SJC-12879

COMMONWEALTH vs. ERVIN FELIZ.

Suffolk. September 11, 2020. - December 23, 2020.

Present: Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.[1]

Obscenity, Child pornography. Sex Offender. Practice, Criminal, Probation. Constitutional Law, Sex offender, Search and seizure. Search and Seizure, Probationer, Expectation of privacy. Moot Question.

Indictments found and returned in the Superior Court Department on March 3, 2015.

A motion for relief from a condition of probation, filed on June 18, 2018, was heard by William F. Sullivan, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Patrick Levin, Committee for Public Counsel Services, for the defendant.

Cailin M. Campbell, Assistant District Attorney, for the Commonwealth.

Sarah M. Joss, for Massachusetts Probation Service, amicus curiae, submitted a brief.

[1] Justice Lenk participated in the deliberation on this case and authored this opinion prior to her retirement.

LENK, J. The defendant pleaded guilty to multiple counts of possession and dissemination of child pornography. He was sentenced to concurrent terms of incarceration, suspended subject to compliance with special conditions of probation, for five years. One condition, challenged here, required the defendant to allow the probation department to conduct random, suspicionless searches of his electronic devices and other locations where child pornography might be stored. The defendant maintains that this condition authorizes unreasonable searches in violation of art. 14 of the Massachusetts Declaration of Rights. On its face, we agree that the condition subjected the defendant to the continuing possibility of unreasonable searches throughout the term of his probation, and is too broad. Properly limited, however, in these particular circumstances, imposition of the condition did not violate the defendant's rights under art. 14.

1. Background. a. Underlying offenses. In 2014, investigators were alerted to social media posts involving suspected child pornography. The investigators traced the posts to a single Internet protocol (IP) address that was associated with the defendant's apartment. After executing a search warrant for the apartment, officers uncovered dozens of images and video recordings of child pornography from a computer and a

"micro SD" memory card belonging to the defendant.[2] The defendant admitted that he had been in possession of child pornography. He told police that he would meet people with similar interests on chat websites, and would exchange child pornography with them through an online chat service.

In March 2015, the defendant was indicted on two counts of possession of child pornography, G. L. c. 272, § 29C, and five counts of dissemination of child pornography, G. L. c. 272, § 29B (a). He pleaded guilty on all counts. In April 2016, a Superior Court judge sentenced him to two concurrent terms of two and one-half years' incarceration in a house of correction, suspended for five years, and an aggregate period of five years' probation.

The sentencing judge also imposed twelve special conditions of probation. Condition no. eight required the defendant to

> "allow the Department of Probation to inspect and to search, at random and without announcement, any computer, electronic device, digital media, videotape, photographs or other item capable of storing photographs, images, or depictions, for the purpose of monitoring compliance with [his] conditions of probation."

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[2] A "micro SD" memory card can be inserted into small electronic devices, such as cellular telephones, laptop computers, or digital cameras. See Commonwealth v. Fernandez, 485 Mass. 172, 181, petition for cert. filed, U.S. Supreme Ct., No. 20-6343 (Nov. 16, 2020) (officer removed memory card from camera and inserted it into laptop computer); Commonwealth v. Tarjick, 87 Mass. App. Ct. 374, 378 (2015) (data may be freely transferred from one device to another through memory card).

Condition no. ten ordered the defendant to submit to global positioning system (GPS) monitoring, as required by G. L. c. 265, § 47.[3] The defendant unsuccessfully objected to condition nos. eight and ten when they were imposed.

b. Prior proceedings. On the day that he was sentenced, the defendant filed a motion for relief from condition no. ten; he argued, among other claims, that the statutorily mandated GPS monitoring requirement was unconstitutional under art. 14. See Commonwealth v. Feliz, 481 Mass. 689, 692 (2019) (Feliz I). A Superior Court judge denied the motion, the defendant appealed, and his petition for direct appellate review thereafter was allowed by this court. See id. at 693. We held that statutorily imposed GPS monitoring was unconstitutional as applied to the defendant, that imposition of GPS monitoring on any defendant required an individualized hearing, and that statutorily mandated GPS monitoring as a condition of probation "will not necessarily constitute a reasonable search for all

