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NO. 40236-0-II

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

STATE OF WASH. 01/07

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STATE OF WASHINGTON,

Respondent,

v.

DEREK LEE PARRIS,

Appellant.

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BRIEF OF APPELLANT

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## A. ASSIGNMENTS OF ERROR

1. In denying the Mr. Parris' motion to suppress evidence, the trial court erroneously entered the following findings:

- i. *Finding of Fact No. I:* The text of this finding is set forth in Appendix A to this brief. CP 52.
- ii. *Findings of Fact No. II:* The text of this finding is set forth in Appendix A to this brief. CP 53.
- iii. *Finding of Fact No. IV:* The text of this finding is set forth in Appendix A to this brief. CP 53.
- iv. *Finding of Fact No. V:* The text of this finding is set forth in Appendix A to this brief. CP 53.

2. In denying Mr. Parris' motion to suppress evidence, the trial court erroneously entered the following conclusions of law:

- i. *Conclusion of Law No. I:* The text of this conclusion is set forth in Appendix A to this brief. CP 54.
- ii. *Conclusion of Law No. III:* The text of this conclusion is set forth in Appendix A to this brief. CP 54.

3. The trial court erred in denying Mr. Parris' motion to suppress evidence that was obtained as the result of an unlawful search and seizure under Article I, Section 7 of the Washington Constitution because the seizure and search of electronic storage devices which were authorized and initiated by DOC officials cannot be justified because electronic media storage devices have a significant privacy interest similar to a locked container.

## **B. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Are the findings and conclusions entered by the trial court pursuant to its ruling in the Motion to Suppress Evidence supported by substantial evidence? (Assignment of Error No. 1, 2)

2. The trial court erred when it denied Mr. Parris' motion to suppress evidence because CCO Nelson lacked the legal authority to seize and search the electronic media storage devices found in Mr. Parris' room? (Assignment of Error No. 3)

## **C. STATEMENT OF THE CASE**

### **1. Procedural History:**

The State charged Derek Lee Parris by Information with depictions of a minor engaged in sexually explicit conduct. CP 1-10. Mr. Parris filed a motion to suppress evidence found in the search of his residence. CP11-17. The Motion to suppress evidence found on electronic storage devices which were discovered in Mr. Parris' room by his CCO pursuant to CrR 3.6 was held on November 16, 2009 before the Honorable Judge Laurie. 1RP. (The verbatim report of proceedings from the CrR 3.6 hearing which occurred on November 16, 2009 will be referred to as 1RP.) At the conclusion of the hearing, the trial court denied the motion to suppress evidence. CP 52-55.

A stipulated facts trial was held on December 21, 2009. 2RP (The verbatim report of proceedings from the stipulated facts trial which occurred on December 21, 2009 will be referred to as 2RP.) On that date Mr. Parris was found guilty of possession of depiction of minors engaged in sexually explicit conduct. 2 RP 4, CP 33-36. Mr. Parris was sentenced to 102 months in confinement. 3RP 8, CP 37-50. (The verbatim report of proceedings from the sentencing hearing which occurred on January 16, 2010 will be referred to as 3RP.) This appeal timely follows. CP 51.

## **2. Statement of the Facts:**

### **a. Motion to Suppress Evidence**

Ms. Nelson testified at the motion hearing. 1RP 9, 4-29. Ms. Nelson was the only witness at the hearing. Ms. Nelson is a Community Corrections Officer with the Department of Corrections. 1RP 4. Ms. Nelson was the Community Corrections Officer assigned to supervise Mr. Parris. 1RP 6. Ms. Nelson was familiar with Mr. Parris' conditions of probation as set forth in the Judgment and Sentence for his conviction for the crime of failure to register as a sex offender. 1RP 5-6, 7.

Ms. Nelson had been out of the office on vacation and returned on July 6<sup>th</sup>, 2009. 1 RP 8. Upon her return she discovered Mr. Parris had been arrested on July 2, 2009 for driving while license suspended in Bremerton, Washington at 10:40 p.m. 1 RP 9. Ms. Nelson was aware of that arrest. Id.

Ms. Nelson decided, after meeting with her supervisor, to search Mr. Parris' residence and arrest him. 1RP 11. Ms. Nelson took that action based on concerns regarding the possibility Mr. Parris could have a gun, which was based on a conversation Ms. Nelson had with Mr. Parris' mother on July 6, 2009, Mr. Parris' contact with a seventeen year old girl, curfew violation, and suspected methamphetamine use. 1RP 10-11. On December 7, 2009 Ms. Nelson went to the room Mr. Parris had been living in with two colleagues. 1RP 11. Mr. Parris was found in the room, was handcuffed and placed in a DOC cage car while the search of his room was conducted. Id. D.L.S., a seventeen year old female, was in the room when Ms. Nelson arrived as well. Id. D.L.S. reported she was visiting Mr. Parris. 1RP 14.

