State v. Campbell, 2022-Ohio-3626

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THE STATE OF OHIO, APPELLANT, v. CAMPBELL, APPELLEE.

Notice:

THIS SLIP OPINION IS SUBJECT TO FORMAL REVISION BEFORE IT IS PUBLISHED IN AN ADVANCE SHEET OF THE OHIO OFFICIAL REPORTS.

Counsel: R. Kyle Witt, Fairfield County Prosecuting Attorney, and Christopher A. Reamer, Assistant Prosecuting Attorney, for appellant.

Conrad & Wood, L.L.C., and Scott P. Wood, for appellee.

Dave Yost, Attorney General, Benjamin M. Flowers, Solicitor General, and Zachery P. Keller and John Rockenbach, Deputy Solicitors General, urging reversal for amicus curiae Attorney General Dave Yost.

G. Gary Tyack, Franklin County Prosecuting Attorney, and Seth L. Gilbert, Chief Counsel, Appeals [**2] Division, urging reversal for amicus curiae Ohio Prosecuting Attorneys Association.

Judges: DEWINE, J. O'CONNOR, C.J., and KENNEDY, FISCHER, and DONNELLY, JJ., concur. BRUNNER, J., concurs in judgment only, with an opinion. STEWART, J., dissents, with an opinion.

Opinion by: DEWINE

Opinion

DEWINE, J.

[*P1] A probation officer conducted a random home-check on an individual subject to community control, searched his cell phone, and discovered child pornography. We are called on to answer one, and possibly two, questions. First, was the probation officer's search lawful? Second, if it was not, does the exclusionary rule apply to prohibit the use of the evidence from the search in a criminal prosecution?

[*P2] Central to our inquiry are several sources of legal authority. We begin with the Fourth Amendment's prohibition on unreasonable searches and seizures. *HN1* We also must consider an Ohio statute, R.C. 2951.02(A), which authorizes a probation officer to search a probationer if there are "reasonable grounds to believe" that the probationer is violating the law or the terms of his community control. Finally, the probationer signed terms and conditions of probation at the start of his community-control period, by which he consented to "searches of my person, my property, [**3] my vehicle, and my residence at any time without a warrant."

[*P3] So how does all this play out? ***HN2*** We conclude that there was no violation of the Fourth Amendment: under established caselaw, probationers who sign a consent-to-search agreement as a condition of community control may be subjected to random searches. But there was a violation of the Ohio statute—the officer had no "reasonable grounds" to believe that the probationer was violating the law or the terms of his community control. The consent provision doesn't help the state here—we conclude that regardless of the consent condition, the probation officer's authority to conduct the search was limited by the statute. Nonetheless, there is no basis to exclude the evidence that was discovered in the search. ***HN3*** The exclusionary rule applies to constitutional violations, not statutory ones.

[*P4] In the proceeding below, the court of appeals determined that the evidence should have been suppressed based on the statutory violation. We reverse its judgment.

I. After his early release from prison, Daniel Campbell is randomly searched by his probation officer

[*P5] Daniel Campbell was sentenced to prison for robbery. Prior to completing his prison term, he was granted judicial [**4] release and ordered to serve community control for the remainder of his sentence. As a condition of his release, Campbell was required to agree to terms and conditions of community control. Among other things, Campbell agreed as follows: "I consent to searches of my person, my property, my vehicle, and my residence at any time without a warrant. I understand this includes common areas and areas that are exclusive to me."

[*P6] Relying on this consent-to-search provision, Campbell's probation officer conducted a random search of his home. The officer did not suspect that Campbell had violated the conditions of community control or any other laws. Rather, she was training new probation officers and planned to reduce Campbell's level of supervision if all went well with the search. But during the search of his home, the officer discovered Campbell's cell phone and decided to go through its contents. It contained child pornography. This discovery led to the seizure of numerous other electronic devices, and ultimately, to Campbell being charged with nine felony offenses.

[*P7] Campbell moved to suppress the evidence that was uncovered, arguing that the suspicionless search violated the Fourth Amendment. The trial [**5] court denied the motion, concluding that the search was constitutional because Campbell had consented when he agreed to warrantless searches of his property as a condition of his community control. The court further held that even if the search had violated the Fourth Amendment, the good-faith exception to the exclusionary rule would apply. After his suppression motion was denied, Campbell entered a no-contest plea to eight felony charges and the trial court imposed a prison term.

[*P8] The Fifth District Court of Appeals reversed the trial court's denial of Campbell's motion to suppress. It agreed that there was no constitutional violation but held that the search violated R.C. 2951.02(A)'s requirement that a probation officer may conduct a search only when there are "reasonable grounds to believe" that a probationer is in violation of the law or the conditions of community control. 2020-Ohio-4119, 157 N.E.3d 373, ¶ 25-28, 46. The court of appeals further concluded that the good-faith exception to the exclusionary rule did not apply. *Id.* at ¶ 50. We accepted jurisdiction over the state's discretionary appeal.

II. Analysis

A. There was no Fourth Amendment Violation

[*P9] ***HN4*** The Fourth Amendment to the United States Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable [**6] searches and seizures, shall not be violated." *Accord* Ohio Constitution, Article I, Section 14.[1] In determining whether a search is reasonable under the Fourth Amendment, the United States Supreme Court has applied an approach that assesses "'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 for the promotion of legitimate governmental interests.'" *Samson v. California*, 547 U.S. 843, 848, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006), quoting *United States v. Knights*, 534 U.S. 112, 119, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001).

[*P10] In *Samson*, the United States Supreme Court concluded that a suspicionless search of a parolee did not violate the Fourth Amendment. *Id.* at 857. A California statute required parolees to consent to searches "'with or without cause'" as a condition of their parole. *Id.* at 846, quoting former Cal.Penal Code 3067. An officer conducted a suspicionless search of a parolee and found narcotics. *Id.* at 846-847. Balancing the privacy interests of the parolee against the state's substantial penological interest in supervising parolees, the court concluded that the suspicionless search was constitutional. *Id.* at 852-853, 857.

[*P11] This court had reached the same conclusion in *State v. Benton*, 82 Ohio St.3d 316, 317, 1998- Ohio 386, 695 N.E.2d 757 (1998), a case decided almost a decade before *Samson*. There, we held that the Fourth Amendment did not prohibit "a random search of the residence of a parolee who, as a condition of parole, consented to warrantless searches by parole officers at any time." *Id.* at 317.

[*P12] Although [**7] *Samson* and *Benton* involved searches of parolees, "there is no material difference between probationers and parolees in the context of constitutional guarantees." *Benton* at 319, fn. 1, citing *State v. Roberts*, 32 Ohio St.3d 225, 229, 513 N.E.2d 720 (1987). ***HN5*** As we have explained, "An individual sentenced to probation—or community control—does not possess the absolute liberty enjoyed by the general population, but rather finds his liberty dependent upon the conditions and restrictions of his probation." *State v. Chapman*, 163 Ohio St.3d 290, 2020-Ohio-6730, 170 N.E.3d 6, ¶ 12. Thus, we have little difficulty finding that there is no Fourth Amendment violation when a probation officer conducts a suspicionless search pursuant to a consent-to-search provision agreed to as a condition of community control.

[*P13] Campbell contends that the consent-to-search provision that he signed does not encompass his **cell** phone. We disagree. He consented to "searches of my person, my property, my vehicle, and my residence at any time without a warrant." Plainly, *Campbell's "property"* encompasses his **cell** phone.

[*P14] In arguing that the search violated the Fourth Amendment, Campbell relies on *United States v. Fletcher*, a case in which the Sixth Circuit Court of Appeals applied the Fourth Amendment balancing approach and concluded that a search of a probationer's **cell** phone was unreasonable. 978 F.3d 1009, 1019 (6th Cir.2020). But that case is different from ours. There, the consent-to-search [**8] condition of supervision covered the probationer's "person," "motor vehicle," and "residence," but it made no mention of other property. *Id.* Central to the court's analysis was the fact that the consent agreement did not "clearly or unambiguously" extend to a search of the probationer's **cell** phone. *Id.* In contrast, Campbell explicitly consented to a search of his property, something that inarguably encompasses his **cell** phone. Thus, by virtue of his status as a probationer, including the plain terms of the consent-to-search form, Campbell "did not have an expectation of privacy that society would recognize as legitimate," *Samson*, 547 U.S. at 852, 126 S.Ct. 2193, 165 L.Ed.2d 250; *see also United States v. Tessier*, 814 F.3d 432, 433, 435 (6th Cir.2016) (upholding suspicionless search of the computer of a probationer who had consented to searches of his "person, vehicle, property, or place of residence" as a condition of probation).

