STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP0500-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

RICHARD L. KELLER,

Defendant-Respondent.

APPEAL FROM AN ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE, ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, THE HONORABLE JAMES K. MUEHLBAUER, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

BRAD D. SCHIMEL
Wisconsin Attorney General

DAVID H. PERLMAN
Assistant Attorney General
State Bar #1002730
Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1420
(608) 266-9594 (Fax)
perlmandh@doj.state.wi.us

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STATEMENT OF ISSUES

1. Was the search of Keller's computer, which Probation Agent Johnson desired and arranged, but was actually performed at Agent Johnson's request and supervision by a Division of Criminal Investigation (DCI) forensic computer analyst, a probationary search or a police search?

The trial court held it was an unlawful police search and granted Keller's motion to suppress the evidence the search generated.

2. Did Keller have an expectation of privacy in a computer and all its contents, when he was prohibited by the rules of his probation to possess or use a computer?

While the trial court did not specifically rule on this issue, it necessarily must have opined that Keller had a privacy interest in the computer since it granted Keller's motion to suppress the evidence found in the computer.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The state anticipates that the arguments will be fully developed in the parties' briefs and that oral argument will not be necessary. But, since this case involves a clarification as to what is a probationary search and the privacy rights of a probationer in property he is prohibited from possessing, the state asks for publication of this court's opinion.

STATEMENT OF THE CASE

This is an appeal from an order filed February 10, 2016, in the Washington County Circuit Court (24, A-App. 101) in which the Honorable James K. Muehlbauer, granted Keller's motion to suppress evidence obtained from a search of his computer.

A criminal complaint filed May 13, 2015, charged Keller with nine counts of possession of child pornography and nine counts of bail jumping, contrary to Wis. Stat. §§ 948.12(1m) and (3)(a), 939.50(3)(d), and 946.49(1)(b), 939.50(3)(h). (1, A-App. 102-107.)

According to allegations in the complaint, the charges were based in large part on evidence discovered from searching Keller's computer. (1, A-App. 107-110.)

On December 8, 2015, Keller filed a motion to suppress any and all evidence obtained from what he alleged was an illegal search of his computer. (18:1-35.)

A hearing on the suppression motion was held on February 3, 2016. (39:1-109, A-App. 114-222.) The court issued its oral ruling on February 3, 2016, finding that the search of Keller's computer was not a lawful probationary search, but rather an improper police search, and granted Keller's motion to suppress the evidence the search generated. (39:106, A-App. 219.)

The written order granting Keller's motion to suppress evidence found on his computer was filed on February 10, 2016 (24, A-App. 101), and the state filed its notice of appeal on March 9, 2016 (26:1-3).

STATEMENT OF FACTS

Prior to July 17, 2013, Keller was supervised by a generic probation agent for an arson case. (39:12-13, A-App. 125-126.) The agent was notified that Keller had been convicted in Dodge County for possession of child pornography, and that a presentence investigation pursuant to that conviction had been ordered. (39:13, A-App. 126.) Consequently, on July 17, 2013, Keller's supervision was transferred to a sex offender probation agent, Nicole

Johnson. (39:12-13. A-App. 125-126.) Agent Johnson was assigned to supervise Keller as a sex offender and to write the Presentence Investigation report. (39:13, A-App. 126.)

Agent Johnson contacted Keller on July 17, 2013, and she met with him at her probation office in West Bend, WI, on that date. (39:13-14, A-App. 126-127.) At this meeting, Agent Johnson reviewed with Keller the rules of his supervision, and Keller signed the rules. (39:14, A-App. 127.) Agent Johnson and Keller discussed the Dodge County conviction, Keller's family, and the current status of Keller's life. (*Id.*) Keller advised Agent Johnson that he was living with his wife and two children and that they were in the process of selling their home and planned to move into an apartment in Kewaskum, WI. (39:15, A-App. 128.) Keller also told Agent Johnson that while he uses a computer at work, he does not have a home computer. (39:16, A-App. 129.) Agent Johnson told Keller that he did not have approval to have a computer at his home for personal use and Keller explained that he understood this and that his wife and children had their own computers, but that they were password protected. (*Id.*) Amongst the probationary rules that Agent Johnson went over with Keller on July 17, 2013, and Keller signed, was paragraph 14 which read "You shall not purchase, possess, nor use computer software, hardware, nor modem, without prior agent approval." (39:18, A-App. 131.)

On July 25, 2013, Agent Johnson made a scheduled visit of Keller's home. Agent Johnson observed that Keller's home was very messy, as there were books and paperwork piled very high, throughout the home. (39:23, A-App. 136.) The home was in disarray and there was a locked door off the kitchen that Keller claimed led to his wife's office. (39:24, A-App. 137.) Keller opened this locked door and Agent Johnson saw inside papers and computer equipment and

tripods. (*Id*.) Keller told Agent Johnson that the computer equipment was his wife's, which she needed for her job. (39:25, A-App. 138.) Agent Johnson was very concerned about Keller's home's sloppy condition, and also about seeing the computers and photography equipment. (39:26, A-App. 139.)

