The computer inspection component of the community custody condition is unconstitutional

The Washington Constitution protects against illegal searches in article I, section 7, which provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Our court recognizes that the protections in article I, section 7 are "grounded in a broad right to privacy and the need for legal authorization in order to disturb that right," *State v. Chacon Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012), and that "a person's home is a highly private place," *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994).

In this context, where Cates facially challenges his community custody condition, rather than the propriety of a specific governmental action, we must determine whether the condition facially authorizes an impermissible search. Whether or not a governmental action constitutes an impermissible search requires a two-part analysis. First, we ask whether the government has disturbed one's private affairs; second, if, and only if, there has been such a disturbance, we ask whether that disturbance was authorized by law. *State v. Puapuaga*, 164 Wn.2d 515, 522, 192 P.3d 360 (2008).

The private affairs inquiry protects only those privacy interests that Washington citizens have held, and should be entitled to hold, safe from governmental trespass absent a warrant. *Id.* We do not consider the subjective

privacy expectations of the individual in question because such expectations do not illuminate those privacy interests that the citizens of this state have held or should be entitled to hold. *Id.* Instead, we examine the historical treatment of the asserted interest, analogous case law, and statutes and laws supporting the claimed interest. *State v. Athan*, 160 Wn.2d 354, 366, 158 P.3d 27 (2007).

At oral argument, the State asserted that the computer inspection component permitted a CCO literally only to visually inspect Cates' computer. Wash. Supreme Court oral argument, *State v. Cates*, No. 89965-7 (Sept. 30, 2014), at 19:50 to 25:20, *audio recording by* TVW, Washington State's Public Affairs Network, *available at* http://www.tvw/org. The State argued that a CCO could look at the computer, perceive whatever content may be displayed on the monitor, and observe any notes that may be near or attached to the computer. *Id.* The State did not argue that the component permitted a CCO to actively inspect the digital contents and files stored on the computer.

I disagree with the State's characterization. The trial court clarified the meaning of the computer inspection component by saying that it gave Cates' CCO "*access* to any computer used by [Cates], and . . . that [Cates] can use a computer so long as it is subject to a *search* on request by his CCO." 5 VRP at 615 (emphasis added). The court explained that the search was meant to allow the CCO to look for

evidence to determine whether Cates was using the computer to contact children or access sexually explicit materials. *Id.*

The court's comments clearly indicate that it intended the computer inspection component to permit Cates' CCO to search Cates' computer. I am not persuaded that a search of a computer means merely beholding its presence; rather, a search of a computer means scrutinizing the digital contents stored on the computer. Similarly, in this context "access" means "freedom or ability to obtain or make use of." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 11 (2002). One does not make use of a computer by simply eyeing the physical frame. One most naturally makes use of a computer by examining its digital contents.

I also find the State's characterization unavailing because we would render the computer inspection component superfluous if we imbued it with the meaning assigned by the State. The inspection that it purports to permit would already be permitted by the home visit component pursuant to the plain view doctrine. I therefore find that the computer inspection component facially authorizes Cates' CCO to inspect the contents of Cates' computer.

I must now determine whether that inspection constitutes a disturbance of Cates' private affairs. In *State v. Miles*, 160 Wn.2d 236, 156 P.3d 864 (2007), we held that a citizen's bank records fall under the private affairs umbrella due, in part,

to the type of information they may contain. We considered that "[p]rivate bank records may disclose what the citizen buys, how often, and from whom. They can disclose what political, recreational, and religious organizations a citizen supports. They potentially disclose where the citizen travels, their affiliations, reading materials, television viewing habits, financial condition, and more." *Id.* at 246-47.

Similarly, in *State v. Hinton*, we found that the contents of a person's text messages constitute private affairs. 179 Wn.2d 862, 869-70, 319 P.3d 9 (2014). We reasoned that text messages expose "'a wealth of detail about [a person's] familial, political, professional, religious, and sexual associations.' Text messages can encompass the same intimate subjects as phone calls, sealed letters, and other traditional forms of communication that have historically been strongly protected under Washington law." *Id.* (alteration in original) (citation omitted) (quoting *United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945, 955, 181 L. Ed. 2d 911 (2012) (Sotomayor, J., concurring)).

A computer raises, to an even greater degree, the same concerns that we considered in *Miles* and *Hinton*. Not only does a computer contain the same type of information that a bank record may reveal, but in our increasingly paperless world a computer likely contains an individual's actual bank records. A computer may also contain a person's e-mail correspondence, which implicate the same intimate

subjects encompassed by one's text messages—and probably more. It is not a stretch to say that as "'the modern day repository of a man's records, reflections, and conversations,'" *Nordlund*, 113 Wn. App at 181-82 (internal quotation marks omitted) (quoting court record at 200), the contents of a computer expose "a 'wealth of detail about [a person's] familial, political, professional, religious, and sexual associations,'" *Hinton*, 179 Wn.2d at 869 (alteration in original) (quoting *Jones*, 132 S. Ct. at 955).

