
IN THE
Supreme Court of Virginia

RECORD NO. 131137

RONALD STUART MURRY, JR.,

Appellant,

V.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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OPENING BRIEF OF APPELLANT

NATURE OF THE CASE

The appellant, hereinafter referred to as “the defendant” or “Ronnie,” was charged with six felonies: one count of forcible rape in violation of Code §18.2-61, one count of aggravated sexual battery in violation of Code §18.2-67.3(A)(3), and four counts of aggravated sexual battery in violation of Code §18.2-67.3(A)(1). On September 13, 2011, following pleas of not

guilty to the charges, the defendant was tried without a jury by the Honorable J. Overton Harris. The court convicted the defendant of all of the charges.

On March 5, 2012, the court sentenced the defendant to a term of 156 years and 7 months of incarceration with 140 years of that sentence suspended, for an active term of incarceration of 16 years and 7 months.

The Court of Appeals granted the defendant's petition for appeal as to one issue concerning the sentence imposed. On June 25, 2013, by published decision, the Court of Appeals affirmed the sentence.

On January 24, 2014, this Court granted the defendant an appeal on two issues involving the sentence imposed.

GRANTED ASSIGNMENTS OF ERROR¹

- IX. The trial court erred in imposing an unreasonable probation condition: a life-time waiver of the defendant's constitutional protections against unreasonable searches and seizures. (JA 140-142)
- X. The Court of Appeals erred in failing to address the constitutionality of the probation condition and in finding that it was reasonable. (JA 10-18)

¹ Assignments of Error I-VIII in the Petition for Appeal to this Court were refused.

STATEMENT OF FACTS

Ronald “Ronnie” Stuart Murry, Jr., was charged with sex offenses involving his teenage stepdaughter, BW. Charges were filed in January, 2011, after BW told her mother that Ronnie had touched her since she was five and had sex with her in October or November, 2009. Ronnie admitted having had consensual sex with BW once when she was thirteen, but denied any sexual touching prior to that single incident. There was no physical evidence collected or presented by the Commonwealth in the case.

Over defense objection, the court imposed a sentencing condition that for the remainder of the defendant’s life he allow “a search of [his] person, [his] personal effects or property at any time, with or without, a warrant of arrest, search warrant, probable cause, or reasonable suspicion by a probation officer or any other law enforcement officer.” (JA 8, 140) The court stated that the justification for the condition was because he “groomed [BW and] . . . overcame her resistance to him taking her virginity[,] . . . in order to protect the community at the time that he’s finally released, I want to have law enforcement to have the ability to go directly into his house at any time to see what he’s doing.” (JA 141)

SUMMARY OF ARGUMENT

Ronald Murry was convicted of six felonies involving sexual contact with his teenaged step-daughter, BW. At sentencing, the court erred in imposing *sua sponte* a lifetime waiver of Murry's Fourth Amendment rights. Over defense objection, the court imposed as a condition of probation that for the remainder of the defendant's life he allow "a search of [his] person, [his] personal effects or property at any time, with or without, a warrant of arrest, search warrant, probable cause, or reasonable suspicion by a probation officer or any other law enforcement officer." (JA 8, 140)

Although no physical evidence or contraband was ever collected in connection with the offenses, the court required the defendant to waive all protections against unreasonable searches and seizures as to his person, personal effects, and property as a condition of his suspended sentence. The Court of Appeals upheld the lifetime waiver based only on a false belief concerning the recidivism rate of sex offenders. (JA 14) The published decision in this case provides erroneous guidance to trial courts that such court-imposed waivers are constitutionally permissible even if unreasonable. The published decision permits what the concurring opinion likely would not have in Anderson v. Commonwealth, 256 Va. 580, 587,

ARGUMENT

I. STANDARD OF REVIEW

Generally, trial court decisions concerning suspension and probation are reviewed on appeal under an abuse of discretion standard. However, whether a search or seizure meets constitutional requirements is a question of law that is reviewed *de novo* on appeal. Commonwealth v. Roberston, 275 Va. 559, 563-64, 659 S.E.2d 321, 324 (2008). Because this case involves the imposed waiver of the constitutional protections concerning searches and seizures, it involves a question of law subject to *de novo* review by this Court.

