

People v. Bowers  
(April 23, 2004) \_\_\_ Cal.App.4<sup>th</sup> \_\_\_

#### ISSUE

If officers discover evidence while conducting an illegal warrantless search of a suspect, is the evidence admissible if, unbeknownst to the officers, the suspect is on probation with a search condition?

#### FACTS

At about 10 P.M., four Contra Costa County sheriff's deputies went to a house in El Sobrante to investigate a tip that it was being used as a "chop shop." When they arrived, Bowers was standing behind some cars in the driveway, so one of the deputies walked over to talk with him. The court did not know what Bowers and the deputy talked about because the deputy did not testify at the suppression hearing.

Later, another deputy asked Bowers if he would consent to a pat search. In response, Bowers raised his hands above his head. During the pat search, the deputy felt a pipe of the sort used to ingest drugs. The deputy removed it, arrested Bowers, then searched him incident to the arrest. During the search, he found two baggies containing methamphetamine.

Although the deputy did not know it at the time, Bowers was on probation with a search condition.

#### DISCUSSION

As noted, there was very little testimony at the suppression hearing on what transpired between Bowers and the deputies. Because of that, the prosecution did not meet its burden of proving the pat search was justified. Nevertheless, the trial court ruled that, because of the search condition, the drugs could not be suppressed.

The Court of Appeal disagreed, ruling that a search cannot be upheld as a probation search unless the officers knew the suspect was on probation. Said the court, "Because [the deputy] acted without knowledge of appellant's search condition, he was not acting pursuant to the conditions of appellant's probation. Hence, the search of appellant's person cannot be retrospectively justified as a probation search just because of the happenstance that he was on probation at the time."

Consequently, the court ordered the drugs suppressed unless the prosecution could prove the pat search was justified by some circumstance other than Bowers' probation search condition.

#### DA's COMMENT

It is settled that a court cannot order the suppression of evidence obtained as the result of a police search unless it makes two determinations:

- (1) THE SEARCH WAS UNLAWFUL. In the context of probation and parole searches, a search is unlawful if any of the following occurred: (a) the officers who conducted the search were unaware the suspect was searchable,<sup>1</sup> (b) the search was arbitrary or constituted harassment,<sup>2</sup> (c) officer-safety precautions were not reasonably necessary, (d) it was unreasonable for officers to believe the place or thing they

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<sup>1</sup> See *People v. Sanders* (2003) 31 Cal.4<sup>th</sup> 318, 332 ["(A) search cannot be conducted under the auspices of a search condition if the officer is unaware that the condition exists."].

<sup>2</sup> See *People v. Robles* (2000) 23 Cal.4<sup>th</sup> 789, 797; *People v. Reyes* (1998) 19 Cal.4<sup>th</sup> 743, 754; *People v. Bravo* (1987) 43 Cal.3d 600, 610.

searched was covered under the search condition, (e) the search was unnecessarily intrusive.

- (2) “STANDING”: The defendant had a reasonable expectation of privacy as to the place or thing that was searched.<sup>3</sup> In the words of the First Circuit, “[I]t is incumbent upon defendant to establish not only unlawful police conduct, but that the unlawful conduct intruded upon some legitimate expectation of privacy on the part of the defendant who challenges it.”<sup>4</sup>

It is also settled that an expectation of privacy cannot result in the suppression of evidence unless it was both subjectively and objectively reasonable. This means, (1) the defendant must have actually believed he would not be searched without a warrant, and (2) that belief must have been so sensible that the general public would have considered it reasonable.<sup>5</sup> With these requirements in mind, consider the following.

When Bowers was convicted of a felony less than two years earlier, the trial judge gave him the option of serving time in prison or being placed on probation with a search condition. He chose the latter. This means that as he stood outside the house in El Sobrante, he knew that any officer could walk up to him, search his pockets, and discover his methamphetamine. He knew this was unlikely to happen, but he also knew it was a possibility. In fact, search conditions are imposed for precisely this reason. As noted in *People v. Mason*, “With knowledge he may be subject to a search by law enforcement officers at any time, the probationer will be less inclined to have narcotics or dangerous drugs in his possession.”<sup>6</sup>

It is therefore apparent that Bowers knew the drugs might be discovered. Although he hoped they wouldn’t, it is settled that “hope” does not produce a reasonable expectation of privacy.<sup>7</sup> It also seems apparent that the general public would not consider

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<sup>3</sup> See *Rakas v. Illinois* (1978) 439 US 128, 148; *United States v. Miller* (1976) 425 US 435, 440 [“(N)o interest legitimately protected by the Fourth Amendment is implicated by governmental investigative activities unless there is an intrusion into a zone of privacy, into the security a man relies upon when he places himself or his property within a constitutionally protected area.”]; *In re Tyrell J.* (1994) 8 Cal.4<sup>th</sup> 68, 89 [“(O)ne must *first* have a reasonable expectation of privacy *before* there can be a Fourth Amendment violation.”].

