No. 09-30429

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

HORSLEY THEROW SOHAPPY,

Defendant-Appellant.

On Appeal from the United States District Court
For the Eastern District of Washington
District Court No. CR-09-2037-EFS

The Honorable Edward F. Shea
United States District Court Judge

DEFENDANT-APPELLANT'S OPENING BRIEF

Rebecca L. Pennell
Federal Defenders of
Eastern Washington & Idaho
306 E. Chestnut
Yakima, WA 98901
(509) 248-8920
Rebecca_Pennell@fd.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

U.S. CONSTITUTION

FEDERAL STATUTES

STATE STATUTES

FEDERAL RULES

UNITED STATES SENTENCING GUIDELINES

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	U.S.C.A No. 09-30429
v.	
HORSLEY THEROW SOHAPPY, Defendant-Appellant.	U.S.D.C. No. CR-09-2037-EFS

I. Issues Presented for Review

The Fourth Amendment allows for a warrantless probation search so long as there is probable cause to believe that a probationer lives at the residence to be searched and the probationer's terms of supervision allow for warrantless searches. In the instant case, the target of the search, Horsley Sohappy, was under probation and was located at the residence of a woman named Marisela Mora, who was also under probation.

The issues presented for review are: (1) Whether law enforcement had probable cause to believe that Mr. Sohappy was living at Ms. Mora's residence, thus justifying a search under Mr. Sohappy's release

conditions, and (2) As an alternative, whether the terms of Marisela Mora's supervision allowed for a search.

II. Statement of the Case

A. Statement of Jurisdiction

The district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This court has jurisdiction over appeals from final judgments under 28 U.S.C. § 1291 and 28 U.S.C. § 1294(1). The judgment and sentence was a final decision subject to appeal under 28 U.S.C. § 1291.

The judgment at issue in this appeal was filed on December 4, 2009. CR 90; ER 23-28(V1).[1] The notice of appeal was filed on December 10, 2009, within 10 days as required by FRAP 4(b). CR 93; ER 149-51(V2).

B. Bail Status

Horsley Therow Sohappy is in the custody of the Attorney General, serving an 84-month term of imprisonment. He is currently in

---

[1]CR refers to the Clerk's Record, which is located at pages 152-160 of the Excerpts of Record; ER refers to the Excerpts of Record, which have been filed in two consecutively paged volumes.

transit. His projected release date is May 22, 2015.

C. Statement of the Case & Factual Statement

At all times pertinent to this case, Horsley Sohappy has been an offender under supervision with the Washington State Department of Corrections (DOC). Mr. Sohappy's release conditions state that he is required to report to his DOC officer as instructed and that he is "subject to search and seizure of [his] person, residence, automobile, or other personal property, if there is reasonable cause on the part of the Department of Corrections to believe" that he has violated the terms of his supervision. ER 59(V2).

On February 23, 2009, Mr. Sohappy was in custody at the Toppenish City Jail. Because Mr. Sohappy was scheduled to be released on February 24, a corrections officer named Erika Vela went to the jail to meet with him and review his release conditions. ER 72(V2). Pursuant to the written condition requiring that Mr. Sohappy report to DOC as instructed, Officer Vela told Mr. Sohappy to report to her after he was released from custody the next morning. ER 72(V2). Mr. Sohappy said that he would comply, but the next day came and went

and Mr. Sohappy never visited the DOC. ER 1-2(V1), 72(V2). As a consequence, Officer Vela obtained a warrant. ER 1-2(V1), 73.

On February 24, 2009, a woman named Sandra Diaz contacted another corrections officer, Michael Hisey, and reported that Mr. Sohappy had recently been at her residence and had displayed a firearm to her son, Javier Diaz, during an altercation. ER 2(V1). Ms. Diaz's information was not first-hand, but came only from her son. ER 46(V2). Officer Hisey went to Mr. Sohappy's reported residence on "N. Oldenway" to investigate, but Mr. Sohappy was not there. ER 6(V1), 72(V2).