[3] Condition no. nine prohibited the defendant from using the Internet, or having any computer or device connected to the Internet, unless he was required to do so for an official job function. Other conditions prohibited the defendant from having unsupervised contact with any child under the age of sixteen; loitering near a school, library, park, or other location where children regularly congregate; and violating any local, State, and Federal laws. The terms of probation stated that if the defendant were fully compliant with all of his terms of probation for two years, he could seek relief from condition no. nine.

individuals convicted of a qualifying sex offense." Id. at 690-691.

In June 2018, the defendant filed a second motion for relief from condition no. eight.[4] He argued that condition no. eight allowed unconstitutional searches under art. 14 because "a search of a probationer must be based upon reasonable suspicion." See Commonwealth v. LaFrance, 402 Mass. 789, 790 (1988); Commonwealth v. Waller, 90 Mass. App. Ct. 295, 304 (2016). After a hearing in July 2018, a Superior Court judge, who was not the sentencing judge, denied the motion. The judge stated that, "[u]nlike the probation conditions in LaFrance and Waller, the condition in the present case does not permit a search of the defendant's premises," and that "[t]he sentencing judge . . . specifically limited a search to devices and not a general search of the defendant's home." The judge did not explain his reasoning in interpreting the condition so narrowly, given its broad wording. Recognizing that condition no. eight constituted a search under art. 14, the judge concluded that the

[4] In the same motion, the defendant also sought relief from condition no. nine, which prohibited his use of the Internet anywhere except as a job requirement while at work. When condition no. nine was imposed, the sentencing judge had indicated that the defendant could seek relief from the condition after two years of compliance with all terms of probation, and that, after four years, if he had been fully compliant with all of the terms of his probation, he could seek early termination.

condition "is reasonably related to the goals of probation and is tailored to specific characteristics of the defendant [and] his offenses,"[5] and therefore denied the motion.

In May 2020, the defendant successfully moved for early termination of his probation, as permitted under the original order of probation.

2. Discussion. a. Mootness. Because the defendant's only request for relief in this appeal is the vacatur of a condition of probation, and his probation has been terminated, his appeal is moot. Nonetheless, we have discretion to review a case notwithstanding its mootness where the issue is of public importance and is capable of repetition yet evading review. See Commonwealth v. McCulloch, 450 Mass. 483, 486 (2008); Matter of Sturtz, 410 Mass. 58, 59-60 (1991), and cases cited.

Although "we are particularly reluctant to answer constitutional questions which have become moot," Matter of Sturtz, 410 Mass. at 60, the issue here warrants resolution.

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[5] The judge observed further that there was no indication in the record that early relief from condition no. nine had been mandatory at the time of sentencing, and that the language of the condition simply provided that the defendant could seek such relief. The judge noted as well that the request for relief from condition no. nine demonstrated the importance of condition no. eight to ensure that the defendant was complying with the terms of his probation.

In 2019, the defendant renewed his motion for relief from condition no. nine. At that point, the Commonwealth did not oppose the motion, and it was allowed by the sentencing judge.

There is apparent confusion among probation officers and district attorneys' offices regarding the validity of search-related conditions of probation. Indeed, following the Appeals Court's decision in Waller, 90 Mass. App. Ct. at 304, which held that "any standard below . . . reasonable suspicion" would not allow a search of a probationer and the probationer's premises, the probation department directed its officers not to enforce conditions that allowed random, suspicionless searches of probationers, and to seek reevaluation of those conditions in court (citation omitted).[6] Given the broad importance of the issue and the apparent uncertainty among prosecutors and courts, we exercise our discretion to decide the case.

b. Search-related conditions of probation. We review de novo the motion judge's conclusion that, as a matter of law, condition no. eight "is reasonably related to the goals of probation and is tailored to specific characteristics of the defendant [and] his offenses." See Commonwealth v. Edwards, 444

[6] While district attorneys in two districts apparently have taken the position that random search conditions in sex offender cases are unconstitutional, the district attorney in another has not. Moreover, the Appeals Court recently determined that a random, suspicionless search, pursuant to a probation condition virtually identical to condition no. eight, and imposed on a probationer whose offenses were similar to the defendant's, was permissible. See Commonwealth v. Shipps, 97 Mass. App. Ct. 32, 34, 44 (2020).

