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Supreme Court No. 89965-7
Court of Appeals No. 68759-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL SHANE CATES,

Petitioner.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

SUPPLEMENTAL BRIEF OF PETITIONER

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 ORIGINAL

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A. SUMMARY OF APPEAL

As a condition of community custody, the trial court ordered Michael Cates to “consent” to searches of his home and personal effects by a community corrections officer (CCO) in order to “monitor” his compliance with supervision. The condition authorizes broad, intrusive, random searches without any basis to suspect that Mr. Cates has actually violated a provision of the sentence. Because the condition authorizes a search without reasonable cause, it is unconstitutional in violation of the Fourth Amendment and article I, section 7.

B. ISSUES PRESENTED

1. Both the Fourth Amendment and article I, section 7 preclude a CCO from searching an offender’s home or personal effects without “reasonable cause” to believe the offender has actually violated a condition of the sentence. Here, as a condition of community custody, the trial court ordered Mr. Cates to “consent” to searches simply upon his CCO’s request, in order to “monitor” his compliance with supervision. Does the condition authorize a search without reasonable cause, in violation of the federal and state constitutions?

2. A challenge to a community custody condition is ripe for review if the issue is primarily legal and requires no further factual

development to decide. Is Mr. Cates's challenge to a community custody condition that, on its face, authorizes a CCO to search his home and personal effects without reasonable cause "ripe" for review?

C. STATEMENT OF THE CASE

At sentencing after Michael Cates was convicted of sexual offenses, the trial court ordered a standard-range term of incarceration followed by 36 months of community custody. CP 3, 6-7, 86-87. The State requested that the court impose a condition of community custody prohibiting Mr. Cates from possessing or accessing a computer without permission of the CCO. 4/24/12RP 615. The court refused, finding there was no evidence that Mr. Cates had used a computer to facilitate commission of the crimes. 4/24/12RP 615. But the court stated Mr. Cates must allow a CCO to search, upon request, any computer he uses:

[Mr. Cates] will have to allow his CCO to have access to any computer used by him, and . . . if there is any evidence that he is using it for improper purposes contacting children or accessing sexually explicit information or materials that he's already prohibited

from^{1]}, then he will be prohibited from using it. I will indicate that he can use a computer so long as it is subject to a search on request by his CCO, and if there is evidence that he's committing any violation by use of the computer, he will lose this right.

4/24/12RP 615.

The court imposed the following written condition:

You must consent to DOC home visits to monitor your compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of the residence in which you live or have exclusive/joint control/access, to also include computers which you have access to.

CP 18. Defense counsel objected to the condition. 4/24/12RP 614-16.

¹ The court imposed the following conditions related to contact with minors and possession of sexually explicit materials: (1) "Do not initiate or prolong contact with minor children without the presence of an adult who is knowledgeable of the offense and has been approved by the supervising Community Corrections Officer"; (2) "Do not seek employment or volunteer positions, which place you in contact with or control over minor children"; (3) "Do not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer"; (4) "Do not possess or access sexually explicit materials, as directed by the Treatment Provider and the supervising Community Corrections Officer"; (5) "Do not date women or form relationships with families who have minor children, as directed by the supervising Community Corrections Officer"; (6) "Do not remain overnight in a residence where minor children live or are spending the night." CP 17.

Mr. Cates appealed, arguing among other things that the community custody condition allowing a CCO to search his home and computer is unconstitutional because it does not require the officer to have reasonable cause before conducting the search. The Court of Appeals affirmed.

D. ARGUMENT

1. **The community custody condition is unconstitutional because it authorizes CCO searches of Mr. Cates's home and personal effects without reasonable cause to believe he has violated a condition of the sentence**

- a. *Standard of review*

A court's sentencing conditions are reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). A sentencing court abuses its discretion in imposing a condition if it applies the wrong legal standard. Id. The court also abuses its discretion if it imposes a condition that is unconstitutional. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

The extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny. Rainey, 168 Wn.2d at 374.

