STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0967

State of Minnesota,
Appellant,

vs.

Troy Lee Bruce,
Respondent.

Filed December 23, 2008
Affirmed
Schellhas, Judge

Hubbard County District Court
File No. 29-CR-08-354

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

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Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

The state appeals a pretrial ruling suppressing evidence found by a parole agent in a warrantless search of a parolee's residence. We conclude that the district court did not err, and we affirm.

FACTS

Appellant State of Minnesota challenges a pretrial ruling suppressing evidence seized from respondent Troy Lee Bruce's residence. Respondent was convicted in 1999, after pleading guilty to fourth-degree criminal sexual conduct. He was imprisoned, released, and placed in the intensive supervision program.[1] On February 15, 2008, after a Minnesota Department of Corrections (DOC) agent saw firearms in respondent's home, respondent was charged with the crime of ineligible person in possession of a firearm. Respondent moved to suppress all evidence of firearms seized at his residence on the basis that the agent's search violated his Fourth and Sixth Amendment rights under the United States Constitution.

Respondent and DOC Agent Michael Amble testified at the Omnibus hearing. Agent Amble testified about supervised release,[2] and both Agent Amble and respondent testified about the events of February 15. Agent Amble is an intensive supervision

[1] Initially, respondent's prison sentence was stayed and he was placed on probation, but his probation was revoked and his sentence executed, after the district court found that he violated a probation condition. This court subsequently reversed respondent's probation revocation. *State v. Bruce*, No. A07-600, 2008 WL 2102893 (Minn. App. May 13, 2008). The parties agree that our earlier reversal does not impact this appeal.

[2] "Supervised release" is the current term for the release practice historically known as parole. *State v. Schwartz*, 628 N.W.2d 134, 139 (Minn. 2001).

release agent who works on a team assigned to respondent. All offenders on supervised release have the same general release conditions, but each offender has individual special release conditions. The list of general conditions is contained in a pre-parole packet. A caseworker goes over the conditions with the offender before release, someone goes over the conditions with the offender again during transport from prison, and a copy of the general conditions is given to offenders. Usually, offenders "sign off on those conditions" the day before their release from prison. In the case of respondent, Agent Amble testified that another agent, Bruce Johnson, went over the conditions with respondent during transport. The state did not call Agent Johnson to testify.[3]

Respondent refused to sign the DOC's Standard Conditions of Release form. When an offender refuses to sign the conditions, someone usually notes that the offender refused to sign but that the conditions were read to him. Here, the form, bearing appellant's typewritten name and a notation, "refused to sign," was signed by a case manager beneath language that reads: "I certify that all listed conditions of release have been read and explained to the releasee this 12th day of September, 2007." The state did not call the case manager to testify. The standard conditions of release in the form includes condition 13, that "[t]he offender will submit at any time to an unannounced visit and/or search of the offender's person, vehicle, or premises by the agent/designee." The form was admitted into evidence as Exhibit 1 without objection by respondent, but

[3] The prosecutor did not provide Agent Johnson with notice of the hearing. The day of the hearing, Agent Amble tried to contact Agent Johnson but learned that he was too far away to appear in court that day. The prosecutor sought a continuance of the hearing so that Agent Johnson could testify, but the district court denied the continuance when it learned that Agent Johnson had never been notified of the hearing.

defense counsel noted on the record that the state offered no testimony regarding the case manager's signature on the form.

Respondent testified about his refusal to sign Exhibit 1. He stated that when he reviewed the special conditions of release, "there was so much legal spegal in there that [he] didn't understand it." Respondent testified that he told the person who gave him the page of conditions that he was not going to sign it until a lawyer could review it because he did not understand it. The person told him "that's fine," and then "sent it back to whoever requested a signature." Respondent did not look at the conditions any further. The next day, when he was told that there were more conditions of release to review, he said, "it would be just like the other ones," and until he "had a chance for an attorney to review them," he would not sign them. Respondent was released by the DOC without signing Exhibit 1, because as Agent Amble explained, the DOC does not keep an offender in prison for refusing to sign the standard conditions of release.

On February 15, 2008, Agent Amble made a routine visit to respondent's residence to get an updated photograph of respondent for a Bureau of Criminal Apprehension website. Agent Amble visited with respondent for five-to-ten minutes and left the residence without remembering to take the photograph. Agent Amble remembered the need for the photograph as he was backing out of respondent's driveway, and he returned to the residence and knocked. There was no answer. He knocked again, received no answer, and returned to his truck and telephoned the residence. His call was unanswered. Agent Amble then called his supervisor, who directed him to call

respondent once more and then call law enforcement. Agent Amble decided to knock once more, and respondent answered the door.

