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NO. 89965-7

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IN THE SUPREME COURT
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STATE OF WASHINGTON, .

Respondent,

v.

MICHAEL S. CATES,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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 ORIGINAL

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I. ISSUE

This court granted review limited to “the condition of community custody issue.” That issue can be paraphrased as follows:

Did the Court of Appeals err in affirming the trial court’s imposition of a condition of community custody requiring defendant to consent to home visits by a community corrections officer, to include access for visual inspection of areas of the residence including computers?

II. STATEMENT OF THE CASE

The facts are correctly set out in the Court of Appeals decision.

III. ARGUMENT

The challenged condition reads:

You must consent to [Department of Corrections] 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. Cates argues this condition allows community corrections officer to search his residence and computer without reasonable suspicion, and thus, violates article I, section 7 of the Washington

Constitution and the Fourth Amendment of the United States Constitution. He also argues that this condition is insufficiently clear to provide fair warning of proscribed conduct and prevent arbitrary and discriminatory enforcement, thus, violating article I, section 3 of the Washington Constitution and the Fourteenth Amendment of the United States Constitution.

A. THE CHALLENGED CONDITION DOES NOT ALLOW COMMUNITY CORRECTIONS OFFICER TO SEARCH DEFENDANT'S RESIDENCE OR COMPUTER WITHOUT REASONABLE SUSPICION.

Cates concedes in his petition that community corrections officers have authority to search the home and possessions of those under their supervision based upon a reasonable or well-founded suspicion. Petition for Review at 5. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009); Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987). Additionally, 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.” Cates does not challenge the constitutionality of RCW 9.94A.631.¹ Petition for Review at 2.

The court has authority to require a defendant “perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” Former RCW 9.94A.712 (applying to sex offenses). Cates’ convictions were for sex crimes committed in secret. RP 611. In addition to the challenged condition, the court imposed five conditions of community custody concerning Cates’ residence; who he could reside with, items he could not possess including sexually explicit materials, and four conditions restricting Cates’ contact with minor children. CP 17-18. Cates does not challenge any of those nine community custody conditions. Computers can be used to access sexually explicit materials and to contact minor children.

Cates challenges the condition that requires his consent to “home visits” by community correction officers to monitor his compliance with supervision. Community corrections officers are “responsible for carrying out specific duties in supervision of sentenced offenders and monitoring of sentence conditions.” RCW

¹ A legislative act is presumptively constitutional, and the party challenging it bears the burden of proving it unconstitutional beyond a reasonable doubt. State v. Heckel, 143 Wn.2d 824, 833, 24 P.3d 404 (2001).

9.94A.030(4). As such they must be allowed to monitor whether the offender is complying with court ordered conditions of release. Washington courts have held that community custody monitoring conditions are valid. State v. Riles, 135 Wn.2d 326, 342, 957 P.2d 655 (1998) (holding polygraph testing is a valid community custody monitoring condition), overruled in part on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010); State v. Vant, 145 Wn. App. 592, 603-604, 186 P.3d 1149 (2008) (holding polygraph testing and imposition of random urinalysis/PBT/BAC tests to ensure compliance with other conditions are valid community custody monitoring conditions).

The challenged community custody condition requires Cates' consent to "home visits" to monitor his compliance with supervision. This condition does not require Cates to consent to searches. Home visits are something less than a search. "Visit" means: "to go somewhere to see and talk to someone in an official way or as part of your job." <http://www.merriam-webster.com/dictionary/visit>. "Search" means: "to carefully look for someone or something; to try to find someone or something." <http://www.merriam-webster.com/dictionary/search>. The Court has recognized the

fundamental difference between consent search and consent to a home visit:

Moreover, as the State correctly contends, there is a fundamental difference between requesting consent to search a home and requesting consent to enter a home for other legitimate investigatory purposes. When police obtain consent to search a home pursuant to a "knock and talk" they go through private belongings and affairs without restriction. Such an intrusion into privacy is not present, however, when the police seek consensual entry to question a resident.

State v. Khounvichai, 149 Wn.2d 557, 564, 69 P.3d 862 (2003) (limiting application of the requirement in State v. Ferrier, 136 Wn.2d 103, 118-119, 960 P.2d 927 (1998) to the "inherently coercive" knock and talk procedure where police request entry for the purpose of obtaining consent to conduct a warrantless search for contraband or evidence of a crime). It is well established that a discovery made in plain view is not a search. Article I, section 7 "[does] not prohibit a seizure without a warrant, where there is no need of a search, and where contraband subject-matter or unlawful possession of it is fully disclosed and open to the eye and hand." Khounvichai, 149 Wn.2d at 565, quoting State v. Miller, 121 Wash. 153, 154, 209 P. 9 (1922). An officer has not conducted a search if the officer observes evidence in plain view.

The home visits in the challenged condition involve only visual inspection of the areas of the residence where Cates lives, including computers to which he has access. CP 18. Requiring consent to home visits, including visual inspection of computers found therein, was reasonably related to monitoring the offender's risk of reoffending and to insuring the safety of the community. The challenged condition of community custody does not require Cates to consent to searches without reasonable suspicion.