II. CONSTITUTIONALITY

In Anderson v. Commonwealth, 256 Va. 580, 507 S.E.2d 339 (1998), Chief Justice Kinser concurred in this Court's affirming a waiver of Fourth Amendment rights because the defendant in that case "voluntarily, with advice of counsel, entered into the plea agreement" for a one-year waiver of Fourth Amendment rights. But she drew a distinction:

" . . . between this case and one in which a trial court imposes the same broad waiver of Fourth Amendment rights as a condition of probation when the defendant has not consented to the waiver in a plea agreement. In the latter situation, . . . such

a waiver might be constitutionally impermissible if it allowed law enforcement officers to conduct warrantless searches of probationers for investigative purposes”

Anderson, 256 Va. at 587, 507 S.E.2d at 343.

The Court of Appeals in this case refused to consider the constitutionality of the involuntary lifetime waiver. Instead, the Court improperly and inexplicably invoked Rule 5A:18. Murry v. Commonwealth, 62 Va. App. 179, 181 n. 1, 743 S.E.2d 302, 304 n. 1 (2013); (JA 13).

Trial counsel expressly objected to “. . . the Fourth Amendment waiver, I would just make an objection for my client” (JA 141) and the trial court relied upon a case discussing the constitutionality of such waivers in justifying its imposition. (JA 141-142: “. . . I want to have law enforcement to have the ability to go directly into his house at any time to see what he’s doing, and I do that pursuant to U.S. versus Knight, 534 U.S. 112, 2001”). It is clear from the record that the trial court was afforded the “opportunity to rule intelligently on the issue” and manifested its awareness of the “precise questions [it was] called upon to decide.” Jackson v. Chesapeake & Ohio Ry. Co., 179 Va. 642, 651, 20 S.E.2d 489, 492 (1942).

The Court of Appeals also recognized the constitutional implications by repeatedly referring to the issue as a “waiver” of “Fourth Amendment

rights.” (JA 15) By arguing that the condition was not reasonable under the circumstances, trial counsel was asserting the proper standard for constitutional review. Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (“[T]he ultimate touchstone of the Fourth Amendment is ‘reasonableness’”).

Although the United States Supreme Court has upheld suspicionless searches of parolees under certain state statutory schemes,² the Court has noted the distinction between the constitutional protections afforded parolees and probationers. See Samson v. California, 547 U.S. 843, 850 (2006) (“parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment”). Additionally, the Supreme Court has upheld warrantless searches for supervised probationers, where reasonable suspicion of criminal activity or the violation of probation conditions exists. See United States v. Knight, 534 U.S. 112 (2001); Griffin v. Wisconsin, 483 U.S. 868 (1987). It is important to note that although the Supreme Court upheld the search in Knight, it did not address the constitutionality of the probation condition itself. Instead, the Supreme Court found that “a search pursuant

² The California statutory provisions at issue were subject to additional state laws that prohibited “arbitrary, capricious or harassing” searches. Samson, 547 U.S. at 856.

to this probation condition, and supported by reasonable suspicion, satisfied the Fourth Amendment.” Knight, 534 U.S. at 114. The Supreme Court has also noted that law enforcement’s ability to search probationers is “not unlimited.” Griffin, 483 U.S. at 875. Neither the United States Supreme Court nor the appellate courts in Virginia have addressed the constitutionality of imposed Fourth Amendment waivers for probationers or convicted defendants who are not on parole or supervised probation.

In this case, the trial court imposed an involuntarily lifetime waiver of the defendant’s constitutional rights against unreasonable searches that subjects the defendant to suspicionless searches and seizures as a condition of his suspended sentence. This waiver goes far beyond furthering the goals of probation by permitting any police officer to search the defendant’s person and personal effects, and to enter and search his “place or residence” and vehicle at any time without requirement of a warrant, probable cause, or even “reasonable cause.” (JA 8) The imposed waiver is not limited to searches and seizures reasonably related to furthering the goals of probation and the waiver has no time limitation. The waiver grants the state the absolute authority to search or harass the defendant with impunity for the rest of his life.

III. UNREASONABLE CONDITION

In addition to reversing the distinction drawn by the Anderson concurrence, the Court of Appeals' decision elevates a myth to a published position of precedential authority. (JA 14-15) The decision was predicated upon a falsehood: that convicted sex offenders are more likely to reoffend. (JA 14-15, 17); Murry, 62 Va. App. at 188, 743 S.E.2d at 307 (citing dicta in the plurality opinion in McKune v. Lile, 536 U.S. 24 (2002)). More recent and reliable research has consistently shown that convicted sex offenders actually have a lower recidivism rate than other convicted offenders.³

