

Judge Moore's Dissent, filed June 28, 2019,
to follow opinion rendered June 26, 2019.

No. 52,667-KW
No. 52,668-KW
(Consolidated Cases)

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

No. 52,667-KW

STATE OF LOUISIANA
Respondent

versus

DARICK DEON CARTER
Applicant

No. 52,668-KW

STATE OF LOUISIANA
Respondent

versus

KARSHALONA GRIFFIN
Applicant

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On Application for Writs from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court Nos. 355,189 and 355,262

Honorable Erin Leigh Waddell Garrett, Judge

* * * * *

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* * * * *

Before WILLIAMS, MOORE, and STEPHENS, JJ.

MOORE, J., dissents and will assign reasons.

MOORE, J., *dissenting.*

I respectfully disagree with the majority's conclusion that Darick Carter's consent to let probation officers enter his house to look for Hermena Wagner was "tainted" because, as a probationer, he felt compelled to consent to their request even when his assigned probation officer was not present. The Probation & Parole ("P&P") officers involved in the search testified that they went to Carter's house to execute a probation violation warrant for Ms. Wagner, who they reasonably believed might staying there. Before going to Carter's house, the officers first went to Ms. Wagner's listed address to arrest her; this address was the home of Mary Carter, Darick Carter's mother. Ms. Carter told them that Ms. Wagner might be at her son's house. Accordingly, they got that address and proceeded to Darick Carter's house to look for Ms. Wagner.

The day before his attempt to execute this warrant, Ms. Wagner's supervising probation officer, Damian McDowell, discussed the case with Ofc. Sharie Cone and the plan to go to Ms. Wagner's listed address. Ofc. Cone told Ofc. McDowell that she had participated in a prior investigation at that house and learned that Ms. Wagner stayed with or dated one of Mary Carter's sons. Ofc. McDowell realized that while executing the warrant for Ms. Wagner he might encounter Darick Carter. He knew that Carter was also on probation and supervised by his fellow officer, Amanda Spivey, who is in the same office. Ofc. Spivey was temporarily restricted to office duty after back surgery and prohibited from doing field work for 3 or 4 weeks, so Ofc. McDowell informed her that he may encounter Carter while executing

the warrant on Ms. Wagner. He asked Ofc. Spivey if she needed him to do a drug test on Carter; Spivey told him yes.¹

The six P&P officers convened at Darick Carter's house. They testified it is customary to have 6 to 8 officers present because of the risk of flight by the probation violator. Officers H.B. Shaver and McDowell went to the front door of the house and knocked while the other officers held back, some nearby and some farther away near the garage. Ofcs. Shaver and McDowell testified that they identified themselves as P&P officers and stated their purpose for being there. Ofc. McDowell testified that he told Carter that he had a warrant for Ms. Wagner and asked if they could come in and look to see if she was there; Carter said she wasn't there. Ofc. McDowell testified, "He [Carter] said he didn't mind if we look around." Ofc. McDowell said they stepped inside and asked who else was in the house; Carter told him his wife and kids were. Ofc. McDowell also told Carter that his supervising agent, Spivey, requested him to give a drug test (urine sample).

P&P Officers Cone and Kerr followed Shaver and McDowell into the house also. Ofc. Kerr testified that he remained in the front room to make sure there were no weapons, while Ofc. Cone went to the master en suite bedroom to get Ms. Griffin (Carter's wife) and the kids and bring them to the front room. Ofc. Cone testified that Ms. Griffin seemed anxious while she was getting dressed, so she asked her "if there was anything in the room that was going to be a violation of his [Carter's] supervision or of the law."

¹ Even if Ofc. Spivey had not been on restricted duty, Ofc. McDowell or some other male officer would have had to perform the urine test for drug use. Departmental policy required male officers to test male probationers and parolees, and female officers to female ones.

She said Ms. Griffin replied, “[W]ell, I have two guns in the safe,” which was located in the en suite bathroom. Ofc. Cone let her finish dressing, sat her down, and contacted Ofc. Shaver regarding the guns.

