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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE

Plaintiff and Respondent

v.

DONTEE TYREE HESTER,

Defendant and Appellant.

F034897

(Super. Ct. No. 07856)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Lee P. Felice, Judge.

Jo Anne D. Roake, under appointment by the Court of Appeal, for Plaintiff and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Lloyd G. Carter and Michelle L. West, Deputy Attorneys General, for Plaintiff and Respondent.

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Dontee Tyree Hester (Hester) appeals his conviction for possessing a gun which derived from his plea after the trial court denied his motion to suppress. He argues the trial court erred in denying the motion to suppress and we agree.

DISCUSSION

Leon Anderson (Anderson), Michael Anthony Hanks (Hanks) and Hester (collectively defendants) were in a Chevrolet stopped by Bakersfield Police Officers Gary Carruesco and Martin Heredia in the early morning hours of August 7, 1999. A gun was found in the car and all of the occupants were arrested and charged with conspiracy to possess a handgun by gang members.

The defendants moved to suppress the gun and to dismiss the indictment arguing that Carruesco and Heredia did not have probable cause to stop the vehicle and there was no evidence of a conspiracy. The trial court denied both motions. Hester and Anderson then pled guilty.

I. Hester's Right to Contest the Stop

The rights provided by the Fourth Amendment are personal, and the proponent of those rights must prove that the challenged governmental action infringed on his or her rights. (*United States v. Kimball* (1st Cir. 1994) 25 F.3d 1, 5.) The People argue Hester does not have a right under the Fourth Amendment to contest the stop of the vehicle because he did not have a legitimate expectation of privacy in the vehicle that was protected by the Fourth Amendment. The People rely on *Rakas v. Illinois* (1978) 439 U.S. 128, *People v. Jackson* (1992) 7 Cal.App.4th 1367, and *United States v. Carter* (6th Cir. 1994) 14 F.3d 1150 which hold that a passenger does not have a Fourth Amendment right to privacy in the passenger compartment of a vehicle when the passenger disclaims any interest in the items seized.

The People's reliance on the cited cases is misplaced because they fail to recognize the distinction between a stop of a vehicle and a search of a vehicle. (*United States v. McKneely* (10th Cir. 1993) 6 F.3d 1447, 1450.) The question is not whether the

search of the Chevrolet was supported by probable cause. The question is was there a reasonable suspicion that a crime had been committed to support the initial *stop* of the Chevrolet? Accordingly, the issue is whether a passenger has the right to contest the initial stop of the vehicle.

The People ignore those cases that have addressed this issue. In *People v. Grant* (1990) 217 Cal.App.3d 1451, 1458 this court held that a passenger may challenge an unlawful stop of a vehicle because the stop intrudes on his personal liberty and freedom of travel. In *People v. Bell* (1996) 43 Cal.App.4th 754 the defendant argued that the investigating officer unlawfully extended the traffic stop of the vehicle in which he was riding by questioning the driver on issues unrelated to the traffic stop. The court noted that the majority of both state and federal opinions concluded that the passenger was detained and could challenge the stop as unlawful. (*Id*. at pp. 760-765.) The appellate court concluded that the defendant was detained as a result of the traffic stop and that if the driver was unlawfully detained, so was the defendant. (*Ibid*.; Accord, *United States v. Kimball, supra,* 25 F.3d 1, 5 ["When a police officer effects an investigatory stop of a vehicle, *all* occupants of that vehicle are subject to a seizure, as defined by the Fourth Amendment. The fact that a defendant is a passenger in a vehicle as opposed to the driver is a distinction of no consequence in this context."]; *United States v. McKneely, supra,* 6 F.3d at. p. 1450.)

The reasoning of *Bell* and *Grant* has not received universal acceptance. In *People v. Cartwright* (1999) 72 Cal.App.4th 1362 the defendant was a passenger in a car lawfully stopped for a Vehicle Code violation. When the driver was unable to produce registration or a driver's license, the officer asked the driver for permission to search the vehicle for the registration. When the driver agreed the officer asked the defendant to exit the vehicle and if there was anything illegal inside the vehicle. The defendant responded that a friend left drugs in her purse.

