S186707

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DOUGLAS GEORGE SCHMITZ,

Defendant and Appellant.

Case No. _____

Appellate District Division Three, Case No. G040641
Orange County Superior Court, Case No. 06HF2342
The Honorable John S. Adams, Judge

PETITION FOR REVIEW

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PETITION FOR REVIEW

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to rule 8.500 of the California Rules of Court, the People of the State of California respectfully request that this Court grant review in this matter to settle an important question of law. (Cal. Rules of Court, rule 8.500, subd. (b)(1).) On August 18, 2010, the Court of Appeal, Fourth Appellate District, Division Three, filed a published opinion reversing the judgment of the trial court and holding the search of appellant's car violated the Fourth Amendment. A copy of the Court of Appeal's opinion is attached to this Petition.

ISSUE PRESENTED

When conducting a search authorized by an automobile passenger's parole condition, can the police search those areas of the passenger compartment that reasonably appear subject to the parolee's access?

STATEMENT OF THE CASE

Appellant was driving his car with three passengers. A woman and a two-year old baby were seated in the backseat. The front seat passenger was an adult male on parole. While appellant's car was stopped in a parking lot, an officer approached and asked if he was lost or needed assistance. He declined help. The officer asked appellant if he minded showing her his driver's license. While he was handing her the license, she noticed his arms were covered with abscesses consistent with drug use. The officer asked if anyone in the vehicle was on probation or parole. Appellant stated that he was not, but the front seat passenger admitted to being on parole. The officer asked for consent to search the car and appellant was silent. (Supp. CT 8-9.)

The officer searched the passenger compartment of the car based on the passenger's parole status. She found two hypodermic needles in a bag of chips, methamphetamine in a shoe, and a needle cap in a woman's purse. The chip bag, shoe, and purse were located in the backseat area of the car. (Supp. CT 9-10.)

Appellant brought a motion to suppress, arguing that he was stopped and searched in violation of the Fourth Amendment. (CT 43.) The trial court denied the suppression motion. (CT 61-64, 66.) Appellant pled guilty to possession of a hypodermic needle, child endangerment, driving under the influence, and being under the influence. (CT 80-81.)

Appellant appealed, claiming that he was stopped without reasonable suspicion and that the search was illegal because it extended beyond the area authorized by the passenger's parole status. (AOB 11-26.)

On August 18, 2010, the Court of Appeal, Fourth Appellate District, Division Three, issued a published decision finding the initial encounter between the officer and appellant was consensual, but the officer's subsequent search of appellant's car violated the Fourth Amendment. (Slip opn. at pp. 7, 12.) The opinion concluded that the officer could not search the passenger compartment of appellant's car based on his passenger's parole status. The court found that by inviting a parolee to ride in his vehicle, appellant "gave up none of his own expectation of privacy." (Slip opn. at p. 11.) The court held that because the parolee was not an owner of the car and had not been entrusted to drive it, he could not consent to a search of the car and therefore his parole status could not justify searching any area beyond the actual seat he was occupying. (Slip opn. at p. 11.) The court particularly found that a front seat passenger has no authority over the backseat and no right to "open packages, eat food, or even read magazines he found in the back seat." (Slip opn. at p. 11.) Because, in the court's view, the front seat passenger had no right to access or use the backseat, he

had no right to permit the officer to search the backseat and his parole status could not justify searching the backseat area. (Slip opn. at pp. 11-12.)

REASONS FOR GRANTING REVIEW

I. REVIEW IS NECESSARY TO SETTLE AN IMPORTANT QUESTION OF LAW REGARDING THE PERMISSIBLE SCOPE OF A PAROLE SEARCH OF A VEHICLE SHARED BY A PAROLEE AND NONPAROLEE

Review of this case is necessary to settle an important question of law—the permissible scope of a parole search of a vehicle shared by a parolee and nonparolee. Although there is considerable law regarding the permissible scope of parolee search of a residence shared between parolees/probationers and nonparolees/nonprobationers, this is the first decision applying the law in the context of a vehicle search. The Court of Appeal's published decision in this case holds that officers may not search the passenger compartment of a vehicle unless the parolee is the legal owner or has been entrusted to drive the vehicle. Even if an officer has reason to believe a parolee passenger has access to or is using the passenger compartment of the car, the Court of Appeal's decision creates a bright-line rule restricting an officer's search to the actual seat occupied by the parolee and no further. Thus, absent review by this Court, officers will be severely restricted in their search and this issue will likely evade judicial review.