Agent Johnson made another home visit with Keller on August 8, 2013, and at that time Keller advised that he planned to have his house listed for sale by September 1, 2013. (39:27, A-App. 140.) Keller further advised that his wife and children were already sleeping at the apartment in Kewaskum. (*Id*.) Keller stated that he was still living at the house. (39:28, A-App. 141.)

On August 13, 2013, Keller missed a scheduled appointment with Agent Johnson. (*Id*.) On August 20, 2013, Agent Johnson contacted Keller's wife by telephone, and she advised Johnson that she and her children had possession of their computers, and they were in the apartment in Kewaskum. At this point, Agent Johnson made plans to have an unscheduled visit of Keller's home. (39:29-30, A-App. 142-143.) On August 20, 2013, Agent Johnson, and Washington County Detective Walsh, who Agent Johnson asked to accompany her, made an unscheduled visit of Keller's home. (39:30-31, 41-42, A-App. 143-144, 154-155.) Agent Johnson discovered that Keller was not at home and so she contacted Keller by cell phone. (39:31-32, A-App. 144-145.) Keller told Agent Johnson that he was at the pharmacy and would be on his way home right away. (39:32, A-App. 145.) Keller soon arrived home and let Agent Johnson in the front door and Johnson noticed that the house was still messy, and she also observed two modems with blinking lights. (39:34, A-App. 147.) Johnson then went into the room that Keller had previously described as his wife's office, and in the room she

saw computers, a tower, a laptop, and a large screen on the wall. (*Id*.)

Agent Johnson asked Keller about the computers that she observed, and Keller stated that he didn't think they worked, but he admitted that he had used the laptop the previous day to check his email. (39:36, A-App. 149.) Agent Johnson, Detective Walsh and another officer, continued to tour the Keller residence and went into the basement area where Agent Johnson saw more computer equipment. (39:37-38, A-App.150-151.) After seeing the computers, Agent Johnson contacted her supervisor, via phone, and told her supervisor that there were computers still in the residence, and she believed these computers to be Keller's since Keller's wife had told her that she had all her computers with her. (39:38, A-App. 151.) At this point the supervisor instructed Agent Johnson to seize the computers. (*Id*.) Agent Johnson seized the computers that were in the office. (39:40, A-App. 153.) Because Keller had violated his supervisory rules by possessing a computer, and because he admitted to accessing an email account that Agent Johnson did not know about, Keller was placed in custody. (39:42, A-App. 155.)

Agent Johnson placed the seized computer items in her vehicle and transported them back to the probation and parole office. (*Id*.) Once at the office Agent Johnson carried the computers into her office, set them on her desk, and inventoried the property. (39:44, A-App. 157.) After completing the inventory form Agent Johnson placed the computers in a locked cabinet, closet, in the hallway of the office. (*Id*.) Access to this locked closet is restricted to Department of Corrections agents or employees. (39:45, A-App. 158.)

On August 21, 2013 Agent Johnson met with Keller at the Washington County Jail, and at this time Keller admitted to using the computer towers to view CD's that contained child pornography. (39:61, 62, 75, A-App. 174-175, 188.)

While Agent Johnson wished to search the computers, she lacked the ability and the expertise to do so, and there was nobody in the West Bend probation office with the ability to search computers. (39:45, 52, A-App. 158, 165.) Agent Johnson wanted to search the computers for child pornography not just because of Keller's violation of Rule 14, possessing and using a computer, but also because she suspected Keller was violating Rule 1, committing an illegal act. (39:70, A-App. 183.) Agent Johnson then asked the Washington County Sheriff's Department if they search computers for probation and they told her no. She then reached out to a detective with the Sheboygan Police Department who had searched computers for her when she was an agent in Sheboygan County. (*Id.*) The Sheboygan detective advised Agent Johnson that perhaps DCI in Madison could search the computer materials for her. (39:68, A-App. 181.)

On September 4, 2013, Agent Johnson contacted DCI and was told that they would get in touch with a forensic analyst that could help her search Keller's computer. (39:47, A-App. 160.) DCI Forensic Analyst Chris Kendrex contacted Johnson, and arrangements were made to search the items that Agent Johnson had seized from Keller's residence. On September 5, 2013, Agent Johnson removed the computers from the locked closet in her office and transported them by vehicle to Madison. (39:48, A-App. 161.)

When Agent Johnson arrived at the DCI offices in Madison, Kendrex met her at the underground parking structure with a wheeled cart, and together they loaded the computer items onto the cart. (39:49, A-App. 162.) They then went, via elevator, to Kendrex's office, which was a lab-type room. (*Id*.) Throughout the subsequent search of Keller's equipment, Agent Johnson remained in the room with Kendrex. (*Id*.) During the search Kendrex sat in a corner cubical and Agent Johnson sat next to him where she had a view of the computer being searched. (*Id*.) Agent Johnson explained to Kendrex that she would order the search stopped once any illegal image was found on Keller's computer. (39:50, A-App. 163.) With Agent Johnson sitting directly behind him, Kendrex began to search the computer and when Agent Johnson saw an image, which she thought was child pornography, she would mention this to Kendrex, but as he was not sure it was what Agent Johnson was looking for, they continued searching. When they came upon an image that Kendrex confirmed was child pornography, Agent Johnson ordered the search to stop. (*Id*.) Agent Johnson then contacted her supervisor and told her that she had found an image that would be considered child pornography in Keller's computer, and the supervisor agreed with Agent Johnson that the search should be concluded. (*Id*.) Agent Johnson then left the DCI offices with all the items that she had come with; she did not leave any of Keller's computers with DCI (39:51, A-App. 164.)

