No. COA19-115 EIGHTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Guilford
	)	
DESMIN TARON MCCANTS	)	

****

DEFENDANT-APPELLANT'S BRIEF

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DEFENDANT-APPELLANT'S BRIEF

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ISSUE PRESENTED

DID THE TRIAL COURT ERR IN DENYING MR. MCCANTS' MOTION TO SUPPRESS?

STATEMENT OF THE CASE

On July 24, 2017, Desmin Taron McCants was indicted for possession of firearm by a felon, which arose from a May 11, 2017 warrantless search of his home. (Rp. 2) On July 3, 2018, Mr. McCants' attorney filed a motion to suppress evidence seized from Mr. McCants' home during the search. (Rpp. 24-27) On July 31, 2018, a hearing was held on the motion. (Rp. 1) At the conclusion of the hearing, the motion to suppress was denied. (Rpp. 81-83, 99-100) On August 1, 2018, Mr.

McCants pleaded guilty to the charge and reserved his right to appeal the denial of his motion to suppress. (Rpp. 86-96, 90, 101-04) That same day the Honorable Stanley Allen sentenced Mr. McCants to a mitigated range sentence of 10-21 months, suspended for a period of 18 months supervised probation. (Rpp. 94-95, 109-12) Mr. McCants gave notice of appeal from the entry of judgment. (Rp. 113) The Office of the Appellate Defender was appointed to represent Mr. McCants and the matter assigned to undersigned counsel. (Rpp. 114-15)

STATEMENT OF THE FACTS

On July 31, 2018, a hearing on Mr. McCants' motion to suppress was held. The state called two witnesses – Nicole Patterson, the probation/post-release officer with the Department of Public Safety who was supervising Mr. McCants, and Kevin Gibson, the chief probation/parole officer in Guilford County. (Rpp. 36, 61) Officers Patterson and Gibson testified as follows.

On August 1, 2016, Mr. McCants was convicted of possession with intent to sell a controlled substance and sentenced to six to seventeen months incarceration. While incarcerated, correctional officer

Christopher Love determined that Mr. McCants was a member of the "Folk Nation." (Rpp. 47-48) Accordingly, Mr. McCants was identified as a security risk group member. (Rp. 39)

Mr. McCants was released from prison onto post-release supervision on April 1, 2017. (Rp. 40) Because of his criminal history he was deemed to be a high-risk offender. (Rp. 38) Mr. McCants was assigned to probation/parole officer Nicole Patterson. (Rp. 36)

Post-Release Supervision and Security Risk Group

In North Carolina, post-release supervision (PRS) is the period of time for which an inmate is released from prison prior to the termination of his maximum period of incarceration. Practically speaking, it is a "9 to 12 month sentence that offenders get when they come out on their release." (Rp. 37) During PRS a supervisee is assigned a probation/parole officer from the Department of Public Safety. (Rp. 36) PRS is not optional. An inmate cannot refuse PRS and elect to stay in prison to serve the remainder of his sentence. (Rp. 73)

In North Carolina, the security risk group (SRG) is a classification utilized by the Department of Public Safety for inmates who have been

identified as belonging to a criminal gang. (Rp. 39) Once released onto PRS, a supervisee who has been classified as a SRG must participate in the "security risk group program." (Rp. 39) Classification as a member of the SRG and completion of the security risk group program is not optional. (Rp. 73)

When on PRS, the supervisee must comply with the terms of supervision imposed upon him. The supervisee is provided with those "specific terms and conditions of their release" upon release from prison and must sign an agreement that he will abide by them. (Rpp. 37, 72) Those terms may include: abiding by a curfew, being subject to some type of monitoring device, participating in various programs, attaining a GED or high school diploma, and being gainfully employed. (Rpp. 38-41)

Additionally, every "probationer and post-release" supervisee is required to submit "to a complete warrantless search - - an unannounced warrantless search" of their home within the first 90 days of release. (Rp. 40) This type of search is referred to as a "plain-view warrantless search of the residence." (Rp. 41) It is conducted by the

supervisee's PRS officer and is limited to a plain-view search of the supervisee's living quarters. (Rpp. 40-43)