The defendant argued that the search was illegal because the driver was subject to an illegally prolonged detention and, therefore, her consent was invalid. The appellate court concluded that the defendant was not detained until the officer ordered her to sit on the curb. (*People v. Cartwright, supra,* 72 Cal.App.4th at p. 1365.) Accordingly, since the defendant was not detained, her Fourth Amendment rights were not violated. In so concluding, the court rejected what it described as the position of the majority of courts in California. (*Id.* at pp. 1365-1366.)

The *Cartwright* court relied on *Maryland v. Wilson* (1997) 519 U.S. 408. The issue in *Maryland* was whether an officer could order the passenger in a vehicle stopped for a traffic violation out of the vehicle without violating the passenger's Fourth Amendment rights in the absence of any reason to suspect the passenger of wrongdoing. The issue was not whether the stop of the vehicle was unlawful or unlawfully prolonged. The Supreme Court concluded that concerns for officer safety outweighed the passengers interest in personal liberty because, as a practical matter, the passenger was already stopped and the only change in circumstance was that the passenger now had to wait outside of the vehicle for completion of the stop. (*Id*. at pp. 413-414.) We find no authority in *Maryland* for the proposition that a passenger has no right to challenge the constitutionality of the stop of a vehicle.

We also note the absurdity that would result from the application of the *Cartwright* rationale to this case. Hanks, the driver of the Chevrolet, could move to suppress the handgun by contesting the legality of the initial stop. If successful, the handgun would be suppressed as to the driver and he would be free to go. However, according to *Cartwright*, the passengers' Fourth Amendment rights would not be implicated because they were not detained when the stop occurred. Accordingly, the passengers would not have any right to suppress the handgun.

We also note a significant distinction exists between *Cartwright* and this case. In *Cartwright*, the stop of the vehicle was lawful because of a Vehicle Code violation.

Cartwright makes this distinction clear in it's conclusion: "Passengers are not seized within the meaning of the Fourth Amendment simply because they occupy a seat in a vehicle which a police officer stops *for a violation of the Vehicle Code*." (*People v. Cartwright, supra,* 72 Cal.App.4th at p. 1369, italics added.) In this case, the Chevrolet was not stopped for a violation of the Vehicle Code. It was stopped because the officers believed that a crime involving not only the driver, but also the passengers, was being committed because each occupant of the vehicle was believed to be a gang member and the officers believed they would find at least one gun in the vehicle. The prosecution was based on the theory that there was a conspiracy to possess the handgun among all the occupants of the vehicle. Therefore, we conclude that each passenger had a Fourth Amendment right that could properly be asserted in a motion to suppress.

II. The Suppression Motion

Hester complains that Carruesco and Heredia did not have sufficient cause to justify the initial detention of the Chevrolet, and accordingly, any evidence obtained should have been suppressed. The People argue there was probable cause to stop the vehicle.

The rules for review of denial of a motion to suppress are well established. This court reviews the explicit and implicit factual findings to determine if they are supported by substantial evidence. (*People v. Soun, supra,* 34 Cal.App.4th at p. 1507.) We then exercise our independent judgment to determine if the facts found by the trial court establish a seizure in violation of the Fourth Amendment. (*Ibid*.)

Moreover, the rules applicable to search and seizure are also easily stated, if not easily applied. A seizure within the meaning of the Fourth Amendment occurs whenever an individual's liberty is restrained by the police either by physical force or by an assertion of authority to which the individual submits, in circumstances in which a reasonable person would have believed he or she was not free to leave. (*People v. Soun, supra, 3*4 Cal.App.4th 1499, 1515.) Distinctions are drawn between "detentions" and

"arrests," since, although both are seizures under the Fourth Amendment, the constitutional standard for permissible detentions "is of lesser degree than that applicable to an *arrest*." (*People v. Harris* (1975) 15 Cal.3d 384, 389.) A detention may be undertaken "if there is an articulable suspicion that a person has committed or is about to commit a crime" (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784), while probable cause for an arrest exists only "when the facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested is guilty of a crime." (*People v. Price* (1991) 1 Cal.4th 324, 410.)

We here are concerned with the initial detention of the Chevrolet in which the defendants were traveling. Temporary detention of individuals during the stop of an automobile by the police constitutes a detention under the Fourth Amendment. (*Whren v. U.S.* (1996) 517 U.S. 806, 809-810.) The reasonableness of official suspicion is measured by what the officers knew before they acted. (*Florida v. J.L.* (2000) 529 U.S. 266, 271.)