On September 6, 2013, Agent Johnson referred the matter to Detective Walsh and arrangements were made for Walsh to pick up the items at Agent Johnson's office. Prior to September 6, 2013, Agent Johnson had not given Detective Walsh or any other law enforcement officer directions or instructions to conduct a criminal investigation on Keller. (39:53, A-App. 166.) On October 4, 2013, Detective Walsh obtained a search warrant for the items seized by Agent

Johnson at Keller's residence leading to the discovery of several child pornographic images. (1:8-9, A-App. 109-110.)

ARGUMENT

I. Introduction.

The core issue of this appeal is whether the child pornography image found in Keller's computer, which led to the search warrant, was discovered from a probation search or from a police search. The trial court opined that since the actual physical manipulations of the computer were performed by DCI Analyst Kendrex, it was an unlawful police search. The State appeals this trial court ruling, believing that because Agent Johnson initiated the search, orchestrated it, benefited from it, and made the call to start and end it, the search was a probation initiative, and the trial court erroneously suppressed the evidence.

Lurking a bit below the surface is a second issue; whether a probationer can have an expectation of privacy in a computer, which by the rules of his supervision he is not allowed to have. Put another way, can a probationer have an expectation of privacy in contraband found in contraband. This issue came up tangentially in a verbal exchange between the prosecutor and the court, just prior to the court's oral ruling suppressing the evidence. (39:93-94, A-App. 206-207.) While the trial court did not specifically hold that a probationer has an expectation of privacy in a computer he is not allowed to possess, it did so, by implication, since it found a Fourth Amendment violation. The State contends that a probationer does not have a privacy interest that society recognizes as reasonable, in property he/she is forbidden to possess. Consequently, the State argues that the search of Keller's computer did not implicate the Fourth Amendment, and the evidence it uncovered was wrongfully suppressed.

II. The search of Keller's computer was a lawful probationary search triggered by reasonable grounds that Keller was violating the rules of his probation.

A. Standard of review and applicable law.

A probation agent may search a probationer's residence or property based on reasonable grounds that the probationer is violating the rules of probation. *State v. Griffin,* 131 Wis. 2d 41, 58, 388 N.W.2d 535 (1986) *aff'd, Griffin v. Wisconsin,* 483 U.S. 868 (1987). The reasonable grounds standard justifying a probation search is less than the probable cause standard needed to obtain a warrant. *Griffin,* 131 Wis. 2d at 60. It is difficult to contemplate a scenario where a probation agent would not have reasonable grounds to believe that a probationer's contraband would not contain more contraband. *State v. Purtell,* 2014 WI 101, ¶¶ 27-31, 358 Wis. 2d 212, 851 N.W.2d 417.

The determination of whether a search is a probation search or a police search is a question of constitutional fact. The circuit court findings of fact are under the clearly erroneous standard but the court's finding of constitutionality is reviewed *de novo. State v. Hajicek,* 2001 WI 3, ¶ 42, 240 Wis. 2d 349, 620 N.W.2d 781. The evaluation of whether a search is a probationary or police initiative is based on the totality of the circumstances. *State v. Devries,* 2012 WI App. 119, ¶ 3, 344 Wis. 2d 726, 824 N.W.2d 913. A probation agent cannot serve as a "stalking horse" (a decoy) for the police; to use their authority to help the police evade their Fourth Amendment requirements. *State v. Wheat,* 2002 WI App 153, ¶ 20, 256 Wis. 2d 270, 647 N.W.2d 441. But, cooperation between a probation agent and a law enforcement officer does not transform a probation search into a police search. *Hajicek,* 240 Wis. 2d 349, ¶ 32. A search which is done at the request and behalf of a probation agent,

but is actually performed by a police officer, is not *per se* a police search. *Devries,* 344 Wis. 2d 726, ¶ 7.

A fair summary of the applicable law is as follows: A probationary search is permissible if the probation agent has reasonable grounds that a probationer is violating the conditions of his probation. It is extremely likely that an agent has the requisite reasonable grounds for a search of contraband in the probationer's possession.

A probation agent cannot serve as a "stalking horse" for the police, as a means by which the police can circumvent Fourth Amendment requirements. But, cooperation between the probation agent and the police does not, by itself, morph a probationary search into a police one. Searches initiated and engineered by probation agents do not automatically become police searches solely because the search was actually performed by a police officer.

Ultimately, the determination of whether a search is a probationary or police action is based on the totality of the circumstances.

B. Application of the law to facts of this case.

There is little debate about the relevant facts in this case; rather the controversy is over how to interpret these facts in a probationary or police search analysis. The key facts are:

- As a condition of his probation, Keller was specifically prohibited from possessing and/or using a computer. (39:18, A-App.131.) Agent Johnson never gave Keller permission to have or use a computer. (39:37, A-App. 150.)