B. THE CHALLENGED CONDITION IS SUFFICIENTLY CLEAR TO PROVIDE FAIR WARNING OF PROSCRIBED CONDUCT AND PREVENT ARBITRARY AND DISCRIMINATORY ENFORCEMENT.

Cates argues that the challenged condition allows community custody officers to search his home and computer without reasonable cause. Petition for Review at 10. This claim is not supported by the plain language of the condition—the condition only requires Cates to consent to home visits—or the law. As the Court of Appeals noted, “RCW 9.94A.631’s plain language expressly authorizes a search of a probationer’s ‘person, residence, automobile, or other personal property’ without a warrant if the CCO has reasonable cause to believe that the probationer violated a condition of the sentence. ... “[T]he standard for adjudicating a

challenge to any subsequent search remains the same: Searches must be based on reasonable suspicion.” Slip Op. at 12, citing State v. Massey, 81 Wn. App. 198, 201, 913 P.3d 424 (1996) (emphasis in original).

Cates argument that community custody officers can search his home and computer without reasonable cause is based on a statement the trial court made when striking a separate proposed condition that prohibited possession of computers and peripheral devices.² Petition for Review at 10. The trial court struck the proposed condition finding that there was no evidence Cates had used a computer to facilitate the crimes for which he was convicted. The court advised Cates that

he will have to allow his CCO to have access to any computer used by him, and if he has found – 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,

² Proposed condition 13 read:

You may not possess or maintain access to a computer, unless specifically authorized by you supervising Community Corrections Officer. You may not possess any computer parts or peripherals, including but not limited to hard drives, storage devices, digital cameras, web cams, wireless video devices or receivers, CD/DVD burners, or any device to store or reproduce digital media or images.

CP 18.

and if there is evidence that he's committing any violation by use of the computer, he will lose this right.

The prosecutor replied, "That means that I can strike out 13. As to 19 which states he must consent to DOC home visits to monitor compliance with supervision, I'll just add the computer to that." The court agreed that would be a reasonable way to deal with the issue.³ RP 615-616. Clearly, the trial court's understanding on the issue was that the challenged condition only required Cates to consent to home visits and did not require Cates to consent to a search of his home or computer without reasonable cause.

In State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010), the Court held a community custody condition void for vagueness where it left too much discretion to the individual community corrections officers and would lead to arbitrary enforcement. 169 Wn.2d at 795. In contrast, here, the challenged condition does not give the community correction officer authority to search. Rather, the authority to search is from RCW 9.94A.631. The statute requires the community corrections officer must have reasonable cause to believe that an offender has violated a condition or

³ The written decision of a trial court is considered the court's "ultimate understanding" of the issue presented. State v. Dailey, 93 Wn.2d 454, 459, 610 P.2d 357 (1980) (a court's oral decision has no binding or final effect if it is not formally incorporated into the judgment).

requirement of the sentence prior to requesting consent to search. RCW 9.94A.631(1). The court can presume that a reasonable officer knows the law he is charged with enforcing. United States v. Hernandez, 55 F.3d 443, 446 (9th Cir. 1995).

In the present case, the trial court did not require Cates' consent to a search of his residence or his computer as a condition of his community custody. Therefore, the Massey court's directive for "sentencing courts to state explicitly in the order that searches of parolees and probationers must be based on reasonable suspicion" is not applicable.⁴ The challenged condition plainly states that the purpose for home visits is to monitor Cates' compliance with the conditions of his community custody. CP 18. A community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct. Valencia, 169 Wn.2d at 793. The challenged condition does not give a Community Corrections Officer authorization to search Cates' residence or computer without reasonable suspicion and does not lead to arbitrary enforcement.

⁴ Massey, 81 Wn. App. at 201.

C. THE CHALLENGED CONDITION DOES NOT PROHIBIT OR RESTRICT DEFENDANT'S USE OR POSSESSION OF COMPUTERS.

Cates argues that the challenged condition infringes on his First Amendment rights. Petition for Review at 7. A condition that touches on First Amendment rights must be narrowly tailored and directly related to the goals of protecting the public and promoting the defendant's rehabilitation. State v. Bahl, 164 Wn.2d 739, 757, 193 P.3d 678 (2008). A convicted defendant's constitutional rights during the period of community placement are subject to the infringements authorized by the Sentencing Reform Act of 1981, RCW 9.94A. State v. Ross, 129 Wn.2d 279, 287, 916 P.2d 405 (1996); State v. Combs, 102 Wn. App. 949, 953, 10 P.3d 1101 (2000). Washington recognizes a warrantless search exception, to search a parolee or probationer and his home or effects with reasonable cause. State v. Campbell, 103 Wn.2d 1, 22, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985); Massey, 81 Wn. App. at 200. Even where a sentencing condition infringes on a fundamental right, an abuse of discretion is the appropriate standard of review. In re Rainey, 168 Wn.2d 367, 375, 229 P.3d 686 (2010).