Agent Amble asked respondent where he had been and respondent explained he had been in "the back smoking room" and could not hear the phone or the door. Agent Amble felt that respondent's behavior was suspicious. Agent Amble requested respondent's consent to re-enter the house and see the smoking room. Respondent led Amble to the back of the house to "a little entryway type thing" that was used for cigarette smoking. Between the smoking room and the main part of the house, there was a small stairwell that went upstairs. Respondent told Agent Amble that the stairwell led to his bedroom, and Agent Amble asked to see the bedroom. Respondent led Agent Amble up the stairs, where Agent Amble noticed an open space or room across from the bedroom. A sheet or blanket hung in the entryway to the space. Respondent told Agent Amble that his stepfather used the space for storage. According to Agent Amble, he asked respondent if he could look in the space, and respondent said yes. Agent Amble then lifted up the sheet and saw firearms. Respondent then told Agent Amble that another parole agent had approved of the firearm storage. Agent Amble left the residence, verified that another agent had not approved the firearm storage, contacted law enforcement, and respondent was arrested.

Respondent's version of the events of February 15 differs from Agent Amble's version. According to respondent, after he told Agent Amble that his stepfather used the space for storage, Agent Amble "picked up the curtain and took a look to see what was in there, and that was when he came across the guns." Respondent testified that he did not

agree or consent to Agent Amble looking in the space, and explained that "[Agent Amble] was already going like looking for the curtain at the bottom to pull it up when he asked 'Well, what's in there?' and then he just pulled it up and stated guns, guns, you know." Respondent maintained that he had no time to say anything before Agent Amble looked in the space.

The district court granted respondent's motion to suppress, finding in part that:

> 6. [Respondent] testified that prior to release . . . he refused to sign documents detailing the conditions of his parole because he was unable to understand the meaning of the conditions.
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> . . . .
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> 8. [Respondent] testified that the general conditions of his parole were never fully explained or clarified to him.
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> . . . .
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> 11. According to [respondent], the general conditions of his parole were never explained to him.
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> . . . .
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> 15. In addition to unannounced home visits, one of [respondent's] general conditions of parole requires that he submit at anytime to a search of his person, vehicle, or premises.
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> 16. [Respondent] was unaware that as a condition of his parole he was required to submit at anytime to a search of his person, vehicle, or premises.

Regarding the home visit of February 15, the district court found:

> 24. After inspecting [respondent's] bedroom, Mr. Amble noticed a nearby doorway with a hung sheet serving as

a door. Mr. Amble inquired of [respondent] as to what was located behind the sheet.

25. [Respondent] informed Mr. Amble that the room behind the sheet was used for storage by his father.

26. Mr. Amble then asked to look behind the sheet. Without receiving permission or hearing objection, Mr. Amble pulled back the sheet and noticed several firearms.

The district court concluded that respondent "did not authorize or consent to the search conducted by Mr. Amble," that the United States and Minnesota Constitutions "require the existence of reasonable suspicion to conduct a search of [respondent's] residence," and "[r]easonable suspicion to search [respondent's] home did not exist at the time of the search when the firearms were discovered."

After ordering suppression of the evidence, the district court dismissed the charge of possession of a firearm, concluding that without the suppressed evidence the state could not prove an essential element of the crime. This appeal follows.

D E C I S I O N

Critical Impact

The threshold issue in a pretrial appeal taken by the prosecution is whether the state has demonstrated that the district court's ruling will have a critical impact on the outcome of the trial. *State v. Kromah*, 657 N.W.2d 564, 566 (Minn. 2003). The state correctly asserts that critical impact is present because the charges were dismissed. *See State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (stating that critical impact is present when suppression of evidence leads to the dismissal of charges).

Consent

After demonstrating critical impact, to succeed in a pretrial appeal the state must demonstrate clearly and unequivocally that the district court erred in its judgment. *Id.* The district court's factual findings are reviewed under the clearly erroneous standard. *Id.* "A trial court's finding is erroneous if this court, after reviewing the record, reaches the firm conviction that a mistake was made." *State v. Kvam*, 336 N.W.2d 525, 529 (Minn. 1983). "Findings of fact are not clearly erroneous if there is reasonable evidence to support them." *State v. Danh*, 516 N.W.2d 539, 544 (Minn. 1994).

