NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

GREGORY PARKER, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D19-2013

Opinion filed December 11, 2020.

Appeal from the Circuit Court for Manatee County; Lon Arend, Judge.

Jacob Grollman of Grollman Law P.A., Bradenton, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Linsey Sims-Bohnenstiehl, Assistant Attorney General, Tampa, for Appellee.

LaROSE, Judge.

Gregory Parker appeals the trial court's order revoking probation and imposing a five-year prison sentence. We have jurisdiction. See Fla. R. App. P. 9.030(b)(1)(A); 9.140(b)(1)(D), (F). Mr. Parker argues that the trial court should have granted his dispositive motion to suppress photographs seized by his probation officer

(PO). The PO obtained the photographs from Mr. Parker's cell phone without a warrant. We affirm.[1]

Background

In September 2017, Mr. Parker pleaded no contest to stalking and installation of a tracking device. See §§ 784.048(2), Fla. Stat. (2016) ("A person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person commits the offense of stalking . . . ."); 934.425(2), Fla. Stat. (2016) ("[A] person may not knowingly install a tracking device or tracking application on another person's property without the other person's consent."). The trial court placed him on two years' probation.

Within two weeks, the State alleged that Mr. Parker violated probation "by contacting the victim . . . numerous times via phone, through text messages, voice messages. He mailed her letters." The State charged him with the new offense of aggravated stalking. See § 784.048(4), Fla. Stat. (2017) ("A person who . . . after any other court-imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person commits the offense of aggravated stalking.").

In December 2018, Mr. Parker pleaded no contest to the new charge. The trial court sentenced him to four years' probation and designated him a violent felony offender of special concern. Among the conditions of Mr. Parker's probation was condition #9 that required Mr. Parker to follow the instructions of his PO and "allow your [PO] to visit in your home." Special condition #12 prohibited contact with the victim for a

[1]We find no merit in the other issues Mr. Parker raises on appeal.

ten-year period. The probationary terms also required Mr. Parker to wear a GPS monitor.

About a month later, in January 2019, the State filed a probation violation affidavit. Allegedly, Mr. Parker violated probation by flying a drone over the victim's condominium complex. The drone photographed the buildings and the victim's assigned parking space. Mr. Parker moved to suppress the photographs, which were retrieved from his cell phone during a search of his residence. He argued that his PO needed a warrant to access his phone. See Riley v. California, 573 U.S. 373, 386 (2014) (holding that law enforcement officers must obtain a warrant to search a cell phone seized from a defendant incident to arrest).

At the suppression hearing, Mr. Parker's PO testified that he instructed Mr. Parker to have no contact with the victim. He explained to Mr. Parker that "no contact" meant "no contact whatsoever, including Snapchat, Instagram, all the latest, greatest ways that people contact each other."

The PO testified that shortly after Mr. Parker began his second stint on probation, the victim reported that Mr. Parker was following her. She also reported that Mr. Parker owned a shotgun, a violation of the terms of his probation. In response to the victim's concerns, the PO reviewed Mr. Parker's GPS tracker. He determined a "pattern" suggesting that Mr. Parker was in the vicinity of the victim's residence. Further, the PO's examination of Mr. Parker's GPS tracker supported the victim's claim that Mr. Parker was following her; the GPS data reflected a travel pattern consistent with the victim's reported travel routine.

The PO, along with several other law enforcement officers, arrived unannounced at Mr. Parker's residence. They conducted a warrantless search of the

home. They discovered no firearm. However, Mr. Parker's unlocked cell phone and a nearby drone were in plain view. Mr. Parker admitted to owning both. The PO scrolled through the phone, discovering several photographs in a folder entitled "Drone Application." These aerial drone photographs showed the area in and around the victim's condominium complex, including the victim's numbered parking spot.

The trial court denied the suppression motion.

Several weeks later, the trial court conducted a revocation hearing. The trial court found that Mr. Parker's flying the drone and photographing the victim's condominium complex violated probation condition #9 and special condition #12. At a subsequent sentencing hearing, the trial court sentenced Mr. Parker to a five-year prison term. See § 775.082(3)(e), Fla. Stat. (2017) (authorizing imposition of "a term of imprisonment not exceeding 5 years" for a third-degree felony conviction).

Analysis

In reviewing the order before us, we defer to "the trial court's factual findings if those findings are supported by competent, substantial evidence, but . . . [we] must review the trial court's ruling of law de novo." State v. M.B.W., 276 So. 3d 501, 505 (Fla. 2d DCA 2019) (quoting State v. Roman, 103 So. 3d 922, 924 (Fla. 2d DCA 2012)).

