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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES KENNETH DENUNA,

Defendant and Appellant.

A132309

(San Mateo County  
Super. Ct. No. SCO72344A)

**I. INTRODUCTION**

After the trial court denied his motion to suppress evidence (methamphetamines and materials commonly used to distribute such) seized from a car in which he was a passenger and the driver was a probationer subject to a search condition, appellant pled no contest to a charge of possession of methamphetamine for sale (Health & Saf. Code, § 11378) and admitted a prior conviction. He was thereafter sentenced to the lower term of 16 months in prison. He appeals, claiming the trial court erred in denying his motion to suppress. We disagree and hence affirm appellant's conviction.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

On the evening of November 10, 2010, Millbrae Police Officer Rebecca Rosenblatt lawfully stopped a Nissan automobile being driven by one Joshua Galamay in

a Safeway store parking lot in that city.<sup>1</sup> There were two passengers in the car, appellant sitting in the front passenger seat and a woman in a rear seat behind Galamay.

Officer Rosenblatt asked the car's occupants for their identification. Galamay provided his, but appellant falsely identified himself as "James DeLeon," and gave an incorrect birth date. Officer Rosenblatt then determined that (1) Galamay was on probation and, as such, subject to a search condition, and (2) appellant had provided her with false identification. She then asked Galamay for permission to "look through your car," to which he responded "that was fine."

The officer then asked the three occupants to step out of the car, which they did, and she then searched the vehicle. In either the "foot well area" or on the rear seat directly behind the front passenger seat where appellant had been sitting, she found a "sling-type" backpack which had a "Michael Jordan icon" on it. Officer Rosenblatt then searched the backpack and found (1) methamphetamine in a travel container normally used to carry soap, (2) baggies typically used to package such, and (3) a scale and a plastic spoon. She described these items collectively as "all the paraphernalia that would be associated with somebody that . . . perhaps was using or selling methamphetamine." After finding these contents, the officer asked the car's former occupants to whom the backpack belonged.<sup>2</sup>

On December 3, 2010, an information was filed charging appellant with three counts: (1) the count described above under Health and Safety Code section 11378; (2) being under the influence of methamphetamine (*id.*, § 11550, subd. (a)); and (3) providing false identification information to a police officer (Pen. Code, § 148.9, subd.

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<sup>1</sup> At the hearing on appellant's motion to suppress, neither counsel asked Officer Rosenblatt why she stopped the Nissan, but appellant effectively concedes the stop was lawful. In his opening brief to us, his counsel implies that the stop was because of "the vehicle's offending rear license plate light." This is supported by the prosecution's opposition to appellant's motion to suppress.

<sup>2</sup> There is nothing in the record indicating that she received a response to this inquiry.

(a)). In connection with the first count, it was also alleged that appellant had suffered a prior felony conviction. (Health & Saf. Code, § 11370.2, subd. (c).)

Appellant was arraigned on December 9, 2010, and pled not guilty and denied the enhancement.

On April 28, 2011,<sup>3</sup> appellant moved to suppress the evidence seized by Officer Rosenblatt the preceding November. The court received briefing on this motion from both sides and, on May 13, held a hearing at which Officer Rosenblatt testified as noted above and counsel argued the merits of appellant's motion to suppress. On May 26, the court held a further hearing at which it discussed the relevant authorities it had considered, and concluded from them that appellant's motion to suppress should be denied.

On June 3, appellant pled no contest to the first count noted above and admitted the alleged prior conviction. The two other counts were dismissed pursuant to the negotiated disposition.

On the same day, the court sentenced appellant to the low term of 16 months in prison.

On June 7, appellant filed a timely notice of appeal.

### **III. DISCUSSION**

#### *A. Our Standard of Review*

As our Supreme Court has noted several times: “In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated. [Citation.] We review the court's resolution of the factual inquiry under the deferential substantial-evidence standard. [Citation.] The ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review. [Citation.]” (*People v. Hoyos* (2007) 41 Cal.4th 872, 891, overruled on another ground as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-643; see also *People*

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<sup>3</sup> All further dates noted are in 2011.

*v. Carter* (2005) 36 Cal.4th 1114, 1140; *People v. Maury* (2003) 30 Cal.4th 342, 384; *People v. Ayala* (2000) 24 Cal.4th 243, 279; & *People v. Camacho* (2000) 23 Cal.4th 824, 830.)

**B. *The Trial Court Correctly Denied the Motion to Suppress***

In its May 26 ruling denying appellant’s motion to suppress, the trial court first noted the applicable standard and then stated why, as it analyzed the applicable law, that standard did not require suppression of the evidence seized by the police. Regarding the first issue, it said: “The standard, as we all know, is whether the probationer had control or access to the item; not how far away the item was from the probationer. And the defendant [was] not the probationer; the driver was the probationer.”

Applying several California cases it had reviewed,<sup>4</sup> the court concluded: “In this particular situation, I think you can argue that since the probationer is driving the car and has access to the items in the car; since the item does not appear to be gender specific, that the police can search the item without asking specifically who it belonged to.”

We agree with this conclusion, and do so on the basis of the authorities relied on by the trial court and several others.

