ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION II

CACR 06-727

SEPTEMBER 26, 2007

JOHN OTTO DOWNING, JR. APPELLANT	APPEAL FROM THE RANDOLPH COUNTY CIRCUIT COURT [NO. CR-2005-42]
V.	HONORABLE HAROLD S. ERWIN, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Appellant John Otto Downing, Jr., appeals his conviction for possession of a controlled substance (methamphetamine) following the entry of a conditional guilty plea. Contemporaneously with the guilty plea, appellant reserved in writing the right to appeal the denial of his motion to suppress. Appellant contends that while he agreed to allow warrantless searches of his property as part of an earlier suspended imposition of sentence, the search nonetheless violated his right to be free of unreasonable searches and seizures. We disagree with his argument and affirm.

The events leading to appellant's conditional plea are as follows. Appellant's girlfriend was arrested on an outstanding warrant and was also found to be in possession of methamphetamine. While in jail, she was overheard on the telephone saying to the other person on the line to "get rid of her stuff." This raised suspicion that appellant's house held

drug-related items. Appellant, at that time, was on a suspended imposition of sentence for manufacturing marijuana and possession of drug paraphernalia. A sheriff's deputy reported to appellant's residence with a copy of his suspended-imposition-of-sentence conditions, which permitted a search of his home without a warrant. The specific condition read, "You shall submit your person, place of residence, motor vehicles or other property to search and seizure at any time, day or night, with or without a search warrant, whenever requested by any law enforcement officer." Appellant's house was searched, and a usable amount of methamphetamine was discovered, along with other contraband. After appellant had been charged with these additional criminal offenses, appellant's attorney moved to suppress the fruits of the search, asserting that the written consent he gave was impermissibly broad under constitutional considerations. The trial court disagreed. In a deal negotiated with the prosecutor, he pleaded no contest, resulting in the conditional guilty plea and judgment of conviction we consider now on appeal.

On appeal from the denial of a motion to suppress, we conduct a de novo review based upon the totality of the circumstances, reviewing findings of historical fact for clear error, giving due weight to inferences drawn by the trial court. *Thornton v. State*, 85 Ark. App. 31, 144 S.W.3d 766 (2004). Thus, the trial court's ruling will not be reversed unless it is clearly erroneous. *See id.* The burden is on the State to prove that the warrantless activity was reasonable. *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997). With few exceptions, the question of whether a warrantless search of a home is reasonable and hence constitutional must be answered, "no." *Kyllo v. United States*, 533 U.S. 27 (2001). There is a presumption

of unreasonableness regarding warrantless entry into a home, but it may be overcome if the State obtains consent from the homeowner. *See Carson v. State*, 363 Ark. 158, 211 S.W.3d 527 (2005); Ark. R. Crim. P. 11.1.

Appellant does not contest that he agreed to this provision, such that it is a giving of consent. Such consent-in-advance clauses are not constitutionally infirm as long as the consent agreement meets certain criteria. *Cherry v. State*, 302 Ark. 462, 791 S.W.2d 354 (1990). In order to support a warrantless search, the court reasoned in *Cherry* (1) that consent actually be given, (2) that the search be made in accordance with the agreement, and (3) that the consent have reasonable bounds. It is the third element with which appellant takes issue. Appellant contends that this consent is too broad and does not advance the goals associated with being on a suspended sentence.

Undoubtedly appellant gave written consent to search without a warrant by any officer of the law. Undoubtedly the search of appellant's house was done in accordance with the consent. The question boils down to whether the search exceeds constitutional bounds. We do not believe that it does.

The search, even under the analysis suggested by *Cherry*, falls within constitutional parameters. The Supreme Court reasoned in *United States v. Knights*, 534 U.S.112 (2001), that the reasonableness of a search depends upon the degree to which the search intrudes on individual privacy balanced against the degree to which it is needed for the promotion of legitimate governmental interests. Therein, the Supreme Court upheld the warrantless search of a probationer's apartment when authorized by his conditions and supported by "reasonable

suspicion." *See id.* Appellant concedes that this case does not support his argument on appeal and instead urges our court to adopt an interpretation of the Arkansas Constitution that would provide greater protection. We decline to do so. This search was done by a sheriff's deputy, and it was supported by reasonable suspicion of criminal activity occurring in his home, specifically possession of illegal drugs or associated paraphernalia. Any argument to be made to create a greater protection for those on conditional programs was waived for failure to make it to the trial court. Even had it been made, we see no overriding concern that would lead us to make such a holding, given that appellant's suspension was conditioned on living a law-abiding life.

Before we leave this subject, we note that appellant asserts in his brief that persons on a suspended imposition of sentence are somehow due greater protection than those on probation. This is so, he says, because probationers are required to be supervised whereas persons on suspended imposition of sentence are not. *See Culpepper v. State*, 268 Ark. 263, 595 S.W.2d 220 (1980); Ark. Code Ann. § 5-4-101 (Repl. 2006). Appellant asserts that for this reason public policy would support the need to search probationers and their surroundings. However, appellant gives us no authority to support this rationale. Indeed, in *Young v. State*, 286 Ark. 413, 692 S.W.2d 752 (1985), our supreme court held that a condition of a probation *or suspension* is not necessarily invalid simply because it restricts a person's ability to exercise constitutionally protected rights. A condition of probation *or suspension* may affect the exercise of a constitutional right within certain limits, and those limits include a requirement that it bear a reasonable relationship to the crime and to future criminality. *See*

id. We see no meaningful distinction to be drawn where the court must impose certain law-abiding conditions on both a probationer and a person on suspended imposition of sentence. Ark. Code Ann. § 5-4-303(a) (Repl. 2006).

For the foregoing reasons, we affirm the denial of appellant's motion to suppress.

Affirmed.

PITTMAN, C.J., and GLADWIN, J., agree.