuance of a search warrant, was justified as a plain view search. CP 71-72. Under the plain view exception to the search warrant requirement, a law enforcement's discovery of incriminating evidence in a residence is lawful if: (1) the officer had a prior justification for being in the position to see the evidence; (2) the discovery of incriminating evidence at that point was inadvertent; and (3) the officer had immediate knowledge that he was observing such evidence. State v. Kull, 155 Wn.2d 80, 85, 118 P.3d 307 (2005).

The trial court concluded that Detective Rudloff was lawfully in the shed searching for Jay

McKague at the point he observed the marijuana. CP 71-72. The defendant contests that conclusion. The defendant correctly argues that Detective Rudloff had to have probable cause that this property was the residence of Jay McKague in order to justify intrusion onto the property in an attempt to serve an arrest warrant on McKague. State v. Hatchie, 133 Wn. App. 100, 113, 135 P.3d 519 (2006). Such probable cause would exist if the facts and circumstances within the officer's knowledge, and of which he had reasonably trustworthy information, were sufficient to warrant a person of reasonable caution in believing this was Jay McKague's residence. Hatchie, 133 Wn. App. at 114.

The defendant contends that Rudloff did not have such probable cause. He focuses on the fact that the DOC flyer to law enforcement, providing notice of the probation violation arrest warrant for Jay McKague, listed 13849 SE Solberg Road as the last known address for Jay, while the search took place at 13903 Solberg Road SE. 8-14-06

Hearing RP 22-23.

Nevertheless, the trial court found that the last known address for Jay was actually 13903 Solberg Road SE. Finding of Fact No. 2 in CP 70. A finding of fact will be upheld if it is supported by substantial evidence. State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). Substantial evidence is evidence sufficient to persuade a fair-minded rational person of the truth of the finding. Levy, 156 Wn.2d at 733.

Both Thurston County Sheriff's Deputies and Community Corrections Officers from the Department of Corrections went to the 13903 Solberg Road SE address to locate Jay McKague. That is because it was known to be the McKague family home, and law enforcement was aware Jay was residing there, as he had in the past. 8-14-06 Hearing RP 6. On two prior occasions, Sheriff's Deputies and DOC Officers, working together, had arrested Jay at that location. 8-14-06 Hearing RP 7, 9. When the officers contacted Jay's mother at the residence on this occasion, she did not refute their

understanding that Jay lived there. She simply indicated that he was not there at that moment.
8-14-06 Hearing RP 8.

This evidence was sufficient to persuade a fair-minded rational person that Jay was actually residing on the property at 13903 Solberg Road SE, regardless of the address on the flyer. Therefore, there was substantial evidence supporting the trial court's finding, and probable cause for Rudloff to believe that Jay was residing at 13903 SE Solberg Road.

2. Detective Rudloff's search of the shed in order to serve the arrest warrant on Jay McKague was under authority of law pursuant to Article 1, section 7 of the Washington State Constitution because Jay McKague was a probationer, the warrant was for a probation violation, and Rudloff had a reasonable suspicion that Jay McKague was hiding inside the shed.

The defendant argues that, even if Rudloff had probable cause to believe Jay McKague lived at the property searched, the search of the shed could only be justified pursuant to the arrest warrant if Rudloff also had probable cause to believe that Jay McKague was present on the property at that time, citing Hatchie, 133 Wn.

App. at 113-114. However, the facts of the present case are distinguishable from those in Hatchie, supra.

Unlike in Hatchie, Jay McKague was under active supervision by the Department of Corrections, and the warrant had been issued by the Department of Corrections for a probation violation. Ex 15; 8-14-06 Hearing RP 6, 10. Washington appellate courts have long recognized that a probationer has reduced privacy rights when issues of probationary compliance arise, and that a reasonable suspicion is sufficient legal basis for a search in regard to such compliance.

In State v. Simms, 10 Wn. App. 75, 516 P.2d 1088 (1973), police and the parole officer of the resident forced their way into a home and conducted a warrantless search for drugs. Applying the Fourth Amendment, the Court of Appeals held that a parole officer could conduct a warrantless search of a parolee's residence based on a reasonable suspicion of a parole violation, not rising to the level of probable cause. Simms,

10 Wn. App. at 85-88. The court also found that if there was such a basis for a search by a parole officer, police officers could be enlisted to aid in that search. Simms, 10 Wn. App. at 86. In Simms, the court found that the basis for the search was an anonymous tip that was little more than casual rumor, and therefore did not constitute a well-founded suspicion justifying the search. Simms, 10 Wn. App. at 78, 88.