"[T]he ultimate touchstone of the Fourth Amendment is reasonableness." Brigham City v. Stuart, 547 U.S. 398, 403 (2006). And, "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant." Riley, 573 U.S. at 382 (alterations in original) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995)). "In the absence of a warrant, a search is reasonable only if it falls within a

specific exception to the warrant requirement." Id. (citing Kentucky v. King, 563 U.S. 452, 460–61 (2011)); see M.B.W., 276 So. 3d at 509 ("The five exceptions [to the warrant requirement] are for searches (1) with the occupant's consent, (2) incident to lawful arrest, (3) with probable cause to search but with exigent circumstances, (4) in hot pursuit, or (5) pursuant to a stop and frisk." (quoting Lee v. State, 856 So. 2d 1133, 1136 (Fla. 1st DCA 2003))).

Under the Fourth Amendment, cell phones are unique. See Riley, 573 U.S. at 393–94. Because of the magnitude of personal information stored on such devices, law enforcement officers must obtain a warrant to search a cell phone lawfully seized incident to arrest. Id. ("The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.").

But Riley did not create a categorical rule requiring a warrant before law enforcement officials can search a cell phone. Indeed, a warrant may not always be required as "other case-specific exceptions may still justify a warrantless search of a particular phone." Id. at 401–02.

Unlike the defendant in Riley, Mr. Parker was serving a probationary sentence when the PO searched his cell phone. "[T]he United States Supreme Court has not yet addressed the reasonableness of a suspicionless probationary search absent an express warrantless search probation condition." Harrell v. State, 162 So. 3d 1128, 1130–31 (Fla. 4th DCA 2015). Nor has the Florida Supreme Court. In fact,

neither court has addressed the warrantless search of a probationer's cell phone. Consequently,

> [u]nder the conformity clause of Florida's Constitution, Florida courts are bound by the Fourth Amendment jurisprudence of the United States Supreme Court. Soca v. State, 673 So. 2d 24, 27 (Fla. 1996). "However, when the United States Supreme Court has not previously addressed a particular search and seizure issue which comes before us for review, we will look to our own precedent for guidance." Id. (citations omitted).

State v. Phillips, 266 So. 3d 873, 875 (Fla. 5th DCA 2019), review denied, No. SC19-619, 2019 WL 2265037 (Fla. May 28, 2019). However, we do not write upon a clean slate. The Fifth District addressed an analogous issue in Phillips. We find the Fifth District's evaluation instructive.

In Phillips, the defendant was on probation for a variety of child sex crimes. 266 So. 3d at 874. As in our case, the defendant's probation order "did not include an express authorization to search [defendant]'s cell phone data." Id. The defendant's PO visited his home and conducted a forensic download of his cell phones. Id. The PO had neither a warrant to search the phones, "nor did she have reasonable suspicion to believe [defendant] had violated his probation or otherwise committed any crime." Id. The PO's search uncovered unreported online identifiers that served as the basis for a probation violation. Id. at 874–75. The defendant moved to suppress the evidence, arguing "that the probationary search was unreasonable because he had a high privacy interest in the contents of his cell phones, the express conditions of his probation order did not authorize a search of any cell phone, and the search was not supported by reasonable suspicion." Id. at 875. The trial court granted the motion. Id.

On appeal, the Fifth District observed, as we have above, that neither the United States Supreme Court nor the Florida Supreme Court have spoken to "the reasonableness of a suspicionless probationary search of cell phone data." Id. at 876. The court went on to note that "courts generally employ a balancing test to determine the reasonableness of a warrantless search '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. at 875 (quoting United States v. Knights, 534 U.S. 112, 118–19 (2001)). In evaluating the competing interests, we look to the totality of the circumstances. Id. at 875 n.3. Upon reviewing several relevant cases, the Fifth District concluded that "[t]hese cases together establish that (1) a probationer has a substantially diminished expectation of privacy, and (2) there is a heightened privacy interest in a person's cell phone data." Id. at 876.

In reaching this conclusion, the Fifth District relied, in part, upon Grubbs v. State, 373 So. 2d 905 (Fla. 1979). Phillips, 266 So. 3d at 876. In Grubbs, the court held that a "warrantless search of a probationer's person and residence, for use in probationary proceedings, is reasonable even where there is no express search condition in the order of probation." Id. (citing Grubbs, 373 So. 2d at 907, 909–10). This stems from the unremarkable proposition "that a probationer's protection under the Fourth Amendment is 'qualified.' " Id. at 876 (quoting Grubbs, 373 So. 2d at 907).