<sup>4</sup> *U.S. v. Bouffard* (1<sup>st</sup> Cir. 1990) 917 F.2d 673, 675.

<sup>5</sup> See *Kyllo v. United States* (2001) \_\_\_ US \_\_\_ [150 L.Ed.2d 94] [“A ‘search’ does not occur—even when its object is a house explicitly protected by the Fourth Amendment—unless the individual manifested a subjective expectation of privacy in the searched object, and society is willing to recognize that expectation as reasonable.”]; *Bond v. United States* (2000) \_\_\_ US \_\_\_ [146 L.Ed.2d 365] [“The law is clear that the Fourth Amendment protects against government intrusion that upsets an actual (subjective) expectation of privacy that is objectively reasonable.”]; *Smith v. Maryland* (1979) 442 US 735, 740.

<sup>6</sup> (1971) 5 Cal.3d 759, 763. ALSO SEE *In re Binh L.* (1992) 5 Cal.App.4<sup>th</sup> 194, 204 [“In short, if there were any circumstances in which the minor could reasonably have expected his decision to carry a loaded pistol to remain private from the police, this was certainly not such a circumstance. Riding in a car only four months after he had acknowledged a probation search condition . . . ”]; *People v. Viers* (1991) 1 Cal.App.4<sup>th</sup> 990, 993 [“A probationer who consents to a warrantless search has no reasonable expectation of traditional Fourth Amendment protection. Instead, the probationer lives with the knowledge he may be subject to a search by law enforcement officers at any time.”].

<sup>7</sup> See *Maryland v. Macon* (1985) 472 US 463, 469 [“The mere expectation that the possibly illegal nature of a product will not come to the attention of the authorities . . . is not one that society is prepared to recognize as reasonable.”]; *People v. St. Amour* (1980) 104 Cal.App.3d 886, 891 [“(I)t is absolutely essential that the person affected exhibit a reasonable expectation (as opposed to mere subjective, personal desire) that the activity in question be so protected.”]; *People v. Scheib* (1979) 98 Cal.App.3d 820, 827 [“The issue is not simply whether a [suspect] has exhibited a

a probationer's pockets a safe haven for drugs, weapons, or other contraband if the probationer was subject to a search condition.

This should have disposed of the issue—except the *Bowers* court ignored it. Instead, it ruled the search was unlawful because the deputies did not know that Bowers was on probation. As noted, while the deputies' lack of knowledge was relevant to the court's determination that the search could not be upheld as a probation search, it was irrelevant to the issue of Bowers' subjective privacy expectations.<sup>8</sup>

Although we do not know why the *Bowers* court disregarded the issue, we *do* know that the California Supreme Court has been agonizing over the privacy expectations of probationers and parolees for years—and has failed to provide the lower courts with any real guidance.<sup>9</sup> In fact, its rulings have been inconsistent and confusing.

For example, when *Bowers* first came before the Court of Appeal in 2002, the court upheld the search, citing the California Supreme Court's 1994 decision in *In re Tyrell J.*<sup>10</sup> In *Tyrell*, the court ruled that evidence obtained as the result of an illegal search of a minor could not be suppressed if the minor was subject to a probation search condition—even if the officer who searched him was unaware of it. *Tyrell* was based on what seems a sound principle: a probationer who knows he can be searched at any time does not have a reasonable expectation of privacy as to drugs, guns, and other contraband in his pockets. As the court in *Tyrell* put it, “[B]ecause the minor was subject to a valid condition of probation that required him to submit to warrantless searches by ‘any’ law enforcement officer, he had no reasonable expectation of privacy over a cache of marijuana in his pants.”<sup>11</sup>

The clarity resulting from *Tyrell* ended abruptly in 2003 when the California Supreme Court announced its decision in *People v. Sanders*.<sup>12</sup> Apart from the fact that *Sanders* was overwritten and poorly reasoned,<sup>13</sup> it neglected to address the central issue

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‘hope’ of privacy or a desire to avoid detection but instead the issue is whether he has a *reasonable expectation of privacy*.”].