In State v. Coahran, 27 Wn. App. 664, 620 P.2d 116 (1980), the Court of Appeals upheld the warrantless search of a parolee's vehicle based on information which did not rise to the level of probable cause. The search was conducted by police who were acting at the request of the parole officer supervising the vehicle's owner. The court found that the information from a citizen informant was sufficient to provide a well-founded suspicion justifying the search of the vehicle. Coahran, 27 Wn. App. at 665-667.

In State v. Campbell, 103 Wn.2d 1, 22, 691 P.2d 929 (1984), the Washington Supreme Court

noted that Washington recognizes a warrantless search exception, when reasonable, to search a parolee or probationer and his home or effects. The court further noted that the reasonableness of such a search rested, in part, on whether it was justified by the demands of supervising the parolee or probationer. Campbell, 103 Wn.2d at 22-23.

In State v. Lampman, 45 Wn. App. 228, 724 P.2d 1092 (1986), Lampman was on felony probation. Her probation officer observed her in brief contact with another probationer. He followed Lampman, and when Lampman noticed him doing so, she began acting very nervously. The probation officer became suspicious, stopped Lampman, searched her purse, and found drug residue. Lampman, 45 Wn. App. at 229-230.

At a later court hearing, Lampman was found to have violated her probation based upon the results of this search. On review, the Court of Appeals first determined that, applying Article 1, section 7 of the Washington State Constitution,

the exclusionary rule applied to a probation revocation hearing. Lampman, 45 Wn. App. at 232. The court then noted that a probationer, just as a parolee, has a diminished right of privacy under the state constitution. Lampman, 45 Wn. App. at 233. The court further found that:

By "diminished right of privacy" is meant that, insofar as the State has a continuing interest in the defendant and its supervision of him as a probationer, the defendant can expect state officers and their agents to scrutinize him closely and search his person, home and effects on less than probable cause.

Lampman, 45 Wn. App. at 233 n. 3. The court ruled that a warrantless search of a probationer was reasonable under the Washington State Constitution if the search was based on a well-founded suspicion of a probation violation, and upheld the legality of the search of Lampman. Lampman, 45 Wn. App. at 233-235.

In State v. Patterson, 51 Wn. App. 202, 752 P.2d 945 (1988), a parole officer searched a parolee's vehicle based on a well-founded suspicion that the parolee had violated the conditions of his parole by involving himself in a

new offense. The Court of Appeals again ruled that, under Article 1, section 7 of the Washington State Constitution, a warrantless search of the person or property of a probationer or parolee was appropriate if based upon a well-founded suspicion that a violation had occurred. Patterson, 51 Wn. App. at 204-205, 208. The court then found the parole officer in Patterson had a reasonable suspicion that Patterson had committed the violation, and that evidence of that violation could be found in the vehicle. Patterson, 51 Wn. App. at 208-209.

In State v. Lucas, 56 Wn. App. 236, 783 P.2d 121 (1989), Lucas had been released from custody pending the appeal of his felony conviction. As a condition of that release, he was placed under the supervision of a Community Corrections Officer. As part of that supervision, he was required to submit to a search of his residence when ordered to do so by his Community Corrections Officer. Lucas, 56 Wn. App. at 237-238. DOC Officers went to Lucas's home and observed through sliding glass

doors that there was suspected marijuana inside. They returned four days later and conducted a warrantless search of the residence. Lucas, 56 Wn. App. at 238-239.

Since a condition of Lucas's release pending appeal was that he be supervised by a Community Corrections Officer, the Court of Appeals ruled that Lucas must be treated like a probationer and had the same diminished right of privacy under Article 1, section 7 of the Washington State Constitution. Lucas, 56 Wn. App. at 240-241. Therefore, a warrantless search of Lucas's residence by Community Corrections Officers was under authority of law pursuant to the state constitution if the Officers had a well-founded suspicion of a violation, even if that suspicion did not amount to probable cause. Finding that there was such a reasonable suspicion in that case, the search of Lucas's residence was upheld. Lucas, 56 Wn. App. at 242-244.