Mass. 526, 532 (2005). See also Commonwealth v. McGhee, 472 Mass. 405, 412 (2015).

Article 14 guarantees the right to be free from unreasonable searches. See Commonwealth v. Norman, 484 Mass. 330, 335-336 (2020); Commonwealth v. Rodriguez, 472 Mass. 767, 775 (2015) ("ultimate touchstone" of art. 14 is reasonableness [citation omitted]). Nonetheless, "[a]s a probationer, the defendant lawfully may be subjected to reasonable restraints on 'freedoms enjoyed by law-abiding citizens.'" Feliz I, 481 Mass. at 700, quoting United States v. Knights, 534 U.S. 112, 119 (2001). See Commonwealth v. Pike, 428 Mass. 393, 402 (1998). "The defendant's status as a probationer informs our assessment of both 'the degree to which [a search] intrudes upon an individual's privacy' and 'the degree to which it is needed for the promotion of legitimate governmental interests.'" Feliz I, supra, quoting Knights, supra. "A probation condition is not necessarily invalid simply because it affects a probationer's ability to exercise constitutionally protected rights" (citation omitted). Pike, supra at 403. Where a condition of probation "infringes on constitutional rights," however, it must "be 'reasonably related' to the goals of sentencing and probation" (citation omitted). Id. See, e.g., Commonwealth v. Eldred, 480 Mass. 90, 96 (2018); Commonwealth v. Guzman, 469 Mass. 492, 497

(2014); Commonwealth v. Power, 420 Mass. 410, 417 (1995), cert. denied, 516 U.S. 1042 (1996).

In examining the reasonableness of a condition of probation that authorizes suspicionless searches without probable cause or reasonable suspicion, courts weigh the government's need for the search and the degree of invasion of the reasonable expectations of privacy that the search entails. See Landry v. Attorney Gen., 429 Mass. 336, 348 (1999), cert. denied, 528 U.S. 1073 (2000). "There is no ready test for reasonableness except by balancing the need to search or seize against the invasion that the search or seizure entails." Commonwealth v. Catanzaro, 441 Mass. 46, 56 (2004), citing Landry, supra, and Commonwealth v. Shields, 402 Mass. 162, 164 (1988).

Some conditions, such as those that authorize blanket suspicionless searches of a probationer's home, are so invasive that they are not permissible under art. 14. See, e.g., LaFrance, 402 Mass. at 794-795. Others, such as random drug screens, authorize only minimally invasive searches and are constitutional despite permitting suspicionless searches. See, e.g., Eldred, 480 Mass. at 96. Where a condition of probation involves "more than [a] minimally invasive" search, a sentencing judge must conduct an individualized assessment and determine whether the Commonwealth's "particularized reason" for the

search outweighs its "degree of invasiveness" (citations omitted). Feliz I, 481 Mass. at 699-700, 705.

Here, given the defendant's use of electronic devices to download and share child pornography over the Internet, we conclude that condition no. eight is reasonably related to the Commonwealth's probationary goals. See Eldred, 480 Mass. at 96.

c. Condition no. eight. The admittedly very broad language of condition no. eight requires the defendant to "allow the Department of Probation to inspect and to search, at random and without announcement, any computer, electronic device, digital media, videotape, photographs or other item capable of storing photographs, images, or depictions, for the purpose of monitoring compliance with [his] conditions of probation."[7] We begin by focusing only on suspicionless searches of the defendant's electronic devices for the presence of child pornography.[8]

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[7] With one exception, the language of condition no. eight is precisely as requested by the Commonwealth during the defendant's pretrial release. The sentencing judge did not impose the final requested provision, that the defendant allow a police officer to assist probation in searching his computers.