- b. *Warrantless CCO searches during community custody are unconstitutional unless based upon reasonable cause to believe the offender has violated a condition of the sentence*

Although persons on community custody have a lesser expectation of privacy than the general public, they are still entitled to the protections of article I, section 7 and the Fourth Amendment. State v. Winterstein, 167 Wn.2d 620, 628-29, 220 P.3d 1226 (2009); Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d. 709 (1987); U.S. Const. amend. IV; Const. art. I, § 7. Under article I, section 7, a CCO may not search the home or personal effects of a person on community custody without a warrant unless the officer has reasonable cause to believe the offender has violated a condition or requirement of the sentence. Winterstein, 167 Wn.2d at 628-29.

The Sentencing Reform Act (SRA) similarly requires a CCO to have “reasonable cause” to believe a violation has occurred before he or she may conduct a warrantless search. RCW 9.94A.631(1) provides:

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.

Because Washington constitutional and statutory law require a CCO to have “reasonable cause” before conducting a warrantless search, a search conducted without reasonable cause also violates the Fourth Amendment. Samson v. California, 547 U.S. 843, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006); United States v. Freeman, 479 F.3d 743, 747-48 (10th Cir. 2007). In Samson, the United States Supreme Court recently upheld a suspicionless search of a parolee by a law enforcement officer, but the search was expressly authorized by a California State law that required parolees to agree to searches without suspicion as a condition of the grant of parole. Samson, 547 U.S. at 852-56. In Freeman, the Tenth Circuit explained that, under Samson, suspicionless searches of parolees are constitutional “only when authorized under state law.” Freeman, 479 F.3d at 747-48.

The standard of reasonable cause requires a CCO to have a “well-founded suspicion that a violation has occurred” before he or she may conduct a warrantless search. State v. Parris, 163 Wn. App. 110, 119, 259 P.3d 331 (2011). This standard is analogous to the

requirements of a Terry² stop and requires individualized suspicion arising from “specific and articulable facts and rational inferences.” Id. It is “defined as a substantial possibility that criminal conduct has occurred or is about to occur.” Id.

- c. *The condition is unconstitutional because it permits a suspicionless, random search of Mr. Cates’s home and personal effects*

The written community custody condition provides:

You must consent to DOC home visits to monitor your compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of the residence in which you live or have exclusive/joint control/access, to also include computers which you have access to.

CP 18. The condition plainly requires Mr. Cates to “consent”³ to searches conducted for the purpose of “monitoring” his compliance with supervision. It does not require a search be based upon reasonable cause. Thus, on its face, the condition permits a CCO to conduct a

² Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

³ The “consent” purportedly required by the condition is not in itself sufficient to establish an exception to the warrant requirement. A warrantless search based on consent is constitutional only when the consent is knowingly and voluntarily given. State v. Ferrier, 136 Wn.2d 103, 116, 960 P.2d 927 (1998). Here, Mr. Cates does not have the option of refusing to consent to a warrantless search. Therefore, the “consent” exception to the warrant requirement does not apply.

routine, random search of Mr. Cates's home, computer and personal effects in order to determine whether he is complying with supervision. It does not require the CCO to have a pre-existing, articulable basis to suspect that a violation has actually occurred.

The trial court's oral statements reinforce the conclusion that the court intended to authorize random CCO searches conducted without reason to believe a violation has occurred. The court explained:

[Mr. Cates] will have to allow his CCO to have access to any computer used by him, and . . . if there is any evidence that he is using it for improper purposes contacting children or accessing sexually explicit information or materials that he's already prohibited from, then he will be prohibited from using it. I will indicate that he can use a computer so long as it is subject to a search on request by his CCO, and if there is evidence that he's committing any violation by use of the computer, he will lose this right.

4/24/12RP 615. These statements show the court intended to allow searches at any time *simply upon the CCO's request*. Id.

The community custody provision allowing broad, suspicionless searches of Mr. Cates's home, computer and personal effects, runs afoul of the express guarantee provided by article I, section 7, that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Generally, a search warrant is required to establish the "authority of law" that is necessary to conduct

a search under article I, section 7. Winterstein, 167 Wn.2d at 628. Any exception to the warrant requirement, including the exception for probation searches, must be “narrow” and “jealously and carefully drawn.” Id.

