

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

vs.

CHARLES WADE MCCALL,

Respondent.

Docket No. 82640

Appeal from a Decision and Order
Eighth Judicial District Court, Clark County
The Honorable Monica Trujillo, District Judge
Case No. C-20-350999-2

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed pursuant to that rule. These representations are made so that the justices of this Court may evaluate any potential conflicts warranting disqualification or recusal.

1. Attorney of Record for Respondent:
 - a. Michael W. Sanft, Esq.
2. Publicly-held Companies Associated:
 - a. N/A
3. Law Firm(s) Appearing in the Court(s) Below:
 - a. Clark County District Attorney
 - b. Clark County Public Defender
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DATED this 8th day of December, 2021.

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STATEMENT OF THE CASE

On September 24, 2020, Respondent Charles Wade McCall (hereinafter “McCall”) was charged with the following to which he pled not guilty- one count of Establishing or Possessing a Financial Forgery Laboratory under NRS 205.46513, three counts of Ownership or Possession of Firearm by Prohibited Person under NRS 202.360, and five counts of Possession of Document or Personal Identifying Information under NRS 205.465.

On February 22, 2021, McCall filed a Motion to Suppress arguing that Parole and Probation exceeded its warrantless search. AA0008-AA0073. After conducting an evidentiary hearing, the district court granted McCall’s motion. AA0272-AA0277.

The State appealed the district court’s order. This Answering Brief now follows.

STATEMENT OF FACTS

The facts that follow are those presented during the evidentiary hearing, encapsulated in the State’s two volume Appendix, pages AA0001-AA0278, and referenced further herein.

Colette Winn was on probation (hereinafter “Winn”). AA0093. She resided in a bedroom she rented from McCall. AA0227. McCall’s home had three bedrooms. AA0118. McCall had the master bedroom with its own

bathroom. AA0120. The third bedroom was rented to Mahatuhi Santos (hereinafter “Santos”). AA0227. All bedrooms had locks with keys for each person who lived within. AA0222. McCall’s bedroom was in the other side of the house, while Winn’s and Santos’ next to one another, and closest to the front door. AA0132. These bedrooms were not considered to be common areas. AA0223.

Neither McCall nor Santos were under State supervision.

Sometime prior to June 25, 2020, Parole and Probation received an anonymous letter regarding Winn. It alleged various probation violations. It provided unconfirmed details of her living arrangement. But most notably, it declared that “weapons might be found.” AA0237. It did not explicitly allege that McCall was in possession of any illegal weapons or was conducting any illegal activity. AA0171.

Based upon the anonymous letter and officer review of McCall’s criminal history (AA0144), probation officers decided to raid McCall’s house. It was Winn’s probation officer’s first visit to the house. AA0122. One probation officer conducted surveillance prior to the raid, and saw one male enter and exit the residence. AA0094. He could not say if it was McCall, Santos, or some other person. Id; also AA0114. No other people were seen entering or exiting during his surveillance. AA0095, AA0102.

Probation officers drove Winn to the house and walked her to the door. AA0097, AA0175. Winn was unable to remember the combination for the front door lock. AA0176-AA0178. McCall came to the door with his dog. Probation officers told McCall to put the dog away. AA0183. The dog did not act in any way that was memorable. AA0128-AA00129. After McCall did so, probation officers walked into his house. AA0098. They did not ask McCall for permission to enter his home. AA0117-AA0118. The probation officers had their guns drawn upon entering. AA0124-AA00125.

Probation officers opened Santos' door while he was sleeping and ordered him out of bed and into the living room. AA0226. They then searched Santos' room. AA0226-AA0227.

As McCall opened the door to get his dog inside his master bathroom, probation officers "broke the plane" and went into McCall's bedroom. AA0135-AA0136. They did not ask McCall or notify him that they were doing so. AA0136. They saw shot gun shells on a cluttered dresser located on the opposite end of the bedroom, but no firearms or drugs. AA0185. No officer saw anything else. AA0137. McCall was then placed in handcuffs and Mirandized within 90 seconds after being arrested. AA0187, AA0208. While in custody, McCall admitted to the location of firearms and drugs in his room. AA0187-AA0188.

Notably, no probation officer wrote a report regarding the event. Only a Declaration of Arrest written by Metro detectives later documented anything to do with Parole and Probation's decisions or actions. AA0192-AA0194.

SUMMARY OF THE ARGUMENT

After considering the evidence in light of McCall's motion to suppress, the district court found that Parole and Probation's protective sweep did not justify a search of McCall's private bedroom without a warrant, and suppressed the results of the search therein.

ARGUMENT ON THE ISSUES

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. Amend. IV; *Maryland v. Buie*, 494 U.S. 325, 331, 110 S.Ct 1093, 1096 (1990); see also . The Fourth Amendment states that “no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. Amend. IV; *Draper v. United States*, 358 U.S. 307, 79 S. Ct. 329 (1959). “Probable cause’ requires that law enforcement officials have trustworthy facts and circumstances which would cause a person of reasonable caution to believe that it is more likely than not that the specific items to be searched for are: seizable and will be found in the place to be searched.” *Keesee v. State*, 110 Nev. 997, 1002, 879

P.2d 63, 66 (1994).

