

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LAURA LOUISE MOSBRUCKER,

Defendant and Appellant.

H037710

(Santa Clara County

Super. Ct. No. C1088131)

While conducting a parole search of defendant Laura Louise Mosbrucker's apartment in Milpitas, law enforcement officers found methamphetamine, scales, a handgun, and ammunition. Defendant moved to suppress the evidence, arguing that the search was unlawful because she was not on parole and the parolee whose status the officers relied on in conducting the parole search did not reside in her apartment.

After the court denied her motion to suppress, defendant entered into a negotiated plea agreement whereby she pleaded no contest to possession of methamphetamine for sale (Health & Saf. Code, § 11378; count 1) and possession of a firearm by a felon (former Pen. Code, § 12021, subd. (a)(1); count 2). As part of the plea agreement, the district attorney moved to dismiss counts 3 and 4 of the information, which charged defendant with possession of ammunition by a felon (former Pen. Code, § 12316, subd. (b); count 3) and misdemeanor being under the influence of a controlled substance

(Health & Saf. Code, § 11550, subd. (a); count 4). At sentencing, the court dismissed counts 3 and 4, suspended imposition of sentence on counts 1 and 2, and placed defendant on probation for three years, subject to several conditions, including that she serve one year in the county jail. Months later, after she was found to have violated the conditions of her probation, defendant was sentenced to the lower term (one year four months) on count 1, plus the lower term (one year four months) concurrent on count 2. In light of her custody credits, the sentence was deemed served and defendant was released from custody.

On appeal, defendant contends that her trial counsel was ineffective because he failed to properly argue and litigate the motion to suppress. She also challenges the validity of the search and argues that the court applied the wrong legal standard when it decided the motion. We conclude that the court applied the correct legal standard, that the search was valid, and that trial counsel was not ineffective. We will therefore affirm the judgment.

Defendant has also filed a petition for writ of habeas corpus, which we ordered considered with the appeal, in which she claims ineffective assistance of counsel related to the motion to suppress. We have disposed of the petition by separate order filed this date. (Cal. Rules of Court, rule 8.387(b)(2)(B).)

FACTS¹

Prosecution's Case

On September 23, 2010, at about 7:00 a.m., Milpitas Police Sergeant Maharaj told Milpitas Police Detective Fox that he had received an anonymous tip that one to two kilos of methamphetamine was being stored at a residence on Old Calaveras Road in the Milpitas foothills. Sergeant Maharaj gave Detective Fox a copy of an Internet map with

¹ Unless otherwise noted, the facts are based on the evidence presented at the hearing on the motion to suppress.

an aerial photo he received from the tipster, showing the residence, along with defendant's name and the name "Skip," and told the detective that a gray truck and an older green car would be parked at the residence.

Detective Fox did a computer check on defendant and learned that she had prior felony convictions, including possession of narcotics (Health & Saf. Code, § 11377, subd. (a)), and that she used the alias "Skip." Detective Fox drove along Old Calaveras Road and found a residence that looked like the one in the aerial photo, with two vehicles that fit Sergeant Manharaj's description parked outside, on an 11-acre farm located on Old Calaveras Road. Further investigation revealed that there were three dwelling units on the property, that two parolees lived there, and that Nathan Jackson was one of the parolees and the landlord.

Detective Fox spoke with Jackson by telephone. Jackson told him that defendant had lived in apartment B for about a month, that defendant's boyfriend was in jail, and that "Paul" (the boyfriend's brother) was staying there. Jackson described Paul as a white male in his thirties. Jackson had spoken to Paul and learned that Paul was on parole, had cancer, and was staying with defendant while defendant's boyfriend was in jail. Jackson said he believed Paul lived there and he had seen Paul taking care of two large dogs that were in the apartment.

A few weeks before this investigation, Detective Fox received information from an informant that a person named Paul, who lived on Calaveras Road and had cancer, was engaged in fraudulent activity, and that his residence contained items used to create counterfeit money.

