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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ERIC J. BOWERS, Defendant and Appellant.	A095890 (Contra Costa County Super. Ct. No. 010855-5)

Eric J. Bowers appeals from the denial of his motion pursuant to Penal Code sections 995 and 1538.5[1] to suppress evidence and to dismiss the information against him. He contends the subject evidence was seized in the course of an unlawful detention pursuant to an otherwise illegal search of his person, which could not be justified as a probation search because the police conducting the search were unaware of his probationary status. In light of controlling precedent, we reject appellant's contention and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 5, 2001, at approximately 9:50 p.m., Sergeant Dony Gordon of the Contra Costa County Sheriff's Department was working on assignment as "J-Team supervisor" of "Operation Blitz," a stolen vehicle recovery operation. Together with three other officers, Sergeant Gordon was investigating a suspected "chop shop

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

operation" at 4260 Santa Rita Road in El Sobrante.[2] As Sergeant Gordon approached the house at that address, he saw appellant talking with Sheriff's Detective Gifford. Appellant was standing less than 10 feet from the front door of the house, behind some automobiles in the driveway on the right side of the house.

As Detective Gifford started to talk with appellant, Sergeant Gordon heard "some rumbling of unknown origin," apparently coming from "movement" in the upstairs area of the house. It was dark, and Sergeant Gordon could not see appellant clearly. Concerned both with what might be transpiring inside the house and with officer safety, Sergeant Gordon asked Detective Gifford to direct appellant to move away from the house and toward himself. Appellant complied. As he approached, Sergeant Gordon asked appellant if he had any weapons in his possession, and requested permission to perform a pat search. In response, appellant raised his hands above his head.

While Detective Gifford "was busy knocking on the [front] door attempting to contact the person inside," Sergeant Gordon conducted a pat search of appellant. As he did so, he felt a hard cylindrical object approximately four inches in length or approximately the width of his hands. When the Sergeant twice asked appellant what it was, appellant replied it was "a pipe." Removing the object from appellant's pocket, Sergeant Gordon recognized it as a "[g]lass-type style pipe" used to ingest cocaine base or methamphetamine. Sergeant Gordon placed appellant under arrest, proceeded to search him, and recovered two baggies containing an "off-white chalky substance." Subsequent testing confirmed the baggies contained 1.2 grams of methamphetamine.

At the time of Sergeant Gordon's pat search of appellant, the latter was on probation. Among other conditions of probation to which appellant had agreed, the probation order required him to submit his person to search and seizure at any time of day or night, with or without warrant, by any peace officer.

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[2] Sergeant Gordon defined a "chop shop operation" as one "which involves individuals removing VIN [vehicle identification numbers] plates from stolen autos and changing them over in an attempt to make them valid."

At the preliminary hearing following his arrest and arraignment, appellant moved to suppress the evidence. The magistrate judicially noticed the 1999 probation order subjecting appellant to warrantless search and seizure, found that appellant had been detained without reasonable suspicion, and concluded that the pat down was consensual but tainted by the unreasonable detention. The magistrate nevertheless ruled that appellant's probation condition was dispositive and validated the search of appellant's person. Following the preliminary hearing, appellant was charged by information with possession of methamphetamine in violation of Health and Safety Code section 11377, subdivision (a), with an additional allegation that by possessing methamphetamine appellant was in violation of the terms of his probation.

Appellant moved pursuant to section 1538.5 and 995 to suppress the evidence and dismiss the information on the grounds the evidence was seized during an illegal search which could not be justified by appellant's probationary status, because the police were unaware of it at the time. The trial court denied appellant's motions to suppress and dismiss, and appellant pled no contest to possession of methamphetamine. He was placed on probation for three years with his prior probation deemed unsuccessfully terminated. This timely appeal followed.

DISCUSSION

The sole question on this appeal is whether the trial court erred in denying appellant's motion to suppress. Appellant argues that the search of his person could not be justified as a probation search in the absence of any evidence the police officer who conducted the search was aware of his probationary status. We disagree.

