Recent Case Report

U.S. v. Barnett

(7th Cir. July 18, 2005) __ F.3d __ [2005 WL 1661539]

ISSUE

Must officers have reasonable suspicion to conduct probation searches?

FACTS

Barnett was charged in Illinois with fleeing from officers and causing criminal damage to state property, both felonies. To avoid a prison sentence, he entered into a plea bargain through his attorney whereby he would serve one year of "intensive" probation, meaning he could be searched at any time by a probation officer.

One day, Barnett's probation officer searched him and found a gun. Although the court did not explain exactly how the search occurred, it was a random search in that the officer did not have any reason to believe that Barnett possessed a weapon or other contraband.

Barnett was subsequently convicted of being a felon in possession of a firearm and sentenced to 15 months in prison.

DISCUSSION

Barnett contended the probation search was unlawful. Although the search condition did not say that officers could search him only if they had reasonable suspicion, he argued that such a restriction should be implied.

In a refreshingly straightforward and discerning opinion, the Seventh Circuit refused Barnett's request that they rewrite his search condition. The court reasoned that a plea bargain is simply a form of contract in which both parties receive and give up something for their mutual benefit. In Barnett's case, he gave up the right to be free of suspicionless searches in order to avoid a state prison sentence. Said the court:

> Nothing is more common than an individual's consenting to a search that would otherwise violate the Fourth Amendment, thinking that he will be better off than he would be standing on his rights. Often a big part of the value of a right is what one can get in exchange for giving it up. Here, given the alternative facing him of a prison sentence, Barnett gave up nothing.

Having lost his argument that judges should interpret parole and probations search conditions as requiring reasonable suspicion, Barnett switched to his backup argument. He claimed he should be able to rescind his plea agreement because the probation department's policy manual says that reasonable suspicion was required, which meant there was an "inconsistency between the search provisions in the manual and in the decree." (Note that even if the search violated the probation department's policy, such a violation would not render the search unlawful under the Fourth Amendment.) In any event, Barnett claimed this so-called "inconsistency" rendered his plea-bargain contract "indefinite" and therefore unenforceable.

At oral argument, the judges had some fun with this argument. They pointed out that if the agreement was, in fact, fatally indefinite, it would be "down the drain." This would mean Moreno would be resentenced on the two felonies "and the new sentence might be a prison term tacked on to his 15-month federal term." According to the court, "He clearly doesn't want that and so in response to a question from the bench told us that he was abandoning the argument."[1]

Accordingly, the court ruled the search was lawful.

COMMENT

The issue decided in *Barnett* was the subject of an article in a recent edition of the PORAC Law Enforcement News entitled "It's the Law: Search, Seizure Conditions Revisited." The writer announced that officers may no longer search a suspect based on a parole or probation search condition unless they have reasonable suspicion. Here are the writer's words: "[O]fficers must have, at a minimum, a 'reasonable suspicion' of criminal activity, and that the parolee or probationer is involved in that activity."

This pronouncement came as quite a surprise to many officers and prosecutors who noted that, if accurate, it would represent a dramatic transformation in the law of police procedure. This is because, as most people in the criminal justice field are aware, the ability of officers to conduct "unexpected, unprovoked" searches serves a critical function in our parole and probation programs.[2] As the California Supreme Court explained in *People* v. *Reyes*, "the potential for random searches" serves to "deter the commission of crimes and to protect the public."[3] Or, as the court observed in *People* v. *Mason:*

> 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.[4]

For these reasons, California courts have consistently rejected attempts by criminal defense attorneys and allied organizations to prohibit parole and probation searches in the absence of reasonable suspicion.[5]

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[1] **NOTE**: The court also ruled that an implied term of the plea bargain contract is that any warrantless search must not be conducted for the purpose of harassing the probationer.

[2] 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."];

[3] (1998) 19 Cal.4th 743, 753. ALSO SEE *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."].

[4] (1971) 5 Cal.3d 759, 763. Emphasis added.

[5] See *In re Tyrell J.* (1994) 8 Cal.4th 68, 80 ["[A]n adult probationer subject to a search condition may be searched by law enforcement officers having neither a search warrant nor even reasonable cause to believe their search will disclose any evidence."]; *People* v. *Reyes* (1998) 19 Cal.4th 743, 752-4 [parole searches may be conducted for any "proper purpose," meaning the search must not be arbitrary, capricious, or harassing]; *People* v. *Bravo* (1987) 43 Cal.3d 600, 607, fn.6 [a reasonable suspicion requirement will not be implied]; *People* v. *Brown* (1987) 191 Cal.App.3d 761, 766 ["[T]o restrict warrantless probation searches to those situations where the probationer has engaged in conduct reasonably suggestive of criminal activity would render the probation order superfluous and frustrate its acknowledged purpose; i.e., to deter further offenses by the probationer and to ascertain whether he is complying with the terms of probation."]. ALSO SEE

So we must wonder: Upon what legal authority was the PORAC assertion based? It's hard to believe, but it was based on a single and divided Ninth Circuit case—a case so blatantly deceptive it bordered on sophistry. The case was *Moreno* v. *Baca*.[6]

It will be worthwhile to take a look at *Moreno.* The facts are simple: Two Los Angeles County sheriff's deputies detained Moreno because they saw him discard an unknown object in a high-crime area.[7] One of the deputies ran Moreno's name and was notified he was on parole. The other deputy searched the area where Moreno had thrown the object and found rock cocaine. Moreno was arrested for possession. The case went to trial but Moreno was acquitted. He then sued the deputies, alleging the detention was unlawful because the deputies did not have "reasonable suspicion" to detain him.