B. There was a violation of R.C. 2951.02(A)

[*P15] The constitutional inquiry is not the end of the matter. We also must grapple with R.C. 2951.02(A), which provides:

[D]uring the period of a felony offender's nonresidential sanction, authorized probation officers who are engaged within the scope of their supervisory duties or responsibilities may search, with or without a warrant, the person of the offender, the [**9] place of residence of the offender, and a motor vehicle, another item of tangible or intangible personal property, or other real property in which the offender has a right, title, or interest * * * if the probation officers have reasonable grounds to believe that the offender is not abiding by the law or otherwise is not complying with the conditions of * * * the felony offender's nonresidential sanction.

[*P16] ***HN6*** Because probation officers are statutory creations, *see* R.C. 2301.27, they "have no more authority than that conferred upon them by statute, or what is clearly implied therefrom." *Hall v. Lakeview Local School Dist. Bd. of Edn.*, 63 Ohio St.3d 380, 383, 588 N.E.2d 785 (1992). R.C. 2951.02(A) authorizes warrantless searches of probationers, so long as the probation officer has "reasonable grounds" to believe that the probationer is violating the law or conditions of community

control. Because Campbell's probation officer lacked the necessary reasonable grounds to search Campbell's **cell** phone, her search was not authorized by R.C. 2951.02(A).

[*P17] The question then becomes, may the state, by requiring a probationer to enter into a consent-to-search agreement as a condition of community control, authorize probation officers to conduct searches in situations beyond those described in R.C. 2951.02(A)? We think not. ***HN7*** In enacting R.C. 2951.02(A), the legislature [**10] specifically defined the level of suspicion ("reasonable grounds") required to authorize a probation officer to search a probationer. Implicit in this authorization was the denial of authority to search a probationer without reasonable grounds. If that were not so, and probation officers were nonetheless authorized to conduct searches without reasonable grounds for doing so, then R.C. 2951.02(A) would be nothing more than advice.

[*P18] It does not matter that Campbell had been required to consent to the search as a condition of his community control, because the probation officer was still constrained by the statutory limits of her authority. ***HN8*** Consent and authority are not the same. If Campbell had given his consent for the probation officer to take his wallet, he might then expect his wallet to be taken, but that would not mean that the probation officer was authorized to take it. So too here. Campbell's consent to random searches as a condition of his community-control sanctions limited his legitimate expectation of privacy but did not grant the probation officer additional authority.

[*P19] When the probation officer searched Campbell's **cell** phone without reasonable grounds to believe that he had violated the [**11] law or the conditions of probation, she exceeded the scope of her authority.

C. Should the evidence be excluded?

[*P20] There remains one final question: whether excluding the evidence obtained through the **cell**-phone search is an appropriate remedy for this statutory violation. Applying established precedent, we find that excluding the evidence is not appropriate.

[*P21] Because this case does not involve a Fourth Amendment violation, the exclusionary rule associated with the Fourth Amendment does not apply. ***HN9*** As the United States Supreme Court explained in *Virginia v. Moore*, "it is not the province of the Fourth Amendment to enforce state law," and thus, the Fourth Amendment's exclusionary rule does not apply when there has been no constitutional violation. 553 U.S. 164, 178, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008).

[*P22] ***HN10*** Similarly, this court has long held that the exclusionary rule applies "to violations of a constitutional nature only." *Kettering v. Hollen*, 64 Ohio St.2d 232, 234, 416 N.E.2d 598 (1980). *Accord State v. Emerson*, 134 Ohio St.3d 191, 2012-Ohio-5047, 981 N.E.2d 787, ¶ 32; *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, 902 N.E.2d 464, ¶ 21; *State v. Myers*, 26 Ohio St.2d 190, 196-197, 271 N.E.2d 245 (1971). Thus, we will not apply the exclusionary rule "to statutory violations falling short of constitutional violations, absent a legislative mandate requiring the application of the exclusionary rule." *Kettering* at 234; *see also State v. French*, 72 Ohio St.3d 446, 449, 1995- Ohio 32, 650 N.E.2d 887 (1995). A plain reading of R.C. 2951.02(A) reveals no such legislative mandate to impose an exclusionary remedy for a violation of the statute's reasonable-grounds requirement. *Compare* R.C. 2933.63(A) (authorizing, [**12] among other things, the suppression of evidence derived from an unlawful wiretap). Absent such a legislative mandate, this court is without authority to write an exclusionary remedy into the statute.

[*P23] Because there is no basis in either the statute or the United States Constitution to apply the exclusionary rule to violations of R.C. 2951.02(A), the court of appeals erred by concluding that Campbell's motion to suppress should have been granted and reversing the contrary decision of the trial court. Our conclusion that the exclusionary rule does not apply makes it unnecessary to address whether the probation officer's search would have fallen under the good-faith exception to that rule.

III. Conclusion

[*P24] There was no constitutional violation in this case—only a statutory one. The Fourth Amendment did not prohibit the suspicionless search of Campbell's cell phone. Because we are confronted with a statutory violation only, there is no basis to exclude the evidence obtained as a result of the search. We reverse the judgment of the Fifth District Court of Appeals and reinstate Campbell's conviction.

Judgment reversed.

O'CONNOR, C.J., and KENNEDY, FISCHER, and DONNELLY, JJ., concur.

BRUNNER, J., concurs in judgment only, with [**13] an opinion.

STEWART, J., dissents, with an opinion.

Concur by: BRUNNER

Concur

BRUNNER, J., concurring in judgment only.

[*P25] Based on existing precedent and appellee Daniel Campbell's not challenging or distinguishing that precedent, I agree with the majority that the trial court ruled consistently with the applicable law when it refused to suppress the fruits of the search of Campbell's residence and cellular phones. However, insofar as the majority finds a violation of R.C. 2951.02(A), relating to a probation officer's authorization to search an offender, I would not find that the statute applied in Campbell's situation.

[*P26] Campbell executed a blanket consent related to community-control supervision after judicial release. This written consent included a provision that said, "I consent to searches of my person, my property, my vehicle, and my residence at any time without a warrant." Though cellular phones are private property requiring a warrant to search in most circumstances, *see Riley v. California*, 573 U.S. 373, 401, 134 S.Ct. 2473, 189 L.Ed.2d 430, 439 (2014), they are nevertheless "property," and a warrant is not needed when consent is given. *See United States v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974); *Schneckloth v. Bustamonte*, 412 U.S. 218, 228-229, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Here, Campbell consented in writing to warrantless searches of his "property," and he thus consented to the search of his cellular phone. And though [**14] R.C. 2951.02(A) permits probation officers to search the homes, automobiles, personal property, and the person of offenders under community-control supervision "with or without a warrant" if the officers "have reasonable grounds" to believe the offender is violating the law or conditions of his community control, no part of R.C. 2951.02 suggests that officers may not also search based on consent if consent has been given by the offender.

[*P27] While "consent" may be questionable when a prison inmate who is granted judicial release faces a choice between providing blanket consent to warrantless searches at any time or most likely returning to prison if he does not give his consent, the language Campbell signed was that he consented. Both this court and the United States Supreme Court seem to have accepted the constitutionality of this Fourth Amendment tradeoff for community supervision, and Campbell has not asked us to distinguish his case from that precedent or to overrule it, *see Samson v. California*, 547 U.S. 843, 846, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006); *United States v. Knights*, 534 U.S. 112, 118, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001); *State v. Benton*, 82 Ohio St.3d 316, 321, 1998- Ohio 386, 695 N.E.2d 757 (1998); nor has he asked that we hold that the circumstances of his consent violate the Ohio Constitution, *see* Article I, Section 14, Ohio Constitution. For these reasons, despite my concerns about the manner and circumstances by which Campbell's consent was obtained, I concur in the judgment of [**15] the majority.

Dissent by: STEWART

Dissent

STEWART, dissenting.

