Recent Case Report

Moreno v. Baca II

(9th Cir. 2005) 431 F.3d 633

New development on probation and parole searches

There have been two developments in the continuing debate as to whether officers must have reasonable suspicion that a probationer or parolee is presently engaging in criminal activities before they may conduct a probation or parole search.

First, the Ninth Circuit's opinion in *Moreno* v. *Baca*[1] has been withdrawn and replaced with an amended opinion in which the panel deleted its controversial ruling that reasonable suspicion is required.

By way of background, on March 7, 2005, Ninth Circuit Judges Wallace Tashima and Harry Pregerson ruled that officers may not conduct probation or parole searches unless they have reasonable suspicion that the suspect has committed a new crime or has otherwise violated the terms of release.

The ruling caused quite a stir in the ranks of California's law enforcement agencies because it represented a major shift in the law. After all, the California Supreme Court has consistently ruled that officers do not need any level of suspicion to conduct probation and parole searches. The court explained the logic of its rule in *People* v. *Mason* when it pointed out, "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."[2]

As we explained in the Fall 2005 *Point of View* (see the report on *U.S.* v. *Barnett*), there was absolutely no legal basis for the court's ruling in *Moreno* v. *Baca*. Still, it was unsettling because, even though it was baseless, and even though the third judge on the panel described it in his dissenting opinion as a "frolic" that "should appropriately disregarded," officers and prosecutors do not casually disregard the published opinions of our appellate courts.

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[1] (9th Cir. 2005) 400 F.3d 1152.

[2] (1971) 5 Cal.3d 759, 763 ALSO SEE *People* v. *Turner* (1976) 54 Cal.App.3d 500, 507 ["Unexpected, unprovoked [probation] searches are permitted, since they are reasonably calculated to monitor the probationer's compliance with the law."]; *People* v. *Reyes* (1998) 19 Cal.4th 743, 753 ["[T]he purpose of the search condition is to deter the commission of crimes and to protect the public, and the effectiveness of the deterrent is enhanced by the potential for random searches."]; *In re Tyrell J* (1994) 8 Cal.4th 68, 87 ["[A] probationer must thus assume every law enforcement officer might stop and search him at any moment. It is this thought that provides a strong deterrent effect upon the [probationer] tempted to return to his antisocial ways."].

In any event, it has now been replaced by a more thoughtful and temperate opinion in which all three judges on the panel agreed that, (1) a search cannot be upheld as a parole or probation search if the officers who conducted it were unaware that the suspect was subject to a search condition, and (2) the sheriff's deputies who conducted the search were not entitled to qualified immunity.

Second, on February 22, 2006, the United States Supreme Court heard oral arguments in *Samson* v. *California*, the case in which the Court is expected to rule on this issue. POV