- During a home visit Agent Johnson found computers, towers, and a laptop, and a lot of other

computer equipment in Keller's residence. (39:34-35, A-App. 147-148.) Keller admitted using the computer to check on email from an email account different than the one he had previously provided to Agent Johnson. (39:36, A-App. 149.)

- Agent Johnson seized Keller's computers and took them to her office. (39:43-44, A-App.156-157.)

- Agent Johnson met with Keller at the Washington County Jail and Keller admitted to using the computer tower to view a child pornography CD. (39:61-62, 75; A-Ap.174-175, 188.)

- Agent Johnson did not have the technical ability to search computers and contacted DCI for assistance in making the search. (39:45, 47, A-App. 158, 160.)

- Agent Johnson went to DCI, met with DCI analyst Chris Kendrex, and explained to him the parameters of the search. (39:49-50, A-App. 162-163.) During the search, Analyst Kendrex, based on his expertise, advised if he felt an image was or was not child pornography. (39:50, A-App. 163.)

- Once a child pornography image had been found, Agent Johnson ordered the search to stop. (*Id.*)

- DCI had no involvement in any investigation of Keller, before or after the disputed search.

A composite view of the above described facts show a clear picture of a probationary driven search. Indeed, only two factors suggest otherwise; the facts that a DCI analyst actually performed the search and that he lent his expertise in evaluating what was discovered. But the DCI, had no interest in Keller, no ongoing investigation, and did not utilize any of the discovered information for their own benefit. It was Agent Johnson who wanted the search performed, and who dictated the scope and duration of the

inspection. In every way, Agent Johnson was the catalyst for the search, and Analyst Kendrex was merely the sub-contractor acting under Agent Johnson's supervision.

The trial court, while noting that the search was Agent Johnson's idea, and that she had a right to seize the computer, balked at her involving Analyst Kendrex, and took issue with the scope of the search, calling it an exploration. The trial court scolded Agent Johnson, exclaiming,

> But we have Agent Johnson taking the computers to DCI in Madison, from her office at the Department of Probation and Parole. It's disputed[1], factually accurate, that she doesn't limit her request to what she want's investigated on the computer. She doesn't say, geez, I just want to determine if Mr. Keller used these computers on or after he had a rule saying he couldn't use them, which is July 17th, 2013. So to the extent she is requesting or directing anything in terms of the DCI investigation and analysis of computers by Mr. Kendrex, she is –there is no attempt to limit this to generalized use of computer.

(39:100, A-App. 213.)

There are several flaws in this trial court analysis. First, it is inaccurate; the record is clear that Agent Johnson was looking for an illegal image, and she testified that she instructed Kendrex that she would stop the search the moment such an image was found. (39:50, A-App. 163.) So, she clearly did limit the scope of the search. Second, in this case, where Agent Johnson set in motion the search, the

[1] It's clear from the context that though the transcript reads "disputed" the trial court meant to say "undisputed."

scope of the search is not relevant to the inquiry as to whether this is a probationary search or a police search. Whether Agent Johnson's motivations were broad or narrow does not impact the determination of whether she or the police were the legal catalyst for the search. Third, the trial court felt it significant that Agent Johnson did not limit the search for proof that the computer was used, as the trial court reasoned that was all she would have needed to do, to show a rule violation. (39:100-101, A-App. 213-214.) The problem with this logic is that Agent Johnson was searching for two possible rule violations; 1) possessing and using a computer and 2) the commission of any illegal act, a violation of Rule 1. (39:70, A-App. 183.) So in expanding the search beyond procuring proof that the computer was merely used, Agent Johnson was properly directing a search based on reasonable grounds of two rule violations.

The trial court seemingly challenged Agent Johnson's reasonable grounds to search Keller's computer for illegal images. The trial court at once stated that Agent Johnson had valid suspicions about Keller's behavior but then in the same breath says, "But that by itself, isn't enough." (39:102, A-App. 215.) The State wonders why a probation agent's valid suspicions are not a sufficient showing of the reasonable grounds necessary to search Keller's computer. In truth there was ample reasonable grounds in this case; starting with the basic fact that Keller was not allowed to have a computer in the first place; the computer was contraband. As our Supreme Court noted in *Purtell,* "[a]s a threshold matter, it is difficult to imagine a scenario where a probation agent would lack reasonable grounds to search an item the probationer is explicitly prohibited from possessing." *Purtell*, 358 Wis. 2d 212, ¶ 28. So, *Purtell* teaches us that a probation agent has reasonable grounds to search a probationer's contraband, in this case Keller's computer. Added to the calculus are the facts that Keller had

admitted to using the computer tower to view a child pornography CD, admitted to using an email account different than the one he had previously disclosed to Agent Johnson, and Keller's sex offender history. (39:54-55, A-App. 167-168.)