Two types of inmates released onto PRS are subject to an additional level of warrantless search. Inmates who are deemed to be "high-risk offenders" or inmates who have been identified as SRG members are subject to an "operation search." (Rp. 42-43) Operation searches are like the "plain-view warrantless search of the residence," in that they are unannounced and warrantless, but the operation searches are more invasive in two ways. *First*, they are not limited to items in plain-view. (Rp. 43) *Second*, they include not only a search of the "offender's living quarters, that means the bedroom [or] wherever they're laying their head at," but also all "common areas" of the residence. (Rp. 43)

The agreement that all supervisees must sign upon the start of PRS contains a clause stating that the individual "must submit to a warrantless search of his residence." (Rpp. 72-73) Individuals within the security risk group program are further informed that "as a

condition of the security risk group program" they must submit to warrantless searches of their residence. (Rpp. 72-73)

The terms of Mr. McCants' PRS required that he comply with a curfew, that he submit to electronic ankle monitoring and drug testing, and that he find a job. (Rpp. 52-53) Mr. McCants had been in compliance with those terms. (Rpp. 52-53) The terms of the "parole agreement that he signed" also required Mr. McCants to submit to warrantless searches of his residence. (Rpp. 72-73)

April 4, 2017 search

On April 4, 2017, Officer Patterson went to Mr. McCants' home and conducted a plain-view warrantless search of his residence. (Rp. 41) Nothing untoward was discovered during the search.

Because Mr. McCants was identified as a SRG member, Officer Patterson gave his name to the operation team so that the more invasive "operation search" of his residence could be performed. (Rp. 43)

May 11, 2017 search

On May 11, 2017, Operation Arrow commenced. (Rp. 24) Operation Arrow was a "joint search operation" in Guilford County "to conduct searches on high-risk offenders or offenders [who] [were] validated as security risk group offenders." (Rp. 62) Mr. McCants was one of the "various individuals" to "target" for search in Guilford County. (Rp. 62)

Officer Patterson was not part of the operation search team that searched Mr. McCants' residence on May 11, 2017. (Rp. 60) The operation search team consisted of eleven individuals, including: an ATF officer, a High Point police detective, a Guilford County sheriff deputy, two Greensboro police officers, a DPS canine officer, and five probation and parole officers. (Rpp. 64-65)

Upon arrival at Mr. McCants' home at 9:35 a.m., Guilford County Chief Probation Officer Kevin Gibson "told him that we were there to effect a search pursuant to the terms of his post-release conditions. I asked him for consent to effect that search. And he consented to the search." (Rp. 65) Mr. McCants was placed in handcuffs and "restraints"

during the search. (Rp. 66) The officers found a gun in the top drawer of the dresser in Mr. McCants' room. (Rp. 91) Mr. McCants was charged with possession of firearm by a felon. (Rp. 2)

The motion to suppress

Trial counsel filed a motion to suppress the evidence seized during the May 11, 2017, warrantless search of Mr. McCants' residence. (Rpp. 24-28) In the written motion and at the hearing, trial counsel argued that the search was unlawful because it was in violation of North Carolina law and the Fourth Amendment. (Rpp. 24-25, 74-78) Trial counsel argued that N.C. Gen. Stat. § 15A-1368.4(e)(10) permits only warrantless searches of a supervisee's person, not of their residence. (Rpp. 24-25, 74-75) And, trial counsel argued that the search was not reasonably related to Mr. McCants' supervision. (Rpp. 24-26, 75-77))

After a hearing was held on the motion to suppress, the trial court issued an order denying it. (Rpp. 81-84, 99-100) While the trial court's order is appended to this brief, the findings of fact and conclusions of law are reproduced verbatim herein:

FINDINGS OF FACT:

1. The defendant was placed on post release supervision on April 1st, 2017 and met his Officer, Officer Patterson on April 4th, 2017

2. Based on Department of Public Safety (DPS) assessments, defendant was considered to be a high risk offender.

3. Defendant was validated a gang member while in Department of Adult Corrections (DAC).

4. Based on his security risk assessment and validated gang status the defendant was placed in the security risk group with a high likelihood of re-offending.