The standard for reviewing a trial court decision on a motion to suppress is well established. Because the power to judge the credibility of witnesses, resolve conflicts in testimony, weigh evidence, and draw factual inferences is vested in the trial court, all presumptions favor the trial court's proper exercise of that power on appeal. We therefore defer to the trial court's findings of fact—whether express or implied—if they are supported by substantial evidence. (*People v. Williams* (1988) 45 Cal.3d 1268, 1301;

People v. Laiwa (1983) 34 Cal.3d 711, 718.) On the other hand, appellate deference is not extended to the selection of the relevant legal principles or their application to the facts as found. Evidence may not be suppressed unless its seizure was in violation of federal constitutional standards of reasonableness. In applying this constitutional standard of reasonableness to the facts as determined by the trial court, we exercise our own judgment under the standard of independent review to determine if the search was proper as a matter of law. (*Williams, supra,* 45 Cal.3d at p. 1301; *In re Lance W.* (1985) 37 Cal.3d 873, 886-887; *People v. Leyba* (1981) 29 Cal.3d 591, 596-597.) As a general rule, however, a trial court's denial of a motion to suppress will be upheld if there is any basis in the record to sustain the ruling. (*People v. Marquez* (1992) 1 Cal.4th 553, 578.)

Thus, although we must defer to the trial court's factual findings, we are not required to defer to its application of the relevant legal principles to the facts as found. Here, the magistrate determined that appellant had been detained without reasonable suspicion, and that his consent to the pat search was vitiated and rendered legally inoperative by the unreasonable detention. Because the magistrate made both of these legal conclusions by interpreting the law and applying it to the facts, we need not defer to them. Instead, under the well-established standard of review, we exercise our own independent judgment under the standard of independent review to determine if the search was proper as a matter of law. (*Williams, supra,* 45 Cal.3d at p. 1301; *In re Lance W., supra,* 37 Cal.3d at pp. 886-887; *People v. Leyba, supra,* 29 Cal.3d at pp. 596-597; *People v. Brown* (1998) 62 Cal.App.4th 493, 496.)

In the usual case, we would review the law concerning reasonable police detentions and pat searches and apply that law to the facts of this case. On the record before us, we harbor strong doubts as to the correctness of the magistrate's legal conclusions that Sergeant Gordon's detention and frisk of appellant were unreasonable and unlawful, and that the detention vitiated appellant's consent to the pat search. (Cf. *People v. Glaser* (1995) 11 Cal.4th 354, 360, 372 [police detained defendant as he attempted to approach a private residence while it was under investigation; brief detention

and search justified both by need to determine defendant's connection to premises and by concern for officer safety].) Nevertheless, neither party has addressed the issue of whether the magistrate erred in making the determination that appellant was unlawfully detained without reasonable suspicion.[3] Rather than asking us to review that key determination, both parties instead focus on the magistrate's conclusion, affirmed by the trial court, that the search of appellant was reasonable because he was a probationer subject to a search and seizure condition, regardless of the officer's knowledge of appellant's probationer status. We therefore turn to that issue.

At the time of the search in this case, appellant was a probationer who had consented to "[s]ubmit [his] person . . . to search and seizure at any time of day or night, with or without warrant, to any peace officer." Our Supreme Court has held that probationers may lawfully be searched without reasonable suspicion, so long as the search is not arbitrary, capricious or intended to harass, because by agreeing to a search term the probationer has waived his of her expectation of a Fourth Amendment right to privacy. (*People v. Woods* (1999) 21 Cal.4th 668, 675, 682; *People v. Reyes* (1998) 19 Cal.4th 743, 751-752; *People v. Bravo* (1987) 43 Cal.3d 600, 607.) The United States Supreme Court has never held that reasonable suspicion is required for a valid probation search; indeed, it recently quite specifically refrained from addressing this issue. (*U.S. v. Knights* (2001) 534 U.S. 112 [122 S.Ct. 587, 590-592 & fn. 6] (*Knights*).) Because the United States Supreme Court has not decided the question differently, the applicable California Supreme Court authority is binding on us. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455-456.)[4]

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[3] In a footnote, respondent "notes for the record its disagreement with the trial court's legal finding that appellant was unlawfully detained." Nevertheless, neither appellant nor respondent bases their appellate arguments on this point. Because the probationary issue they do address is dispositive, we confine our holding to that question.

[4] The specific holding of *Knights* is that a probationer's consent to a search condition applies not only to probation-related searches, but extends to searches for an investigatory or law-enforcement purpose based on reasonable suspicion. (*Knights, supra,* 122 S.Ct. at

Appellant insists that, regardless of reasonable suspicion, Sergeant Gordon's detention and pat search were unjustified in this case because the officer did not know that appellant was on probation and was subject to a search condition. Once again, appellant's argument is contrary to existing California Supreme Court authority.