Thus, two expressed concerns of the trial court are incompatible with the facts of this case. 1) The trial court thought the search was overbroad because it went beyond looking for proof that Keller used the computer. This concern ignored the fact that Agent Johnson was also looking for evidence of a violation of probation's primary rule; that a probationer not commit an illegal act. 2) The trial court questioned whether Agent Johnson had reasonable grounds to search the computer. To have such doubts, the trial court seemingly disregarded Keller's admission to Agent Johnson of viewing child pornography, and the court also ignored what *Purtell* reasoned and common sense dictates; if a probationer is possessing and using a computer he is not supposed to have, there are reasonable grounds to believe the probationer is doing things with the computer he is not supposed to do.

Despite spending substantial effort quarreling with the scope and justifications for the computer search, the trial court primarily bases its opinion suppressing the evidence on its determination that the search was a police search. The State submits that in reaching this conclusion, the trial court was unduly impressed by the fact that Agent Johnson did not herself physically perform the search. The trial court emphatically noted,

> Now what we have, is we have as undisputed that Agent Johnson never, ever, even attempted to turn on any of these computers. Certainly didn't make any attempt to search them on their own. None. Very different from *Purtell* where the agent

> searched the computer, saw some bad stuff, and got all worked up and contacted police and got a bunch of search warrants.

(39:99, A-App. 212.)

The trial court's irritation over Agent Johnson's delegation of the physical search function to a DCI analyst should have been soothed by *State v. Devries*, where this Court held that the act of delegating the physical search function from the probation agent to a police officer does not morph an otherwise probationary search to a police one. In *Devries,* the probation agent asked a police officer to perform a preliminary breath test (PBT) and, after concluding the search, the officer gave the test result to the agent. This Court held that even though the police did the PBT test, it was a probationary search, since the probation agent initiated the search and there was no evidence the police officer had any purpose for his involvement other than to assist the probation agent in conducting the probation investigation. *See Devries*, 344 Wis. 2d 726, ¶ 5. While the *Devries* court properly noted that most past cases involving probation searches were situations where the agents performed the search, this is a difference without a distinction when all the surrounding facts point to a probationary inspired endeavor. The *Devries* court brought this point home when it wrote,

> [w]hile Devries is correct that these cases [probation search cases] conclude that the challenged searches were probation searches in large part because the primary role of the police in each case was to ensure safety during the search, the cases do not suggest that a search which is done at the request and on behalf of a probation agent, but is physically performed by a police officer, is *per se* a police search. None of the cited cases involved a law enforcement officer executing

> a search *at the request and on behalf of a probation agent*, which are the facts we address here.

Devries, 344 Wis. 2d 726, ¶ 7 (emphasis added).

The similarities between *Devries* and our case are palpable. In both instances the probation agent initiated the search, engineered its scope, and benefited from it. Most significantly, in both cases the law enforcement agency, which did the search, had no purpose for their involvement other than to assist the probation agent in conducting the probation investigation. The prosecutor properly brought *Devries* to the trial courts attention but the trial court rejected its utility in resolving the issue reasoning,

> I understand the argument about *Devries* and using a PBT. If you don't have one, let's get a police officer in there and have them administer the PBT because the probation agent just doesn't have one. But I am not persuaded that that analogy goes this far: to allow somebody else to really do what amounts to the entire investigation, and make the decisions in terms of the information that's being viewed on the computer. It's—it's extremely troubling, to say the least."

(39:104, A-App. 217.)

This reasoning suggests that an officer who conducts the PBT and produces a test result, is less involved in the searching process than an analyst that searches a computer and produces a result. The State readily concedes that searching a computer is a more complex exercise than performing a PBT, but the nature of a search does not turn on its degree of difficulty but rather on the respective motivations of the probation agent and the police representative. Here, as in *Devries*, the probation agent wanted the search, initiated the search, and neither the police officer in *Devries*, nor the analyst here, had any

interest in a search being performed, other than to help the probation agent with their investigation. The State submits that the trial court erred when it deemed *Devries* was not controlling to its inquiry.

The trial court also felt it compelling that Analyst Kendrex did not robotically perform the search but rather imposed his expertise in interpreting the evidence the search uncovered. The trial court observed,

> [a]s I said earlier, I am troubled by the extent of this search and the manner in which it was done and, in my view the lack of direction from Agent Anderson[2] in directing the search. She drove to Madison. She brought the computers there, okay. We all know that, that's undisputed. But other than that she was told to take a chair. That's her testimony. Yes, she looked over Agent[3] Kendrex' shoulder, but he called all the shots in searching the computer, made his own decisions. Apparently even on which computer to search, and how to search, and what to do. And then he made the decision on if and when he saw something that he thought was child porn.

(39:104, A-App. 217.)

The trial court misses the mark; Agent Johnson's delegation of the search function to Analyst Kendrex was entirely motivated by her lack of training and her perceived lack of proficiency in searching computers. So, it would have been incongruous for Agent Johnson to seek help because of her lack of ability in searching computers, and then to dictate how the search should be technically performed. The interjection of Kendrex's expertise in the process was exactly

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[2] The trial court misspoke, the Agent's last name is Johnson.

[3] Kendrex is a DCI analyst and not a DCI agent.

why Agent Johnson solicited his help in the first place. Agent Johnson delegated the searching act to a professional and wisely heeded his advice, based on his expertise. But, by doing so she did not surrender her status as the catalyst of the search, much as a police officer does not yield his/her role as the lead investigator of a crime when submitting a blood sample to a lab for analysis.