Our review of the facts found by the trial court is relatively straightforward since there is virtually no dispute as to what occurred on the night in question. Heredia and Carruesco were on patrol on the night of August 6, and the early morning of August 7, 1999, in an area of Bakersfield which the officers considered to be the territory of the criminal street gang East Side Crips. Heredia and Carruesco were aware that earlier that evening a drive-by shooting had occurred at Casa Loma Park. Two people were killed in that shooting and at least two others were wounded. Some of the victims were members of the criminal street gang Country Boy Crips, a rival to the East Side Crips. Heredia and Carruesco were also aware that the East Side Crips were suspected of being responsible for the shooting.

At approximately 12:30 a.m. Heredia and Carruesco observed three vehicles, a Chevrolet, Chrysler and Mazda, driving side-by-side on a three-lane road. The officers followed the vehicles and tried to determine who and how many people occupied the

vehicles using the spotlights on their patrol vehicle. They determined that four Black males between 15 and 25 years of age occupied the Chevrolet, and one of these individuals was Leon Anderson, a person they knew to be a member of the East Side Crips. They also determined that four individuals occupied the Chrysler and that two were Black males of the same age. They could not identify the sex or race of the two rear passengers in the Chrysler. The officers did not observe the number, race or sex of the occupants in the Mazda. The officers could not identify any individual other than Anderson.

After following the three vehicles for approximately one-quarter mile, and making the observations described above, Carruesco and Heredia activated the emergency lights on their patrol vehicle and stopped the Chevrolet.

Carruesco explained his justification for the stop of the Chevrolet:

> "Based on the occupants of the vehicle being all black males and the recognition of Mr. Anderson as an East Side Crip, it has been my experience that gang members oftentimes hang out together in large groups because they have strength in numbers and [are] more intimidating in a larger group. [¶] … [¶]
>
> "There had been a shooting at Casa Loma that turned into a homicide where the East Side Crips were suspected to be suspects. I believed that if they knew that they were suspected as being suspects, they would probably arm themselves. [¶] … [¶]
>
> "There has been since I've been working here, an ongoing geud between those specific gangs, and it has been my experience that when there is a shooting against one gang, the victim gang retaliates against the suspect gang in a short period of time. [¶] … [¶]
>
> "Based on the fact that there was a homicide in rival gang member territory and the fact that the East Side Crips were being named as the

> suspects, it is my opinion that the East Side Crips would arm themselves in fear of retaliation and for their own protection."[1]

Although not pertinent to our analysis, upon approaching the Chevrolet after the traffic stop, Heredia saw that one of the passengers had a handgun. When the vehicle was searched a loaded handgun was located under the front seat. Cocaine base was found in the back seat of the police vehicle in which Hester was placed after he was arrested.

We are required to determine whether Carruesco's reasoning resulted in a seizure that was unreasonable in violation of the Fourth Amendment. "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231.) We focus on the totality of the circumstances in assessing whether the particularized and objective facts known to the police provided reasonable cause to detain appellant. (*Id.* at p. 238.)

> "The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions--inferences and deductions that might well elude an untrained person.
>
> "The process does not deal with hard certainties, but with probabilities.… Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

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1 Carruesco admitted the stop was not made as a result of a Vehicle Code violation.

> "The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." (*United States v. Cortez* (1981) 449 U.S. 411, 418.)

We quote *Cortez* at length because it is on the principles stated therein that the People rely in arguing that the stop of the vehicle was reasonable. The People emphasize the "whole picture," as well as the "inferences and deductions" Carruesco made in deciding to stop the Chevrolet. The whole picture consists of the Casa Loma shooting, the three cars driving together at 12:30 a.m. in East Side Crip territory, the identification of one occupant as an East Side Crip, and the presence of several Black males in the Chrysler and Chevrolet. The inferences and deductions include (1) all three vehicles were traveling together, (2) everyone in the Chevrolet was an East Side Crip because they were Black males and were riding with Anderson, (3) everyone in the Chrysler was an East Side Crip because there were two Black males in the car and they were traveling with the Chevrolet, (4) everyone in the Mazda was an East Side Crip because it was traveling with the Chevrolet, even though Carruesco did not know the age, sex or race of the occupants, (5) these gang members were aware of the Casa Loma shooting, (6) these gang members were expecting retaliation, and, (7) they were armed because they were expecting retaliation.