As the Court of Appeal's decision notes, this is the first published decision regarding the permissibility of a search of a non-parolee's car based on a passenger's parole status. (Slip opn. at pp. 9-10.) In reaching its decision, the Court of Appeal purported to rely on prior decisions by this Court regarding the permissible scope of a search of residences shared between parolees/probationers and nonparolees/nonprobationers. (Slip opn. at pp. 8-10.) However, the court significantly altered the existing standard.

Instead of considering whether the parolee had joint access to the area searched, the court focused on legal right to consent to a search of the area. The Court of Appeal's decision broke with this Court's precedent and afforded far more constitutional protection to a car search than a search of a home.

In *People v. Woods* (1999) 21 Cal.4th 668 (*Woods*), this Court upheld a warrantless search of a bedroom shared between a probationer and two non-probationers. This Court found a warrantless search of a residence shared by a probationer may extend to common areas which the probationer has "common authority over or other sufficient relationship to the premises or effects sought to be inspected." (*Id.* at p. 676.)

> The "common authority" theory of consent rests "on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."

(*Ibid.*, citing *United States v. Matlock* (1974) 415 U.S. 164, 170 [94 S.Ct. 988, 39 L.Ed.2d 242].) Subsequent courts have relied on this language in both probation and parole search cases and have found the warrantless search can extend to areas of the residence, and containers therein, that the officer reasonably believes are subject to the probationer's or parolee's joint access or control. (See, e.g., *People v. Smith* (2002) 95 Cal.App.4th 912, 917 (*Smith*); *People v. Robles* (2000) 23 Cal.4th 789, 798 ["common or shared areas of their residence may be searched by officers aware of an applicable search condition"].) Under this analysis, ownership of the item searched is not determinative. For example, in *Smith*, the Court of Appeal

for the Third Appellate District upheld a warrantless search of a woman's purse found in a bedroom shared by a male probationer and a female nonprobationer. The *Smith* court found that the search was proper because it was reasonable under the totality of the circumstances for the officers to believe the probationer was using the purse, even if he did not own or control it. (*Smith*, *supra*, 95 Cal.App.4th at pp. 919-920.)

In this case, the Court of Appeal varied from existing law and greatly reduced the area subject to a parole search. The court ignored whether the parolee appeared to have access to and be using the item searched, here a chip bag and a pair of shoes located in the backseat. Rather, the court focused exclusively on whether the parolee had legal ownership of the car or control over the entire vehicle. The court ignored this Court's previous holding that joint access to or use of the item searched are sufficient. The Court of Appeal's decision failed to acknowledge that a passenger can own or possess items located in someone else's car.

The Court of Appeal explicitly held that appellant "gave up none of his own expectation of privacy" by inviting a parolee to ride in his vehicle. (Slip opn. at p. 11.) This is in direct contradiction to this Court's holding in the context of a search of a home shared with a parolee. In *People v. Sanders* (2003) 31 Cal.4th 318 (*Sanders*), this Court found that by living with a parolee subject to search terms, the nonparolee "had a reduced expectation of privacy." (*Id.* at p. 330; see also *Woods*, *supra*, 21 Cal.4th at

p. 684 ["Those associating with a probationer assume the ongoing risk that their property and effects in common or shared areas of a residence may be subject to search"]; *People v. Boyd* (1990) 224 Cal.App.3d 736, 749 [by spending the night with one parolee in another parolee's trailer, defendant (a non-parolee) had a lessened expectation of privacy]; *People v. Triche* (1957) 148 Cal.App.2d 198, 203 [by sharing space with "a parolee subject to special rules of supervision," a nonparolee's right to privacy "must be to some extent restricted in the public interest"].)