The reasonableness of a search is weighed between an “individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.” *Buie*, 494 U.S. at 331, 110 S.Ct at 1096. Admittedly, the “need for law enforcement officers to protect themselves” is a legitimate governmental interest. *Terry v. Ohio*, 392 U.S. 1, 24, 88 S.Ct 1868, 1882 (1968); *See Buie*, 494 U.S. at 332, 110 S.Ct at 1097. However, law enforcement officers must possess a “reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.” *Buie* 494 U.S. at 337, 110 S.Ct at 1099-100. In this case, specific and articulable facts were never provided by the probation officers in this case to justify their sweep.

Probationers maintain limited “Fourth Amendment guarantees against correctional authorities who supervise them.” *Seim v. State*, 95 Nev. 89, 94, 590 P.2d 1152, 1155-556 (1979). A warrantless search of a probationer’s home is reasonable under the Fourth Amendment when supported by reasonable suspicion and authorized by a condition of probation. *United States v. Knights*, 534 U.S. 112, 122 S.Ct 587, 593 (2001). Most importantly, “the Fourth Amendment’s touchstone is reasonableness, and a search’s reasonableness is determined by assessing, on the one hand, the degree to

which it intrudes upon an individual's privacy, and on the other, the degree to which it is needed to promote legitimate governmental interests." *Id.*, citing *Wyoming v. Houghton*, 526 US 295, 300. "Warrantless searches and seizures in a home are presumptively unreasonable." *Johnson v. State*, 118 Nev. 787, 794, 59 P.3d 450 (2002). It is not reasonable to assume that just because a person is an ex-felon, that the Fourth Amendment no longer applies to them. The only requirement to contest a warrantless search is a reasonable expectation of privacy. *Id.*

"Suppression issues present mixed questions of law and fact." *Johnson v. State*, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002). "While this court review the legal questions de novo, it reviews the district court's factual determinations for sufficient evidence." *Id.*, at 794. The reasonableness of a seizure is a matter of law reviewed de novo. *Id.*; *United States v. Campbell*, 549 F.3d 364, 370 (6th Cir. 2008).

When the factual findings depend largely on credibility determinations, an appellate court will defer to the district court. *Spain v. Rushen*, 883 F.2d 712, 717 (9th Cir. 1989), cert. denied, 110 S. Ct. 1937 (1990). An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination, or it disregards controlling law. *NOLM, LLC v. City of Clark*, 120 Nev. 736, 739, 100 P.3d 658, 660–61

(2004).

I. Protective Sweeps Are Not Limitless

“A ‘protective sweep’ is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others.” *Maryland v. Buie*, 494 U.S. at 327. Here, no arrest took place at the home until after the unlawful intrusion. Officers arrested Winn at the Department of Parole & Probation and then returned her to the home for the purpose of invoking her probation search clause, which is limited to areas under her control. There were no other exigent circumstances to warrant a protective sweep.

Individuals on probation are subject to limited Fourth Amendment protections. *Seim v. State*, 95 Nev. 89, 94, 590 P.2d 1152, 1155-556 (1979). While law enforcement officers are allowed to execute protective sweeps, this does not allow sweeps that violate the reasonable expectation of privacy of others who are not on probation.

II. McCall Was Not On Supervision, Nor Subject to the Same Warrantless Search as Probationer Winn

McCall was not on supervision. The anonymous letter that was the cornerstone to Parole and Probation’s targeting of McCall did not clearly identify McCall to be anything other than an ex-felon. As such, McCall was entitled to the same protections of the Fourth Amendment as any other

person in the United States. This required the State to provide a warrant in order to search his private bedroom, or exigent circumstances as to why they needed to do so without one.

In addition, the possession of a shotgun shell by an ex-felon is not a state crime. The mere fact that one is seen in McCall's room is not sufficient for immediately cuffing McCall, placing him under arrest, and reading him Miranda, all the while violating his Fourth Amendment rights.

CONCLUSION

For these reasons, McCall petitions this Honorable Court to uphold the district court's order to suppress the items found in violation of his Fourth Amendment rights.

DATED this 8th day of December, 2021.

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ATTORNEY’S CERTIFICATE OF COMPLIANCE

I certify that I have read this brief and, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I certify that this brief is typed in 14-point Georgia font using Apple Pages, is 13 pages and 2,352 words long, and complies with the typeface and -style requirements of NRAP 32(a)(4)-(6), as well as the page length requirements of NRAP 32(a)(7)(A). I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure and/or subsequent orders of this Court and with NRAP 28(e), which requires every assertion in the brief regarding matters in the record be supported by a reference to a page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of December, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of December, 2021, I served this document on the following:

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AFFIRMATION

Pursuant to NRS 239B.030, this document contains no social security numbers.

/s/ Michael Sanft
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12/8/21
Date