This stop violated the Fourth Amendment for two reasons. The first is that the inferences and deductions drawn by Carruesco are not supported by the facts. The second is that the inferences and deductions that were made did not lead to a probability that anyone in the Chevrolet was engaged in criminal activity. The trial court seemed to understand the defect in the People's case, yet denied the motion.

Carruesco begins by concluding that all three cars were traveling together. First, his observations were for a very short distance. Second, Carruesco did not provide any

facts to support this conclusion other than that the cars were traveling side-by-side, and later were in the same lane together.

Next, Carruesco inferred that each individual in the Chevrolet was a gang member because the only individual in the car who he identified was known to him to be a East Side Crip, the cars were driving in East Side Crip territory, and the Chevrolet contained Black males between 15 and 25 years of age. Carruesco's conclusion is unreasonable. While Carruesco's conclusion is one possible explanation for the few facts he observed, there are far too many other possible explanations which fit these facts to conclude that everyone in the cars was a gang member. The only way to justify Carruesco's conclusion is to assume as fact that every Black male between 15 and 25 in this part of Bakersfield is an East Side Crip, or that every Black male between the ages of 15 and 25 who is in a car with an East Side Crip must also be an East Side Crip. These conclusions are far too consistent with racial profiling to be permitted by the Constitution. (*Whren v. U.S., supra,* 517 U.S. at p. 813; *United States v. Brignoni-Ponce* (1975) 422 U.S. 873, 885-886.)

Carruesco's third conclusion, that everyone in the Chrysler was an East Side Crip, is even more suspect. First, he only observed two of the occupants in the Chrysler. For all Carruesco knew, the other two occupants could have been elderly females. Second, the short time Carruesco followed the three cars did not justify his conclusion that the three cars were traveling together. Even if they were traveling together, the myriad of innocent explanations ignored by Carruesco precludes the conclusion that every occupant in the Chrysler was an East Side Crip.

Since we conclude that the inference that the occupants of the Chrysler were East Side Crips was unreasonable, it is obvious that Carruesco's conclusion that the occupants of the Mazda were East Side Crips was also unreasonable. Carruesco did not know the sex, race, age or number of occupants in the Mazda. It was irresponsible of Carruesco to come to any conclusion about the occupants of this vehicle.

There were no facts introduced to show that Carruesco, at the time he stopped the Chevrolet, knew that the occupants, even if they were gang members, knew about the Casa Loma shooting. The shooting in the park occurred six hours before the stop. At least two of the suspects were arrested a short time after the shooting. While Carruesco may have believed that every East Side Crip knew of the shooting, a mere belief will not support a detention. (*People v. Conway* (1994) 25 Cal.App.4th 385, 389.)

Carruesco's final inference, that these gang members were expecting retaliation that night and, accordingly, were armed, is belied by Carruesco's own testimony. Carruesco stated to the court that he has seen retaliation for gang shootings that has occurred months after the first shooting. If we accept Carruesco's reasoning, since retaliation was possible for at least the next few months, he would be justified in stopping every vehicle in which he believed East Side Crips were riding for the next few months because they may be expecting retaliation and would therefor arm themselves. The absurdity of this proposition demonstrates the flaw in Carruesco's logic.

The trial court stated on several occasions during the motion to suppress that this was an unusual situation. It was unusual only because the detention was not supported by any facts that would justify the detention. Instead the People relied on inference and deduction to justify the prosecution. However, no inference or deduction will support a detention if there are not any facts indicating that the person being detained was involved in criminal activity. (*People v. Conway, supra* 25 Cal.App.4th at p. 389.) The trial court erred when it failed to recognize this fundamental distinction when it denied the motion to suppress.

We find support for our conclusion in *Cortez*. In *Cortez*, the border patrol was investigating a particular group that was smuggling illegal aliens across the border. The border patrol learned the following facts during a two-month investigation. The area they were investigating was a border crossing for illegal aliens. They had over a period of time located numerous tracks of individuals all headed from the Mexican border that

terminated near a specific point at Highway 86. Because they terminated at the highway, the officers concluded that a vehicle picked up the groups.