Our Supreme Court directly addressed the issue of the scope of a search of a car that may be conducted when express permission has been obtained in *People v. Clark* (1993) 5 Cal.4th 950 (*Clark*), disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22. In *Clark*, the owner of a car (Smith) gave the Ukiah police permission to search his car, a car in which the defendant had apparently slept the night a murder had been committed nearby. In the car, the police found bloody clothing, which witnesses told them the defendant had been wearing “on the night of the murder.” (*Clark* at p. 978.) Via a motion to suppress, the defendant argued that the consent of the owner of the car was insufficient to justify the police’s search of it and their seizure of his clothing, and repeated that argument on appeal from his murder conviction. Our

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<sup>4</sup> Per the court’s statement in the course of its ruling, those cases are: *People v. Baker* (2008) 164 Cal.App.4th 1152 (*Baker*); *People v. Smith* (2002) 95 Cal.App.4th 912 (*Smith*); *People v. Woods* (1999) 21 Cal.4th 668 (*Woods*). (See 1 RT 15-16.)

Supreme Court rejected it, saying: “[O]bjects left in an area of common use or control may be within the scope of the consent given by a third party for a search of the common area. [Citation.] [¶] As the owner of the searched car, Smith unquestionably had a possessory interest in it. Smith gave the police his consent to search the car for anything that might prove helpful in the investigation of the murder. By leaving his clothes readily displayed on the seat of Smith’s car, defendant assumed the risk that Smith would consent to a search of the car and its contents. Defendant simply retained no legitimate privacy interest in the clothes as against Smith or Smith's invitees. The Fourth Amendment is not violated unless a legitimate expectation of privacy is infringed. [Citation.]” (*Id.* at p. 979.)

As the trial court correctly noted, our Supreme Court ruled to the same effect in *Woods*. In that case, a woman who shared her home with two others, including the defendant, was subject to a warrantless search condition as a result of being on probation. (*Woods, supra*, 21 Cal.4th at p. 671.) In the course of “a warrantless search of [that person’s] residence, police officers uncovered evidence of criminal activity (drugs and firearms) against” the defendant and one other person. Those persons successfully moved to suppress that evidence in the Contra Costa County Superior Court, a ruling that was affirmed by Division Three of this court. However, our Supreme Court disagreed with these rulings in *Woods* and reversed Division Three’s opinion. Citing *Clark*, among other authorities (and specifically noting that that case involved the “search of a car”), the court held that the search was valid and the evidence obtained thereby admissible. It said: “It long has been settled that a consent-based search is valid when consent is given by one person with common or superior authority over the area to be searched; the consent of other interested parties is unnecessary. [Citations.] Warrantless consent searches of residences have been upheld even where the unmistakable purpose of the search was to obtain evidence against a nonconsenting coinhabitant. [Citations.] [¶] As the United States Supreme Court explains, ‘when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a

third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.’ [Citations.] 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.’ [Citations.]” (*Woods, supra*, 21 Cal.4th at pp. 675-676.)

There are, as the court below noted, several appellate court decisions even more specifically applicable to the fact situation presented here. But the trial court did not cite a Court of Appeal case that involved a fact situation closest to the case before us. That case is *People v. Boyd* (1990) 224 Cal.App.3d 736 (*Boyd*), an opinion from the Fifth District authored by now-Supreme Court Justice Marvin Baxter.<sup>5</sup> It concerned whether the Merced County Superior Court had properly denied a motion to suppress brought by a defendant, a woman, whose handbag was searched during a police search of a “travel trailer occupied by appellant and Tim Mitchell, a parolee” (*id.* at p. 739) and owned by another parolee, Santos. Both parolees had search conditions regarding their paroles. Based on information concerning drugs possessed by Santos and a threat he had made to a woman, as well as information concerning Mitchell’s possible dealing in methamphetamine, the parole agent charged with supervising both Santos and Mitchell recruited the Turlock Police Department to help him search both Santos’ house and the nearby trailer. In the latter, they found a bag containing (as in this case) methamphetamine and materials used in the distribution of that drug. The bag was, it turned out, not the property of either of the parolees, but of the woman roommate of Mitchell’s, defendant Boyd.

The Fifth District affirmed the trial court’s denial of Boyd’s motion to suppress. In so doing, it noted that the search was authorized by the parole agreements of Mitchell

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<sup>5</sup> Appellant cites *Boyd* several times in his opening brief to us, but does not challenge its holding nor even attempt to distinguish it.

and Santos (*Boyd, supra*, 224 Cal.App.3d at p. 743), and that the search of Boyd's handbag was not unjustified because that bag was "gender neutral in appearance." (*Id.* at pp. 741, 745.) Perhaps most importantly for purposes of the case before us, the court held that the search was not invalidated "because the officer fails to ask the nonparolee roommate whether the object about to be searched is his or her property." It explained: "Such a rigid rule would unnecessarily bind the officer to the answer given, regardless of its veracity. The officer should not be bound by the reply in the face of overwhelming evidence of its falsity. Even if the nonparolee roommate's claim of ownership sounds reasonable, reasonable suspicion may be predicated on the parolee's possession or control of the object. The officer must reasonably suspect that the object is owned, controlled or possessed by the parolee for the search to be valid. Depending upon the facts involved, there may be instances where an officer's failure to inquire, coupled with all of the other relevant facts, would render the suspicion unreasonable and the search invalid. However, this is not such a case." (*Id.* at p. 749.)