5. Because of his status [as] a high risk offender with a risk assessment of 69 DPS protocol required an unannounced search of his residence.

6. On April 1, 2017 Officer Patterson made a home visit at 3307 Boyle Ave. and did a plain view search of the residence and confirmed this as offender[']s address.

7. On May 11, 2017 Officer Patterson, defendant[']s supervising officer, placed the defendant[']s name on a list of homes to have an unannounced warrantless search.

8. Officer Patterson was not present for the search but her Supervisor Kevin Gibson was present.

9. Chief Gibson had been briefed on the defendant's home[']s layout and where the defendant[']s room was located.

10. This search was not a random search. Although there was a large task force targeting parolees, this offender was specifically put on the list for a search because he had not had a thorough home search since his release from prison.

11. The search took place at approximately 930 am.

12. Chief Gibson advised defendant that they were there for a search and defendant knowingly, willfully and understandingly consented to the

search. There is no evidence before the court that the defendant[']s consent was given other than voluntar[il]y.

13. Both Chief Gibson and officer Patterson testified that in their opinion the search was directly related [to] the defendant's supervision.

14. Chief Gibson testified he saw numerous bullet holes in the front of the house indicating a firearm must have been discharged near defendant's home giving rise to the necessity of a search for firearms.

15. The defendant was a validated gang member which makes a search for weapons directly necessary to his supervision.

CONCLUSIONS OF LAW:

1. The search was conducted at a reasonable time.

2. The search was conducted by a post release supervision officer.

3. The search was conducted for a purpose directly related to the defendant[']s post release supervision.

(Rpp. 99-100)

After Mr. McCants' motion to suppress was denied, he pleaded guilty to possession of a firearm by a felon and reserved his right to appeal the denial of his motion to suppress. (Rpp. 86-96, 90, 101-04) The trial court sentenced Mr. McCants to a mitigated range sentence of 10-21 months, suspended for a period of 18 months supervised probation. (Rpp. 94-95, 109-12) Mr. McCants gave notice of appeal from the entry of judgment. (Rp. 113)

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Mr. McCants appeals from the final judgment of the Superior Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(4), 15A-1444 (a2) and (e), and 15A-979(b).

STANDARD OF REVIEW

When reviewing a trial court's ruling on a motion to suppress evidence, this Court reviews "the trial court's order to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.'" *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (*quoting State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). Conclusions of law are reviewed *de novo* and must be legally correct. *State v. Hernandez,* 170 N.C. App. 299, 304, 612 S.Ed.2d 420, 423 (2005) "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING MR. MCCANTS' MOTION TO SUPPRESS BECAUSE THE WARRANTLESS SEARCH OF MR. MCCANTS' HOME VIOLATED NORTH CAROLINA LAW AND THE FOURTH AMENDMENT.

A. Introduction

The trial court erred in denying Mr. McCants' motion to suppress because the May 11, 2017 warrantless search of his home was neither authorized by North Carolina law nor based on any established exception to the warrant requirement. Specifically, the search of Mr. McCants' home violated N.C. Gen. Stat. § 15A-1368.4(e)(10) and was otherwise unlawful under the Fourth Amendment and Art. I § 20 of the North Carolina Constitution.

Pursuant to N.C. Gen. Stat. § 15A-1368.4(e)(10), there are four requirements for a PRS search: (1) the search must be conducted at "reasonable times"; (2) the search must be of the "supervisee's person"; (3) the search must be conducted by a post-release supervision officer; and, (4) the search must be "for purposes reasonably related to the post-release supervision." The May 11 search violated Mr. McCants'

statutory and constitutional rights because it was a warrantless search of his home and it was not reasonably related to his post-release supervision.

The trial court's denial of Mr. McCants' motion to suppress is predicated upon two errors. *First*, the trial court's conclusions of law do not support the ultimate ruling because the trial court failed to acknowledge that § 15A-1368.4(e)(10) does not permit warrantless searches of a supervisee's home. *Second*, the trial court erroneously concluded that the warrantless search of Mr. McCants' home was reasonably related to his post-release supervision.