[*P28] I agree with the majority opinion that there was a violation of R.C. 2951.02(A) when a probation officer conducted a suspicionless search of appellee Daniel Campbell's home and property. I likewise agree that the exclusionary rule does not apply to bar evidence obtained as the result of a search that violated R.C. 2951.02(A). Nonetheless, the evidence in this case should have been excluded because Campbell's Fourth Amendment rights were violated when the probation officer searched his **cell** phone. Because the majority opinion finds otherwise, I dissent.

[*P29] The majority concludes that there is no violation of the Fourth Amendment when a probation officer conducts a suspicionless search of a probationer's **cell** phone pursuant to a consent-to-search provision agreed to as a condition of the person's community control. I would reach the same conclusion if the consent-to-search provision contained language that clearly and unambiguously applied to the search of a **cell** phone. But the consent-to-search provision here did not clearly and unambiguously apply to Campbell's **cell** phone.

[*P30] The majority points to the fact that Campbell signed a form that outlined the terms and conditions of his community control, which included [**16] Campbell's consent to search his "property * * * at any time without a warrant." The majority states, "Plainly, *Campbell's 'property'* encompasses his **cell** phone." (Emphasis sic.) Majority opinion, ¶ 13. And it bases its decision solely on its interpretation of the word "property." Although not entirely unreasonable, in the context of this case, the majority's reliance on this broad interpretation and basic understanding of the word "property" is misplaced. This is because the law has routinely treated searches of **cell** phones differently than searches of personal property in general.

[*P31] The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *See also* Article I, Section 14, Ohio Constitution. "The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search 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 for the promotion of legitimate governmental interests.'" *United States v. Knights*, 534 U.S. 112, 118-119, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001), quoting *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999). Courts "'examin[e] the totality of the circumstances' to determine whether a search is reasonable within the meaning of the Fourth Amendment." (Brackets sic.) *Samson v. California*, 547 U.S. 843, 848, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006) [**17], quoting *Knights* at 118.

[*P32] Consent-to-search provisions that are included as part of probation conditions are valid if they are clear and unambiguous. *See Knights* at 119-120 (probationer's reasonable expectation of privacy was "significantly diminished" when the "probation order clearly expressed the search condition" and probationer "was unambiguously informed" of that condition). If the consent-to-search condition is clear and unambiguous, then the person does not "have an expectation of privacy that society would recognize as legitimate." *Samson* at 852.

[*P33] Regarding the consent-to-search provision here, the majority observes that Campbell consented to "searches of [his] person, [his] property, [his] vehicle, and [his] residence at any time without a warrant," and thus "*Campbell's 'property'*" "[p]lainly" and "inarguably" encompassed his **cell** phone, so there was no Fourth Amendment violation. (Emphasis sic.) Majority opinion at ¶ 13, 14. However, because courts recognize that searching the contents of a **cell** phone is different from searching other property, the issue is not as plain or clear as the majority views it. Due to the unique nature of a **cell** phone, Campbell's generic consent to a search of his "property" did not clearly and unambiguously [**18] include an agreement to allow the search of the contents of his **cell** phone. Without such a clear consent-to-search condition, Campbell still retained an expectation of privacy in the contents of his **cell** phone that society recognizes as legitimate.

[*P34] In *State v. Smith*, this court described the "unique nature" of **cell** phones "as multifunctional tools" that "defy easy categorization." 124 Ohio St.3d 163, 2009-Ohio-6426, 920 N.E.2d 949, ¶ 22. We explained that **cell** phones "have the ability to transmit large amounts of data in various forms, likening them to laptop computers, which are entitled to a higher expectation of privacy." *Id.* We then held that "because a person has a high expectation of privacy in a **cell** phone's contents, police must then obtain a warrant before intruding into the phone's contents." *Id.* at 23.

[*P35] In *Riley v. California*, the United States Supreme Court unanimously held that with respect to "data on **cell** phones," police "must generally secure a warrant before conducting a search" incident to a lawful arrest. 573 U.S. 373, 386, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014). The *Riley* court stated that modern **cell** phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Id.* at 385. The court explained that it [**19] "generally determine[s] whether to exempt a given type of search from the warrant requirement '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 for the promotion of legitimate governmental interests.'" *Id.*, quoting *Houghton*, 526 U.S. at 300, 119 S.Ct. 1297, 143 L.Ed.2d 408.

[*P36] In *Riley*, the court discussed *United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), which held that an officer's search of a suspect incident to a lawful arrest did not violate the Fourth Amendment. But the court explained, "The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." *Riley* at 392. "To the contrary, when 'privacy-related concerns are weighty enough' a 'search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.'" *Id.*, quoting *Maryland v. King*, 569 U.S. 435, 463, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013). The court compared searches incident to an arrest with warrantless searches of **cell** phones, stating:

[W]hile *Robinson*'s categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on **cell** phones. On the government interest side, *Robinson* concluded that the two risks identified in *Chimel* [*v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)]—harm to officers and destruction of evidence—are present in all [**20] custodial arrests. There are no comparable risks when the search is of digital data. In addition, *Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. **Cell** phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a **cell** phone bears little resemblance to the type of brief physical search considered in *Robinson*.

Id. at 386.

[*P37] The *Riley* court went on to describe the unique characteristics of **cell** phones, which of course, are numerous. The court discussed the storage capacity of smart phones, which "translates to millions of pages of text, thousands of pictures, or hundreds of videos." *Id.* at 394. The court further explained:

The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two * * * tucked into a wallet. * * * [T]he data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. [**21] Jones for the past several months, as would routinely be kept on a phone.

Id. at 394-395.

[*P38] The *Riley* court also discussed how **cell** phones differ from other personal items—not only because **cell** phones contain a vast amount of private information—but because of how pervasive they are in society, with more than 90 percent of American adults owning one. 573 U.S. at 395, 134 S.Ct. 2473, 189 L.Ed.2d 430. Because **cell** phones are ubiquitous, allowing law-enforcement officers to scrutinize the "sensitive personal information" contained within them "is quite different from allowing [officers] to search a personal item or two in the occasional case." *Id.*

[*P39] Similarly to one who has been arrested, a person who is serving probation likewise has diminished privacy interests. But also relevant is the fact that searching the contents of a **cell** phone bears little to no resemblance to the types of general searches contemplated by the boilerplate language of the consent-to-search condition in this case. Particularly, as the majority opinion acknowledges, the probation officer in this case had no reasonable suspicion of criminal activity to conduct a search in the first place.

[*P40] The majority disagrees with Campbell that a recent Sixth Circuit Court of Appeals case, *United States v. Fletcher*, 978 F.3d 1009 (6th Cir.2020), supports [**22] Campbell's argument that the search of his **cell** phone violated the Fourth Amendment. *See* majority opinion at ¶ 14. While *Fletcher* is not entirely on point, it is instructive. In *Fletcher*, the defendant had been convicted in an Ohio court of importuning a minor and was sentenced to five years of community-control sanctions (the federal court improperly referred to it as probation). *Id.* at 1013. "The terms of [community control] prohibited him from contacting the victim of his offense, contacting any minors unsupervised, and possessing any kind of pornography." *Id.* An additional condition provided that Fletcher "'[a]greed to a search without warrant of [his] person, [his] motor vehicle or [his] place of residence by a Probation Officer at any time.'" (Brackets sic.) *Id.*

[*P41] "During a routine visit with his probation officer, the officer noticed that Fletcher had two phones." *Id.* The officer searched one of the phones and saw child pornography. He then turned off the phone and contacted a detective, who obtained a warrant to search the phone. The detective then discovered "child pornography that had been downloaded from the internet and that had been filmed by the phone itself." *Id.* Fletcher was charged in state court with multiple [**23] counts of pandering sexually oriented matter involving a minor. Fletcher was also charged in federal court with conspiracy to produce child pornography and production of child pornography. In Fletcher's federal case, "[h]e filed a motion to suppress the evidence recovered from his **cell** phone, which the district court denied." *Id.* at 1014. The district court found Fletcher guilty of both child-pornography offenses. Fletcher appealed the district court's denial of his motion to suppress.

[*P42] The Sixth Circuit reversed the district court and held that the government's legitimate interests, "ensuring that Fletcher successfully complete[d] probation and refrain[ed] from engaging in criminal activity," did not outweigh Fletcher's expectation of privacy. *Id.* at 1019. Although Fletcher had agreed to a warrantless search of his person, motor vehicle, and residence as part of his community control, the Sixth Circuit explained that "[n]one of these terms clearly or unambiguously includes a **cell** phone." *Id.*, citing *United States v. Lara*, 815 F.3d 605, 610 (9th Cir.2016). In *Lara*, a probationer agreed to a search of, among other things, his "property." *Lara* at 607. The Ninth Circuit Court of Appeals held that this term did not "clearly or unambiguously encompass[] his **cell** phone and the information [**24] contained therein." *Id.* at 610.

