Judgment rendered June 26, 2019.
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C. Cr. P.

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

* * * * *

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.

WILLIAMS, C.J.

The defendants, Darick Deon Carter and Karshalona Griffin, who were charged with drug and firearm offenses, sought supervisory review of the trial court's denial of their motions to suppress evidence. This court consolidated the applications and granted the writs to docket. For the following reasons, we hereby reverse the denial of the defendants' motions to suppress, grant the motions and remand.

FACTS

The record shows that at all relevant times, defendant, Darick Carter, was on probation supervised through the Shreveport District Office of Probation and Parole and defendant, Karshalona Griffin, was not under any parole or probation supervision. On January 23, 2018, at approximately 6:30 a.m., a number of Shreveport Probation and Parole Officers, including Officers Damian McDowell, Sharie Cone, H.B. Shaver, and David Kerr, went to Darick Carter's residence at 1140 Richmond Circle in Shreveport, Louisiana. The following facts were presented by the state. The officers were attempting to execute a probation violation warrant on Hermena Wagner, who they believed was at Carter's residence, and to conduct a drug screen on Carter based on a request by Amanda Spivey, the probation officer assigned to supervise him. Officer Spivey was on light duty status at the time and restricted from performing field work. After entering the house and while waiting for Carter to produce a drug screen, Officer Cone walked down the hall and spoke with Carter's wife, Karshalona Griffin, in the master bedroom. Officer Cone asked Griffin to get dressed and advised her of the reason for the visit. Because Griffin seemed nervous, Officer Cone asked her if there was anything in the residence that might be a violation of

Carter's probation or the law. Griffin responded that there were two guns inside a safe in the closet of the bathroom adjacent to the bedroom. Based on the information about the guns, Carter was advised of a parole violation and the officers searched the residence. In addition to the two firearms in the safe, the officers located a shotgun, an assault rifle, a significant amount of marijuana and $20,000 in cash.

Carter was arrested and charged with four counts of possession of a firearm by a convicted felon and one count of possession with intent to distribute a Schedule I CDS, marijuana (2 ½ pounds or more). Griffin was arrested and charged with four counts of illegal carrying of weapons while in possession of a CDS and one count of possession with intent to distribute a Schedule I CDS, marijuana (2 ½ pounds or more).

The defendants filed separate motions to suppress all of the evidence seized from the search of the residence on the basis that the search was performed without the presence of Officer Spivey, the specific probation officer assigned to Carter. The defendants cited *State v. Brignac*, 2017-0448 (La. 10/18/17), 234 So. 3d 46, which held that La. C.Cr.P. art. 895(A)(13)(a) requires that a warrantless search of a probationer's residence be conducted by the probation officer specifically assigned to him. The state filed an opposition, arguing that *State v. Brignac, supra*, was distinguishable because in this case, Officer Spivey was placed on medical light duty and the Shreveport District Office for Probation and Parole ("Shreveport P&P Office") has a policy that permits another probation officer to perform any duties associated with the supervision of a probationer when the assigned officer cannot.

At the hearing on the motions to suppress, the state presented Officer Spivey's employment accommodation forms, showing that she was on light duty from January 22, 2018 to February 19, 2018, and written statements from Phillip Adkins, supervisor of the Shreveport district, and William Tuggle, the district manager of the Shreveport P&P Office, dated August 2018. Adkins wrote that Officer Spivey had been the officer assigned to supervise Carter since October 2013, and that while on light duty she was not permitted to perform duties outside the district office. Adkins stated that when an officer is on light duty prohibiting field work, other probation and parole staff are "routinely assigned, as needed, to deal with any day to day issues involving the supervision of the case in the field." Tuggle wrote that when an officer is on light duty, "any commissioned probation and parole officer associated with the Shreveport District Office may, without prior approval, perform any duties associated with the direct supervision of any individual placed on either probation or parole."

After hearing the evidence, the trial court denied the defendants' motions to suppress. The trial court stated that it agreed with the majority of defense counsel's interpretation of *State v. Brignac*, *supra*, but found the state's application of the statute persuasive. The trial court noted that La. C.Cr.P. art. 895(A)(13)(a) was amended, effective August 1, 2018, to overturn *Brignac*. The court found that under the amended statute, a warrantless search is reasonable as long as the "probation officer appointed another officer" to act for her. Based on all of the testimony, the trial court stated that Officer Spivey asked Officer McDowell to conduct a drug screen on Carter, and noted that a male officer would have been required to conduct

a drug test of Carter in any event. The trial court found that the search complied with the amended version of La. C.Cr.P. art. 895(A)(13)(a).

