[Cite as *State v. McBeath*, 2010-Ohio-3653.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23929
v.	:	T.C. NO. 09 CR 3260/1
BRANDY C. McBEATH	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 6th day of August, 2010.

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FROELICH, J.

{¶ 1} After her motion to suppress evidence was overruled, Brandy McBeath pled no contest in the Montgomery County Court of Common Pleas to possession of crack cocaine in an amount greater than ten grams but less than twenty-five grams. She was convicted and sentenced to two years of imprisonment. McBeath appeals from her conviction, based on the

denial of her motion to suppress. For the following reasons, the judgment of the trial court will be affirmed.

I

{¶ 2} On October 1, 2009, Brandon McBeath ("Brandon") lived at 628 Plymouth, Apartment 32, in Dayton with his mother, Debbie Sandifer. Brandon was on community control through Greene County for engaging in a pattern of corrupt activity, robbery, and theft. The conditions of his community control sanction included that he not engage in illegal activity, that he report to his probation officer, that he promptly report any new charges or other contact with law enforcement to his probation officer, and that he permit the search of his person or residence if his probation officer had reason to believe that a violation of his community control had occurred or was about to occur.

{¶ 3} During the summer of 2009, Brandon had failed to report to his probation officer, Matthew Johnson, for several months. Johnson communicated with Brandon's attorney to urge Brandon to comply with his reporting obligation. Through his own research, Johnson also learned that Brandon had been charged with serious drug offenses in Moraine in June 2009. However, when Brandon reported to Johnson again in late August or September, Brandon did not disclose the additional charges that were pending against him. Based on Brandon's violations of the terms of his community control and Johnson's suspicion that Brandon was involved in illegal activity, Johnson worked with the Dayton Police Department to arrange a search of Brandon's apartment, as permitted by the terms of his community control. Officer William Geiger and his drug alert dog, Turk, were asked to participate in the search, along with another police officer

and two probation officers.

{¶ 4} On the morning of October 1, 2009, the police officers and probation officers arrived at Brandon's one-bedroom apartment on Plymouth. When they knocked and announced their presence, they did not get a response for several minutes, and then Brandon's mother, Sandifer, opened the door. When she opened the door, Brandon was coming out of the back room of the apartment, and McBeath was sitting on the couch in the living room.

{¶ 5} The probation officers asked Brandon for a urine sample, and he went to the restroom. While Brandon was in the bathroom, Officer Gieger was waiting in the living room, and he saw cocaine "in plain view" on top of the mantle. Officer Geiger tested the substance with a reagent and got a positive reaction for cocaine. Thereafter, at the request of the probation officers, Officer Geiger retrieved Turk from the cruiser, and the dog conducted a "free-air sniff" of the apartment. Turk alerted on plastic totes in Brandon's bedroom, a computer desk in the sunroom, the mantle, and the couch in the living room on which McBeath was sitting. The probation officers and police officers then found a scale, a large amount of money, and a firearm in the totes, and they found crack pipe filters with residue on the desk in the sunroom.

{¶ 6} McBeath, Sandifer, and Brandon were sitting on the couch in the living room when the search began. When Sandifer got up and asked to use the restroom, Johnson alerted Officer Geiger to a bulge in the back of her pants; Geiger recovered a loaded firearm from the back of Sandifer's pants. The three occupants of the apartment were then handcuffed, although they remained on the couch, and Brandon was frisked for weapons. Officer Geiger requested that a female officer be dispatched to the apartment to frisk the two women. Officer Jennifer Godsey arrived about five minutes later.

{¶ 7} When Officer Godsey arrived, she was briefed on the situation and conducted a patdown of McBeath for weapons. According to Officer Godsey, McBeath was wearing "form fitting" jeans when Godsey arrived, but the jeans were "pulled down" across her buttocks, unbuttoned, and unbelted. Officer Godsey frisked McBeath from head to toe and, when she frisked McBeath's buttocks, she felt a hard, golf-ball sized object that she immediately believed to be contraband. Godsey asked McBeath about the object, and McBeath stated that her boxer underwear was "bunched up." When Godsey attempted to straighten out the underwear, a clear baggie fell out of McBeath's pants containing one large chunk and several smaller chunks of crack cocaine. McBeath was arrested.

{¶ 8} On October 9, 2009, McBeath was indicted for one count of possession of cocaine, in an amount equal to or greater than ten grams but less than twenty-five grams. She pled not guilty and filed a motion to suppress the evidence against her. On November 20, 2009, the trial court conducted a hearing on the motion to suppress, at which McBeath, Officers Geiger and Godsey, and Probation Officer Johnson testified. The trial court overruled the motion to suppress, and McBeath subsequently entered a plea of no contest. She was convicted and sentenced to two years in prison.

{¶ 9} McBeath appeals from the trial court's denial of her motion to suppress, raising two assignments of error.