[*P43] Here, the majority opinion distinguishes *Fletcher* from the present case because the consent-to-search condition in *Fletcher* "covered the probationer's 'person,' 'motor vehicle,' and 'residence,' but it made no mention of other property." Majority opinion at ¶ 14, quoting *Fletcher*, 978 F.3d at 1019. The majority concludes that because "Campbell explicitly consented to a search of his property, something that inarguably encompasses his **cell** phone," he "'did not have an expectation of privacy that society would recognize as legitimate.'" Majority opinion at ¶ 14, quoting *Samson*, 547 U.S. at 852, 126 S.Ct. 2193, 165 L.Ed.2d 250. The Sixth Circuit, however, did not state anywhere in its opinion that Fletcher's **cell** phone should be excluded because the consent-to-search condition did not include an agreement to search his "property." And more importantly, in support of its holding, the Sixth Circuit cited to *Lara*, a case in which the consent-to-search agreement, like Campbell's, allowed for a warrantless search of "property" in general, which the *Lara* court determined did *not* include a **cell** phone. *Fletcher* at 1018-1019, citing *Lara* at 610-611.

[*P44] Because courts have recognized the unique nature of **cell** phones, I would conclude that a consent-to-search condition included as part of a person's community-control [**25] sanctions must clearly and unambiguously include **cell** phones before a probation officer may search the person's **cell** phone without a warrant. I would therefore conclude that Campbell retained a legitimate expectation of privacy in the contents of his **cell** phone and that his Fourth Amendment rights were violated when the probation officer searched the phone without first obtaining a warrant.

[*P45] I would also conclude that the evidence should have been excluded under the exclusionary rule because Campbell's Fourth Amendment rights were violated. I further agree with the Sixth Circuit Court of Appeals that the good-faith exception to the exclusionary rule does not apply under these circumstances. As the court explained in *Fletcher*:

Application of the exclusionary rule here will deter suspicionless searches of a probationer's **cell** phone post-*Riley* where the terms of a probation agreement do not authorize such a search [of a probationer's **cell** phone]. Application of the rule would also encourage the future inclusion in probation agreements of clear and unambiguous terms regarding the *distinct category* of **cell** phones.

Id. at 1020. (Emphasis added.)

[*P46] I would therefore affirm the Fifth District's decision reversing the trial court's denial of Campbell's [**26] motion to suppress, albeit for different reasons. The search of Campbell's **cell** phone was unlawful, and the exclusionary rule should bar the admission of the evidence that was the fruit of that unlawful search. Further, the evidence from the subsequent search of Campbell's other electronic devices should be excluded because the subsequent search was itself the product of the initial unlawful **cell**-phone search. Because the majority opinion concludes otherwise, I respectfully dissent.

Footnotes

- 1

  Campbell has not developed an argument under Article I, Section 14 of the Ohio Constitution, and thus we have no occasion to consider that provision's application under the facts of this case.

State v. Campbell, 2020-Ohio-4119

Court of Appeals of Ohio, Fifth Appellate District, Fairfield County

August 18, 2020, Date of Judgment

Case No. 2019 CA 00055

Reporter

2020-Ohio-4119 * | 157 N.E.3d 373 ** | 2020 Ohio App. LEXIS 3016 *** | 2020 WL 4814198

STATE OF OHIO, Plaintiff - Appellee -vs- DANIEL J. CAMPBELL, Defendant - Appellant

Counsel: For Plaintiff-Appellee: R. KYLE WITT, Fairfield County Prosecutor, By: CHRISTOPHER REAMER, Assistant County Prosecutor, Lancaster, Ohio.

For Defendant-Appellant: SCOTT P. WOOD, Conrad/Wood, Lancaster, Ohio.

Judges: Hon. William B. Hoffman, P.J., Hon. John W. Wise, J., Hon. Craig R. Baldwin, J. Hoffman, P.J. and Wise, John, J. concur.

Opinion by: Craig R. Baldwin

Opinion

[**375] *Baldwin, J.*

[*P1] Appellant, Daniel J. **Campbell** appeals the decision of the Fairfield County Court of Common Pleas denying his motion to suppress evidence discovered by his **probation** officer during a random search. Appellee is the State of Ohio.

STATEMENT OF FACTS AND THE CASE

[*P2] Daniel **Campbell** was granted judicial release in *State v. **Campbell***, Fairfield County Common Pleas Case No. 2012 CR 00193 and placed on community control. His **probation** officer, Kelsey Conn, decided that **Campbell** was doing well enough that his level of supervision should be reduced and that his case should be transferred to a new **probation** officer. Conn thought that a "home check" would be appropriate prior to the transfer, so she and several other members of the [***2] **probation** office

visited Campbell's residence and conducted a search. The probation officers discovered what appeared to be child pornography on Campbell's cell phone and that discovery resulted in Campbell's conviction and incarceration.

[*P3] Campbell was indicted for two counts of robbery in May 2012 and he entered a guilty plea to one count in December 2012. Campbell pursued and exhausted his appellate rights and in December 2015 he began serving his three year sentence. The trial court granted his request for judicial release in December 2017 and placed him on community control. Campbell signed a document captioned Acknowledgement, Agreement, & Additional Terms & Conditions of Community Control and that document contains a term regarding questioning and searches that states as follows:

[*P4] C. I consent to being questioned by any Community Control Officer. I consent to searches of my person, my property, my vehicle, and my residence at any time without a warrant. I understand this includes common areas and areas that are exclusive to me.

[*P5] Campbell was compliant with the terms of his community control order. His probation officer decided he was entitled to a reduced level of supervision but [***3] planned to search his home, a process she described as a "home check," prior to changing his status. The probation officer relied upon the community control conditions for authority to complete a search of Campbell's residence and cell phone without probable cause, reasonable grounds, or any other justification for the search.

[*P6] Probation Officer Conn conducted the "home check" on August 1, 2018 accompanied by other members of the probation [**376] office. Her colleagues secured the back door of the residence while she and other officers approached the front door and knocked. She was admitted by Campbell and she explained her purpose. He did not object and she entered the home with the other officers and instructed Campbell to have a seat at the kitchen table while they conducted the search.

[*P7] During the search of Campbell's bedroom a cell phone was discovered. The cell phone was brought to Probation Officer Conn and she reviewed text messages on the phone to ensure that it was Mr. Campbell's phone. She continued her search of data accessible on the phone until she found what appeared to be pornographic images of minors. Conn conferred with Senior Probation Officer Casey Jones regarding how to [***4] proceed and Jones asked Campbell to confirm he owned this phone. Campbell affirmed it was his cell phone. The search was postponed until search warrants could be obtained for that phone and other electronic devices. The affidavit requesting the search warrant relied upon the images discovered by Ms. Conn when she looked through the cell phone.

[*P8] As a result of the discovery of pornographic images found on several electronic devices owned by Mr. Campbell, he was charged with nine felony offenses. Campbell filed a motion to suppress the evidence discovered by probation officer Conn contending that the search was not based on reasonable grounds to believe he had violated the terms of his community control and was unlawful. Appellee filed a memorandum contra contending that Campbell "knowingly, voluntarily and intelligently waived any of the limited Fourth Amendment protected possessed in exchange for his release from prison."

[*P9] The trial court conducted an oral hearing on the matter and heard testimony from the probation officer, Kelsey Conn. Conn explained that she had been a probation officer for five years and completed the probation officer training required by the Supreme Court of Ohio. She described [***5] the process of reviewing the terms of the conditions of community control with each of her probationers, which includes a consent "to search any time without a warrant." When asked about the home visits, she confirmed that they are unannounced and the purpose was to confirm that the probationers were residing at their stated address and that there were no additional violations of terms of probation such as firearms or drugs. Ms. Conn also confirmed that the Fairfield County Probation Department conducts random searches even if the probationer has not aroused any suspicion that

they might be in violation of the terms and conditions of their **probation**. She agreed that they commonly search probationers who have complied with all of the terms of their community control order.

