
STATE OF MONTANA

Plaintiff and Appellee,

v.

REGINA LEE THOMPSON,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, the Honorable Robert B. Allison, Presiding

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STATEMENT OF THE ISSUES

Issue One: Whether it is a violation of a probationer's right to privacy when her probation officer walks through her home's exterior door, then turns and pushes open her interior home door without a warrant, without reasonable cause, and without previous contact with the probationer or any indication that she was even home.

STATEMENT OF THE CASE

On February 21, 2017, Regina Lee Thompson, ("Regina",) pled guilty to the offense of bail jumping in Flathead County District Court. (D.C. Doc 28.) On July 6, 2017, the court deferred imposition of sentence for four (4) years, subject to several conditions including that she be placed under probation. (D.C. Doc 39.) On June 10, 2019, a Petition to Revoke the sentence was filed, which was subsequently dismissed by the Flathead County Attorney on August 22, 2019. (D.C. Docs 41 and 51.)

On July 16, 2020, Regina was arrested and a new Petition to Revoke was filed, alleging that Regina had violated the conditions of her deferred sentence. (D.C. Docs 52 and 54.) To support this petition, a Report of Violation was submitted that alleged Regina was in

possession of methamphetamines and a handgun, among other violations. (D.C. Doc 53.) On November 18, 2020, Regina filed a motion to compel discovery, alleging that the prosecution had failed to disclose additional records and reports that were necessary to prepare Regina's defense. (D.C. Doc 69.) On December 21, 2020, Regina filed a motion to suppress evidence, alleging an unlawful probation search of Regina's home. (D.C. Doc 80.) A Response and Reply were filed on December 23rd and December 28th respectively. (D.C. Docs 85 and 86.) An evidentiary hearing on the motion to suppress was held on December 31, 2020, at which time the court orally denied Regina's motion to suppress. (See 12-31-20 Hrng on Mtn to Suppress, hereinafter referred to as "12-31-20 Tr.")

The court held a contested hearing on the petition to revoke on January 8th of 2021. (See 1-8-21 Pet to Revoke.) During the hearing, Regina again motioned to dismiss the matter based on the alleged discovery violations. (See 1-8-21 Pet to Revoke at 28.) The court denied Regina's motion to dismiss, found Regina in violation of probation and revoked her sentence. The disposition hearings on the petition to revoke were held on February 11 and March 23, 2021. Regina was sentenced to

a five-year commitment with the Department of Corrections. (D.C. Doc 102.) She was given credit for 14 months of street time and 250 days of time served. Regina timely appealed.

STATEMENT OF THE FACTS

When Regina Thompson was sentenced for bail jumping in July of 2017, she was assigned David Edwards (“Edwards”) as her probation officer. Condition #2 of her sentence stated the following, emphasis added:

“2. The Defendant must obtain prior written approval from his/her supervising officer before taking up residence in any location. The Defendant shall not change his/her place of residence without first obtaining written permission from his/her supervising officer or the officer’s designee. ***The Defendant must make the residence open and available to an officer for a home visit or for a search upon reasonable suspicion.*** The Defendant will not own dangerous or vicious animals and will not use any device that would hinder an officer from visiting or searching the residence.”

(D.C. Doc 39.)

Regina Thompson resided in a home near Hungry Horse, MT during the time of these events. It was a trailer home with an exterior attachment connected to it. (See Defendant’s Exhibit A and Appellant’s App. A.) The exterior attachment acted as a sort of mudroom where visitors must enter the mudroom exterior door before entering the

second interior door that led into the actual home. To the left of the exterior door on the outside wall was a black sign with red lettering that said “NO TRESPASSING” (See App. A.) When cross-examined, Regina’s probation officer could not remember with certainty if the No Trespassing sign was there on the day in question. (12-31-20 Tr. at 24, and 30.)