Javier Diaz was arrested on February 25, 2009. At 9:35 that morning, Officer Hisey visited Mr. Diaz in jail and questioned him about the incident with Mr. Sohappy. ER 71(V2). Mr. Diaz told Officer Hisey that the altercation referenced by his mother had occurred on February 23, 2009;[2] that Mr. Sohappy kept a gun in the front pocket of his pants; and that Mr. Sohappy was living with a woman named

---

[2]Mr. Diaz later told law enforcement that the altercation had actually taken place in January.

Marisela Mora at her residence in Toppenish, Washington. ER 2(V1). Mr. Diaz's motives towards Mr. Sohappy were suspect, as the two had a contentious relationship. ER 6(V1).

Marisela Mora is also an individual under DOC supervision, subject to the same release conditions as Mr. Sohappy. ER 2(V1), 63-38(V2). Officer Hisey was familiar with Ms. Mora and had previously contacted both her and Mr. Sohappy at Ms. Mora's address in Toppenish. ER 3(V1), 33(V2). The record does not reflect how many times Officer Hisey had seen Mr. Sohappy at Ms. Mora's residence. There is also no evidence suggesting that Mr. Sohappy and Ms. Mora had ever lived together, previous to the allegation made by Mr. Diaz.

At approximately 11:30 a.m. on February 25, 2009, DOC Officer Larry Nelson contacted Marisela Mora's mother, Laura Luna, to ask about Mr. Sohappy's whereabouts. Ms. Luna stated that Mr. Sohappy is a close family friend who frequently visits the residence. She added that Mr. Sohappy had been to the residence the night before for dinner. However, Ms. Luna also stated that Mr. Sohappy was not staying at the residence and probably was not there at that time. ER 3(V1).

After talking to Ms. Luna, Officer Nelson called Ms. Mora. While speaking with her on his cellular phone, Officer Nelson, accompanied by Officer Hisey and two Toppenish police officers, drove to Ms. Mora's residence. ER 3(V1). Once at the residence, Officer Nelson instructed Ms. Mora to come outside and speak with him. Ms. Mora complied. Officer Nelson asked Ms. Mora who was inside of the residence. Ms. Mora said there were a couple of relatives and a friend. Ms. Mora refused to provide the name of the friend. Officer Nelson then demanded entry into the residence. Ms. Mora stepped in front of the entryway and blocked his path. Officer Hisey handcuffed Ms. Mora for "possible supervision violations." ER 3-4(V1). At that point, Ms. Mora admitted that Mr. Sohappy was inside the residence, in her bedroom. ER 33(V2). Officer Hisey was familiar with the residence and knew that the back bedroom belonged to Ms. Mora. ER 33 (V2).

Once Ms. Mora admitted to Mr. Sohappy's whereabouts, DOC officers went inside the residence. Officer Hisey went to the back bedroom and observed the door closed. ER 33(V2). Officer Hisey ordered Mr. Sohappy out of the room and Mr. Sohappy complied. ER 33

(V2). Mr. Sohappy came out of the room with his hands up, laid on the floor as instructed by Officer Hisey, and was taken into custody "without incident." ER 33, 36 (V2).

After Mr. Sohappy's arrest in the hallway, Officer Nelson went into the bedroom to look for the gun that had been alleged to be in Mr. Sohappy's possession. ER 37 (V2). Officer Nelson looked under a mattress in the bedroom and found a gun wrapped in a sock. ER 37 (V2). In a nearby jacket, Officer Nelson found documents bearing Mr. Sohappy's name as well as some ammunition that matched the gun. ER 4(V1), 33, 37(V2)..

On April 14, 2009, an indictment was filed against Mr. Sohappy, alleging a violation of 18 U.S.C. § 922(g)(possession of a firearm by a prohibited person) on the basis of the gun and ammunition seized from Marisela Mora's residence. CR 1; ER 29-30(V2). During the pretrial phase of his case, Mr. Sohappy moved to suppress the gun and ammunition, arguing that the search of Ms. Mora's residence was not permitted either by his terms of supervision or Ms. Mora's. CR 26. The motion was denied. CR 62; ER 1-22(V1). Mr. Sohappy subsequently

entered a conditional guilty plea, preserving his right to appeal the motion to suppress. CR 65, 66. Sentencing was held on December 3, 2009. CR 89. Mr. Sohappy received a term of 84 months' incarceration, three years of supervised release, no fine, and a $100 special penalty assessment. CR 90; ER 23-28(V1). Mr. Sohappy appeals his conviction, but not his sentence.

