No. 80755-8

J.M. JOHNSON, J. (concurring)—I agree with this court's decision to reverse and remand this case for further proceedings. I am confident that the court below will find that Community Corrections Officer Kristopher Rongen had probable cause to search 646 Englert Road, Woodlawn, Washington, the residence of record of Terry Lee Winterstein.

The Search

"Probable cause" exists if a reasonable person would believe that a specific condition is more likely than not true. Whether probable cause exists is necessarily a fact-based inquiry. Three specific facts in this case show that a reasonable person would have believed that Winterstein likely resided at 646 Englert Road. Probable cause thus existed, and Officer Rongen had authority of law to search Winterstein's true residence.

First, Winterstein identified 646 Englert Road as his residence when he

gave Officer Rongen a guided tour of the premises, including Winterstein's bedroom, three months prior to the search. At this point, Rongen knew (beyond probable cause) that 646 Englert Road was Winterstein's residence.

Second, Officer Rongen communicated to Winterstein that Winterstein had to seek Rongen's approval before changing his residence. Winterstein never protested this requirement. Nor did Winterstein ever seek approval or notify Rongen directly in any way that he was moving into a motor home spray-painted "646 ½" (a fictional address), located on the same property as 646 Englert Road.[1] Rongen had an unrebutted expectation that he would be notified if a condition changed, and Winterstein did not fulfill this expected requirement of seeking approval or even giving Rongen direct notice. A reasonable person in these circumstances would believe Winterstein's address had likely continued to be 646 Englert Road, so Rongen had probable cause.

Third, Officer Rongen verified Winterstein's address before conducting his search. Before entering 646 Englert Road, Rongen checked the offender based tracking system, one of two Department of Corrections databases that contained probationers' personal information, and confirmed Winterstein's

[1] The motor home was so filled with boxes that Detective Timothy Watson testified that it did not appear that anyone could live there. Verbatim Report of Proceedings (VPR) (June 28, 2005) at 248.

address.[2] If this court held that an officer was required to check yet another database to verify an official database's information and Rongen's firsthand knowledge, I would dissent.

Winterstein identified 646 Englert Road as his residence to Officer Rongen in person. Rongen informed Winterstein he expected Winterstein to seek approval before changing his address. Winterstein never argued or disagreed with that condition, so Rongen's reliance on that condition as a basis of believing Winterstein never changed addresses is completely reasonable. Rongen verified Winterstein's address as 646 Englert Road before searching that location. Given these facts, I fail to see how any court could help but find that a reasonable person would believe it more likely than not that Winterstein still resided at 646 Englert Road. Rongen thus had authority of law to search that location.

Fortunately, the legislature has recently provided additional guidance to the issue of probationer residence requirements. RCW 9.94A.703(2) states, "Unless waived by the court, as part of any term of community custody, the court shall order an offender to: . . . (e) Obtain prior approval of the department

[2] Officer Rongen testified that he did not regularly use the other database. VPR (June 28, 2005) at 127-28.

for the offender's residence location and living arrangements." Though this legislation was passed after Winterstein was released on community custody and thus does not apply in this case, the legislature has signaled that it will not allow future probationers to play games with the criminal justice system, such as pretending to live in an uninhabitable motor home with a spray-painted, fictional address.

Inevitable Discovery

The majority's analysis of the inevitable discovery doctrine is an unnecessary discussion and therefore dictum. I further note that this court has upheld the inevitable discovery doctrine in *State v. Warner*, 125 Wn.2d 876, 889, 889 P.2d 479 (1995). It is a necessary conclusion of *Warner*, and thus binding precedent on this court, that in at least some cases the Washington Constitution is compatible with the inevitable discovery doctrine, though perhaps not to the full extent of the Fourth Amendment to the United States Constitution.

At any rate, the issue is not properly addressable at this time.

Conclusion

I concur in remanding to the trial court in order for that court to find authority of law for probation officers' supervisory investigations at the

residences of offenders who have been released before completing their maximum sentence. Such early release is an option increasingly utilized for most convicted offenders. Supervision is necessary to minimize reoffending and known residence key to such supervision. The public will not understand, and the legislature did not authorize, the game playing by probationers such as appears on these facts.

AUTHOR:
Justice James M. Johnson

WE CONCUR:
Justice Susan Owens

Justice Mary E. Fairhurst