In July of 2020, probation officer Edwards spoke to law enforcement officer Mandi Perry (“Perry”) regarding Regina Thompson. (See 12-31-20 Tr. at 6-7.) Perry informed Edwards that men were seen at or near Regina’s residence on July 9, 2020 repainting and changing the identities of some four-wheelers that were suspected as stolen. (12-31-20 Tr. at 46-47.) This led to a pursuit where one of the men was caught but the other man was not. Perry requested Edward’s assistance to see if they could contact Regina and find out if the man who got away was at Regina’s house. (12-31-20 Tr. at 43.) Perry believed Edwards, as Regina’s probation officer, could assist in Perry’s investigation. Edwards explained to Perry that as Regina’s probation officer he can conduct a home visit on Regina’s home, but he cannot just go into her house

without reasonable suspicion that she has violated the conditions of her supervision. (12-31-20 Tr. at 7-8., and 44.)

On July 16, 2020, five days after the reports of the stolen four-wheelers, Officers Edwards, Perry, and two or three other officers went to visit Regina's home. (12-31-20 Tr. at 7, 15, and 33.) Edwards did not call Regina before visiting the home. (12-31-20 Tr. at 23.) Edwards was not given any information that there was reason to believe there was drugs at the home. (12-31-20 Tr. at 33.) Upon arrival, Edwards and the officers did not observe any indication that anyone was home, nor did they observe any four-wheelers nearby. (12-31-20 Tr. at 31.) Edwards testified that he believes he knocked on the exterior door before pushing it open and entering the mudroom. (12-31-20 Tr. at 27, and 29.) He did not see Regina or anyone else in the mudroom. (12-31-20 Tr. at 27.) He then knocked on the interior door several times without receiving any answer. (12-31-20 Tr. at 7, and 28.) He did not hear any noises indicating that anyone was home. (12-31-20 Tr. at 28.) Edwards then turned the knob for the interior door and cracked it open. (12-31-20 Tr. at 7, and 28.) After announcing himself, Regina appeared and presented herself. (12-31-20 Tr. at 7.)

When Regina presented herself, Edwards explained that he was there for a home visit and asked if anybody else was in the home. (12-31-20 Tr. at 7.) Regina indicated that a man named Kyle Hill was in the back room. Edwards and the officers then entered the home and escorted everyone into the back room. (12-31-20 Tr. at 7.) Next, one of the officers noticed a methamphetamine pipe on the coffee table in the living room. Edwards indicated to Regina that he now had reasonable suspicion to search her home. (12-31-2- Tr. at 9-10.) Edwards and the officers searched inside her dresser and found methamphetamine. Edwards then asked Regina if there were any firearms in the residence. Regina admitted that she had a handgun in her purse, which the officers subsequently found.

STANDARDS OF REVIEW

The Montana Supreme Court reviews the denial of a motion to suppress “to determine whether the district court’s findings of fact are clearly erroneous and whether the district court’s interpretation and application of the law is correct.” *State v. Thomas*, 2020 MT 222, ¶ 9,401 Mont. 175, 471 P.3d 733. The Court reviews a district court’s

conclusions of law to determine whether they are correct. *State v. VonBergen*, 2003 MT 265, ¶7, 317 Mont. 445, 77 P.3d 537.

SUMMARY OF THE ARGUMENT

The probation officer violated Regina's right to be free from unreasonable searches when he opened the interior door to her home without her consent, without a warrant, and without reasonable cause that she had violated the terms of her probation. An individual, even one under probation, has a reasonable expectation of privacy in their home. The district court erred in ruling that the probation officer was acting within the protocol of a home visit because Regina did not open the door nor invite the probation officer inside. In fact, the probation officer had no evidence that Regina was home when he opened the door.

ARGUMENT

I. The probation officer conducted a search by entering the mudroom of the probationer's home, turning the handle of the interior door, and pushing it open without consent.