The court concluded its opinion thusly: "Our independent application of the appropriate standard to the evidence presented leads us to conclude that the officers had reasonable suspicion that the handbag was owned or controlled by one or both of the parolees and was therefore within the scope of the parole search. [Citation.] Their subjective suspicion was 'based on articulable facts which together with rational inferences from those facts warrant objectively reasonable suspicion.' [Citation.] The court did not err in denying appellant's motion to suppress the handbag and contraband within." (*Boyd, supra*, 224 Cal.App.3d at pp. 750-751.)

The other two appellate court opinions relied on by the trial court cite the *Boyd* opinion approvingly. (See *Smith, supra*, 95 Cal.App.4th at p. 918 and *Baker, supra*, 164 Cal.App.4th at p. 1159.)<sup>6</sup> Both cases also support the trial court's ruling here. Thus, in *Smith*, the Third District affirmed the trial court's denial of a motion to suppress when the

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<sup>6</sup> So has the Ninth Circuit; see *United States v. Davis* (9th Cir. 1991) 932 F.2d 752, 760 (*Davis*).

drugs were found in the appellant's (a woman) purse in a bedroom she shared with her boyfriend, a probationer with a search condition. Citing both *Boyd* and our Supreme Court's opinion in *Woods*, the Third District wrote: "We agree with *Boyd* the reasonable suspicion standard may be satisfied based on an examination of the totality of the circumstances surrounding the search. . . . [¶] Equally important, the instant search did not exceed the scope of the consent relied upon ([*Woods*], *supra*, 21 Cal.4th at p. 682), nor can it be argued the search was undertaken in a harassing or unreasonable manner. [Citation.] The officers limited their search only to the room occupied by Kelsey, and searched only those items over which they reasonably believed Kelsey had complete or joint control. [¶] '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.' [Citations.]" (*Smith, supra*, 95 Cal.App.4th at pp. 918-919.)

Although reaching a different result, in a case involving what was "a distinctly feminine purse found on the passenger's floorboard" of a car in which the woman defendant was sitting next to the (speeding) male parolee driver, the court in *Baker* cited both *Woods* and *Boyd* regarding the applicable law. (*Baker, supra*, 164 Cal.App.4th at p. 1161.) It stated: "When executing a parole or probation search, the searching officer may look into closed containers that he or she reasonably believes are in the complete or joint control of the parolee or probationer. [Citations.] This is true because the need to supervise those who have consented to probationary or parolee searches must be balanced against the reasonable privacy expectations of those who reside with, ride with, or otherwise associate with parolees or probationers. We acknowledge that passengers in automobiles have a lesser expectation of privacy in automobiles than in a residence." (*Id.* at p. 1159.)

Although citing and discussing these cases, appellant's briefs to us attempt to distinguish them because, principally, "Officer Rosenblatt lacked even reasonable suspicion to believe the backpack in question was either owned by, or in the complete or joint control of the probationer" and hence "the search cannot be deemed to be valid." We will return to this contention shortly.

But appellant's main contention is that all of the California authorities just discussed (some of which, again, were specifically relied on by the trial court) have been effectively undermined by a 2005 decision of the Ninth Circuit, *Motley v. Parks* (9th Cir. 2005) 432 F.3d 1072 (*Motley*), a case he cites repeatedly, claiming it "conclusively established probable cause as the relevant standard when assessing law enforcement authority to search non-consenting parties' items or residences."

In the first place, of course, nothing in a federal Court of Appeals decision is "conclusive" as to us. (See, e.g., *People v. Camacho, supra*, 23 Cal.4th at p. 830, fn. 1.) But, much more importantly—and contrary to appellant's repeated and substantial reliance on *Motley*—that decision does not contradict, or even slightly undermine, the California appellate decisions just discussed.

In *Motley*, the Ninth Circuit was faced with an appeal by a girlfriend (Motley) of a parolee with a search condition (Jamerson) of an order by the federal district court granting summary judgment in favor of the defendants, state and federal officers, who were conducting a search of 10 residences in a gang-infested area of Los Angeles, residences supposedly inhabited by parolees with search conditions or the like but who insisted on searching Motley's apartment notwithstanding the fact that Jamerson had, six weeks earlier, been taken back into custody for a parole violation. The district court had granted summary judgment in favor of the defendant officers and contrary to plaintiff Motley (who was suing the officers under 42 U.S.C. § 1983) on the basis that the officers were entitled to qualified immunity "for the unlawful search." (*Motley, supra*, 432 F.3d at p. 1077.) In an extended opinion dealing with several of the issues raised by plaintiff Motley on appeal, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the defendant officers and against the plaintiff and apartment owner Motley (except as to one officer who was accused of using "excessive force" by training his gun on the young child of Motley and Jamerson). (*Id.* at pp. 1088-1089.)

The holding of *Motley* that appellant seems to find helpful to him is that, in the course of affirming the ruling against the claims of apartment-resident Motley, the Ninth Circuit held that (1) "before conducting a warrantless search pursuant to a parolee's

parole condition, law enforcement officers must have probable cause to believe that the parolee is a resident of the house to be searched” (*Motley, supra*, 432 F.3d at p. 1080) and (2) on the facts before the district court, “the officers had probable cause to believe they were at Jamerson’s residence . . . .” (*Id.* at p. 1082.)