Carter and Griffin sought supervisory review of the denial of their motions. In January 2019, this Court consolidated the applications, granted the writs and placed the matter on the appeal docket. This Court advised the parties to specifically brief the issue of whether the amended statute was to be applied retroactively and to discuss the applicability of the former and amended subsections.

DISCUSSION

Defendants contend the trial court erred in applying the provisions of Article 895(A)(13). Defendants argue that the evidence should be suppressed because the probation officers did not have a search warrant and the probation officer assigned to Carter was not present at the house.

The right of every person to be secure in his person, house, papers and effects, against unreasonable searches and seizures, is guaranteed by the Fourth Amendment to the United States Constitution and Article I, § 5, of the Louisiana Constitution. It is well settled that a search and seizure conducted without a warrant issued on probable cause is *per se* unreasonable unless the warrantless search and seizure can be justified by one of the narrowly drawn exceptions to the warrant requirement. *State v. Thompson*, 2002-0333 (La. 4/9/03), 842 So. 2d 330; *State v. Tatum*, 466 So. 2d 29 (La. 1985); *State v. Boyette*, 52,411 (La. App. 2 Cir. 1/16/19), 264 So. 3d 625.

When the legality of a search or seizure is placed at issue by a motion to suppress evidence, the state bears the burden of proving the admissibility of any evidence seized without a warrant. La. C.Cr.P. art. 703(D). Trial courts are vested with great discretion when ruling on a motion to suppress,

and the ruling of a trial judge on the motion to suppress will not be disturbed absent an abuse of that discretion. *State v. Coleman*, 2014-0402 (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*, 2017-0070 (La. 10/9/17), 227 So.3d 828.

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*, 2017-1230 (La. 4/27/18), 241 So. 3d 305. While a warrantless search is generally unreasonable, a person on parole or probation has a reduced expectation of privacy under the Fourth Amendment of the U.S. Constitution and under La. Const. art. I, § 5. *State v. Angel*, 44,924 (La. App. 2 Cir. 1/27/10), 31 So. 3d 547. This reduced expectation of privacy allows reasonable warrantless searches of their person and residence by their probation or parole officer. *State v. Malone*, *supra*. 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. Angel*, *supra*; *State v. Drane*, 36,230 (La. App. 2 Cir. 9/18/02), 828 So. 2d 107, *writ denied*, 2002-2619 (La. 3/28/03), 840 So. 2d 566. These conditions are to further the purposes of probation, rehabilitation of the convicted individual and protection of society. It is a standard condition of probation that the probationer allow the probation officer to visit his home at the option of the officer. S*tate v. Malone*, *supra*; *State v. Vailes*, 564 So.2d 778 (La. App. 2 Cir. 1990).

While the decision to search must be based on something more than a mere hunch, probable cause is not required, and only a reasonable suspicion that criminal activity is occurring is necessary for a probation officer to conduct the warrantless search. *Malone, supra*; *State v. Haley, supra*. However, a probationer is not subject to the unrestrained power of the authorities. *State v. Angel, supra*. Even though warrantless searches by a probation or parole officer are allowed, a search to which a probationer is subjected may not serve as a subterfuge for a police investigation, but instead, must be conducted when the probation officer believes such a search is necessary in the performance of his duties and must be reasonable in light of the total atmosphere in which it takes place. *State v. Haley, supra*.

At the time of the search in January 2018, La. C.Cr.P. art. 895 provided that when a defendant is placed on probation, the trial court may impose specific conditions reasonably related to his rehabilitation, including that defendant shall agree to searches of his person or place of residence "at any time, by the probation officer or the parole officer assigned to him," without or without a search warrant, when the probation officer has reasonable suspicion to believe that the probationer has been engaged in criminal activity. La. C.Cr.P. art. 895(A)(13)(a).

In *State v. Brignac, supra*, the supreme court held that Article 895(A)(13)(a) requires that a warrantless search of a probationer's residence be conducted by the probation officer specifically assigned to that probationer. The court stated that the determination of whether a probation officer is "assigned to" a particular probationer is a factual finding to be made by the district court. In that case, two probation officers, who had not been assigned to the defendant, along with federal and state law enforcement

officers, conducted a warrantless search of a probationer's residence after the probation department received a tip from another agency that she may have been involved in the sale of narcotics. The court found that because the search was not conducted by the probation officer assigned to the defendant, the search violated Article 895(A)(13)(a) and resulted in an unconstitutional search under the Louisiana Constitution, requiring exclusion of the evidence obtained in the search.