Mr. McCants could not have been convicted of possession of firearm by a felon had his motion to suppress been granted and the fruits of the illegal search excluded from evidence. Accordingly, this Court should vacate his conviction and remand the case to Guilford County Superior Court with instructions to grant his motion to suppress and conduct any further proceedings deemed necessary.

B. Controlling authority

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and, the person or things to be seized.

Article I, § 20 of the North Carolina Constitution provides that "General warrants…are dangerous to liberty and shall not be granted."

PRS is governed by N.C. Gen. Stat. § 15A-1368.[1] Pursuant to § 15A-1368.1, PRS applies to all felons sentenced to a period of active punishment, except felons sentenced to a Class A or B1 sentence of life imprisonment without parole. Pursuant to § 15A-1368 (a)(1), PRS is defined as "[t]he time for which a sentenced prisoner is released from prison before the termination of his maximum prison term[.]" Pursuant to § 15A-1368.2(c), the supervisee's period of PRS is nine months for

[1] A copy of the statute is appended to this brief.

Class F through I felons and twelve months for Class B1 through E felons.

N.C. Gen. Stat. § 15A-1368.2(b) provides that "[a] prisoner shall not refuse post-release supervision." If an inmate willfully refuses to accept "post-release supervision or to comply with the terms of post-release supervision," or violates "the terms of post-release supervision in order to be returned to prison to serve out the remainder of the prisoner's sentence" the inmate can be prosecuted and punished for contempt of court and "any other sanction provided by law for the same conduct." *Id.* A sentence for contempt of court may not be applied as "credit for time served against the sentence for which the prisoner is subject to post-release supervision." *Id.*

Pursuant to §15A-1368.4, there are numerous conditions of PRS, including, *inter alia*, paying court costs and fines, making restitution, not possessing firearms, and not possessing any controlled substances. Pursuant to § 15A-1368.4(e)(10), a supervisee must:

> Submit at reasonable times to searches of the supervisee's person by a post-release supervision officer for purposes reasonably related to the post-release supervision. [2]

C. The trial court's conclusions of law do not support the court's ultimate ruling because the conclusions fail to acknowledge that § 15A-1368.4(e)(10) does not authorize warrantless searches of a supervisee's residence.

North Carolina law provides that a PRS search must be: (1) conducted at "reasonable times"; (2) of the "supervisee's person"; (3) conducted by a post-release supervision officer; and, (4) "for purposes reasonably related to the post-release supervision." § 15A-1368.4(e)(10) Furthermore, "[t]he Commission shall not require as a condition of post-release supervision that the supervisee submit to any other searches that would otherwise be unlawful." *Id.* Despite this the PRS

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[2] This is in contrast to § 15A-1368.4(b1)(8) which requires supervisees who are "sex offenders and persons convicted of offenses involving physical, mental, or sexual abuse of a minor" to submit at reasonable times to warrantless searches by a post-release supervision officer of the supervisee's "person" and "vehicle and premises while the supervisee is present, and for purposes reasonably related to the post-release supervision[.]" Furthermore, it is in contrast to N.C. Gen. Stat. § 15A-1343(b)(13) which requires probationers, as a regular condition of probation, to "submit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present, for purposes directly related to the probation supervision."

Commission has instituted two requirements in violation of the statute. *First*, all inmates released onto PRS are required to sign an agreement submitting to a complete unannounced warrantless plain-view search of their living quarters. (Rpp. 40-43, 72-73) *Second*, all inmates released onto PRS who are deemed high-risk, or are included in the SRG, are required to sign an agreement submitting to an unannounced complete warrantless search of their residence, known as an "operation search." (Rpp. 42-43, 72-73)

The state's witnesses at the motion to suppress hearing testified unequivocally to the following facts. *First*, as a condition of his PRS, Mr. McCants was required to sign an agreement submitting to warrantless searches of his home. *Second*, the May 11, 2017 warrantless "operation search" conducted by the Operation Arrow team was not of Mr. McCants' person, but was of his home. (Rpp. 40, 42-44, 72-73)