Homes have special protection in search and seizure law. *State v. Graham*, 2004 MT 385, ¶ 20, 325 Mont. 110, 103 P.3d 1073. The physical invasion of the home is the chief evil to which the 4th Amendment and Montana's Article II, § 11, are directed. *State v.*

Therriault, 2005 MT 286, ¶ 53, 203 Mont. 189, 14 P.3d 444. The Court has emphasized again and again that the entrance to the home is where the federal and Montana constitutions draw a firm line, and that absent an exception, that threshold may not be crossed without a warrant.

State v. Therriault, 2005 MT 286, ¶ 53, 203 Mont. 189, 14 P.3d 444.

In determining whether a “search” has occurred, we look at three factors: (1) whether the person has an actual expectation of privacy; (2) whether society is willing to recognize that expectation as objectively reasonable; and (3) the nature of the State's intrusion. *State v. Moody*, 2006 MT 305, ¶ 18, 334 Mont. 517, 148 P.3d 662, (citing *State v. Elison*, 2000 MT 288, ¶ 48, 302 Mont. 228, ¶ 48, 14 P.3d 456, ¶ 48.) A probationer has a diminished but not extinguished expectation of privacy in their home. *State v. Moody*, 2006 MT 305, ¶¶ 19, 37-38, 334 Mont. 517, 148 P.3d 662. An individual has an actual expectation of privacy beyond the curtilage of his or her home when the individual has evidenced the expectation “by fencing, [by posting] ‘No Trespassing’ or similar signs, or ‘by some other means [which] indicates unmistakably that entry is not permitted.’” *State v. Bullock*, 272 Mont. 361, at 384, 901 P.2d at 75-76. It is well-settled that the government's intrusion into

a home through an unlocked door is no different than if entry is gained with a key, or the use of force. *Therriault*, referencing *Sabbath v. United States* (1968), 391 U.S. 585, 590, 88 S.Ct. 1755, 1758–59, 20 L.Ed.2d 82.

In denying Regina’s motion to suppress, the district court ruled that the probation officer was merely in the process of conducting a home visit when (after already entering her mudroom) he opened the interior door, pushed it open, and called for Regina. The court’s ruling is quoted below:

“...for purposes of this hearing I’ll say that he opened the door, that it was latched, that he turned the knob, or flipped the latch, and opened the door to a degree and then called for Regina, and then she came and then they spoke and things progressed from there. I don't find that that violates the protocol for conducting a home visit...”

(12-31-20 Tr. at 65 – 66.) The district court did not rule, and the State did not argue, that the probation officer had reasonable cause to conduct a probation search when he opened the door to Regina’s home. It was only after the probation officer walked into the main room of the home and observed drug paraphernalia that the State argued reasonable cause existed to support a probation search and that a search then subsequently occurred.

Home visits are a commonly imposed condition of probation and a home visit by a probation officer is not a search. *State v. Moody*, 2006 MT 305, at ¶¶ 23–24. Edwards’ actions, however, were not part of a home visit because Regina did not welcome him into her home. Instead, Edwards forced an entry into the home, which constitutes a search. As a probationer, Regina had a diminished but not extinguished expectation of privacy in her home. *State v. Moody*, at ¶ 19. She also had an expectation of privacy in the mudroom of her home through the posting of her “No Trespassing” sign, which indicated that entry in the mudroom was not permitted. *State v. Bullock*, at 384. By opening both the exterior door and the interior door, Edwards had initiated a search. The fact that the door was unlocked does not minimize the extent of the intrusion and it should be treated the same as a forced entry. *Sabbath v. United States* (1968), at 590.

It is true that a probationer is required to make her home open and available for a probation officer to visit. It does not follow, however, that a probation officer can therefore force an entry into the probationer’s home if no one answers the door. It is the obligation of the probationer to make her home available to visit. If Regina continually

refused to allow her probation officer to conduct a home visit, the State could argue she was in violation of her conditions of probation. This, however, does not allow her probation officer to take it upon himself to forcefully enter her home.