After the decision in *Brignac*, the Louisiana Legislature amended Article 895(A)(13)(a), effective August 1, 2018, to provide that a probationer shall:

> Agree to searches of his person, his property, his place of residence, his vehicle, or his personal effects, or any or all of them at any time, by the probation or parole officer assigned to him or by any probation or parole officer who is subsequently assigned or directed by the Department of Public Safety and Corrections to supervise the person, whether the assignment or directive is temporary or permanent, with or without a warrant of arrest or with or without a search warrant, when the probation officer or the parole officer has reasonable suspicion to believe that the person who is on probation is engaged in or has been engaged in criminal activity.

See Acts 2018, No. 351. Section 3 of Acts 2018, No. 351 provides that the provisions of the Act are intended to legislatively overrule the Louisiana Supreme Court's decision in *Brignac, supra*, to the extent that the court held that a warrantless search of a probationer's residence violates the provisions of La. C.Cr.P. art. 895(A)(13)(a) when the search is not conducted by the probation officer assigned to the probationer by the Department of Public Safety. The starting point in the interpretation of any statute is the language of the statute itself. When a law is unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the legislative intent. La. C.C. art. 9; *Brignac, supra*.

Absent contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretative laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary. La. C.C. art. 6. In *State v. Washington*, 2002–2196 (La. 9/13/02), 830 So. 2d 288 (per curiam), the Louisiana Supreme Court set forth a two-part inquiry to determine whether a law should be applied retroactively. First, it must be ascertained whether the enactment expresses legislative intent regarding retrospective or prospective application. If such intent is expressed, the inquiry ends. If no such intent is expressed, then courts are directed to classify the law as either substantive, procedural or interpretive.

Substantive laws are laws that impose new duties, obligations or responsibilities upon parties, or laws that establish new rules, rights and duties or change existing ones. Interpretive laws are those which clarify the meaning of a statute and are deemed to relate back to the time that the law was originally enacted. Procedural laws prescribe a method for enforcing a substantive right and relate to the form of the proceeding or the operation of laws. Laws that are procedural or interpretive may be applied retroactively. *State v. Washington, supra*; *State v. Logue*, 51,210 (La. App. 2 Cir. 4/12/17), 216 So.3d 1140.

At the hearing on the motions to suppress in this case, Officer Spivey testified that she was assigned to supervise Carter's probation, and that she has been supervising him since 2013. Officer Spivey stated that due to a back injury, she was out of work and when she returned on January 22, 2018, she was placed on light duty through February 19, 2018. While on light duty, she was unable to perform any field work that would require her to leave the office. Officer Spivey testified that in accordance with the

custom and practice of the Shreveport P&P Office, she asked Officer McDowell to perform a drug screen on Carter if McDowell came into contact with Carter as she had not conducted a drug screen on Carter in some time. She stated that she does not have authority to assign probationers to officers, and that she did not assign Carter to any other probation officer.

Phillip Adkins, the supervisor of the Shreveport District and Officer Spivey's supervisor, testified that he was aware of Officer Spivey's restrictions, which limited her ability to fully supervise her caseload. Supervisor Adkins stated that it was consistent with the policy of the Shreveport P&P Office for Officer Spivey to ask another officer to conduct a drug screen on Carter. Supervisor Adkins thought it could be burdensome to reassign the probationer to a new officer. Supervisor Adkins testified that he, as a supervisor, assigns probationers to probation officers according to the guidance of the Department of Public Safety, and Officer Spivey does not have authority to make such assignments. According to Supervisor Adkins, probation officers are permitted to ask other officers for help with any of their duties; the assignment is not changed, but that other officer is temporarily acting in the assigned probation officer's stead. He testified that Officer Spivey is the only probation officer who has been officially assigned to Carter. Further, Supervisor Adkins stated that he, as a supervisor, previously instructed officers to contact a person on supervision, who was not assigned to them, in order to conduct some task, such as a drug screen, an arrest, a search, or make contact in jail, if an officer was sick, on vacation, in court, or otherwise occupied. Supervisor Adkins did not say, and the state does not contend, that he had done that in this case.

