

No. 93845-8

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

CURTIS LAMONT CORNWELL,

Petitioner.

SECOND SUPPLEMENTAL BRIEF OF PETITIONER

Court of Appeals No. 47444-1-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 13-1-04618-2
The Honorable Jack Nevin, Judge

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I. QUESTION PRESENTED

Does an unrestricted search of a probationer's home or personal property violate article 1, section 7 of the Washington state constitution if the search is not limited to areas that might contain evidence related to the suspected probation violation?

II. ARGUMENT & AUTHORITIES

Unless an exception is present, a warrantless search is impermissible under both article I, section 7 of the Washington state constitution and the Fourth Amendment to the United States Constitution. Wash. Const. art. I, § 7; U.S. Const. amd. IV. Article I, section 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Generally, the term "authority of law" includes authority granted by valid statutes, the common law, and rules promulgated by the supreme court. State v. Gunwall, 106 Wn.2d 54, 68-69, 720 P.2d 808 (1986).

In Washington, statutory and case law provide the necessary authority for a warrantless search of a probationer or parolee. RCW 9.94A.631 authorizes a warrant exception for a community corrections officer (CCO) to search a probationer's residence and other personal property when the CCO has reasonable cause to believe a probationer has violated the conditions of his or her release. Divisions 2 and 3 have both found that a search under this

statutory exception requires the existence of “a nexus between the suspected violation and the searched property.” State v. Livingston, 197 Wn. App. 590, 598, 389 P.3d 753 (2017); State v. Jardinez, 184 Wn. App. 518, 338 P.3d 292 (2014).

Washington case law also recognizes that probationers and parolees have a diminished right of privacy that permits a warrantless search based on a well-founded suspicion that a probation violation has occurred. State v. Patterson, 51 Wn. App. 202, 205, 752 P.2d 945 (1988); State v. Lucas, 56 Wn. App. 236, 239-40, 783 P.2d 121 (1989). But the question in this case is not whether CCO Grabski had a reasonable suspicion that Cornwell violated the terms of his probation by failing to report.¹ The question is whether CCO Grabski exceeded the reasonable and permissible scope of the probationer search exception when he searched Cornwell’s car even though he did not expect the search to yield evidence related to the known probation violation. The answer, under RCW 9.94A.631, the Fourth Amendment and article 1, section 7, is yes.²

¹ As argued in detail in previous briefing, CCO Grabski could not have had a reasonable suspicion that Cornwell had committed any other violations.

² The application of RCW 9.94A.631 to the facts of this case is discussed more thoroughly in previous briefing filed by Cornwell. This brief, at the request of this Court, will focus on the application of article 1, section 7.

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. In determining whether a search is reasonable, the probationer's status must be considered. "Though the State properly subjects [a probationer] to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation. The parolee has relied on at least the implicit promise that parole will be revoked only if he fails to live up to the parole conditions." Morrissey v. Brewer, 408 U.S. 471, 482, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

Thus, "[c]onsidering the interest of the parolee in his liberty and privacy, it would seem to be beyond question that to subject the parolee to arbitrary and capricious searches at the whim of his parole officer would be constitutionally impermissible. The Fourth Amendment protection against unreasonable searches and seizures does extend to one released on parole, and searches by parole officers ... are subjected to this broad reasonableness requirement." State v. Simms, 10 Wn. App. 75, 84, 516 P.2d 1088 (1973) (and cases cited therein).

But article I, section 7 of the Washington state constitution goes even further. As noted above, article I, section 7 prohibits searches conducted “without authority of law.” Thus, where the Fourth Amendment precludes only “unreasonable” searches and seizures without a warrant, article I, section 7 prohibits any disturbance of an individual’s private affairs “without authority of law.” See York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 305-06, 178 P.3d 995 (2008). “This language prohibits not only unreasonable searches, but also provides no quarter for ones which, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional.” State v. Valdez, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). This creates “an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions[.]” State v. Ringer, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983).

So, under both the Fourth Amendment and article I, section 7, a probationer does not lose all of his or her privacy rights due to their status as a probationer. Instead, a probationer’s diminished expectation of privacy is constitutionally permissible only to the extent necessitated by the legitimate demands of the operation of the parole process. State v. Parris, 163 Wn. App. 110, 118, 259

P.3d 331 (2011); Simms, 10 Wn. App. at 86.

In other circumstances, this Court has recognized that, under article 1, section 7, the scope of a search must be connected to the reason that justifies the search. For example, a search incident to the arrest of a car's driver must be necessary to preserve officer safety or prevent destruction or concealment of evidence *of the crime of arrest*. Valdez, 167 Wn.2d at 777. A wide-ranging, unlimited search of an arrestee's car is therefore not constitutionally permissible.

Pretextual traffic stops are also unconstitutional under article I, section 7. State v. Ladson, 138 Wn.2d 343, 358, 979 P.2d 833 (1999). An investigative stop must be justified at its inception and must be *reasonably limited in scope*, based on whatever reasonable suspicions legally justified the stop in the first place. Ladson, 138 Wn.2d at 350.

This is because "recognized exceptions to the warrant requirement are limited by the reason which called them into existence, not [as] a pro forma device ... to undermine the 'authority of law' warrant requirement enshrined in our state constitution." Ladson, 138 Wn.2d at 356.

Similarly, under article 1, section 7, even if a CCO has a

reasonable suspicion that a probation violation has occurred, the subsequent search must be connected to that suspicion, and must be limited to a search for evidence of that violation. This limitation accommodates the legitimate demands of the probation system by allowing warrantless searches on less than probable cause, while still respecting and protecting the legitimate privacy rights of probationers and parolees. Such limitation also protects against the probationer exception becoming a “pro forma device” for CCOs to undermine and avoid article I, section 7’s warrant requirement.

Article I, section 7 jurisprudence clearly supports the conclusion that the scope of a probationary search must be connected to the reason that justifies the search; that is, the suspected probation violation. In this case, because CCO Grabski had no reason to believe that evidence of the suspected violation would be found in the search of Cornwell’s car, the search was not reasonable and violated article 1, section 7.

Washington’s exclusionary rule is “nearly categorical” because article I, section 7 “clearly recognizes an individual’s right to privacy with no express limitations.” State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009). Therefore, any evidence collected

as a result of the unconstitutional search of Cornwell's car should have been suppressed.

III. CONCLUSION

This Court should find that our state constitution does not permit an unrestricted search of a probationer's person and property based on a reasonably suspected community custody violation without regard to whether the CCO has any reason to believe that evidence related to the suspected violation will be found. And Cornwell respectfully requests that this Court find that the search in this case exceeded the permissible scope of the probationer warrant requirement, and reverse his conviction.

DATED: August 27, 2017



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CERTIFICATE OF MAILING

I certify that on 08/27/2017, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Curtis L. Cornwell, DOC# 792343, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



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August 27, 2017 - 5:30 PM

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Appellate Court Case Title: State of Washington v. Curtis Lamont Cornwell
Superior Court Case Number: 13-1-04618-2

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