³ See Rebecca E. Swinburne Romine et al, "Predicting Reoffense for Community-Based Sexual Offenders: An Analysis of 30 Years of Data," *Sexual Abuse: A Journal of Research and Treatment* (29 May 2012)(available at: <http://sax.sagepub.com/content/early/2012/05/25/1079063212446514>) at p. 9 ("Overall, reoffending was an infrequent occurrence in this sample regardless of how it was defined, with contact sexual offenses identified in 10% of the sample and any criminal re-offense identified in 20% of the sample **over a follow-up period of up to 30 years.**")(emphasis added); Richard Tewksbury et al., "Final Report Sex Offenders: Recidivism and Collateral Consequences," 30 September 2011 (available at: <https://www.ncjrs.gov/pdffiles1/nij/grants/238060.pdf>) at p. 10 ("The results are consistent with previous research which has argued that sex offenders have relatively low rates of recidivism, typically lower than non-sex offenders."). See also Furby, L., Weinrott, M. & Blackshaw, L., "Sex Offender Recidivism: A Review," *Psychological Bulletin*, 105 at pp. 3-30 (1989); Hanson, R. & Morton-Bourgon, K., "The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies," *Journal of Counseling and Clinical Psychology*, 73, at pp. 1154-1163

Based on the false premise of a high rate of recidivism, the Court of Appeals concluded that the trial court could have been reasonably concerned about his recidivism rate despite specific evidence to the contrary. (JA 17: “Although Murry was evaluated as posing a relatively low threat of recidivism for a sex offender”)

Considering the nature of the offenses, the surrounding circumstances, and Murry’s lack of any criminal history, the condition is clearly unreasonable as applied to this defendant. The trial court imposed a condition related to the detection of contraband and physical evidence of a crime even though the nature of the offenses in this case involved neither contraband nor physical evidence. See United States v. Lalor, 996 F.2d 1578, 1582 (4th Cir. 1993)(citing Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978))(for searches “the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe

(2005); Langevin, R. et al, “Lifetime Sex Offender Recidivism: A 25-year Follow-up Study,” *Canadian Journal of Criminology and Criminal Justice*, 46 at pp. 531-552 (2004)

According to the Bureau of Justice Statistics, within three years of release, “[r]eleased prisoners with the highest rearrest rates were robbers (70.2%), burglars (74.0%), larcenists (74.6%), motor vehicle thieves (78.8%), those in prison for possessing or selling stolen property (77.4%), and those in prison for possessing, using, or selling illegal weapons (70.2%).” See Recidivism, Summary Findings (available at: <http://www.bjs.gov/index.cfm?ty=tp&tid=17>)

that the items to be seized will be found in the place to be searched”). Although the Court of Appeals acknowledged that “there would be little evidence of [any] new sexual abuse,” the Court of Appeals inexplicably concluded that “[t]he probation condition subjecting Murry to suspicionless searches may facilitate the discovery of evidence of similar crimes or other related probation violations should Murry reoffend in the future.” (JA 17); Murry, 62 Va. App. at 188, 743 S.E.2d at 307.

The Court of Appeals held that the probation condition is reasonable, without providing any reasonable explanation as to why, simply because the defendant committed a sex offense. However, the cases cited by the Court of Appeals as supporting the absolute waiver of Fourth Amendment rights for sex offense convictions either do not directly address the issue, involved probation conditions narrower than the absolute waiver in this case, or emphasized factors beyond the sex offense conviction as justification for the waiver. (JA 15, n. 4) In United States v. Vincent, 167 F.3d 428 (8th Cir. 1999), the court did not address the propriety of the waiver probation condition but the legality of a subsequent search that was based on reasonable suspicion that Vincent had violated his probation and that was “conducted for related evidence.” 167 F.3d at 431. In People v.

Wardlow, 227 Cal. App. 3d. 360, 278 Cal. Rptr. 1 (Cal. Ct. App. 1991), the court upheld the waiver because the defendant had a serious substance abuse problem which was related to his commission of the sex offenses and the warrantless searches were necessary “to ensure Wardlow did not abuse controlled substances.” 227 Cal. App. 3d at 366-367, 278 Ca. Rptr. at 3. The court in Greenwood v. State, 754 So.2d 158 (Fla. 1st DCA 2000), noted that the waiver condition was statutory (and, therefore, was not required to be reasonably related to the defendant’s offense) and did not address the constitutionality of the waiver provision because it had not been properly preserved. 754 So.2d at 160. In Carswell v. State, 721 N.E.2d 1255 (Ind. Ct. App. 1999), the waiver provision only permitted warrantless searches by the defendant’s probation officer and had to be predicated upon reasonable suspicion, 721 N.E.2d at 1258, 1262, unlike the waiver in this case that applies to “any Probation Officer or Law Enforcement Officer” and specifically does not require “reasonable cause.” (JA 8). See also Fitzgerald v. State, 805 N.E.2d 857 (Ind. Ct. App. 2004)(vacating a probation condition that waived rights against unreasonable searches by the probation officer). Finally, in State v. Lockwood, 160 Vt. 547, 632 A.2d 655 (1993), the Vermont Supreme Court