The room was in a very messy condition. 1RP 14. Ms. Nelson had difficulty walking in the room. Id. During the search Ms. Nelson found an empty liquor bottle, several hypodermic needles, "a number of different kinds of adult pornography", DVDs, magazines and a video. 1RP 15. Ms. Nelson also found electronic media storage devices in the room. 1RP 16. She confiscated several items she referred to as either memory cards or memory sticks. Id. Ms. Nelson did not find a computer, camera, or video camera in the room. 1RP 18. One of the cards had the first name of D.L.S. written upon it. Id. At the time the items were seized Ms. Nelson did not know the contents of the storage devices and acknowledged that the

devices could have been empty. 1RP 22, 24. Ms. Nelson examined the contents of the memory cards the next day. 1RP 16-17. Ms. Nelson found photographs including a movie clip of Mr. Parris and D.L.S. engaged in sexual acts. Ms. Nelson had a staff member make a copy of the DVDs found. Id.

After Ms. Nelson searched the memory cards she contacted the Kitsap County Sheriff's Office and provided the media cards and a report she prepared. Id. Ms. Nelson assumed law enforcement viewed the material she submitted to the office. 1RP 19. A warrant for the devices was subsequently obtained by law enforcement. 1RP 31.

#### D. ARGUMENT

1. Insufficient Evidence was presented at the Cr.R 3.6 RP hearing to support entering Cr.R 3.6 Findings of Fact: I, II, IV and V.

Where the trial court has weighed the evidence, the appellate court review is to determine whether the findings made by the trial court are supported by substantial evidence. *Holland v. Boeing Co.*, 90 Wn.2d 384, 390, 583 P.2d 621 (1978), citing *Morgan v. Prudential Ins.Co. of America*, 86 Wn.2d 432, 545 P.2d 1193 (1976). A trial court's determination of the issues raised in a motion to suppress is reviewed for substantial evidence and to see if the findings support the conclusions of law. *State v. Schlieker*, 115 Wn.App. 264, 269, 62 P.3d 520 (2003). Substantial evidence is defined as "a sufficient quantity of evidence in the

record to persuade a fair-minded, rational person of the truth of the finding.” *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The conclusions of law made by the trial court are to be reviewed de novo. *State v. Mendez*, 137 Wn.2d 208, 212, 970 P.2d 722 (1999).

The appellant assigns error to Cr.R 3.6 Findings of Fact: I, II, IV and V and Conclusions of Law II, and III entered by the trial court.

**(A) Insufficient Evidence was presented at the Motion to Suppress hearing to support entering Cr.3.6 Findings of Fact No. I because the testimony did not match the findings entered by the trial court .**

The Cr.R 3.6 Findings of Fact I states as follows in pertinent part:

“Per the terms of the Judgment and Sentence, Parris was also required by DOC to maintain a curfew that required him to be in his home from 10pm to 5am.” CP 52.

There was not sufficient evidence presented to support the trial court’s finding of fact. Ms. Nelson testified at the motion hearing. 1RP 4-29. Ms. Nelson was the Department of Corrections probation officer assigned to supervise Mr. Parris. 1RP 6. Ms. Nelson was familiar with Mr. Parris’ conditions of probation as set forth in the Judgment and Sentence for conviction for failure to register as a sex offender. 1RP 5-6, 7. One of those conditions required Mr. Parris to abide by a curfew. 1RP 6. Ms. Nelson described the curfew as follows:

“The curfew is set from 10 p.m. to 5 a.m., seven days a week; unless he had permission to be out, such as for employment, if he worked graveyard or a specific function.” Id. 1RP 6.

The findings of fact entered in this matter did not include the exception language as described by Ms. Nelson during her testimony. Mr. Parris had been arrested on July 2, 2009 for driving while license suspended in Bremerton, Washington at 10:40 p.m. 1RP 9. Ms. Nelson was aware of that arrest. Id.

In the case at hand, the evidence did not support a finding that Mr. Parris has a curfew without exception. The Court erred in entering a finding that did not include the full description of the terms of the curfew as outlined by Ms. Nelson. The finding did not comport with the testimony provided. The language is important in the determination if Ms. Nelson had grounds to conduct a lawful search based on a suspected probation violation, including a suspected violation of the curfew condition. The issue of whether the exception to the curfew rule applied was not explored in the testimony presented at the motion to suppress. The finding of fact entered by the Court does not entirely accurately reflect the entire testimony of Ms. Nelson.

