MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Duane R. Fultz,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 29, 2021

Court of Appeals Case No. 20A-CR-1386

Appeal from the Marion Superior Court

The Honorable Jennifer Prinz Harrison, Judge

Trial Court Cause No. 49D20-1905-F2-20203

Altice, Judge.

Case Summary

[1] Parolee Duane Fultz was charged with Level 2 felony dealing in methamphetamine and Level 3 felony possession of methamphetamine. In this interlocutory appeal, Fultz appeals the trial court's denial of his motion to suppress evidence discovered by parole field agents during a warrantless search of his residence, asserting that the search was unconstitutional under the United States and Indiana Constitutions.

[2] We affirm.

Facts & Procedural History

[3] On April 5, 2019, Fultz was released from the Indiana Department of Correction (DOC) where he was serving a robbery sentence. Upon release, he was assigned to DOC Parole Officer Zachary Williams. Fultz timely met with Officer Williams on April 10, 2019, and Fultz reviewed and signed his Parole Release Agreement (Agreement). Among other terms, the Agreement provided:

> 2. EMPLOYMENT AND RESIDENCE — I will make every effort to remain gainfully employed and I understand that I must obtain written permission from my supervising officer prior to changing my employment or residence.
>
> * * *
>
> 5. ABUSE OF ALCOHOL OR CONTROLLED SUBSTANCES — I understand that the following is a violation of my parole: (a) Being intoxicated. Abuse of alcohol or drugs

> not a defense for violation of the Parole Release Agreement. (b) Using, possessing, or trafficking illegally in a controlled substance. Abuse of alcohol or drugs is not a defense for violation of the Parole Release Agreement.
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> * * *
>
> 9. HOME VISITATION AND SEARCH - (a) I will allow my supervising officer or other authorized officials of the Department of Correction to visit my residence and place of employment at any reasonable time. (b) I understand that I am legally in the custody of the Department of Correction and that my person and *residence of property under my control may be subject to reasonable search by my supervising officer or authorized official of the Department of Correction if the officer or official has reasonable cause to believe that the parolee is violating or is in imminent danger of violating a condition to remaining on parole*.

Exhibit Vol. at 4 (emphasis added). At this meeting, Fultz submitted to a "baseline" urine drug screen, which came back positive for marijuana and Suboxone. *Transcript* at 10. In later testimony, Officer Williams explained that parolees who test positive are "put on a list" with parole's Field Team, "and eventually they'll be searched[,]" although "[i]t won't be that day. It could be, you know, a week, two weeks, three weeks to a month" before the search occurs. *Id*. at 13. Also, pursuant to policy, once a parolee tests positive, he or she is required to test weekly and have four clean drug screens before being moved to monthly visits with parole.

[4] Because Fultz was unemployed, Officer Williams instructed Fultz to attend "a hire class" on April 12 at WorkOne, where parolees receive assistance with

obtaining employment. *Id*. Fultz attended the class, but Officer Williams received a call from the staff indicating that Fultz "had his two phones out the entire time" – although those in attendance were not to have or use their phones – and was "back talking" the staff. *Id*. at 14. Fultz also initially refused to provide his name or the name of his supervising agent and did not do so until "the very end" of class. *Id*.

[5] Officer Williams's next scheduled meeting with Fultz was on April 15. Fultz did not appear for the appointment, so Officer Williams called him. Fultz apologized and said he thought the meeting was two days later. Due to Fultz's positive drug screen, his poor behavior at the hire class, "no proof of even trying to be employed," and missing an appointment, Officer Williams "could have violated him and sent him back to prison," but instead Officer Williams placed Fultz on home curfew. *Id*. at 15. This arrangement required Fultz to be at home from 9 p.m. to 6 a.m.

[6] Officer Williams next met with Fultz on April 25. Fultz took a drug screen and tested positive for marijuana. When Officer Williams next met with Fultz on April 29 at Fultz's home, Fultz submitted to a drug test and "was clean" this time. *Id*. at 17.

[7] The next meeting was on May 20 at Officer Williams's office. Upon entry, and pursuant to policy, Fultz was patted down for weapons, and none were found. Officer Williams administered a drug test to Fultz, and he was negative. At some point during the meeting, Officer Williams contacted the Field Team and

asked them to search Fultz's residence. Agents Harold Branch and John Hosler, along with two other agents, arrived at Officer Williams's office to transport Fultz to his residence and conduct the search. Before transporting Fultz, an agent conducted a pat down of Fultz and found over $850 in cash in his front pocket. Officer Williams found this to be "suspicious" because Fultz "had been out over a month and there was no proof of a job." *Id*. at 18. Officer Williams questioned Fultz about the money, and Fultz produced two paper receipts and told Officer Williams that he had done some work for a place called Above and Beyond Painting. The receipts were "just yellow paper" and the type that Officer Williams viewed as "the typical receipts you can buy from like CVS or Walmart." *Appendix* at 57 (deposition). Officer Williams reminded Fultz, as he had told him at their initial meeting, that either a pay stub or a tax ID number for the employer was required as verification of employment.