II

{¶ 10} McBeath's first assignment of error states:

{¶ 11} "THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S MOTION

TO SUPPRESS WHEN IT FOUND THAT THE WARRANTLESS SEARCH OF APPELLANT'S RESIDENCE WAS PROPER."

{¶ 12} McBeath claims that she had a legitimate expectation of privacy in her brother's apartment because she stayed there overnight regularly in the weeks preceding the search. She also argues that the State failed to show that there was any likelihood of criminal activity at the apartment prior to the search and that the police officers were on a "fishing expedition."

{¶ 13} The trial court made several pertinent findings of fact in rejecting McBeath's argument that the evidence should have been suppressed because she had an expectation of privacy in the apartment or because the police officers did not have a reason to suspect criminal activity.

{¶ 14} First, it is undisputed that Brandon was under the supervision of the probation department as a condition of his community control, and one of the conditions of his supervision was that he "will be subject to search of [his] person or property in a reasonable manner and in a reasonable time by [his] Probation Officer when there are grounds to believe that a violation of community control has occurred or is about to occur." Other conditions of his supervision were that he would obey all laws and not be charged with a violation of law, report any arrest, citation, conviction, or any other contact with law enforcement officers within one business day, report to the probation officer as specified by the probation officer, and not possess any controlled substance, illegal drugs, or instrument used to administer drugs unless prescribed by a physician. Brandon had told his probation officer that he resided at 628 Plymouth, Apartment 32, in Dayton. Prior to the search, Brandon had failed to report to his probation officer, as required, during a three month period (June - August 2009).

{¶ 15} After his probation officer contacted him through his attorney to urge him to report, Brandon failed to disclose that he had been charged with new felony offenses in Moraine, but the probation officer was aware of this development through a law enforcement database. Based on these factors, the trial court concluded that the term of supervision that authorized the search of Brandon's residence was appropriate and that he "gave consent to the search of the [apartment] when he executed the terms of supervision with the Greene County Adult Probation Department." In other words, the trial court concluded that Brandon had consented to the search of his apartment under the circumstances presented.

{¶ 16} Second, the trial court concluded that McBeath's mother, Sandifer, had, "for all intents and purposes, invited [the officers] into the apartment." It was undisputed that Sandifer lived at the apartment. Thus, the officers also had Sandifer's permission to enter the house.

{¶ 17} Third, the court found that McBeath's testimony that she resided in the apartment, upon which her claim of a legitimate expectation of privacy was based, "lacked some credibility." McBeath testified that she rented an apartment elsewhere, which was leased soley in her name, for more than two years before this incident and for some time thereafter. However, even assuming that she was a regular overnight guest and had some expectation of privacy in the living room where she slept, the court rejected McBeath's argument that her rights were violated because a third party, Brandon, who had authority to consent to a search, authorized the search of the apartment.

{¶ 18} Based on the evidence presented, the trial court reasonably concluded that Brandon had consented to the search of his apartment as a condition of his community control, that the probation officers had a reasonable basis to believe that he had violated his community

control and to execute such a search, and that Brandon's consent to the search of his apartment negated McBeath's argument that her rights had been violated by the search of the apartment.

{¶ 19} It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is "per se unreasonable *** subject only to a few specifically established and well-delineated exceptions." *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854, citing *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576; *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455, 91 S.Ct. 2022, 2031-2032, 29 L.Ed.2d 564. It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. *Davis v. United States*, 328 U.S. 582, 593-594, 66 S.Ct. 1256, 1261-1262, 90 L.Ed. 1453; *Zap v. United States*, 328 U.S. 624, 630, 66 S.Ct. 1277, 1280, 90 L.Ed. 1477. Moreover, as the trial court noted in its decision, "[n]umerous Ohio courts have found that a warrantless search performed pursuant to a condition of parole requiring a parolee to submit to random searches of his person or place of residence by the parole officer is constitutional." *State v. Benton* (1998), 82 Ohio St.3d 316, 320-321, 1998-Ohio-386; *State v. Brigner*, Greene App. No. 04CA72, 2005-Ohio-4524, ¶29.

{¶ 20} Overnight guests have a reasonable expectation of privacy in the home in which they are staying. *Minnesota v. Olson* (1990), 495 U.S. 91, 96-97, 110 S.Ct. 1684, 109 L.Ed.2d 85. However, when the State seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant who had the expectation of privacy, but may show that permission to search

was obtained from a third party who possessed common authority over the premises or effects to be searched. *U.S. v. Matlock* (1973), 415 U.S. 164, 171, 94 S.Ct. 988, 39 L.Ed.2d 242. "The authority which justifies the third-party consent does not rest upon the law of property *** but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *State v. Knisley*, Montomgery App. No. 22897, 2010-Ohio-116, ¶32, citing *Mattock* at fn. 7 and *State v. Jefferson,* Montgomery App. No. 22511, 2008-Ohio-2888, at ¶14.