The trial court criticized Agent Johnson for searching for child pornography without a warrant when it stated, "And why do it without a search warrant, when you could easily get a search warrant." (39:94, A-App. 207.) The State takes issue with this claim, because when Agent Johnson delegated the physical search function of the computers to Analyst Kendrex, neither she nor the police had the requisite probable cause necessary for a search warrant. Certainly there was reasonable grounds, as discussed above, but probable cause could only be shown through the use of Keller's admission to Agent Johnson of viewing a child pornography image, a compelled statement. Keller's admission to Agent Johnson, as a compelled statement, could not be part of the basis for a search warrant. *See State v. Spaeth,* 2012 WI 95, ¶ 34-36, 343 Wis. 2d 220, 819 N.W.2d 769, referencing *Kastigar v. United States,* 406 U.S. 441.

To the trial court, the only way to properly search Keller's computer was with a search warrant, which the State argues there was insufficient probable cause to obtain, or to have Agent Johnson perform the search herself. The trial court logic concludes that it is proper for a probation agent to attempt to search a computer, with no ability to do so, and improper to delegate the physical search to a skilled professional, experienced in conducting such searches. The Fourth Amendment does not require such inefficiency.

Certainly, Analyst Kendrex was cooperating with Agent Johnson. But, cooperation between a law enforcement agency and a probationary agent does not make a probation search unlawful. *See Hajicek*, 240 Wis. 2d 349, ¶ 33. A probation search is not transformed into a police search because the information leading to the search was provided by law enforcement, or the police were engaged in a concurrent investigation of the probationer, or the probation officer handed over the fruits of the search to the police. *State v. Jones,* 2008 WI App 154, ¶ 15, 314 Wis. 2d 408, 762 N.W.2d 106. What is unlawful is when a probation agent works in concert with the police to circumvent police Fourth Amendment obligations, to serve as a "stalking horse." The cooperation between the probation and DCI in our case is far less extensive than those partnerships, which under *State v. Jones,* do not necessarily transform a probation search into a police search. Here, the DCI had no knowledge or interest in Keller when Agent Johnson solicited their help, were not engaged in a concurrent investigation, and did not use the evidence after the search. There is nothing that points to Agent Johnson serving as Analyst Kendrex's stalking horse. Nevertheless, the trial court implied that Agent Johnson was Kendrex's stalking horse when it stated,

> And I am sure Ms. Anderson's[4] heart was in the right place, she was trying to do the right thing. But she is not a police officer, she doesn't have a search warrant, and she is enlisting the help of people who do criminal investigations to do all the work and all the investigations. She is just—she is basically a delivery person. I got this stuff, I am turning it over to you, go ahead and search it. And because I am a probation agent we don't need

[4] Trial court misspoke. Her name is Johnson.

> search warrants. We can ignore all the law that says you usually do.

(39:106, A-App. 219.)

This trial court reasoning would have traction if DCI contacted Agent Johnson about their investigatory interests in Keller, and Agent Johnson then concocted a scheme for DCI to search Keller's computer by bootstrapping into her more lenient rules. But that is not what happened here, where Agent Johnson was not acting in the trial court's words as "basically a delivery person" but rather was the catalyst, engineer and beneficiary, of the search.

The trial court erred in many ways in reaching its conclusion that the search of Keller's computers was a police search. First, the court failed to take into account that Agent Johnson was looking for evidence of two rule violations, and was not limited to looking for evidence of mere computer usage. Second, the trial court did not acknowledge the *Purtell* teachings that contraband, by its mere status as contraband, almost certainly gives a probation agent reasonable grounds to search it. And the trial court did not seem to consider Keller's admission of viewing child pornography as relevant to the reasonable grounds inquiry. Third, the trial court ignored *Devries* in believing that the delegation of the searching function from the probation agent to another morphs an otherwise probationary search into a police search. Fourth, the court found determinative the injection of the analyst's expertise in the searching process, thereby ignoring case law that allows for partnership and cooperation between probation and police in a probation search. Fifth, the trial court characterized Agent Johnson as "basically a delivery person," as Analyst's Kendrex's stalking horse, ignoring the facts that Kendrex had no interest in Keller both before and after the search.

The State submits that the totality of the circumstances in this case clearly point to a probationary search and the trial court erred in finding that a lawful probationary seizure had morphed into an illegal police search. Accordingly, the State asks this Court to reverse the trial court's granting of Keller's suppression motion.

III. Keller did not have a reasonable expectation of privacy in a computer he was prohibited from possessing or using.

As argued above, Agent Johnson engaged in a lawful reasonable grounds search of Keller's computers. But, even if this Court was to find that the search was a police search, the search was still permissible, as Keller does not have a reasonable expectation of privacy in a computer he was specifically prohibited from possessing or using.

This issue surfaced during a dialogue between the prosecutor and the court, after the motion hearing testimony had concluded, and before the court's oral ruling was rendered.

> THE COURT: I don't mean to interrupt you and be difficult, but what about, playing devil's advocate, what about the difference between the fact they could smell alcohol on Devries' breath, he has no expectation of privacy in the air around his mouth as he is breathing. But everybody has some expectation of privacy in computers, according to the United States Supreme Court.
>
> [The prosecutor]: …Secondly, United States Supreme Court and the Wisconsin Supreme Court have indicated that probationers have less expectations of privacy, especially in contraband.