Here, the challenged condition does not restrict or limit Cates' use of computers. Under the condition Cates' consent is limited to home visits. During home visits access to computers is limited to visual inspection for the purposes of monitoring Cates' compliance with supervision. A search of a computer must be based on reasonable cause to believe that Cates has violated a condition of his sentence. RCW 9.94A.631(1). The unchallenged conditions of community custody lawfully restricted Cates from contacting minors and possessing sexually explicit materials. CP 17. Those conditions are narrowly tailored and directly related to the goals of protecting the public and promoting Cates' rehabilitation. The challenged condition is narrowly tailored and directly related to monitoring Cates' compliance with his community custody. The trial court did not abuse its discretion by imposing the challenged condition that requires Cates' consent to visual inspection of computers he has access to as a means of monitoring his compliance with his supervision.

D. THE DEFENDANT'S CHALLENGE TO THE COMMUNITY CUSTODY CONDITION IS NOT RIPE FOR REVIEW.

In the present case, citing Massey, 81 Wn. App. at 200, the Court of Appeals correctly concluded that the challenged condition

is not ripe for review until Cates is actually subjected to an allegedly improper search. Slip Op. at 13. A claim is ripe for review on direct appeal if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. State v. Valencia, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010); State v. Bahl, 164 Wn.2d 739, 751, 193, P.3d 678 (2008). The court must also consider the hardship to the parties of withholding court consideration. Id. Cates is not currently under hardship because of the challenged condition. A condition of sentence is not ripe for review until the defendant has been harmfully affected by the challenged condition. Valencia, 169 Wn.2d at 791; Massey, 81 Wn. App. at 200. Nothing in the record reflects that DOC has attempted to search Cates' residence or computer.

Here, the issue raised is primarily legal; whether the challenged condition allows community corrections officer to search Cates' residence or computer without reasonable cause, in contradiction of RCW 9.94A.631(1). Nothing about this statutory question will change between now and when Cates is released from prison, supporting its characterization as a legal question. Valencia, 169 Wn.2d at 788; State v. McWilliams, 177 Wn. App. 139, 153, 311 P.3d 584 (2013) review denied, 179 Wn.2d 1020,

318 P.3d 279 (2014). Additionally, since Cates was sentenced to the challenged condition at issue, the third factor of the ripeness test, whether the challenged action is final, is also met. Valencia, 169 Wn.2d at 789.

The second factor of the ripeness test asks whether the issues require further factual development. The challenged condition does not place an immediate restriction on the Cates' conduct. The condition necessitates that the State take additional action similar to conditions identified in Bahl imposing financial obligations or allowing for the search of a person or residence. 164 Wn.2d at 749, citing State v. Ziegenfuss, 118 Wn. App. 110, 113–115, 74 P.3d 1205 (2003) (challenge to sentencing condition imposing financial obligation not ripe until State takes action to collect fines); State v. Massey, 81 Wn. App. 198, 200–201, 913 P.2d 424 (1996) (challenge to sentencing condition subjecting defendant to search premature until search actually conducted); State v. Phillips, 65 Wn. App. 239, 243–244, 828 P.2d 42 (1992) (same as Ziegenfuss). Such conditions are not ripe for review until the State attempts to enforce them because their validity depends on the particular circumstances of the attempted enforcement. Valencia, 169 Wn.2d at 789.

In Massey, the defendant challenged a similar sentencing court order, without the access-to-computers language. The Massey order required that the defendant submit to searches by a community corrections officer as a condition to community placement, the order did not state that searches must be based on reasonable suspicion. Massey, 81 Wn. App. at 199. The Court of Appeals found that the validity of such conditions depends on the particular circumstances of the attempted enforcement, and held that Massey's claim was premature until he was subjected to a search that he deemed unreasonable. Massey, 81 Wn. App. at 200.

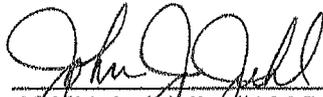
Reasonableness or reasonable suspicion is a legal conclusion based on the particular facts and circumstances surrounding the search in a given case. State v. Patterson, 51 Wn. App. 202, 204–208, 752 P.2d 945, review denied, 111 Wn.2d 1006 (1988). Because a fact-based inquiry regarding reasonableness is required, Cates' challenge fails to satisfy the second factor which requires there be no need for further factual development for review. Valencia, 169 Wn.2d at 786; Bahl, 164 Wn.2d at 751. Accordingly, Cates' appeal lacks the factual context necessary to show harm to resolve the issue. Cates does not risk violation for

the mere use or possession a computer; he risks violation only for using a computer for an illegal purpose. Thus, the factual development of the claim is essential to assessing its validity. The Court of Appeals correctly affirmed the trial court's imposition of the challenged condition of community custody requiring Cates' consent to home visits for the purposes of visual inspection to monitor his compliance with supervision.

IV. CONCLUSION

The Court of Appeals should be affirmed.

Respectfully submitted on August 15, 2014.



JOHN J. JUHL #18951
Deputy Prosecuting Attorney
Attorney for Respondent

Sent via e-mail

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