The Court of Appeal's opinion creates a bright-line rule in this case that the front passenger's parole status can only justify a search of the front passenger seat, and no other area of the car. This determination was not based on the individual facts of this case, but on the court's own opinion that a front seat passenger has no "right" to touch anything in the rest of the car. The court should have looked to the totality of the circumstances to determine whether it was reasonable for the officer to believe that the front seat passenger had access, control, or was using the bag of chips or shoe located in the backseat.

The Court of Appeal opinion not only broke with prior law regarding the permissible search of a residence shared by a parolee and nonparolee, the decision contradicts well-established law regarding the sufficiency of the evidence establishing possession. Contrary to the Court of Appeal's holding that the front seat passenger had no "right" to control or use any

items in the backseat area, the law is clear that an individual may possess items in a vehicle even when not in control of the vehicle as the driver. (See *People v. Vermouth* (1971) 20 Cal.App.3d 746, 755.) Furthermore, items in a vehicle may be jointed possessed by all of its occupants. (*Ibid.*) Whether there is sufficient evidence that an occupant of a vehicle is in possession of contraband found within it depends on the totality of the facts in a given case. (See, e.g., *People v. Tharp* (1969) 272 Cal.App.2d 268, 273-274 [considering totality of circumstances, including the character of the bag searched, to determine whether there was sufficient evidence defendant possessed a case of drugs found in a vehicle he co-occupied]; *People v. Vermouth*, *supra*, at p. 755 ["Whether there is probable cause to arrest more than one occupant of a vehicle halted by the police on a public highway for a felony based upon possession of contraband observed in the car generally depends upon the facts in a given case"].) The Court of Appeal's bright-line rule limiting a parole search to the particular seat occupied by the parolee contradicts this well-established law holding that possession of an item in a vehicle is determined by considering the totality of the circumstances.

By breaking with the past case law and creating a bright-line rule that limits a parole search to the actual seat the parolee is occupying, the Court of Appeal afforded far more constitutional protection to a vehicle than a residence. This contradicts well-established Fourth Amendment

jurisprudence. The law is clear that individuals have far less privacy interests in a vehicle than in a home. (See *South Dakota v. Opperman* (1976) 428 U.S. 364, 368 [96 S.Ct. 3092, 49 L.Ed.2d 1000]; *Wyoming v. Houghton* (1999) 526 U.S. 295, 304-305 [119 S.Ct. 1297, 143 L.Ed.2d 408]; *In re Arturo D.* (2002) 27 Cal.4th 60, 68 ["individuals generally have a reduced expectation of privacy while driving a vehicle on public thoroughfares"].)

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . It travels public thoroughfares where both its occupants and its contents are in plain view.

(*South Dakota v. Opperman, supra*, 428 U.S. at p. 368.) The Court of Appeal's decision fails to take into account the reduced expectation of privacy held in one's vehicle.

The Court of Appeal's singular focus on consent law not only breaks with prior law, it has no constitutional underpinnings. The Court of Appeal relied on multiple cases concerning consent searches, not parole searches. (Slip opn. at pp. 8-10, citing *Illinois v. Rodriguez* (1990) 497 U.S. 177 [110 S.Ct. 2793, 111 L.Ed.2d 148]; *United States v. Matlock, supra,* 415 U.S. at p. 164.) But a parole search is not a consent search. In *People v. Reyes* (1998) 19 Cal.4th 743 (*Reyes*), this Court found California's practice of searching parolees without a warrant is not based on the consent exception to the warrant requirement. (*Id.* at p. 749.) Instead, this Court found parole

searches are constitutionally justified based on the parolee's reduced expectation of privacy. (*Reyes, supra*, 19 Cal.4th at p. 752.) The United States Supreme Court upheld this justification in *Samson v. California* (2006) 547 U.S. 843, 850-853 [126 S.Ct. 2193, 165 L.Ed.2d 250] (*Samson*) and specifically found that California parole searches are not consent searches. (*Id.* at p. 852, fn. 3.)

