

FILED

FEB 13, 2014

Court of Appeals
Division III
State of Washington

31308-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

FELIPE JARDINEZ, RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

RESPONDENT'S BRIEF

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A. ISSUES

1. A community corrections officer conducted a search pursuant to RCW 9.94A.631(1). Under the Fourth Amendment, and absent a reasonable suspicion that the device searched contained evidence of criminal conduct or violations of the offender's conditions of community custody, was the search of the contents of an electronic device found on the offender's person unlawful?
2. A community corrections officer conducted a search pursuant to RCW 9.94A.631(1). Under Const. art. 1, § 7, and absent a reasonable suspicion that the device contained evidence of criminal conduct or violations of the offender's conditions of community custody, was the search of the contents of an electronic device found on the offender's person unlawful?

B. STATEMENT OF THE CASE

The trial court's unchallenged findings establish the relevant facts in this matter:

Defendant violated the conditions of his community custody for failing to appear for a scheduled appointment with the community corrections officer on November 3,

2011 and by admitting to his corrections officer on November 15, 2011 to consumption of marijuana.

Following the defendant's admission, his correction officer, Roger Martinez, requested defendant to empty his pockets. The defendant removed a set of keys and a MP3 Player from his pockets. Officer Martinez recognized the electronic device and picked it up

Besides appearing, "a little nervous," Officer Martinez testified he had no other evidence or facts that would suggest there may be evidence of a crime or violation of the conditions of the defendant's community custody on the electronic device. Further, he testified that he knew the device could be used to store information, *data*, music, pictures and videos. He also understood the device was capable of storing private information

Officer Martinez turned on the device and began scrolling through the menu. He discovered a video taken with the device earlier that day and opened the file to observe the video. He discovered it was a video of a person believed to be the defendant holding a shotgun. Officer Martinez believed this to be the defendant based upon a brief glimpse of the defendant and recognizing the room where the video was taken to be the defendant's bedroom based upon an earlier visit to the home.

The defendant was confronted about the video. At first, the defendant stated the weapon was a BB gun and belonged to a friend. After Officer Martinez advised defendant he intended to conduct an immediate home visit, the defendant admitted it was a shotgun and it was located at his house.

Officer Martinez testified the search for the weapon at the defendant's residence was more intensive than a search of the residence for violation of failure to report and consumption of marijuana. Officer Martinez testified ordinarily he would walk through the residence and look for indicia of violations such as photographs, ammunition, drug paraphernalia and the like. The search was more

focused upon discovering the shotgun based upon the information discovered in the MP3 device and the subsequent statements of the defendants.

(CP 37-39)

After reviewing relevant legal authority, the court stated: “The issue before this court is whether or not Officer Martinez had objective facts supporting a reasonable suspicion that the MP3 device contained evidence that criminal activity had occurred or was about to take place.”

(CP 40) Finding no evidence the officer had a reasonable suspicion “that the device contained evidence of a past, present or future criminal conduct or violations of the defendant’s conditions of community custody,” the court concluded the search was improper and suppressed the shotgun found in the house. (CP 40-41)

C. ARGUMENT

This court is asked to decide whether, consistent with the protections afforded by our federal and state constitutions, an officer, having reasonable suspicion that an offender has violated a condition or requirement of his sentence, may conduct a search of the offender’s personal property in the absence of a reasonable suspicion that property to be searched may contain or provide evidence related to the suspected violation.

The trial court's findings of fact are unchallenged; review is *de novo*: "Unchallenged findings of fact are verities on appeal." *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). A trial court's conclusions of law are reviewed *de novo*. *Id.* "The court's conclusions of law must be supported by its findings of fact." *State v. Veltri*, 136 Wn. App. 818, 821, 150 P.3d 1178 (2007)

RCW 9.94A.631(1) authorizes a community corrections officer to conduct a warrantless search of an offender's personal property based on a reasonable suspicion:

(1) If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant, pending a determination by the court or by the department. *If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.*

RCW 9.94A.631(1) (emphasis added)

The Fourth Amendment protects against unreasonable searches:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

“While the language of the Amendment is ‘general,’ it ‘forbids every search that is unreasonable;’” *Ker v. State of Cal.*, 374 U.S. 23, 33, 83 S. Ct. 1623, 1629, 10 L. Ed. 2d 726 (1963) quoting *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357, 51 S. Ct. 153, 158, 75 L. Ed. 374 (1931). Whether a search is justified by a warrant or by some exception to the warrant requirement, the scope and manner of the search itself must be reasonable. See *New Jersey v. T.L.O.*, 469 U.S. 325, 337, 105 S. Ct. 733, 740, 83 L. Ed. 2d 720 (1985); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 299, 87 S. Ct. 1642, 1646, 18 L. Ed. 2d 782 (1967).

Ker involved a search incident to a warrantless arrest. After determining that the arrest itself was lawful the court stated “The question remains whether the officers’ action here exceeded the recognized bounds of an incidental search.” 374 U.S. at 33. In *Warden* the Court held that the scope of a search in the course of “hot pursuit” of a suspect could be “as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape.” 387 U.S. at 299.

