Appeal No. 2010AP1398-CR **Cir. Ct. No. 2008CF32**

WISCONSIN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TALLY ANN ROWAN,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Vergeront, P.J., Higginbotham and Blanchard, JJ.

The issue presented by this appeal is whether a sentencing court violated the Fourth Amendment or WIS. CONST. art. I, § 11, by setting a condition of extended supervision that allows any law enforcement officer to search the defendant's person, vehicle, or residence for firearms, at any time and without probable cause or reasonable suspicion. While it is clear that a court may impose conditions of extended supervision that limit a defendant's Fourth Amendment rights, the issue presented here is whether it is permissible to impose a condition that, in essence, eliminates those rights. There are no cases in Wisconsin that address this issue. Because this is a novel issue of statewide importance that is

certain to recur, we hereby certify this appeal to the Wisconsin Supreme Court for its review and determination, pursuant to WIS. STAT. RULE 809.61 (2009-10).[1]

BACKGROUND

Tally Ann Rowan was convicted of battery to a police officer.[2] The facts surrounding Rowan's arrest are relevant to an understanding of why the circuit court thought it necessary to impose the challenged condition as part of her extended supervision. The underlying incident occurred after Rowan, who was intoxicated, crashed her car into a post. A police officer at the scene suspected that Rowan had been drinking and was concerned that Rowan may have been injured in the crash, so he called for assistance. When emergency personnel arrived and approached Rowan's car, Rowan said: "[G]et the fuck away from there. Where the fuck is my gun? I'm going to shoot you." Rowan then began to reach down, "reaching into an area" in her car. Rowan was pulled from the car and put in handcuffs. Rowan then told an officer that she was going to find him and his family, that she would shoot his family, and that she was a member of a militia.

Rowan was taken to a hospital, where she continued to be very agitated, grabbing at people, spitting at police and hospital employees, and threatening the doctor, other medical staff, and their families. A nurse asked an officer to hold Rowan's arm so they could give her medication to calm her down.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] At the same time, Rowan was also convicted of resisting or obstructing an officer and carrying a concealed weapon. Those charges are not at issue in this appeal.

As the officer held Rowan's arm, Rowan grabbed the officer's thumb, and very seriously injured the officer's hand. It was this incident that led to the charge of battery to a police officer.

Rowan was found guilty after a jury trial. The court sentenced her to one year and two months of initial confinement and three years of extended supervision on the battery charge. The court ordered the following as a condition of extended supervision, and explained its rationale:

> No possession of a firearm or ammunition. Consent to search your person, any premises you occupy or any vehicles you occupy at any time without probable cause. The goal is to make sure that you are not in possession of a firearm. Knowing that you could be searched will be an additional incentive for you not to have contraband.

Rowan brought a motion for postconviction relief asking the court to remove this search condition. The court denied the motion but amended the condition of extended supervision to read: "[T]he defendant's person or her residence or her vehicle is subject to search for a firearm at any time by any law enforcement officer without probable cause or reasonable suspicion." The court stated that the evidence had shown that "the scope of persons that she threatened was quite expansive and shows at least at that point an unusual level of risk to the public," and that many of the threats involved firearms. The court noted that Rowan had threatened another judge, and showed a continuing "pattern of threatening behavior."

The court stated that it was imposing the condition so that Rowan would know that she could be searched for the possession of a firearm at any time, and that the condition would aid in her rehabilitation and encourage her not to have a firearm when she returned to the community. The court found that this was

a "special need situation" that justified departure from the normal Fourth Amendment rules on probable cause and warrant requirements.[3] The court said it imposed the condition of extended supervision because of "the nature of the underlying offense and the facts specific to this particular case," and that "anything we can do to minimize the temptation for her to possess a firearm will promote community safety … while she is under the supervision of the Court." The court limited the condition to searches of Rowan's own home or vehicle, and stated that any search conducted as a condition of her extended supervision must be conducted in a reasonable manner.[4]

ANALYSIS

The issue presented by this certification is whether a condition of extended supervision that allows any law enforcement officer to search the defendant, her home, or her vehicle, for a firearm at any time and without requiring reasonable suspicion and in the absence of a state statute or regulation allowing such a search, is permissible under the Fourth Amendment and WIS. CONST. art. I, § 11.