In finding of fact 5, the trial court found that "DPS protocol required an unannounced search of his residence." (Rp. 99) In findings of fact 7-14, the trial court found that the May 11, 2017 search was a

warrantless search of Mr. McCants' home. (Rpp. 99-100) However, the trial court's conclusions of law gave no effect to those findings. In its conclusions of law, the trial court concluded that the search was conducted at a reasonable time, by a post-release supervision officer, and was directly related to Mr. McCants' post-release supervision. (Rp. 100) Based upon those three conclusions of law, the trial court denied the motion to suppress. (Rp. 100) Those conclusions do not support the ultimate order denying the motion to suppress because they ignore the fundamental flaw with the search: it was a general warrantless search of Mr. McCants' residence based on unlawful conditions imposed by the PRS Commission and conducted in direct violation of the law.

It is well-settled that conclusions of law must support a trial court's ultimate determination. *Moore v. Proper*, 366 N.C. 25, 32, 726 S.E.2d 812, 818 (2012); *Estate of Wooden ex rel. Jones v. Hillcrest Convalescent Ctr., Inc.*, 222 N.C. App. 396, 403, 731 S.E.2d 500, 506 (2012). A warrantless search of a supervisee's residence is in direct violation of § 15A-1368.4(e)(10). The trial court's conclusions of law do not recognize that and, as result, the conclusions of law do not support

the trial court's ultimate determination. The trial court was able to deny Mr. McCants' motion to suppress by giving no effect, in its conclusions of law, to the dual facts that warrantless searches of a supervisee's residence are in direct violation of § 15A-1368.4(e)(10) and that the May 11, 2017 warrantless search conducted in this case was not a search of Mr. McCants' person, but was a search of his residence. Because the trial court failed to make conclusions of law from those facts, the conclusions of law are erroneous in law and fail to support the trial court's ultimate determination.

D. The warrantless search of Mr. McCants' residence conducted by the Operation Arrow team was not reasonably related to his supervision.

The trial court made findings of fact and a conclusion of law that the May 11, 2017 search of Mr. McCants' residence was for purposes reasonably related to Mr. McCants' supervision. (Rpp. 99-100) Specifically, the trial court made the following findings of fact relevant to this issue:

> 10. This search was not a random search. Although there was a large task force targeting parolees, this offender was specifically put on the list for a search because he had not had a thorough home search since his release from prison.

13. Both Chief Gibson and officer Patterson testified that in their opinion the search was directly related the defendant's supervision.

14. Chief Gibson testified he saw numerous bullet holes in the front of the house indicating a firearm must have been discharged near defendant's home giving rise to the necessity of a search for firearms.

15. The defendant was a validated gang member which makes a search for weapons directly necessary to his supervision.

(Rp. 100) Based upon those findings, the trial court concluded that the "search was conducted for a purpose directly related to the defendant[']s post release supervision." (Rp. 100) These findings of fact are not supported by the evidence. The conclusion of law is not supported by the findings and is erroneous in law.

The witnesses at the motion to suppress hearing testified that the operation search was directly related to Mr. McCants' supervision. (Rpp. 40, 44, 69) However, "even assuming the trial court found the testimony of all the testifying officers at the suppression hearing to be credible, the evidence presented by the State was simply insufficient to satisfy the requirements" of § 15A-1368.4(e)(10). *See State v. Powell*, ___ N.C. App. ____, 800 S.E.2d 745, 753 (2017). Section 15A-1368.4(e)(10) requires that the search much be conducted for a purpose reasonably

related to the supervision of the individual on PRS and the May 11, 2017 warrantless search of Mr. McCants' home was not conducted for such a purpose.

First, § 15A-1368.4(e)(10) requires that the warrantless search be of the supervisee's person. The search on May 11, 2017 was not of Mr. McCants' person. It was of his home. Therefore, it was invalid as a matter of law. As such, it could not be conducted for a purpose reasonably related to Mr. McCants' supervision.

Second, Mr. McCants had been in full compliance with all the terms of his PRS. (Rpp. 52-53) His home had already been searched the month before and nothing untoward was discovered during that search. There was no reasonable suspicion for the search. There was no probable cause for the search. Nor was the search based upon a tip of any illegal or untoward behavior by Mr. McCants.

