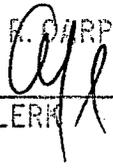


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STATE OF WASHINGTON

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NO. 81594-1


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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY J. ERICKSON,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ISSUES

1. When a defendant fails to appear in response to a summons for a probation violation is the Court required to find probable cause to support the alleged violation before issuing a bench warrant for the probationer's arrest?

II. STATEMENT OF THE CASE

The State has sufficiently set out the facts in this case in its response brief.

III. ARGUMENT

A. THE COURT MAY ISSUE A WARRANT WITHOUT FINDING PROBABLE CAUSE TO BELIEVE PROBATION VIOLATIONS HAVE BEEN COMMITTED WHEN A DEFENDANT FAILS TO APPEAR FOR A HEARING IN WHICH HE HAS BEEN SUMMONSED TO APPEAR.

The defendant challenged the validity of the Lynnwood Municipal bench warrant issued when he failed to appear in response to a summons for a probation violation hearing after he was convicted of Assault 4 DV. He argued a warrant issued on less than probable cause to believe the probation violations were committed violated the Fourth Amendment and Article 1 section 7 of the Washington Constitution. The Court of Appeals affirmed, holding probable cause was not necessary to issue a warrant for a probation violation because probationer have a diminished right of

privacy under both Federal and State Constitutions. Additionally the warrant was expressly authorized by CrRLJ 2.5(b)(5).

Under the Fourth Amendment ordinary citizens are entitled to be free from unreasonable search and seizure. Persons who are subject to probation or parole are subject to a more limited liberty interest. Morrissey v. Brewer, 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). A person who is subject to supervision after conviction of an offense may be seized on less than probable cause. United States v. Gooch, 506 F.3d 1156, 1160 n. 3 (9th Cir. 2007)(rejecting application of the holding in State v. Parks, 136 Wn. App. 232, 148 P.3d 1098 (2006) where a bench warrant has been issued for an alleged violation of the terms of probation after conviction).

There do not appear to be any cases which have directly addressed the circumstances in this case. This Court has considered the issue presented here in a similar case, State v. Fisher, 145 Wn.2d 209, 35 P.3d 366 (2001). There the court issued a bench warrant after the defendant pled guilty but before she was sentenced. The warrant was based on an affidavit from the deputy prosecutor. The affidavit alleged three reasons to issue the warrant. First, an unnamed informant told the Community

Corrections officer assigned to the defendant's case that at the defendant's plea hearing the defendant said she did not intend to appear for sentencing. Second, the unnamed grandmother of the defendant's child reported that the defendant had been spending a lot of time at a known drug user's house. Third, a named police officer had observed the defendant present at a known drug user's house since her release from custody. Fisher, 145 Wn.2d at 213.

Fisher considered the issue in light of the Fourth Amendment. This Court held that when a person had been convicted of an offense probable cause to believe the defendant violated a court order was not necessary in order to issue a bench warrant. Rather, all that was required was reasonable suspicion or reasonable cause. Fisher, 145 Wn.2d at 227.

Fisher also considered the application of court rules to determine whether issuance of a warrant on less than probable cause for a convicted person was permissible. Because Fisher had pled guilty but had not yet been sentenced this Court considered whether the warrant was properly issued under CrR 3.2(j)(1) (now codified as CrR 3.2(l)(1) and CrR 3.2(f) (now codified as CrR 3.2(h)). Since CrR 3.2(j)(1) did not require probable cause prior to issuance of a warrant the lesser standard of a well founded

violation, not probable cause, was required to issue a bench warrant for persons who have pleaded guilty and are awaiting sentencing. Fisher, 145 Wn.2d at 227-228.

This case differs from Fisher in two respects. First the defendant had been not only convicted but sentenced and subject to conditions. Second, the warrant was issued not based on an affidavit alleging facts which purported to establish a violation of the conditions of release. Rather it was issued after the defendant failed to appear in response to a summons. These facts further support issuance of a warrant upon the record here.