III. Summary of Argument

The gun and ammunition that form the basis of Horsley Sohappy's conviction were seized without a warrant, in violation of the Fourth Amendment. This was not a valid probation search. The search was not authorized by Mr. Sohappy's terms of probation because there was not probable cause to believe that Mr. Sohappy lived at the residence in question, which belonged to Marisela Mora. The search also was not authorized by the fact that Marisela Mora was under probation. Although Ms. Mora clearly lived at the residence, the terms of her probation did not permit a search without reasonable suspicion of a violation. Because, at the time of the search, there was no grounds for believing that Ms. Mora had violated her probation, law

enforcement were not entitled to search.

IV. Argument

A. The District Court's Ruling Is Reviewed De Novo

The denial of a motion to suppress is reviewed *de novo*. *United States v. Gorman*, 314 F.3d 1105, 1110 (9th Cir. 2002).

B. Probable Cause Did Not Support Searching Marisela Mora's Residence Pursuant to Mr. Sohappy's Release Conditions

"[B]efore conducting a warrantless search pursuant to a properly imposed parole condition, law enforcement officers must have probable cause to believe that the parolee[3] resides at the house to be searched." *Motley v. Parks*, 432 F.3d 1072 (9th Cir. 2005)(en banc). In the case at hand, law enforcement had an arrest warrant, but not a search warrant. Accordingly, they were only entitled to search Marisela Mora's Toppenish, Washington residence pursuant to Mr. Sohappy's release conditions if they had probable cause to believe that Mr. Sohappy also

---

[3]There is no constitutional difference between probationers and parolees; thus, the terms "parolee" and "probationer" are legally interchangeable. *See United States v. Lopez*, 474 F.3d 1208, 1213 n.5 (9th Cir. 2007).

lived at the residence. *Cuevas v. De Roco*, 531 F.3d 726, 732 (9th Cir. 2008); *Watts v. County of Sacramento*, 256 F.3d 886, 889 (9th Cir. 2001).

The standard for determining whether there is probable cause to believe that a probationer lives at a given residence is "relatively stringent." *United States v. Howard*, 447 F.3d 1257, 1262 (9th Cir. 2006). Residency cannot be established simply by virtue of the fact that a probationer frequents a given residence or even that the probationer has spent the night at the residence. *See Watts v. County of Sacramento*, 256 F.3d 886, 890 (9th Cir. 2001)(fact that an individual answers the door to his girlfriend's residence in boxer shorts does not, alone, establish probable cause of residency).

In *United States v. Howard*, this Court surveyed thirty years of relevant case law and identified four common elements of cases where courts have found probable cause to believe that a probationer was living at an unreported residence:

> (1) The facts did not indicate that the probationer was living anywhere else;
> (2) Law enforcement officers directly "observed something that gave them good reason to suspect that the [probationer] was using [an] unreported residence as his home base;"
> (3) The probationer was observed to have keys to the unreported

> residence; and
> (4) A co-resident or the probationer identified the residence as the probationer's residence.

447 F.3d at 1265-66.

In the present case, none of the aforementioned elements are present. First, the DOC had information suggesting that Mr. Sohappy was living at a residence other than Ms. Mora's. Specifically, Mr. Sohappy had a reported residence on "N. Oldenway." ER 6(V1), 72(V2). The fact that Officer Hisey was not able to locate Mr. Sohappy at the N. Oldenway residence does not suggest that Mr. Sohappy was not living there. Officer Hisey only reported one failed attempt to locate Mr. Sohappy at the N. Oldenway residence. ER 72(V2). As recognized in *Howard*, it is not unusual for a probationer to be away from home during the time of an unannounced visit. 447 F.3d at 1260, 1266-67 & n.14. It takes a number of failed attempts before a probation officer can conclude that a probationer is not living at his reported residence. *Compare United States v. Conway*, 122 F.3d 841, 843 (9th Cir. 1997)(probable cause to believe probationer lived at another residence when, among other things, probationer was only at the residence once

in the course of 21 attempted visits).

Second, law enforcement officers never directly observed anything to suggest that Mr. Sohappy was living at Ms. Mora's residence. Unlike the facts in *Motley v. Parks*, 432 F.3d 1072 (9th Cir. 2005)(en banc), Mr. Sohappy had never reported living at Ms. Mora's residence in the past. Nor had law enforcement ever observed anything to suggest that Mr. Sohappy was living at Ms. Mora's residence, as opposed to simply visiting on occasion. Prior to February 25, the only connection between Mr. Sohappy and the residence that was directly observed by law enforcement was Officer Hisey's contact with Mr. Sohappy at Ms. Mora's residence. ER 3(V1), 33(V2). There is no indication that Mr. Sohappy was regularly at Ms. Mora's residence, or even that he was seen there more than once. Law enforcement did not observe anything new on February 25. Even when Officers Hisey and Nelson went into the residence and saw Mr. Sohappy walk out of Ms. Mora's bedroom, they did not have sufficient grounds to believe he was living at the residence, as opposed to merely visiting.

As this Court has repeatedly emphasized, there is a big difference

between presence at a residence and residency. In *Watts v. County of Sacramento*, 256 F.3d 886, 890 (9th Cir. 2001), the Court held that the facts that a suspect was present at his girlfriend's residence and answered the front door in his boxer shorts were not sufficient to establish probable cause that he lived at the residence. Similarly, in *United States v. Howard*, 447 F.3d 1257 (9th Cir. 2006), the Court held that a defendant's *repeated* presence at his girlfriends residence, including the most recent occasion when he was observed stepping out onto the doorstep, wearing no shirt, was not sufficient to establish residency.

With respect to the third *Howard* element, there are no facts whatsoever to suggest that Mr. Sohappy has ever had a key to Ms. Mora's residence. Mr. Sohappy was never alleged to have a key and no witnesses ever reported seeing Mr. Sohappy coming and going from Ms. Mora's residence.

Finally, neither Mr. Sohappy nor any of the occupants of the Toppenish residence ever indicated that Mr. Sohappy lived with Ms. Mora. On the morning of February 25, Ms. Mora's mother, Laura Luna,

specifically denied that Mr. Sohappy lived at the residence. ER 3(V1). When Marisela Mora told Officers Nelson and Hisey that Mr. Sohappy was inside her residence, she never said she was in "his room" or "our room." She said he was in the back bedroom. ER 33(V2). The district judge interpreted Ms. Mora's statement as indicating that Mr. Sohappy was in "*her* bedroom." ER 4(V1)(emphasis added).

The only individual who ever said that Horsley Sohappy was living at Marisela Mora's residence is Javier Diaz. However, *Howard* did not identify information from a non-resident informant as sufficient to support probable cause. *Howard*, 447 F.3d at 1265-66. Moreover, even if a non-resident's information could contribute to the probable cause analysis, Javier Diaz's statements would not be sufficient in this case. As recognized by the district court, Mr. Diaz was not a particularly reliable informant. ER 6(V1). There was a history of bad blood between Mr. Diaz and Mr. Sohappy, giving Mr. Diaz a motive to fabricate. ER 6(V1). Furthermore, Mr. Diaz lodged his accusations against Mr. Sohappy while he was in custody and had a motive to curry favor with law enforcement. This circumstance alone made his

credibility extremely suspect. *United States v. Angulo-Lopez*, 791 F.2d 1394 (9th Cir. 1986). Finally, Mr. Diaz provided no explanation for why he knew that Mr. Sohappy was living with Ms. Mora, another important element of assessing the reliability of his information. *Id.* at 1397-98 (an informant's reliability can be strengthened by showing his basis of knowledge).

While not all four of the *Howard* elements need be present to establish probable cause, the case law suggests that there at least needs to be a majority. 447 F.3d at 1265-66. Moreover, *Howard* makes clear that if none of the four factors are present, there cannot be probable cause. 447 F.3d at 1268. Here, as in *Howard*, none of the four factors relevant to determining a probable cause for a probationer's unreported residence are present. Accordingly, the search in this case cannot be justified by Mr. Sohappy terms of probation.

C. There Was No Basis to Search the Residence Pursuant to Marisela Mora's Release Conditions

As an alternative to upholding the search based upon Mr. Sohappy's release conditions, the district court ruled that the search was justified because Marisela Mora was also under supervision with the Department of Corrections. ER 9(V1). This analysis is mistaken. Although Marisela Mora unquestionably lived at the Toppenish residence, and although she was also under state supervision, these circumstances did not permit a search. Under the terms of Ms. Mora's supervision, a search was only permitted if DOC officers had reasonable cause to believe that she had violated the terms of her supervision. ER 63-68(V2). At the time officers initiated the search on February, 25, Ms. Mora had not done anything to violate her supervision. Accordingly, a search was unauthorized.

The Fourth Amendment allows for a warrantless search of a probationer's residence, so long as a search is permitted under the terms of the probationer's sentence. *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987). Law enforcement need not have probable cause to search a probationer's residence. *United States v. Knights*, 534 U.S. 112, 119-121

(2001). Instead, the requisite level of suspicion is set by the terms of the probationer's supervision. *Samson v. California*, 547 U.S. 843 (2006); *United States v. Lopez*, 474 F.3d 1208, 1213 (9th Cir. 2007)(explaining that the terms of probation set a probationer's reasonable expectation of privacy). In the instant case, Marisela Mora's release conditions allowed for a search so long as there was "reasonable cause" to believe she had violated the terms of her sentence. ER 67(V2). Accordingly, whether the DOC officers were entitled to search Ms. Mora's residence based upon her probation status turns on whether there was reasonable cause to believe she had violated her supervision.

The district court ruled that Ms. Mora violated the terms of her supervision by failing to identify the "friend" in her house at Officer Nelson's request. ER 9(V1). This analysis is flawed for two reasons: First, Ms. Mora's release conditions did not require her to answer Officer Nelson's questions. Second, Ms. Mora did answer Officer Nelson's question before the search took place.

Going to the first issue, it should be noted, as a general matter, that a probation officer's power over a probationer is never limitless.

While probationers have less rights than other citizens, they nevertheless retain numerous constitutional protections. For example, as noted above, a probation officer cannot search a probationer's home unless specifically authorized to do so. In addition, a probationer cannot be forced to take medications or to disassociate himself or herself with individuals who are not deemed harmful. *See United States v. Soltero*, 506 F.3d 718 (9th Cir. 2007); *United States v. Williams*, 356 F.3d 1045 (9th Cir. 2004).

Keeping in mind the general need for some limits, Marisela Mora's release conditions must not be interpreted as requiring her to answer her probation officer's questions. Ms. Mora's conditions required her to abide by written or oral instructions issued to her by her community corrections officer. ER 66(V2). However, she was not specifically required to answer all inquiries. The two concepts are not the same. This is illustrated by the language used in the standard federal probation and supervised release conditions, which state that a "defendant shall answer truthfully all inquiries by the probation officer *and* follow the instructions of the probation officer." U.S.S.G. §§

5B1.3(c)(3) & 5D1.3(c)(3).

The distinction between requiring a probationer to follow instructions and to answer inquiries is important. Requiring an individual to do various things, such as show up for an appointment or to a court hearing, does not raise any constitutional concerns. However, requiring an individual to talk, on penalty of violating the terms of supervision and being sent to jail, raises serious Fifth Amendment problems. *United States v. Saechao*, 418 F.3d 1073, 1075 (9th Cir. 2005). Accordingly, this Court should avoid interpreting a set of probation conditions to require answers to inquires, if at all possible. *Id.*

Washington state courts have held that even when an individual is required by law to submit to law enforcement instructions, the individual maintains the right to refuse to provide information. *State v. Contreras*, 92 Wash.App. 307, 316 (1998); *State v. Hoffman*, 35 Wash.App. 13, 17 (1983). The requirement that a probationer follow all instructions must be read similarly. Indeed, were a probationer required to answer all inquiries, on risk of being sent to jail, statements made to a probation officer would be subject to suppression. *United*

States v. Saechao, 418 F.3d 1073 (9th Cir. 2005). It is, therefore, with good reason that the State of Washington would not want to compel probationers to answer questions posed by supervising officers. Instead, it makes good policy sense for Washington to prefer that answers to a probation officer's questions be deemed voluntary.