[*P10] She confirmed that it was her common practice to do a home check when she is considering reducing the probationer's level of supervision to ensure complete compliance before the transfer, and she had planned to complete such a home check on **Campbell** prior to reassigning his case and lowering his level of supervision. Up to the date of this home check, **Campbell** had been compliant with all the terms and conditions of [***6] his **probation**, had not tested positive for drugs, and had attended all of his mental health counseling as ordered. Conn confirmed that **Campbell** had not violated the terms and conditions of **probation** prior to August 1, 2018, and she had no suspicion nor had she received information that he had committed any violation prior to the inspection. Conn expressed her belief that this fieldwork, or home check, was lawful or constitutional at the time it was conducted and she claimed [**377] that she reviews the policies and procedures of her department on an annual basis to ensure that she is complying with the law.

[*P11] The trial court denied the motion to suppress finding that **Campbell** executed a valid consent to search his property and that the law enforcement officer was acting in good faith reliance upon a judicial order that the officer believed authorized her to act.

[*P12] **Campbell** changed his plea to no contest to counts one through nine and he was sentenced to an aggregate term of eighty-four months and ordered to register as a Tier I and a Tier II sexual offender. **Campbell** filed a notice of appeal and submitted one assignment of error:

[*P13] "I. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS." [***7]

STANDARD OF REVIEW

[*P14] *HN1* Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. When ruling on a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and to evaluate witness credibility. See *State v. Dunlap*, 73 Ohio St.3d 308, 314, 1995-Ohio-243, 652 N.E.2d 988 (1995); *State v. Fanning*, 1 Ohio St.3d 19, 20, 1 Ohio B. 57, 437 N.E.2d 583 (1982). Accordingly, a reviewing court must defer to the trial court's factual findings if competent, credible evidence exists to support those findings. See *Burnside, supra; Dunlap, supra*. However, once this Court has accepted those facts as true, it must independently determine as a matter of law whether the trial court met the applicable legal standard. See *Burnside, supra*, quoting *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist. 1997); See, generally, *United States v. Arvizu*, 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002); *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). That is, the application of the law to the trial court's findings of fact is subject to a de novo standard of review *Ornelas, supra*.

[*P15] **Campbell** contends that the trial court erred by failing to apply the correct law to the facts and thereafter incorrectly decided that his Fourth Amendment rights were not violated, so we review the trial court's decision de novo.

[*P16] *HN2* The Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution provide "[t]he right of the people to be secure * * * against unreasonable searches and seizures * * *." A warrantless search or seizure is per se unreasonable under these constitutional provisions, subject [***8] to a few specific and well-delineated exceptions. *California v. Acevedo* (1991), 500 U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619; *State v. Kessler* (1978), 53 Ohio St.2d 204, 207, 373 N.E.2d 1252. The prosecution has the burden of establishing the application of one of the exceptions to this rule designating warrantless searches as per se unreasonable. *Id.* Generally evidence obtained from searches and seizures conducted in violation of the Fourth Amendment is inadmissible in court. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, 86 Ohio Law Abs. 513 (1961). The purpose of this exclusionary rule is to remove any incentive to violate the Fourth Amendment and, thereby, deter police from unlawful conduct. *United States v. Leon* (1984), 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677; *State v. Jones*, 88 Ohio St.3d 430, 435, 2000-Ohio-0374, 727 N.E.2d 886. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence [**378] is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring v. United States*, 555 U.S. 135, 144, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009).

ANALYSIS

[*P17] The Fourth Amendment right of appellant, Daniel J. **Campbell**, to be free of unreasonable searches and how his status as a probationer and the application of R. C. 2951.02 affect that right, is the focal point in this matter. The United States Supreme Court and the Supreme Court of Ohio have spoken on probationer and parolee Fourth Amendment rights in different contexts, but [***9] those courts have not addressed the issue of whether a **probation** officer can, without violating R.C. 2951.02, conduct a random, unannounced search of a probationers property with neither cause nor any suspicion that the probationer has committed another offense, violated any term of his **probation** or acted in such a way that the **probation** officer would reasonably suspect that the probationer had acted inappropriately. We have reviewed those holdings as part of our analysis of the law and find that while these decisions provide background for the development of the law, they are not controlling in this case because those courts did not address the impact of R.C. 2951.02.

JUDICIAL LIMITATION OF PROBATIONER / PAROLEE FOURTH AMENDMENT RIGHTS

[*P18] The United States Supreme Court addressed whether a probationer's Fourth Amendment rights were impacted by his status as a person subject to the close supervision of the state in *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987). Wisconsin law put Griffin in the legal custody of the State Department of Health and Social Services and rendered him "subject ... to ... conditions set by the court and rules and regulations established by the department." Wis.Stat. § 973.10(1) (1985-1986). One of the Department's regulations permitted any **probation** officer to search a probationer's [***10] home without a warrant as long as his supervisor approves and as long as there are "reasonable grounds" to believe the presence of contraband—including any item that the probationer cannot possess under the **probation** conditions. Wis.Admin.Code HSS §§ 328.21(4), 328.16(1). Another regulation made it a violation of the terms of **probation** to refuse to consent to a home search. HSS § 328.04(3)(k).

[*P19] The Supreme Court reviewed the regulations in the context of the purposes of the justice system and concluded that "The warrantless search of petitioner's residence was "reasonable" within the response to the "special needs" of a **probation** system. *Id.*, syllabus, paragraph 1. The court limited its decision to the reasonableness of the regulations, stating that "The conclusion that the regulation in question was constitutional makes it unnecessary to consider whether any search of a probationer's home is lawful when there are "reasonable grounds" to believe contraband is present." *Id.*, syllabus, paragraph 1.

[*P20] The limits of the Fourth Amendment rights of a parolee in the absence of an applicable statute or regulation arose in *State v. Benton*, 82 Ohio St.3d 316, 1998-Ohio-386, 695 N.E.2d 757 (1998). The companion to R.C. 2951.02(A), R.C. 2967.131 was effective at that time of Benton's trial and arguably relevant, but the court decided that the terms [***11] of that section were not applicable [**379] to the facts of the case and decided the question solely on the constitutional issue.

[*P21] ***HN3*** In *Benton*, the Supreme Court of Ohio found that "A warrantless search performed pursuant to a condition of parole requiring a parolee to submit to random searches of his or her person, motor vehicle, or place of residence by a parole officer at any time is constitutional." *Benton, supra*, syllabus. Benton agreed to a term of **probation** that permitted "a search without warrant of my person, my motor vehicle, or my place of residence by a parole officer at any time." *Id.* at 316. The Court noted that "[i]t is clear that a requirement that searches only be conducted when officers have 'reasonable suspicion' or probable cause that a crime has been committed or that a condition of **probation** has been violated could completely undermine the purpose of the search condition." *Id.* at 320.

[*P22] The court acknowledged that R.C. 2967.131(B) had been adopted prior to Benton's trial but declined to apply it to the facts of the case:

In Ohio, there was no statutory authority for a search of a parolee's residence until November 9, 1995, four months after the defendant agreed to the conditions of his supervision. After the defendant signed [***12] the Conditions of Supervision form, but while he was on parole and before the search in question was conducted, the General Assembly enacted R.C. 2967.131(B).

146 Ohio Laws, Part I, 125. ***HN4*** This statute requires field officers conducting a search to have reasonable grounds to believe that the releasee is not abiding by the law or otherwise is not complying with the terms and conditions of his or her conditional release. However, this statute did not exist when the defendant signed the Conditions of Supervision form. Accordingly, this statute cannot create a right that the defendant had already waived.

Supra footnote 3.

[*P23] Justice Pfeifer's dissent provides further insight to the *Benton* court's thinking when he states: "I am thankful that the enactment of R.C. 2967.131(B) [1] limits the scope of this decision. ***HN5*** Under the statute, a parole officer may conduct a warrantless search of a parolee or his property if the officer has reasonable grounds to believe that the parolee is not abiding by the law or complying with the terms of his parole." *Supra*, p. 323.