[8] Field Agents transported Fultz to his home, where Fultz's wife or girlfriend and minor children were present. After a brief protective sweep of the home to make sure no others were present, the agents began the search. Agent Hosler went into a spare bedroom-type room on the first floor that appeared to be used for storage. He looked in the closet and, in a metal box on the shelf, found what he believed to be a large quantity of methamphetamine. Due to the quantity that was found and pursuant to policy, the field agents contacted the Indianapolis Metropolitan Police Department (IMPD), and IMPD officers responded to the scene, read *Miranda* rights to Fultz, and, after receiving Fultz's

consent, searched the home. Subsequent testing confirmed that what Agent Hosler found was over 400 grams of methamphetamine. *Appendix* at 96.

[9] On May 23, 2019, the State charged Fultz with Level 2 felony dealing in methamphetamine and Level 3 felony possession of methamphetamine. On April 28, 2020, Fultz filed a motion to suppress, asserting that the search of his home was illegal and that admission of the evidence recovered would violate his rights under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution.

[10] The trial court scheduled a hearing on Fultz's motion to suppress for June 24, 2020. Officer Williams and Agent Hosler were deposed prior to the hearing. Agent Hosler testified that the Field Team consists of six agents, without an assigned caseload, to assist parole officers as needed by handling searches and arrests of parolees. He stated that often the Field Team is contacted by parole officers "when they've got someone who [] needs a follow up home search because they've done something to establish reasonable cause." *Id*. at 94. Agent Hosler explained that reasonable cause for a search typically occurs with a failed drug test, a missed appointment, unreported contact with law enforcement, or an anonymous tip, for example, reporting that a parolee is engaged in criminal activity. Agent Hosler testified that, in this case, the Field Team was contacted on May 20 by Officer Williams because Fultz had failed a drug screen on April 10 and missed an office visit on April 15 "so he had [] two recent causes to establish reasonable cause that we need to follow-up and do a . . . home search." *Id*. at 95.

[11] Officer Williams testified that he contacted the Field Team on May 20 based on "a combination of [] factors," namely because Fultz had tested positive for drugs twice, lacked verified employment, and missed an appointment, noting "all three of those are reasonable suspicion." *Id*. at 63. He stated that "anytime anyone tests positive" that person is "gonna get searched eventually" depending on availability of the Field Team. *Id*. at 64.

[12] At the suppression hearing, Officer Williams indicated that, although Fultz tested negative on May 20 and April 29 and had not committed any specific violation on May 20, he contacted the Field Team on May 20 because Fultz was in violation of the Agreement due to his prior failed tests and missed appointment. Officer Williams further noted, "[H]e was put on a list when he initially tested positive . . . [s]o he was going to be searched regardless" but "Marion County has over 3,000 parolees" so conducing a search "usually takes about 30 to 60 days" after a violation to occur. *Transcript* at 27-28. Officer Williams testified that there are no rules on how quickly agents must get to a parolee's home to do a search.

[13] When asked on cross-examination to confirm that "there were no violations" that occurred on May 20, Officer Williams responded,

> That's not how a violation works with parole. It can be everything leading up to the violation. So, yes, there was still a violation, the drug screen, the missing the visit, acting up in the hire class.

Id. at 29. Officer Williams acknowledged that he could have summoned the Field Team on April 10, 15, or 25, but stated that he chose not to, instead opting to place Fultz on home curfew "to give [Fultz] more time to succeed" on parole. *Id*. at 34.

[14] With regard to the cash found in Fultz's pocket, Officer Williams testified:

> The receipts I told him I wouldn't accept. Like I told him in the initial interview and I tell everyone that's on parole with me, I don't accept 1099 employment. You have to have a verifiable job. You have to prove to me that you're working. And it has to be a check.

Id. at 19.

[15] Agent Branch testified that Officer Williams contacted the Field Team on May 20 and that his understanding was that the reason for the search was a failed drug test on April 10. He testified that he did not consider that timeframe to be abnormal. He also stated that testing negative on one date after previously testing positive does not in any way "fix" the violation of the prior failed test. *Id*. at 44.