Detective Fox started to surveil the property. After about 30 minutes, around 10:24 a.m., he saw the truck that had been parked there driving on Calaveras Road and noticed that it did not have a front license plate in violation of Vehicle Code section 5200, subdivision (a). Defendant was driving the truck; Detective Fox recognized her from booking photos he reviewed earlier that day. Since he was in an unmarked car,

he called for a marked police unit to conduct a traffic stop for the license plate violation. A Milpitas police officer pulled the truck over in a parking lot. Detective Fox contacted defendant and noticed that she had objective symptoms of being under the influence of a stimulant. (At the hearing, defendant stipulated that she demonstrated the effects of being under the influence of methamphetamine.)

Paul Franks² was a passenger in the truck at the time of the traffic stop. One of the officers who responded to the traffic stop told Detective Fox that Franks was on parole. A Milpitas police dispatcher confirmed that Franks was on parole for a forgery conviction. After Detective Fox learned the passenger's name, he recalled the information he had received about a suspect named Paul who was engaged in fraud. He also recalled that he arrested Franks in 2007 on fraud, narcotics, and stolen vehicle charges.

Detective Fox asked defendant if Franks lived with her. She said Franks stayed with her a couple of times a week but did not live with her. She said he arrived at 5:00 a.m. that morning and she was taking him to see his parole officer. Detective Fox asked defendant whether she had used narcotics and she said she had not used methamphetamine in quite some time. But her physical symptoms contradicted what she was saying. Detective Fox administered field sobriety tests, which defendant failed. Detective Fox arrested defendant for being under the influence of a narcotic.

Detective Fox spoke with Franks at the scene of the traffic stop. Franks said he was on his way to see his parole officer and to pick up medication from his doctor. Franks displayed objective symptoms of being under the influence of a stimulant; he was unable to stand still, spoke rapidly, and was sweating. The detective asked Franks

² Franks is described in the record as both "Paul Frank" and "Paul Franks." We shall use the surname "Franks," since that is the spelling used in written submissions to the court and in his records from the Department of Corrections and Rehabilitation, which were in evidence at the hearing on the motion to suppress.

whether he had recently used narcotics and Franks said he had used methamphetamine about two days before. Detective Fox also asked Franks where he was living. Initially, Franks said he lived with his mother in San Jose, at the address on file with his parole officer. Later, Franks said he was staying with defendant two to three times a week, he had slept there before, he stayed there to take care of his brother's dogs, and he kept medication at defendant's apartment and a toothbrush in the bathroom. Detective Fox testified that based on his training and experience, parolees often have an address of record but take up residence at another location that is not reported to the parole department. Detective Fox believed Franks was staying at defendant's residence. Detective Fox asked Franks if he had anything illegal on his person. Franks said he had "weed" in his pocket. The detective searched Franks and found a marijuana cigarette in his pants pocket.

Detective Fox contacted Franks's parole officer, Camilo Monsanto, who confirmed that Franks was supposed to report to the parole office that day. Monsanto told the detective that Franks had reported that he was living with his mother in San Jose. Detective Fox told Monsanto that he had information that Franks was staying at another residence in Milpitas and that he planned to conduct a parole search of that residence. Monsanto did not object to the search.

Detective Fox requested the assistance of a canine officer from the Fremont Police Department. Fremont Police Officer Snelson and his dog Cris, a certified narcotics detection canine, came to the scene of the traffic stop to help search defendant's truck. Before they searched, Detective Fox obtained defendant's permission to search the truck. The officers found counterfeit money (fifteen \$20 bills) concealed in the lining of the front passenger seat. Officer Snelson and Cris searched the truck and did not find any drugs. Detective Fox arrested Franks for being in possession of marijuana and counterfeit money. Defendant and Franks were transported to the Milpitas police station.

The officers next went to defendant's apartment to conduct a parole search pursuant to Franks's parole search condition. Detective Fox testified that at the time of the search, he had reason to believe Franks was residing in defendant's apartment based on (1) Franks's statement that he was staying there two or three times a week; (2) Franks's statement that he kept a toothbrush and medication there; (3) the landlord's statement that he had seen Franks at the property; (4) the information the landlord provided about Franks (he had cancer, he was on parole); and (5) the information that someone named "Paul" who lived on Calaveras Road was involved in fraudulent activity.

