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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JERRY LEE HILL, Defendant and Appellant.	A097724 (Solano County Super. Ct. No. FC191162)

Defendant appeals from the judgment following his conviction of receiving stolen property. We hold that defendant's motion to suppress evidence was properly denied, concluding that a search of defendant's motel room was lawful even though the police were unaware of defendant's probation search condition. We also conclude there was sufficient accomplice corroboration and affirm.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Following a plea agreement, defendant's girlfriend, Jamie Gregory, testified that on March 17, 2001, defendant asked her to help him burglarize the home of Patricia Bond. Gregory refused because Bond was her friend. Defendant responded by striking Gregory in the face with an auto part, breaking her nose.

The next morning, defendant told Gregory he would kill her if she did not help with the burglary. Gregory called Bond between 8:30 and 9:00 a.m. to determine if she was home. Bond testified that Gregory appeared surprised that Bond had not yet left for church. Bond was suspicious because Gregory was living in her car and had recently

asked Bond for money. Bond left home, locking the doors. While Bond was gone, Gregory entered the house through a rear window and admitted defendant through a sliding glass door. They took jewelry, coins, a DVD player, VCR, tools and other items. After defendant sold some of Bond's property, he and Gregory checked into a Travelodge.

Discovering the burglary upon her return, Bond called the police and Officer Moore responded. Based on Bond's report, Moore considered Gregory a suspect. Bond described Gregory's car, which was seen later at the Travelodge. Gregory testified that she was walking to her car to get a clean shirt when Moore approached and told her he was investigating a burglary. Gregory told Moore she was with defendant, who was inside the Travelodge room taking a shower. Moore noted facial injuries and several lacerations on Gregory's nose. Gregory reentered the room, and spoke with defendant near the bathroom door. Officer Moore later searched the motel room and recovered some of Bond's jewelry and silver dollars hidden under the bathroom sink and behind the toilet. He found other stolen property in dresser drawers. Moore did not recover Bond's DVD player or VCR, which defendant had already sold. After his arrest, defendant told Moore that he could not be charged with a burglary because he did not enter the house. He also asked, "If I help you get the other property back, can we work some kind of deal to help [Gregory] out?" He said, "[I]f I could get some kind of guarantee for her . . . I could help you guys out and get the rest of that property back."

Defendant's niece Mali Hill and his friend Taamra Rose testified that Gregory injured her face when she fell on an auto part while defendant was fixing her car. Another friend testified that Gregory approached her several weeks before the burglary and tried to sell her a ring.

The jury convicted defendant of receiving stolen property, but found him not guilty of burglary. The court found the defendant's prior conviction was not true. Defendant was sentenced to three years in prison.

DISCUSSION

I. *Motion to Suppress*

Defendant moved to suppress his statements to Officer Moore and the evidence seized in the motel room. The trial court denied the motion, finding that because defendant was on probation he had no reasonable expectation of privacy. Defendant claims the court erred because Moore had been erroneously informed that defendant was on parole. Only later, after the search, did Moore determine that defendant had a probation search condition.[1] We reject defendant's claim.

A. *Factual Background*

At the suppression hearing, Moore testified that after Bond identified both Gregory and defendant as possible suspects, Moore contacted Gregory at the Travelodge that same morning. Gregory's car had also been discovered there and Gregory admitted she was staying at the motel with her boyfriend. Gregory refused Moore's request to search the motel room. When Moore asked to speak to defendant, Gregory went back inside. Through a crack in the door, Moore watched as Gregory stood at the bathroom door and whispered to defendant. Defendant came outside and confirmed that he was staying at the motel room with Gregory. Moore could not recall if he asked defendant for permission to search.

Moore radioed the police dispatcher and asked whether Gregory or defendant was on probation. When the dispatcher erroneously told him no, Moore asked his patrol supervisor to obtain a warrant. While awaiting the arrival of a detective, Moore received another call from the dispatcher who again erroneously advised him that defendant was on parole. Relying on this information, Moore searched the motel room and found property taken in the burglary. Several days later Moore learned that defendant was no longer on parole, but was on probation with a search condition.

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[1] Nowhere in the record are the terms of defendant's probation search condition listed. Defendant does not dispute, however, that he was subject to a condition allowing law enforcement officers to search his residence.