The sole issue before the Ninth Circuit was whether the deputies were entitled to qualified immunity on Moreno's allegation. To make this determination, the courts are supposed to simply determine whether the law the officers allegedly violated was "clearly established."[8] If so, they don't receive immunity.

Because the deputies did not know that Moreno was on parole when they detained him, this fact was irrelevant in determining the lawfulness of the detention.[7] Thus, the only issue before the court was whether it is "clearly established" that officers must have reasonable suspicion before they may detain a suspect. The answer, of course, is yes—*it has been clearly established since 1968.*[8] Accordingly, all three judges ruled the deputies were not entitled to qualified immunity.

That should have ended it. But two of the judges—Wallace Tashima and Harry Pregerson—felt compelled to embark on a meaningless discourse on whether officers who know that a suspect is on parole or probation must have reasonable suspicion before they may detain or search him. As concurring judge Richard Clifton wrote, the Tashima-Pregerson fling was "entirely irrelevant to the result reached in this case and should appropriately be disregarded."[9] Judge Clifton added:

> [T]he majority's digression to assert that the Constitution requires reasonable suspicion to search a parolee, regardless of the terms of parole, amounts to no more than a frolic.

U.S. v. *Crawford* (9th Cir. en banc 2004) 372 F.3d 1048, 1062-76 [conc. opn. of Trott, J.] [explaining why no level of suspicion is required].

[6] (9th Cir. 2005) 400 F.3d 1152.

[7] **NOTE**: Moreno denied discarding anything. In determining whether qualified immunity must be granted, the court was required to interpret the evidence in the light more favorable to Moreno.

[8] See *Saucier* v. *Katz* (2001) 533 U.S. 194, 201 "[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established."].

[9] **NOTE: As Judge Clifton explained:** There is no reason to consider whether Plaintiff's parole condition altered his Fourth Amendment rights because Defendants were not aware he was on parole when they conducted the search. Regardless, the majority reaches out to address this question and to try to announce a new rule of law—specifically, that "the Constitution requires that a law enforcement officer *must, at minimum, have a reasonable suspicion* that a parolee has engaged in criminal wrongdoing or violated his parole prior to arresting him or conducting a search of his person." Emphasis added. **Also see** *People* v. *Mendoza* (2000) 23 Cal.4th 896, 915 ["A decision is not authority for everything said in the opinion but only for the points actually involved and actually decided."]; *Maryland* v. *Wilson* (1997) 519 U.S. 408, 412-3 ["We agree with respondent that the former statement was dictum, and the latter was contained in a concurrence, so that neither constitutes binding precedent."].

It was, therefore, apparent that the Tashima-Pregerson escapade was blatant dicta and, therefore, did not constitute a ruling of the court.[10]

But there is something even more troubling about their ruling. It was based on the judges' flagrant distortion of the United States Supreme Court's opinion in *U.S.* v. *Knights*.[11] In *Knights,* the Court, in explaining its ruling, made the following statement:

> We need not decide whether Knights' acceptance of the search condition constituted consent [to suspicionless searches].

Although this language could not have been clearer—*"We need not decide"*—Tashima and Pregerson blithely concluded that the Court in *Knights* essentially ruled that reasonable suspicion was required. How did they reach this absurd conclusion? Because, said Tashima and Pregerson, the *Knights* Court "emphasized the existence of a 'reasonable suspicion' when it affirmed" the search.

This was a sham. As Judge Clifton wrote, "The majority supports its announcement by asserting that in *United States v. Knights* the Supreme Court held that 'reasonable suspicion was required to search the probationer's house.' That is plainly wrong."[12]

Not only did Tashima and Pregerson distort the plain ruling in *Knights*, they ignored the fact that the U.S. Supreme Court has stated—also quite clearly—that random, suspicionless searches are vital and effective in monitoring the activities of convicts. As the Court observed in *Hudson* v. *Palmer*, "The uncertainty that attends random searches of [prison] cells renders these searches perhaps the most effective weapon of the prison administrator in the constant fight against the proliferation of knives and guns, illicit drugs, and other contraband."[13]

It is unnecessary to comment further about judges Tashima and Pregerson. Their leanings are well known. But there is no excuse for PORAC having announced such a major change in police procedure based on such trumped-up "authority."

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[10] See *Maryland* v. *Wilson* (1997) 519 U.S. 408, 412-3 ["We agree with respondent that the former statement was dictum, and the latter was contained in a concurrence, so that neither constitutes binding precedent."]; *People* v. *Mendoza* (2000) 23 Cal.4th 896, 915 ["A decision is not authority for everything said in the opinion but only for the points actually involved and actually decided."]. ALSO SEE *U.S.* v. *Yoon* (6th Cir. 2005) 398 F.3d 802, 806 ["Dicta is language that that is only incidental to the holding."].

[11] (2001) 534 U.S. 112, 117.

[12] At p. 1170. Judge Clifton also noted, "In *Knights,* the Supreme Court held that '*no more than* reasonable suspicion' is required to conduct a search of a probationer's house. Since it had already been determined that reasonable suspicion existed in that case, the Court did not need to consider whether the search in question could be supported by something less. And the Court did not simply leave that for readers to infer. It said as much, in so many words. . . . " *Ibid.*

[13] (1984) 468 U.S. 517, 528.