(39:93, A-App. 206.)

The State contends that while a probationer's expectations of privacy remain in certain areas, though reduced in comparison to those enjoyed by an ordinary citizen, they can, under certain circumstances, dissipate completely. The State argues that a probationer's possession and utilization of contraband is such a circumstance.

A. Applicable law.

A person seeking Fourth Amendment protections must have a legitimate expectation of privacy in the property searched. *State v. West,* 179 Wis. 2d 182, 190, 507 N.W.2d 343 (Ct. App. 1993). The determination of whether a person has a reasonable expectation of privacy is a two part inquiry; 1) whether the individual, by his or her conduct has exhibited a subjective expectation of privacy, and 2) whether this privacy expectation is one that society is prepared to recognize as reasonable. *See West,* 179 Wis. 2d at 190 referencing *Smith v. Maryland,* 442 U.S. 735, 740 (1979)

The determination of whether a defendant has a reasonable expectation of privacy is based on the totality of the circumstances. *State v. Whitrock,* 161 Wis. 2d 960, 974, 468 N.W.2d 696 (1991). In determining whether a defendant's subjective expectation of privacy is one society deems reasonable, the court looks at several factors including, 1) whether the defendant had a property interest in the premises, 2)whether he is lawfully on the premises, 3) whether he had complete dominion and control and the right to exclude others, 4) whether he took precautions customarily taken by those seeking privacy, 5) whether he put the property to some private use, and 6) whether the claim of privacy is consistent with historical notions of privacy. *Id.*

There has developed in the law a spectrum of privacy interests; ordinary citizens enjoy full privacy rights, probationers have a compromised set of privacy entitlements, and a prisoner has virtually no privacy protections. *State v. Guzman,* 166 Wis. 2d 577, 594-595, 480 N.W.2d 466 (1992). The expectations of privacy for a probationer is not the same as the expectations of privacy of someone who is not on probation. *Id*. at 595, quoting *State v. Tarrell,* 74 Wis. 2d 647, 654, 247 N.W.2d 696 (1976).

Ordinary citizens, even citizens who are being lawfully detained, have a legitimate expectation of privacy in the contents of their electronic devices. But this privacy interest is undercut when the electronic device in question is contraband. *Purtell*, 358 Wis. 2d 212, ¶ 28. A probationer's expectation of privacy in a computer is reduced because he/she is on probation, and this compromised privacy is further diminished when the possession and use of computers was specifically prohibited by a condition of that probation. *Purtell*, 358 Wis. 2d 212, ¶ 29.

A fair summary of the applicable law is that a determination of whether a person has a reasonable expectation of privacy is based on the totality of the circumstances. The privacy inquiry is two-pronged; 1) does the subject have a subjective expectation of privacy and 2) is this expectation of privacy one that society deems reasonable. The evaluation of the reasonableness of one's expectations of privacy is a fluid one looking at several factors. The privacy interests of a probationer are reduced when compared to the privacy rights enjoyed by ordinary citizens. The compromised privacy rights of a probationer are further diminished when considering the probationer's privacy expectations in contraband.

B. Application of facts to the law of this case.

There is no dispute that Keller was on probation to Agent Johnson for sex offense convictions and that it was a specific condition of his probation that he not possess or use a computer. There is also no dispute that at the time his computer was searched, Agent Johnson knew that Keller had wrongfully possessed a computer and had wrongfully, by Keller's own admission, used it. So the key question is whether Keller, by violating his conditions of probation, forfeited his privacy interests in the computer.

The law is well established that ordinary citizens have an expectation of privacy in computers. Indeed, a citizen's privacy interest in their electronic devices is sufficiently high to remain present even when the subject is arrested. *See Riley v. California,* 134 S.Ct. 2473 (2014); *State v. Carroll,* 2010 WI 8, ¶ 27, 322 Wis. 2d 299, 778 N.W.2d 1. It is self-evident that an ordinary citizen would have a reasonable expectation of privacy in a computer; a device capable of secreting the most private of information and one that is typically replete with security features. It is likely that even a probationer would retain a modicum of legitimate privacy expectations in their computers, much as he/she maintains some Fourth Amendment safeguards in their homes or vehicles. But, the State submits that the reduced privacy a probationer enjoys in a computer, compared to a citizen, dissipates completely when the probationer, as a condition of probation, is prohibited from possessing or using a computer. This is particularly true for situations as we have here; contraband, child pornography images, being stored in contraband, the computer Keller was not allowed to possess.

Any privacy claims Keller might make as to the computer searched in this case, fail to survive legal scrutiny. To make a Fourth Amendment claim, Keller must first show a subjective expectation of privacy. While typically this hurdle is a small one in a computer search case, it is not as clear cut here where Keller kept the computers in easily discoverable places in his home, which he knew or should have known was subject to both scheduled and unscheduled visits by Agent Johnson. And Keller exhibited a weak connection to the property, first by originally claiming it belonged to his wife and then claiming that he wasn't even sure if the computers were operational. (39:25, 36, A-App. 138, 149.) So, while it can be debated whether Keller showed a subjective privacy interest in the computer, a resolution of this issue is not necessary in this case, since Keller's privacy expectation is not one society would deem reasonable.