Officer William Tuggle, the District Manager of the Shreveport District Office of Probation and Parole, testified that in the Shreveport P&P Office, 60 officers and support staff supervise around 5,200 parolees and probationers. Supervisors are responsible for the assignment of cases, and Officer Spivey does not have authority to assign officers to probationers. Officer Tuggle stated that if a probation officer is sick or on light duty for several days or weeks, the cases are not reassigned, but he or the supervisor would designate certain officers to handle day-to-day responsibilities. He testified that it was consistent with the policy of the Shreveport P&P office for Officer Spivey to ask another officer to conduct a drug screen on Carter. Officer Tuggle stated that it would take days to reassign the typical caseload of an officer, and that it would not be practical to reassign cases if the officer is likely to return within a matter of weeks. He stated that it is common for officers to ask other officers for help, but that such help does not change the assignment.

Even though Sec. 3 of Acts 2018, No. 351 asserts that the provisions of the act are intended to "overrule" the *Brignac* decision, we must consider the statutory language itself as it relates to this case. The current language of Article 895(A)(13)(a) provides that the probationer agrees to searches of his residence at any time by the probation officer assigned to him or any officer subsequently assigned or directed by the Department of Public Safety to supervise that person. Contrary to the trial court's finding, the statutory language requires the Department of Public Safety to assign or direct an officer to supervise a probationer and does not provide that a probation officer may appoint another officer to provide such supervision. At a minimum, Article 895(A)(13)(a) would require that Adkins, the district

supervisor, assign or direct another officer to perform Officer Spivey's field duties during her light duty status. Adkins could have accomplished this directive simply by preparing a departmental memo. We find that this procedure would not have been overly burdensome and would have complied with the statute.

The record shows that Officer Spivey was the only probation officer assigned or directed by the Department, through Adkins, to supervise Carter. Thus, a warrantless search of Carter's residence by a probation officer other than Officer Spivey does not comply with Article 895(A)(13)(a), even as that subsection was amended in 2018. Consequently, we need not determine here whether the statute applies retroactively. Because the warrantless search of Carter's residence was not authorized by the statute, the state had the burden to prove that an alternative exception to the warrant requirement was applicable to the search performed in this case.

The state argues that the search was valid because Carter gave consent to enter his residence to look for Wagner and Carter needed to provide a drug screen sample.

A search warrant must be obtained, absent exigent circumstances or consent, to enter the house of a third party to search for the subject of an arrest warrant. *State v. Howard*, 2015-1404 (La. 5/3/17), 226 So. 3d 419, citing *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L.Ed.2d 38 (1981). The prohibition against warrantless searches does not apply to a search that is conducted pursuant to consent. *See 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*, *supra*; *State v. Boyette*, *supra*. If evidence was derived from an unreasonable search or seizure, the proper remedy is exclusion of the evidence from trial. *State v. Benjamin*, 97-3065 (La. 12/1/98), 722 So. 2d 988; *State v. Lewis*, 52,289 (La. App. 2 Cir. 9/26/18), 256 So. 3d 510.

The Louisiana Supreme Court adopted the factors from *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L. Ed. 2d 447 (1979), to determine if a warrantless search of a probationer's home violated the probationer's constitutional rights. The factors include: (1) the scope of the particular intrusion; (2) the manner in which it was conducted; (3) the justification for initiating it; and (4) the place in which it was conducted. *State v. Malone*, *supra; State v. Haley*, *supra*.

In the present case, Officer Shaver testified that he, along with six other probation officers, went to Carter's residence in an attempt to execute a probation violation warrant on Wagner after receiving information that she might be with Carter, but the officers had no information that Carter had any probation violations. Officer Shaver stated that he and Officer McDowell knocked on the door, and Carter answered. Officer Shaver testified they went inside the residence and explained the reason for their visit and told Carter that Officer Spivey had requested a drug screen. Officer Shaver stated that Carter tried, but could not produce a drug screen sample at that time, so they waited to give him the opportunity to be able to do so. Officer Shaver stated that Carter said Griffin and their children were also in the residence. Officer Shaver testified that when Officer Cone told him that

Griffin said there were guns in the bedroom, they proceeded to check the residence for further violations. He stated that after the guns and drugs were recovered, Carter and Griffin were advised of their Miranda rights and arrested. Officer Shaver testified that none of the officers present at the search were assigned to Carter. Also, he stated that helping another probation officer does not change the officer's assignment.