Mr. Cates’s privacy interests in his home and computer, in particular, are entitled to heightened protection under article I, section 7. “Article I, section 7 is more protective of the home than is the Fourth Amendment,” and a person’s privacy interest in the home is entitled to “heightened constitutional protection” under the state constitution. State v. Groom, 133 Wn.2d 679, 685, 947 P.2d 240 (1997). Likewise, viewing the contents of a person’s computer, like viewing the contents of his text messages, “exposes a wealth of detail about [a person’s] familial, political, professional, religious, and sexual associations.” State v. Hinton, 179 Wn.2d 862, 869, 319 P.3d 9 (2014) (internal quotation marks and citation omitted). Like text messages, the contents of a person’s computer are similar to “other traditional forms of communication that have historically been strongly protected under Washington law.” Id. at 870.

The broad search condition in this case is far from “narrow” or “jealously and carefully drawn.” It does not adequately protect Mr.

Cates's substantial right to privacy in his home and the contents of his personal computer, or establish the "authority of law" required under article I, section 7. Thus, the condition violates Mr. Cates's constitutionally protected right to privacy.

The trial court's written and oral statements indicate the court intended to impose a "monitoring"⁴ condition authorizing random, suspicionless searches for the purpose of determining whether Mr. Cates is complying with other conditions of community custody. See CP 17. Under limited circumstances, Washington courts have approved the use of "monitoring" search conditions, such as random urinalysis or polygraph testing, when imposed to ensure compliance with other conditions of community custody. See State v. Riles, 135 Wn.2d 326, 342, 957 P.2d 655 (1998) (holding "[a] trial court has authority to impose monitoring conditions such as polygraph testing"); State v. Vant, 145 Wn. App. 592, 603, 186 P.3d 1149 (2008) (upholding conditions authorizing random urinalysis and polygraph testing to monitor compliance with other conditions of community

⁴ "Monitor" means "to watch, observe, or check esp. for a special purpose." Webster's Third New International Dictionary 1460 (1993).

custody); State v. Julian, 102 Wn. App. 296, 305, 9 P.3d 851 (2000) (“Polygraphs and urinalyses are classified as monitoring tools rather than actual conditions of community placement,” which trial court may impose “to enforce its other lawful conditions”).

But those cases do not apply here because they did not address the constitutionality of the search conditions under article I, section 7. More important, those cases authorized searches that were much more limited in purpose and scope than the intrusive searches authorized by the condition in this case. No Washington case has held that a trial court may permit broad, random, suspicionless searches of an offender’s home, computer and other personal effects for the general purpose of monitoring his compliance with supervision.

In upholding the condition, the Court of Appeals reasoned it is constitutional because it *implicitly* requires the CCO to have reasonable suspicion before conducting a search. Slip Op. at 12-13. In reaching this conclusion, the Court of Appeals ignored the trial court’s statements indicating its intent to authorize random, suspicionless searches. The Court of Appeals also ignored the plain language of the condition itself.

Courts in other jurisdictions have refused to read a “reasonable suspicion” requirement into conditions of probation that on their face authorized random, suspicionless probation searches. In Fitzgerald v. State, 805 N.E.2d 857, 864 (Ind. Ct. App. 2004), for example, the Indiana court struck down a condition of probation that provided: “You shall waive your right against *unreasonable* searches by the Probation Officer or anyone acting on behalf of the Probation Officer for the purpose of insuring compliance with your conditions of probation.” The court rejected the State’s argument that “reasonableness is inherent in the test of the probation condition.” Id. at 865. The court explained, “[i]n effect, the State is asserting that any search conducted by a Probation Department for purposes of probation compliance is automatically cloaked with reasonableness. Such is not the case.” Id.

Similarly, in State v. Bennett, 288 Kan. 86, 88, 200 P.3d 455 (2009), the Kansas court struck down a condition that provided: “Defendant is to submit to random searches deemed necessary that Community Corrections or Law Enforcement may conduct without probable cause or need for further Court order.” The court held the condition was unconstitutional because it authorized “searches at any time for potentially any reason,” even though it did not specifically

state that such searches could be conducted without reasonable suspicion. Id. at 99.