[*P24] The United States Supreme Court considered warrantless searches of probationers supported by reasonable suspicion in *United States v. Knights*, 534 U.S. 112, 113, 122 S.Ct. 587, 588, 151 L.Ed.2d 497 (2001), where a California trial court imposed a probationary term that permitted [***13] "search at anytime, with or without a search or arrest warrant or reasonable cause, by any **probation** or law enforcement officer." *Id. at syllabus*. The court found that the warrantless search, supported by reasonable suspicion and authorized by a **probation** condition, satisfied the Fourth Amendment, focusing on Knights'

probationary status. ***HN7*** A lesser degree of cause satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable. *Id.*

[*P25] Perhaps in response to *Knights*, the state of California adopted a statute "which requires every prisoner eligible for release on state parole to "agree in writing to be subject to search or seizure by a parole officer or other peace officer ..., with or without a search warrant and with [**380] or without cause." *Samson v. California*, 547 U.S. 843, 126 S.Ct. 2193, 2194, 165 L.Ed.2d 250 (2006), syllabus. The Supreme Court considered the statute and concluded that "[t]he Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." *Id.* at syllabus. The court noted that the California Legislature adopted this requirement because "given the number of inmates the State paroles and its high recidivism rate, a requirement that searches be based on individualized suspicion *** would undermine [***14] the State's ability to effectively supervise parolees and protect the public from criminal acts by reoffenders."*Id* at 854.

[*P26] After the *Griffin* decision, but before the opinions in *Benton, Knights* and *Samson*, the Ohio Legislature adopted House Bill 4 1995 Ohio Laws File 49 (H.B. 4) amending R.C. 2951.02 and R.C. 2967.131 adding identical language to both sections addressing the Fourth Amendment rights of persons on **probation** or parole respectively. The amendment imposed a "reasonable grounds" restriction on searches and imposed a notification obligation on the courts:

During the period of an offender's **probation** or other suspension, authorized **probation** officers who are engaged within the scope of their supervisory duties or responsibilities may search, with or without a warrant, the person of the offender, the place of residence of the offender, and a motor vehicle, another item of tangible or intangible personal property, or other real property in which the offender has a right, title, or interest or for which the offender has the express or implied permission of a person with a right, title, or interest to use, occupy, or possess if the **probation** officers **have reasonable grounds** to believe that the offender is not abiding by the law [***15] or otherwise is not complying with the conditions of the offender's **probation** or other suspension. The court that places the offender on **probation** or that suspends the offender's sentence of imprisonment pursuant to division (D)(2) or (4) of section 2929.51 of the Revised Code shall provide the offender with a **written notice** that informs the offender that authorized **probation** officers who are engaged within the scope of their supervisory duties or responsibilities may conduct those types of searches during the period of **probation** or other suspension if they have reasonable grounds to believe that the offender is not abiding by the law or otherwise is not complying with the conditions of the offender's **probation** or other suspension. (Emphasis added.)

1995 Ohio Laws File 49 (H.B. 4), 2951.02(C), See Also 2967.131(B).

[*P27] The Ohio Legislature's adoption of House Bill 4 appears to be a response to the holding in *Griffin* and an effort to bring clarity to the procedure for conducting warrantless searches of persons subject to the rules of **probation** or parole. ***HN8***

The Legislature adopted "a regulation that is itself a reasonable response to the "special needs" of a **probation** system" that permitted the **probation** department to conduct [***16] a search when "information provided indicates *** only the likelihood ("had or might have guns") of facts justifying the search." *Griffin, supra at* syllabus, 880.

[*P28] After the issuance of the decisions in *Helton* and *Samson* it is evident that the terms of House Bill 4 provide more protection to a probationer/parolee than what is required by the Fourth Amendment and we acknowledge this is the Legislature's prerogative. *State v. Boykin*, 9th Dist. Summit No. 25752, 2012-Ohio-1381, ¶ 7aff'd, 138 Ohio St.3d 97, [**381] 2013-Ohio-4582, 4 N.E.3d 980, ¶ 7 (2013), quoting *In re Application to Seal Record of No Bill, 131* Ohio App.3d 399, 403, 722 N.E.2d 602

(3d Dist.1999). ***HN9*** Some Ohio statutes provide greater rights than either the Ohio or United States Constitution. *Siegwald v. Curry*, 40 Ohio App.2d 313, 323-24, 319 N.E.2d 381 (10th Dist.1974) ("Similarly here, the legislature can enact statutes which grant greater rights to accused persons than the minimum threshold found in the Constitutions." *State v. Boone*, 8th Dist. Cuyahoga No. 81155, 2003-Ohio-996, ¶¶ 23-24; "A state may provide its citizens with greater protection of their individual rights than does the federal constitution." *Wilcher v. City of Wilmington*, 139 F.3d 366, 380 (3d Cir.1998).

APPLICATION OF THE REASONABLE GROUNDS REQUIREMENT

[*P29] We have had the opportunity to apply the relevant language of House Bill 4 in our decisions. In *State v. Bays*, 5th Dist. Ashland No. 10-CA-42, 2011-Ohio-3021, we addressed a warrantless search of a probationer's residence in the context of the rulings in *Benton, Griffin* and the adoption of R.C. 2967.131. Evelyn Bays signed a parole agreement that contained the following terms:

I agree to a search without warrant of my person, my motor vehicle, [***17] or my place of residence by a supervising officer or other authorized representative of the Department of Rehabilitation and Correction at any time. * * *

Notice pursuant to section 2959.131 of the Revised Code 2, officers of the Adult Parole Authority may conduct warrantless searches of your person, your place of residence, your personal property, or any other property of which you have been given permission to use if they have reasonable grounds to believe that you are not abiding by the law or terms and conditions of your supervision.

State v. Bays, 5th Dist. Ashland No. 10-CA-42, 2011-Ohio-3021, ¶¶ 3-4

[*P30] With regard to reasonable grounds, we found that "Officer Flaherty had evidence that Evelyn's husband was cultivating marijuana in their basement, as was reported to her by an employee of the tobacco shop that Appellant and Evelyn ran. Such evidence is sufficient to supply the necessary basis for the APA to search a parolee's home." *State v. Bays*, 5th Dist. Ashland No. 10-CA-42, 2011-Ohio-3021, ¶ 33.

[*P31] We addressed another case involving a search of a probationer's residence in *State v. Karns*, 196 Ohio App.3d 731, 2011-Ohio-6109, 965 N.E.2d 352 (5th Dist.) where the probationary term, similar to the term in this case, contained no requirement of a finding of reasonable grounds for the search. In *Karns*, the terms of community control included a consent to a search of the probationer's property and her residence, "which included common [***18] areas within the residence and areas that are exclusive to me, at any time" by community-control officers. *Id.* at ¶ 4. ***HN10*** While the term of the community control did not reference a need for reasonable grounds, we noted that "Ohio law permits a **probation** officer to conduct a warrantless search of a probationer's person [**382] or home if an officer has "reasonable grounds" to believe that the probationer failed to abide by the law or by the terms of **probation**." *Id.* at ¶ 33. We reviewed the facts in the record of *Karns* and held that the trial court erred by finding that the search was supported by reasonable suspicion and reversed the decision of the trial court. Judge Farmer's dissent in *Karns* noted that reasonable grounds were required before a warrantless search was

permitted, but she would have found that the facts supported a conclusion that reasonable grounds existed and that the decision to deny the motion to suppress was not error.

[*P32] *HN11* We confirmed our view that Ohio law requires reasonable grounds to support a warrantless search of a probationer in *State v. Maschke*, 5th Dist. Morrow No. 11 CA 12, 2014-Ohio-288 where we found that "Ohio law permits a **probation** officer to conduct a warrantless search of a probationer's person or home if an officer has [***19] 'reasonable grounds' to believe the probationer failed to abide by the law or by the terms of **probation**." *State v. Maschke*, 5th Dist. Morrow No. 11 CA 12, 2014-Ohio-288, ¶ 18 quoting *State v. Smith*, Stark App.No.2011CA00140, 2011-Ohio-6872, ¶ 11.

HOUSE BILL 4 LIMITS TRIAL COURT'S SENTENCING DISCRETION

[*P33] *HN12* The statutory requirement of reasonable grounds for a search of a probationer that we acknowledged in *Maschke, Karns* and *Bays* limits a trial court's authority to create community control terms. Trial courts have discretion to impose probationary terms that are "interests of doing justice, rehabilitating the offender, and insuring his good behavior" *State v. Jones*, 49 Ohio St.3d 51, 53, 550 N.E.2d 469, 470 (1990), but that discretion has its limits. *Id.* A "sentencing court has broad discretion to shape community control sanctions provided that the sanctions are constitutionally and statutorily permitted." Katz, Lipton, Gianneli, & Crocker, Baldwin's Ohio Practice, Criminal Law, Section 119:2 (3d Ed.2014). *State v. Anderson*, 143 Ohio St.3d 173, 2015-Ohio-2089, 35 N.E.3d 512, ¶ 19. See also *City of Columbus v. Davis*, 10th Dist. Franklin No. 90AP-1423, 1991 Ohio App. LEXIS 2528, 1991 WL 94452, *2 (That discretion is limited by statute, as well as by the constitutional requirements of due process.)