In the case of *In re Tyrell J.* (1994) 8 Cal.4th 68, the Supreme Court upheld a warrantless search of a juvenile probationer, finding irrelevant the police officer's ignorance of the minor probationer's search condition. (*Id.* at pp. 74, 84-86, 96.)[5] Although *Tyrell J.* deals with a juvenile probationer rather than an adult like appellant, the Supreme Court's reasoning in that case applies if anything more strongly to adults

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pp. 590-593.) The holding in *Knights*, which was published after appellant's opening brief was filed, has rendered moot many of appellant's arguments. In his reply brief, appellant nevertheless asserts that *Knights* requires us to conclude that an otherwise unlawful search of an adult probationer cannot be legally justified by the fact of the probationer's search condition unless the officer performing the search was actually aware of the probationer's status and search condition. Appellant's argument does not pass muster. It cannot even pass the threshold of appellant's own acknowledgment that *Knights* did *not* address the question of whether the police's awareness of the probationary status of the person searched makes any difference to the validity of the search, and specifically *declined* to address the constitutionality of suspicionless probation searches. (*Knights, supra,* 122 S.Ct. at p. 592, fn. 6.) In the absence of United States Supreme Court authority on these issues, we must follow the law as set out by our own Supreme Court.

5 The Supreme Court initially granted review in *People v. Moss* to reconsider its holding in *Tyrell J.* that a search of a probationer subject to search clause is valid even if the searching officer was unaware of the condition. (*People v. Moss* (March 13, 2000, G024202) [nonpub. opn.], review granted June 28, 2000, S087478.) However, on January 16, 2002, the state's high court dismissed the petition as improvidently granted and remanded the matter to the court of appeal. Subsequently, the Supreme Court granted review in two cases from the Fifth District in which the court concluded a warrantless automobile search was unlawful even though police later discovered that three of the four occupants were on probation. (*People v. Hanks* (Nov. 14, 2001, F035120) [nonpub. opn.], review granted March 13, 2002, S102982, and *People v. Hester* (Nov. 7, 2001, F034897) [nonpub. opn.], review granted March 13, 2002, S102961.) Consideration of *Hanks* and *Hester* has now been deferred pending consideration and disposition of a related issue in *People v. Sanders* (Nov. 20, 2000, F033862)[nonpub. opn.], review granted March 2, 2001, S094088.

who have consented to the conditions of their probation, than to juveniles who have not so consented. As the Supreme Court emphasized, the probationer was never led to believe that only officers who were actually aware of the search condition could validly execute it; he had no way of knowing whether the officer performing the search knew of the search condition; and he could not reasonably have believed the officer would *not* search him. On this basis, the Supreme Court concluded that "a juvenile probationer subject to a valid search condition does not have a *reasonable* expectation of privacy over his or her person or property." (*Id.* at p. 86.) Like the juvenile probationer in *Tyrell J.*, appellant was never led to believe that only officers aware of his search condition could validly execute it, and he had no way of knowing whether Sergeant Gordon knew of his search term. Thus, appellant was in the same position as the juvenile probationer in *Tyrell J.*: he had no reasonable expectation of privacy over his person, and could not have reasonably believed Sergeant Gordon would not search him under the circumstances.

The Supreme Court has specifically extended the reasoning of *Tyrell J.* to adults. (*People v. Reyes, supra,* 19 Cal.4th at p. 752 ["*Tyrell J.*'s reasoning applies with equal force to adults"].) Although *Reyes* involved an adult *parolee* rather than a probationer, its rationale is equally applicable to adult probationers such as appellant. Once again, that reasoning applies even more clearly to adult probationers than to parolees or juveniles, because of the element of consent. As the Supreme Court recognized in *Reyes*, unlike a parolee, an adult probationer gives up his or her expectation of privacy by voluntarily and knowingly *agreeing* to a search condition of probation. In contrast, neither juveniles nor parolees give such voluntary advance consent to being searched. Involuntary search conditions may justifiably be imposed on parolees and juvenile probationers only because the courts have determined that their Fourth Amendment privacy interests are outweighed by society's interest in public safety. (*People v. Reyes, supra,* 19 Cal.4th at pp. 749, 752 ["[a]n adult probationer consents to a waiver of his Fourth Amendment rights in exchange for the opportunity to avoid serving a state prison sentence"; in contrast, "[t]he consent

exception to the warrant requirement may not be invoked to validate the search of an adult parolee because . . . parole is not a matter of choice"]; *Tyrell J., supra,* 8 Cal.4th at pp. 79-84 [whereas juvenile offenders do not consent to search terms because they cannot refuse probation, "an adult offender 'has the right to refuse probation, for its conditions may appear to defendant more onerous than the sentence which might be imposed' "; for this reason, "a condition of probation requiring an adult probationer to 'submit his person . . . to search and seizure at any time of the day or night, with or without a search warrant' [citation] is justified by the probationer's *advance consent to the search*"]; *People v. Bravo, supra,* 43 Cal.3d at p. 608 [although it is necessary to balance a parolee's privacy interest against the societal interest in public safety in order to determine the proper scope of a parole-search condition, "[n]o such balancing is necessary" in the case of an adult probationer, since "[a] probationer, unlike a parolee, consents to the waiver of his Fourth Amendment rights in exchange for the opportunity to avoid service of a state prison term"].)