WISCONSIN STAT. § 973.01(1) allows a court to impose conditions on a term of extended supervision. "The statute grants a court 'broad, undefined discretion' in imposing conditions of extended supervision, as long as the

[3] While the court actually said "Fifth Amendment," it is clear from the context that the court was referring to the Fourth Amendment.

[4] The court stated in relevant part: "I think the constitution would require the search be done in a reasonable manner…. To come in and just tear apart a house might be an example of [a] search which is performed in an unreasonable manner."

conditions are reasonable and appropriate." ***State v. Galvan***, 2007 WI App 173, ¶8, 304 Wis. 2d 466, 736 N.W.2d 890 (citations omitted).

Rowan argues that the condition the court placed on her extended supervision is not reasonable or appropriate.[5] She further argues that there must be some legislative authority to allow any law enforcement officer, as opposed to the community corrections officer assigned to supervise her, to conduct searches. The State, on the other hand, argues that the circuit court properly exercised its discretion and that the condition is permissible under ***Samson v. California***, 547 U.S. 843 (2006). The State also argues that the condition is analogous to the conditions imposed in other Wisconsin cases.

There are two lines of United States Supreme Court cases relevant to the analysis of this issue. In ***Griffin v. Wisconsin***, 483 U.S. 868, 872 (1987), the Court ruled that the warrantless search of a probationer's residence was reasonable because it was conducted under a valid State regulation, WIS. ADMIN. CODE HSS §§ 328.21(4) and 328.16 (1981),[6] that was a reasonable response to a "special need" of the probation system. The Court held that the State's "special needs" as

[5] Rowan also argues that there was insufficient evidence to prove that the police officer was acting in her official capacity when Rowan injured her. We believe that this issue can be decided based on well-established precedent.

[6] Now WIS. ADMIN. CODE DOC § 328.21 (2006). This provision allows a probation officer to search a probationer, his or her "body contents," or his or her "living quarters or property" under specified conditions. § 328.21(1). A personal search is allowed if the staff member has "reasonable grounds" to believe that the probationer possesses contraband, "[a]t the direction of a supervisor," before a probationer enters or after he or she leaves a secure facility, or when a probationer is taken into custody. § 328.21(2)(b). Living quarters or property may be searched "if there are reasonable grounds to believe that the quarters or property contain contraband or an offender who is deemed to be in violation of supervision." § 328.21(3).

articulated in its probation regulations justified the departure from the warrant and probable cause requirements. ***Id.*** at 876.

In ***United States v. Knights***, 534 U.S. 112, 114 (2001), the Court considered a condition of probation that allowed a search of the probationer's person, property, place of residence, vehicle, and personal effects at any time without a warrant or reasonable cause by a probation officer or any law enforcement officer. The Court held that a warrantless search of the probationer's apartment, *supported by reasonable suspicion* and authorized by a condition of probation, was "reasonable" within the meaning of the Fourth Amendment. ***Id.*** at 122. The Court noted that "[j]ust as other punishments for criminal convictions curtail an offender's freedom, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." ***Id.*** at 119. The Court balanced the probationer's rights against the State's interests and held that "the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house." ***Id.*** at 121.

In ***Samson***, the United States Supreme Court addressed the constitutionality of a California law that required every prisoner who was eligible for parole to agree in writing to be subject to search and seizure by a peace officer at any time of the day or night without a warrant or without cause. ***Samson***, 547 U.S. at 846. The Court noted that parolees "have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is" because parole is "'an established variation on the imprisonment of convicted criminals.'" ***Id.*** at 850 (citation omitted). "This Court has repeatedly acknowledged that a State has an 'overwhelming interest' in supervising parolees because 'parolees … are more likely to commit future criminal offenses.'" ***Id.*** at

853 (citation omitted). The Court held that "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." ***Id.*** at 857.[7]