Meanwhile, in the front room, Ofc. McDowell was trying to get a urine sample from Carter, who said he could not give one. Once the officers were informed of the presence of weapons, they began a search of the house. They recovered the two handguns from the unlocked safe, an assault rifle behind the safe, a shotgun elsewhere, \$20,000 in cash, over a pound of marijuana, and a sales ledger.

The prohibition against warrantless searches does not apply to a search that is conducted pursuant to consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). To be valid, consent must be (1) free and voluntary, in circumstances that indicate the consent was not the product of coercion, threat, promise, pressure or duress that would negate the voluntariness; and (2) given by someone with apparent authority to grant consent, such that the police officer reasonably believes the person has the authority to grant consent to search. *State v. Howard*, 15-1404 (La. 5/3/17), 226 So. 3d 419, *State v. Boyette*, 52,411 (La. App. 2 Cir. 1/16/19), 264 So. 3d 625.

In this instance, the majority concludes that because Carter was a probationer, and thus subject to warrantless searches by his assigned probation officer, he felt that he must submit to the warrantless home search, especially given the fact that Ofc. McDowell told him that he needed a urine sample for a drug test requested by his assigned probation officer, Sharie Spivey. An individual on probation does not have the same freedom from governmental intrusion into his affairs as does the ordinary citizen. *United*

States v. Knights, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001); *State v. Malone*, 403 So. 2d 1234 (La. 1981); *State v. Haley*, 51,256 (La. App. 2 Cir. 5/24/17), 222 So. 3d 153, *writ denied*, 17-1230 (La. 4/27/18), 241 So. 3d 305. That reduced expectation of privacy evolves from a probationer's conviction and agreement to allow a probation officer to investigate his activities in order to confirm compliance with the provisions of his probation. *State v. Drane*, 36,230 (La. App. 2 Cir. 9/18/02), 828 So. 2d 107, *writ denied*, 02-2619 (La. 3/28/03), 840 So. 2d 566. This is to further the purposes of probation, rehabilitation of the convicted individual and protection of society, and is a standard condition of probation that the probationer allow the probation officer to visit his home at the option of the officer. La. C. Cr. P. art. 895 A(4); *State v. Malone*, *supra*; *State v. Vailes*, 564 So. 2d 778 (La. App. 2 Cir. 1990).

There was no testimony at the hearing, however, that supports the position that Carter felt compelled, because of his probation status, to give his consent to the officers to search for Ms. Wagner in his house. Although Ofc. McDowell stated that he requested a urine sample for a drug test several times, Carter never gave him one. All the officers testified that the primary reason for going to Carter's house was to locate Ms. Wagner, and that was why they asked to look for her there. They had no information that Carter was in possession of firearms and marijuana. Ofc. McDowell offered to obtain a drug test from Carter if he encountered him while executing the warrant on Ms. Wagner.

The P&P officers were lawfully in the defendants' house because they obtained Carter's consent to look around the house for Ms. Wagner. The officers had no information that Carter had any probation violations and

their intent was not to conduct a search for such. However, while they were looking for Ms. Wagner and performing a protective sweep, Griffin told Ofc. Cone that there were two guns in the safe in a closet. Owning or possessing a firearm would be a violation of Carter's probation, as it would be for any convicted felon. La. C. Cr. P. art. 895 A(6). With this information, the officers had probable cause to believe that a crime had been committed and the parameters of the consent search were now expanded beyond the search for Ms. Wagner to a search for weapons in the house. Also, the search for the weapons was justified for safety reasons.

Trial courts are vested with great discretion when ruling on a motion to suppress, and trial court's ruling on the motion will not be disturbed absent an abuse of that discretion. *State v. Coleman*, 14-0402 (La. 2/26/16), 188 So. 3d 174, *cert. denied*, 137 S. Ct. 153, 196 L. Ed. 2d 116 (2016); *State v. Farris*, 51,094 (La. App. 2 Cir. 12/14/16), 210 So. 3d 877, *writ denied*, 17-0070 (La. 10/9/17), 227 So. 3d 828.

In this instance, the trial court did not abuse its discretion in denying the defendants' motions to suppress. Therefore, I respectfully dissent.