The computer inspection component in Cates' community custody condition protects none of this information. On its face, the computer inspection component does not limit the scope of the inspection. Instead, it purports to authorize unfettered access to all of the contents on Cates' computer. While some of the information on Cates' computer may be relevant to his compliance with his community custody conditions, much of it is not. The computer inspection component does nothing to protect this unrelated information.

I realize that one's home, in general, may enjoy greater privacy protection than even one's personal property and that an offender on community custody enjoys substantially reduced privacy interests in both. However, it is not correct that such an offender enjoys no privacy protections at all. Cates' community custody condition does not violate his private affairs by authorizing a visual inspection of his

home because the condition appropriately limits the scope of that inspection only to the extent necessary to monitor his compliance with the terms of his sentence. In contrast, the computer inspection component attempts to allow Cates' CCO access not only to information that may help monitor Cates' compliance with the terms of his sentence, but also to highly private information entirely unrelated to Cates' term of community custody. I therefore would find that the computer inspection component facially authorizes an intrusion into Cates' private affairs.

I also would find that this intrusion is not authorized by law. Normally, the State may obtain authority of law from a valid search warrant. *Hinton*, 179 Wn.2d at 868. A Washington court's authority to issue a search warrant must derive from specific statutory authorizations or court rules. *City of Seattle v. McCready*, 123 Wn.2d 260, 274, 868 P.2d 134 (1994). Statutory authorization means a statute that authorizes a court to issue a warrant—a statute may not simply dispense with the warrant requirement. *State v. Ladson*, 138 Wn.2d 343, 352 n.3, 979 P.2d 833 (1999). In the absence of a warrant, the State must show that the intrusion "falls within one of the jealously guarded and carefully drawn exceptions to the warrant requirement." *Hinton*, 179 Wn.2d at 869.

The trial court did not have statutory authority to impose the computer inspection component on Cates. As we have stated, under the statutory scheme a

court may impose community custody conditions that in other circumstances might qualify as a search—without any cause requirement—so long as the court limits those procedures to the extent necessary to monitor the offender's compliance with the terms of his sentence. But a court may not require an offender to accept an unrestricted incursion into his private affairs, entirely divorced from the legitimate demands of the community custody process, as the trial court did here. I can find no statute authorizing a warrantless search of an offender on community custody without restriction. A warrantless search of such an offender is permissible only if the offender's CCO can at least show reasonable cause to believe the offender has violated his community custody conditions.

The computer inspection component plainly permits a search of Cates' computer without the reasonable cause required by RCW 9.94A.631. The condition states that the computer inspections shall be included in the visual inspections permitted during the CCO's home visits.[8] The computer inspections necessarily constitute a search. By including the computer inspection component—which necessarily requires at least reasonable cause—within an otherwise appropriate monitoring condition, the condition facially authorizes a search of Cates' computer

[8]As noted, I agree the home visits do not violate article I, section 7 because they qualify as an appropriate monitoring condition, which means that a CCO does not need any degree of cause to carry them out.

without any requisite suspicion that Cates has violated the terms of his community custody. I find support for my reading of the condition in the statement from the trial court that the component permits Cates to use a computer "so long as it is subject to a search *on request by his CCO*." 5 VRP at 615 (emphasis added). The court's statement does not indicate that it envisioned any degree of cause being necessary for that search. The trial court may not authorize an otherwise baseless search of an offender's private affairs.

While the computer community custody condition purports to provide Cates' consent, this language does not establish consent in a constitutional sense. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004). One gives consent to a search when (1) that person gives such consent voluntarily, (2) that person has authority to grant such consent, and (3) the search does not exceed the scope of the consent. *Id.* We require consent to be both meaningful and informed. *State v. Schultz*, 170 Wn.2d 746, 754, 248 P.3d 484 (2011).

Cates' consent, if any, could arise only from the fact that he signed his judgment and sentence. But I do not find this consent meaningful. Cates must consent to the search of his computer or face the possibility of having his community custody revoked and being returned to prison. And this consent was imposed on

Cates by the trial court as a condition of his community custody—such consent is not voluntary.

Because the computer inspection component in Cates' community custody condition purports to allow an intrusion into Cates' private affairs without authority of law, I would hold that the computer inspection component facially violates the protections in article I, section 7. I would invalidate the computer inspection component on that basis.

Cates' challenge to the computer inspection of his community custody provision is ripe for this court's consideration. We need not require Cates to suffer the potential consequences of the condition to challenge its constitutional validity. The State concedes that the issues are primarily legal and that the challenged action is final. Cates' challenge satisfies the third requirement of ripeness because it does not require further factual development. Ripeness does not require a current hardship, and nothing will change prior to Cates' release that will alter the analysis of whether the community custody condition, on its face, allows unconstitutional searches. Therefore, I would reverse the Court of Appeals, reach the merits of Cates' challenge, and hold that the computer inspection component of the community custody condition is unconstitutional.