The second prong in the privacy analysis, the reasonableness of the privacy expectation, is evaluated through the examination of several factors articulated by our supreme court in *State v. Whitrock* and its progeny. A closer look at these factors compared to the facts of this case, reveal Keller's unreasonable privacy expectation in the computer he was prohibited from having or using.

1) Whether the defendant had a property interest in the premises.

It appears that Keller owned the computer, so this factor favors Keller's privacy.

2) Whether he was legitimately (lawfully) on the premises.

Keller was prohibited from possessing and using the computer by the conditions of his probation. He was not legitimately in possession of the computer when it

was searched. This factor favors a no expectation of privacy finding.

3) Whether he had complete dominion and control and the right to exclude others.

At the least Keller knew, or should have known, that he would have no right to exclude Agent Johnson from seizing his computer if she discovered it. This factor favors a no expectation of privacy finding.

4) Whether he took precautions customarily taken by those seeking privacy.

Keller did not hide the computers in his home, did not immediately claim ownership, and suggested the computers did not work. On the other hand, computers, by their very nature, have a privacy aspect. This factor points the needle slightly towards favoring Keller's privacy.

5) Whether he put the computer to some private use.

We know that Keller used the computer in a private, and decidedly illegal way, a storage vessel for child pornography. The child pornography was contraband, and it is hard to imagine that this factor is satisfied by an illegal act.

6) Whether the claim of privacy is consistent with historical notions of privacy.

As has been discussed above, Fourth Amendment jurisprudence treats probationers very differently than it treats ordinary citizens. Probation is a key part of the criminal justice system and has, as one of its objects. the rehabilitation of convicted criminals, and

> the protection of state and community interests. *See Griffin*, 131 Wis. 2d at 54. The State and community interests are not well served by acknowledging a probationer's privacy interest in a computer he was prohibiting from having as a condition of probation, a condition specifically placed because he had been convicted of child pornography possession. Keller's claim of privacy in the child pornography, stored in the contraband that was his computer, is inconsistent with historical notions of privacy and the purposes and objectives of probation.

The State submits an examination of the *Whitrock* factors shows that any privacy claim Keller asserts as to his computer is not one society would deem reasonable. Indeed, society has a compelling interest in rejecting Keller's privacy claim, as a way of presenting his rehabilitative path with diminished opportunities for straying off course.

It is not a radical concept to propose that a probationer does not have an expectation of privacy in an item he/she is prohibited from possessing or using. Probation represents a middle ground in the criminal justice system; the probationer has many freedoms not available to the incarcerated, and yet also has many restrictions not imposed on ordinary citizens. It follows logically that such a hybrid would produce a wide range of privacy expectations. In some cases, a probationer might enjoy the same privacy as an ordinary citizen. For example, presuming no vehicle restrictions, a probationer is as protected as anyone from a traffic stop without reasonable suspicion. In other cases a probationer enjoys some privacy protection, but in a reduced manner than those afforded a citizen. For instance, a probationer typically has expectations of privacy in his home but understands he can be subjected to unscheduled visits by

his probation agent, or warrantless home searches if the probation agent has reasonable grounds. Finally, in some areas the State submits the probationer should have no expectation of privacy, such as here where the probationer violates his conditions of probation by possessing and using a computer.

But for the courts bestowment of probation instead of incarceration, a probationer would be in jail or prison. In jail or prison, Keller's privacy rights would be largely extinguished. *See Purtell*, 358 Wis. 2d 212, ¶ 22. The state submits that the conditions of probation are the price a probationer pays for not being incarcerated. So, the probationer's privacy rights cannot circumvent the sting of probation's conditions. Without conditions the probationer could not be reasonably released from incarceration and thus would virtually have no privacy rights at all. The State argues that it is precisely because Keller had no privacy rights in the computer searched, that he was considered a manageable risk for society, and thereby able to maintain some privacy rights in areas not impacted by the rules and conditions of probation.

The State submits that Keller had no reasonable expectation of privacy in contraband containing contraband; no reasonable expectation of privacy in a computer prohibited by the conditions of his probation. Thus although, as argued above, this case involved a probationary search and not a police search, the search would be lawful in either case as it did not implicate the Fourth Amendment.

CONCLUSION

For all of the forgoing reasons, the State respectfully submits that the order on defendant's motion to suppress evidence should be reversed, and the case be remanded for further proceedings.

Dated this 28th day of July, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

DAVID H. PERLMAN
Assistant Attorney General
State Bar #1002730

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1420
(608) 266-9594 (Fax)
perlmandh@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 7,737 words.

_____
DAVID H. PERLMAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 28th day of July, 2016.

_____
DAVID H. PERLMAN
Assistant Attorney General

APPENDIX

INDEX TO APPENDIX

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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DAVID H. PERLMAN
Assistant Attorney General

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Dated this 28th day of July, 2016.

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DAVID H. PERLMAN
Assistant Attorney General