GEORGIA COURT UPHOLDS PROBATION SEARCH BASED ON FOURTH AMENDMENT WAIVER

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On May 19, 2016, the Court of Appeals of Georgia decided *Whitfield v. State*[i], which serves as instructive concerning the law related to law enforcement officers conducting warrantless searches of probationer's residences. The relevant facts of *Whitfield*, taken directly from the case, are as follows:

> [T]he evidence shows that in 2013, Whitfield entered a negotiated guilty plea to selling methyenedioxy methamphetamine and was sentenced to five years of probation. As one of the terms of his probation, Whitfield agreed to a Fourth Amendment waiver. Specifically, Whitfield agreed to submit to search of person, residence, papers, vehicle, and/or effects at any time of day or night without a search warrant, whenever requested to do so by a [p]robation [o]fficer or any other law[-]enforcement officer upon reasonable cause to believe that [he] is in violation of probation or otherwise acting in violation of the law, and . . . [to] consent to the use of anything seized as evidence in any judicial proceeding or trial.
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> Subsequently, in March 2015, Whitfield tested positive for marijuana during a monthly check-in with his supervising probation officer. But during his next monthly check-in on April 6, 2013, Whitfield tested negative for marijuana. Although Whitfield's April drug screen was negative, he told his probation officer that "he had been counting [the] days since his last use of marijuana and had been testing himself." And according to the probation officer's training, these actions are "two red flags for somebody trying to subvert any kind of testing or detection of use." As a result of these "red flags," as well as Whitfield's positive drug screen the previous month, the probation officer asked another law-enforcement officer to "check-up" on Whitfield and "see what was at [his] house." The probation officer also conveyed to the officer that Whitfield was subject to a Fourth Amendment waiver.
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> On April 9, 2015, three law-enforcement officers complied with the probation officer's request and went to Whitfield's residence. When they arrived, Whitfield was at work, but his mother answered the door. Upon greeting Whitfield's mother, the officers asked her

> for permission to search Whitfield's bedroom, and she then led them to his room. The officers then conducted a brief search of Whitfield's bedroom and found a tobacco grinder next to his bed. Although no marijuana was plainly visible, the officer who found the grinder opened it and discovered marijuana inside.
> Thereafter, Whitfield was charged, via accusation, with one count of possession of marijuana less than one ounce.[ii]

Whitfield filed a motion to suppress the marijuana and argued that the search of his residence and room was conducted without a warrant and absent a valid exception to the warrant requirement. The trial court denied the motion, and he was convicted at a bench trial. He appealed the denial of his motion to suppress to the Court of Appeals of Georgia.

On appeal, Whitfield argued that the trial court erred in denying the motion to suppress because the probation officer and the law enforcement officers lacked reasonable suspicion to support the search because, although he failed a March drug test, he passed the subsequent test the next month. As such, he asserted that there was no reasonable suspicion at the time of the search.

The court of appeals first noted:

> [A]lthough searches must usually be accompanied by a warrant and supported by probable cause to be reasonable, "exceptions have been permitted when 'special needs,' beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." Indeed, the supervision of probationers that is necessary to operate a probation system presents "special needs that may justify departures from the usual warrant and probable-cause requirements.[iii]

The court then observed that, after a drug conviction, Whitfield consented, as a term of probation to avoid incarceration, to a waiver of his Fourth Amendment rights. The court, regarding the waiver, stated:

> [B]y accepting this special condition of probation, "and to the extent a search and seizure was not otherwise tainted without subsequent attenuation so as to compel invocation of the exclusionary rule, [Whitfield] waived his Fourth Amendment right." *Reece v*. *State*, 257 Ga. App. 137, 140 (2) (b) (570 SE2d 424) (2002) (punctuation omitted); *accord State v*. *Sapp*, 214 Ga. App. 428, 431-32 (3) (448 SE2d 3) (1994). **But even under such a waiver, there must still be "some conduct reasonably suggestive of criminal activity to 'trigger' the search."** *Reece*, 257 Ga. App. at 140 (2) (b) (punctuation omitted); *accord Prince v*. *State*, 299 Ga. App. 164, 169 (3) (b) (682 SE2d 180) (2009). This trigger can be prompted by "a good-faith suspicion, arising from routine police investigative work." *Reece*, 257 Ga. App. at 140 (2) (b) (punctuation omitted); *accord Prince*, 299 Ga. App. at 169 (3) (b).

In sum, **the general rule is that**

> **the police can search a probationer, who is subject to such a special condition of probation, at any time, day or night, and with or without a warrant, provided there exists a reasonable or good-faith suspicion**

> **for [the] search, that is, the police must not merely be acting in bad faith or in an arbitrary and capricious manner (such as searching to harass probationer).** *Reece*, 257 Ga. App. at 140 (2) (b) (punctuation omitted); *accord Brown v*. *State*, 307 Ga. App. 99, 106 (4) (704 SE2d 227) (2010); *Prince*, 299 Ga. App. at 169 (3) (b).[iv] [emphasis added]

The court of appeals then set out to determine if the trial court erred in holding that reasonable suspicion existed to support the search. The court noted that the positive drug screen was properly a valid factor in determining the existence of reasonable suspicion, and they rejected Whitfield's argument that the subsequent negative screen rendered the previous screen stale. Further, the court noted that the trial court also relied upon additional information. Particularly, the probation officers testified that Whitfield told him, in April, when he tested negative, that he had been counting the days since his last drug use and had been self-testing. Based on the experience of the probation officer, this also supported the reasonable suspicion in light of the positive drug test in March. As such, the court of appeals held that the trial court did not err in concluding that reasonable suspicion was present to support the warrantless search.

Therefore, the court of appeals affirmed the denial of the motion to suppress.

Note: *Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.*

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[i] A16A0420 (Ga. App. Decided May 19, 2016)
[ii] Id.
[iii] Id.
[iv] Id.