**(B). Insufficient Evidence was presented at the Motion to Suppress hearing to support entering Cr.3.6 Findings of Fact No.II. because the testimony did not include the Finding of Fact entered by the trial court.**

The CrR 3.6 Findings of Fact No. II states in pertinent part as follows:

“On July 6, 2009 Mr. Parris failed to report to DOC for a regularly scheduled meeting.” CP 53.

There was not sufficient evidence presented to support the trial court’s finding of fact.

In this case Ms. Nelson did not testify as to a missed meeting. Upon her return from vacation, Ms. Nelson reviewed the police report regarding Mr. Parris’ arrest for driving with a suspended license, spoke to Mr. Parris’ mother and staffed the case with her supervisor. 1RP 9-11. Ms. Nelson decided to search Mr. Parris’ residence and arrest Mr. Parris because she was concerned about the gun referred to in her conversation with Mr. Parris’ mother, Mr. Parris’ contact with a seventeen year old girl, curfew violation, and recent methamphetamine use. 1RP 11. Ms. Nelson did not refer to a missed meeting with Mr. Parris as a basis for her decision to arrest and conduct a search of Mr. Parris’ residence.

In the case at hand, the evidence did not support a finding that Mr. Parris missed a regularly scheduled meeting with Ms. Nelson. The Court erred in entering such a finding. The finding did not comport with the testimony provided. The language is important in the determination if Ms. Nelson had grounds to conduct a lawful search based on a suspected probation violation, which could include a violation of reporting conditions. However, Ms. Nelson did not describe any missed meeting as one of the

basis for suspecting a probation violation had occurred. The finding of fact entered by the Court does not entirely accurately reflect the testimony of Ms. Nelson.

**(C) Insufficient Evidence was presented at the CrR 3.6 hearing to support entering CrR 3.6 Findings of Fact No. IV.**

Findings of Fact No. IV states in pertinent part as follows:

“CCO Nelson discovered alcohol containers, hypodermic syringes, 4 triple X rated DVDs and 2 pornographic magazines.” CP 53.

At the motion hearing Ms. Nelson testified she found a number of different kinds of adult pornography, DVDs, magazines and a video. 1RP 15.

In the case at hand, the evidence did not support a finding regarding the quality or quantity of the pornographic materials located in Mr. Parris' room. The Court erred in entering such a finding. The finding did not comport with the testimony provided. The language is important in the determination if Ms. Nelson had grounds to conduct a lawful search based on a suspected probation violation, which could include a violation of the condition regarding possession of pornographic material. The finding of fact entered by the Court does not entirely accurately reflect the testimony of Ms. Nelson.

**(D) Insufficient Evidence was presented at the CrR 3.6 hearing to support entering CrR 3.6 Findings of Fact No. V.**

Findings of Fact No. V states in pertinent part as follows:

“Detective Smith later sought a search warrant to search the memory sticks and thumb drives based on the information provided to him by CCO Nelson. Detective Smith observed the same photographs and movies as Ms. Nelson.” CP 53.

The evidence presented at the motion to suppress did not support this finding. Ms. Nelson testified copies of the DVD found were made, and the original DVD and memory sticks were transferred to the Kitsap County Sheriff's Office. 1 RP 17. Ms. Nelson thought the electronic media had been evaluated by a forensics expert after she sent the items to the Sheriff's Office. 1 RP 19-20. Ms. Nelson assumed that someone in the Sheriff's Office viewed the media, but did not know the identity of that person. Additionally, there was not testimony from Ms. Nelson indicating that the material she viewed on the media was the same as the material viewed by Detective Smith. Detective Smith did not testify at the hearing and therefore there was not evidence indicating that Detective Smith saw the same photographs and movies on the media as Ms. Nelson. Nor was any testimony presented regarding the search warrant.

In the case at hand, the evidence did not support a finding regarding the identity of the member of the Sheriff's office who obtained the warrant or any comparison between what Ms. Nelson and a Detective saw on the media. The Court erred in entering such a finding. The finding did not comport with the testimony provided. The finding of fact entered by the Court does not accurately reflect the testimony of Ms. Nelson and

makes an unsupported assertion regarding what a witness observed. Detective Smith did not testify at the hearing. Without that testimony it is not possible to determine if both he and Ms. Nelson saw identical material.

**2. The trial Court erred when it entered conclusions of law denying Mr. Parris' motion to suppress evidence because CCO Nelson lacked the legal authority to seize and search the electronic storage media found in Mr. Parris' room.**

The search violated Mr. Parris' constitutional rights because the information available to the CCO was not sufficient to create reasonable suspicion needed to justify the warrantless search and the scope of search was not reasonable.