The United States Constitution and Minnesota Constitution prohibit unreasonable searches or seizures. U.S. Const. amend. IV; Minn. Const. art I, § 10. "Generally, warrantless searches are per se unreasonable." *Gauster*, 752 N.W.2d at 502. Consent is an exception: "[t]he police do not need probable cause or, in proper circumstances, reasonable articulable suspicion to search if a person voluntarily consents to an officer's request to search his person and his belongings." *State v. Harris*, 590 N.W.2d 90, 102 (Minn. 1999). The state argues that respondent consented to the search because: he said "yes" to Agent Amble's request to look behind the sheet; he did not say "no" or give a negative response to the request; and his consent to search other parts of the residence extended to the search behind the sheet. We disagree.

The existence of consent is a factual question. *United States v. Wilson*, 11 F.3d 346, 351 (2nd Cir. 1993) ("Whether an individual has consented to a search is a question of fact . . . ."); *United States v. Rusher*, 966 F.2d 868, 877 (4th Cir. 1992) ("[c]onsent is an issue of fact"); *United States v. Patacchia*, 602 F.2d 218, 219 (9th Cir. 1979) ("The

existence of consent to a search is not lightly to be inferred, and is a question of fact to be determined from the totality of circumstances."). The district court found that respondent did not consent to Agent Amble's search and the court's findings are supported by reasonable evidence in the form of respondent's testimony. *See Danh*, 516 N.W.2d at 544 (stating that findings of fact are not clearly erroneous when there is reasonable evidence to support them). The district court heard conflicting testimony and made credibility determinations to which we defer. *See State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003), *review denied* (Minn. July 15, 2003) ("Because the weight and believability of witness testimony is an issue for the district court, we defer to that court's credibility determinations."). The district court's findings are not clearly erroneous.

Reasonable Suspicion

The state argues that the district court erred in concluding that without consent, reasonable suspicion was required for the search even though respondent is a parolee on supervised release. To obtain reversal on this issue, the state must demonstrate clearly and unequivocally that the district court erred in its judgment. *Gauster*, 752 N.W.2d at 502. Whether reasonable suspicion was required presents a legal question that we review de novo. *See id.* (stating that legal questions are reviewed de novo).

The state bases its argument on *Samson v. California*, 547 U.S. 847, 126 S. Ct. 2193 (2006), in which the Supreme Court concluded that reasonable suspicion was not required to search a parolee. The state argues that in this case, reasonable suspicion was not required under *Samson*, and complains that the district court did not cite *Samson*.

The district court did not cite *Samson*, instead citing *United States v. Knights*, 534 U.S. 112, 122 S. Ct. 587 (2001), in which the Supreme Court required reasonable suspicion to search a *probationer's* residence. The district court also cited *State v. Anderson*, 733 N.W.2d 128, 137-40 (Minn. 2007), in which the Minnesota Supreme Court applied *Knights* to a search of a *probationer* in Minnesota. But the district court did recognize "that some caselaw does exist that indicates that parolees' rights under the Fourth Amendment are less than probationers['] and the public at large," citing *Latta v. Fitzharris*, 521 F.2d 246, 251 (9th Cir. 1975) (refusing to apply a warrant requirement to a search of a parolee in California). The district court concluded that it was "satisfied after conducting the appropriate balancing test that based upon Minnesota law the appropriate standard is the standard expressed in the *Anderson* decision."

The *Knights*, *Samson* and *Anderson* courts all applied the same balancing test—they simply reached different conclusions based on the factual circumstances in each case. To determine whether the district court erred in its conclusion that reasonable suspicion was required for Agent Amble's search of respondent's residence, we apply the balancing test applied in *Knights*, *Samson*, and *Anderson* to the facts in this case. In *Samson*, in considering a Fourth Amendment challenge to a search of a California parolee, the Supreme Court applied the *Knights* balancing test, assessing the degree to which a condition intruded upon an individual's privacy against the degree to which it was needed for the promotion of legitimate governmental interests. 547 U.S. at 847-48, 126 S. Ct. at 2197.

