

No. 93845-8

**IN THE SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

vs.

CURTIS LAMONT CORNWELL,

Petitioner.

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. ISSUES PRESENTED FOR REVIEW

1. To justify such a search of a probationer, must the property searched relate to the violation that the community custody officer believes has occurred?
2. Does RCW 9.94A.631(1) allow officers to conduct searches of probationers regardless of whether there is any nexus between the violated condition and the searched property?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Curtis Lamont Cornwell by Information with three counts of unlawful possession of a controlled substance with intent to deliver (RCW 69.50.401(1)(2)) and one count of resisting arrest (RCW 9A.76.040). (CP 1-2) The trial court denied Cornwell's CrR 3.6 motion to suppress evidence found during a search of the vehicle he had been driving at the time of his arrest. (CP 79-90; TRP1 135-45)¹ A jury convicted Cornwell as charged. (CP 207-13; TRP2 201) The trial court imposed a standard range sentence totaling 87 months and both mandatory and discretionary legal financial obligations. (SRP 23; CP 125, 126) Cornwell timely appealed. (CP 239)

¹ The trial transcripts, labeled volumes I and II, will be referred to as "TRP#." The transcript of sentencing will be referred to as "SRP" and the remaining transcript will be referred to by the date of the proceeding.

B. SUBSTANTIVE FACTS

1. *Facts from CrR 3.6 Motion to Suppress*

Tacoma police officer Randy Frisbie and Community Corrections Officer (CCO) Thomas Grabski were conducting surveillance of a home suspected of being used for drug sales and prostitution. (TRP1 15) Officer Frisbie observed a black Chevrolet Monte Carlo pull alongside CCO Grabski's vehicle and its driver appeared to roll down a window to look at Grabski. (TRP1 15) Officer Frisbie noted the license plate number of the Monte Carlo so that they could later determine the name of its registered owner. (TRP1 15) A few days later, Officer Frisbie saw the Monte Carlo again, and saw an unknown man get out of the driver's side of the car and walk into a pawn shop. (TRP1 15) The officers were unable to learn the identity of the man at that time. (TRP1 15)

However, they were able to learn that the registered owner was named Janet Lamb. (TRP1 15-16) The officers contacted Lamb, who confirmed that she was the registered owner of the Monte Carlo. (TRP1 16) She told the officers that she had given the car to Curtis Cornwell, but now wanted it back.² (TRP1 16, 105,

² Grabski testified that he did not interpret this statement to mean that Cornwell had stolen the Monte Carlo, only that Cornwell was likely the person seen driving the Monte Carlo. (TRP1 107)

106)

CCO Grabski learned that Cornwell was on community custody and had a Department of Corrections (DOC) warrant issued for his arrest because he had violated the terms of his release. (TRP1 16, 17, 83, 88) Grabski believed that the warrant was issued based on Cornwell's failure to report for a scheduled check-in with his CCO. (TRP1 113) Grabski shared this information with Officer Frisbie. (TRP1 16, 17)

On November 28, 2013, while on patrol with Officer Patrick Patterson, Officer Frisbie saw the Monte Carlo drive past, and assumed Cornwell was the driver. (TRP1 17, 19, 48) Officer Frisbie turned his patrol car to follow the Monte Carlo, but before he was able to activate his emergency lights to initiate a stop, the Monte Carlo pulled into a driveway and Cornwell began to exit the car. (TRP1 18, 38-39, 48) Officer Frisbie ordered Cornwell to stay in the vehicle, but he did not comply. Cornwell instead lowered himself to the ground, then jumped up and began to run away. (TRP1 19-20, 49) Officers Frisbie and Patterson tased Cornwell, then took him into custody. (TRP1 20, 21, 49) The officers confirmed Cornwell's identity and warrant status, then called Grabski who, as a CCO, can conduct a warrantless "compliance

check” search of property when an offender is suspected of violating the terms of community custody. (TRP1 21, 22, 51, 57-58, 80)

Grabski arrived and contacted Cornwell, then decided to search the Monte Carlo because Cornwell was driving the car when he was arrested. (TRP1 22, 90) On the front seat, Grabski found a black nylon bag containing what appeared to be prescription pills. (TRP1 22, 52-53, 90, 91)