Third, the search was not a targeted search. All supervisees on PRS who are classified as high-risk or who are identified as SRG members must sign an agreement consenting to a warrantless operational search of their home. (Rpp. 40-42, 72-73) Accordingly, this

search was conducted as a part of joint law enforcement initiative by the Operation Arrow team working throughout Guilford County to target supervisees who were identified as high risk or as SRG members. (Rp. 62) A search cannot be reasonably related to the supervision of a particular supervisee if the search applies to all supervisees across-the-board who fall into broad categories.

Accordingly, the trial court's findings of fact that the search was reasonably related to Mr. McCants' supervision are not supported by the evidence. The conclusion of law that the search was for a purpose reasonably related to Mr. McCants' post-release supervision is not supported by the findings and is erroneous in law.

E. Consent obtained in the face of colorable lawful coercion is not voluntary.

The trial court found as fact that Mr. McCants voluntarily consented to the May 11, 2017 search of his home. (Rp. 100) This finding of fact is not supported by the evidence. Rather, it is directly contrary to the evidence adduced at the motion to suppress hearing. At the hearing, all of the witnesses unequivocally testified that Mr. McCants was informed that PRS required him to submit to warrantless

searches of his residence. (Rpp. 40-42, 72-73) In finding of fact 12, the trial court found that "Chief Gibson advised defendant that they were there for a search and defendant knowingly, willfully and understandingly consented to the search. There is no evidence before the court that the defendant[']s consent was given other than voluntar[ily]." (Rp. 100) This finding of fact was made in direct contravention to the evidence adduced at the motion to suppress.

North Carolina law requires Mr. McCants to submit to PRS. §15A-1368.4(e)(10). (Rpp. 72-74, 81) Refusal is not allowed. *Id*. (Rp. 81) Pursuant to the statute, supervisees are subject to warrantless searches of their person. However, the PRS Commission has expanded that to include warrantless searches of all supervisees' residences. (Rpp. 40-43, 72-73) In accordance with that policy, upon release onto PRS Mr. McCants was required to sign an agreement consenting to unannounced warrantless searches of his residence. (Rpp. 72-73) Mr. McCants "had to sign" the agreement "in order to get out of prison" and he could not refuse PRS and "just finishing serving his sentence." (Rp. 81) Three days after his release from prison onto PRS, Mr. McCants was subjected

to the first warrantless search of his residence, conducted in accordance with the PRS agreement he was required to sign. (Rpp. 40-43) Then, on May 11, 2017, the Operation Arrow search team arrived at Mr. McCants' home to conduct another warrantless search of his residence. Officer Gibson testified that upon arrival "I told him that we were there to effect a search pursuant to the terms of his post-release conditions. I asked him for consent to effect that search. And he consented to the search." (Rp. 65) This was not voluntary.

It is well-established that "[a]ny 'consent' given in the face of 'colorably lawful coercion' cannot" "be considered voluntary." *Lo-Ji Sales v. New York*, 442 U.S. 319, 329, 60 L.Ed.2d 920, 930 (1979). When the state seeks to rely upon consent to justify the lawfulness of a search, the state must meet that burden by proving that the consent "was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 549-50, 20 L.Ed.2d. 797, 802-03 (1968). Mr. McCants' consent was nothing more than acquiescence to a claim of lawful authority that was, in fact, unlawful.

At the time the Operation Arrow team arrived at Mr. McCants' home, Mr. McCants: (1) had been released on PRS; (2) had been told PRS is not voluntary and an inmate cannot refuse it; (3) had been required, as a condition of PRS, to sign an agreement stating that he consented to warrantless searches of his residence; and, (4) had been subjected to a previous warrantless search of his home as a condition of PRS. (Rpp. 37-39, 40-43, 72-73) Therefore, Mr. McCants was aware of the presumed lawful authority for the warrantless search and was aware that he was required to submit to it. Under these circumstances, his consent was nothing more than acquiescence in the face of colorably lawful coercion and cannot be considered freely and voluntarily given.