Because a parole search in California is not a consent search, the court here was wrong to focus exclusively on whether the passenger had a legal right to consent to the search of defendant's car. The court should have looked to whether appellant had a constitutionally protected reasonable expectation of privacy in the area searched. The court should have considered that appellant was subject to a reduced expectation of privacy because he was in a vehicle and had invited a parolee to ride with him. In addition to this reduced expectation of privacy, society has a strong interest in regulating parolees, who have been released early from prison only on the condition that they will be extensively monitored, including through warrantless searches, in order to protect the public and ensure successful reintegration. The Court of Appeal's opinion fails to take into account that a parolee could end-run the parole search condition simply by riding in a car with a non-parolee. According to the Court of Appeal's opinion, even if the parolee was using the car to store his belongings, a parole search could not be conducted of any area besides the seat he is

occupying. The court should have looked to the totality of the circumstances to determine whether it was reasonable for the officer to conclude that the parolee had access to the area and items searched. The court's bright-line rule, untethered to any facts in this case, has no constitutional support.

This Court should grant review of this case to settle this important question of law and provide much needed guidance regarding the permissible scope of a parole search of a vehicle shared by a parolee and nonparolee.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court grant review of the instant case.

Dated: September 24, 2010

Respectfully submitted,

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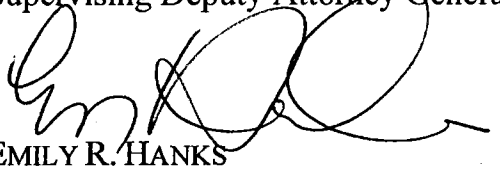

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 2653 words.

Dated: September 24, 2010

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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.

DOUGLAS SCHMITZ,

Defendant and Appellant.

G040641

(Super. Ct. No. 06HF2342)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James H. Poole, Judge. Reversed and remanded.

William D. Farber, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

Distinguishing between friends and enemies can sometimes be more problematic than would be expected. Douglas George Schmitz was convicted of four misdemeanors, based on a search premised on the parolee status of a passenger in his car. He must have had difficulty figuring out in which column – friends or enemies – he should list that passenger.[1]

Douglas George Schmitz appeals after pleading guilty to four misdemeanors. His guilty plea came after the court denied his motion to suppress evidence found on the floor in the rear passenger area of his car. The evidence was discovered during a search predicated on the parolee status of the passenger riding in the vehicle's front seat, and Schmitz argues the parolee status of a front seat passenger does not validate a warrantless search of the back seat area, as the parolee sitting in the front passenger seat cannot be viewed as having "joint access and control" over that back seat area. We agree. A mere passenger in a vehicle, who claims neither a possessory nor property interest therein, lacks the "common authority" over the vehicle which would allow him either to consent or object to its search. Consequently, the parole status of such a passenger cannot be relied upon as the sole basis to justify such a search. The judgment is reversed.

FACTS[2]

Deputy Sheriff Mihela Mihai testified that about 7:00 p.m. on November 24, 2006, she observed an older model Oldsmobile or Buick turn off a main street into a smaller street which was lined on both sides by the garages of a condominium complex. She thought the driver might be lost, and pulled into the street after him. She saw the car

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[1] "Wert thou my enemy, O thou my friend,
"How wouldst thou worse, I wonder than thou dost
"Defeat, thwart me?" (Gerard Manley Hopkins: *Thou Art Indeed Just, Lord.*)

[2] In accordance with well-established precedent, we must defer to the trial court's factual findings, both express and implied, in reviewing its ruling on a motion to suppress evidence. "'[T]he power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor the exercise of that power, and the trial court's findings on such matters, whether express or implied, must be upheld if they are supported by substantial evidence.'" (*People v. Leyba* (1981) 29 Cal.3d 591, 596-597, quoting *People v. Lawler* (1973) 9 Cal.3d 156, 160.)

make a U-turn in the small street, and proceed back toward the main street. As the car was nearing her vehicle, she stopped, and the other car then stopped parallel to hers.