2. *Facts from Trial*

In addition to the facts testified to at the CrR 3.6 hearing, Officers Frisbie, Patterson and Grabski testified at trial that the black nylon pouch contained three different types of pills, a lighter, a spoon, and unused ziplock baggies. (TRP2 60, 64-66, 67, 73, 74, 102, 104) Cornwell also was in possession of three cellular phones and \$1,573 in mixed denomination bills. (TRP2 56, 83, 105) The officers testified that these items were commonly associated with the sale of narcotics and that the amount of pills found was inconsistent with an amount likely needed for personal use. (TRP2 49, 94-96, 111)

The three types of pills found in the black pouch were analyzed. (TRP2 139) One type contained oxycodone, one type

contained amphetamine, and the third type contained methamphetamine. (TRP2 142, 144, 145) Cornwell told the officers that he had the pills because he suffered from migraine headaches. (TRP1 53; TRP2 100)

III. ARGUMENT & AUTHORITIES

CrR 3.6(b) requires that the trial court enter written findings of fact and conclusions of law following its decision on a motion to suppress brought pursuant to CrR 3.6(a). The trial court failed to enter these required findings in this case, which makes it impossible for Cornwell to assign error to findings of fact. However, it is clear from the testimony at the hearing that the Officers believed that DOC had issued a warrant for Cornwell's arrest because he had failed to report and this was the entire and only basis for the contact and arrest on November 28, 2013; that the Monte Carlo had been seen near a suspected drug house at some unspecified date and time prior to Cornwell's arrest; that the Monte Carlo was registered to Janet Lamb; that Lamb had at one point given Cornwell permission to drive the Monte Carlo but had since changed her mind; and that the search of the Monte Carlo was conducted under the statutory authority that allows a CCO to conduct a compliance check of an offender suspected of violating

the terms of his or her release. (TRP1 12-13, 15, 16, 17, 22, 24, 57-58, 60, 63, 64, 80, 90, 93, 106, 107, 113)

The trial court denied Cornwell's motion to suppress the items found in the Monte Carlo during the search. The trial court concluded that CCO Grabski had reasonable grounds to believe that Cornwell violated the terms of his release because of the existence of the warrant. (TRP1 142) The court upheld the search stating, in relevant part:

Cornwell may indeed have had a subjective expectation of privacy in his personal effects in the car. But that expectation was not a reasonable, an objectively reasonable expectation in these circumstances. His status as probationer means that his effects and his personal belongings . . . and other personal property, was continuously subject to searches and seizures by law enforcement officials. His expectation of privacy in his personal effects fails the reasonable test in my opinion . . . because there has been a legislative determination that probationers do not have a reasonable expectation of privacy in residences, vehicles, or personal belongings, even including closed containers. And our appellate courts have acknowledged that, otherwise, our laws and society demand a warrant for such searches but not for those who are on community custody. So part of my holding is that Mr. Cornwell did not have a reasonable expectation of privacy in the inside of that vehicle[.]

(TRP1 140-41)

When reviewing the denial of a motion to suppress, the trial

court's conclusions of law are reviewed *de novo*. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citing State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)). In this case, a *de novo* review shows that the trial court was incorrect.

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution protect citizens against warrantless searches and seizures.³ Warrantless searches and seizures are *per se* unreasonable. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). Because this is a strict rule, courts limit and narrowly construe exceptions to the warrant requirement. Parker, 139 Wn.2d at 496. 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, 83 L. Ed. 2d 720 (1985).

Washington courts have recognized an exception to the warrant requirement allowing for a search of parolees or probationers. State v. Campbell, 103 Wn.2d 1, 22, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 85 L. Ed. 2d 526, 105 S. Ct.

³ It is now settled that Art. I, § 7 is more protective than the Fourth Amendment. State v. Jackson, 150 Wn.2d 251, 260, 76 P.3d 217 (2003); State v. Vrieling, 144 Wn.2d 489, 495, 28 P.3d 762 (2001).

2169 (1985). And RCW 9.94A.631(1) also provides, in relevant part:

If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, an offender may be required to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

However, while persons on community custody have a lesser expectation of privacy than the general public, they are still entitled to some constitutional protections. Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987); State v. Winterstein, 167 Wn.2d 620, 628-29, 220 P.3d 1226 (2009). Accordingly, there are limits to warrantless searches of offenders on community custody, and CCO Grabski exceeded those limits.

"[A] diminution 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) (quoting In re Martinez, 83 Cal. Rptr. 382, 463 P.2d 734, 738, n. 6 (1970)). "[A] balancing 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).

Thus, even in the context of a search by a CCO, the scope of a search must be reasonable.