<sup>8</sup> NOTE: It is settled that an officer's uncommunicated state of mind is irrelevant to the issue of whether a suspect reasonably believed he was free to leave. The rationale of these cases would seem to apply to privacy expectations. See *United States v. Mendenhall* (1980) 446 US 544, 554, fn.6 [“(T)he subjective intention of the DEA agent in this case to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent.”]; *In re Manuel G.* (1997) 16 Cal.4th 805, 821 [“The officer's uncommunicated state of mind . . . [is] irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred.”]; *People v. Bennett* (1998) 68 Cal.App.4th 396, 402, fn.5 [“The mere fact [the officer] *might* and probably *would* have stopped Bennett from leaving had he chosen to do so is legally irrelevant. That did not happen. And, of course, any uncommunicated subjective motivation entertained by [the officer] has no bearing on our analysis.”]; *Morgan v. Woessner* (9th Cir. 1993) 997 F.2d 1244, 1254 [“Although an officer's subjective belief is ordinarily irrelevant to the question whether a citizen believes that he or she is free to go, it becomes relevant if there is reason to believe that the officer's belief was conveyed to the detainee.”]; *In re Kemonte H.* (1990) 223 Cal.App.3d 1507, 1512.

<sup>9</sup> See, for example, *In re Tyrell J.* (1994) 8 Cal.4th 68, 89; *People v. Woods* (1999) 21 Cal.4th 668; *People v. Robles* (2000) 23 Cal.4th 789.

<sup>10</sup> (1994) 8 Cal.4th 68.

<sup>11</sup> At p. 74.

<sup>12</sup> (2003) 31 Cal.4th 318.

<sup>13</sup> NOTE: Our opinion that *Sanders* was poorly reasoned was based mainly on the following:

- (1) The court said that in determining the legality of the officers' protective sweep of Sanders' apartment it had to consider whether the officers knew that a co-occupant, McDaniel, was on parole. In reality, the “legality” of the sweep did not depend one iota on this unless, of course, the prosecution sought to justify the sweep as a parole search—which it did not. Instead, the legality of the sweep depended on, (1) whether it complied with the United States Supreme

in the case: Did Sanders' parolee roommate, McDaniel, reasonably expect that his home would not be searched under the terms of parole which specifically authorized such a search? Instead, after noting that *Tyrell* received a "chilly reception" from a law professor, it ruled the evidence should have been suppressed because the search was unlawful; and it was unlawful because the officers were unaware that McDaniel was on parole. Thus, the *Sanders* court simply ignored the privacy requirement.

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Court's decision in *Maryland v. Buie* in which the Court ruled that sweeps are permissible if officers reasonably believed there was someone on the premises who posed a threat to them; or (2) whether the officers reasonably believed there was someone on the premises who was in danger. See *Maryland v. Buie* (1990) 494 US 325, 334; *People v. Ray* (1999) 21 Cal.4th 464, 477.

- (2) Although the court in *Sanders* repeatedly said it was ruling on the legality of the sweep, it did no such thing. Instead, in a footnote it said, "We express no view regarding the Court of Appeal's ruling that the 'protective sweep' of the apartment violated the rule announced in [*Buie*]." The question arises: How can the court rule the sweep was unlawful if it was "express[ing] no view" on the subject?
- (3) In discussing the circumstances that led to the officers' decision to conduct the sweep, the court omitted several pertinent details that would have supported the officers' actions. These details were covered in our report on *Sanders* in the Fall 2003 edition of *Point of View*.
- (4) The court attempted to justify its decision to suppress the evidence by claiming the decision was necessary to prevent officers from routinely engaging in illegal searches in high-crime neighborhoods. The court reasoned that if evidence obtained by means of illegal searches of parolees was admissible, there would be a danger that officers would "engage in facially invalid searches," especially in "high crime areas where police might suspect probationers to live" "in the hope that at least one of the occupants would be subject to a search condition." We trust this does not reflect the court's opinion of the integrity of California's law enforcement officers. In any event, the court offered no evidence to support its concern. Moreover, because after-the-fact validation of certain illegal searches has been permitted in California since *Tyrell J.* was decided in 1994, and because the court cited no evidence that this has resulted in "facially invalid searches," it appears the court's concern was misplaced. Finally, if officers engage in "facially invalid searches," the search would likely qualify as "arbitrary," "capricious," or "harassing," in which case it would be invalidated on that basis. See *People v. Robles* (2000) 23 Cal.4th 789, 797; *People v. Reyes* (1998) 19 Cal.4th 743, 754; *People v. Bravo* (1987) 43 Cal.3d 600, 610.
- (5) The court said that one of the reasons it was suppressing the evidence was to "protect the rights" of Sanders, who was McDaniel's roommate. ["An additional reason for suppressing the evidence obtained in the search of the residence in the present case, where the police were unaware that one of the residents was subject to a search condition, is to protect the rights of the parolee's cohabitants and guests." At p. 335]. It is, however, settled that evidence may be suppressed only because it was obtained in violation of the U.S. Constitution—not because it serves some other purpose, no matter how noble. As Justice Brown pointed out in her concurring opinion, "The exclusionary rule thus operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'" Citing *United States v. Leon* (1984) 468 US 897, 906.
- (6) One of the reasons cited by the *Sanders* in departing from *Tyrell* was that *Tyrell* "received a chilly reception" from a certain liberal law professor, and that several law review students were "unkind" or critical of the decision ("*Fourth Amendment Protection for Juvenile Probationers in California, Slim or None?*" *Hastings Law Review*). A chilly reception to *Tyrell* will, of course, surprise no one. What is surprising is that the court would give the appearance of attempting to appease law professors and law students—or, for that matter, any other segment.