There were three adults and a small child in the other car. The deputy asked the driver, Schmitz, if he was lost. He responded that he was not, and explained he had simply pulled into the street with the intention of making the U-turn, as he did not believe he could do so on the main street. The deputy then parked her car and got out. According to the deputy, Schmitz's car was not obstructed by hers, and he was free to drive around it if he chose.[3]

The deputy then got out of her car and asked Schmitz where he was from. He told her "Long Beach." She asked if he needed directions, and he responded "no." She asked if he minded showing her his driver's license. As he was getting out his license, she observed that his arms were covered with abscesses – a condition which her training in street narcotics suggested was indicative of possible drug use.

The deputy then asked Schmitz if he was on probation or parole. He replied "no." She asked if anyone else in the car was on parole and was told that the male passenger in the front seat was on parole. At that point, the deputy had witnessed no violation of the law, and had observed Schmitz do nothing suspicious other than make a U-turn. At some point, apparently in response to the information that the front passenger was on parole, the deputy called for backup. As she explained it, "I already knew that somebody in that vehicle was on parole, I already knew that my safety could be jeopardized so they needed to know I'm talking to somebody on parole who can be uncooperative, wanted, unwanted, and so on."

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[3] Schmitz testified that he tried to drive away after telling the deputy he did not need help, but felt unable to do so because she got out of her car and was continuing to talk to him. Although he stated "at one point she yelled stop," he never explained when that point was – other than it was "not that first instance."

The deputy then asked Schmitz for permission to search his vehicle. He did not answer. Thereafter, she asked all the passengers to get out of the car and conducted a search, based upon the front seat passenger's parole status.

The search included the entire passenger area of the car, as well as the interior of a purse belonging to the female back seat passenger. The search revealed a syringe cap located inside the purse, as well as two syringes (one without a cap) found inside a chip bag on the floor of the rear passenger area, and some methamphetamine found inside a pair of shoes – also on the floor of the rear passenger area.

Based upon that evidence, Schmitz was arrested. He then moved to suppress the evidence found in the course of the automobile search pursuant to Penal Code section 1538.5, arguing the prosecutor had the burden of justifying the validity of any search carried out in the absence of a warrant. (*People v. Williams* (1999) 20 Cal.4th 119, 130.)

In opposition to the motion, the prosecution argued the initial encounter between Schmitz and the deputy was consensual, and he was not seized or detained. The prosecutor then correctly asserted that police officers are free to ask a person for identification "without implicating the Fourth Amendment," and suggested that the presence of abscesses on Schmitz's arms was "indicative of drug use." But the prosecutor also maintained that the parole status of the front seat passenger, who exhibited "rapid speech [and] fidgety behavior," combined with the fact that both he and the back seat passenger (who was also "fidgety") admitted to past drug usage and arrests, suggested "criminal activity was afoot."[4] The prosecutor argued that once officers have "a particularized and objective basis for suspecting the person stopped of criminal activity," or "probabl[e] cause to believe an automobile contains contraband or evidence

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[4] The alleged drug histories of Schmitz's passengers, along with their "rapid speech" and "fidgety" behavior, although cited in the prosecutor's brief, are not supported by the evidence in the record, and thus cannot be relied upon to support the search.

of a crime, or is itself an instrumentality of a crime, they may search the vehicle for such contraband or evidence without a search warrant."

After hearing evidence pertaining to the motion to suppress, the court denied the motion. While acknowledging the issue was a "close call," the court stated "I don't think that the officer has done anything inappropriate or anything that would negate the fact that the stop was entirely voluntary at the time and something a police individual would ask of someone who appeared to be lost and whose behavior, or conduct, or physical appearance suggested there might be a rational reason for her to conduct further investigation."

After the court denied his motion to suppress, Schmitz pleaded guilty to counts of: (1) misdemeanor driving under the influence of drugs or alcohol (Veh. Code, § 23152, subd. (a)); (2) misdemeanor driving under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)); misdemeanor unauthorized possession of a hypodermic needle or syringe (Bus. & Prof. Code, § 4140); and (4) misdemeanor child abuse (Pen. Code, § 273a, subd. (b).)