For example, in Patterson, witnesses identified probationer Patterson as the person who committed an armed robbery, and police received separate tips that the weapon used would be found in Patterson's car. Division 3 held that this constituted reasonable suspicion for a parole officer to search Patterson's car without a warrant. 51 Wn. App. at 209.

Conversely, in State v. Parris, a CCO searched the residence of probationer Derek Parris, whose community custody conditions included prohibitions on contact with minors, possession of sexually explicit materials, and use of drugs or alcohol. 163 Wn. App. 110, 120, 259 P.3d 331 (2011). Parris had been spotted in his car with an underage girl, had failed a urinalysis drug test, and Parris' mother told the officers that Parris might have obtained a firearm. 163 Wn. App. at 120. During a search of his residence, which Parris did not challenge, officers found memory cards and other digital storage devices. 163 Wn. App. at 120.

Parris challenged the seizure and viewing of the contents of the memory cards, but the court ruled that the CCO had a well-founded and reasonable suspicion that the memory cards might

contain evidence of the suspected and additional violations. 163 Wn. App. at 120. Accordingly, “the requirements of community custody necessitated the search [of the memory cards] both for Parris’ safety and for the safety of others.” 163 Wn. App. at 120.

The Parris opinion suggested, but did not explicitly hold, that perhaps an offender on community custody has no expectation of privacy in any of his or her property and is not entitled to any 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.

163 Wn. App. at 123 (footnotes omitted). The trial court in this case seemed to come to the same conclusion, holding that Cornwell had absolutely no expectation of privacy in his car or the personal items within. (TRP1 140-41)

But such a broad reading of RCW 9.94A.631(1) was subsequently rejected by Division 3 in State v. Jardinez, 184 Wn. App. 518, 338 P.3d 292 (2014). At issue was whether Jardinez’s

CCO had legal authority to search the content of his iPod when the CCO did not expect the search to yield evidence related to either of the known parole violations (Jardinez’s failure to appear and his marijuana use). 184 Wn. App. at 523. The State argued that “any parole violation justifies any search for any other violation [and] that the statute allows a search of ‘other personal property,’ which, according to the State, implies property other than the property with a nexus to any criminal activity.” 184 Wn. App. at 525 (emphasis in original).

The Jardinez court rejected the State’s invitation to read RCW 9.94A.631(1) so broadly, and emphasized that there must be a reasonable nexus between the searched personal property and the alleged crime or violation.⁴ 184 Wn. App. at 529. In reaching this conclusion, the court relied on well-established search and seizure law, and on the Sentencing Guidelines Commission’s official comment regarding RCW 9.94A.631(1):

“The Commission intends that Community Corrections Officers exercise their arrest powers sparingly, with due consideration for the seriousness of the violation alleged and the impact of confinement on jail population. Violations may be charged by the

⁴ The Jardinez court noted that, if read broadly, Parris could be interpreted as supporting a search of any offender’s property upon violation of community custody conditions, but noted that the Parris court “did not expressly rule that all property of the offender may be searched.” 184 Wn. App. at 527-28.

Community Corrections Officer upon notice of violation and summons, without arrest.

The search and seizure authorized by this section should relate to the violation which the Community Corrections Officer believes to have occurred.”

184 Wn. App. at 529 (quoting David Boerner, SENTENCING IN WASHINGTON: A LEGAL ANALYSIS OF THE SENTENCING REFORM ACT OF 1981, at app. 1-13 (1985)) (emphasis added).⁵

In the present case, Division 2 rejected the Jardinez court’s reasoning, and rejected Cornwell’s reliance on that case, stating that “no other Washington court has required a nexus between the property to be searched and a specific violation.” (Opinion at 7)

However, a different panel of Division 2 has since recognized the validity of the Jardinez court’s nexus requirement, stating:

We agree with Division Three’s conclusion that the Commission’s comment is strong evidence that the legislature intended that there must be a nexus between the suspected violation and the searched property. Accordingly, we adopt the approach in Jardinez and hold that a valid search under RCW 9.94A.631(1) requires that there be a nexus between

⁵ Division 3 noted that multiple Federal and Washington State court decisions, cited in Jardinez’s briefing, limit the scope of a search to be commensurate with, but not exceed, the suspicion that instigated it: Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009); Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967); State v. Hudson, 124 Wn.2d 107, 874 P.2d 160 (1994); and State v. B.A.S., 103 Wn. App. 549, 13 P.3d 244 (2000). Jardinez, 184 Wn. App. at 525.

the alleged violation and the searched property.

