

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

July 23, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 97-0584-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**EUGENE THOMAS, II,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed.*

SNYDER, P.J. Eugene Thomas, II appeals from a judgment convicting him of possession of marijuana and drug paraphernalia. The evidence which resulted in the conviction was seized during a probation search of Thomas'

residence.<sup>1</sup> Because we conclude that the search and seizure were legal and did not violate Thomas' rights, we affirm the judgment.

The trial court made the following findings of the essential, undisputed facts:

[T]he probation agent, Jennifer Whitehead, was supervising Mr. Thomas for misdemeanor offenses [for] which he was previously convicted.... [Thomas] had previously been a parolee in a sexual assault conviction and that when he was on parole was on high risk status. Agent Whitehead had met previously with the agent who had formerly supervised [Thomas] when he was on parole.

... [O]n September 30, 1996, while Ms. Whitehead was on a routine home visit at [Thomas'] home, she observed sex toys while at the defendant's residence. She reasonably thought that [Thomas] was engaging in a pattern of conduct that was not conducive to his rehabilitation; that the defendant was becoming obsessed with sexual matters.

Additionally, [Whitehead] believed that possession of the sex toys was in violation of the rules of supervision in that [Thomas] had previously been convicted of a sexual offense, he was in possession of sex toys, and that under those circumstances that this was not in the best interests of the public nor conducive to the rehabilitation of [Thomas]. [Thomas] was aware of the rules of supervision and understood those rules.<sup>2</sup>

... Ms. Whitehead then left the residence [and] discussed these issues with her supervisor.<sup>3</sup> She later returned to [Thomas'] residence with law enforcement officers. A search of [Thomas'] residence was conducted and the sex

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<sup>1</sup> Thomas was on probation for misdemeanor criminal damage to property and disorderly conduct.

<sup>2</sup> At the suppression hearing, Whitehead testified that Thomas was in violation of probationary Rule No. 1, which states, "You shall avoid all conduct which is in violation of federal or state statutes, municipal or county ordinances or which is not in the best interests of the public welfare or your rehabilitation."

<sup>3</sup> Under WIS. ADM. CODE § DOC 328.21(3)(a), the approval of an agent's supervisor should be obtained unless exigent circumstances require a search without approval.

toys were confiscated. Also during the course of the search marijuana was discovered, as well as drug paraphernalia. Those items were also seized.

The appellate issue is whether the warrantless search of Thomas' residence, which was predicated on the agent's observation of "sex toys" and resulted in the seizure of the contraband marijuana and drug paraphernalia, was legal. We conclude that it was a reasonable probation search based on the probation agent's personal knowledge and observations.

While this was a warrantless search, it was not a police search.<sup>4</sup> Because a probationer's right to privacy is balanced against the probation system's interest in invading that privacy, it is not necessary that a probation officer obtain a warrant prior to a search. See *State v. Griffin*, 131 Wis.2d 41, 56, 388 N.W.2d 535, 540 (1986), *aff'd*, 483 U.S. 868 (1987). As stated there, "It is the nature of probation and the duties placed on probation agents that justify such [warrantless] searches." *Id.* at 57, 388 N.W.2d at 541. Although a probationer has a diminished expectation of privacy, he or she still has privacy rights that must be respected and adequately protected. See *id.* at 57-58, 388 N.W.2d at 541.

Like parole, probation "is an integral part of the criminal justice system and has as its object the rehabilitation of those convicted of crime and the protection of the state and community interest." *State v. Tarrell*, 74 Wis.2d 647, 653, 247 N.W.2d 696, 700 (1976) (quoted source omitted). The conditions, rules and regulations that are imposed on the probationer must address the dual goals of rehabilitation and protection of the public interest. See *id.* at 654, 247 N.W.2d at

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<sup>4</sup> Police officers were with Whitehead during the search, but Thomas does not contend that the search was anything other than a probation search.

701. Infringements of a probationer's constitutional freedoms are permissible as long as they are reasonably related to the individual's rehabilitation. *See id.*

The constitutional legality of a warrantless search of a probationer's residence by a probation officer raises a question of law which we review independently without deference to the decision of the trial court. *See Griffin*, 131 Wis.2d at 62, 388 N.W.2d at 543. The trial court's findings of evidentiary or historical facts will not be upset on appeal unless they are contrary to the great weight and clear preponderance of the evidence. *Id.*

Thomas argues that because the sex toys were not per se illegal contraband and because his parole status concerning the prior sex conviction had terminated, the probation agent erred in conducting a search. We disagree.

Probation agents have a dual role of assisting in the rehabilitation of the probationer and protecting the public. *See Tarrell*, 74 Wis.2d at 655, 247 N.W.2d at 701. One condition of probation requires the probationer to obey all laws of the State of Wisconsin. *See id.* at 654-55, 247 N.W.2d at 701. The first rule outlined for Thomas stated, "You shall avoid all conduct ... which is not in the best interests of the public welfare or your rehabilitation." A probation agent has a duty to determine whether the probationer is complying with the terms of his or her probation. *See id.* at 655, 247 N.W.2d at 701.

Whitehead had knowledge of Thomas' past criminal record, specifically, a sexual assault conviction, and observed sex toys in his residence. Whitehead testified that "[m]y concern is that he would be obsessing over the sexual issues again and commit another crime." Under the circumstances, we conclude that whether sex toys are contraband or illegal is not the controlling factor. Had Thomas not had the prior conviction for a sex offense, the probation

search may not have been reasonable. However, Whitehead's past knowledge of Thomas' sex crime conviction, coupled with her observations of the sex toys during her residence visit, provided a sufficient basis of concern about Thomas being in violation of his probation status and his potential involvement in criminal violations. Because of these concerns, Whitehead's need to verify Thomas' compliance with the rules of supervision and the law was justified. *See* WIS. ADM. CODE § DOC 328.21 (7)(i).

Thomas, proceeding in this court pro se, seeks to raise other issues on appeal which he did not raise during the suppression hearing.<sup>5</sup> Because these issues were not raised before the trial court, they are not preserved for appellate review. We need not review issues raised for the first time on appeal. *See Segall v. Hurwitz*, 114 Wis.2d 471, 489, 339 N.W.2d 333, 342 (Ct. App. 1983).

Because Whitehead had reasonable grounds based on her own knowledge and observations to believe that Thomas might be in violation of his probation and that his residence might contain evidence of probation violations, we conclude that the probation search was constitutional.

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<sup>5</sup> These issues include Thomas' claims that the State's witnesses misrepresented his prior conviction (age of victim and nature of assault) and his relationship with his girlfriend; that the agent did not know or tell the trial court that he was living with his girlfriend and her adult daughter at the time of the search; that the agent failed to specifically prohibit possession of sexual materials during his probation; that the probation rules were too vague; and that the agent wrongly punished him again for the prior sex offense by conducting the search.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