The court then suspended imposition of sentence, and placed Schmitz on informal probation for three years on condition he spend a total of 90 days in county jail on counts one and two. Schmitz was also ordered to pay various fines and fees, and register as a narcotics offender pursuant to Health and Safety Code section 11590.

DISCUSSION

"The rules for review of denial of a motion to suppress are well established. This court reviews the explicit and implicit factual findings to determine if they are supported by substantial evidence. (*People v. Soun* (1995) 34 Cal.App.4th 1499, 1507.) We then exercise our independent judgment to determine if the facts found by the trial court establish a seizure in violation of the Fourth Amendment. (*Ibid.*)" (*People v. Hester* (2004) 119 Cal.App.4th 376, 385.)

Schmitz first argues the evidence should have been suppressed as the product of his unlawful detention by the deputy. He asserts the deputy had no reasonable basis to believe any criminal activity was afoot at the time she engaged him in conversation and requested his identification, and thus that he was unreasonably "seized" in violation of the Fourth Amendment. "A seizure occurs whenever a police officer 'by means of physical force or show of authority' restrains the liberty of a person to walk away." (*People v. Souza* (1994) 9 Cal.4th 224, 229, quoting *Terry v. Ohio* (1968) 392 U.S. 1, 19, fn. 16.) But Schmitz's argument simply ignores the evidence indicating the encounter, at least initially, was a consensual one.

"Unlike a detention, a consensual encounter between a police officer and an individual does not implicate the Fourth Amendment. It is well established that law enforcement officers may approach someone on the street or in another public place and converse if the person is willing to do so. There is no Fourth Amendment violation as long as circumstances are such that a reasonable person would feel free to leave or end the encounter." (*People v. Rivera* (2007) 41 Cal.4th 304, 309.)

Here, Schmitz's own testimony supports the inference the encounter was consensual. He admits the deputy did not block his car with hers, and he testified he "could have driven on." He stated that, initially, her only words to him were an inquiry about whether he needed help. After answering "no," he "attempted" to drive away, but was thwarted when she "kept talking to me." He acknowledged that when she got out of her car, the deputy did not say anything to him "about stopping or staying there or waiting." Instead, she "asked" him for identification. At that point, by Schmitz's own description, he "put it in park; she said thank you, and I said you're welcome."

Schmitz's own testimony limns the encounter as not merely consensual, but cordial. It suggests that while he could have driven on, he would have felt rude in doing so while the deputy was still speaking to him – so he chose not to. Whatever constraint Schmitz felt appears to have been the product of his own exercise of good manners,

rather than of the deputy's assertion of authority; it was not a "seizure" for purposes of the Fourth Amendment.

Of course, the consensual nature of the encounter, at least from Schmitz's perspective, changed when the deputy asked for permission to search his car. He did not give it, and his silence cannot be construed as acquiescence. A "search cannot be validated upon an implied consent based upon the failure of defendant . . . to protest the entry . . . ." (*People v. Superior Court (Arketa)* (1970) 10 Cal.App.3d 122, 127; *People v. Baker* (2008) 164 Cal.App.4th 1152, 1160.)

The question, then, is whether the search of Schmitz's automobile can be justified – as the prosecution attempts to do in this case – on the basis that Schmitz's front seat passenger was on parole, and was thus subject to search at any time. "In California, a parolee remains in the legal custody of the Department of Corrections and Rehabilitation through the balance of his sentence and must comply with all of the terms and conditions of parole, including a search condition requiring him to submit to a search, with or without cause, at any time." (*People v. Smith* (2009) 172 Cal.App.4th 1354, 1361, citing *Samson v. California* (2006) 547 U.S. 843, 851-852.)

Thus, as explained in *People v. Sanders* (2003) 31 Cal.4th 318, "[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." (*Id.* at p. 333.)