B. ***Analysis***

Defendant contends the search of the motel room based on defendant's probation search condition was unlawful because Officer Moore was unaware of this condition at the time of the search. Defendant's argument is contrary to existing California Supreme Court authority. In *In re Tyrell J.* (1994) 8 Cal.4th 68 (*Tyrell J.*), 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.)[2] The Supreme Court concluded that a juvenile probationer subject to a valid search clause does not have a reasonable expectation of privacy over his person or property and thus his "expectation of privacy is not one society is prepared to recognize as reasonable and legitimate." (*Id.* at p. 86.) The court emphasized: "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 [that the searching officer] would *not* search him, for he did not know whether [the officer] was aware of the search condition." (*Ibid.*, italics in original.)

In *People v. Reyes* (1998) 19 Cal.4th 743, the Supreme Court extended the reasoning of *Tyrell J.* to parolees and concluded that parole searches conducted without reasonable suspicion do not intrude on a reasonable expectation of privacy. (*Id*. at p. 751.) The court stated: "The rationale of *Tyrell J.* can be stated succinctly. When involuntary search conditions are properly imposed, reasonable suspicion is no longer a prerequisite to conducting a search of the subject's person or property. Such a search is

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2 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 a 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 Supreme 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 in which the Fifth District 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, 2002, 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), review granted February 28, 2001, S094088.

reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing. *Tyrell J.*'s reasoning applies with equal force to adults. In both cases the expectation of privacy is already reduced by the absence of the warrant requirement. As a convicted felon still subject to the Department of Corrections, a parolee has conditional freedom—granted for the specific purpose of monitoring his transition from inmate to free citizen. The state has a duty not only to assess the efficacy of its rehabilitative efforts but to protect the public, and the importance of the latter interest justifies the imposition of a warrantless search condition." (*Id.* at p. 752.)

The reasoning of *Tyrell J.* applies even more forcefully to searches of adult probationers who, unlike minors, consent to searches in order to obtain probation. (See *Tyrell J.*, *supra*, 8 Cal.4th at p. 82.) In *People v. Bravo* (1987) 43 Cal.3d 600, 608, the Supreme Court emphasized that an adult probationer consents to a waiver of his Fourth Amendment rights in exchange for the opportunity to avoid serving a state prison sentence. " '[W]hen [a] defendant in order to obtain probation specifically [agrees] to permit at any time a warrantless search of his person, car and house, he voluntarily [waives] whatever claim of privacy he might otherwise have had.' " (*Id.* at p. 607, quoting *People v. Mason* (1971) 5 Cal.3d 759, 766.) "We read the consent in *Mason* as a complete waiver of that probationer's Fourth Amendment rights, save only his right to object to harassment or searches conducted in an unreasonable manner." (*Bravo*, *supra*, 43 Cal.3d at p. 607.)

As in the case of minor probationers, we presume adult probationers are aware that officers can stop them at any time or place and conduct a warrantless search. Like the minor probationer in *Tyrell J.*, defendant was never led to believe that only officers who were actually aware of the search condition could validly execute it. Moreover, since defendant did not know whether Moore was cognizant of the search condition, he could not have reasonably believed the motel room would not be searched.

Nevertheless, defendant argues that the Supreme Court limited the application of *Tyrell J.* in *People v. Robles* (2000) 23 Cal.4th 789, by requiring "knowledge first" to

validate a residential search. We disagree. *Robles* is distinguishable on its facts.[3] In *Robles*, officers searched the garage of the defendant, who was not on probation and not subject to any search condition. The police sought retroactively to justify their warrantless search on the basis of the probationary status and search condition of the defendant's brother, who lived with him. At the time of the search, the police were unaware of the brother's search condition. (*Id.* at p. 798.)

In determining that the search was unlawful, the Supreme Court first focused on the privacy rights of nonprobationers who live with a person subject to a search condition: "The logic of *Tyrell J.* cannot be stretched to vitiate the illegality of the police action here. 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. . . . 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. [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.]" (*Robles*, *supra*, 23 Cal.4th at p. 798.)