[8] In describing condition no. eight, the motion judge stated that it "requires the defendant to allow the probation department to search any electronic device," and did not discuss any of its broader terms. At argument before us, the Commonwealth maintained this narrow focus, and indicated that it was not arguing that condition no. eight would permit probation officers to search the defendant's home or person for child

i. Degree of invasiveness. Electronic devices are the repositories of a "vast store of sensitive information" that can provide "an intimate window into a person's life." Carpenter v. United States, 138 S. Ct. 2206, 2214, 2217 (2018). For many people, electronic devices contain the "privacies of life" (citation omitted). Riley v. California, 573 U.S. 373, 403 (2014). "Indeed, a cell phone search . . . typically [would] expose to the government far more than the most exhaustive search of a house . . . ." Id. at 396. Even a device that contains a singular type of data, such as a digital camera that stores only photographs, can reveal "intimate details of an individual's life." See Commonwealth v. Mauricio, 477 Mass. 588, 593 (2017). Accordingly, an individual has a compelling privacy interest in the contents of his or her electronic devices. See Commonwealth v. Fulgiam, 477 Mass. 20, 32-33, cert. denied, 138 S. Ct. 330 (2017) (text messages implicate strong privacy interests). See, e.g., United States v. Wurie, 728 F.3d 1, 11 (1st Cir. 2013), aff'd sub nom. Riley v. California, 573 U.S. 373 (2014) (noting "significant privacy implications inherent in cell phone data searches"); United States v. Warshak, 631 F.3d 266, 286 (6th Cir. 2010) (electronic mail messages implicate strong privacy interests).

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pornography. Rather, its explicitly stated concern was with computers and electronic devices.

The location-specific information that a device such as a cellular telephone can provide also has significant privacy implications. That such devices have become almost a "feature of human anatomy" makes their protection from government intrusion all the more important. See Riley, 573 U.S. at 385. As the use of electronic devices becomes increasingly "indispensable to participation in modern society," Carpenter, 138 S. Ct. at 2220, an individual's "realm of guaranteed privacy" must be preserved (citation omitted), see Commonwealth v. Almonor, 482 Mass. 35, 41 (2019).

Here, the judge reasoned that "[t]he condition allowing searches of the defendant's electronic devices is more closely analogous to a condition of random drug and alcohol tests than it is to a search of the defendant's home." We disagree. A search of an individual's electronic device is far more akin to the search of a home than to a random drug test.

ii. Commonwealth's interests. While the defendant's privacy interests are heavily implicated by condition no. eight, the Commonwealth also maintains a powerful interest in furthering its probationary goals by means of that condition. Preventing "sexual exploitation and abuse of children constitutes a government objective of surpassing importance." Feliz I, 481 Mass. at 702, quoting New York v. Ferber, 458 U.S. 747, 757 (1982). Child pornography is a "permanent record of

the depicted child's abuse, and the harm to the child is exacerbated by [its] circulation" (quotations omitted). Paroline v. United States, 572 U.S. 434, 440 (2014), quoting Ferber, supra at 759. "The reproduction and dissemination of child pornography itself harms the children who are depicted and revictimized with each viewing." Feliz I, supra at 703. At the same time, the Commonwealth also "has a 'vital interest in rehabilitating convicted sex offenders,' . . . in part because rehabilitation protects the public, by reducing the possibility of future offenses" (citation omitted). Id. at 702.

The Commonwealth's interest is particularly strong where, as here, the offenses involve many vulnerable victims, and a defendant who seeks out online communities from which to obtain and share child pornography during chat sessions. "Because child pornography is now traded with ease on the Internet, 'the number of still images and videos memorializing the sexual assault and other sexual exploitation of children, many very young in age, has grown exponentially.'" Paroline, 572 U.S. at 440, quoting United States Sentencing Commission, Federal Child Pornography Offenses 3 (2012). The ability to store these images on memory cards that can be inserted into multiple different electronic devices, many of them mobile, enhances the Commonwealth's concerns. This capability affords numerous means and settings in which child pornography can be shared, and

potentially reduces the effectiveness of police tactics such as monitoring specific websites or IP addresses.