But of course, the precise question raised in this case is not whether the search violated the *parolee's* expectation of privacy, but whether it violated that of Schmitz, the owner and driver of the car in which the parolee was riding as a passenger. The prosecution here argues the search of the vehicle's passenger compartment was proper because a valid parole search may extend to areas that the parolee shares with nonparolees, over which the parolee has "'common authority.'" (*People v. Smith* (2002)

95 Cal.App.4th 912, 916; citing *United States v. Matlock* (1974) 415 U.S. 164, 171.) However, neither *Smith* nor *Matlock* involves the search of a vehicle, despite the driver's refusal of consent, based upon the parole status of a *passenger* who apparently lacks either a possessory or ownership interest therein. Thus, neither discusses whether the parolee's mere presence as a passenger in a vehicle confers upon him the requisite "common authority" to justify its search.

In *United States v. Matlock, supra,* 415 U.S. 164, which involved the search of a bedroom based upon consent of a woman who shared it with the defendant, the U.S. Supreme Court explained that the "common authority" over property which confers the power to consent to its search is founded "on mutual use of the property by persons *generally having joint access or control for most purposes* so that it is reasonable to recognize that any of the co-inhabitants *has the right to permit the inspection in his own right* and that the others have assumed the risk that one of their number might permit the common area to be searched." (*Id.* at p. 172, fn. 7, emphasis added.)

In *People v. Woods* (1999) 21 Cal.4th 668, 675, our own Supreme Court characterized the rule as allowing police to search an area based upon the probationary status of a person "with *common or superior* authority over the area to be searched," as such authority renders "the consent of other interested parties . . . unnecessary." In the case of a probation-related search, that rule means the police may "only search those portions of the [property] they reasonably believe the probationer has *complete or joint control over.*" (*Id.* at p. 682, italics added.)

It is well established that those who reside with either a probationer or parolee enjoy a reduced expectation of privacy in the premises they share. (*People v. Sanders, supra,* 31 Cal.4th at p. 330; *People v. Robles* (2000) 23 Cal.4th 789, 798-799.) However, that diminution is not coextensive with the limited privacy expectations of the probationer or parolee. "Even though a person subject to a search condition has a severely diminished expectation of privacy over his or her person and property, there is

no doubt that those who reside with such a person enjoy measurably greater privacy expectations in the eyes of society. For example, those who live with a probationer maintain normal expectations of privacy over their persons. In addition, they retain valid privacy expectations in residential areas subject to their exclusive access or control, so long as there is no basis for officers to reasonably believe the probationer has authority over those areas. (See *Illinois v. Rodriguez* (1990) 497 U.S. 177, 188-189; *People v. Woods, supra,* 21 Cal.4th at p. 682.) That persons under the same roof may legitimately harbor differing expectations of privacy is consistent with the principle that one's ability to claim the protection of the Fourth Amendment depends upon the reasonableness of his or her individual expectations." (*People v. Robles, supra,* 23 Cal.4th at p. 798.)

Indeed, as our Supreme Court has recognized, an unduly restrictive view of the privacy expectations of those who associate with probationers or parolees might actually undermine the rehabilitative goals of those programs: "it must be remembered that probation is an 'important aspect[] of the state's penal system,' the 'optimum successful functioning' of which 'is of compelling public interest.' [Citation.] . . . Many law-abiding citizens might choose not to open their homes to probationers if doing so were to result in the validation of arbitrary police action. If increased numbers of probationers were not welcome in homes with supportive environments, higher recidivism rates and a corresponding decrease in public safety may be expected, both of which would detract from the 'optimum successful functioning' of the probation system." (*People v. Robles, supra,* 23 Cal.4th at p. 799.)

Unfortunately, while there are numerous cases applying this "common authority" standard to situations involving the search of residential premises shared between a parolee or probationer who is subject to a search condition, and another person who is not subject to such a condition, we have found no cases which analyze the rule in a situation involving the search of a car as opposed to a residence, or based upon the parolee status of one who is merely a visitor to the premises searched. (But see *People v.*

Baker, supra, 164 Cal.App.4th 1152 [involving the search of a purse belonging to a passenger in a parolee's car]; and *People v. Smith, supra,* 172 Cal.App.4th 1354, [involving an intrusive search of a parolee's person (which was objected to) as well as the car in which he occupied the driver's seat (which was not objected to)].)