Edwards had to open two doors to gain access to Regina's home. He admitted that he had to open the exterior door to gain access to the mudroom. Then, after knocking on the second door multiple times, he decided to turn the latch and open that door as well. While a probationer's right to privacy is diminished, it still exists, particularly in her home. The home is historically the *raison d'être* for the constitutional protection. *State v. Graham*, 2004 MT 385, ¶ 22, 325 Mont. 110, 103 P.3d 1073. Therefore, Edwards actions constitute a search.

II. The probation officer did not have reasonable cause to conduct a search.

A warrantless search of a home is per se unreasonable, but one exception is a probation search. *State v. Peoples*, 2022 MT 4, ¶ 17, 407 Mont. 84, 502 P.3d 129. In Montana, a probation officer may search a probationer's residence without a warrant so long as the officer has reasonable cause for the search. *State v. Moody*, 2006 MT 305, ¶ 12, 334

Mont. 517, 148 P.3d 662. The ‘reasonable cause’ standard is substantially less than the probable cause standard required by the Fourth Amendment because of the probationer's diminished expectation of privacy. *Id.*, at ¶ 12. There must be a factual foundation justifying a probationary search and the search must not be used as an instrument of harassment or intimidation. *State v. Burke*, 235 Mont. 165, 171, 766 P.2d 254, 257 (1988).

At the point where Edwards turned and opened the interior door to Regina’s home, he did not have reasonable cause to conduct a probation search. First, there was no evidence that Regina was home. Edwards admitted that he did not call her in advance to request a home visit. (12-31-20 Tr. at 23.) He also admitted that he did not hear or see evidence that anyone was home upon his arrival. Secondly, there was no evidence that she was violating the terms of her probation. The reason for the home visit was based on suspicion of stolen four-wheelers by “a couple of gentlemen”. (12-31-20 Tr. at 6.) There is nothing in the record to suggest that Officer Perry or any other officer had suspected Regina of stealing four-wheelers herself, or of any other wrongdoing. Lastly, no search warrant was issued to authorize the search of

Regina's home. Without reasonable cause or any other exception, Edwards intrusion into Regina's home was unreasonable

III. All evidence obtained after forcing open the door must be suppressed.

Although the generalized rule is evidence is not suppressed in probation hearings, other states with similar state constitutions have suppressed the evidence in probation hearings based on independent state grounds.

In *State v. Marquart*, 1997-NMCA-090, 123 N.M. 809, 945 P.2d 1027 (N.M. Ct. App.1997), the New Mexico Court of Appeals held that, pursuant to Article II, Section 10 of the New Mexico Constitution, the exclusionary rule extends to probation revocation proceedings. In so holding, the court explained:

The New Mexico Supreme Court in [*State v. Gutierrez*, 1993-NMSC-062, 116 N.M.431, 863 P.2d 1052 (N.M. 1993),] distinguished its rationale for application of the exclusionary rule from that of the United States Supreme Court. While the United States Supreme Court held that the purpose of the exclusionary rule is to deter police misconduct, the New Mexico Supreme Court has held that the focus of the exclusionary rule "is to effectuate in the pending case the constitutional right of the accused to be free from unreasonable search and seizure." . . . Accordingly, our Supreme Court in *Gutierrez* emphasizes that our state constitution focuses on the constitutional [privacy] rights of individuals; thus, the exclusionary rule is not a "mere 'judicial remedy'" for unconstitutionally seized evidence. . . . Application of

the exclusionary rule to probation revocation proceedings is consistent with this state's constitutional purpose. *Marquart*, 945 P.2d at 1031.

Notably, the *Marquart* court concluded that the exclusionary rule applies even where the evidence is seized by an officer who is unaware of the probationer's status.