Officer Snelson, Detective Hernandez, and Detective Prudy helped Detective Fox search defendant's apartment. Detective Fox arranged for animal control officers to be present, since Jackson said there were dogs in the apartment. Defendant lived in a one-bedroom, one bath apartment. The officers used defendant's key to open the front door, which opened into the kitchen, which was connected to the living room. On the east side of the living room was a doorway that led to the bedroom; the door to the bathroom was in the bedroom. Thus, the bathroom was only accessible through the bedroom.

As he entered, Detective Fox saw men's clothing in the living room, on the chair at the computer desk and near a dresser. There was a computer, multiple printers, and a photograph of Franks on the living room wall. Two large pit bulls were present and the animal control officers took custody of the dogs.

Detective Fox testified that the information he had received indicated possible drug trafficking and that based on his experience and training, individuals involved in drug trafficking often keep weapons. In addition, the officers had no idea whether anyone was inside the apartment. The officers therefore conducted a protective sweep of the apartment as they entered. During the protective sweep, the narcotics dog alerted on a safe that was in the bedroom, near the open doorway between the living room and the bedroom.

After the dog alerted on the safe, Detective Fox contacted the police station and had one of the officers ask defendant about the safe. Defendant said the safe belonged to her boyfriend, who was in jail, and she did not have the combination to the safe. Detective Fox testified that the safe was in an area of the apartment that Franks had access to because it was along the pathway to the bathroom and “the only way to get to the bathroom was to walk through the bedroom” Detective Fox decided to obtain a search warrant to search the safe and the rest of the apartment for narcotics. Detective Fox reasoned that the officers could search the living room because it appeared that Franks used that room. However, he did not believe they could search defendant’s bedroom because she was not on parole, she had no search conditions, and they did not have a search warrant.

While waiting for the warrant, the officers searched the living room. They found: (1) prescription bottles with Franks’s name on them; (2) a letter addressed to Franks at his San Jose address; (3) a card addressed to Franks at the county jail and a note addressed to Franks; (4) a man’s shoe; (5) a toothbrush, toothpaste, cologne, men’s deodorant, and foot powder in the television stand; (6) printers with paper similar to that used to print the counterfeit money in defendant’s truck; (7) counterfeit \$20 bills in a printer and in a black bag near the computer; and (8) a pillow and one or two blankets on the floor.

On cross-examination, Detective Fox testified that only defendant’s name was on the rental agreement, that he did not believe Franks had a key to defendant’s apartment, and that he never saw Franks enter or leave the apartment.

At the preliminary hearing, Detective Fox testified that after the officers obtained a warrant, they searched the safe, the bedroom, and the bathroom. Inside the safe, they found two digital scales with crystal methamphetamine residue; a Colt semi-automatic, nine-millimeter handgun; and nine-millimeter ammunition. In the bathroom vanity, they found a plastic bag with five grams of crystal methamphetamine, a usable amount. The

prosecution included these facts in its written opposition to the motion to suppress. But at the special hearing on the motion, neither party adduced any evidence regarding the results of the search of the safe or the bathroom, except for Detective Fox's testimony that Exhibit 3 (a photograph) showed "the safe where the gun was found."

Defendant's Case

Jackson testified that he leased the property on Old Calaveras Road; that the dwelling was originally a seven-bedroom, four-bath house; and that he turned some of the bedrooms into apartments. Defendant rented apartment B on August 19, 2010; she was the only tenant listed on the rental agreement. They had an oral agreement that if anyone else lived there, she would have to pay more rent to cover increased utility costs. Jackson recalled seeing Franks at the apartment twice; Franks helped defendant move in and was there one other time for a barbecue. Franks did not move in with defendant. Jackson entered the apartment twice during the first week that defendant lived there and did not see any indication that Franks was living there. Jackson never heard male voices in defendant's apartment. He could not recall whether defendant had any dogs.