iii. Assessing the balance. The Commonwealth's interest in prevention is especially compelling with respect to a defendant who, as here, explained to police that he used chat sites to seek out like-minded people on the Internet in order to obtain and share child pornography, and who had numerous such images, far more than those which underlay the indictments, both on stationary devices at his home and on a mobile card that could be inserted into a cellular telephone. The Commonwealth accordingly had a particularly cogent need for a condition of probation that would permit monitoring of the defendant's electronic devices for the presence of child pornography. See Commonwealth v. Shipps, 97 Mass. App. Ct. 32, 44 (2020) ("it [is] difficult to imagine how the probation department could effectively monitor the defendant's adherence to the condition that he not possess child pornography on his cell phone, absent a condition permitting [an] unannounced, targeted search").

More generally, the goals of probation -- rehabilitation and protection of the public -- "are best served if the conditions of probation are tailored to address the particular characteristics of the defendant and the crime." Commonwealth v. Rousseau, 465 Mass. 372, 390 (2013), quoting Pike, 428 Mass. at 403. Where a condition of probation involves suspicionless

searches of the instrumentalities of a defendant's offenses, the Commonwealth's interest in prevention and rehabilitation may be particularly strong. See Rousseau, supra (condition of probation prohibiting defendants' use of computers, limited to permit work on their legal cases, was reasonably related to goals of preventing "attention-seeking behavior" of using computers "to enhance the image of themselves or their past acts of arson," given evidence at trial that defendants "actively sought to publicize their criminal acts"). See, e.g., Commonwealth v. Lapointe, 435 Mass. 455, 460-461 (2001) (condition of probation prohibiting defendant who had been convicted of sexual abuse of his daughter from living in family home, where crimes had occurred and where defendant had molested other family members, was reasonably related to reducing risk of recidivism and also to helping rehabilitate defendant, and struck "an appropriate balance between the facts of the case and the goals of sentencing and probation"); Commonwealth v. Veronneau, 90 Mass. App. Ct. 477, 478, 481-482 (2016) (upholding condition of probation that defendant "surrender his firearms during the term of his probation," where "given the nature of the offense [(carrying loaded firearm while under influence of alcohol)], the condition was reasonable and appropriate"). Compare Commonwealth v. Gomes, 73 Mass. App. Ct. 857, 859-860 (2009) (striking condition of probation requiring random drug

and alcohol testing where record did not demonstrate connection between drugs or alcohol and offense or offender).

Undoubtedly, even a narrow search of the photograph files on one of the defendant's electronic devices would be far more than minimally invasive, thus ordinarily requiring reasonable suspicion and a warrant to search. Given the defendant's history, however, his limited expectation of privacy in his devices, while substantial, must give way to the Commonwealth's overriding interest in protecting virtually limitless numbers of vulnerable children. In the circumstances here, where the condition involves the type of instruments that the defendant used to commit his offenses, and that played a crucial role in allowing revictimization of the children depicted in the images by countless others, the Commonwealth's need for a probation condition authorizing searches of the defendant's electronic devices for child pornography outweighs the defendant's privacy interests in the devices. Accordingly, condition no. eight, with limitations, is constitutional as applied to the defendant.

d. Limitations on condition no. eight. We turn to consider two issues with respect to the plain language of condition no. eight, beyond the condition's authorization of searches of the defendant's electronic devices for child pornography.

First, we note that, by its terms, condition no. eight encompasses not only searches of the defendant's electronic devices, but also searches of his "digital media, videotape, photographs or other item[s] capable of storing photographs, images, or depictions." This language appears to permit dragnet searches of the defendant's home, at any time, without reasonable suspicion, to uncover possible physical photographs or videotapes, as well as to search his home for the existence of any electronic devices. Such indiscriminate rummaging through a defendant's home is precisely the kind of "blanket threat of warrantless searches" that art. 14 prohibits. See Commonwealth v. Obi, 475 Mass. 541, 548 (2016). "[T]the drafters of the Fourth Amendment [to the United States Constitution] and art. 14 undoubtedly were concerned with the physical integrity of persons, homes, papers, and effects for their own sake, [but] they also sought to preserve the people's security to forge the private connections and freely exchange the ideas that form the bedrock of a civil society." Commonwealth v. Mora, 485 Mass. 360, 371 (2020). Accordingly, "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." Kyllo v. United States, 533 U.S. 27, 31 (2001). A probationer's existing, albeit limited, expectation of privacy means little if he or she loses the ability "to retreat into his

[or her] home and there be free from government intrusion." Silverman v. United States, 365 U.S. 505, 511 (1961).