The *Samson* Court concluded that the California parolee did not have an expectation of privacy that society would recognize as legitimate, *id.* at 851, 126 S. Ct. at 2199, noting that parole is "an established variation on imprisonment of convicted criminals" and that the "essence of parole is release from prison, before completion of sentence, on the condition that the prisoner abides by certain rules," *id.* at 850, 126 S. Ct. at 2198 (quotation omitted). Under California state statute, a parolee serving a parole period outside of physical custody was subject to general conditions, such as reporting any change in employment status, refraining from criminal conduct, and requesting permission before traveling more than 50 miles from the parolee's home, and could also be subject to special conditions, such as psychiatric treatment programs or abstinence from alcohol. *Id.* at 851, 126 S. Ct. at 2199. Other conditions of parole in California include drug tests, restrictions on association, and mandatory meetings with parole officers. *Id.* The Court concluded that the "extent and reach of these conditions clearly demonstrate that parolees . . . have severely diminished expectations of privacy by virtue of their status alone," *id.*, noting that it was "salient" that parolees were required to submit to suspicionless searches "at any time" and that the condition was "clearly expressed" to the parolee. *Id.* at 852, 126 S. Ct. at 2199. The Court held that the California parolee's signature on an order submitting to the condition showed "unambiguously" that the parolee was aware of the condition, *id.*, and that a condition of release could "so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment." *Id.* at 847, 126 S. Ct. at 2196.

The *Samson* Court also concluded that the state's interests were substantial, *id.* at 853, 126 S. Ct. at 2200, explaining that it "has repeatedly acknowledged that a State has an overwhelming interest in supervising parolees because parolees are more likely to commit future offenses," and that the state's interests in reducing recidivism and promoting reintegration among parolees warrants privacy intrusions "that would not otherwise be tolerated under the Fourth Amendment." *Id.* (quotation omitted).

In this case, although Minnesota's interests are as substantial as California's, respondent's expectation of privacy is greater than the California parolee's in *Samson*. The district court found that respondent was unaware of the release conditions, and we conclude that this finding is not clearly erroneous. *See Danh*, 516 N.W.2d at 544 (stating that findings of fact are not clearly erroneous when there is reasonable evidence to support them); *Miller*, 659 N.W.2d at 279 ("Because the weight and believability of witness testimony is an issue for the district court, we defer to that court's credibility determinations."). And, unlike the parolee in *Samson*, respondent was not required to agree to the conditions in order to secure his release.[4] Lastly, as a Minnesota parolee on

[4] In Minnesota, signature and agreement to the conditions of release are not required to secure release for most offenders, although they are required for non-violent controlled-substance offenders. *See* Minn. Stat. § 244.055, subd. 5 (2006) ("To be eligible for release under this section, an offender shall sign a written contract with the commissioner agreeing to comply with the requirements of this section and the conditions imposed by the commissioner."). But other offenders are only required by rule to sign release conditions, and the rule states no consequence for failure to sign. *See* Minn. R. 2940.2500 (2007) (stating only that "[a]t the time of release from a correctional facility each inmate shall have read to him or her the conditions of parole or supervised release, and the inmate shall sign the conditions of parole or supervised release. The inmate's signature shall be witnessed by the staff member who read the conditions of parole or supervised release to the inmate."). The legislature could modify Minnesota law to

intensive supervised release, respondent was not subject to a variety of conditions mandated by statute such that respondent's expectation of privacy was clearly diminished by virtue of his parolee status alone. A Minnesota offender in the intensive supervised release program does not know from his status alone or from statutes controlling his status that he is subject to certain release conditions.[5] By statute, the commissioner of corrections "*may* impose appropriate conditions of release" including "unannounced searches," "random drug testing," "frequent face-to-face contacts," and other conditions. Minn. Stat. § 244.05, subd. 6 (2006) (emphasis added).

In consideration of the significant distinctions between *Samson* and this case, the holding in *Samson* does not support the state's argument that reasonable suspicion was not required for Agent Amble's search of respondent's residence. The state has therefore not demonstrated clearly and unequivocally that the district court erred in suppressing the evidence found in the search of respondent's residence. We conclude that the district court correctly ruled that reasonable suspicion was required for the search and did not err in suppressing the evidence.

Affirmed.

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require an offender to sign and agree to conditions of release in order to secure release. Or, the commissioner of corrections could add a consequence for failure to comply with its rule requiring signature, including denial of release.

[5] By contrast, Minnesota's intensive community supervision program does impose a number of mandatory conditions on offenders, including submission to searches. *See* Minn. Stat. § 244.14, subd. 4 (2006) (requiring offenders in the intensive community supervision program to submit to unannounced searches at any time, with no mention of any suspicion required for the searches); Minn. Stat. § 244.15 (2006) (imposing a number of mandatory conditions on offenders in the intensive community supervision program, including random drug tests and frequent face-to-face contacts).