In *State ex rel Juvenile Dep't of Multnomah County v. Rogers*, 314 Ore. 114, 836 P.2d 127, (Or. 1992), the Oregon Supreme Court held that, under its state constitution, the exclusionary rule applied to probation revocation proceedings. In doing so, the Court distinguished the underlying purpose of the Fourth Amendment with that of its state constitution as follows:

"[U]nlike the Fourth Amendment exclusionary rule, which has been based on deterring police misconduct, exclusions under Article I, section 9 [of the Oregon Constitution] have been based on the personal right to be free from an unlawful search and seizure." Thus, when the government violates an individual's Article I, section 9, rights by conducting an unreasonable search or seizure in obtaining evidence, the individual's state constitutional right to be secure against that unlawful search or seizure is protected "through the sanction of [the] suppression of evidence." This court has consistently reaffirmed that personal rights underlie the Oregon exclusionary rule. *Id.* at 129-30 (citing, *inter alia*, *State v. Tanner*, 304 Ore. 312, 745 P.2d 757, 761 (Or.1987) (noting Oregon Supreme Court "identified privacy as the principal interest protected against unlawful searches"))).

The court further concluded that application of the exclusionary rule is not limited to criminal prosecutions, and that the petitioner, who had been on probation but was recommitted to the custody of the state, had a liberty interest that was "sufficiently analogous to the liberty interest at stake in traditional criminal prosecutions that the reasons for the sanction of suppression of evidence are equally applicable." *Id.* at 120.

In *State v. Lampman*, 45 Wash. App. 228, 724 P.2d 1092 (Wash. App. 1986), the Washington Court of Appeals acknowledged that its state courts had long held that the exclusionary rule did not apply to parole or probation revocation proceedings, but concluded that the "recent recognition of broader protections embodied in the state constitution" required it to reevaluate those holdings. *Id.*, at 1094. The court observed that "the exclusionary rule is merely a remedial measure for Fourth Amendment violations," designed to deter unlawful police conduct, whereas "the emphasis of article I, section 7 of the state constitution is on protecting an individual's right to privacy rather than on curbing governmental actions." *Id.* at 1095. The court concluded:

Guided by this emphasis on the right to privacy, we hold that article I, section 7 requires application of the exclusionary rule,

without exception, to probation revocation proceedings. The exclusionary rule, under article I, section 7, is a remedy for a violation of an individual's right to privacy. If a probationer's right to privacy is violated, the exclusionary rule should be invoked regardless of the particular proceeding involved. A probationer, however, has a diminished expectation of privacy, which, in effect, means a diminished right of privacy. That diminished expectation or right of privacy is reflected in the warrantless search excepted [sic] that Washington courts apply to reasonable searches of probationers. The standard for determining whether a warrantless search of a probationer is reasonable is whether the police or probation officer has a well-founded suspicion that a probation violation has occurred.

Montana also has a state constitution that emphasizes the rights of privacy for individuals above and beyond what is guaranteed by the U.S. Constitution, similar to New Mexico, Oregon, and Washington. *State v. Thomas*, 2020 MT 222, ¶13, 401 Mont. 175, 471 P.3d 733. The Montana Constitution separately provides the “right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.” Mont. Const. art II, § 10. Applying Montana’s heightened right to privacy, if a probationer’s right to privacy is violated, the exclusionary rule must be invoked to protect the rights of the probationer even if it is for a probation revocation hearing. Therefore, all evidence obtained after the

probation officer violated Regina's right to be free from an unreasonable search must be suppressed.

CONCLUSION

Regina respectfully requests the Court reverse the district court's denial of her motion to suppress and dismiss the petition to revoke.

Respectfully submitted this 16th day of October, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is 3,521, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Karl Pitcher
KARL PITCHER

APPENDIX

Defendant's Exhibit A..... App. A

12/31/20 Minute Entry indicating Defendant's Motion to
Suppress is Denied.....App. B

CERTIFICATE OF SERVICE

I, Karl Pitcher, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-16-2022:

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