

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 7, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

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**Appeal No. 2012AP1307-CR**

**Cir. Ct. No. 2010CF86**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JEREMIAH J. PURTELL,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Washington County: JAMES K. MUEHLBAUER, Judge. *Reversed and cause remanded for further proceedings consistent with this opinion.*

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

¶1 LUNDSTEN, P.J. The defendant, Jeremiah Purtell, was on probation following conviction for two counts of cruelty to animals when a probation agent entered his residence and lawfully removed two of Purtell's

computers. During a subsequent warrantless inspection of some of the contents of Purtell's computers, Purtell's probation agent found images of what appeared to be child pornography. The question here is whether this search of the contents of Purtell's computers was supported by reasonable grounds to believe that the computers contained contraband. The circuit court concluded that the search was supported by reasonable grounds to believe the computers contained contraband. We disagree and, therefore, reverse and remand.

### ***Background***

¶2 Purtell was convicted of two counts of cruelty to animals, one resulting in the death of the animal, and he was placed on probation. One condition of Purtell's probation was that he not own or possess a computer and that he could only use a computer "at his place of business or school." The purpose of this prohibition may have been to limit Purtell's access to certain types of images, but the conditions of his probation did not actually impose a limitation on the types of images or written materials Purtell could possess.

¶3 At a meeting with his probation agent, Purtell complained about the no-computer condition. Purtell told the agent that he had a working laptop and a desktop computer that did not work, both at his residence. Purtell also told the agent that he had a Myspace account and gave the agent his Myspace password.

¶4 For reasons that do not matter for purposes of this appeal, Purtell's agent subsequently went to Purtell's residence and removed his laptop and desktop computers. The seizure of Purtell's computers is not challenged. Later, at her

office, the agent looked at the contents of one of Purtell's computers.<sup>1</sup> The agent "clicked on files" and observed that titles of the files did not always match the images that were in the files. The agent located files showing females engaged in sexual acts with animals. The agent later testified: "[A] number of the files, when we opened them, had names of like very young females. [And there was] concern at some point that this was sex involving underage females."

¶5 Based on information that Purtell's agent gained from looking at the contents of Purtell's computers, law enforcement subsequently obtained a warrant to search the computers.<sup>2</sup> The resulting further search revealed a large volume of still images and "videos" depicting young children engaged in sex acts.

¶6 Purtell was charged with eight counts of possession of child pornography. He moved to suppress the evidence resulting from the search of his computers, arguing that his probation agent performed an illegal warrantless search. At a hearing on this suppression motion, Purtell's probation agent testified that, prior to searching the contents of one of Purtell's computers at her office, she looked at Purtell's Myspace account. On that account, she saw pictures of "animals that were partially human," such as a "woman that was half woman and half a cow." The agent testified that, based on what she saw on Purtell's Myspace account, she thought Purtell's computers might have "files regarding cruelty to

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<sup>1</sup> There is a lack of clarity in the record regarding which computer the probation agent searched at her office. However, for purposes of the suppression issue, it does not matter whether she viewed the contents of the laptop or the desktop. The agent's justification for searching was the same as to both computers, and the information she obtained served as the basis for her later conducting a more thorough search of the contents of both computers.

<sup>2</sup> A police detective also viewed the contents of some files while at the probation agent's office, but this fact does not affect the arguments on appeal.

animals or death and mutilation of animals.” She was concerned about Purtell’s mental health issues.

¶7 After hearing testimony and viewing evidence, the circuit court denied Purtell’s suppression motion. The court concluded that the agent had “legitimate reasons of probation supervision to view the [contents of the] computers.” The court stated that the images the agent saw on Purtell’s Myspace account gave the agent reason to believe that there was contraband on Purtell’s computers.

¶8 A jury trial was held, and the jury found Purtell guilty of four of the eight counts of possession of child pornography.

### *Discussion*

¶9 Probationers, like all citizens, are protected by the Fourth Amendment requirement that searches and seizures by state actors or agents be “reasonable.” See *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). However, the warrant requirements under the Fourth Amendment are relaxed for probationers. *Id.* Pertinent here, the probation officer did not need a warrant supported by probable cause to search Purtell’s residence or his belongings. A “probation officer may search a probationer’s residence if the probation officer has reasonable grounds to believe the probationer is in the possession of contraband.” *State v. Jones*, 2008 WI App 154, ¶18, 314 Wis. 2d 408, 762 N.W.2d 106. On this topic, we defer to fact finding by the circuit court, but review the application of law to facts de novo. See *id.*, ¶17.