[16] Agent Hosler testified that the Field Team received a phone call from Officer Williams on May 20 to pick up Fultz and take him to his residence for a home search. Agent Hosler recalled that the reason for the search was a failed drug screen and missed office visit that occurred approximately a month prior. When Agent Hosler, who had been on the Field Team for four years, was asked to estimate the average time between "a reasonable cause event" and a search,

he responded, "[W]e try to get it within 30 days but sometimes it can go much longer because of the backlog[,]" estimating that there are on average eighty failed drug tests in a month "to follow-up on" and "[w]e don't have the manpower to get to them all as quickly as we would like." *Id*. at 47.

[17] The trial court took the matter under advisement and then issued an order on July 17, 2020, denying Fultz's motion to suppress. The court rejected Fultz's arguments that, since he had tested negative after the earlier positive screens and missed appointment, he was not in violation of parole or in imminent danger of violating parole. Rather, the court found that the search was reasonable under the Fourth Amendment, as it was authorized by a condition of parole and supported by reasonable suspicion and that, based on the totality of circumstances, the search was reasonable under Article 1, Section 11 of the Indiana Constitution.

[18] Fultz filed a petition to certify the order for interlocutory appeal and to stay the proceedings. The trial court granted his petition, and this court accepted jurisdiction. Additional facts will be provided below as needed.

Discussion & Decision

[19] Fultz contends that the trial court erred in denying his motion to suppress. "'When reviewing a trial court's denial of a defendant's motion to suppress, we view conflicting factual evidence in the light most favorable to the ruling but we will also consider substantial and uncontested evidence favorable to the defendant.'" *Hodges v. State*, 54 N.E.3d 1055, 1058 (Ind. Ct. App. 2016)

(quoting *Wertz v. State*, 41 N.E.3d 276, 279 (Ind. Ct. App. 2015), *trans. denied*). We determine whether the record contains substantial evidence of probative value that supports the trial court's decision. *State v. Harper*, 135 N.E.3d 962, 968 (Ind. Ct. App. 2019), *trans. denied*. "When the trial court's denial of a defendant's motion to suppress concerns the constitutionality of a search or seizure . . . it presents a question of law, and we address that question de novo." *Robinson v. State*, 5 N.E.3d 362, 365 (Ind. 2014). Fultz argues that the search of his residence on May 20 violated both his federal and state constitutional rights. We address each in turn.

Fourth Amendment

[20] The Fourth Amendment protects citizens from unreasonable searches and seizures, and, generally, searches should be conducted pursuant to a warrant supported by probable cause. *Harper*, 135 N.E.3d at 968. But, as Fultz acknowledges, parolees have a reduced expectation of privacy, and warrantless searches are permitted. *Id.*; *State v. Vanderkolk*, 32 N.E.3d 775, 777 (Ind. 2015). His argument on appeal is that "an individual's status of being a parolee alone does not authorize suspicionless searches," and, here, neither the Field Agents nor Officer Williams had reasonable suspicion that Fultz was engaged in criminal activity on May 20 in order to support a search of his residence. *Appellant's Brief* at 7.

[21] We agree with Fultz to the extent that one's status as a parolee does not itself authorize a suspicionless search. Rather, where, as here, the Agreement signed by Fultz did not clearly inform him that he could be subject to warrantless and

suspicionless searches,[1] the State must show that the warrantless search was based on reasonable suspicion. *See Harper*, 135 N.E.3d at 972 (finding that warrantless search, which was allowed by parole agreement if officers had reasonable cause to believe parolee was violating condition of parole, was supported by officers' reasonable suspicion of criminal activity); *see also State v. Schlechty*, 926 N.E.2d 1, 3 (Ind. 2010) (recognizing that "a warrantless search may be justified on the basis of reasonable suspicion to believe that the probationer has engaged in criminal activity and that a search condition is one of the terms of probation"), *cert. denied* (2011).[2] However, we disagree with Fultz's latter assertion that the officers lacked reasonable suspicion of criminal activity and thus the search of his home was invalid.