In his briefs to us, appellant translates this Ninth Circuit holding into a rule that *any search*—whether of a residence, a car, or a backpack found in a car—must be based on the searching officers having “probable cause to believe” that a backpack found in a car being driven by a parolee or probationer subject to a search condition was the property of that person. For several separate and distinct reasons, this contention is simply wrong.

In the first place, *Motley* dealt specifically—and only—with law enforcement officers search of a person’s *residence* and made no reference to searches of cars or “items” of non-consenting persons.<sup>7</sup>

Second, and materially unlike the facts here, in *Motley* the consenting parolee did *not* own or control the area being searched; it was controlled by the non-consenting party, Jamerson’s girl friend, Motley.

Third, nowhere in the Ninth Circuit’s affirmance of the summary judgment against Motley did that court express any disapproval of the California authorities cited above (e.g., *Clark, Boyd, Smith, and Baker*) holding that officers *are* permitted to open and examine the contents of an “item” in a vehicle or other location when that vehicle or

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<sup>7</sup> The key headings in *Motley* make this clear. The first pertinent heading states “Probable Cause is Needed to Establish Residence” while the next reads: “The Officers Had Probable Cause to Believe That Jamerson Resided with Motley.” (*Motley, supra*, 432 F.3d at pp. 1078, 1080.) And, interestingly, the Ninth Circuit is the only federal circuit which has held that the more strict “probable cause standard” applies regarding whether the residence to be searched is “that of the suspect named in the search warrant.” All the other circuits that have addressed this issue have concluded that the “easier to satisfy” reasonable belief standard applies in such cases. (See *Covington v. Smith* (7th Cir. 2008) 259 Fed. Appx. 871, 873-874.) But, as explained further below, neither standard applies here because of (1) Galamay’s probation search condition and (2) his express consent to Officer Rosenblatt’s search of his car.

location is apparently under control of a consenting parolee or probationer and there is no evidence (as there clearly was in *Baker*) that the item in question was *not* the property of the consenting parolee. As our Supreme Court noted in *Woods*: “It long has been settled that a consent-based search is valid when consent is given by one person with common or superior authority over the area to be searched; the consent of other interested parties is unnecessary. [Citations.] Warrantless consent searches of residences have been upheld even where the unmistakable purpose of the search was to obtain evidence against a nonconsenting coinhabitant. [Citations.]” (*Woods, supra*, 21 Cal.4th at pp. 675-676.)<sup>8</sup> And, as the *Baker* court noted: “When executing a parole or probation search, the searching officer may look into closed containers that he or she reasonably believes are in the complete or joint control of the parolee or probationer. [Citations.] . . . We acknowledge that passengers in automobiles have a lesser expectation of privacy in automobiles than in a residence.”<sup>9</sup> (*Baker, supra*, 164 Cal.App.4th at p. 1159.) Absolutely nothing in *Motley* undermines these holdings.

Fourth, and perhaps most importantly, the *Motley* court made clear that, as it issued its opinion, it was awaiting the United States Supreme Court’s decision in *Samson v. California* (2006) 547 U.S. 843 (*Samson*), a case as to which that court had granted review, and which involved the question of whether “the Fourth Amendment prohibit[s] police from conducting a warrantless search of a person who is subject to a parole search condition, where there is no suspicion of criminal wrongdoing and the sole reason for the search is that the person is on parole?” (*Motley, supra*, 432 F.3d at p. 1078, fn. 4.) But appellant nowhere cites, much less discusses, that court’s resolution of this issue in *Samson*, a case decided six months after *Motley*.

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<sup>8</sup> Appellant cites a portion of this passage in his opening brief to us.

<sup>9</sup> The United States Supreme Court has held similarly regarding the expectations of privacy accorded passengers in automobiles. (See, e.g., *Wyoming v. Houghton* (1999) 526 U.S. 295, 303 (*Houghton*) [“Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars . . . .”].)

In its clearly significant decision in *Samson*, the Supreme Court held that the Fourth Amendment was not violated by a “suspicionless search of a parolee” (*Samson, supra*, 547 U.S. at p. 857) when that person is, under California law, subject to a search condition *qua* parolee. (*Id.* at pp. 850-857.) The holding in *Samson* is key here because a similar consented-to search—of a vehicle being driven by a probationer—was conducted by Officer Rosenblatt in this case. And the Ninth Circuit now agrees that the law as laid down in *Samson* is controlling and, thus, “parole and probation conditions are . . . sufficient to justify the invasion of privacy entailed by a home search.” (*Sanchez v. Canales* (9th Cir. 2009) 574 F.3d 1169, 1174 & fn. 3; see also *United States v. Baker* (9th Cir. 2011) 658 F.3d 1050, 1056 [“a suspicionless search of a probationer does not violate the Fourth Amendment”] and *United States v. Bolivar* (2012) 670 F.3d 1091 (*Bolivar*).)<sup>10</sup> Ipso facto, the same applies to a search of an automobile being driven by a parolee or probationer, or where consent for such a search is otherwise provided by the car’s owner. (See, e.g., *Houghton, supra*, 526 U.S. at pp. 304-305; *Clark, supra*, 5 Cal.4th at p. 979.)