Therefore, condition no. eight cannot be read to permit suspicionless searches of the defendant's home. Compare Commonwealth v. Henry, 475 Mass. 117, 123 (2016) (probation officer may search probationer's home by obtaining warrant supported by reasonable suspicion instead of probable cause), with LaFrance, 402 Mass. at 792-793 (suspicionless searches of probationer's person and home, permitted by terms of probation, were invalid under art. 14, and reasonable suspicion was required to justify search of probationer and her premises), and Waller, 90 Mass. App. Ct. at 305 (condition of probation authorizing suspicionless searches of probationer's home ordered modified to require reasonable suspicion).

A second concern with condition no. eight is that, by its terms, it authorizes a probation officer to search the defendant's "digital media . . . for the purpose of monitoring compliance with these conditions of probation." As the defendant points out, his conditions of probation also include, inter alia, not having contact with individuals under the age of sixteen; not loitering within three hundred feet of a school, library, or park; that he continue to pursue mental health counselling; and that he obey all laws. Applied broadly, as the plain language appears to permit, this provision could allow

searches of any document, text message, electronic mail message, image, or file on the defendant's computers, tablets, or cellular telephones, in an effort to determine whether the defendant, for example, had attended scheduled meetings with his counsellor, to read his notes to his therapist and details about his medical condition, or to search for evidence of the defendant having violated any statute or ordinance.

Moreover, in invalidating GPS monitoring (and location tracking) in Feliz I, 481 Mass. at 705-706, as applied to this defendant, we noted that the Commonwealth had not demonstrated the need to monitor his physical location, in part because his crimes took place over the Internet. A suspicionless search of the defendant's electronic devices pursuant to condition no. eight, to determine the defendant's prior locations and whether he stayed out of excluded zones such as parks, would be equally impermissible.[9]

[9] One of the difficult issues raised in this case is how to implement a rule that authorizes the search of a probationer's electronic devices, including his or her cellular telephones, without granting the government blanket permission to search the probationer's home or person. The record here provides no answers, and any such condition necessarily would be fact-specific to an individual probationer's circumstances. It might be possible, for example, to use technology to monitor a probationer's use of the Internet without physical access to the electronic device. It also might be possible effectively to monitor a probationer's cellular telephone use by other means short of entering the probationer's home. A judge considering imposing a condition requiring some form of monitoring of a

Thus, to ensure that condition no. eight does not violate art. 14, it must be understood to allow only searches of the defendant's electronic devices for child pornography, not his home or person, and not for other subjects. See, e.g., Shipps, 97 Mass. App. Ct. at 33, 43-44 (search of probationer's electronic devices pursuant to probation condition was permissible when probation officer limited search to opening photograph application on probationer's cellular telephone, and ended search immediately after recognizing child pornography).[10]

Finally, we note that were a probation officer to have conducted searches of the defendant's electronic devices in a frequency or manner inconsistent with the specific probationary goals discussed supra, the defendant could have challenged those specific searches as unconstitutional under art. 14. See, e.g., Commonwealth v. Johnson, 481 Mass. 710, 720, cert. denied, 140 S. Ct. 247 (2019); Feliz I, 481 Mass. at 699 n.16.

3. Conclusion. The order denying the motion for relief from a condition of probation is affirmed.

So ordered.

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probationer's electronic devices should determine what is effective and possible given the constitutional limitations we have discussed.

[10] Because the defendant's period of probation has been terminated, a remand to modify the language of condition no. eight to reflect these necessary limitations would serve no purpose.