

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JOHNNY THOMPSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D21-3734

July 15, 2022

Appeal from the Circuit Court for Hillsborough County; Mark D. Kiser, Judge.

Howard L. Dimmig, II, Public Defender, and Cynthia J. Dodge, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Blain A. Goff, Assistant Attorney General, Tampa, for Appellee.

CASANUEVA, Judge.

In this appeal, Johnny Thompson seeks reversal of the trial court's denial of his motion to strike a condition of community control and probation. We have jurisdiction. See art. V, § 4(b)(1),

Fla. Const. We agree with the State's concession of error and reverse.

Thompson pleaded guilty to burglary of an unoccupied structure, criminal mischief, and grand theft. On each count he was sentenced to concurrent terms of two years of community control followed by three years of probation.¹ During the change of plea and sentencing hearing, the trial court denied Thompson's *ore tenus* motion to strike the special condition of community control and probation requiring him to "consent to random warrantless searches by law enforcement officers and the community control/probation officer." This was error.

In *Grubbs v. State*, 373 So. 2d 905, 906 (Fla. 1979), the Florida Supreme Court addressed a certified question concerning the constitutionality of a condition of probation requiring a petitioner to consent to a search at any time by any law enforcement officer. The supreme court held that while a warrantless search by a probation officer is allowed, such general authority does not extend to all law enforcement officers. *Id.* at

¹ He also pleaded guilty to resisting an officer without violence. However, he was sentenced to time served for that offense.

909. As a result, the court in *Grubbs* held that a condition of probation requiring a defendant to consent to a warrantless search by a law enforcement officer other than a probation officer violated article I, section 12, of the Florida Constitution. *Id.* at 910.

In *Bamberg v. State*, 953 So. 2d 649, 650 (Fla. 2d DCA 2007), a defendant appealed an order revoking his probation. This court held that *Grubbs* had been partially superseded by *United States v. Knights*, 534 U.S. 112 (2001). *Bamberg*, 953 So. 2d at 654 n.4. ("If law enforcement officers lack a reasonable suspicion to search, then *Knights* is inapplicable. In that instance, *Knights* would not conflict with *Grubbs*.").

In *Knights*, a condition of the defendant's probation required him to submit to warrantless searches by any law enforcement officer. *Knights*, 534 U.S. at 114. The United States Supreme Court held that in such a circumstance, a law enforcement officer other than a probation officer could conduct a warrantless search provided the officer has a reasonable suspicion that a defendant was engaged in criminal activity. *Id.* at 121-22.

Thus, even where consent to warrantless searches is a condition of community control or probation, a community control

or probation officer or supervisor does not need a reasonable suspicion to conduct a warrantless search. However, any other law enforcement officer can only conduct a warrantless search if the officer has a reasonable suspicion that the defendant on community control or probation is engaged in criminal activity. *See Bamberg*, 953 So. 2d at 653–54, 654 n.4.

This court has only addressed this question after a violation of community control or probation has been alleged. *See id.* at 650; *Hanania v. State*, 264 So. 3d 317 (Fla. 2d DCA 2019). But in this case, as in *Grubbs*, Thompson is challenging a trial court's ability to impose the condition of community control and probation during sentencing.

The Fourth District recently addressed a similar issue. *See Bowman v. State*, 335 So. 3d 135 (Fla. 4th DCA 2022). The Fourth District, relying in part on this court's analyses in *Bamberg* and *Hanania*, held that because only a probation officer could conduct a warrantless search of a defendant on probation without reasonable suspicion, the trial court was required to strike a condition of probation that required a defendant to "submit to a random,

warrantless search, without reasonable suspicion, by law enforcement officers other than his probation officer." *Id.* at 138.

In its concession of error, the State concedes that this court should adopt the reasoning of *Bowman* and reverse the trial court's denial. We agree. Consistent with *Bowman* and our prior decisions in *Bamberg* and *Hanania*, we reverse the trial court's order and remand with directions to strike "law enforcement officers and" from the special condition of community control and probation that reads: "You will consent to random warrantless searches by law enforcement officers and the community control/probation officer."

Reversed and remanded.

KELLY and ROTHSTEIN-YOUAKIM, JJ., Concur.

Opinion subject to revision prior to official publication.