To sum up: the “probable cause” test being posited by appellant via his reliance on *Motley* is simply not applicable here: the prosecution does not have to show “probable cause” or even “reasonable suspicion” to search an area, whether a residence or a car, owned by or under the apparent control of a probationer or parolee subject to a search condition. (See, e.g., *Samson, supra*, 547 U.S. at pp. 850-857; *People v. Reyes* (1998) 19 Cal.4th 743, 748-754 (*Reyes*); *Woods, supra*, 21 Cal.4th at pp. 674-676; *People v. Ramos* (2004) 34 Cal.4th 494, 505-506; *People v. Gomez* (2005) 130 Cal.App.4th 1008, 1014-

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<sup>10</sup> In *Bolivar*, a panel of the Ninth Circuit made clear that *Motley* does not overrule in any way that court’s 1991 decision in *Davis* (see fn. 6, *ante*). Rather, the *Bolivar* court went to great lengths—indeed, several pages—to clarify its holding in *Motley*. In so doing, it made clear that *Motley* (a) did not overrule or change its holding in *Davis* and (b) applied the “probable cause” standard *only* to the question of whether a parolee resides at a particular address before conducting a search of that residence, i.e., *did not* apply that standard to the issue of police searches of items found in the residence. (*Bolivar, supra*, 670 F.3d at pp. 1094-1095.)

1017; *People v. Medina* (2007) 158 Cal.App.4th 1571, 1578-1580 (*Medina*);<sup>11</sup> *Baker*, *supra*, 164 Cal.App.4th at pp. 1158-1159; *People v. Moret* (2009) 180 Cal.App.4th 839, 851-852; 1 Erwin et al., *Cal. Criminal Defense Practice* (2011) § 22.08[3]; 4 Witkin & Epstein, *Cal. Criminal Law* (3d ed. 2000 & 2011 Supp.) *Illegally Obtained Evidence* §§ 51, 52 & 56; 5 LaFave, *Search & Seizure* (2011 Supp.) § 10.10.)<sup>12</sup>

The only remaining issue is whether an officer searching a vehicle driven by a probationer with a search condition may search any and all items in that vehicle or, to the contrary, must ask for specific permission to search an individual item or inquire as to the ownership of that item. The answer to this question is provided by several decisions of the United States Supreme Court and by the California authority noted earlier.

In the present case, Officer Rosenblatt had two bases to search the car Galamay was driving: (1) the latter was a probationer subject to a search condition and (2) he expressly said “that was fine” when asked by the officer if she could search his car. As noted above, our Supreme Court in *Clark* made clear that “objects left in an area of common use or control may be within the scope of the consent given by a third party for a search of the common area” and, additionally, that “by leaving his clothes readily displayed on the seat of Smith’s [the owner’s] car, defendant assumed the risk that Smith would consent to a search of the car and its contents. Defendant simply retained no legitimate privacy interest in the clothes as against Smith or Smith’s invitees.” (*Clark*, *supra*, 5 Cal.4th at p. 979; see also *Boyd* and *Smith*, quoted and discussed *ante* at pp. 4-8.)

The United States Supreme Court has held similarly, particularly regarding searches of automobiles. In *Houghton*, *supra*, 526 U.S. 295, that Court reversed a ruling by the Wyoming Supreme Court and held that the Fourth Amendment was not violated

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<sup>11</sup> In *People v. Olguin* (2008) 45 Cal.4th 375, 384, our Supreme Court quoted, clearly approvingly, this statement from *Medina*: “[A] suspicionless search pursuant to a probation search condition is not prohibited by the Fourth Amendment.”

<sup>12</sup> Unfortunately, with the exceptions of *Woods*, *Reyes*, and *Baker*, none of these authorities—and their very specific articulation of the “suspicionless search” permitted under the Fourth Amendment via a probation search condition—are cited in either of the parties’ briefs to us.

by searches of a car stopped in the early morning by the Wyoming Highway Patrol for speeding and having a faulty brake light. As in the present case, that car had three occupants, a male driver and two front-seat passengers, both women. (*Id.* at p. 298.) Having seen a “hypodermic syringe” in the male driver’s pocket, and hearing him admit that “he used it to take drugs,” the officers asked the two females to exit the car. Also as here, the ultimate defendant, Houghton, gave the officers a false name. Those officers, because of the driver’s admission, then searched the car and its contents, including a purse belonging to Houghton. There, they found both her identification *and* drugs and drug paraphernalia. (*Ibid.*) After Houghton’s conviction in a trial court, the Wyoming Supreme Court reversed that conviction because the officers did not know whether, in fact, the “ ‘container [was] the personal effect of a passenger who is not suspected of criminal activity . . . .’ ” (*Id.* at p. 299.)

The court reversed that ruling. In so doing, it held: “*When there is probable cause to search for contraband in a car, it is reasonable for police officers . . . to examine packages and containers without a showing of individualized probable cause for each one. A passenger’s personal belongings, just like the driver’s belongings or containers attached to the car like a glove compartment, are ‘in’ the car, and the officer has probable cause to search for contraband in the car. . . .* [¶] Whereas the passenger’s privacy expectations are, as we have described, considerably diminished, the governmental interests at stake are substantial. Effective law enforcement would be appreciably impaired without the ability to search a passenger’s personal belongings when there is reason to believe contraband or evidence of criminal wrongdoing is hidden in the car. As in all car-search cases, the ‘ready mobility’ of an automobile creates a risk that the evidence or contraband will be permanently lost while a warrant is obtained. [Citation.] In addition, a car passenger . . . will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing. [Citation.] A criminal might be able to hide contraband in a passenger’s belongings as readily as in other containers in the car [citation]—perhaps even surreptitiously, without the passenger’s knowledge or permission.” (*Houghton, supra,*

