Filed 5/20/05; pub. order 6/15/05 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MASON G. MILLER, Defendant and Appellant.	G033762 (Super. Ct. No. 03SF0758) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Susanne S. Shaw, Judge. Reversed.

David K. Rankin, 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, Assistant Attorney General, James D. Dutton, Charles C. Ragland and Garry Haehnle, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Mason G. Miller appeals the trial court's denial of his motion to suppress evidence pursuant to Penal Code section 1538.5. The defendant argues that,

although he was on probation, the initial detention prior to the search was unjustified. Because the prosecution conceded this issue below, a change in the relevant law requires reversal.

I

FACTS

The defendant was on probation on the night of October 20, 2003. At approximately 3:30 a.m., Orange County Deputy Sheriff Bradford Kenneally observed the defendant's vehicle exiting the parking lot of a church. He knew the church had no activity going on at that hour of the morning, and he also knew the parking lot was dark and secluded. He initiated a traffic stop.

Kenneally asked the defendant, who was driving, whether he had a driver's license, and the defendant told him his license had been suspended. He stated he was driving because passenger, Holly Hampton, to whom the car was registered, had had too much to drink. The defendant and Hampton were detained while a records check was conducted, which revealed that the defendant had consented to searches as a condition of his probation. The records check also verified that the defendant did not have a driver's license. Kenneally asked the defendant to step out of the car and for consent to search his person and the vehicle, which the defendant granted.

In the defendant's front pocket, the deputy found 52 small, clear plastic bags with red markings, and $151. In the car, he found a used glass pipe, which he recognized as the type used for smoking methamphetamine. He also found approximately half a gram of marijuana, and approximately eight grams of a crystal substance which Kenneally believed to be a form of methamphetamine.

The deputy advised the defendant of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. The defendant stated the marijuana and methamphetamine

were his. Ultimately, Kenneally determined Hampton was able to drive and allowed her to leave.

The defendant was charged with three counts relating to possession of drugs for sale and drug paraphernalia, and driving without a valid license. The information also alleged prior felony drug convictions. The defendant moved to suppress evidence pursuant to Penal Code section 1538.5, and after that motion was denied, he pled guilty. He was sentenced to two years in state prison.

II

DISCUSSION

In reviewing a motion to suppress, we defer to the lower court's findings of fact supported by substantial evidence, but exercise independent judgment in determining whether the detention was reasonable under the Fourth Amendment. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) In the trial court, the district attorney conceded that the initial stop was conducted without reasonable suspicion. Thus, the issue below turned on whether the defendant's status as a probationer rendered the validity of the initial stop irrelevant.

The district attorney relied on *People v. Viers* (1991) 1 Cal.App.4th 990, which held that advance knowledge by a law enforcement officer of a defendant's waiver of his Fourth Amendment's protections was not necessary to justify a detention and search. (*Id.* at pp. 993-994.) There was a change in law, however, after the trial court's decision and while this appeal was pending, specifically, this court's decision in *Myers v. Superior Court* (2004) 124 Cal.App.4th 1247. *Myers* held that a police officer must be aware of a defendant's Fourth Amendment waiver prior to conducting a warrantless search. (*Id.* at p. 1255.)

Respondent argues that the district attorney reasonably relied on the state of the law at the time, and at oral argument, urged us to remand for a full suppression hearing. We asked for further briefing on the legal effect, if any, of the concession below and whether a suppression hearing was appropriate. The defendant argues the concession constituted a waiver of the issue of whether the initial stop was justified. We agree.

At the suppression hearing, the prosecution has the burden of establishing that the stop was lawful under any exception to the warrant requirement. (*People v. James* (1977) 19 Cal.3d 99, 106.) Here, the prosecution chose to concede the question of the stop's validity. "The People concede the detention of defendant on October 20, 2003, which led to the evidence he now seeks to suppress, was conducted without a warrant, without probable cause, and without reasonable suspicion." Relying on the probation consent provisions was the prosecution's conscious decision, and it would be plainly unfair to allow them to relitigate the issue. (See *People v. Manning* (1973) 33 Cal.App.3d 586, 601 ["[T]he scope of issues upon review must be limited to those raised during argument, whether that argument has been oral or in writing. This is an elemental matter of fairness in giving each of the parties an opportunity adequately to litigate the facts and inferences relating to the adverse party's contentions."].)

Respondent relies on *People v. Lazalde* (2004) 120 Cal.App.4th 858, in support of its argument that this matter should be remanded for a further suppression hearing. The police obtained a telephonic search warrant for a motel room after watching the defendant conduct several hand-to-hand transactions at a shopping center. (*Id.* at p. 860.) The defendant challenged the sufficiency of the affidavit in support of the search warrant. (*Id.* at p. 861.) The prosecution argued the affidavit was sufficient but eventually conceded the telephonic warrant was invalid. Instead, the prosecution defended the search on the grounds of a probation search condition of which the officers

had not been aware at the time of the search. (*Ibid.*) The trial court denied the motion to suppress, but the Court of Appeal's initial decision to affirm was vacated after the California Supreme Court decided knowledge of a search condition was necessary to justify an otherwise unreasonable search of a parolee's residence. (*Id.* at p. 860; see *People v. Sanders* (2003) 31 Cal.4th 318, 330.)

The court remanded the matter for a suppression hearing, holding it had no basis to decide the matter on a theory other than the probation search condition. (*People v. Lazalde, supra,* 120 Cal.App.4th at p. 865.) Thus, the defendant had been deprived of the opportunity to litigate the validity of the search warrant because of the prosecution's reliance on the prior law. (*Ibid.*) "Appellant raised the issues of the validity of the warrant and the officer's good faith reliance on it in his moving papers. He was foreclosed from pursuing these issues by the prosecution's decision to rely on the probation search condition. At the hearing on the motion to suppress, there was some discussion of circumstances under which the warrant was obtained and served. However, given the context in which this discussion occurred, it would be unfair to appellant for this court to rely on the trial court's remarks as establishing that the officer acted in good faith. . . ." (*Ibid.*)

Unlike the circumstances in *Lazalde,* nothing the defendant did here prevented the prosecution from fully litigating the validity of the stop. The prosecution could have pursued both theories, but it chose to rely on one which has since become invalid. Fairness dictates the prosecution accept the consequences of its decision. It waived the issue by not pursuing it in the trial court, and given the change in law, the grounds it relied on are now invalid.

III

DISPOSITION

The judgment is reversed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Appellant, v. MASON G. MILLER, Defendant and Respondent.	G033762 (Super. Ct. No. 03SF0758) ORDER GRANTING REQUEST FOR PUBLICATION; NO CHANGE IN JUDGMENT

Appellant has requested that our opinion, filed on May 20, 2005, be certified for publication. It appears that our opinion meets the standards set forth in California Rules of Court, rule 976(b). The request is GRANTED.

The opinion is ordered published in the Official Reports.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.