Thus, because adult probationers voluntarily *consent* to the waiver of their Fourth Amendment expectation of privacy in order to obtain the benefits of probation, the reasoning of *Tyrell J.* and *Reyes* applies equally—if not with even greater force—to searches of adult probationers by officers unaware of their probationary status. In this case, appellant had the right to refuse probation if he believed that its conditions would be more onerous than the sentence which might have been imposed. Because he instead consented in advance to the search term in order to gain the advantages of probation, he cannot now be heard to complain that the search was illegal because the officer did not know of his probationary status. " '[A] probationer who has been granted the privilege of probation on condition that he submit at any time to a warrantless search may have no reasonable expectation of traditional Fourth Amendment protection.' [Citation.] Consequently, 'when defendant in order to obtain probation specifically agreed to permit at any time a warrantless search of his person, car and house, he voluntarily waived

whatever claim of privacy he might otherwise have had.' [Citation.]" (*People v. Bravo, supra,* 43 Cal.3d at p. 607.)

This conclusion is not contradicted by the Supreme Court decision in *People v. Robles* (2000) 23 Cal.4th 789. In the first place, to the extent *Robles* stands for the proposition that an adult probationer's consent to a search condition is limited to searches that are reasonably related to the "special needs" and purposes of probation, that limitation on a probationer's advance consent has now been rejected by the United States Supreme Court in *Knights*. (*Knights, supra,* 122 S.Ct. at pp. 590-593; *Robles, supra,* 23 Cal.4th at p. 797.)

Moreover, *Robles* is distinguishable on its facts. The search at issue in *Robles* was of the *residence* of a person who was *not on probation* and not subject to any search condition, whether voluntarily or involuntarily imposed. The police sought retroactively to justify their warrantless search of the defendant's residence on the basis of the probationary status and search condition of the defendant's brother, with whom the defendant lived, even though they had no knowledge of the brother's probation condition at the time of the search. Under the particular circumstances presented, the Supreme Court rejected this justification. Although a probationer has a diminished expectation of privacy, "those who reside with such a person enjoy measurably greater privacy expectations." (*Robles, supra,* 23 Cal.4th 798.) In view of the potential for constitutional abuse presented by searches of residences occupied by a number of people, the warrantless search of the nonprobationary defendant's residence could not be justified by the chance fact the residence was also occupied by a probationer. (*Id.* at pp. 794-801.)[6]

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6 "Even though a person subject to a search condition has a severely diminished expectation of privacy over his or her person and property, there is no doubt that those who reside with such a person enjoy measurably greater privacy expectations in the eyes of society. For example, those who live with a probationer maintain normal expectations of privacy over their persons. In addition, they retain valid privacy expectations in residential areas subject to their exclusive access or control, so long as there is no basis for officers to reasonably believe the probationer has authority over those areas.

Appellant's case is entirely different. Unlike the *Robles* defendant, appellant had personally and voluntarily waived his Fourth Amendment expectation of privacy by choosing probation with a search condition. Unlike the situation in *Robles*, the search at issue was of appellant's person, not of a residence which he shared with other individuals enjoying a greater expectation of privacy than his. On the basis of our independent review of the record on the basis of the constitutional standard of reasonableness, and in light of the controlling California precedent, we conclude the trial court did not err in denying the motion to suppress. (*People v. Marquez, supra*, 1 Cal.4th at p. 578; *In re Lance W., supra*, 37 Cal.3d at pp. 886-887; *People v. Leyba, supra*, 29 Cal.3d at p. 596-597.)

DISPOSITION

The judgment is affirmed.

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McGuiness, P.J.

We concur:

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Parrilli, J.

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Pollak, J.

[Citations.] That persons under the same roof may legitimately harbor differing expectations of privacy is consistent with the principle that one's ability to claim the protection of the Fourth Amendment depends upon the reasonableness of his or her individual expectations. [Citations.]" (*Id.* at p. 798.)