On the other hand, Grubbs "reasoned that the government has a significant interest in a probationary search." Id. at 876. A probationer is under the supervision and control of the State, and Florida law "inherently includes the duty of the probation supervisor to properly supervise the individual on probation to ensure compliance with the probation order." Grubbs, 373 So. 2d at 908.

Thus, we know that a probationer has a diminished privacy interest. At the same time, he has a heightened privacy interest in his cell phone. Yet, the State has an interest in supervising the probationer. See Harrell, 162 So. 3d at 1132 (observing that the totality of the circumstances "analysis involv[es] weighing the [S]tate's interest in supervising probationers and protecting the public at large against a probationer's privacy interests" (citing Knights, 534 U.S. at 119–21)). With these interests in mind, the Phillips court engaged in a "balancing analysis" examining the totality of the circumstances, ultimately "conclud[ing] that although a cell phone likely carries with it a greater privacy interest than even one's residence, it does not tip the scales much in [the probationer]'s favor." 266 So. 3d at 878.

Largely, the Fifth District's decision was driven by consideration of the crimes for which the defendant was serving probation. "Where a child predator once searched for victims in person, the internet offers a much more effective, efficient, and dangerous tool for identifying minor victims." Id. The court concluded "that the seriousness of [defendant]'s underlying offenses against a child, combined with the new opportunities to find child victims presented by today's technology, drastically increased the government's interest in conducting a probationary search of [defendant]'s cell phone data." Id.

Like Phillips, our case implicates a probationary search of a cell phone, with the evidence discovered utilized as the basis for the probation violation. As in Phillips, the PO's search of the cell phone was not unrelated to Mr. Parker's underlying offenses. And, unlike Phillips, Mr. Parker's PO certainly had suspicion that Mr. Parker was not abiding by his probationary terms.

Section 948.03 provides a standard condition that the probationer shall "permit the probation officer to visit him or her at his or her home or elsewhere" and "live without violating any law." § 948.03(1)(b), (e), Florida Statutes (2018). Although "section 948.03 does not specifically state as a condition of probation that a probationer must submit to a warrantless search of his or her person, home, or vehicle . . . this section does, however, authorize a probation officer to visit a probationer's home or elsewhere at any time." Brown v. State, 697 So. 2d 928, 929 (Fla. 2d DCA 1997). Mr. Parker's PO testified that he reviewed with Mr. Parker, and had him sign, a form advising that "Probation Officers have the right to search your residence."

Mr. Parker's PO conducted a warrantless search of Mr. Parker's residence, not only after the victim had reported that Mr. Parker possessed a firearm and that he was following her, but after reviewing Mr. Parker's GPS movements, which confirmed a travel pattern consistent with the victim's fears. These circumstances created a reasonable suspicion that Mr. Parker was in violation of the no contact provision, as well as the prohibition on his possession of a firearm. Cf. Phillips, 266 So. 3d 877 ("We start our analysis from the premise that our supreme court has already decided that the search of a probationer's residence, even without an express search condition or individual suspicion, is reasonable where the results of the search are only used in probation proceedings." (citing Grubbs, 373 So. 2d at 907, 909–10)).

After law enforcement officers' search of Mr. Parker's residence revealed no firearm, the PO turned his attention to the drone and the phone. Unlike Phillips, there was no forensic analysis of cell phone data. Rather, the PO looked at the phone logs, photographs, and the drone application. This search was far less invasive than that conducted in Phillips. Moreover, as in Phillips, we, too, must examine the nature of

Mr. Parker's behavior leading up to the PO's search of his phone. As the State points out, in deciding to search the phone "the [PO] would also have been aware [Mr.] Parker would use technology to stalk because two GPS tracking devices had previously been found on the victim's vehicle." With past as prologue, it was certainly reasonable for the PO to conduct a warrantless search of Mr. Parker's phone; technology was a tool for Mr. Parker to stalk the victim. Undoubtedly, after observing the drone in plain view, and given Mr. Parker's history of using various technology to surveil the victim, the State's interest in searching Mr. Parker's cell phone was outweighed by any privacy interest he had in the phone.

Conclusion

The warrantless search of Mr. Parker's cell phone was reasonable and consistent with the protections against "unreasonable searches and seizures." Amend. IV, U.S. Const.; Art. I, § 12, Fla. Const. ("The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated."). The trial court properly denied Mr. Parker's motion to suppress.

Affirmed.

NORTHCUTT and SMITH, JJ., Concur.