As stated by the Indiana Supreme Court, because "'sentencing is a creature of the legislature * * * courts are limited to imposing sentences that are authorized by statute, rather than only being limited to sentences [***20] that are not prohibited by statute.'" (Emphasis sic.) *Wilson v. State*, 5 N.E.3d 759 (Ind.2014), quoting *Wilson v. State*, 988 N.E.2d 1221, 1224 (Ind.App.2013) (Robb, C.J., dissenting).

*** A "sentencing court has broad discretion to shape community control sanctions provided that the sanctions are constitutionally and statutorily permitted." *Katz, Lipton, Gianneli, & Crocker, Baldwin's Ohio Practice, Criminal Law*, Section 119:2 (3d Ed.2014).

Anderson, supra at ¶ 13, 19 (2015)

[*P34] *HN13* Likewise R.C. 2929.51(D)(1) and (2) grant a trial court broad discretion to suspend an offender's imprisonment in favor of conditional **probation**. Although R.C. 2929.51(D)(2) states that the offender's **probation** may be conditioned "upon any terms that the court considers appropriate," it is well-settled that the court's discretion in imposing conditions of **probation** is limited by statute, as well as by the constitutional requirements of due process. [**383] *Jones, supra* at 52. *City of Columbus v. Davis, supra*, 1991 Ohio App. LEXIS 2528, [WL] at *2.

[*P35] The trial court below subjected **Campbell** to a community control sentence that included requirement that he be subject to random, warrantless searches. ***HN14*** Revised Code 2925.01 (A) reduces the level of justification needed for a search from probable cause to reasonable grounds and expressly eliminates the need for a warrant, but it does not authorize random, warrantless searches. This limit to judicial discretion is further supported by a mandatory requirement [***21] in that section of the code that probationers receive a written notice of the need for reasonable grounds for search.

[*P36] The Eighth District Court of Appeals addressed the inclusion of warrantless searches with no cause in a community control order and found:

[t]he condition allowing "random" home inspections to be violative of R.C. 2951.02(A). ***HN15*** "[C]ourts are limited to imposing sentences that are authorized by statute * * *." *Anderson* at ¶ 13, citing *Wilson v. State*, 5 N.E.3d 759 (Ind.2014). R.C. 2951.02 requires officers to have "reasonable grounds" that a misdemeanor offender is violating the law or otherwise not complying with the conditions of the community control sanctions. In this case, the trial court abused its discretion ordering "random" home inspections inconsistent with the "reasonable grounds" requirement set forth in R.C. 2951.02(A).

City of Cleveland v. Turner, 8th Dist. No. 107102, 2019-Ohio-3378, 132 N.E.3d 766, ¶ 59 appeal not allowed sub nom. *Cleveland v. Turner*, 157 Ohio St.3d 1512, 2019-Ohio-5193, 136 N.E.3d 510, ¶ 59 (2019).

[*P37] We reach the same conclusion in the case before us. The trial court's inclusion of provision in the terms of community control, obligating **Campbell** to consent to searches of his person, property, vehicle, and residence at any time without a warrant exceeds the court's sentencing authority as it omits the statutorily required notice and reasonable grounds to support the search.

APPELLEE'S ALTERNATIVE [*22] ANALYSIS**

[*P38] Appellee invites us to disregard the statute in favor of what we describe as an alternative, constitutional, analysis. ***HN16***

We must reject the invitation as "[n]o court should *** induldge (sic) the constitutional issue if the litigant is entitled to relief upon other grounds." *Burt Realty Corp. v. City of Columbus* 21 Ohio St.2d 265, 269, 257 N.E.2d 355 (1970), quoting *Greenhills Home Owners Corp. v. Village of Greenhills*, 5 Ohio St.2d 207, 215 N.E.2d 403 (1966). Because the text of R.C. 2951.02(A) is plain and unambiguous, we are bound to give effect to the legislature's intent by simply applying the law as written. *State v. Faggs*, 159 Ohio St. 3d 420, 2020-Ohio-523, 151 N.E.3d 593 quoting *State v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, 848 N.E.2d 496, ¶ 12. We find no need to consider the constitutional analysis proffered by appellee because the issue posed by this case is resolved by the language of R.C. 2951.02(A).

[*P39] If, arguendo, we would consider the cases cited by appellee, our decision would remain unchanged because the cases are limited to their facts and are distinguishable.

[*P40] Appellee cites *State v. Kelley*, 5th Dist. Delaware No. 13 CAA 04 0028, 2014-Ohio-464, in support of its argument, but that case ultimately addressed the reasonable grounds for the search finding "[t]hus, pursuant to *Griffin* and Ohio's regulatory

scheme, a warrantless search of a probationer's home and [**384] other property does not violate the Fourth Amendment, provided the searching officer possesses reasonable grounds to believe that the probationer is in violation of [***23] the law or of the conditions and terms of **probation**." *Id.* at ¶ 28. Appellee cites to *State v. Bays, supra*, *State v. Burns*, 4th Dist. Highland No. 11CA14, 2012-Ohio-1529, *State v. Storer*, 12th Dist. Fayette No. CA2019-04-005, 2019-Ohio-5166 and *United States v. Tessier*, 814 F.3d 432, 2016 WL 659251 (Feb. 18, 2016) in support of its proposition that "[c]onsent given as a condition of placement under a term of supervision requiring a probationer or parolee to be subject to random searches without suspicion have routinely been held as reasonable under the Fourth Amendment" but those cases do not support appellee's conclusion in the context of this case.

[*P41] In *Bays*, the probationer was given notice that: "*** pursuant to section 2959.131 of the Revised Code, officers of the Adult Parole Authority may conduct warrantless searches of your person, your place of residence, your personal property, or any other property of which you have been given permission to use if they have reasonable grounds to believe that you are not abiding by the law or terms and conditions of your supervision." Bays, *supra at ¶ 4*. In that case, we found that evidence that the parolee's husband was growing marijuana in the basement of their home was "sufficient to supply the necessary basis for the APA to search a parolee's home." *Id.* at ¶ 33. More significant in that case was the fact that the parolee consented to the search and the husband, [***24] who was ultimately charged, did not object. Consequently, the discussion of the application of *Benton* in that case is not a binding part of the decision.

[*P42] *State v. Burns*, 4th Dist. Highland No. 11CA14, 2012-Ohio-1529 is next offered by appellee in support of random searches, but the Fourth District later confirmed in *State v. Johnson*, 4th Dist. No. 14CA3618, 2014-Ohio-5400, 26 N.E.3d 243 that reasonable grounds for a search of a probationer are required:

The United States Supreme Court has upheld **probation** searches conducted pursuant to a condition of **probation**, provided that a "reasonable suspicion" exists that evidence of criminal activity can be found in a probationer's home. *State v. Burns*, 4th Dist. Highland No. 11CA14, 2012-Ohio-1529, 2012 WL 1142698, ¶ 14 citing *United States v. Knights*, 534 U.S. 112, 120-121, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001).

Johnson, supra at ¶ 14.

[*P43] That court included a reference to R.C. 2951.02 and later found that the **probation** officers had "reasonable suspicion" to search part of the residence. *Id.* at ¶25.

[*P44] *State v. Storer*, 12th Dist. Fayette No. CA2019-04-005, 2019-Ohio-5166 is inapposite as it relies on *Benton*, and, as we concluded above, that decision was rendered without considering the application of the "reasonable grounds" requirement adopted by the Legislature. The *Storer* court suggests that a statutory reasonable suspicion (R.C. 2951.02) and constitutional consent bases per *Benton* co-exist, but we must disagree. The Legislature has determined that the terms of **probation** must include a "reasonable [***25] grounds for a search" restriction and we have no authority to ignore the impact of the statute on the *Benton* ruling.