Warrantless searches are per se unreasonable under both Article I, Section 7 of the Washington State Constitution and the Fourth Amendment to the United States Constitution. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). The lawfulness of a warrantless search is to be reviewed de nove. *State v. Kypreos*, 110 Wn.App. 612, 616, 39 P.3 371 (2002); (citing *United States v. Van Poyck*, 77 F.3d 285, 290 (9<sup>th</sup> Cir. 1996)).

Evidence seized as fruit of an illegal, warrantless search is suppressed unless the State meets its burden of proving that the search falls under a jealously and carefully drawn exception to the warrant

requirement. *State v. Ferguson*, 131 Wn.App. 694, 128 P.3d 1271, 1275 (2006), citing *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996)). If the information contained in an affidavit of probable cause for a search warrant was obtained by an unconstitutional search, the information may not be used to support the warrant. *State v. Ross*, 141 Wn.2d 302, 304, 4 P.3d 130 (2000) (citing *State v. Johnson*, 75 Wn.App. 692, 879 P.2d 293 (1996)). The reasonableness of a search is determined at the moment of its inception. A search which is not reasonable at its inception will not be validated even if it uncovers incriminating evidence. *State v. Grundy*, 25 Wn.App. 411, 607 P.2d 1235 (1980).

Limitations exist on where officers may lawfully go when entering a private citizen's property. "[t]he curtilage of a home is so intimately tied to the home itself that it should be placed under the home's umbrella of Fourth Amendment protection." *State v. Ross*, 141 Wn.2d 3014, 312, 4 P.3d 130 (2000) (citing *State v. Ridgway*, 57 Wn.App. 915, 918, 790 P.2d 1263 (1990)). Residents have an expectation of privacy in the curtilage, or area contiguous with a home." *State v. Poling*, 128 Wn.App. 659, 667, 116 P.3d 1054 (2005) Law enforcement on legitimate business may enter an area of curtilage which is impliedly open to the public, such as an access route to a house or a walkway leading to a residence. *State v. Smith*, 113 Wn.App. 846, 852, 55 P.3d 686(2002), (citing *State v. Seagall*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981)). Law enforcement entering such

areas must “do so as would a ‘reasonably respectful citizen.’” *State v. Poling*, 128 Wn. App at 667, quoting *State v. Seagull*, 95 Wn.2d 898, 902 632 P.2d 44 (1981). A substantial or unreasonable departure from this area exceeds the scope of the invitation and violates a constitutionally protected expectation of privacy. *Id.*

A probation officer may search a probationers’s home without a warrant as long as the search is reasonable and is based upon a well founded suspicion that a probation violation has occurred. *State v. Winterstein*, 167 Wn.2d. 620, 220 P.3d 1226 (2009), *State v. Lucas*, 56 Wn.App. 236, 244, 783 P.2d 121 (1989); *State v. Simms*, 10 Wn.App. 75, 87, 516 P.2d 1088 (1973). A well founded suspicion is defined as analogous to the requirements of a *Terry* stop. *State v. Winterstein, supra, State v. Simms*, 10 Wn.App. 87, 516 P.2d 1088; *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Reasonable suspicion to allow a *Terry* stop must be based upon specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the search. *State v. Winterstein, supra, Terry v. Ohio*, 392 U.S. at 21, 9, 88 S.Ct. 1868. A reasonable suspicion requires sufficient probability but not absolute certainty. *State v. Winterstein, supra, New Jersey v. T.L.O.*, 469 U.S. 325, 346, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). The CCO’s ability to search is not unlimited as argued below.

In the case at hand the trial court made conclusions of law and ultimately the trial court found the search of the residence reasonable. Each of the conclusions of law contested by Mr. Parris are addressed individually below.

**(A) The Court erred in entering Conclusion of Law No. II because the CCO Nelson was not justified in searching the electronic media storage devices located in Mr. Parris' room.**

The trial court entered conclusion of law II, which states in part:

“CCO Nelson was justified in searching the defendant’s bedroom and thus, searching the electronic storage devices within the bedroom.” CP 54.

Warrantless searches of a probationer and or his home must be reasonable. *State v. Massy*, 81 Wn.App. 198 (1986);913 P.2d 424; *State v. McKague*, 143 Wn.App. 531, 178 P.3d 1035 (1998). The information upon which a probation officer acted must be based on some valid reason to believe that a probation violation has occurred. *Id.* An officer must be acting on something more than casual rumor, general reputation, or at the request of police. *State v. McKague, supra.*