The Fourth Amendment similarly restricts the scope of searches in other contexts. “Police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable

to believe the vehicle contains evidence of the offense of arrest.” *Arizona v. Gant*, 556 U.S. 332, 351, 129 S. Ct. 1710, 1723, 173 L. Ed. 2d 485 (2009). Searches unrelated to arrest are also restricted by the reasonableness requirement. “A search pursuant to a *Terry* stop must be justified not only in its inception, but also in its scope. *Terry v. Ohio*, 392 U.S. 1, 20, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). A valid weapons frisk is strictly limited in its scope to a search of the outer clothing; a patdown to discover weapons which might be used to assault the officer. *Terry*, at 29–30, 88 S. Ct. at 1884–85.” *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). “[S]chool authorities may conduct a warrantless search of a student without probable cause if the search is reasonable under all the circumstances. A search is reasonable if it is: (1) justified at its inception; and (2) reasonably related in scope to the circumstances that justified the interference in the first place.” *State v. B.A.S.*, 103 Wn. App. 549, 553, 13 P.3d 244 (2000); *see State v. Brown*, 158 Wn. App. 49, 56, 240 P.3d 1175 (2010).

And so, even in the context of a search by a probation officer, the scope of the search must be reasonable, based on facts known to the officer: a “[B]alancing of the parolee’s privacy interest with the societal interest in public safety is necessary to determine the proper scope of the warrantless search condition in [the offender’s] parole agreement”

State v. Patterson, 51 Wn. App. 202, 208, 752 P.2d 945 (1988). “[D]iminution of Fourth Amendment protection can only be justified ‘to the extent actually necessitated by the legitimate demands of the operation of the parole process.’” *State v. Simms*, 10 Wn. App. 75, 86, 516 P.2d 1088 (1973).

In Mr. Patterson’s case an anonymous tip led to evidence indicating he had been involved in an armed robbery and the weapon could be found in his car: “First, Mr. Patterson’s photo was tentatively identified by the clerk in the Jackpot store. Second, witnesses stated the robber of the Jackpot store had been armed with a revolver. Third, the police had information there might be a gun in the car; a detective had received information from Mr. Wines (partner in Apple Valley Distributing where the car was stored) there may be a gun in the car.” The court quite reasonably held “this constituted reasonable suspicion to search Mr. Patterson’s car without a warrant.” *State v. Patterson*, 51 Wn. App. at 208.

The State here failed to show that evidence relating to Mr. Jardinez’s failure to meet with his CCO or his use of marijuana would be found in the electronic device.

The State cites *State v. Parris*, 163 Wn. App. 110, 117-18, 259 P.3d 331 (2011) and *U.S. v. Conway*, 122 F.3d 841, *certiorari denied*

522 U.S. 1065, 118 S. Ct. 730, 139 L. Ed. 2d 668 (1998) as authority for the proposition that RCW 9.94A.631(1) authorizes an unrestricted search of a convict's personal property and residence based on a reasonable suspicion of any violation of the conditions of custody. But the *Parris* opinion recites at length facts showing that not only did the officer have a reasonable expectation Parris had violated community custody conditions and was in possession of a firearm, she also had a reasonable belief that evidence relating to these violations might be found in the electronic storage devices that were searched.

Nevertheless, both *Parris* and *Conway* suggest that an offender on community custody has no reasonable expectation of privacy and thus, in effect, is simply not entitled to the protections afforded under the Fourth Amendment:

RCW 9.94A.631(1) operates as a legislative determination that probationers do not have a reasonable expectation of privacy in their residences, vehicles, or personal belongings (including closed containers) for which society is willing to require a warrant. The statute itself diminishes the probationer's expectation of privacy. We hold, therefore, that Parris had no reasonable expectation of privacy in his portable memory cards and, thus, no separate warrant was required to search the memory cards' contents.

State v. Parris, 163 Wn. App. at 123.

Similarly *Conway* concluded that a search of an offender's residence and container found there was valid under the Fourth

Amendment, regardless of whether officers believed they would find evidence related to the alleged violations. Both *Parris* and *Conway* fly in the face of the Fourth Amendment requirement, namely that the search must be reasonable under all the circumstances of the particular case. *State v. Hobart*, 94 Wn.2d 437, 617 P.2d 429 (1980); *State v. Webster*, 20 Wn. App. 128, 579 P.2d 985 (1978).

If *Parris* and *Conway* are nevertheless to be considered authority for finding the search in this case reasonable under Fourth Amendment standards, then this court must determine whether it is permissible under the more protective provisions of Constitution Article I, § 7. Paragraph Article I, § 7 provides greater protections than the Fourth Amendment. *State v. Valdez*, 167 Wn.2d 761, 771-72, 224 P.3d 751 (2009); citing *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 306, 178 P.3d 995 (2008); *State v. White*, 97 Wn.2d 92, 109-10, 640 P.2d 1061 (1982).

The Washington Supreme Court has expressly held that under Article I, § 7, the scope of the search must be connected to the reason that justifies research. *Valdez*, 167 Wn.2d at 769. Absent such a connection, an unrestricted search based solely on the existence of an unrelated exception to the warrant requirement suggests the exception is a mere pretext for an unconstitutional search. *State v. Ladson*, 138 Wn.2d 343, 353, 979 P.2d 833 (1999).

The constitution does not permit an unrestricted search of an offender's person and property based on a reasonably suspected community custody violation without regard to whether the community corrections officer has any reason to believe that evidence related to the suspected violation would be found. The trial court's findings establish that the officer had no reason to suspect evidence of the suspected violations would be found in the search. The court correctly concluded the search was unlawful and granted defendant's motion to suppress the evidence derived from the unlawful search.

D. CONCLUSION

The decision of the trial court should be affirmed.

Dated this 13th day of February, 2014.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Appellant,)	No. 31308-5-III
)	
vs.)	CERTIFICATE
)	OF MAILING
FELIPE JARDINEZ,)	
)	
Respondent.)	

I certify under penalty of perjury under the laws of the State of Washington that on February 13, 2014, I served a copy of the Respondent's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on February 13, 2014, I mailed a copy of the Respondent's Brief in this matter to:

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