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[1] We contrast the Agreement – in which Fultz agreed to searches when the officers have reasonable cause to believe he is violating parole – to those in which a parolee or probationer agrees to dispense with reasonable suspicion or cause. *See Samson v. California*, 547 U.S. 843, 846 (2006) (permitting suspicionless search where a parolee had agreed to a parole search condition authorizing searches "with or without a search warrant and with or without cause"); *State v. Vanderkolk*, 32 N.E.3d 775, 779 (Ind. 2015) ("Indiana probationers and community corrections participants, who have consented or been clearly informed that the conditions of their probation or community corrections program unambiguously authorize warrantless and suspicionless searches, may thereafter be subject to such searches during the period of their probationary or community corrections status."); *State v. Ellis*, 153 N.E.3d 305, 310 (Ind. Ct. App. 2020) (search did not need to be supported by reasonable suspicion where probationer signed agreement that "You waive your right against search and seizure, and shall permit [probation staff] . . . to search your person, residence, motor vehicle, or any location where your personal property may be found, to insure compliance with the requirements of community corrections").

[2] Although *Schlechty* is a probation case, our Supreme Court in *Vanderkolk* (where the Court determined that probationers on community corrections may, pursuant to a valid agreement to probation conditions, authorize warrantless and suspicionless searches) recognized that the "similarities between parole and probation (or community corrections) are far greater than the differences." 32 N.E.3d at 779 (discussing *Samson*, 547 U.S. at 850, where the Court held that parolees may have an even lesser expectation of privacy than probationers "because parole is more akin to imprisonment than probation is to imprisonment").

[22] Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, but it still requires at least a minimal level of objective justification and more than an inchoate and unparticularized suspicion or "hunch" of criminal activity. *Harper*, 135 N.E.3d at 968 (citing *Schlechty*, 926 N.E.2d at 7). In this case, Officer Williams testified that the search on May 20 was based on a combination of violations that occurred leading up to May 20.

[23] More specifically, Officer Williams testified that the search was based on Fultz's failed drug screens on April 10 and April 25, his missed appointment on April 15, his disruptive behavior and attitude at the hire meeting on April 12, and his failure to obtain required verifiable employment. Fultz contends that those were "stale" violations, having occurred weeks and up to more than a month prior to May 20 and, therefore, could not support reasonable suspicion that on May 20 Fultz was presently "violating" the Agreement. *Appellant's Brief* at 5, 11, 15. Fultz essentially claims that, for a search to be valid, the parolee must be suspected of *presently violating* parole, as opposed to having previously violated it.

[24] His claim in this regard is based on: (1) the terms of the Agreement, in which Fultz agreed that he and his residence "may be subject to reasonable search" if his parole officer "has reasonable cause to believe that the parolee *is violating or is in imminent danger of violating* a condition to remaining on parole," *Exhibits Vol.* at 4 (emphasis added), and (2) Ind. Code § 11-13-3-7(a)(6) which allows for searches of a parolee's person or property if the parole officer "has reasonable

cause to believe that the parolee *is violating or is in imminent danger of violating* a condition to remaining on parole." (Emphasis added). Fultz urges that "[t]he use of the active verb 'violating' indicates the parolee must be in the act of violating at the time the search is conducted," and, here, parole agents did not have reasonable suspicion to believe that Fultz – who passed his two recent drug screens – was violating parole on May 20. *Appellant's Brief* at 15.

[25] We are unpersuaded that, as Fultz suggests, any prior violation cannot form the basis of reasonable suspicion to support a search. First, such a requirement is neither realistic nor feasible. Officer Williams and Agent Hosler testified that in Marion County the workload often prevents a residential search immediately upon a parolee's violation. Officer Williams estimated that, on average, it can take thirty to sixty days. Agent Branch testified that the span of time in this case, from the failed April tests to the search of the residence on May 20, was not "abnormal" or out of the ordinary. *Transcript* at 44.

[26] Second, Fultz's suggestion that any search must occur precisely when the parolee is violating, but not later, is a "now or never" approach: Request and obtain the search upon occurrence of a violation, or the ability to have a search conducted is gone, i.e., use it or lose it. The effect of such would discourage probation officers from allowing parolees more time and more opportunity to succeed on parole.

[27] Furthermore, we reject Fultz's assertion that, because his drug screens were clean on April 29 and May 20, Officer Williams could not have had reasonable

suspicion on May 20 that Fultz was engaged in criminal activity at that time. Fultz, who was released on April 5, immediately failed a screen on April 10, despite knowing that he would be meeting with his parole officer upon release. He attended an employment class on April 12 but was inattentive and disruptive, causing the staff at the meeting to contact Officer Williams. Fultz missed an appointment on April 15 and, rather than filing a parole violation, Officer Williams placed Fultz on home curfew. The next visit with Officer Williams was on April 25, and Fultz tested positive for marijuana. Officer Williams went to Fultz's residence on April 29 and while there administered a drug screen, and Fultz tested negative.