Community Correction officers can only perform a warrantless search when they have a well-founded suspicion that a probationer is violating a condition of probation. Without that well-founded suspicion, a search is unreasonable; *State v. Patterson*, 51 Wn.App. 202, 204-06, 208, 752 P.2d 945 (1988). As previously stated, the questions of whether a

suspicion is reasonable or well-founded, the Court is to apply the analysis required of a *Terry* stop. Articulate suspicion is defined as a substantial possibility that criminal conduct has occurred or is about to occur. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). Before a CCO may conduct a warrantless search based on a reasonable suspicion, the CCO must have an articulable and well-founded suspicion based on objective facts, that the person has committed a probation violation. Although a probationer has a diminished expectation of privacy, that privacy interest is diminished only to the extent required to ensure that the probation program is workable and public safety is not jeopardized. *State v. Simms*, 10 Wn.App. 75, 86, 516 P.2d 1088, *rev. denied*, 83 Wn.2d 1007 (1974); *State v. Patterson*, 51 Wn.App. 202, 752 P.2d 945 *rev. denied*, 111 Wn.2d 1006 (1988). The limitations on a probationer's diminished right to privacy will depend on the particular probationer involved, as well as the facts and circumstances surrounding the search.

Mr. Parris was on community supervision on the date in question, so although diminished, his right to privacy was still protected under the Fourth Amendment and Wash. Const. Art. 1 sec. 7. *Gruen v. Wisconsin*, 483 U.S. 868, 870-871, 97 L.Ed 709, 107 S.Ct 3164 (1987); *State v. Patterson*, 51 Wn.App. 202, 206-207, 920 P.2d 945, *review denied* 111 Wn.2d 1006 (1988). Any constitutional search or seizure requires

exclusion of all evidence found following the constitutional violation. *State v. Ladsen*, 138 Wn.2d 343, 359-60; 979 P.2d 833 (1999)

In the case at hand Ms. Nelson testified she seized the electronic storage media on a suspicion they may contain pornographic images which would be a violation of Mr. Parris' terms of probation. 1 RP 16. There were no articulable facts that supported the suspicion that the items contained improper images. The contents of the storage devices, if any, were not apparent from looking at the items themselves. 1RP 24. Ms. Nelson had no idea what was on the electronic storage devices at the time she seized them. 1RP 22. Ms. Nelson was acting on a general hunch or "educated guess" when she seized the storage devices. 1RP 23. Ms. Nelson had not been provided with any information regarding the possible contents of the storage devices. 1RP 25-26. Ms. Nelson did not have any information that would lead anyone to conclude that there was some reasonable grounds to believe any type of pornographic image was on the memory devices.

One of the memory sticks had D.L.S.'s first name on it. 1RP 22. However, the contents on the item was not apparent from looking at it. *Id.* As Ms. Nelson indicated during her testimony, it was impossible for anyone to determine what was on the electronic storage devices without accessing the devices on a computer. 1RP 25. The devices did not announce what was stored on them. The devices certainly did not

announce that pornographic images were stored on them. While the devices may be used for the storage of images, some articulable facts must be present to show that the storage devices stored improper images. No computer or camera was found in Mr. Parris' room. 1RP 18. In this case no such facts were present supporting the search of the electronic storage devices.

**(B) The Court erred in entering Conclusion of Law No. III because an electronic media storage device is equivalent to a closed container and the owner of the device has a reasonable expectation of privacy regarding the images stored on the device within the meaning of the Fourth Amendment and Const. Art. I, sec. 7.**

As set forth previously in this brief, a probation officer may search a probationer's home without a warrant as long as the search is reasonable and is based upon a well founded suspicion that a probation violation has occurred. *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009). A probation officer may search a probationer's home without a warrant as long as the search is reasonable and is based upon a well founded suspicion that a probation violation has occurred. *State v. Winterstein, supra*; *State v. Lucas*, 56 Wn.App. 236, 244, 783 P.2d 121 (1989); *State v. Simms*, 10 Wn.App. 75, 87, 516 P.2d 1088 (1973).

For the purposes of Fourth Amendment analysis, an electronic storage device is treated like a closed container. "Although only a handful

of reported decisions directly discuss the expectation of privacy in computer memory, these opinions agree that stored computer memory enjoys a very high level of constitutional protection.” Raphael Winick, “Searches and Seizures of Computers and Computer Data”, 8 Harv. J Law & Tech 75, 82 (1994). An individual has the same expectation of privacy in a computer or other electronic data storage and retrieval device as in a closed container. *United States v. Chan*, 830 F.Supp 531, 534 (D.Cal. 1993). In the *Chan* case officers seized an electronic paging device incident to arrest, activated the device and examined its contents without a warrant. The Court held that the examination of the device was a search under the Fourth Amendment, but did uphold the search as incident to arrest. *supra*.

In the case of *United States v. David*, 756 F. Supp. 1385 (D. Nev. 1991) law enforcement seized and examined the contents of a computer memo book. The Court held the warrantless examination of the contents of the computerized book was a search. The Court found the search violated the owner’s reasonable expectation of privacy and suppressed the evidence found. *Id.* at 1392-93.