F. The May 11, 2017 search of Mr. McCants' home violated the state and federal constitutions.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Warrantless searches and seizures are *per se* unreasonable, subject to a few well-established exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). The expectation of privacy of one on parole, probation, or other forms of

release is reduced, but it still falls within the Fourth Amendment's protection against unreasonable searches and seizures. *United States v. Bradley*, 571 F.2d 787, 789 n.2 (4th Cir. 1978). And, there is no recognized established exception to the warrant requirements for the search of such an individual. *Id.*

Searches of individuals on probation or parole are "an example of the rare instance in which the contours of a federal constitutional right are determined, in part, by state law." *United States v. Freeman*, 479 F.3d 743, 747-48 (10th. Cir. 2007). A warrantless search of an individual on probation or parole satisfies the Fourth Amendment if it is carried out pursuant to a regulation that itself satisfies the Fourth Amendment reasonableness requirement under well-established principles. *Griffin v. Wisconsin*, 483 U.S. 868, 873, 880 (1987). An example of searches that do pass constitutional muster is found in North Carolina law governing the warrantless search of probationers. In those instances "North Carolina has narrowly tailored the authorization to fit the State's needs, placing numerous restrictions on the warrantless searches." *United States v. Midgette*, 478 F.3d 616, 624

(2007). For warrantless searches of probationers, the sentencing judge must specially impose the warrantless search condition and not all probationers are subject to it. *Id*. The search must be conducted during a reasonable time and the probationer must be present. *Id*. The search must be conducted for purposes specified by the court in the conditions of probation and it must be reasonably related to the probationer's supervision. *Id*.

Our General Assembly narrowly tailored the search of an individual on PRS to meet constitutional demands. As reflected in § 15A-1368.4(e)(10), the search must satisfy four requirements. It is only the supervisee's person that can be searched. *Id*. The search must be conducted at a reasonable time. *Id*. The search must be conducted by a PRS officer. *Id*. And, the search must be for purposes reasonably related to the post-release supervision. *Id*. Moreover, the PRS Commission "shall not require as a condition of post-release supervision that the supervisee submit to any other searches that would otherwise be unlawful." *Id*. In direct contravention to the constitutionally narrowing limitations, the PRS Commission requires supervisees to

submit to general warrantless searches of their residences as a condition of their release. General warrantless searches of all supervisees' home violates the Fourth Amendment reasonableness requirement. Accordingly, the May 11, 2017 warrantless search of Mr. McCants' residence violated the Fourth Amendment.

G. Conclusion

Evidence obtained following an illegal intrusion into a defendant's home is "tainted" by the original illegal entry and is therefore inadmissible. *See Wong Sun v. United States*, 371 U.S. 471, 485 (1963); *State v. Yanokwiak*, 65 N.C. App. 513, 518, 309 S.E.2d 560, 564 (1983). Had Mr. McCants' motion to suppress been granted, there would have been no evidence to support the charge of possession of firearm by a felon. Thus, the charge would have been dismissed and Mr. McCants would not have pleaded guilty. For these reasons, this Court should vacate his conviction for possession of firearm by a felon and remand to the trial court with instructions to grant Mr. McCants' suppression motion.

CONCLUSION

For the foregoing reasons and authorities, Mr. McCants respectfully contends that the order denying his motion to suppress be reversed and his conviction for possession of a firearm by a felon be vacated.

Respectfully submitted this the 26th day of March, 2019.

(Electronically Filed)
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CERTIFICATE OF COMPLIANCE WITH RULE 28(j)(2)

I hereby certify that Defendant-Appellant's Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure in that it is printed in fourteen-point Century Schoolbook font and the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by Microsoft Word, the program used to prepare the brief.

This the 26th day of March, 2019.

(Electronically Filed)
Katherine Jane Allen
Assistant Appellate Defender

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a copy of the above and foregoing Brief has been duly served upon Andrew Hayes, Assistant Attorney General, North Carolina Department of Justice, via email to ahayes@ncdoj.gov.

This the 26th day of March, 2019.

(Electronically Filed)
Katherine Jane Allen
Assistant Appellate Defender

No. COA19-115 EIGHTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Guilford
	)	
DESMIN TARON MCCANTS	)	

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APPENDIX

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