State v. Livingston, 197 Wn. App. 590, 598, 389 P.3d 753 (2017).

Thus, the weight of authority holds that there must be a nexus between the suspected violation and the property to be searched.

Division 2 erred when it held otherwise in this case.

Division 2 also erred when it found that, even if a nexus is required, it existed in this case. According to the court:

CCO Grabski saw Cornwell in the vehicle near a known drug house that was under surveillance, a valid DOC arrest warrant had been issued for Cornwell, Cornwell attempted to flee from the vehicle when stopped, and based on his criminal history, CCO Grabski suspected that Cornwell was involved in drug-dealing. Therefore, CCO Grabski had reasonable cause to believe Cornwell had violated his probation and had authority under RCW 9.94A.631(1) to search the vehicle. Thus, we hold that the vehicle search was lawful under RCW 9.94A.631(1) and the trial court properly denied the motion to suppress.

(Opinion at 8) These facts recited by the Court of Appeals simply do not support a conclusion that there was nexus between the suspected violation and the search of the Monte Carlo, and do not support a suggestion that CCO Grabski had alternative suspicions sufficient to support a search of the car.

First, the fact that Cornwell was seen “in the vehicle near a known drug house” does not create a reasonable suspicion that he

is engaged in criminal activity. A person's presence in a known crime area does not, by itself, give rise to a reasonable suspicion to detain that person. State v. Ellwood, 52 Wn. App. 70, 74, 757 P.2d 547 (1988). Similarly, a person's "mere proximity to others independently suspected of criminal activity" does not justify a detention. State v. Thompson, 93 Wash.2d 838, 841, 613 P.2d 525 (1980).

The Court of Appeals also states that CCO Grabski suspected that Cornwell was involved in drug-dealing based on his criminal history. However, CCO Grabski did not observe Cornwell engaging in any behaviors that indicated he was currently dealing drugs. And neither CCO Grabski nor Officer Frisbie reported seeing Cornwell actually enter or exit the suspected drug house.

The Court of Appeals also notes that Cornwell attempted to flee from the officers. When the officers first contacted Cornwell, he asked them why he was being stopped. (TRP1 20) Officer Frisbie told him there was a DOC warrant for his arrest. (TRP1 20) Then Cornwell tried to run away. (TRP1 20) The only conclusion from this testimony is that Cornwell fled to avoid arrest on the warrant, not that he fled because there was contraband in the Monte Carlo.

Not only do these facts fail to establish that CCO Grabski had alternative reasons to suspect that Cornwell had violated the terms of his probation, they do not establish a nexus between any suspected violations and the Monte Carlo.

CCO Grabski testified that the violation underlying Cornwell's warrant was likely a failure to report. (TRP1 85, 101, 102, 113) There would be no need to search the Monte Carlo or the black nylon bag to find proof of this suspected violation. In fact, Grabski testified that the purpose of the search was to "to make sure there's no further violations of his probation." (TRP1 93) Grabski was not looking for evidence of the suspected violation, but instead expanded the scope of his search beyond its proper limits in order to look for evidence of additional violations.

RCW 9.94A.631 does not strip probationers of all of their Fourth Amendment privacy rights, and does not authorize CCO Grabski's warrantless search of the Monte Carlo or the contents of the nylon bag. The trial court incorrectly interpreted and applied the statute when it found this statutory exception to the warrant requirement justified the search. The State also failed to establish

that any other exception to the warrant requirement applies.⁶ Accordingly, the trial court's denial of Cornwell's motion to suppress must be reversed and the evidence collected as a result of the search must be suppressed.⁷

IV. CONCLUSION

The 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. CCO Grabski had no reason to believe that evidence of Cornwell's suspected violation (failure to report) would be found in the search of the Monte Carlo. There was no nexus between the search and the suspected violation. Cornwell's convictions for unlawful possession of a controlled substance with intent to deliver must be reversed.

DATED: June 1, 2017



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⁶ The State bears the heavy burden of proving that a warrantless search falls within an exception to the warrant requirement. Parker, 139 Wn.2d at 496.

⁷ The remedy for a violation of article I, section 7 is suppression of the evidence obtained either during or as a direct result of an unconstitutional search or seizure. State v. Buelna Valdez, 167 Wn.2d 761, 778, 224 P.3d 751 (2009).

CERTIFICATE OF MAILING

I certify that on 06/01/2017, 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.

Stephanie Cunningham

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