Of course, residential searches strike at the very heart of the privacy interest protected by the Fourth Amendment.[5] "'[T]he "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."' [Citations.]" (*People v. Camacho* (2000) 23 Cal.4th 824, 831.) By contrast, "individuals generally have a reduced expectation of privacy while driving a vehicle on public thoroughfares." (*In re Arturo D.* (2002) 27 Cal.4th 60, 68.) Nonetheless, those drivers do have a cognizable privacy interest in their cars, which cannot be searched without legal justification. (*Ibid.*) The question, then, is whether Schmitz lost his legally protected privacy interest in the interior of his vehicle – the right to refuse consent to its search – simply because he allowed a parolee to ride as a passenger in the front seat. We conclude he did not.

To reiterate the rule set forth in *United States v. Matlock, supra*, and followed by our Supreme Court in *People v. Woods, supra,* the "common authority" over property which confers the power to authorize its search is founded "on mutual use of the property by persons *generally having joint access or control for most purposes* so that it is reasonable to recognize that any of the co-inhabitants *has the right to permit the inspection in his own right* and that the others have assumed the risk that one of their number might permit the common area to be searched." (*United States v. Matlock, supra,* 415 U.S. at p. 172, fn. 7, italics added.)

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[5] The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" by police officers and other government officials. (U.S. Const., 4th Amend.)

In this case, there was no evidence that Schmitz, merely by allowing a parolee to ride as a passenger in his car, ceded to that parolee any authority over the car at all, let alone the authority to permit inspections of the vehicle's interior "*in his own right.*" Indeed, there was no evidence Schmitz *knew* his passenger was a parolee. Had Schmitz left the vehicle in the parolee's possession, or allowed him to drive it, that would be different. (See *People v. Ledesma* (2006) 39 Cal.4th 641, 703 ["Cases from a number of jurisdictions have recognized that a guest who has the run of the house *in the occupant's absence* has the apparent authority to give consent to enter an area where a visitor normally would be received." (Italics added.)]; *United States v. Morales* (1988) 861 F.2d 396, 399 ["Under the *Matlock* test, a driver of a vehicle has the authority to consent to a search of that vehicle. As the driver, he is the person having immediate possession of and control over the vehicle."].) But Schmitz did neither. Instead, he simply allowed the parolee to visit the car temporarily as a passenger. Under those circumstances, the passenger/parolee himself would have had gained no expectation of privacy in the vehicle – and thus had no basis himself to either consent or object to its search (*Rakas v. Illinois* (1978) 439 U.S. 128 [holding that mere passengers, who claimed neither a possessory nor any property interest in the vehicle searched, or in the items seized from it, could not object to the search or seizure]) – while Schmitz gave up none of his own expectation of privacy, nor of his authority to prevent the officer's search of the vehicle.

Schmitz clearly had a reasonable expectation of privacy in his glove box, his console, his door pockets, his own seat, the back seat – indeed every part of his car except the front passenger seat where the parolee was sitting. The parolee, by contrast, had no expectation of privacy anywhere in the car and no standing to contest his own search. Nothing Schmitz did could reasonably have been viewed as ceding authority over his back seat to the parolee. The parolee had no right to open packages, eat food, or even read magazines he found in the back seat. He could only obtain authority over the chip

bag at issue here by claiming ownership, which – given his lack of search and seizure rights – would have been bootless.

Because Schmitz, as the driver, at all relevant times had possession and control of the vehicle which was searched, and his parolee/passenger never gained or exercised any apparent authority over the vehicle which might have given the police officer the reasonable impression he had the right to permit its inspection, the officer could not search the interior of the vehicle based upon the passenger's parole status. As there appears to be no other justification for the warrantless search of the vehicle's interior, the court erred in refusing to suppress the evidence obtained during that search.

The judgment against Schmitz is reversed, and the case is remanded to the trial court for further proceedings consistent with this opinion.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Douglas George Schmitz**
Case No.: _____
Appellate District, Division Three Court, Case No.: G040641
Orange County Superior Court, Case No.: 06HF2342

I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 24, 2010, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on September 24, 2010 to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 24, 2010, at San Diego, California.

N. Hernandez
Declarant

Signature

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