Under RCW 9.94A.740(1), the Secretary of the Department of Corrections is authorized to issue a

warrant for the arrest of an offender who violates a condition of community custody. Such a warrant was issued in this case for the arrest of Jay McKague. For arrest warrants generally, the Court of Appeals determined in Hatchie, supra, that the protections of individual privacy in Article 1, section 7 of the Washington State Constitution require that a law enforcement officer have probable cause to believe the person subject to the arrest warrant is present on the property before searching the property where that person resides. Hatchie, 133 Wn. App. at 114. However, as a probationer under active DOC supervision, Jay McKague had a diminished right of privacy under Article 1, section 7. Lampman, 45 Wn. App. at 233.

Given a Community Correction Officer's authority to have searched the residence of Jay McKague based on a well-founded suspicion of a probation violation, it would certainly be anomalous to require a higher standard to search that property for Jay McKague in order to arrest

him on a warrant for a probation violation. Thus, it is the State's contention that Rudloff's search for Jay McKague in the shed on the property where he resided was lawful if Rudloff had a reasonable suspicion that Jay McKague was present.

On four out of five prior occasions when Detective Rudloff had attempted to contact Jay McKague, Jay had attempted to hide or run from Rudloff. Two of those occasions had occurred at the residence at 3903 Solberg Road SE when Rudloff had assisted DOC Officers in attempting to arrest Jay McKague. 8-14-06 Hearing RP 8-9. It was Community Corrections Officer Matt Frank who told Jay's mother that they were going to search the premises given prior experience with Jay. 8-14-06 Hearing RP 8.

Rudloff then learned from Jay's mother that someone was living in the shed on the property. She identified that person as Jay's brother, Ken, and that it was Ken that officers might encounter if they went to that location. However, again based on prior experience, it was reasonable for

Rudloff to suspect that it was actually Jay using the shed to hide from law enforcement.

Thus, the trial court correctly ruled that Rudloff was acting legally in searching the shed for Jay McKague. Rudloff observed that Jay could be lying under the couch, and if so, part of his body might be visible between the end of the couch and the wall. Therefore, Rudloff properly lifted the blankets to look in that area.

The defendant argues that the discovery of the marijuana at that location was not inadvertent because Rudloff was actively conducting a search at the time. However, as the trial court found, he was searching for Jay McKague. Therefore, his discovery of the marijuana was inadvertent. As the defendant concedes, Rudloff immediately recognized the substance was marijuana and therefore evidence of a crime.

The trial court correctly concluded that Rudloff's discovery of the marijuana was lawful under the plain view exception to the requirement for a search warrant. Given Jay McKague's status

as a probationer, the existence of a DOC warrant for a probation violation, Rudloff's probable cause to believe Jay lived at that location, and his reasonable suspicion that Jay was hiding on the property to avoid detection, Rudloff had a lawful justification for being where he was when he discovered the marijuana. That discovery was inadvertent, and he was immediately aware he had evidence before him. Thus, the requirements for the plain view exception were satisfied in this instance.

D. CONCLUSION

Based on the above, the State respectfully requests that this court affirm the trial court's determination that the search in this instance was lawful, and therefore affirm the defendant's conviction for unlawful possession of a controlled substance.

DATED this 4th day of June, 2007.

Respectfully submitted,



JAMES C. POWERS/WSBA #12791
DEPUTY PROSECUTING ATTORNEY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Respondent)	DECLARATION OF
)	MAILING
v.)	
)	
KEN D. McKAGUE,)	
Appellant)	

BY James C. Powers
 STATE OF WASHINGTON
 COUNTY OF THURSTON
 JUNE 11 2007
 COURT OF APPEALS

STATE OF WASHINGTON)	
)	ss.
COUNTY OF THURSTON)	

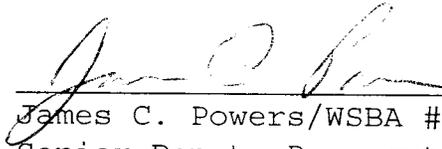
James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 8th day of June, 2007, I caused to be mailed to appellant's attorney, PATRICIA A. PETHICK, a copy of the Respondent's Brief, addressing said envelope as follows:

Patricia A. Pethick,
Attorney at Law
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Tacoma, WA 98417

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that
the foregoing is true and correct to the best of
my knowledge.

DATED this 4th day of June, 2007 at Olympia, WA.



James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney