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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ADRIAN EUGENE MOORE, Defendant and Appellant.	E032142 (Super.Ct.No. FSB022611) OPINION

APPEAL from the Superior Court of San Bernardino County. Patrick J. Morris, Linda M. Wilde, Kenneth R. Barr and Brian McCarville, Judges. Reversed.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Robert M. Foster, Supervising Deputy Attorney General, Frederick R. Millar, and Bradley Weinreb, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant guilty of possessing rock cocaine and the trial court, in a separate proceeding and after defendant waived his right to a jury, found that defendant had previously been convicted of two prior serious felonies within the meaning of the three strikes law. After denying defendant's motion to strike one of the prior convictions, the trial court sentenced defendant to the term of 25 years to life in accordance with the mandate of the three strikes law.

Defendant raises various claims of error in this appeal. We agree with his claim that the search of his mouth pursuant to which the police recovered the rock of cocaine violated the Fourth Amendment and therefore the trial court erred in denying defendant's motion to suppress that evidence. Because that search was unlawful, we will reverse the judgment and consequently will not address defendant's remaining claims of error.

FACTUAL AND PROCEDURAL BACKGROUND

Because we are reversing the judgment based on the unlawful search, we will not recount in detail the evidence presented at trial. For our purposes it is sufficient to note that San Bernardino City Police Officers Antillon and Brennan were on bike patrol in downtown San Bernardino at 12:35 p.m. on May 5, 1999, when they spotted defendant and a woman leaving an apartment. Defendant had a beer in his right hand and the woman appeared to be looking at something in her hands. As Officer Antillon headed across the street toward them, defendant and the woman stopped walking. When the woman looked up and spotted the officer she said something to defendant and then walked quickly back to the apartment complex.

Officer Antillon contacted defendant who immediately stated that he would throw away the beer he had been holding. Following an initial exchange during which defendant appeared to the officer to be very agitated and nervous, Officer Antillon noticed what appeared to be a black plastic bindle in defendant's left hand. When defendant would not comply with Officer Antillon's directive to open his hand, a struggle ensued that included other officers who had arrived at the scene. Ultimately, defendant put the object in his mouth and the police officers had him transported by ambulance to a hospital where defendant was sedated and the bindle was removed from his mouth. That bindle tested positive for cocaine.

Defendant moved in Superior Court to suppress the drugs on the ground that the search of his mouth had violated his Fourth Amendment right to be free from unreasonable searches. The trial court denied that motion after the prosecutor presented evidence to show that defendant had been on parole at the time of the search and therefore had waived his Fourth Amendment rights.

Defendant contends, because the police officers did not know he was on parole at the time they conducted the search, that search was unlawful and therefore the trial court erred in denying his motion to suppress the drugs. We agree for reasons we now explain.

DISCUSSION

Resolution of defendant's claim is governed by *People v. Sanders* (2003) 31 Cal.4th 318, in which our state supreme court held that the warrantless search of a home was unreasonable under the Fourth Amendment because, although one of the home's

occupants was on parole and subject to a search condition, the police were unaware of that condition at the time the search was conducted. (*Id*. at p. 332.) In reaching that conclusion, the *Sanders* court distinguished *People v. Reyes* (1998) 19 Cal.4th 743, in which the court had upheld as reasonable a search conducted "under the auspices of a properly imposed parole search condition" even though the police did not also have a particularized suspicion of wrongdoing. (*Id*. at p. 754.) The *Sanders* court noted, "In *Reyes*, unlike the present case . . . the searching officer was aware of the existence of the search condition. In fact, the standard adopted in *Reyes*, upholding a search conducted 'under the auspices of a properly imposed parole search condition,' presumes the officer's awareness of the search condition, because a search cannot be conducted 'under the auspices' of a search condition if the officer is unaware that the condition exists." (*People v. Sanders*, *supra*, 31 Cal.4th at p. 332.) The *Sanders* court went on to state, "We recognized in *Reyes* that whether the parolee has a reasonable expectation of privacy is inextricably linked to whether the search was reasonable. . . . [¶] *But our reasoning in Reyes does not apply if the officer is unaware that the suspect is on parole and subject to a search condition. Despite the parolee's diminished expectation of privacy, such a search cannot be justified as a parole search, because the officer is not acting pursuant to the conditions of parole*." (*Id*. at p. 333, emphasis added.)

The above-emphasized language clearly reveals the Supreme Court's view that knowledge of the parole search term must precede the search in order for the search to be reasonable under the Fourth Amendment. In this case, the prosecution's only showing in

opposition to defendant's motion to suppress the drugs was a certified copy of defendant's parole terms which, as the trial court noted, included a term that required defendant to "agree to search or seizure by a parole officer or other peace officer at any time of the day or night with or without a search warrant, with or without probable cause." The prosecutor did not present any evidence to show that the police officers were aware that defendant was on parole and subject to a parole search condition at the time the search was conducted. Therefore, the prosecution did not meet its burden of demonstrating that the search was within the parole search term exception to the warrant requirement. (*People v. Duncan* (1986) 42 Cal.3d 91, 97.) The trial court, in turn, erred in relying on defendant's parole search term to deny defendant's motion to suppress.

Although it appears that the search could have been reasonable as one conducted pursuant to a lawful arrest, the prosecutor did not rely on that exception in the trial court and therefore did not present evidence to support such a finding. Instead, defendant and the prosecutor based their respective arguments on their moving and opposing papers as well as on the transcript of defendant's preliminary hearing. That hearing was conducted under Article I, section 30 of the California Constitution, which makes hearsay evidence admissible at a preliminary hearing. (Cal. Const., art. I, § 30, subd. (b).) Officer Brennan was the only witness to testify at defendant's preliminary hearing and he stated that he had an encounter with defendant on the date in question and sometime after that encounter, defendant was taken by ambulance to the emergency room of a hospital where defendant was sedated and the doctor began "pulling items out" of defendant's mouth.

According to Officer Brennan, of the three items the doctor removed from defendant's mouth, the second appeared to contain a rock of cocaine.

Officer Brennan's preliminary hearing testimony does not disclose the circumstances surrounding the police officers' initial encounter with defendant and the subsequent events that caused the police to have defendant transported to the hospital. Therefore, we cannot determine from the record on appeal whether the search of defendant's mouth was conducted pursuant to a lawful arrest. On the basis of the only evidence the prosecution presented, the search was unreasonable under the Fourth Amendment and we therefore must reverse the judgment.

DISPOSITION

The judgment is reversed.

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/s/ McKinster
J.

I concur:

/s/ King
J.

RAMIREZ, P.J., Dissenting

I respectfully dissent from the opinion of the majority.

The first matter to be addressed is which facts the trial court could properly rely on in ruling on the motion to suppress. Although in his opening brief Moore asserts that the facts stated in his written motion and in the prosecutor's written response thereto could be properly considered, apparently later realizing that taking this position weakened,[1] rather than strengthened, his case, he retreated from it in his reply brief and agreed with the People's position. For their part, the People asserted in their brief that only evidence presented at the hearing on the motion may properly be considered.[2] While the authorities they cite in support of this proposition are not exactly on point, it is clear that the People are correct. (Pen. Code, § 1538.5, subd. (i) [". . . [T]he defendant shall have the right to fully litigate the validity of a search or seizure *on the basis of the evidence presented at a special hearing*." (Italics added.)]; *People v. Loewen* (1983) 35 Cal.3d 117, 123 [The appellate court upholds any implied finding of fact if supported by

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[1] For example, in the People's written response, they assert that the San Bernardino police officers who accosted Moore were in the company of a parole agent, that almost immediately upon encountering Moore, they asked him if he was on probation or parole and he admitted being on the latter, and that "[a]mong the general rules imposed upon all people released on parole is the requirement that '[y]ou . . . may be searched without a warrant at any time . . . ." The implication of these assertions is that the officers were aware that Moore had a parole search term, which would provide a basis for affirming the trial court's ruling consistent with the analysis advanced by the majority.

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substantial *evidence*.]; *People v. Escudero* (1979) 23 Cal.3d 800, 804, fn. 1, 806 [The court below may not rely on a preliminary hearing transcript that was not offered into evidence at the hearing on the motion. The People's burden of proof can be discharged only by "objective evidence."]; *People v. Neighbours* (1990) 223 Cal.App.3d 1115, 1120 [The appellate court will consider "only the evidence adduced at the hearing of the [Penal Code section] 1538.5 motion . . . ."]; *In re Javier A.* (1984) 159 Cal.App.3d 913, 921 [An appellate court is limited to "the evidence presented at the motion to suppress."]; *Wilder v. Superior Court* (1979) 92 Cal.App.3d 90, 94 [Despite the fact that a party cited portions of the preliminary hearing transcript in its points and authorities, absent a stipulation or exception to the hearsay rule, the transcript is not admissible and may not be relied upon by the court below.]; *People v. Carson* (1970) 4 Cal.App.3d 782, 786 [A defendant makes a prima facie showing when he or she "establishes" that an arrest was made without a warrant -- "establishes" means using competent evidence.])

What we are left with in this case is the transcript of the preliminary hearing and the search condition of Moore's parole. *No other asserted facts are relevant to a discussion of the propriety of the denial of the motion.* Any recitation of such facts, as the majority engages in, improperly clouds and confuses the issue. The majority's statement that the parties "based their respective arguments on their moving and opposing papers as well as the transcript of [Moore's] preliminary hearing[,]" (maj. opn.,

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2 Curiously enough, though, in their supplemental brief, the People cite facts adduced *at trial* in urging that the motion was correctly denied.

ante, at p. 5) while true, is unhelpful,[3] because the facts asserted in those documents, to the extent they were not supported by evidence presented at the hearing on the motion (and most of them were not), are irrelevant to the propriety of the ruling of the court below.

The next matter to be addressed is the application of *People v. Sanders* (2003) 31 Cal.4th 318 [*Sanders*], to the narrow set of facts adduced at the hearing on the motion.[4] In *Sanders*, police entered the apartment of a man and a woman in response to a domestic disturbance call after hearing them yelling at each other and seeing that the woman had an abrasion on her face. (*Id*. at p. 322.) After they entered, they saw the man put something metal behind a couch cushion and they handcuffed both, ignoring the latter's demands that they leave. (*Ibid*.) During a "protective sweep" of the apartment, one of the officers found bagged cocaine in work boots inside an open closet. (*Id*. at p. 323.)

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[3] It also feeds into Moore's seeming lack of clarity during the pendency of this appeal about what facts were properly available for the court below to consider. (See text accompanying fn. 1, *ante*.)

[4] I note in passing that Moore failed to meet his initial burden of showing that the search occurred without a warrant. (See *People v. Williams* (1999) 20 Cal.4th 119.) No evidence was adduced at the preliminary hearing (including the officer's truncated version of events) that there was no warrant; such a matter, naturally, was not addressed in the search condition of Moore's parole and Moore presented no evidence concerning it at the hearing on the motion, nor did the People stipulate, as they routinely do in such cases, to the absence of a warrant. Remarkably, in his reply brief, Moore acknowledges his obligation in this regard, but asserts, "[The People] do[] not dispute that [Moore] established a prima facie showing that the search was without a warrant . . . ." I, for one, would like to know how.

The officer then discovered that the man was on parole, subject to search terms. (*Ibid*.) A parole search was conducted, and the cocaine seized. (*Ibid*.)

The *Sanders* court traced the development of the law of parole and probation searches, beginning with *In re Martinez* (1970) 1 Cal.3d 641, which outlawed the search of a parolee's home by officers who were unaware of his status. *Sanders* noted that the high court questioned the reasoning in *Martinez* in *In re Tyrell J.* (1994) 8 Cal.4th 68, where it upheld the search of a juvenile probationer even though the searching officer was unaware of the minor's status and that he had a search condition, reasoning that juvenile probationers have reduced expectations of privacy that are outweighed by society's interest in rehabilitating them. (*Sanders*, *supra*, 31 Cal.4th at pp. 326-328.) As an extension of the reasoning in *Tyrell J*., *Sanders* noted that *People v. Reyes* (1998) 19 Cal.4th 743 upheld the search of a parolee's shed by officers who were aware of his status but lacked reasonable suspicion of criminal activity. (*Sanders*, *supra*, at pp. 750-751, 752.)

Concerning the rights of the male parolee therein, the *Sanders* court said, ". . . [P]olice cannot justify an otherwise unlawful search of a residence because, unbeknownst to the[m], a resident . . . was on parole and subject to a search condition. . . . [T]his result flows from the rule that whether a search is reasonable must be determined based upon the circumstances known to the officer when the search is conducted and is consistent with the primary purpose of the exclusionary rule -- to deter police misconduct. [¶] A parolee's expectation of privacy certainly is diminished, but it is not eliminated. [Fn.

omitted.] . . . [¶] In *Reyes*, . . . the searching officer was aware of the existence of the search condition. . . . [¶] We recognized in *Reyes* that whether the parolee has a reasonable expectation of privacy is inextricably linked to whether the search was reasonable. A law enforcement officer who is aware that a suspect is on parole and subject to a search condition may act reasonably in conducting a parole search even in the absence of a particularized suspicion of criminal activity, and such a search does not violate any expectation of privacy of the parolee. We observed in *Reyes*: 'The level of intrusion is de minimis and the expectation of privacy greatly reduced when the subject of the search is on notice that his activities are being routinely and closely monitored. . . .' [¶] But our reasoning in *Reyes* does not apply if the officer is unaware that the suspect is on parole and subject to a search condition. Despite the parolee's diminished expectation of privacy, such a search cannot be justified as a parole search, because the officer is not acting pursuant to the conditions of parole. [¶] . . . '[T]he reasonableness of a search is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."' [¶] . . . [I]f an officer is unaware that a suspect is on probation and subject to a search condition, the search is not justified by the state's interest in supervising probationers or by the concern that probationers are more likely to commit criminal acts. [¶] . . . [¶] Thus, the admission of evidence obtained during a search of a residence that the officer had no reason to believe was lawful merely because it later was discovered that the suspect was subject to a search condition would

legitimize unlawful police conduct. . . . [¶] An additional reason for suppressing the evidence obtained in the search of the residence in the present case . . . is to protect the rights of the parolee's cohabitants and guests. . . . Permitting evidence that has been suppressed as to a cohabitant[5] to be used against the parolee would encourage searches that violate the rights of cohabitants and guests by rewarding police for conducting an unlawful search of a residence . . . [and] . . . '[m]any law-abiding citizens might choose not to open their homes to probationers [or parolees] . . . [which would result in] higher recidivism rates and a corresponding decrease in public safety . . . ." (*Sanders*, *supra*, 31 Cal.4th at pp. 332-335.)