Second, the *Robles* court addressed the concerns of the exclusionary rule implicated in such a search. The court reiterated its observation in *Tyrell J.* that dispensing with a strict "knowledge-first" rule would not encourage police to engage in warrantless searches because officers would be taking the chance that if the person targeted is not subject to a search condition, any contraband found will be inadmissible in court. (*Robles*, *supra*, 23 Cal.4th at p. 799.) However, the *Robles* court cautioned "residential searches present an altogether different situation." (*Id.* at p. 800.) The court

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[3] To the extent that *Robles* held that probation searches must be reasonably related to the "special needs" and purposes of probation, such limitation has been rejected by the United States Supreme Court in *United States v. Knights* (2001) 534 U.S. 112, 116-121.

stated: "Notably, residences frequently are occupied by several people living together, including immediate family members and perhaps other relatives or friends, as well as guests. Allowing the People to validate a warrantless residential search, after the fact, by means of showing a sufficient connection between the residence and any one of a number of occupants who happens to be subject to a search clause, would encourage the police to engage in facially invalid searches with increased odds that a justification could be found later. It also would create a significant potential for abuse since the police, in effect, would be conducting searches with no perceived boundaries, limitations, or justification." (*Ibid.*)

The circumstances of the search considered by the *Robles* court differ significantly from those here. Unlike the defendant in *Robles*, defendant *is* a probationer subject to a search condition. Nevertheless, defendant claims that, even as a probationer with a search condition, he retained a limited expectation of privacy to be free from warrantless searches of his residence shared with others. Defendant argues that following the analysis in *Robles*, we should extend additional Fourth Amendment protections to him in order to guard innocent non-probationer housemates from improper police conduct.

We reject defendant's reasoning, and decline to extend *Robles* beyond its facts. The search of defendant's motel room falls within the "logic" of *Tyrell J.* (*Robles*, *supra*, 23 Cal.4th at p. 798.) *Tyrell J.* provided that a probation search condition can validate the warrantless search of a juvenile probationer, even if the police did not know of the condition at the time of the search. The *Robles* court does not appear to disagree. The court states, in discussing and quoting from *Tyrell J.*, that a juvenile probationer subject to a search condition must expect that an authorized official " 'could at any time stop [the probationer] on the street, at school, *or even enter his home*, and ask that he submit to a warrantless search.' " (*Robles*, *supra*, at p. 798, italics added; see *Tyrell J.*, *supra*, 8 Cal.4th at p. 86.)

Nowhere in its opinion does the *Robles* court state that *Tyrell J.* is limited to nonresidential searches or to searches of a residence solely occupied by the probationer. Instead, *Robles* states only that the "logic" of *Tyrell J.* does not apply to "vitiate the

illegality of the police action" in *Robles.* (*Robles*, *supra*, 23 Cal.4th at p. 798.) That particular police action was not a search that resulted in evidence incriminating a probationer, as it was in *Tyrell J*. and in defendant's matter. If *Robles* is applied as defendant urges, a probationer could recapture the rights he has waived by the simple expedient of residing with a nonprobationer.

Nor is defendant's extension of *Robles* logically supported. In return for his placement on probation, defendant consented to searches of his residence. Defendant cannot waive his right to be free from warrantless searches on one hand, yet retain a reasonable and unfettered expectation of privacy on the other. Under the binding authority of *Tyrell J*., defendant's waiver ended his Fourth Amendment privacy right, except for freedom from arbitrary or harassing searches.

While we acknowledge the impact of residential searches on those living with the probationer, defendant would have us carve out a limited Fourth Amendment protection for *him* in order to protect those who live with him. The law already provides these co-habitants with remedies. Any incriminating evidence offered against them could be suppressed and other civil remedies may be available for pursuit. To go further and suppress evidence against defendant confers upon him a right to which he is not entitled.

II. *Corroboration of the Accomplice's Testimony*

Defendant contends that Gregory's uncorroborated accomplice testimony was insufficient to support his conviction for receiving stolen property. We disagree.