Officer McDowell testified that he had an active warrant for Wagner. He stated the officers were "under the impression" that Carter was Wagner's boyfriend, and when Wagner was not at her listed address, they went to Carter's residence to find her. Officer McDowell testified that Carter was assigned to Officer Spivey and that he had told Officer Spivey that they may end up going to Carter's residence to look for Wagner, and asked her if she wanted him to conduct a drug screen on Carter; Officer Spivey said yes. Officer McDowell stated that he spoke with Officer Spivey face-to-face when he mentioned conducting a drug screen on Carter. Officer McDowell testified that in going to Carter's residence, their intention was to look for Wagner and they had no search or arrest warrant for Carter.

Officer McDowell further testified: he and Officer Shaver knocked on the door, made contact with Carter, and identified themselves; he told Carter that he had a warrant for Wagner and asked if they could come in and look to see if she was there; Carter said Wagner was not there, but he did not mind if they looked around; Carter told them that his wife and kids were in the residence; as they were clearing the residence for officer safety and the safety of the occupants, Officer Cone received information from Griffin that there were weapons in the bedroom, so they searched the residence; neither Carter nor Griffin ever protested or told them they did not have a right to

search the residence; he asked Carter to produce a drug screen sample, but he was unable to do so; in acting for Officer Spivey, he was not reassigned to Carter; neither he nor Officer Spivey has authority to make assignments.

Officer Cone testified as follows: she and other officers went to Wagner's listed address to execute a warrant, and they encountered Mary Carter, who said that Wagner was not there and that Wagner was her son's girlfriend; the officers checked the computer and saw that Mary Carter was the mother of Carter; the officers then went directly to Carter's residence to look for Wagner; after Officer McDowell and Officer Shaver made contact with Carter, they all went into the residence and she heard Carter say that his wife and children were also present; she found Griffin in the master bedroom and told her that they were looking for Wagner; she allowed Griffin to get dressed; Griffin was anxious and kept looking around the room, so Officer Cone asked her if there was anything in the room that was going to be a violation of Carter's supervision or the law; Griffin responded that there were two guns in the safe; Officer Cone told Officer Shaver about the guns; Officer Shaver advised Carter of his rights and they conducted a search; Officer Spivey was not present during the search; even though Officer Spivey was on light duty, Carter was still assigned to her.

Officer Kerr also testified as to the circumstances of the search, and reiterated that Officer Spivey, Carter's assigned probation officer, was not present during the search. Officer Kerr stated that he did not know Officer Spivey had been contacted, but he was told during a briefing beforehand that Carter was Spivey's case.

The state contends Carter gave consent for the officers to enter his residence to look for Wagner. However, we note inconsistencies in the

testimony that cast doubt on the voluntariness of Carter's consent. Shaver testified that he asked Carter if the officers could come in to talk with him, he said okay and Officer McDowell told him that Officer Spivey had requested a drug screen sample. Officer Shaver did not mention that Carter gave consent for the officers to look for Wagner. Nor did Officers Cone or Kerr corroborate Office McDowell's statement that Carter said the officers could look around the residence for Wagner.

In addition, coupling a request to enter and look for Wagner with the statement that Officer Spivey had requested a drug screen sample would have the effect of pressuring Carter to consent to an entry by the officers because Carter, as a probationer, could not refuse a request by Officer Spivey, his probation officer, that he provide a drug screen sample. Valid consent for a search must be free and voluntary in circumstances that indicate the consent was not a product of pressure or duress.

Based upon this record, the totality of the circumstances indicates that the officers' assertion to Carter that Officer Spivey had sent them to obtain a drug screen sample taints the voluntariness of any consent by Carter to enter his residence because he would not feel able to refuse entry for a drug screen sought by Officer Spivey. Further, the lack of corroboration in the officers' testimony raises a question as to whether Carter was giving consent to talk with the officers or to enter his residence to look for a third party. Based on the evidence presented, we cannot say the state satisfied its burden to prove that the search in this case was justified by an exception to the warrant requirement. Thus, we must conclude that the evidence obtained in the search should be excluded and the trial court erred in denying the motions to

suppress the evidence. Accordingly, the ruling of the trial court is reversed, we grant the motions to suppress and remand for further proceedings.

CONCLUSION

For the foregoing reasons, the trial court's denial of the defendants' motions to suppress the evidence is reversed and the motions are granted. This matter is remanded to the district court for further proceedings.

REVERSED; MOTIONS TO SUPPRESS GRANTED; REMANDED FOR FURTHER PROCEEDINGS.