noted that the probation condition as actually written – such that it purported to allow a warrantless and suspicionless search of the defendant’s home – was invalid. 160 Vt. at 558, 632 A.2d at 662. The Vermont Supreme Court upheld the probation condition - only with a reasonableness limitation implied – based on the trial court’s findings of the defendant’s unique risk of reoffending given his own history of abuse, his developmental delay, and his demonstrated compulsions. Id.

Beyond the fact of the sex offense conviction, the Court of Appeals cited the trial court’s comments about the defendant’s “grooming behavior” and the positive⁴ perceptions others had about his character to conclude that the defendant had a high risk of offending. (JA 16) However, the evidence presented in the case was exactly the opposite; the psychosexual evaluation concluded that the defendant was at relatively **low** risk for reoffending. Further, given the other probation conditions imposed – including those prohibiting unsupervised contact with minors and prohibiting any contact with BW – the waiver of Fourth Amendment rights provides no additional protection against Murry committing new sexual

⁴ The trial court counter-intuitively concluded that because the defendant had a good reputation that he was more likely to reoffend.

offenses against minors.

Additionally, nothing in the circumstances of the offense would support imposing a condition of probation designed to detect “contraband or evidence of a crime . . . in a particular place.” Illinois v. Gates, 462 U.S. 213, 238 (1983). Unlike the defendant in Anderson who had been charged with drug and gun offenses,⁵ and the defendant in Wardlow, Murry had no history of illegal drug use or possession and no history of illegal possession of firearms or weapons. The circumstances of this case involved no physical evidence of any kind. Therefore, nothing in “the nature of the offense, [Murry’s] background, and the surrounding circumstances” supported the imposition of the probation condition waiving all Fourth Amendment rights.

The trial court abused its discretion in imposing an unconstitutional condition of the suspended sentence unrelated to the offenses of conviction, the surrounding circumstances, and the background of the defendant. The lifetime waiver of constitutional protections against unreasonable searches and seizures is an unreasonable condition imposed

⁵ Anderson v. Commonwealth, 256 Va. 580, 584, 507 S.E.2d 339, 341 (1998)(“Anderson was charged with possession of cocaine, possession of a firearm after having been convicted of a felony, and possession of marijuana.”)

solely to strip the defendant of basic societal rights and expose him to potential harassment. The probation condition in this case is far broader than the conditions approved in other jurisdictions. See United States v. Vincent, 167 F.3d 428, 431 (8th Cir. 1999)(upholding a search based on reasonable suspicion that Vincent had violated his probation and that was “conducted for related evidence”); Carswell v. State, 721 N.E.2d 1255, 1258, 1262 (Ind. Ct. App. 1999) (the waiver provision only permitted warrantless searches by the defendant’s probation officer and had to be predicated upon reasonable suspicion); Fitzgerald v. State, 805 N.E.2d 857 (Ind. Ct. App. 2004)(vacating a probation condition that waived rights against unreasonable searches by the probation officer); State v. Lockwood, 160 Vt. 547, 558, 632 A.2d 655, 662 (1993)(noting that a probation condition purporting to allow a warrantless and suspicionless search of the defendant’s home would be invalid).

The trial court’s stated purpose for the condition, to permit “law enforcement . . . to go directly into his house at any time to see what he’s doing” demonstrates the trial court’s intent to permit governmental harassment of the defendant unrelated to the goals of probation or public safety. The unreasonable and overly broad waiver is constitutionally

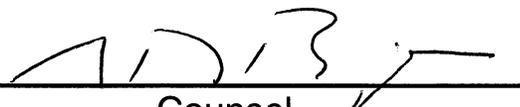
impermissible and unreasonable as applied to the defendant.

CONCLUSION

For each of these reasons, the sentencing order must be vacated and the matter remanded for resentencing.

Respectfully Submitted,

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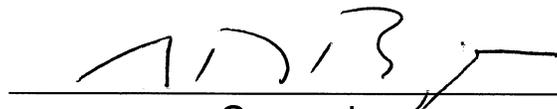
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This Opening Brief does not exceed 50 pages and I hereby certify compliance with Rule 5:26, this 5th day of March, 2014.



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