One set of footprints, which appeared repeatedly, left an impression with a distinctive pattern. The investigating officers designated this person "Chevron" and concluded he was the guide. Because the tracks often led into dead ends that required backtracking by the groups, and these areas would easily be avoided in daylight, the officers concluded the trips were made at night. The officers determined by examining the tracks that the groups usually contained between 8 and 20 individuals. Based on the times when they discovered "Chevron's" tracks, the officers determined that "Chevron" usually led groups across the border during or near weekends and on nights when the weather was clear.

The investigating officers were on duty on a Sunday night in late January. The absence of "Chevron's" tracks revealed that his last border crossing was in early January. The night in question was the first clear night after three days of rain. The officers concluded there was a strong possibility that "Chevron" would make a crossing that night.

The officers assumed that if "Chevron" made a crossing that night he would leave Mexico after dark. They estimated the time it would take to make the crossing by those on foot and determined that "Chevron" would reach the pick-up point between 2 a.m. and 6 a.m. that morning. The officers also determined that the pick-up vehicle would approach the pick-up point from the east, and return to the east since that was the direction the groups were walking before they were picked up and it was unlikely that the groups would walk away from their ultimate destination.

On the night in question, the officers began their surveillance of Highway 86 approximately 27 miles east from the pick-up point. The officers were looking for a vehicle large enough to carry groups of illegal aliens without drawing unwanted attention, such as pick-ups, vans, motor homes, campers and like vehicles. They also

were looking for a vehicle which headed west bound, and then returned east bound within one and one half hours, the time they estimated it would take to make the round trip from their vantage point to the pick-up point. Only one distinctive camper met the criteria established by the officers. When the officers stopped the vehicle, they found six illegal aliens in the camper and an individual wearing shoes that matched the pattern of "Chevron's" shoes in the cab.

The United States Supreme Court held that the above facts established probable cause for the stop of the vehicle. The Court began by reiterating that the Fourth Amendment applied to brief investigatory stops such as the one at issue here. (*United States v. Cortez, supra,* 449 U.S. at p. 417.) They also reiterated that the essence of Fourth Amendment analysis "… is that the totality of the circumstances--the whole picture--must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. [Citations.]" (*Id*. at pp. 417-418.)

The Court concluded the officers used objective facts to draw permissible inferences to form a legitimate basis for suspicion of a particular person and for action on that suspicion. (*Id*. at p. 419.) The Court held that, based on the whole picture of the two-month investigation, these experienced Border Patrol agents could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity. (*Id*. at pp. 421-422.)

Carruesco and Heredia's investigation lasted closer to two minutes than two months. They were on a heightened state of alert because of the desire to prevent escalation of ongoing gang conflicts. While their intentions may have been good, the tragedy at Casa Loma Park did not result in suspension of the Fourth Amendment. In contrast to the extensive investigation and rational deductions found in *Cortez*, Carruesco and Heredia acted on a hunch and intuition, neither of which will support a detention. (*People v. Conway, supra,* 25 Cal.App.4th at p. 389.) Reducing this stop to its essence,

Carruesco and Heredia acted because a passenger in the vehicle was a member of the East Side Crips. Mere membership in a criminal street gang, without additional *facts* supporting an inference of criminal activity, does not permit a detention. (*People v. Rodriquez* (1993) 21 Cal.App.4th 232, 239.) Carruesco and Heredia violated the Fourth Amendment rights of the occupants of the Chevrolet by stopping the vehicle without a reasonable suspicion that the occupants were engaged in criminal activity.

III. Probation Search Conditions

The People assert that even if Carruesco and Heredia did not have justification for stopping the vehicle, the motion to suppress was properly denied because three of the occupants in the Chevrolet were subject to probation or parole search conditions. Although the record is far from clear, it appears that Hanks, Dawson, and Hester were on probation. Hester's search condition apparently required a reasonable suspicion of criminal activity before he could be searched although the record is unclear as to the scope of the search condition for any of the defendants.