These cases have been described as creating two lines of analysis. ***United States v. Freeman***, 479 F. 3d 743, 748 (10th Cir. 2007). The ***Griffin*** line of cases use a "special needs" analysis that rests "on the rehabilitative relationship between the parolee and the parole officer, and thus [does not extend] to other law enforcement officers unless they are acting under the direction of the parole officer." ***Id.*** In contrast, the ***Knights-Samson*** line of cases rest "on the parolee's diminished expectation of privacy stemming from his own parole agreement and the state regulations applicable to his case." ***Id.***

At first glance, it would appear that ***Samson*** answers the question presented and the condition is constitutional, at least under the federal constitution. Some cases interpreting ***Samson***, however, have limited its application to conditions that are controlled by state law. *See, e.g.*, ***Freeman***, 479 F. 3d at 748; ***United States v. Kone***, 591 F. Supp. 2d 593, 603 (S.D.N.Y. 2008) (***Samson*** "has little to no bearing on whether a warrantless search *not* authorized by statute, regulation or condition of supervision is permissible"); ***State v. Bennett***, 200 P.3d 455 (Kan. 2009) (***Samson*** limited to suspicionless searches deemed permissible by state statute). Some courts have applied ***Samson*** to allow warrantless, suspicionless searches of parolees if the language of the parole agreement specifically allows for it. *See, e.g.*, ***United States v. Smith***, 526 F.3d 306, 310-11

[7] Rowan was placed on extended supervision, yet "[u]nder Truth-in-Sentencing, extended supervision and reconfinement are, in effect, substitutes for the parole system that existed under prior law." ***State v. Brown***, 2006 WI 131, ¶44, 298 Wis. 2d 37, 725 N.W.2d 262.

(6th Cir. 2008). And at least one state has held that ***Samson*** violated the state constitution, whose search and seizure provision is identical to WIS. CONST. art. I, § 11. *See* ***State v. Ochoa***, 792 N.W.2d 260, 291 (Iowa 2010).[8]

When creating the condition at issue here, the circuit court applied the ***Griffin*** approach and found that this was a "special needs" situation. Given that the condition allows searches by "any law enforcement officer," we are not convinced that the "special needs" analysis applies. *See*, *e.g.*, ***Freeman***, 479 F. 3d at 748 (this was not a "special needs" case because the search was not conducted by a community corrections officer). In addition, it is open to question whether ***Knights*** applies in this case, because the condition does not require reasonable suspicion.

There is no case in Wisconsin that directly addresses this situation. The State argues that there are Wisconsin cases that establish by analogy that the condition was permissible. *See*, *e.g.*, ***State v. Oakley***, 2001 WI 103, ¶1, 245 Wis. 2d 447, 629 N.W.2d 200 (court properly exercised its discretion when it imposed a condition of probation prohibiting a father of nine who had

[8] The Iowa court held:

> We conclude that a parolee may not be subjected to broad, warrantless searches by a general law enforcement officer without any particularized suspicion or limitations to the scope of the search. The power asserted by the State in this case too closely resembles authority pursuant to a general warrant, provides no meaningful mechanism to control arbitrary searches, avoids the warrant preference rule that this court has traditionally recognized, utilizes a balancing test that improperly weighs the interests involved, and does not adequately recognize the security and sanctity interests of parolees in their home.

State v. Ochoa, 792 N.W.2d 260, 291 (Iowa 2010).

intentionally refused to pay child support from having another child until he could show that he could support that child and his current children); and ***Krebs v. Schwarz***, 212 Wis. 2d 127, 128-29, 568 N.W.2d 26 (Ct. App. 1997) (finding constitutional a condition of probation prohibiting probationer, who had been convicted of first-degree sexual assault of his daughter, from entering into an intimate or sexual relationship with any person without first receiving approval from his agent).

However, these cases do not answer the question here because the condition imposed on Rowan is of a different nature than those in the cases cited: it continues for the entire period of her extended supervision, it can be enforced at any place, at any time of the day or night, and there is nothing she can do to remove the condition. While it is clear that limitations are allowed on a parolee or probationer's Fourth Amendment rights, the condition imposed here essentially eliminated Rowan's Fourth Amendment rights, by allowing searches by any law enforcement officer, at any time, at any place, for a small handgun, without need for even reasonable suspicion. Whether this is permissible is an open question of statewide importance and certain to recur.