This brings us to *Bowers*. As noted, in *Bowers I* the court initially upheld the search on grounds that Bowers' search condition eliminated any reasonable expectation that the drugs in his pocket would not be discovered. But shortly before issuing its opinion in *Sanders*, the California Supreme Court granted review of *Bowers*. Then, after deciding *Sanders*, it sent *Bowers* back to the Court of Appeal with instructions to reconsider it in light of *Sanders*.

How should the Court of Appeal interpret these instructions? They sounded as if the Supreme Court was saying that *Sanders*—not *Tyrell*—governed the case. But *Sanders* did not even address the privacy issue upon which *Bowers I* and *Tyrell* were based. Furthermore, *Bowers* was much closer factually to *Tyrell* than *Sanders*. For example, Bowers and Tyrell were pat searched while Sanders and McDaniel were subjected to a far more intrusive search of their home; Bowers and Tyrell were both on probation with search conditions, while McDaniel was on parole. Finally, and most importantly, Bowers—unlike Tyrell, McDaniel, and Sanders—actually consented to warrantless searches of his person when he accepted the terms of probation.

Despite this, the *Bowers* court responded to the Supreme Court's instructions by doing exactly what the Supreme Court did in *Sanders*: it ignored the issue of whether a probationer has a reasonable expectation of privacy as to places and things that could be searched pursuant to the terms of probation.<sup>14</sup>

How did the *Bowers* court dispose of *Tyrell*? It could not distinguish it because, as noted, *Tyrell* was much closer to *Bowers* than *Sanders*. So it ruled the Supreme Court in *Sanders* had impliedly overturned *Tyrell*,<sup>15</sup> even though the Supreme Court in *Sanders* could have—but expressly refused to—overturn *Tyrell* less than one year earlier.<sup>16</sup>

What does this mean? We now have one more bewildering decision in which the privacy expectations of probationers and parolees have been ignored. And it's an important issue because the public has a strong interest in keeping close tabs on probationers and parolees. As the United States Supreme Court has observed, “[I]t must be remembered that the very assumption of the institution of probation is that the probationer is more likely than the ordinary citizen to violate the law.”<sup>17</sup>

If the Court of Appeal or the California Supreme Court can provide a plausible explanation of why probationers and parolees have both a subjective and an objective expectation of privacy as to places and things that can be searched pursuant to the terms of probation or parole, they should do so. But, given their inability to provide such an explanation when the issue was directly presented in *Sanders* and *Bowers II*, it seems

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<sup>14</sup> NOTE: The court alluded to the issue when it noted that the Attorney General had argued that “by accepting his probation appellant consented to the concomitant search condition and thereby relinquished whatever claim to privacy he might otherwise have had.” Thus, the “standing” issue was squarely presented. Yet, in the very next sentence the court changed the subject back to the irrelevant issue of the lawfulness of the search, saying, “In our opinion, this rationale does not survive the Supreme Court’s opinion in *Sanders*, which was clearly based on the premise that any justification for a police search must be based on facts known to the police before the search is conducted.”

<sup>15</sup> NOTE: In essentially overturning *Tyrell*, the *Bowers* court said, “In every other respect, the Supreme Court’s discussion of *Tyrell J.* throughout *Sanders* was clearly disapproving.” “*Tyrell* had received a ‘chilly reception from legal commentators.’” “[R]espondent assumes the continuing validity of *Tyrell . . .*” “Respondent is correct in asserting that the Supreme Court did not expressly overrule *Tyrell J.* in its opinion in *Sanders*. Nevertheless . . .” “In her concurring opinion [in *Sanders*], Justice Kennard stated: ‘Left open by the majority here is the continuing validity of the majority opinion in *Tyrell J. . . .*’”

<sup>16</sup> NOTE: Although it is possible the Supreme Court would like to overturn *Tyrell*, it is more fitting if the Supreme Court overturned or marginalized its own decisions.

<sup>17</sup> *United States v. Knights* (2001) 534 US 112, 120.

unlikely they will be able to do so. This is especially true considering they would also have to explain why such a ruling would not run afoul of the clear and consistent rulings of the United States Supreme Court on reasonable privacy expectations.

If the courts cannot do both of these things, they owe it to the administration of justice to revert back to *Tyrell*, and not worry about the “chilly reception” it received from a law professor.