Carruesco and Heredia were unaware that the occupants were on probation at the time they stopped the Chevrolet. Hester argues that the officers' lack of knowledge that there were probation search conditions makes the stop illegal.

Resolution of this issue requires a review of California Supreme Court cases dealing with parole and probation searches. In *People v. Burgener* (1986) 41 Cal.3d 505 the defendant was suspected of committing a robbery during which a convenience store clerk was fatally wounded. The defendant was on parole with a warrantless search condition. After the defendant was arrested, the police searched the apartment he lived in with the consent of defendant's parole officer. Incriminating evidence was found in the apartment.

The defendant argued the incriminating evidence should have been suppressed because the search was conducted without a warrant. The Supreme Court first affirmed that parolees have a reduced expectation of privacy and, accordingly, certain

governmental intrusions into their privacy are permissible. (*People v. Burgener*, *supra*, 41 Cal.3d at p. 531.) The Supreme Court, after noting the myriad of regulations a parolee is subjected to upon release from prison, held "The interest in parole supervision to ensure public safety, which justifies administrative parole revocation proceedings in lieu of criminal trial with the attendant protections accorded defendants by the Bill of Rights, also permits restrictions on parolees' liberty and privacy interests. Balancing these interests of the parolee against the societal interest in public safety leads us to conclude that warrantless searches of parolees are not per se unreasonable if conducted for a purpose properly related to parole supervision." (*Id.* at p. 532.) The court continued that society's interest in public safety permits parole searches on a reasonable suspicion standard, a standard which would not rise to the level of probable cause in the typical criminal context. (*Id*. at p. 534.) This standard must be based on articulable facts and rational inferences that would lead an objectively reasonable person to conclude there was reasonable suspicion that the parolee was involved in criminal activity. (*Ibid*.) The Supreme Court concluded that the search met the required standard and that the fact that the search was conducted for the purpose of discovering evidence to support new criminal charges was of no moment. (*Id*. at p. 536.) "The societal interest in parole supervision and in the speedy return of parole violators to prison in order to protect the public has added weight, not less, when a reasonable suspicion exists to believe that a parolee has been involved in criminal activity. Any violation of the law is also a violation of the conditions of a parole. The law enforcement purpose of the police who seek authorization from the parole agent for a warrantless search, and the parole supervision purpose of the agent who gives that authorization are indistinguishable." (*Ibid*.)

In *People v. Bravo* (1987) 43 Cal.3d 600 the defendant was a probationer who had a warrantless search condition as a condition of his probation. Police officers received a tip that defendant was selling drugs. However, surveillance of his residence did not

reveal any suspicious activity. A search of his residence pursuant to the probation terms located illegal drugs.

Defendant argued that a search pursuant to the probation requirement could only occur if the officers had reasonable cause to suspect defendant was involved in criminal activity. The Supreme Court rejected this argument holding that by accepting probation with a warrantless search condition, the defendant voluntarily waived his right to privacy save only his right to object to harassment or to object to searches conducted in an unreasonable manner. (*People v. Brugener, supra,* 41 Cal.3d at p. 607.) The Supreme Court distinguished *Burgener* by distinguishing between probation, in which a probationer voluntarily waives a right to be free from unreasonable searches in exchange for escaping a prison sentence, and parole, in which the warrantless search requirement is not voluntary. (*Id*. at p. 608.) A parolee does not waive his right to be free from unreasonable searches, but the condition is imposed on him by statute on his release from prison. A probationer, however, voluntarily waives his right since probation is a privilege, and the probationer has an option to refuse the condition if he or she finds it too burdensome. (*Ibid*.)

The Supreme Court added that the probationer's waiver of his Fourth Amendment rights did not allow searches undertaken for harassment nor searches for arbitrary or capricious reasons. (*Id*. at p. 610.) "We do not suggest that searches of probationers may be conducted for reasons unrelated to the rehabilitative and reformative purposes of probation or other legitimate law enforcement purposes…. We hold only that a search condition of probation that permits a search without a warrant also permits a search without 'reasonable cause,' as the former includes the latter. [Citation.]" (*People v. Burgener, supra,* 41 Cal.3d at pp. 610-611.)

