[J-59-2012]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 39 EAP 2011
	:	
Appellee	:	Appeal from the Judgment of the Superior
	:	Court entered on 12/15/2010 at No. 2724
	:	EDA 2008 affirming the Judgment of
v.	:	Sentence entered on 8/18/2008 in the
	:	Court of Common Pleas, Philadelphia
	:	County, Criminal Trial Division at No. CP-
DAVID A. WILSON,	:	51-CR-001866-2007
	:	
Appellant	:	11 A.3d 519 (Pa.Super. 2010)(En Banc)
	:	
	:	ARGUED: May 8, 2012

DISSENTING OPINION

MR. JUSTICE McCAFFERY **DECIDED: May 28, 2013**

I respectfully dissent. The majority does not consider the constitutional issue presented, but decides the matter purely under the principles of statutory interpretation, and determines that the court's sentencing order violates 42 Pa.C.S. § 9912(d)(2) because the order permits random, warrantless searches, without reasonable suspicion.[1] The majority appears to accept, see slip op. at 12 n.7., 14 - 15, that Section 9912 was enacted by the legislature in response to Commonwealth v. Pickron, 634 A.2d

[1] The statute at issue sets forth the supervisory relationship of probation and parole officers with offenders, and provides, in pertinent part, that "[a] property search may be conducted by an officer if there is reasonable suspicion to believe that the real or other property in the possession of or under the control of the offender contains contraband or other evidence of violations of the conditions of supervision." 42 Pa.C.S. § 9912(d)(2).

1093 (Pa. 1993), wherein this Court held that Pennsylvania has no "statute or regulation" governing the conducting of warrantless searches of a probationer's or a parolee's residence, and that in the absence of some authority, such as a statute or regulation, or the consent of the individual owner of the residence to the search, warrantless searches violate a probationer's or a parolee's Fourth Amendment rights. Id. at 1097.[2]

I dissent because, in the years since Pickron was decided and the statute at issue was enacted, the United States Supreme Court has made clear that probationers and parolees do not have a Fourth Amendment right to be free from random, suspicionless searches conducted by supervising officers. Samson v. California, 547 U.S. 843 (2006). In Samson, the United States Supreme Court upheld the constitutionality of a California statute that requires parolees to agree "to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." Id. at 846. The Samson Court noted that it had also previously upheld the constitutionality of a search conducted under the authority of a California statute requiring a probationer to agree to suspicionless searches. Id. at 848 (citing United States v. Knights, 534 U.S. 112, 114 (2001)). The Samson Court explained that because reasonable suspicion to search the probationer had existed in Knights, the Knights Court had not reached the issue of whether a suspicionless search would have been reasonable under the Fourth

[2] No state constitutional issues were raised in Pickron, and thus, this Court decided the issue only under Fourth Amendment jurisprudence. Moreover, although Pickron concerned the search of a parolee's residence, its holding applied specifically to both parolees and probationers. Pickron, supra at 1098. This Court has recognized that "the constitutional rights of a parolee are indistinguishable from that of a probationer." Commonwealth v. Williams, 692 A.2d 1031, 1035 n.7 (Pa. 1997); but see In the Interest of J.E., 937 A.2d 421, 427 n.3 (Pa. 2007) ("there is a marked difference between the rights of probationers and parolees").

Amendment simply as a condition of probation, and that that was the issue to be addressed in Samson, "albeit in the context of a parolee search." Id at 850. The High Court then balanced the state's substantial interests in promoting safety and reducing recidivism against the limited privacy rights of criminal offenders, and determined that suspicionless searches conducted as a condition of probation or parole are constitutional. Id. at 854 - 856.

The majority here does not discuss the constitutional principles set forth in Samson or Knights because it renders its decision purely on the basis of statutory interpretation, concluding that a court order requiring random suspicionless searches as a condition of probation violates the plain meaning of Section 9912. The majority does so under its adherence to the principle that where constitutional and non-constitutional bases for relief exist, we attempt to resolve the matter on non-constitutional grounds. See slip op. at 10.

In my respectful view, this Court should not conduct statutory interpretation in a vacuum, or ignore the constitutional precepts of our High Court's Fourth Amendment jurisprudence that squarely impact the subject matter of the statute under review. The subject matter of the statutory provision at issue is the level of suspicion necessary to conduct a warrantless search of the property of a probationer or parolee. In determining the applicability of this provision, I believe that we should consider relevant, substantive constitutional precedent. I believe further that such consideration would lead to an opposite result here and to a determination that the trial court's order expressly making Appellant subject to random searches of his residence as a condition of probation, is constitutional and, thus, legal.

Indeed, if the statute under review here mandated that Appellant agree to suspicionless searches as a probationary condition, I suspect that a majority of this

Court would conclude, on the basis of our High Court's controlling precedent, that the statute was constitutional. But because the mandate originated in a trial court's sentencing order, the legality of which Appellant challenges on a statutory basis, the majority does not consider relevant Fourth Amendment jurisprudence, but engages only in statutory interpretation. The majority determines that the mandate is illegal because it violates what the majority perceives is language so restrictive as to be exclusive, to wit, that a warrantless search of a parolee or probationer only "may be conducted by an officer if there is reasonable suspicion." 42 Pa.C.S. § 9912(d)(2). I believe that, under settled constitutional precepts, a warrantless search may also be conducted by an officer simply as a court-ordered condition of probation or parole.[3] Accordingly, I respectfully dissent.

One of the assumptions underlying probation "is that the probationer is more likely than the ordinary citizen to violate the law." Knights, supra at 120. The High Court has "repeatedly acknowledged that a State's interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." Samson, supra at 853. In furtherance of this responsibility, the states "do not have to ignore the reality of recidivism or suppress its interests 'in protecting potential victims of criminal enterprise' for fear of running afoul of the Fourth Amendment." Id. at 849 (quoting Knights, supra at 121).