Defendant has waived this issue by conceding at trial the existence of sufficient corroboration. After the prosecution rested, the court, on its own, raised the issue of the sufficiency of corroborative evidence. In response, defense counsel referred to defendant's statement that he could help the police by getting Bond's remaining property for them. Defense counsel told the court: "I believe that that would be sufficient corroboration for the receiving [stolen property] charge, but I don't believe it's sufficient corroboration as to the burglary charge." Nevertheless, the court found that Gregory's testimony was corroborated on the burglary count.

In closing argument, counsel again conceded the sufficiency of the evidence on the receiving stolen property count: "[T]here's evidence that he received stolen property, and it doesn't depend on the testimony of Jamie Gregory. I thought that counsel made a good point of that with her argument that he's in the bathroom where much of the stuff is located that came from the house. Well, that's evidence that you can consider on this count of receiving stolen property. Doesn't prove he stole it, but it sure proves that he's in a place where he's . . . apparently got control over it, got some knowledge that it's there."

Even absent defendant's concession, his claim of insufficient corroboration is without merit. A conviction cannot be based solely on accomplice testimony. (Pen. Code, § 1111.) There must be sufficient corroborating evidence that "shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (*Ibid.*) To adequately corroborate accomplice testimony, the prosecution must " 'produce independent evidence which, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged. [Citation.]' [Citation.]" (*People v. Rodriques* (1994) 8 Cal.4th 1060, 1128.) The nature and extent of corroboration required is not great. "Corroborating evidence may be circumstantial in nature, and may consist of evidence of the defendant's conduct or his declarations." (*People v. Garrison* (1989) 47 Cal.3d 746, 773.) "[C]orroborative evidence is sufficient even though slight and entitled to little consideration when standing alone. [Citation.]" (*People v. Wood* (1961) 192 Cal.App.2d 393, 396.) "Only a portion of the accomplice's testimony need be corroborated, and the corroborative evidence need not establish every element of the offense charged. [Citation.] All that is required is that the evidence connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the [accomplice] is telling the truth. [Citation.]" (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 25, internal quotation marks omitted.) In determining the sufficiency of corroborative evidence we must view the evidence in the light most favorable to the verdict and uphold the trial court's disposition if, on the evidentiary

record, the jury's determination is reasonable. (*People v. Garrison*, *supra*, 47 Cal.3d at p. 774.)

A conviction for stolen property requires proof that the property was stolen, the defendant knew it was stolen, and the defendant had possession of it. (Pen. Code, § 496, subd. (a).) Defendant was located in the Travelodge motel room where Bond's stolen property was found, hours after the burglary. After Moore recovered Bond's property, defendant told Moore that he could not be charged with burglary since he did not actually enter the house. Defendant's statement indicates knowledge of the burglary and that the items recovered by Moore were stolen. Defendant also told Moore that he would help get Bond's remaining property back in exchange for a deal for Gregory. This statement further demonstrates defendant's knowledge that the items found in the motel room were stolen.

Moreover, when Moore initially contacted Gregory at the Travelodge, she told him that defendant was inside the motel room taking a shower. Moore then watched as Gregory went back inside the motel room and talked to defendant near the bathroom. When Moore later entered the bathroom to search it, he discovered Bond's stolen jewelry hidden in a wet towel underneath the sink and her silver coins hidden at the rear of the toilet. This evidence supports an inference that that defendant concealed the property while Moore was outside the room with Gregory.

While this evidence is not overwhelming, it tends to connect defendant to the commission of the crime of which he has been convicted and we must uphold the jury's verdict. (*People v. Garrison*, *supra*, 47 Cal.3d at p. 774.) Because Gregory's testimony was sufficiently corroborated, it follows that her testimony was properly admitted, and adequately supports defendant's conviction for receiving stolen property.

III. *Ineffective Assistance of Counsel*

Defendant's last contention is that his trial counsel was ineffective for failing to move to dismiss the receiving stolen property charge based on insufficient accomplice corroboration. In order to demonstrate ineffective assistance of counsel, defendant must show not only the deficiency of counsel's performance, but also that prejudice resulted.

(*Strickland v. Washington* (1984) 466 U.S. 668, 687.) Given our conclusion regarding the sufficiency of the accomplice corroboration, defendant has failed to meet either burden.

DISPOSITION

The judgment is affirmed.

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Corrigan, Acting P.J.

We concur:

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Parrilli, J.

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Pollak, J.