Jackson recalled speaking with Detective Fox about defendant. Jackson denied making any of the statements that the detective attributed to him about Franks. According to Jackson, Detective Fox said he wanted to enter defendant's apartment and asked if Jackson had a key. Jackson and defendant had the only two keys to the apartment.

Jackson was on parole for attempted murder and testified that although he was found guilty in a jury trial, he did not commit the offense. He had five or six other felony convictions; his last felony conviction was in 1989. He was convicted of misdemeanor domestic violence in 2010 and misdemeanor engaging in an act of prostitution in 2008.

Parole officer Monsanto testified he had been Franks's parole officer since December 2009 and that Franks's residence of record was his parents' home in San Jose. Franks visited his parole officer monthly. Each time, he went to Monsanto's office and

was tested for drugs. Every other month, after the office visit, Monsanto drove Franks to his San Jose address and conducted a home visit. The majority of parole visits are prearranged; the only time visits are unannounced is when the parole agent suspects the parolee is lying or involved in prohibited activity. Monsanto did not make any unannounced visits in Franks's case. Other than the monthly visits, Monsanto did not track Franks's whereabouts or activities. He did not have any information that suggested that Franks lived anywhere other than his residence of record before Detective Fox called him. In April 2010, Franks was arrested for possession of fictitious bills and counterfeit dye. The offense was treated as a parole violation and Franks spent three or four months in jail.

Defendant testified. When she rented the apartment, she told Jackson that her boyfriend was in custody. Franks was not her boyfriend; Franks and her boyfriend are not brothers, just friends. Franks was not staying with her; he just helped her move in. Franks did not have a vehicle, did not have a key to her apartment, and did not take care of the dogs; the most he did was walk the dogs and take them out "a couple times." Defendant also testified that she could not take the dogs out because there were other dogs on the property and her dogs were "other-dog aggressive" and hard to control.

Defendant testified that she let Franks spend the night once because she did not feel like driving him "back down" to San Jose. Later, she said he stayed with her "two or three times" during the month she lived there; "three times . . . total." Defendant denied telling Detective Fox that Franks stayed with her two or three times a week. The men's clothing and toiletries in her apartment belonged to her boyfriend and Franks did not have much personal property there, except for his medication. She never saw counterfeit money in her apartment and did not know anything about alleged fraudulent activity there. She agreed one would have to walk past the safe to get to her bathroom.

MOTION TO SUPPRESS

After the preliminary hearing, defendant filed a motion to suppress the evidence found in her bedroom and bathroom.

The prosecution opposed the motion, arguing that the officers lawfully detained defendant based on a reasonable suspicion that she had violated the Vehicle Code, lawfully arrested her based on a reasonable suspicion she was under the influence of a controlled substance, and lawfully conducted a parole search of her apartment based on a reasonable belief that a parolee resided there. They argued that the safe was found during a protective sweep of the residence, that the parole search was limited to areas within the parolee's joint control, and that the officers lawfully searched the bedroom and bathroom after obtaining a search warrant.

In reply, defendant argued that the warrantless search of her apartment was not justified by Franks's parole status since the officers did not have probable cause to believe Franks lived there and that the warrant was obtained as a result of an unreasonable parole search. Defendant argued that Franks did not have a key, his name was not on the rental agreement, he did not receive mail at her apartment, the officers did not conduct surveillance of either the Milpitas apartment or Franks's San Jose address to corroborate the allegation that Franks lived with her, and that even if Franks stayed there a few times a week, occasional overnight stays are not enough to establish probable cause. Defendant also argued that even if Franks lived in the apartment, the evidence suggested that he used the living room and defendant used the bedroom, which was insufficient to justify the search of her bedroom.