In the case of *United States v. Barth*, 26 F. Supp.2d 929 (W.D. Tex. 1998) a defendant sent his computer to a technician for repairs. Pornography was found on the computer’s hard drive and the technician delivered the computer to law enforcement. The Court held that the data

on the hard drive must be suppressed. The Court stated as follows: "By placing data in files in a storage device such as his hard drive, the Court finds that Defendant manifested a reasonable expectation of privacy in the contents of those files. These files should therefore be afforded the full protection of the warrant requirement." *Id.* at 936-37.

By keeping photographic images in an electronic storage device, Mr. Parris manifested a reasonable expectation of privacy in the image data. *Cf. State v. Walter*, 66 Wn.App 862, 833 P.2d 440 (1992), *review denied*, 121 Wn.2d 1033, 856 P.2d 383 (1993). The examination of that data constituted a search within the meaning of the Fourth Amendment and Const. Art. I, sec. 7. Although Mr. Parris as a probationer had a lesser expectation of privacy, he still has privacy rights. The search of the electronic storage media was an improper search in this case. The storage devices have a heightened search requirement, similar to a closed container as argued above. Therefore, CCO Nelson could not search those devices without a warrant. In this case CCO Nelson did not have a reasonable suspicion that improper images were stored on the devices as previously argued. Ms. Nelson was not aware of any information suggesting improper images were on the devices, nor was it apparent from looking at the devices that improper images would be found on the devices. The storage devices could only be accessed with the use of a computer or other storage media reader. Neither a computer

or any type of camera was found in Mr. Parris' room. 1RP 18. The electronic storage devices are akin to a locked container. The data on the devices is not accessible until/unless it is opened with an instrument (i.e. computer or storage media reader). The search of those devices was not reasonable.

In the case at hand the search of the electronic storage media by Ms. Nelson lead to the application, and obtaining a search warrant to search the storage devices. CP 11, 18. CCO Nelson did not have a search warrant to view the images on the storage devices. 1RP 16-17. If the search by the Department of Corrections was not done by the authority of a warrant, and no exception to the warrant requirement exists, then the information obtained as a result of an illegal search may not be used in support of the application for a search warrant. The inclusion of illegally obtained information in a warrant affidavit does not render the warrant per se invalid, provided the affidavit contains facts independent of the illegally obtained information sufficient to give rise to probable cause. See *State v. Maxwell*, 114 Wn.d2 761, 769, 791 P.2d 223 (1990); *Franks v. Delaware*, 438 U.S. 154, 171-172, 98 S.Ct. 2674, 57 L.Ed.2d 667 (968); *State v. Gaines*, 154 Wn.2d 771, 718, 116 P.3d 993 (2005) In this case the information illegally obtained by Ms. Nelson was used specifically in the warrant application to justify the search of the storage devices. Consequently, the search warrant was not properly obtained and

the evidence obtained from the search warrant should be suppressed. *State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1987). Without the information provided by CCO Nelson, the application for the search warrant would not establish facts that would show that evidence of a crime of sexual exploitation would be found on any of the electronic media devices. Therefore, the evidence obtained by CCO Nelson and evidence obtained pursuant to the search warrant later obtained in this case should be suppressed.

### C. State and Federal Constitutional Analysis.

The Washington State Constitution provides great protection to the privacy of citizens in their homes. *State v. Johnson*, 104 Wn.App. 409, 415, 16 P.3d 680, *review denied*, 143 Wn.2d 1024, 25 P.3d 1020 (2001); *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994) As stated previously in this brief, a hotel room is comparable to a private residence.

The Washington State Constitution provides more protection to privacy rights than the Fourth Amendment to the United States Constitution. *State v. Jones*, 146 Wn.2d 328, 45 P.3d 1062 (2001) It is well settled that Article I, Section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment. *State v. Jones*, 146 Wn.2d at 332, *referring to State v. Hendrickson*, 129 Wn.2d 61, 69, 917 P.2d 563 (1996); *State v. Stroud*,

106 Wn.2d 144, 148, 720 P.2d 436 (1986); *State v. Williams*, 102 Wn.2d 733, 741-42, 689 P.2d 1065 (1984). "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Article I, Section 7 Washington State Constitution Under this provision, the State may not unreasonably intrude upon a person's private affairs. *State v. Borland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990); *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984)

The Court examines six factors in determining if the Washington State Constitution provides greater protection of privacy rights as outlined in *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). The factors include an examination of the 1) textual language; 2) textual differences; 3) constitutional and common law history; 4) preexisting State law; 5) structural differences; 6) matters of particular state or local concern. *State v. Gunwall*, 106 Wn.2d at 61-62, 720 P.2d 808. Factors 1, 2, 3 and 5 have been previously considered. Washington State Constitution, Article 1, Section 7. Only factors four and six need to be examined as those factors require examination in light of the facts of a specific case. *State v. Russel*, 125 Wn.2d 24, 58, 882 P.2d 747 (1994) citing *State v. Borland*, 115 Wn.2d at 576, 800 P.2d 112, cert. denied, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995)

