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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JAMES NEWMAN, Defendant and Appellant.	B155445 (Super. Ct. No. BA214756)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig E. Veals, Judge. Affirmed.

David C. Read, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, William T. Harter and Kenneth N. Sokoler, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant asks the court to overturn his felony conviction for possession of a controlled substance, cocaine, in violation of Health and Safety Code section 11350(a), and possession of a concealed weapon in violation of Penal Code section 12020, subdivision (a)(4).[1] He argues the trial court erred in failing to grant his motion to suppress evidence; that the inadvertent destruction of the weapon requires reversal of the weapons conviction; and that CALJIC 17.41.1 interfered with jury deliberations, requiring reversal of his conviction. We find no reversible error and affirm.

FACTUAL SUMMARY

Los Angeles Police Department uniformed officers Malik and Guillen were on bicycle patrol in downtown Los Angeles on a March, 2001 afternoon. Officer Malik noticed defendant, who was standing on the sidewalk "holding a small orange juice container using only two fingers with the rest of his hand closed." Officer Malik thought this was strange because "most people hold any type of container in their hand [with] more than just their two fingers." Officer Malik decided to investigate. Officer Guillen followed. They circled back and rode up onto the sidewalk. Defendant was talking to a friend and eating a sandwich. Neither officer had seen him before and neither was aware that defendant was on parole and subject to a search condition.

Officer Malik stopped his bicycle about two feet from the defendant and asked him "how it was going and what he had in his hand." Defendant answered, "I don't have anything." Officer Malik asked him again, "a little bit more forcefully, 'What do you have in your hand?'" This time defendant answered, "Man, they're just crumbs" and opened up his hand. Officer Malik then observed

[1] All further statutory references are to the Penal Code, unless otherwise noted.

"two rock like objects" fall from his hand. Police collected the rock like objects. Later analysis revealed no illegal substances.

After collecting the objects, Officer Malik asked defendant if he had anything that might "cut or stick" in a patdown search. Defendant replied that he had a knife in his waistband. Police found the knife, which was approximately 11 inches long with a seven inch, nonfolding blade. The knife was housed in a cardboard sheath. Although police registered the knife at the property room, it was later destroyed. During booking, police also found an object resembling rock cocaine in defendant's pocket. This time the substance tested positive for cocaine.

DISCUSSION

Defendant claims his Fourth Amendment rights were violated when police detained him without justification. The trial court found that the encounter between defendant and the officers was consensual, and denied defendant's section 1538.5 motion to exclude evidence found as a result of the encounter. We find the motion was property denied fro another reason: defendant was subject to a valid parole search condition. Because of this condition, he lacked a reasonable expectation of privacy from search by a police officer, and this is true even though the officer was unaware of his parole condition. In light of this conclusion, although we regard the detention by itself to be problematic, we need not and do not decide the issue because defendant was subject to the search condition.

I

Defendant argues that officers should not be permitted to justify an otherwise unconstitutional search and seizure based on his parole search condition of which the officers were unaware when the search and seizure occurred. On appellate review, factual findings of lower courts are upheld if supported by substantial evidence. But when reviewing questions of law, such as whether a

search or seizure was reasonable, we exercise independent judgment. (*People v. Camacho* (2000) 23 Cal.4th 824, 830.)

A search conducted on an adult parolee, subject to a properly imposed search condition, does not intrude on any expectation of privacy society is prepared to recognize as legitimate. (*People v. Reyes* (1998) 19 Cal.4th 743, 752-754.) *Reyes* relies on the holding in *In re Tyrell J.*, *supra*, 8 Cal.4th 68. In that case, our Supreme Court held that a peace officer who, without prior justification, searches a juvenile probationer subject to a search condition does not violate the Fourth Amendment rights of the minor even if the officer is ignorant of the condition. In *People v. Robles* (2000) 23 Cal.4th 789, the Supreme Court refused to extend *Tyrell J.* to search of a residence shared by the defendant and a third party roommate who was subject to a probation search condition. (*In re Tyrell, J., supra*, 23 Cal.4th at pp. 805-806.) In the same month, the court indicated that it would reconsider the holding in *Tyrell J.* (*People v. Moss*, review granted June 26, 2000, S087478). The Court later dismissed the grant of review in *Moss* but ordered briefing in *People v. Sanders* (review granted March 25, 2002, S094088) on whether to reconsider the holding in *Tyrell J.*, and whether, if the *Tyrell J.* holding remains viable, it should apply to adult parolees subject to search conditions. We also note that the Supreme Court recently cited *Tyrell J.* with approval in *In re Randy G.* (2001) 26 Cal.4th 556, 564. Although it appears that the Supreme Court will ultimately reconsider its decision in *Tyrell J.* at present, that case remains binding on this court. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In *People v. Reyes*, officers searched the defendant's shed at the request of his parole officer who had received a tip that defendant had violated his parole. Defendant was subject to a valid search condition under his parole release. The court applied the logic of *Tyrell J.*, which held that a juvenile probationer with a