In several similar cases, courts have struck down conditions of probation that on their face authorized random, suspicionless searches. Unlike the Court of Appeals in this case, these courts did *not* conclude that the requirement of reasonable cause was an *inherent* component of the condition. See United States v. Farmer, No. 13-3373, 2014 WL 2808079, at *2, 5 (7th Cir. June 23, 2014) (striking down condition that stated, “[t]he defendant shall submit to the search, with the assistance of other law enforcement as necessary, of his person, vehicle, office, business, and residence, and property, including computer systems and peripheral devices”); State v. Fields, 67 Haw. 268, 271, 282, 686 P.2d 1379 (1984) (striking condition that stated Fields was “subject at all times during the period of her probation to a warrantless search of her person, property and place of residence for illicit drugs and substances by any law enforcement officer including her probation officer”); Commonwealth v. LaFrance, 402 Mass. 789, 791 n.2, 793, 525 N.E.2d 379 (1988) (striking condition that stated probationer must “[s]ubmit to any search of herself, her properties or any place where she then resides or is situate, with or without a search warrant, by a probation officer or

by any law enforcement officer at the direction or by the request of the probation officer”); State v. Schwab, 95 Or. App. 593, 596-97, 771 P.2d 277 (1989) (striking condition that stated probationer must “submit to search of his person, automobile and premises and seizure of any contraband without consent and without a search warrant by his probation officer to verify compliance with the conditions of probation”).

The probation conditions struck down in the foregoing cases are indistinguishable from the condition at issue here. Consistent with this weight of authority, this Court should similarly conclude that the condition is unconstitutional because, on its face, it authorizes random, suspicionless searches of Mr. Cates’s home and personal effects.

Moreover, reading a “reasonable cause” requirement into the condition, as the Court of Appeals did, is contrary to the constitutional due process requirement that conditions of community custody be sufficiently clear to provide fair warning of proscribed conduct and prevent arbitrary and discriminatory enforcement. See State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). A condition authorizing CCO searches that does not specify the search must be based upon

reasonable cause does not provide adequate notice to offenders or reasonable guidance to law enforcement.⁵

In sum, this Court should reverse the Court of Appeals and strike down the condition.

2. The challenge is ripe because the condition is unconstitutional on its face and will subject Mr. Cates to immediate hardship upon his release

In determining whether a challenge to a community custody condition is “ripe” for review, the Court considers whether (1) the challenge is “primarily legal,” (2) the condition places an immediate restriction on the defendant’s conduct, and (3) the defendant would suffer significant risk of hardship if the Court declined to review it.

State v. Valencia, 169 Wn.2d 782, 788-89, 239 P.3d 1059 (2010); State v. Bahl, 164 Wn.2d 739, 747-48, 193 P.3d 678 (2008). All three prongs are met here.

⁵ In State v. Massey, 81 Wn. App. 198, 913 P.2d 424 (1996), the Court of Appeals upheld a community custody condition authorizing CCO searches that did not explicitly state the search must be based upon reasonable cause. The Court of Appeals relied upon Massey in upholding the condition in this case. To the extent Massey conflicts with the principles discussed here, it should be overruled.

The more the question is purely legal and the less that any additional facts would aid in the Court's inquiry, the more likely the challenge is to be ripe. Bahl, 164 Wn.2d at 748. Generally, the question of the constitutionality of a community custody condition is purely legal and requires no further factual development. Id. That is, either the condition as written is constitutional or it is not. Valencia, 169 Wn.2d at 789.

As discussed above, the community custody condition is unconstitutional on its face because it authorizes random, suspicionless searches of Mr. Cates's home, computer and personal effects. The constitutionality of the condition is a purely legal question and requires no further factual development. It is therefore ripe for review.

Relying on State v. Massey, 81 Wn. App. 198, 913 P.2d 424 (1996), the Court of Appeals held the challenge is not ripe because Mr. Cates has not yet been subject to an unconstitutional search. But Mr. Cates is not challenging the constitutionality of a probation search. He is challenging the constitutionality of the condition of community custody that requires him to "consent" to random, suspicionless searches or face arrest and jail. No further factual development is

needed to decide whether the condition as written authorizes searches without reasonable cause and is unconstitutional on its face.