[28] Fultz attended his scheduled appointment at Officer Williams's office on May 20, although Officer Williams testified that he "had to call [Fultz] and remind him that he had an office visit that day." *Appendix* at 55. Fultz had thus far reported no employment to Officer Williams, but a Field Agent found over $800 in Fultz's pocket. Fultz then provided receipts for work, although he had been advised that he needed to provide official check stubs from an employer and that "1099"-type independent work was fine if Fultz wanted to do it, but it would not be considered acceptable as verified employment. *Transcript* at 19.

[29] Fultz's violations, occurring almost consecutively and just after release from the DOC, indicated Fultz's disregard for the Agreement that he signed and suggested a pattern of behavior. The fact that Fultz thereafter passed two screens did not preclude Officer Williams from having reasonable suspicion on

May 20 that Fultz was engaged in criminal activity in violation of the Agreement.[3]

[30] The warrantless search of Fultz's residence was supported both by reasonable suspicion to believe that Fultz had engaged in criminal activity and pursuant to a search condition contained in his Agreement. We therefore conclude that the search comported with the dictates of the Fourth Amendment.[4]

Article 1, Section 11

[31] We next address Fultz's claim that the search of his residence violated his protections under Article 1, Section 11 of the Indiana Constitution. The purpose of Section 11 "is to protect from unreasonable police activity those areas of life that Hoosiers regard as private." *State v. Quirk*, 842 N.E.2d 334, 339-40 (Ind. 2006). Generally, under Indiana law, the reasonableness of a search or seizure turns on the "totality of the circumstances" and a balance of: (1) the degree of concern, suspicion, or knowledge that a violation has occurred; (2) the degree of intrusion the method of the search imposes on the citizen's ordinary activities; and (3) the extent of law enforcement needs. *Litchfield v.*

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[3] This is not to say that prior violations can never become stale or too remote from the date of the search. We expressly make no finding in that regard. Rather, we simply find that such was not the case here. While we have no doubts about the application of this parole agreement language to Fultz, the addition of language to agreements about past violations would be helpful for courts and parolees in the future.

[4] Fultz makes no claim that the search itself was conducted unreasonably.

State, 824 N.E.2d 356, 361 (Ind. 2005).[5] Applying those factors here, we find that the search was reasonable.

[32] Regarding the first factor, Officer Williams had knowledge that Fultz had violated the Agreement several times in the month after Fultz's release. Thus, the degree of concern or suspicion that Fultz had not and was not following the conditions of parole was high. As to the degree of intrusion that the search imposed, the record shows that the search was conducted during the daytime and was a "mov[e]-item" type of search, to lift cushions or mattresses, but did not leave the house in disarray. *Transcript* at 40. Fultz's girlfriend and his two minor children, described as older than toddlers but probably under age ten, were home. During the search, the children "weren't scared" and were "roughhousing" and doing "just normal kids stuff." *Appendix* at 77. The record also indicates that the search did not last long; Agent Branch went upstairs to the master bedroom, while Agent Hosler went into the spare room on the first floor and found the box with the methamphetamine, at which time the parole search ended and IMPD was called. On these facts, we find that the degree of intrusion that the method of the search imposed was low.

[33] Regarding the third factor, extent of law enforcement needs, it is well-settled that the State has legitimate interests in supervising parolees, protecting the

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[5] We reject the State's suggestion that "*Litchfield's* balancing test does not apply" to this case. *Appellee's Brief* at 24. The State's assertion is based on *Hodges*, where this court found that a separate *Litchfield* analysis was unnecessary due to *Vanderkolk's* endorsement of warrantless and suspicionless searches in cases where the probationer had so agreed. Here, however, the Agreement did not authorize suspicionless searches.

public from criminal acts, and further rehabilitative objectives. *See McElroy v. State*, 133 N.E.3d 201, 209 (Ind. Ct. App. 2019) (discussing *Litchfield* in context of community corrections participant), *trans. denied*. In *Samson*, the Court, in addressing the search of a parolee's residence under the Fourth Amendment, recognized that a state has an "overwhelming interest" in "reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees [that] warrant[s] privacy intrusions[.]" 547 U.S. at 853. On balance, we conclude that the search of Fultz's residence was not unreasonable under the totality of the circumstances and therefore did not violate Article 1, Section 11 of the Indiana Constitution.

[34] As the search of Fultz's home was reasonable under both the Indiana Constitution and the Fourth Amendment, the trial court did not err in denying Fultz's motion to suppress.

[35] Judgment affirmed.

Mathias, J. and Weissmann, J., concur.