¶10 As Purtell makes clear, he does not challenge the search of his residence or the seizure of his computers. Rather, he challenges the search of the

*contents* of his computers. Indeed, the State and Purtell agree that the issue here is whether Purtell’s probation agent had “reasonable grounds” to believe that Purtell’s computers contained “contraband.” The parties further agree that “contraband,” for purposes of this case, means any item that Purtell was not allowed to possess under the conditions of his supervision or any item whose possession is forbidden by law. *See id.*, ¶18.<sup>3</sup>

¶11 So far as we can tell, the State’s sole argument on appeal is that, based on several pieces of information, Purtell’s probation agent had reasonable grounds to believe that Purtell’s computers contained images depicting cruelty to animals or the mutilation of animals, and that such images were “contraband.”<sup>4</sup> However, even if we were persuaded that there were reasonable grounds to believe that Purtell’s computers contained images depicting cruelty to animals or the mutilation of animals, the State fails to demonstrate that such images are “contraband.”

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<sup>3</sup> The State does not suggest that the search of the contents of Purtell’s computers was not a distinct search that invaded a recognized privacy interest. Accordingly, we have no occasion to consider whether Purtell’s diminished expectation of privacy, owing to his status as a probationer, was further diminished because he possessed the computers in violation of the conditions of his probation, such that the authorities were not required to possess “reasonable grounds” in order to search the contents of his computers. In addition, we note that, because we conclude that the search of Purtell’s computers violated the Fourth Amendment, we need not address the apparent suggestion in Purtell’s appellate brief that the search also violated an administrative rule.

<sup>4</sup> Before the circuit court, the prosecutor argued other theories that might support the probation agent’s search of Purtell’s computers. The prosecutor argued that a search was justified by the need to determine whether Purtell had mental health treatment needs and to verify that Purtell had no contact over the internet with the owner of the animals that Purtell abused. The State does not rely on these arguments on appeal and, so far as we can tell, they do not provide a basis for affirming the circuit court’s suppression ruling.

¶12 First, as Purtell points out, the conditions of Purtell’s probation did not prohibit him from possessing images depicting cruelty to animals or the mutilation of animals. Although it seems obvious in hindsight that such a condition should have been imposed, the fact remains that no such condition was imposed.

¶13 Second, the State fails to point to reasonable grounds supporting the probation agent’s belief that the computers contained something that was otherwise illegal to possess. For example, the State does not argue that, apart from the conditions of his probation, it was illegal for Purtell to possess images depicting cruelty to animals or the mutilation of animals. This implicit concession appears to be appropriate. *See generally United States v. Stevens*, 559 U.S. 460 (2010) (holding that a federal statute criminalizing the creation, sale, or possession of depictions of animal cruelty was facially invalid under the First Amendment). Nor does the State argue that the agent had reasonable grounds to believe that Purtell’s computers contained evidence of a crime or contained some other material or images that Purtell could not legally possess, such as child pornography.

¶14 Instead, before this court and the circuit court, the State simply pointed to behavior that was generally suspicious, such as the fact that Purtell possessed the computers at home in violation of the conditions of his probation and Purtell’s failure to attend a scheduled mental health treatment appointment. These and other factors may have justified the probation agent taking some action, but they do not supply “reasonable grounds” to believe that Purtell’s computers contained contraband. As we have explained, the State’s argument in this regard appears to be based on the faulty assumption that Purtell’s probation conditions prohibited him from possessing images depicting cruelty to animals or the

mutilation of animals. Having rejected that assumption, the State's arguments leave us with no basis to affirm the circuit court's denial of Purtell's suppression motion.

¶15 Before concluding, we make an observation. Before the circuit court, the arguments made by the prosecutor and Purtell's trial attorney seemingly assumed that images depicting cruelty to animals or the mutilation of animals would have been "contraband." We note, in particular, that Purtell's trial counsel argued that the "half human and half animal" images did not supply an indication that Purtell's computers contained pictures of animal abuse, but he did not make the argument made on appeal. That is, Purtell's trial counsel did not argue that the possession of such images would not have violated any law or condition of probation. Moreover, when the circuit court made clear it was assuming that such images would be "contraband," Purtell's counsel failed to object. Thus, on appeal, the State might have argued forfeiture and asserted that Purtell's postconviction counsel should have raised this issue as a matter of ineffective assistance of counsel. The question then is whether this court should raise the forfeiture issue sua sponte and rely on it to affirm the circuit court. We decline to do so for two reasons. First, we generally try to avoid deciding cases against a party on a ground that has not been briefed. Second, so far as we can tell, an affirmance on that basis would simply lead to meritorious allegations of ineffective assistance of counsel. As should be apparent by now, it appears to us that Purtell's trial counsel should have argued that there was no prohibition on Purtell possessing images of cruelty to animals, even though such a prohibition should have been in place. And it further appears to us that trial counsel's failure to raise the issue was both deficient and prejudicial.

*Conclusion*

¶16 For the reasons above, we reverse the judgment of conviction.

*By the Court.*—Judgment reversed and cause remanded for further proceedings consistent with this opinion.

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