

COURT OF APPEALS
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STATE OF WASHINGTON
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NO. 38327-6-II

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

STATE OF WASHINGTON,

Respondent,

vs.

KEVIN M. WENTZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR MASON COUNTY
CAUSE NO. 07-1-00505-6

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it ordered Kevin Wentz as a condition of community custody to allow DOC or a CCO to monitor compliance with the conditions of his community custody by way of warrantless searches of Mr. Wentz's home without any basis to believe that violations of the conditions would be found in the home.

B. STATEMENT OF THE CASE

Kevin M. Wentz was before the Mason County Superior Court for sentencing on September 8, 2008. The charges were unlawful possession of a controlled substance with intent to deliver (marijuana); and unlawful possession of a firearm in the second degree. (Sept. 8, 2008 Transcript, pg. 1); (CP 114).

Included with the sentencing forms was one entitled "Conditions of Community Custody".(CP 114, pg. 13). That form contained a provision that reads as follows: "The defendant shall consent to allow home visits by the DOC/CCO to monitor compliance with supervision. Home visits include access for purposes of visual inspection of all areas of the residence in which the defendant lives and/or has exclusive or joint control or access." (CP 114 pg. 13).

Mr. Wentz argued that the provision amounted to a warrantless, suspicionless authority for DOC to search his home, and was therefore not lawful. (Sept. 8 Transcript, pg. 7).

The State responded that it was a standard condition that the court had imposed in every single felony case and it was thus an appropriate condition to monitor the defendant's compliance with community custody. (Sept. 8 Transcript, pg. 8).

The Mason County Superior Court, Judge Toni A. Sheldon, ruled that the condition would be imposed. (Sept. 8 Transcript, pg. 8).

C. ARGUMENT

The Court erred when it imposed a condition of community supervision that allows a CCO to search Mr. Wentz's house without a search warrant or even a reasonable suspicion of a violation. Such a search requires a well founded suspicion of a violation.

It is well settled that Article I, section 7 of the Washington Constitution provides greater protection for individual privacy than does the Fourth Amendment. State v. Rankin, 151 Wn.2d 689, 694-95, 92 P.3d 202 (2004) (mere request for identification from automobile passenger is a seizure unless there is reasonable suspicion based on specific, articulable facts).

Under article I, section 7 of the Washington Constitution, warrantless searches are per se unreasonable. Article I, section 7 provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Under this provision, the warrant requirement is especially important as it is the warrant which provides the requisite “authority of law.” Exceptions to the warrant requirement are to be jealously and carefully drawn. The burden of proof is on the State to show that a warrantless search or seizure falls within one of the exceptions to the warrant requirement. State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005).

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. It does not prohibit reasonable warrantless searches and seizures. Thus, the analysis under the Fourth Amendment focuses on whether the government has acted reasonably. In contrast, the word ‘reasonable’ does not appear in Article I, section 7 of the Washington Constitution. Thus, there is no ‘good faith’ exception to the warrant requirement in Washington. Morse, at 9.

Article I, section 7’s language is explicitly broader than that of the Fourth Amendment as it clearly recognizes an individual’s right to privacy with no express limitations and places greater emphasis on privacy. While the Fourth Amendment operates on a downward ratcheting mechanism of

diminishing expectations of privacy, Article I, section 7 holds the line by pegging the constitutional standard to those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant. State v. Ladson, 138 Wn.2d 343, 348-49, 979 P.2d 833 (1999).

When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. Under the Fourth Amendment, courts have asked whether suppression would serve to deter future police misconduct. However, under Article I, section 7, suppression is constitutionally required. In other words, the exclusionary rule applies in every case where there was an unlawful search or seizure. This constitutionally mandated exclusionary rule saves Article I, section 7 from becoming a meaningless promise. Exclusion provides a remedy for the citizen in question and saves the integrity of the judiciary by not tainting our proceedings by illegally obtained evidence. Ladson, at 359-60 (while pretextual traffic stops may be acceptable under the Fourth Amendment, they are not acceptable under Article I, section 7).

Another significant difference between Fourth Amendment analysis and Article I, section 7 analysis is that under the State

Constitution, unlawfully obtained evidence cannot be used for any purpose. State v. Lampman, 45 Wn.App. 228, 724 P.2d 1092 (1986).

Here, the post-conviction requirement for home visits that must allow access to all areas of Mr. Wentz's home without question authorizes DOC to conduct warrantless, suspicionless searches. The CCO is literally given complete discretion whether to search Mr. Wentz's home, without any requirement for a search warrant, judicial authorization, or any reason to support the searches. There is no requirement for probable cause or even reasonable suspicion. Indeed, neither the prosecutor nor the court felt that such was necessary. (Transcript Sept. 8, pg. 8).

Article I, §7 of the Washington Constitution requires application of the exclusionary rule, without exception, to probation revocation hearings. State v. Lampman, 45 Wn. App. 228, 232, 724 P.2d 1092 (1986).