526 U.S. at pp. 302, 304-305 (italics added; see also the court’s unanimous opinion in *Maryland v. Pringle* (2003) 540 U.S. 366, 372-373 [owner and driver of a car stopped for speeding gave verbal consent to a search of his car, a search which produced drugs in a back-seat arm rest, drugs the defendant later admitted were his]; and *Illinois v. Rodriguez* (1990) 497 U.S. 177, 179, 185-186 [warrantless search of apartment valid when based on consent of a third party who police reasonably believed had common authority over the premises].)<sup>13</sup>

Aside from his substantial reliance on the “probable cause” standard applied in *Motley*, appellant’s main arguments in favor of reversal appear to be that: (1) even if consent is provided by a condition of probation, it is “limited to the scope of the consent given”; (2) it “is not entirely clear” whether the “probable cause” or “reasonable suspicion” standard applies in a case such as this, but whichever applies it was not followed here by Officer Rosenblatt; and (3) an officer searching personal property in a car he or she has properly stopped “must make some kind of inquiry in an effort to ascertain ownership of the item if he wishes to search it.”

The first two of these arguments fail on their face. Appellant does not even attempt to argue that the probation condition car-driver Galamay was operating under was in any way more limited than the general, broad probation search condition. (See, e.g., 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 558(3) & (4); *id.*, Illegally Obtained Evidence, §§ 51 & 52.) And, as the authorities cited above (see p. 12, *ante*) make clear, the operative standard here is neither “probable cause” or

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<sup>13</sup> In his reply brief to us, appellant attempts to distinguish *Houghton* and *Pringle* because, in his view, “they relate only to some identified criminal activity, some *wrongdoing* as justifying the search in question.” But the initial wrongdoing in both of those cases was speeding, similar to the unilluminated license plate here. Thereafter, in both cases, there was either visible criminal activity (drugs in the driver’s pocket in *Houghton*) or specific consent to a search (*Pringle*). Here, the car search was based on a proper stop and a justified “suspicionless search” because the driver (1) was subject to a warrantless probation search condition and (2) gave his specific, verbal consent to the search.

“reasonable suspicion,” but simply whether or not the probationer involved appears to own or control the property or car the police wish to search.

This final argument of appellant—that Officer Rosenblatt should have either asked permission to search the backpack or determined to whom it belonged—leads us back to the most recent California case on this subject, *Baker, supra*, 164 Cal.App.4th 1152. This case is cited several times by appellant in his briefs to us, but its rationale is simply inconsistent with appellant’s argument. In that case, our colleagues in the Fifth District cited both *Houghton* and *Rodriguez* in their thoughtful decision. As noted above, they held that the search of the purse of a woman passenger in a car being driven by a parolee with a search condition was unlawful *because* it was clearly and obviously “a distinctly feminine purse found on the passenger’s floorboard where Baker, the only female passenger, was seated.” (*Baker* at p. 1161.)

But before so ruling, the *Baker* court articulated the legal premises with which it was dealing. It wrote: “A third exception [to the Fourth Amendment’s requirement of probable cause] with potential application here permits warrantless searches even without probable cause where the officer has legally obtained adequate consent. [Citations.] In California, probationers and parolees may validly consent in advance to warrantless searches in exchange for the opportunity to remain on or obtain release from a state prison. (*Woods, supra*, at p. 674.) The California Supreme Court has repeatedly said such searches are lawful. (*Id.* at p. 675.) And, these searches have repeatedly been evaluated under the rules governing consent searches, albeit with the recognition that there is a strong governmental interest supporting the consent conditions—the need to supervise probationers and parolees and to ensure compliance with the terms of their release. [Citations.] ‘A consensual search may not legally exceed the scope of the consent supporting it. [Citation.] Whether the search remained within the boundaries of the consent is a question of fact to be determined from the totality of circumstances. [Citation.]’ [Citation.] [¶] Baker, however, was not on probation or parole. Therefore, the issue is whether the driver’s consent, given in advance as a condition of his parole, reaches Baker’s purse. Valid consent may be given by a third party who possesses

common authority over the property at issue. [Citation.] *‘It long has been settled that a consent-based search is valid when consent is given by one person with common or superior authority over the area to be searched; the consent of other interested parties is unnecessary. . . . [¶] . . . “[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.”* [Citations.] 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.” [Citations.]’ (*Woods, supra*, 21 Cal.4th at pp. 675–676.) [¶] *When executing a parole or probation search, the searching officer may look into closed containers that he or she reasonably believes are in the complete or joint control of the parolee or probationer.* [Citations.] *This is true because the need to supervise those who have consented to probationary or parolee searches must be balanced against the reasonable privacy expectations of those who reside with, ride with, or otherwise associate with parolees or probationers. We acknowledge that passengers in automobiles have a lesser expectation of privacy in automobiles than in a residence.* [Citation.]’ (*Baker, supra*, 164 Cal.App.4th at pp. 1158-1159, italics added.) Clearly, the only reason that summary of the law was not applied by the *Baker* court to the facts before it was because of the “distinctly feminine” nature of the “closed container” searched. (*Id.* at pp. 1159-1160.)