In *In re Tyrell J.* (1994) 8 Cal.4th 68, a juvenile was on probation and was subject to a search condition at any time by any law enforcement officer. An officer stopped the juvenile and some friends because of suspicious behavior. The officer did not know the

juvenile was on probation. During the course of the stop the officer searched the juvenile and found illegal drugs. The trial and appellate court both concluded that absent the probation term, the search violated the Fourth Amendment.

The Supreme Court, after distinguishing between adult and juvenile probationers, concluded that the juvenile did not have a reasonable expectation of privacy that society was willing to recognize as legitimate. (*In re Tyrell J., supra,* 8 Cal.4th at p. 86.) "Tyrell J. was subject to a valid search condition, directly imposed on him by the juvenile court in a prior matter. We presume he was aware of that limitation on his freedom, and that any police officer, probation officer, or school official could at any time stop him on the street, at school, or even enter his home, and ask that he submit to a warrantless search. There is no indication the minor was led to believe that only police officers who were aware of the condition would validly execute it. The minor certainly could not reasonably have believed [the officer] would not search him, for he did not know whether [the officer] was aware of the search condition. Thus, any expectation the minor may have had concerning the privacy of his bag of marijuana was manifestly unreasonable." (*Ibid*.)

Parole searches were next addressed in *People v. Reyes* (1998) 19 Cal.4th 743 where the court addressed the "tension" between *Tyrell J*. and *Burgener*. In *Reyes*, defendant was on parole and agreed to a parole condition which allowed any law enforcement officer to search defendant and his residence without a warrant. Defendant's parole officer received a tip that defendant may be under the influence of illegal narcotics. The parole agent requested the local police to evaluate defendant to determine if the tip was accurate. The officers observed defendant exiting a small shed in back of his house, but did not identify any suspicious activity. The officers searched the shed and located methamphetamine.

The Supreme Court held that when an involuntary search condition is properly imposed the searching officers are not required to have a reasonable suspicion of criminal

activity before conducting the search. "Such a search is reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing." (*People v. Reyes, supra,* 19 Cal.4th at p. 752.) Accordingly, the search of defendant did not violate his Fourth Amendment rights.

In *People v. Woods* (1999) 21 Cal.4th 668 an officer observed Mofield walking in front of a house occupied by Loza carrying a long object covered by a cloth. The officer knew that Loza was on probation and that she had agreed to warrantless searches of her residence. When Mofield saw the officer, he quickened his pace and turned into a driveway. The officer detained Mofield and discovered a long knife under the cloth and drugs and drug paraphernalia on Mofield.

After he was arrested, Mofield told the officer he resided with Loza. Believing he would find incriminating evidence against Mofield, the officer decided to conduct a probation search of Loza's residence. When he knocked on the door, Loza refused permission to enter. The officer reminded Loza of her probation search requirement and entered the premises. He discovered defendants, who also lived in the residence, in a bedroom along with additional drugs and paraphernalia.

The trial court ordered the evidence against defendants suppressed because it found that the officer used the probation search condition as a pretext to look for incriminating evidence against Mofield. The Supreme Court accepted this factual finding, but reversed the trial court's order of suppression. Concluding that the subjective intent of the officer conducting the search is irrelevant. (*People v. Woods, supra,* 21 Cal.4th at pp. 680-681.) The court found that the probation search was justified because the officer had been told three days before that drugs were being sold out of the house and because of Mofield's actions as observed by the officer that day. (*Id*. at p. 681.) The court limited its holding by stating that the search may not exceed the probation search clause at issue, the search may not be undertaken in a harassing or unreasonable manner, and that the search is limited to those portions of the residence that

the officers reasonably believe the probationer has complete or joint control over. (*Id*. at p. 682.)

In *People v. Robles* (2000) 23 Cal.4th 789 the Supreme Court was faced with the question of a warrantless search conducted at the home of a probationer. The officers suspected defendant, who lived with the probationer, of being involved in the theft of a car. The officers believed the stolen vehicle was located in the garage of the residence shared by the probationer and defendant, who were brothers. However, at the time the officers conducted the search, they were not aware the probationer lived at the house and that his probation contained a search condition. The People tried to justify the otherwise illegal search by arguing the police had a right to conduct the search since the probationer lived at the house.