An analysis of the fourth factor set forth in *Gunwall, supra*, demonstrates that the prior Washington case law has given significance

to privacy interests of residences. Many Washington cases have held that Article I, Section 7 provides greater privacy protections than the Fourth Amendment. *See City of Seattle v. Mesiani*, 110 Wn.2d 454, 456, 755 P.2d 775 (1988) (citing *State v. Simpson*, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980); *State v. Young*, 123 Wn.2d at 188, 867 P.2d 593; *State v. Borland*, 115 Wn.2d at 578, 800 P.2d 1112; *State v. Gunwall*, 100 Wn.2d 814, 818, 676 P.2d 419 (1984); *State v. Chrisman*, 100 Wn.2d 814, 818, 676 P.2d 419 (1984) As specified in the case of *State v. Young*, 123 Wn.2d at 185, 867 P.2d 593 and *State v. Chrisman*, 100 Wn.2d at 820, 676 P.2d 419.

“In no area is a citizen more entitled to privacy than in his or her home. The closer officers come to intrusion into a checking, the greater the constitutional protection.” *Id.*

The case at hand concerns privacy interests in entering and subsequently searching a residence. An independent review of this matter under Article I, Section 7 is warranted.

The next step in the *Gunwall* analysis is of whether the privacy interest is a matter of State or local concern. *State v. Gunwall*, 106 Wn.2d at 620, 720 P.2d 808. This State has awarded its citizens a heightened protection against unlawful intrusions into private residences. *State v. Chrisman*, 100 Wn.2d at 822, 676 P.2d 419. As indicated in the case of *State v. Ferrier*, 137 Wn.2d at 114, the sixth factor of the *Gunwall* analysis suggests independent review of Article I, Section 7 when reviewing a

claim of lack of consent to enter and subsequently search a residence. Consequently, it is evident that Article I, Section 7 of the Washington State Constitution provides greater protections of individual privacy rights than the United States Constitution. Therefore any interference with the right to privacy should be closely examined and Mr. Parris should be given the broader protection provided by Washington State law as the cases previously cited in this brief indicate.

**E. CONCLUSION**

For the reasons cited above, Mr. Parris respectfully requests the court to reverse the conviction entered in this matter.

RESPECTFULLY SUBMITTED this 30th day of June, 2010.



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MICHELLE BACON ADAMS  
WSBA No. 25200  
Attorney for Appellant

**APPENDIX A**

SCANNED

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IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,	)	
	)	No. 09-1-01327-4
Plaintiff,	)	
	)	FINDINGS OF FACT AND CONCLUSIONS
v.	)	OF LAW FOR HEARING ON CrR 3.6
	)	
DEREK LEE PARRIS,	)	
Age: 30; DOB: 06/11/1979,	)	
	)	
Defendant.	)	

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled Court pursuant to a hearing on CrR 3.6; the parties appearing by and through their attorneys of record below-named; and the Court having considered the motion, briefing, testimony of witnesses, if any, argument of counsel and the records and files herein, and being fully advised in the premises, now, therefore, makes the following-

FINDINGS OF FACT

I.

That The defendant, Derek Parris is currently on probation for a conviction for Failure to Register as a sex offender under Kitsap County cause number 06-1-01552-3. Pursuant to that Judgment and Sentence the court prohibited the defendant from possession of alcohol, and illegal drugs. In addition the defendant is prohibited from possession of sexually explicit materials, from engaging in criminal behavior, and from having contact with children under the age of 18. Per the terms of the Judgment and Sentence, Parris was also required by DOC to maintain a curfew



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1 that required him to be in his home from 10pm to 5am.

2 **II.**

3 That on July 2, 2009, the defendant was arrested for driving without a license. The arrest  
4 occurred at 10:40pm. On July 6, 2009, Parris failed to report to DOC for a regularly scheduled  
5 meeting. His mother contacted Nancy Nelson, the defendant's DOC officer, on July 6, 2009.  
6 She was concerned because Parris had threatened to use a firearm to prevent DOC from arresting  
7 him. In addition, Parris has recently submitted a positive urine sample for methamphetamine.

8 **III.**

9 That on July 7, 2009, CCO Nelson received permission from her supervisor to arrest the  
10 defendant and search his home based on his recent violations of probation. When CCO Nelson  
11 arrived, the defendant initially refused to come out of his bedroom. Eventually, the defendant  
12 was persuaded to come out and it was discovered that the defendant was hiding in his room with a  
13 17 year old female, DLS. At that point the defendant and DLS denied anything more than a  
14 casual friendship.