[3] Although my discussion, supra and infra, focuses on the rights of probationers and parolees under Fourth Amendment jurisprudence, in my view, under the facts of this case, I believe there is no reason to articulate a different standard for the legality of the search under Article I, Section 8 of the Pennsylvania Constitution than under the Fourth Amendment, or to determine that the Pennsylvania Constitution affords probationers and parolees greater protection than the United States Constitution.

"The reasonableness of a search is determined '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.'" Knights, supra at 118 - 119 (quoting Wyoming v. Houghton, 526 U.S. 295, 300, (1999)). "The touchstone of the Fourth Amendment is reasonableness, not individualized suspicion." Samson, supra at 855 n.4. "Thus, while this Court's jurisprudence has often recognized that 'to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure,' United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976), we have also recognized that the 'Fourth Amendment imposes no irreducible requirement of such suspicion.'" Id. Requiring parolees or probationers to consent to random, suspicionless searches does not violate the Fourth Amendment. Samson, supra at 846. Moreover, in light of a state's "earnest concerns respecting recidivism, public safety, and reintegration of parolees and probationers into productive society, and because the object of the Fourth Amendment is reasonableness," the decision that suspicionless searches of parolees and probationers is constitutionally permissible "is far from remarkable." Id. at 855 n.4.[4]

Here, the Superior Court's Opinion in Support of Affirmance ("OISA"), written by Judge Jack A. Panella, sheds considerable light upon the specific facts underlying this

[4] In Samson, the parolee had accepted the conditions of parole. The High Court expressly declined to rest its holding "on the consent rationale" and instead, decided the search was reasonable under its "general Fourth Amendment approach" of balancing the relevant factors. Samson, supra at 852 n.3. This Court has previously upheld the constitutionality of a warrantless search conducted as a condition of parole where the parolee expressly consented to the condition by signing a pre-release form authorizing same. Williams, supra. Whether Appellant consented to the probation condition does not appear to be an issue in the instant case. Although he did not challenge or object to the condition as explained to him by the court at the time of sentencing, he did challenge the legality of the condition on direct appeal.

case that impact society's interests and concerns for public safety, recidivism, and the reintegration of offenders into productive society. See Commonwealth v. Wilson, 11 A.3d 519, 522 - 523 (detailing Appellant's criminal history, the history of Philadelphia Gun Court, and statistics with respect to gun violence in Philadelphia). Ultimately, the OISA determined that the probation condition authorizing suspicionless searches was "eminently reasonable" under the Fourth Amendment as "clearly tied to Wilson's rehabilitation and protection of the public." Id. at 526.

The OISA also considered, and rejected, Appellant's argument that the order was illegal because it violated the statutory provision requiring reasonable suspicion to search:

> A plain reading of [Section 9912(d)(2)] discloses that it pertains to searches made by probation officers acting on their own authority without judicial sanction. In this case, the trial court itself ordered the condition of random, warrantless searches expressly as a condition of probation. **As noted above, the condition imposed by the trial court comports with the protections offered by the United States and Pennsylvania Constitutions.** In no way does [Section 9912(d)(2)] limit the authority of the trial court to impose, when appropriate, a condition of probation that the probationer be subjected to random, warrantless searches.

Id. at 527. (Original emphasis deleted, additional emphasis added).

The majority describes the above reasoning in the OISA as adopting a limited reading of the statute. See slip op. at 7. I respectfully disagree. In my view, the OISA considered the meaning of the statute in light of prevailing constitutional principles. I believe the majority's disposition here actually takes a myopic view, and essentially turns a blind eye to the clearly expressed constitutional principle that suspicionless searches of probationers and parolees does not offend the Fourth Amendment as expressed by our High Court in Samson.

Nevertheless, the majority expresses that the "constitutional overlay," i.e. the constitutional concerns raised in Pickron, are "probative of the plain meaning, intention, and reach of the statute." Slip op. at 15. Our holding in Pickron was based on the reasoning that "there are no safeguards to protect the limited [F]ourth [A]mendment rights of probationers and parolees if their supervision is left entirely to the discretion of individual parole officers." Id. at 1098. In my view, the concerns this Court had in Pickron for the safeguarding of those very limited Fourth Amendment rights against the unsupervised and unfettered discretion of probation and parole officers do not exist in the present case. Here, as the OISA ably explained, the authority for the warrantless search is an express provision contained in the sentencing order of the court that has the ultimate supervisory authority over the offender. Moreover, under Section 9754(c)(13) of the Sentencing Code, the sentencing court has the broad authority to require a probationer to satisfy **any** condition reasonably related to his or her rehabilitation that is not unduly restrictive of his or her liberty. 42 Pa.C.S. §9754(c)(13). In my respectful view, that authority would include warrantless, random searches for weapons as a condition of probation for a convicted recidivist firearms offender. See Samson, supra.

Thus, unlike the majority, I would not reconcile any conflict between Sections 9754 and 9912 regarding a probationer's Fourth Amendment rights purely under the principles of statutory interpretation. In light of Samson, I would apply settled constitutional precedent to conclude that generally requiring a probationer or parolee to agree to submit to random, suspicionless searches as a condition of probation is constitutional and legal, and specifically that a sentencing order requiring warrantless, random, suspicionless searches for weapons as a condition of probation upon a

recidivist gun offender does not offend the Fourth Amendment. Accordingly, I respectfully dissent. [5]

[5] Nevertheless, I note my agreement with the majority's determination that striking the random search condition from the sentencing order must result in a remand for resentencing to permit the court to fashion an appropriate sentence for Appellant's multiple weapon and drug convictions. See slip op. at 16 n.11.