valid search condition had a greatly reduced expectation of privacy. (*People v. Reyes, supra*, 19 Cal.4th at pp. 753-754; *In re Tyrell J., supra,* 8 Cal.4th 68, 88.) The *Tyrell J.* court reasoned that a probationer who knows he is subject to search of his person or home without probable cause or a warrant lacks a reasonable expectation of privacy over his property or person; thus, no greater intrusion into his privacy occurs when an officer, unaware of the condition, conducts a search. (*In re Tyrell J. supra*, 8 Cal.4th at p. 88.) The Court in *Reyes* reasoned that the logic of *Tyrell J.* applies "'equally, if not more so, to parolees.'" (*People v. Reyes*, *supra*, 19 Cal.4th at p. 751.) Thus, even a suspicionless intrusion by officers is justified against an individual who is subject to a parole condition the person searched or detained must first have a reasonable expectation of privacy *before* there can be a Fourth Amendment violation. (*In re Tyrell J*., *supra*, 8 Cal.4th at p. 89.)

In this case, no evidence suggests that officers Malik or Guillen knew of the search condition or defendant's parole status. But a parolee is obviously on notice of his own parole condition. Thus, defendant did not have a reasonable expectation of privacy from search and officers did not violate his Fourth Amendment rights.

In his reply brief, defendant contends that under section 3067 his is not subject to a parole search condition. That statute provides, in general, that a prison inmate who is subject to parole "shall agree in writing" to a search condition of parole (subd. (a)); failure to agree results in loss of "worktime credit earned" pursuant to section 2930 et seq. (subd. (b)). This law enacted in 1996, applies only to inmates who are eligible for parole for an offense committed on or after January 1, 1997 (subd. (c)). Because the offense for which defendant was serving time was committed in 1993, he argues that section 3067 does not apply to him. It apparently does not, but it is not the only basis under which the state can require a

parole search condition. The state may impose any condition reasonably related to parole supervision that does not constitute harassment. (See § 3053, subd. (a) [upon granting any parole Board of Prison Terms may impose "any conditions that it may deem proper"].) If the Legislature had intended section 3067 to prevent imposition of search conditions on parolees who committed offenses before 1997, it doubtless would have said so; it did not. Defendant agreed in writing to the imposed parole search condition.

II

Defendant was convicted of carrying a dirk or dagger, in violation of section 12020, subdivision (a)(4). The prosecution failed to introduce the weapon into evidence because it had been destroyed after the officers booked it as a property item. Because the weapon was not introduced at trial, defendant claims the evidence was insufficient to support his conviction.

"'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206, quoting *People v. Jones* (1990) 51 Cal.3d 294, 314.)

Section 12020, subdivision (a)(4) makes it illegal for anyone to carry a dirk or dagger concealed on his or her person. The statute does not require the introduction of the weapon into evidence; elements of the offense may be established through witness testimony. Evidence Code section 411 provides that "[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." (Evid. Code, § 411.)

A rational trier of fact could have believed the testimony of Officers Malik and Guillen describing the knife and where it was found: that the knife was concealed under defendant's shirt, sticking out of his waistband; that it was approximately 11 inches long with a seven or seven and one-half inch blade that appeared sharpened on the end; and that it resembled a butcher's knife with a nonfolding blade, and that was encased in a cardboard sheath.

This is sufficient evidence to support defendant's conviction for violation of section 12020, subdivision (a)(4).

IV

Defendant argues the trial court erred when it instructed the jury using CALJIC No. 17.41.1.[2] Since briefing in this case, the Supreme Court has held that this instruction should not be given in future criminal trials, but that it does not infringe upon a defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict, and does not require reversal of a defendant's conviction. (*People v. Engelman* (2002) 28 Cal.4th 436, 440.)

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[2] CALJIC No. 17.41.1 states: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation." (CALJIC No. 17.41.1.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

EPSTEIN, J.

We concur:

VOGEL (C.S.), P.J.

HASTINGS, J.