A challenge to a community custody condition is also “ripe” for review if the condition will impose an immediate hardship on the offender upon his release from prison. Bahl, 164 Wn.2d at 747.

Here, the condition will impose an immediate hardship on Mr. Cates because it will chill the exercise of his free speech rights. Offenders on community custody have a right to access and transmit material protected by the First Amendment. Id., at 753. The community custody condition requires Mr. Cates to consent to a search of his home, including any computer he uses. CP 18; 4/24/12RP 615. A personal computer is “the modern day repository of a man’s records, reflections, and conversations” and is subject to First Amendment protection. State v. Nordlund, 113 Wn. App. 171, 181-82, 53 P.3d 520 (2002) (internal quotation marks and citation omitted).

“First Amendment overbreadth doctrine is largely prophylactic, aimed at preventing any ‘chilling’ of constitutionally protected expression.” State v. Halstien, 122 Wn.2d 109, 122, 857 P.2d 270 (1993). As a result, courts permit a facial challenge to a condition of

community custody that chills or burdens constitutionally protected free speech rights. See id.

Here, by subjecting Mr. Cates's personal computer to random, suspicionless searches, the community custody condition chills his constitutionally protected free speech rights. It is not unreasonable to assume that any person would be more cautious and circumspect in expressing himself on his personal computer if he knows that a State actor may search the computer at any time for any reason.

Finally, Mr. Cates would suffer significant risk of hardship if the Court declined to review the condition. An offender should not be required to face revocation proceedings before being permitted to challenge his conditions of release and need not "expose himself to actual arrest or prosecution to be entitled to challenge a [condition] that he claims deters the exercise of his constitutional rights." Bahl, 164 Wn.2d at 747 (quotation marks and citation omitted). Preenforcement review serves the interest of judicial efficiency and helps prevent hardship on the defendant "who otherwise must wait until he or she is charged with violating the conditions of community custody, and likely arrested and jailed, before being able to challenge the conditions on this basis." Id. at 751.

Here, the condition requires Mr. Cates to “consent” to suspicionless searches by his CCO. CP 18. If he refuses, he is subject to immediate arrest and jail. See RCW 9.94A.631(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.”). Mr. Cates should not have to wait until that occurs before he is able to challenge the constitutionality of the condition.

In United States v. Baker, 658 F.3d 1050, 1054-55 (9th Cir. 2011), overruled on other grounds by United States v. King, 687 F.3d 1189 (9th Cir. 2012), the Ninth Circuit permitted a facial challenge to a condition of probation that required the defendant to submit to searches without reasonable suspicion. The court held the challenge was ripe because it did not require further factual development and the defendant “need not refuse to abide by a condition of supervised release to challenge its legality on direct appeal.” Id.

Likewise, in State v. Fields, 67 Haw. 268, 274-77, 686 P.2d 1379 (1984), the Hawaii Supreme Court permitted a facial challenge to a condition of probation that subjected the defendant to searches without reasonable suspicion. The court reasoned that the potential

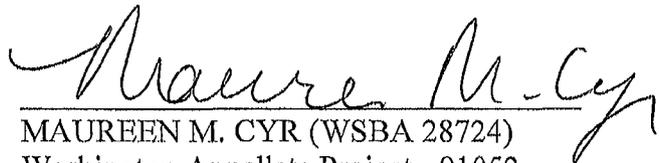
deprivation of the defendant's fundamental right to privacy provided "reason to act before there is an attempt to enforce the sentencing court's order." Id. at 276. It would not be in the public interest to compel the issue to wend its way through the appellate process after the sentencing court's order had been enforced. Id.

As in those cases, Mr. Cates's facial challenge to the community custody condition is ripe for review. It requires no further factual development to decide and Mr. Cates should not be required to refuse to comply with the condition, subjecting himself to arrest and jail, before he may challenge it.

E. CONCLUSION

The community custody condition is unconstitutional on its face because it requires Mr. Cates to consent to random, suspicionless searches of his home and personal effects. This Court should reverse the Court of Appeals and strike the condition.

Respectfully submitted this 15th day of August, 2014.


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Supplemental Brief of Petitioner

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