The Supreme Court rejected the argument and found the search violated the defendant's Fourth Amendment rights. "It is true that if persons live with a probationer, common or shared areas of their residence may be searched by officers aware of an applicable search condition. [Citations.] Critically, however, cohabitants need not anticipate that officers with no knowledge of the probationer's existence or search condition may freely invade their residence in the absence of a warrant or exigent circumstances. Thus, while cohabitants have no cause to complain of searches that are reasonably and objectively related to the purposes of probation—for example, when routine monitoring occurs [citation] or when facts known to the police indicate a possible probation violation that would justify action pursuant to a known search clause [citation]—they may legitimately challenge those searches that are not." (*People v. Robles, supra,* 23 Cal.4th at pp. 798-799.)

Significant for our purposes the court rejected the People's argument that any search conducted of a probationer's home is authorized regardless of whether the police had knowledge that the probationer resided at the home. "Contrary to the People's argument, *People v. Woods, supra*, 21 Cal.4th 668 does not support the proposition that

police officers may lawfully enter a residential premises, without a warrant and without any awareness of a resident's probation search condition, to indiscriminately search for and seize evidence of suspected criminal wrongdoing. As our decisions indicate, searches that are undertaken pursuant to a probationer's advance consent must be reasonably related to the purposes of probation. [Citations.] Significantly, a search of a particular residence cannot be 'reasonably related' to a probationary purpose when the officers involved do not even know of a probationer who is sufficiently connected to the residence. Moreover, if officers lack knowledge of a probationer's advance consent when they search the residence, their actions are wholly arbitrary in the sense that they search without legal justification and without any perceived limits to their authority." (*People v. Robles, supra,* 23 Cal.4th at p. 797.)

The United States Supreme Court decisions on this issue are not helpful. The only decision we found which remotely approaches this issue is *Whren v. U.S., supra,* 517 U.S. 806, which held that a Wisconsin statute, which provided that parole searches could be conducted without a warrant anytime a parole agent had a reasonable suspicion the parolee was involved in criminal activity, did not violate the Fourth Amendment. *Whren* did not hold that the Fourth Amendment imposes a reasonable suspicion requirement.

The California Supreme Court cases referred to above, indicate that a police officer need not have a reasonable suspicion of criminal activity to conduct a warrantless search pursuant to a probation waiver. However, the search must be reasonably related to the probation requirement. This will require in most situations, if not all situations, that the officer knows at the time the search is conducted that the person or residence being searched is subject to a warrantless search. The Supreme Court has not held in any of these cases that a probation waiver may justify a search where the officer did not know that person or residence was subject to such a waiver. *Tyrell J*. is distinguishable because, as pointed out by the Supreme Court, a juvenile probationer does not voluntarily waive his rights as an adult probationer does, but is subject to an imposed condition

similar to an adult parole. (*In re Tyrell J.*, *supra*, 8 Cal.4th at pp. 81-83.) *Robles* suggests that the requirement that the officer have knowledge of the probation waiver before conducting a search is equally applicable to the probationer as well as third parties affected by the probationer's waiver. Thus, Carruesco and Heredia's ignorance of the probation status of Hanks, Dawson and Hester precludes reliance on the search condition to justify the stop of the vehicle.

Even if we had concluded that a search could be conducted in the absence of knowledge of probation, we would find the trial court erred in denying the motion to suppress for another reason. This case does not present the issue of whether a probation waiver can justify a search. The question is whether a stop of a lawfully operated vehicle can be justified because a passenger in the vehicle was on probation. The answer to this question is no. We can envision no conduct more unreasonable than stopping a vehicle and then hoping the stop can later be justified if one of the occupants in the vehicle happens to be on probation. Whether such conduct is described as unreasonable, harassment, or arbitrary and capricious, it is prohibited by the Fourth Amendment.

DISPOSITION

The judgment is reversed and the cause remanded to the superior court. The court is directed to vacate its order denying the motion to suppress and enter a new order granting the motion. The court is directed to vacate the guilty plea if Hester makes an appropriate motion within 30 days after the remittitur is issued. In that event, the

superior court should reinstate the original charges and allegations contained in the information if the prosecution so moves. If Hester does not move to vacate the guilty plea, the trial court is directed to reinstate the original judgment.

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Cornell, J.

WE CONCUR:

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Buckley, Acting P.J.

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Levy, J.