Citing *Baker* several times in his opening brief to us, appellant concludes by citing it after this argument: “Under these facts, since Officer Rosenblatt lacked even reasonable suspicion to believe the backpack in question was either owned by, or in the complete or joint control of the probationer, the search cannot be deemed to be valid.”

There are, as *Baker* and the other cases summarized above conclude, several things clearly wrong with this argument: (1) once Officer Rosenblatt determined that the

driver of the car was subject to a probation condition, what was involved here was a “suspicionless search” (see *Samson, supra*, 547 U.S. at p. 857) of his car justified by that condition, and not a search contingent upon either “probable cause” or “reasonable suspicion;” (2) contrary to the specific facts in *Baker*, there was nothing about the backpack (a “closed container” per *Baker*) lying behind appellant’s front passenger seat that clearly identified it as belonging to someone else. Put another way, it was not “distinctly feminine” but, rather, “gender neutral” in appearance (compare *Baker, supra*, 164 Cal.App.4th at p. 1161, with *Boyd, supra*, 224 Cal.App.3d at pp. 741, 745). And, finally: (3) consent to search the car was given by Galamay, the “person with common or superior authority over the area to be searched . . . .” (*Woods, supra*, 21 Cal.4th at p. 675.)

We conclude that, consistent with the law discussed above, the search of appellant’s backpack was appropriate under the circumstances and, therefore, his motion to suppress was properly denied.

#### IV. DISPOSITION

The judgment of conviction is affirmed.

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Haerle, J.

I concur in the judgment:

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Kline, P.J.



Concurring Opinion of Lambden, J.

I concur in the result for the following reasons.

Appellant challenges the denial of his motion to suppress evidence found in his backpack during a probation search of a third party. “In reviewing a suppression ruling, ‘we defer to the superior court’s express and implied factual findings if they are supported by substantial evidence.’ ” (*People v. Lomax* (2010) 49 Cal.4th 530, 563.) However, “ ‘we exercise our independent judgment in determining the legality of a search on the facts so found.’ ” (*Ibid.*)

The Fourth Amendment permits warrantless searches where the officer has legally obtained adequate consent. (See *People v. Woods* (1999) 21 Cal.4th 668, 674 (*Woods*), citing *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 219.) In California, probationers may validly consent in advance to warrantless searches to avoid service of a state prison term. (*Woods*, at p. 674.)

Though a probationer or a parolee waives his Fourth Amendment rights by agreeing to a search condition, such a condition does not give officers free rein to conduct indiscriminate or limitless searches. (See *Woods, supra*, 21 Cal.4th at p. 681.) Instead, such searches are limited in two ways. (See *ibid.*) First, searches remain limited in scope to the terms stated in the search clause. (*Ibid.*) Second, whatever the terms of the search condition, searches are always limited to those items over which the probationer exercises “complete or joint authority.” (*Ibid.*, citing *United States v. Matlock* (1974) 415 U.S. 164, 170-171.)

Despite these distinct limitations, it became apparent early on that probation and parole searches would implicate the Fourth Amendment rights of third parties who associated with probationers or parolees. (See, e.g., *People v. Alders* (1978) 87 Cal.App.3d 313, 317-318; *People v. Veronica* (1980) 107 Cal.App.3d 906, 908-909.) For instance, in *Alders* the Court of Appeal invalidated the search of a woman’s coat that was found in a probationer’s home during a standard probation search. (*Id.* at pp. 317-318.) The court concluded that the evidence found in the coat should have been suppressed

because “there was no reason to suppose that a distinctly female coat was jointly shared by [the woman who owned it] and [the probationer].” (*Ibid.*)

*People v. Veronica, supra*, 107 Cal.App.3d at pages 908-909, raised similar concerns. There, law enforcement agents found narcotics in a brown leather purse during a parole search. (*Id.* at p. 908.) The parolee moved to suppress the evidence seized in the purse on the grounds that “it was clearly the property of [his wife],” who was living with the parolee. (*Ibid.*) The trial court denied the motion, but the Court of Appeal reversed. (See *id.* at pp. 908-910.) The court invalidated the search of the purse because “there was simply nothing to overcome the obvious presumption that the purse” belonged to the parolee’s wife, and not to the parolee. (*Id.* at p. 909.)

Recognizing that probation and parole searches were burdening the rights of third parties, courts began to restrict their scope. (See *People v. Montoya* (1981) 114 Cal.App.3d 556, 561-563.) In *Montoya*, the Court of Appeal held that law enforcement officers must have “probable cause” to believe that an item belongs to the parolee before they search the item pursuant to his search condition. (*Id.* at pp. 562-563.) Other courts, however, pushed back. (See *People v. Palmquist* (1981) 123 Cal.App.3d 1, 11-13, disapproved on other grounds as stated in *People v. Williams* (1999) 20 Cal.4th 119, 135.) In *Palmquist*, the court rejected the probable cause standard, holding instead that officers needed only “reason to believe” that the item to be searched either belonged to or was jointly shared by the probationer. (*Palmquist*, at pp. 13-14 [upholding the search of a green ski parka found during a probation search because its appearance did not indicate that it belonged to the probationer’s female roommate].)