15 **IV.**

16 That during the initial search of the defendant's bedroom, CCO Nelson saw clothing  
17 items within the residence that appeared to belong to DLS. From the items within the bedroom, it  
18 appeared DLS was living with the defendant. CCO Nelson discovered alcohol containers,  
19 hypodermic syringes, 4 triple X rated DVD's and 2 pornographic magazines. CCO Nelson also  
20 found several memory sticks and a computer thumb drive. One of the memory sticks was labeled  
21 with the first name of DLS.

22 **V.**

23 That CCO Nelson later viewed the information contained on the memory sticks and  
24 located a movie that the defendant had created of him and DLS engaging in sexual acts.  
25 Detective Smith later sought a warrant to search the memory sticks and thumb drives based on the  
26 information provided to him by CCO Nelson. Detective Smith observed the same photographs  
27 and movies as CCO Nelson.

28 **VI.**

29 That CCO Nelson has worked for the department of corrections as a probation officer for  
30 12 years. During this time, she has been responsible for monitoring felony level sex offenders.  
31 During this time period, CCO Nelson has arrested approximately 400 offenders in a variety of



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locations. A majority of these arrests included searches of the offender's person, home, cars, and/or worksites. Based on CCO Nelson's training and experience, she knows that most pornography is contained on electronic devices, that defendants often create their own pornographic materials, and that defendants store homemade pornography materials as well as pornography downloaded from the internet on memory sticks/other electronic storage devices.

**CONCLUSIONS OF LAW**

**I.**

That the above-entitled Court has jurisdiction over the parties and the subject matter of this action.

**II.**

That A DOC officer may search a defendant's home without a warrant so long as the search is reasonable and is based upon a well founded suspicion that a violation of probation has occurred. *State v. Winterstein*, 140 Wn. App. 676, 691, 166 P.3d 1242 (2007). "A 'well founded suspicion' is analogous to the cause requirement of a *Terry* stop." *Id.* When these requirements are met, DOC is permitted to search the defendant's living areas and other common areas the defendant uses. *State v. McKague*, 143 Wn. App. 531, 178 P.3d 1035 (2008). In this case, CCO Nelson had a reasonable suspicion that the defendant was in violation of several probation requirements. The defendant had a new law violation, the defendant had used drugs, and violated curfew. CCO Nelson was justified in searching the defendant's bedroom and thus, searching the electronic storage devices within the bedroom.

**III.**

That there is not a heightened requirement for DOC officers to meet before a DOC officer searches an offender's electronic storage devices. Electronic storage devices are not analogous to locked containers and even if they were, there is no requirement, under the law, that prohibits DOC officers from searching locked containers. However, if there were a heightened standard, it would have been met in this case. In this case, CCO Nelson had observed pornographic materials throughout the defendant's room; CCO Nelson knew that defendants would typically store pornographic materials on electronic storage devices; DLS, a minor, appeared to be living with the defendant; and DLS's name appeared on one of the electronic storage devices.



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SO ORDERED this 19 day of January, 2010.

*[Signature]*

JUDGE

PRESENTED BY-

APPROVED FOR ENTRY-

STATE OF WASHINGTON

*[Signature]*

*[Signature]*

COREEN E. SCHNEPF, WSBA No. 37966  
Deputy Prosecuting Attorney

*Hansen*, WSBA No. 3338  
Attorney for Defendant

Prosecutor's File Number-09-105888-36

FINDINGS OF FACT AND CONCLUSIONS OF LAW;  
Page 4 of 4



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NO. 40236-0-II

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

STATE OF WASHINGTON  
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STATE OF WASHINGTON,

Respondent,

CERTIFICATION OF MAILING

v.

DEREK LEE PARRIS,

Appellant.

I, SUSAN M. PEDEN, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day, I had the Brief of Appellant in the above-captioned case hand-delivered or mailed as follows:

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Clerk of Court  
Court of Appeals, Division II  
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Tacoma, WA 98402

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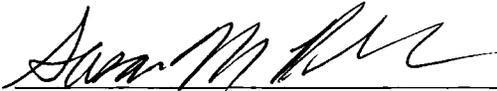
Mr. Randall Sutton  
Kitsap County Prosecuting Attorney's Office  
614 Division Street, MS-35  
Port Orchard, WA 98366

ORIGINAL

**Copy Mailed To:**

Derek Lee Parris/ DOC #775697  
c/o Washington Correction Center  
P.O. Box 900  
Shelton, WA 98584

DATED this 30th day of June, 2010, at Port Orchard, Washington.



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SUSAN M. PEDEN  
Legal Assistant