{¶ 21} The trial court properly concluded that the warrantless search of the apartment did not violate McBeath's constitutional rights because Brandon had expressly consented to such a search by the terms of his community control. Once a probationer has agreed to the warrantless search of his residence as a condition of supervision, evidence from such a search cannot be suppressed as being the result of an illegal search or as "fruit of the poisonous tree." Thus, McBeath's expectation of privacy did not warrant the suppression of the evidence found as a result of the search of Brandon's apartment.

{¶ 22} The first assignment of error is overruled.

III

{¶ 23} The second assignment of error states:

{¶ 24} "THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S MOTION

TO SUPPRESS WHEN IT FOUND THAT THE PATDOWN SEARCH OF THE APPELLANT WAS PROPER."

{¶ 25} McBeath contends that the patdown search of her person violated her constitutional rights because it exceeded the scope of a search for weapons. She claims that there was no reasonable likelihood that a weapon would be found inside her buttocks, where the crack cocaine was discovered.

{¶ 26} The trial court addressed this argument in two ways. First, the trial court concluded that the officers had probable cause to arrest McBeath for possession of drugs at the time of the search, "which authorized a search, as opposed to a pat down of her person." In the alternative, or additionally, the trial court concluded that the "quickly evolving series of events" and the "dangerous nature of the weapon found on Sandifer" warranted a protective search for concealed weapons and that, in conducting that search for concealed weapons, the officers were not required to ignore other contraband. See *Terry v. Ohio*, (1968), 392 U.S. 1, 88 S.Ct. 330, 54 L.Ed.2d 331.

{¶ 27} We agree with the trial court on both counts.

{¶ 28} Officer Geiger testified that, during the early-morning search of Brandon's apartment, he observed a substance that he recognized to be cocaine on the mantle in the living room of the apartment. McBeath had slept in the living room the night before, in close proximity to the cocaine, and stayed at the apartment regularly. When the drug dog conducted a "free-air sniff" at Geiger's direction, the dog alerted to several items in the apartment, including the couch on which McBeath was sitting.

{¶ 29} Probable cause to arrest exists "if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed."

State v. Perez, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶73, citing *Henry v. United States* (1959), 361 U.S. 98, 102, 80 S.Ct. 168, 4 L.Ed.2d 134. Probable cause is a "practical, nontechnical conception," *Brinegar v. United States* (1949), 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879, that "turn[s] on the assessment of probabilities in particular factual contexts." *Illinois v. Gates* (1983), 462 U.S. 213, 232, 103 S.Ct. 2317, 76 L.Ed.2d 527. Under the circumstances presented herein, the trial court reasonably concluded that the officers had probable cause to arrest McBeath when she was searched. Accordingly, the officers would have been authorized to search her for contraband as well as for weapons.

{¶ 30} Moreover, the evidence presented at the suppression hearing supported the conclusion that Officer Godsey's search of McBeath was a limited pat-down search for weapons. Officer Godsey testified that she was called to the apartment to conduct a patdown search of two women who were present there after other officers discovered drugs in the apartment and a firearm on one of the women. When she arrived, McBeath's "form fitting" jeans were "pulled down from her waist about halfway down her buttocks. They were unbuttoned, undone, as well as the belt was undone." She testified that she conducted the patdown of McBeath from head to toe using a flat hand. Godsey testified that she patted down the area between McBeath's buttocks because it was an "area of concealment," even though she had never found a weapon there. Godsey felt a hard substance which she immediately recognized as contraband, i.e., crack cocaine. When Godsey focused on that area, McBeath suggested that her boxer shorts were bunched up in that spot, but when Godsey pulled on the boxer shorts to smooth them out, crack cocaine fell out of McBeath's pants. Godsey testified that

she had been searching only for weapons and not for contraband when she patted down McBeath.

{¶ 31} We have, on several occasions, expressed concern over the intrusiveness of a search of the area between an individual's buttocks. E.g., *State v. Allen*, Montgomery App. No. 22663, 2009-Ohio-1280, ¶45; *State v. Barnett*, Montgomery App. No. 21619, 2007-Ohio-3694, ¶19; *State v. Mackey* (2001), 141 Ohio App.3d 604. Trial courts should view such situations closely, if not skeptically. However, Godsey's testimony established that her search of McBeath did not rise to a prohibited level of intrusiveness. The patdown for weapons was limited to the exterior of McBeath's clothing. Godsey used a flat hand, and she did not search between the crack of McBeath's buttocks. Based on the record, Godsey's patdown did not exceed the permissible scope of a *Terry* patdown.

{¶ 32} Based on Godsey's testimony, the trial court could have reasonably concluded that the patdown of McBeath's person was directed only toward the discovery of weapons to ensure the officers' safety, and the trial court properly denied McBeath's motion to suppress on this basis as well.

{¶ 33} The second assignment of error is overruled.

IV

{¶ 34} The judgment of the trial court will be affirmed.

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BROGAN, J. and FAIN, J., concur.

Copies mailed to:

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