Alternatively, even if the "abide by all instructions" requirement were to encompass answering questions, the types of questions that an offender can be required to answer are limited. Specifically, for those offenders in Washington who are required to answer probation inquiries, there are some statutory limitations. At the time Ms. Mora signed her release conditions in 2008, Washington law provided that a an offender under "community supervision" could be required to comply with "crime-related prohibitions and other sentence conditions imposed by a court." Rev. Code Wash. § 9.94A.030(10)(2008). A "'[c]rime-related prohibition' means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs *or to*

otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department." Wash. Rev. Code § 9.94A.030(13)(2008) (emphasis added). The Washington courts have interpreted these provisions to mean that offenders can only be required to participate in questioning, such as polygraph testing, to the extent necessary to monitor compliance with other conditions of supervision. *State v. Riles*, 135 Wash.2d 326, 340 (1998); *State v. Julian*, 102 Wash.App. 296, 304-305 (2000). What this means is that a probationer cannot be subject to mandatory questioning, or monitoring, on issues unrelated to the terms of his or her supervision.

Officer Nelson's question to Ms. Mora fell outside the scope of what can be required of a probationer under Washington law. Marisela Mora was not prohibited from having contact with Mr. Sohappy, or anyone else for that matter. ER 105(V2). Accordingly, Officer Nelson's question regarding who was present in the residence was irrelevant to assessing Ms. Mora's compliance with probation. Marisela Mora was within her rights to refuse to answer and her refusal cannot be

considered evidence of a violation.

Second, even if the "abide by all instructions" requirement were to encompass answering questions and even if Ms. Mora were required to answer all questions, not just those related to her terms of supervision, there still would not have been a violation because Ms. Mora answered Officer Nelson's question. Although Ms. Mora initially refused to provide the name of the friend inside her residence, she eventually told Officers Nelson and Hisey that the individual inside was Mr. Sohappy. Prior to the search, there were no questions posed to Ms. Mora that had been left unanswered. Accordingly, there was no basis for a search pursuant to Ms. Mora's release conditions.

V. Conclusion

The search in this case was not justified either by Mr. Sohappy's terms of supervision or by Ms. Mora's. The Department of Corrections officers may have had reason to want to enter Ms. Mora's residence to look for Mr. Sohappy and search for a gun. However, under the circumstances, a search warrant was necessary. Because the search was conducted without a warrant, Mr. Sohappy asks that the Court reverse his conviction with instructions to grant his motion to suppress.

Respectfully submitted,

s/Rebecca L. Pennell_____
REBECCA L. PENNELL
Federal Defenders of Eastern
Washington and Idaho
Attorneys for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

Case No. 09-30429

I certify that this brief complies with the page limitation set by FRAP 32(a), in that it is proportionally spaced, has a typeface of 14 points, and does not exceed 30 pages.

March 11, 2010.

s/Rebecca L. Pennell
REBECCA L. PENNELL
Federal Defenders of Eastern
Washington and Idaho
Attorneys for Defendant-Appellant

CERTIFICATE OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel for Horsley Therow Sohappy is unaware of any related cases pending before this court.

s/Rebecca L. Pennell
REBECCA L. PENNELL
Federal Defenders of Eastern Washington and Idaho
Attorneys for Defendant-Appellant

CERTIFICATE OF SERVICE

I, the undersigned, declare:

On March 11, 2010, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service of the brief will be accomplished by the appellate CM/ECF system.

I certify that the foregoing is true and correct. Executed on March 11, 2010, at Yakima, Washington.

s/Rebecca Pennell
Rebecca Pennell