Filed 3/29/02

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANK LOUIS HENKE, Defendant and Appellant.	G025118 (Super. Ct. No. 97NF3649) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Stuart T. Waldrip, Judge. Affirmed.

Howard J. Specter, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela A. Ratner Sobeck and Angela K. Rosenau, Deputy Attorneys General, for Plaintiff and Respondent.

Frank Louis Henke appeals from his conviction by jury of possession of methamphetamine and his ensuing sentence of 27 years to life — a Three Strikes sentence enhanced by two prison term priors. Henke contends the trial court erred in refusing to suppress evidence seized in a warrantless search conducted by an officer who had neither knowledge of his parolee at large status nor probable cause to search. Henke also asserts the court erroneously concluded it had no discretion to strike the prison term priors once it imposed the Three Strikes sentence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

For purposes of the motion to suppress, the parties stipulated to the following facts. Henke was a passenger in a car that made an illegal U-turn in "an alleged high crime area." Officer Cheryl Murphy conducted a routine traffic stop to investigate the violation. The driver handed over her license and car registration. Approximately eight minutes into the stop, the officer asked Henke to identify himself. He replied he had no identification with him, but that his name was Frank Louis Cross. Murphy instructed Henke and the driver to remain in the car and ran a warrants check on the name "Cross." Nothing turned up. Three to four minutes later, Murphy returned and asked Henke his name again, and whether he had any arrests. He admitted an arrest for possession of marijuana and reiterated his name was Cross.

Officer Murphy ran the name again and came up empty. Convinced Henke was lying about his identity, she arrested him for giving a false name to an officer. In a patsearch, Murphy found a baggie containing a small amount of white powder in Henke's pocket. He admitted it was "dope-meth" and his real name was Henke. The officer then discovered he had an outstanding arrest warrant for a parole violation.

Obtaining the driver's consent to search the car, the officer found a scale and baggies in a diaper bag, and under the driver's seat a baggie of methamphetamine weighing 29 grams. Henke was charged with possession of methamphetamine and possession of methamphetamine for sale.

In his motion to suppress, Henke argued the search violated his Fourth Amendment rights because Officer Murphy lacked either a warrant or probable cause. The trial court denied the motion.

At trial, the jury convicted Henke of the possession count but acquitted him of the sales charge. The court then found true the allegations of four serious felony priors (Pen. Code, § 667, subd. (d))[1] and two prison term priors (§ 667.5, subd. (b)). The court sentenced Henke to 27 years to life.

DISCUSSION

1. *The Motion to Suppress*

Henke argues the trial court erred in denying his motion to suppress. Unfortunately for Henke, the California Supreme Court has curtailed sharply the grounds available to a parolee for contesting a search and seizure. As we explain below, none of these potential grounds for relief applies to the search Henke endured. Consequently, we conclude the search was lawful and the motion to suppress properly denied.

People v. Reyes (1998) 19 Cal.4th 743 sets forth the following rule governing parole searches: "Because of society's interest both in assuring the parolee corrects his behavior and in protecting its citizens against dangerous criminals, a search pursuant to a parole condition, without reasonable suspicion, does not 'intrude on a reasonable expectation of privacy, that is, an expectation that society is willing to recognize as legitimate.' (*In re Tyrell J.* (1994) 8 Cal.4th 68, 89.) [¶] . . . [¶] [R]easonable suspicion is no longer a prerequisite to conducting a search of the [parolee's] person or property. 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. 751.)

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[1] All further statutory references are to the Penal Code.

Henke asserts two grounds for finding the instant search violated the Fourth Amendment. First, he contends Officer Murphy's ignorance of his parole status and attendant search condition prevents that search condition from justifying an otherwise unlawful detention and search. (The People concede Officer Murphy lacked reasonable suspicion to detain Henke.) Second, Henke contends the search amounted to the sort of "arbitrary, capricious or harassing" conduct so clearly proscribed in *People v. Reyes*, *supra*, 19 Cal.4th at p. 751. Neither argument has merit.

We consider first the officer's ignorance of the search condition. In *In re Tyrell J.*, *supra*, 8 Cal.4th 68, our Supreme Court upheld an otherwise arguably unlawful search of a juvenile probationer based on the applicability of a search condition of which the officer was unaware. The court held the officer's ignorance of the search condition was irrelevant for the simple reason that "a juvenile probationer subject to a valid search condition does not have a reasonable expectation of privacy over his or her person or property." (*Id.* at p. 86.)

The court noted a probationer is presumably aware "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." (*In re Tyrell J.*, *supra*, 8 Cal.4th at p. 86.) From this premise, the court concluded any expectation of privacy on the part of a juvenile parolee subject to a search condition is "manifestly unreasonable." (*Ibid*.) The court also pointed out "one must first have a reasonable expectation of privacy before there can be a Fourth Amendment violation." (*Id.* at p. 89.)