Today it is well-established that reasonable suspicion is the appropriate standard to determine whether a probationer or parolee jointly controls or owns an item.<sup>1</sup> (See

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<sup>1</sup> Contrary to appellant’s assertion, probable cause is not the appropriate standard. (See *Motley v. Parks* (9th Cir. 2005) 432 F.3d 1072, 1080 [requiring officers to have probable cause to believe that a parolee resides at a particular address before conducting a parole search].) *Motley* addressed the level of certainty required for officers to decide that they are entering the right residence. However, the opinion did not address the

*People v. Boyd* (1990) 224 Cal.App.3d 736, 750-751 (*Boyd*.) In *Boyd*, officers searched a trailer after receiving a tip that the owner, a parolee who had a standard search condition, was involved in drug activity. (*Id.* at p. 740.) At the time of the search the trailer was occupied by another parolee, who also had a search condition, and a woman, the appellant. (*Ibid.*) Officers found appellant’s handbag, which contained contraband. (*Ibid.*)

The Court of Appeal held that the search was appropriate because officers had “reasonable suspicion” that one or both of the parolees owned or controlled the handbag. (*Boyd, supra*, 224 Cal.App.3d at pp. 750-751.) Not only did the bag appear to be gender neutral, but officers found it on a bed which appeared to have been jointly occupied by the appellant and the second parolee. (*Ibid.*)

*People v. Baker*, on the other hand, applied the reasonable suspicion standard to determine that an officer unlawfully searched a purse found during a parole search. (*People v. Baker* (2008) 164 Cal.App.4th 1152, 1159-1160 (*Baker*.) In *Baker*, an officer searched a car after learning the driver, a male, had a standard search clause as a condition of his probation. (*Id.* at p. 1156.) The officer found a purse at the feet of the appellant, a woman sitting in the front passenger seat. (*Ibid.*) Inside the purse the officer found methamphetamine. Appellant moved to suppress the evidence found in the purse, but the trial court denied her motion. (*Ibid.*)

The Court of Appeal reversed, concluding that there could be “no reasonable suspicion” that the parolee either owned or jointly controlled the purse. (*Baker, supra*, 164 Cal.App.4th at p. 1159.) Although the officer did not know who the purse belonged to when he searched it, there was no basis to believe that a “distinctly feminine purse . . . belonged to [anyone other than] the sole female occupant.”<sup>2</sup> (*Id.* at pp. 1159-1160.)

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separate issue of the level of certainty that a parolee owns, possesses, or controls a particular item within the residence.

<sup>2</sup> I disagree with *Baker* to the extent it holds that during a parole or probation search an officer may look into closed containers “that he or she *reasonably believes* are in the complete or joint control of the parolee or probationer.” (See *Baker, supra*, 164 Cal.App.4th at p. 1159, italics added, citing *Woods, supra*, 21 Cal.4th at p. 682.)

Applying the foregoing principles, I conclude Officer Rosenblatt had reasonable suspicion that Galamay, the driver on probation, either owned or controlled appellant's backpack. Therefore, Rosenblatt's search of the backpack was lawful even though the backpack ultimately belonged to appellant. After asking the occupants to leave the vehicle, Rosenblatt found the backpack located in the backseat, directly behind the front passenger seat where appellant was sitting. As the driver, Galamay would only need to turn and reach behind the front passenger seat to retrieve the backpack; indeed, the trial court found that Galamay "ha[d] access to the items in the car." Thus, as in *Boyd*, Rosenblatt had reasonable suspicion that the probationer had complete, or at the very least joint, authority over the backpack.

*Baker* does not lead to a different result. First, unlike the distinctly feminine purse found in that case, nothing about the appearance of appellant's black backpack suggested that it was not under Galamay's complete or joint authority. In addition, the officer in *Baker* found the purse at the appellant's feet, further suggesting that it was in the appellant's sole possession. Here, Rosenblatt found the backpack in the backseat, behind the front passenger seat where appellant was sitting, and where it would have been relatively awkward for him to reach. Appellant's lack of immediate access to his backpack supported Rosenblatt's reasonable suspicion that Galamay either owned or controlled the backpack, which he could reach from the driver's seat with relative ease.

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In *Woods, supra*, 21 Cal.4th at page 682, our Supreme Court held that "officers generally may only search those portions of [a] residence they reasonably believe the probationer has complete or joint control over." *Woods* thus addressed the standard governing which areas or portions of a residence officers may search once properly inside the residence. However, *Woods* did not address the standard governing which containers officers may search once lawfully located in a particular area of the residence.

I do not hesitate to reach this conclusion because *Baker* goes on to apply reasonable suspicion, and not reasonable belief, to determine who owned or controlled the purse in that case. (*Baker, supra*, 164 Cal.App.4th at p. 1159 [concluding that "there could be no reasonable suspicion that the purse belonged to the driver, that the driver exercised control or possession of the purse, or that the purse contained anything belonging to the driver"].)

The fact that Rosenblatt did not know to whom the backpack belonged at the time of the search does not change our result. Although Rosenblatt could have done so, an officer does not have an affirmative duty to ask whether an item belongs to the probationer before searching it. (*Baker, supra*, 164 Cal.App.4th at p. 1160.) And here, there was nothing to overcome Rosenblatt's reasonable suspicion that Galamay either owned or had complete or joint authority over the backpack.

Since Rosenblatt could reasonably suspect that Galamay, the probationer, had complete or at least joint authority over appellant's backpack, I conclude that the search was lawful. I therefore affirm the trial court's denial of appellant's motion to suppress.

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Lambden, J.