Therefore, if evidence of a sentence or community custody violation were to be obtained based on a home visit search without authority of law, it could not be used to punish Mr. Wentz or for any other reason.

Under the Washington Constitution, there is an exception to the warrant requirement for a probation officer to search a parolee. However, that exception requires reasonable suspicion. State v. Patterson, 51 Wn.

App. 202, 208, 752 P.2d 945 (1988).

In Patterson, the search was of the parolee's car, not his house. Regardless, the condition imposed in the current case does not require reasonable suspicion or any suspicion at all.

Our State Supreme Court has construed the case law for warrantless parolee searches to require a 'well founded suspicion' of a violation. State v. Fisher, 145 Wn.2d 209, 224, 35 P.3d 366 (2001). But the Conditions of Community Supervision here allow a search without any suspicion. Such is not the law.

The Fisher Court held that an arrest warrant issued for Fisher's arrest should not have been issued because a well founded suspicion requires specific articulable facts of a willful violation of Fisher's conditions of release pending sentencing. Fisher, at 228.

Here, no facts are required. The search is at the complete discretion of the probation officer or CCO by a literal reading of the condition.

The Court of Appeals, Division I, in State v. Massey, 81 Wn. App. 198, 913 P.2d 424, held that a provision similar to the one in the current case was valid. There, the defendant was ordered to submit to searches without any language that stated that the search must be based on reasonable suspicion. The Court of Appeals held that the defendant's

challenge to the search condition was premature until the defendant was subject to a search. The Court also stated that such a search would require a well founded suspicion of a violation even though the language of the condition did not state such and strongly urged trial courts to put that language in the conditions. Massey, at 425-26.

However, Massey appears to have involved a statute related to the condition, and that distinguishes it from this case.

Our State Supreme Court very recently cited and discussed Massey. In State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008), the Court was faced with a question similar to the present question. The Court was asked to decide in part whether a supervision condition placed on the defendant was ripe for review because he had not yet been accused of violating the condition. The Court noted the Massey case along with other cases that went both ways on the issue, and ruled that there are three requirements that compose a claim that is ripe for review: (1) the issues raised are primarily legal; (2) the issues do not require further development, and (3) the challenged action is final. The Court held that the issues were ripe for review despite that the defendant had not been accused of a violation. Bahl was under a hardship because a community corrections officer could arrest and jail him if he suspected that Bahl had violated the conditions; the hardship was significant, and the three factors

above were met. Bahl, 164 Wn.2d at 751.

One way the Bahl Court distinguished cases like Massey was that there is a difference in challenging the constitutionality of a statute and a criminal defendant challenging an allegedly illegal sentence. Standing must be established to challenge a statute on the grounds of vagueness, for example. But a criminal defendant always has standing to challenge the illegality of his sentence. “In contrast to a constitutional challenge to a statute, the challenge is to sentencing conditions that apply uniquely to an individual defendant, who clearly has standing to challenge them, as terms of his or her sentence, on the basis of claimed illegality.” Bahl, 164 Wn.2d at 750. Therefore, Mr. Wentz has standing to challenge this sentence condition.

Here, Mr. Wentz is under significant hardship. A CCO can come into his home and demand to search all of it without court authorization or even reasonable suspicion. Such a search would be erroneous, but Wentz would have to put up with it and challenge it from jail. Further, the issue raised here is legal, it does not require further development and the trial court’s judgment and sentence that imposed the search condition is final. There appears to be no reason why review should not take place.

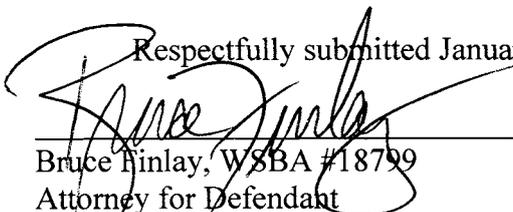
A probationer has fewer constitutional protections than does a person not on probation. But, a probationer’s person, property, and house

cannot be searched by his CCO without a well founded suspicion of a violation. That is the law, and the judgment and sentence should clearly say so. Otherwise, the probationer could well be subject to a search not based on a well founded suspicion by a CCO who was proceeding on the literal language of the court's order.

D. CONCLUSION

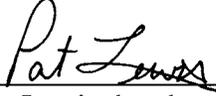
The trial court erred when it imposed a condition of community supervision that literally allows a CCO to search Mr. Wentz's house without any need for a search warrant or a reasonable suspicion of a violation. The issue is ripe for review and this Court should reverse the Superior Court and remand for entry of a condition that states clearly that the CCO must have a well founded suspicion of a violation in order to conduct a search of Mr. Wentz's house.

Respectfully submitted January 5, 2009.



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Dated: January 7, 2009.

A handwritten signature in cursive script that reads "Pat Lewis". The signature is written in black ink and is positioned above a horizontal line.

Pat Lewis, legal assistant for
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DECLARATION OF SERVICE BY MAIL-2

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