[*P45] *United States v. Tessier, supra*, addresses "the following "standard" search condition that applies to all probationers in Tennessee: "I agree to a search, without a warrant, of my person, vehicle, property, or place of residence by any **Probation**/Parole officer or law enforcement officer, at any time."" *Tessier, supra* at 433. Because [**385] Ohio has adopted R.C. 2967.131 and 2951.02 and the opinion in *Tessier* does not address analogous restrictions in Tennessee, we find *Tessier* inapposite.

[*P46] The precedent cited by the parties establishes that a search of a parolee or probationer without cause or a warrant does not violate the Fourth Amendment (*Benton*) and that the same search pursuant to a statute or statewide policy is not prohibited by the Fourth Amendment (*Griffin, Samson* and *Tessier*). *Knights* establishes that a **probation** term supported by reasonable suspicion is sufficient to render a warrant unnecessary. These cases do not address Ohio's statutory requirement that searches of probationers must be supported by reasonable grounds and the court must give written notice of that requirement. These cases, therefore, do not assist appellee's argument.

GOOD FAITH

[*P47] The state argues that, [***26] in the alternative, the evidence should not be excluded because the **probation** officer's search was conducted based upon an objectively reasonable good faith reliance upon the court's order imposing the terms of community control. We find two faults with this contention,

[*P48] *HN17* The "good faith exception" typically applies to searches incident to a warrant that is later determined to be invalid. "Under the "good faith exception," the exclusionary rule should not be applied so as to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause. *State v. Laubacher*, 5th Dist. Stark No. 2018 CA 00169, 2019-Ohio-4271, ¶ 44 quoting *State v. George*, 45 Ohio St.3d 325, 330, 544 N.E.2d 640 (1980). The trial court below found that though this case does not involve a warrant, "little distinction can be drawn from a judicial authorized search warrant and a judicially required term of **probation** from an officer acting in good faith. In each instance the officer acts in part on the authority of a judge who has authorized and or required that the place or individual to be search comply." Appellee provides no [***27] precedent directly on point, but does cite to the case of *State v. Gies*, 1st Dist. No. C-180597, 2019-Ohio-4249, 146 N.E.3d 1277, ¶ 17 cert. denied, *U.S., 140 S. Ct. 2840, 207 L. Ed. 2d 166, 2020 WL 2814851. The **probation** officers in that case "relied in good faith upon R.C. 2951.02(A) in conducting their warrantless search of Mr. Gies's residence." *Id* at ¶ 17. **Campbell**'s **probation** officer does not mention R.C. 2951.02 in her testimony and the record contains nothing that would suggest that the **probation** officer was aware of the code section despite her contention of annually reviewing the requirements for a search.

[*P49] And the **probation** officer's reliance on the court's order lacks an objective basis. She confirmed that she believed that the document signed by **Campbell** authorized her to search **Campbell** and that no one had told her that the law had changed, but she provides no explanation or basis for that belief. She acknowledges an annual review of policies and procedures that would include lawful and constitutional searches, but she does not address the terms of R.C. 2951.02 despite its application to the facts of this case. The record provides scant evidence from which we can determine whether her belief that her actions were permissible under the Fourth amendment were objectively reasonable. She did not claim that she relied on advice [***28] she received from an assistant prosecuting attorney, fellow members of law enforcement or information she had received during [**386] training seminars or upon binding appellate precedent from any court. *State v. Johnson*, 141 Ohio St.3d 136, 2014-Ohio-5021, 22 N.E.3d 1061, (2014) ¶¶ 44-45. Further, unlike the issuance of a warrant, this case does not involve the submission of an affidavit supporting probable cause and the issuance of a warrant based upon that affidavit, later determined to be defective. *State v. Wilmoth*, 22 Ohio St.3d 251, 261, 22 Ohio B. 427, 490 N.E.2d 1236, 1244 (1986). **Probation** Officer Conn expressed a subjective belief that random warrantless searches of probationers were permitted, but the record lacks an unambiguous objective basis for her conclusion.

[*P50] When we consider the facts in this case and our holdings in *Karn, Bays*, and *Maschke* as well as language of R. C. 2951.02, we cannot agree that the good faith exception is applicable to the failure to comply with the unambiguous requirements of the Ohio Revised Code.

CONCLUSION

[*P51] ***HN18*** Revised Code 2951.02 contains two relevant requirements, a prerequisite of reasonable grounds for a search and an obligation to provide notice. Neither requirement was fulfilled in this case. The Fairfield County Common Pleas Court was required to provide **Campbell** with a written notice informing him that his **probation** officer, in the completion of [***29] her duty, may conduct searches during the period of community control sanction or the nonresidential sanction if they have reasonable grounds to believe that he was not abiding by the law or otherwise is not complying with the conditions of the offender's community control sanction or nonresidential sanction. The appellee did not provide any evidence that such a notice was provided and the record contains no suggestion that a compliant notice exists. The document referenced by appellee at the hearing on the motion to suppress and within its brief contains only a provision where **Campbell** states he consents "to being questioned by any Community Control Officer" as well as a "consent to searches of my person, my property, my vehicle, in my residence at any time without a warrant." This notice not only fails to comply with the statute, but it contradicts the terms of the law, providing for a search without reasonable grounds. **Campbell**'s purported written consent cannot be used to alter the statutory limitations imposed upon the trial court's discretion to impose a sentence or community control.

[*P52] The appellee conceded within its brief that there was not reasonable grounds for the search [***30] of **Campbell**'s residence or **phone** and that, in fact, the **probation** department regularly conducts random searches as part of the policy of the department. While we acknowledge that the precedent cited in the briefs provide that such searches may not violate the Fourth Amendment and are supported by the weight of the state's interest in law enforcement and rehabilitation, this court is obligated to apply R.C. 2951.02 which contains the unambiguous requirement that searches will occur if the **probation** officer has reasonable grounds to suspect a criminal offense or **probation** violation and after the offender is given notice of the possibility of such a search. This legislation is consistent with, and perhaps a response to, the decision in *Griffin, supra*, which found that the lesser standard of "reasonable grounds" for a search of a probationer's home was ""reasonable" within the meaning of the Fourth Amendment because it was conducted pursuant to a regulation that is itself a reasonable response to the "special needs" of a **probation** system." *Griffin, supra syllabus, paragraph 1.* ***HN19*** The Supreme Court of Ohio and the United States Supreme Court have issued decisions that sanction random searches of parolees and probationers without cause, but the Ohio legislature [***31] has not abandoned [**387] the requirement of reasonable grounds for such a search and our role is to apply the law as written and not as it might be.

[*P53] In our 2011 decision of *State v. Karns, supra*, we applied the "reasonable grounds" requirement on the search of a probationer despite the fact that the relevant community control terms authorized random, warrantless searches. We reversed the decision of the Fairfield County Common Pleas Court in that case based upon the lack of "reasonable" grounds and we cannot justify a different conclusion in the matter before us.

[*P54] The **probation** officer was forthright about the common usage of random searches as a policy of the Fairfield County **Probation** Department. Her testimony also suggested she scrupulously reviewed the law regarding the legality and

constitutionality though neither she nor appellee reconciled her policy with the obligations contained within R.C. 2951.02 nor is there any effort to distinguish our application of the statute. We are concerned the record reflects "deliberate, reckless, or grossly negligent conduct, or *** recurring or systemic negligence" that the exclusionary rule is designed to deter. *Herring, supra.*

[*P55] Because **Campbell** was not provided the required notice and because the [***32] search of **Campbell**'s residence was not supported by reasonable grounds, we find that the search of **Campbell**'s residence and **cell phone** violated the requirements of R.C. 2951.02. We hold that the appellant's first assignment of error is well taken and reverse the decision of the Fairfield County Court of Common Pleas and remand the matter to the court for further proceedings consistent with this opinion.

By: Baldwin, J.

Hoffman, P.J. and

Wise, John, J. concur.

Footnotes

- 1

  HN6 R.C. 2967.131 applies to persons subject to the control to the state parole board and contains terms identical to those found in R.C. 2951.02(A) regarding the need for reasonable grounds to conduct a search.

- 2

  We believe the reference to R.C. 2959.131 in the parole terms is typographical error, as the notice described after the reference is found in R.C. 2967.131 and we have not found any code section captioned R.C. 2959.131, nor any Chapter 2959 in the Ohio Revised Code.