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5 The *Sanders* court condemned the search as to the nonparolee woman by following the development of the law after *Tyrell* in *People v. Robles* (2000) 23 Cal.4th 789, which invalidated the search of a resident's garage by officers who were unaware at the time that the resident's cohabitant was on probation and subject to a search condition. (*Sanders*, *supra*, 31 Cal.4th at pp. 329.) The *Robles* court declined to extend the logic of *Tyrell J.* to one who resides with a parolee because the former still enjoys a greater expectation of privacy than does the latter and the extent of the nonparolee's expectation, "hinged, in part, upon the searching officer's knowledge of the search condition." (*Sanders*, *supra*, at p. 329.) *Sanders* noted that the *Robles* court said of *Tyrell*'s conclusion that its holding was consistent with the primary purpose of the exclusion rule, i.e., deterring unlawful police conduct, "'[R]esidential searches present an altogether different situation.'" (*Sanders*, *supra*, at p. 330.) *Sanders* noted that *Robles* went on to explain that since parolees often live in households also occupied by nonparolees, allowing police to justify searches of such households on the basis of after-acquired knowledge of the status of one of its occupants "would encourage the police to engage in facially invalid searches with increased odds that a justification could be found later . . . [and] . . . would create a significant potential for abuse since the police, in effect, would be conducting searches with no perceived boundaries, limitations or justification." (*Sanders*, *supra*, at p. 330.) The *Sanders* court said that the holding in *Robles* mandated the conclusion that the search was invalid as to the nonparolee woman. (*Sanders*, *supra*, at p. 330.)

Based on the fact that *Sanders* involved the search of a residence, the holding expressly referred to a search of a residence and the California Supreme Court's "additional reason" for its holding depended exclusively on that fact, the People assert that *Sanders* does not render the search here invalid, even absent evidence at the hearing below that the officers were aware of Moore's status as a parolee and search condition. Their point is not lacking in logical appeal, but, unfortunately, the majority does not even address it.

At the time the hearing on the motion took place, i.e., April 2000, *Martinez'*s condemnation of parole searches without prior knowledge by the searching officer of the defendant's parole status and search condition had been repudiated by *Tyrell*. It is abundantly clear, and the parties agree, that at the time of the hearing, both sides believed that the existence of the parole search condition *alone* justified the search of Moore.[6] It was not until more than three years later that *Sanders* was decided.

It may be, however, that there is no need to determine whether *Sanders* compels any particular outcome in this case -- that is, if the majority were merely to follow the ultimate request of Moore, the party aggrieved by the ruling of the court below. In his supplemental reply brief, Moore put it admirably, saying, ". . . [I]n light of the recent

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[6] After the court below read Moore's search term into the record, it said to defense counsel, "So, technically speaking, you[r] 1538.5 should be denied." Defense counsel replied, "Okay. [¶] . . . [T]hat is well taken. . . ." However, he went on to assert that the manner in which Moore was searched, i.e., that he was choked and handled forcefully,

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decision in *Sanders*, the appropriate remedy at this time would be to remand the matter for a new hearing in the trial court. . . . *It would be unfair to both the People and to [Moore] for this [c]ourt to determine the constitutionality of the search based on a record which was not created for this purpose*."[7] (Italics added.) Assuming the representations in the People's responsive papers below were correct, at such a hearing upon remand, the People should be able to easily prove that the officers who encountered Moore, and were, by the way, in the presence of a parole officer, were made aware from the beginning that Moore was on parole. It would require an additional question or two at such a hearing to determine their awareness that parolees have search conditions. This would moot any necessity on the part of this court to determine whether *Sanders* requires knowledge of the parolee's status and search condition when the latter is encountered on a public street. As Moore put it, this disposition is fair to both parties, and it should have been adopted by the majority.

RAMIREZ

P. J.

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was unlawful. Immediately after he made this argument, the court below denied the motion.

[7] This would eliminate any inclination on the part of the People to persuade us, due to the unusual context of this issue, to consider the facts adduced at trial as justification for the search (see fn. 2, *ante*), an approach I find unappealing.