In *People v. Reyes*, *supra*, 19 Cal.4th 743, the Supreme Court noted that "*Tyrell J.*'s reasoning applies with equal force to adults" (*id*. at p. 752) and observed that the deterrent purpose of a search condition will be served by subjecting the parolee to "the potential for random searches." (*Id*. at p. 753.) The court reasoned that "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." (*Ibid*.) Given that a parolee cannot reasonably expect to be free from warrantless searches, the searching officer's ignorance of the search condition does not transform a warrantless search into a Fourth Amendment violation. (*In re Tyrell J.*, *supra*, 8 Cal.4th at p. 89 ["one must first have a reasonable expectation of privacy before there can be a Fourth Amendment violation"].)

Henke's other argument for finding the search unconstitutional likewise fails. He asserts the officer's conduct in "arbitrarily singling out an innocent bystander to a minor traffic violation and then harassing him with overzealous inquiries" constitutes the sort of arbitrary and harassing conduct condemned in both *Tyrell* and *Reyes*. Our Supreme Court has been quite specific about the type of unreasonable police conduct that would send a parole search onto unconstitutional terrain, and Officer Murphy's conduct comes nowhere near that mark.

In *People v. Reyes*, *supra*, 19 Cal.4th 743, the court explained: "'a parole search could become constitutionally "unreasonable" if made too often, or at an unreasonable hour, or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the searching officer.' (*Id*. at p. 1741; . . . see *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1004 [a search is arbitrary and capricious when the motivation for the search is unrelated to rehabilitative, reformative or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee]; *People v. Bremmer* (1973) 30 Cal.App.3d 1058, 1062 [unrestricted search of a probationer or parolee by law enforcement officers at their whim or caprice is a form of harassment].)" (*People v. Reyes*, *supra*, 19 Cal.4th at pp. 753-754.)

Here, the officer had a legitimate reason to stop the car in which Henke was a passenger: The driver had made an illegal U-turn. Such a stop could hardly be called the product of whim or caprice. Moreover, in the course of a traffic stop it is certainly permissible for an officer to ask a passenger for identification and to run a warrants check. (*People v. McGaughran* (1979) 25 Cal.3d 577, 584-586; *People v. Grant* (1990)

217 Cal.App.3d 1451, 1459-1460.) That the request did not occur until eight minutes after the officer initiated the stop is not undue delay. Nor did the stop become unreasonably prolonged with the additional "three to four" minutes taken up by the second warrant check on Henke.

Perhaps more to the point, we simply reject Henke's characterization of the police conduct involved here as "inherently unreasonable." During the course of a legitimate traffic stop in a high crime area, an officer's brief investigation of a passenger who lacks identification seems no cause for constitutional alarm. As for Henke's complaint the officer had no reasonable suspicion to justify the detention and was instead apparently acting on nothing more than a hunch, we hasten to remind Henke that his search condition made reasonable suspicion unnecessary. (*People v. Reyes*, *supra*, 19 Cal.4th at p. 751.)

Finally, we decline Henke's invitation to disregard the California Supreme Court's decisions in *Reyes* and *Tyrell J.* We are in no position, as Henke suggests, to disregard these high court decisions as "improper interpretation[s] of federal law[.]" Applying *Reyes* and *Tyrell J*, we find Henke's motion to suppress was properly denied.

2. *The Motion to Strike the Prison Priors*

Henke next challenges the trial court's rejection of his request to strike the two prison priors, which added two years to his Three Strikes sentence. He contends the court "failed to understand its discretion" and improperly concluded it could not strike the prison priors, given its decision not to strike any of the prior serious felony convictions. We disagree. The record demonstrates the court understood it had the power to strike the priors.

After the court sentenced Henke under the Three Strikes law, the prosecutor raised the issue of the two one-year priors. The court responded: "And that would add two additional years. So that would increase the minimum then to 27 years to life with minimum of 27 years *unless I were to find those allegations should be stricken.* [¶] I

don't think I really have a basis for doing that. I think it would be inconsistent for the court to hold to the strike and not hold to the 667.5 (B) allegations. So the term that would be imposed for count 1 would be a life term with minimum of 27 years." (Italics added.)

We do not agree with Henke this comment demonstrates the court misunderstood its discretion. As the Attorney General points out, the court's comment was an explanation of its decision not to exercise its discretion and not an indication it was unaware of its power. Henke did not object below, and the record here does not affirmatively demonstrate the trial court misunderstood its power to strike the priors. (*People v. Fuhrman* (1997) 16 Cal.4th 930, 945.) There was no error.

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.