A defendant facing a probation modification or revocation hearing may be released from custody pursuant to rule 3.2. CrRLJ 7.6(b). CrRLJ 3.2(h) and (k)(1) are the same as the rules considered in Fisher. Thus, reasonable suspicion that the defendant has violated a court order is sufficient for the court to issue a bench warrant.

There were at least three court orders that the defendant was subject to for which the court had at least reasonable suspicion the defendant had violated. As a condition of his sentence the defendant was required to notify the court of any change of address. He was also required to be on active supervision, and

participate in an alcohol evaluation and follow up treatment. 1 CP 61. He was subsequently ordered to appear before the court pursuant to a summons sent to the address listed for him in the docket. The summons specifically warned the defendant that his failure to appear could result in issuance of a bench warrant. 1 CP 54.

The evidence supporting the defendant's failure to report a change in address came when the summons was returned on September 26, 2006 with the notation that the defendant had moved and left no forwarding address. The defendant's address history had not been updated in the statewide court database since May 2006. 1 CP 58, 62. The probation officer supplied reasonable suspicion to believe the defendant had failed to comply with the active probation and treatment requirements when the probation officer filed a report with the court stating that he had failed to report to probation upon his release from confinement and he had failed to enroll in treatment by March 20, 2006. 1 CP 52. The defendant's actual failure to appear provided sufficient proof he had violated the order to appear justifying the warrant. 1 CP 56, 62.

Fisher did not discuss the constitutional requirements for issuance of a bench warrant under Article 1, § 7 of the Washington State Constitution. Nor has the defendant presented any analysis to suggest that in this circumstance Article 1, § 7 provides probationers any greater protection than the Fourth Amendment as required by State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). A Gunwall analysis is not necessary when the Court has already decided the scope of protection afforded by the State and Federal Constitutions is greater, or that the State Constitution affords greater protection. State v. Thorne, 129 Wn.2d 736, 785, 921 P.2d 514 (1996). In some contexts this Court has found Art. 1, §7 is more protective than the Fourth Amendment. See State v. Eisfeldt, 163 Wn.2d 628, 185 P.3d 580 (2008). However, it does not appear the Court has determined the scope of protection afforded by each Constitution in this particular circumstance; when a person has been found guilty of an offense, is subject to conditions of that sentence, and fails to respond to a summons to answer for alleged violations of those conditions. Given these circumstances the Court should decline to consider the question presented under the State Constitution. Spokane v. Douglass, 115 Wn.2d 171, 176-177, 795 P.2d 693 (1990).

Even if the Court does proceed with an analysis under Article 1, §7 in the absence of a Gunwall analysis, the decision of the Court of Appeals should be affirmed. The Washington Constitution provides that “no person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Washington Constitution, Art. 1, §7. A court rule may provide the “authority of law” required to issue a warrant. Seattle v. McCready, 123 Wn.2d 260, 272-273, 868 P.2d 134 (1994), Fisher, supra.

CrRLJ 3.2 (k)(1) permits the Court to issue a bench warrant upon finding the defendant has willfully violated a condition of the defendant’s release. If the reasonable suspicion standard from Fisher applies to the circumstances of this case, the court had ample reason to believe the defendant had violated the court’s orders.

In addition CrRLJ 2.2(b)(5) specifically permits the Court to issue a bench warrant when a person has been summonsed to court and fails to appear in response to the summons. Under this rule no additional finding is required. The failure to appear itself is a violation of a court order, witnessed by the judge at the time the order issued. For that reason no further finding should be

necessary to issue the warrant for a party who fails to appear for a violation hearing after conviction.

Like Fisher, CrRLJ 2.2(b)(5) and CrRLJ 3.2(k)(1) gives the court the "authority of law" required by Article 1, § 7 to issue the warrant. The warrant issued by the Lynnwood Municipal Court is valid. The trial court did not err when it denied the motion to suppress. The Court of Appeals decision affirming the trial court should be affirmed.

IV. CONCLUSION

For the forgoing reasons, and for the reasons set out in the State's Response brief, the State asks the Court to affirm the Court of Appeals decision upholding the validity of the warrant, arrest, and search incident to arrest.

Respectfully submitted on January 21, 2009.

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