The trial court denied the motion to suppress. The court held that defendant's statements, along with those of Franks and Jackson, "gave the officers a reasonable suspicion that the parolee had sufficiently frequent joint control over shared common areas of the apartment such that they could be searched pursuant to his search condition." Citing case law, the court specifically referred to the "reasonable belief standard." The

court stated, “Based on further statements, and given that the layout of the apartment required one to walk from the living room, (the parolee’s area,) through Defendant’s bedroom, to reach the only bathroom, it was reasonable to believe that the parolee had access to these areas. A frequent overnight guest would necessarily be given access to the only bathroom and the pathway to reach it. Because it was from these locations that the evidence in question was obtained (the methamphetamine and the narcotics dog’s alert on the safe) there was no violation of Defendant’s Fourth Amendment rights.”

DISCUSSION

Defendant contends that her trial counsel was ineffective because he “failed to properly argue and litigate the motion to suppress.” In the introductory portion of her argument, defendant asserts three errors by trial counsel: “First, trial counsel failed to introduce any evidence at the suppression hearing regarding the seizure of the evidence. . . . Second, trial counsel did not argue that the dog sniff was unlawful, because it was not supported by probable cause. Third, trial counsel did not argue that the affidavit in support of the warrant should have been redacted, to eliminate information pertaining to the dog sniff, and retested for probable cause.”³ Defendant argues that counsel’s ineffective assistance was unduly prejudicial and that if the motion

³ However, defendant’s argument headings are different from these three contentions. The single main argument heading in her brief is: “APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL . . . SINCE TRIAL COUNSEL FAILED TO PROPERLY ARGUE AND LITIGATE THE MOTION TO SUPPRESS EVIDENCE.” Defendant’s argument subheadings are: “A. Police Officers had No Probable Cause to Believe that the Parolee was a Resident in Appellant’s Home. . . . [¶] B. The Trial Court Used the Wrong Test in Determining the Legality of the Parole Search. . . . [¶] C. Even if the Parole Search of Appellant’s Living Room was Permissible, the Dog Sniff Performed in the Bedroom was Illegal, as it was not Supported by Probable Cause or Conducted within a Lawful Protective Sweep. . . . [¶] D. Absent Evidence of the Dog Sniff of the Safe, the Remaining Information in the Affidavit in Support of the Search Warrant was Insufficient to Establish Probable Cause for the Search of the Residence.”

had been properly litigated, it would have been granted. Defendant also argues “[n]otwithstanding trial counsel’s ineffective assistance, the trial court erred when it denied [the] motion to suppress” because there was no probable cause to believe a parolee lived in defendant’s apartment or had control over the areas searched and because the court applied the wrong test to determine the legality of the parole search. We begin by addressing defendant’s contentions regarding the validity of the search, since resolution of those points impacts our review of the ineffective assistance of counsel claim.

I. Validity of the Parole Search

A. Standard of Review for Motions to Suppress

“As the finder of fact in a proceeding to suppress evidence (Pen. Code, § 1538.5), the superior court is vested with the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences in deciding whether a search is constitutionally unreasonable.” (*People v. Woods* (1999) 21 Cal.4th 668, 673 (*Woods*)). On appeal, all factual conflicts must be resolved in the manner most favorable to the trial court’s disposition. (*Ibid.*)

“The standard of appellate review of a trial court’s ruling on a motion to suppress is well established. We defer to the trial court’s factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment.” (*People v. Glaser* (1995) 11 Cal.4th 354, 362 (*Glaser*)); accord, *People v. Panah* (2005) 35 Cal.4th 395, 465.) In assessing the reasonableness of searches and seizures, we apply federal constitutional standards. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1156, fn. 8.) In the trial court, the “prosecution has the burden of establishing the reasonableness of a warrantless search” by a preponderance of the evidence. (*People v. Jenkins* (2000) 22 Cal.4th 900, 972; *People v. James* (1977) 19 Cal.3d 99, 106, fn. 4, citing *United States v. Matlock* (1974) 415 U.S. 164, 177-178,

fn. 14 (*Matlock*.) On appeal, the appellant bears the burden of demonstrating error. (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 718.) We will affirm the trial court’s ruling if it is correct on any applicable theory of law. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)

B. General Search and Seizure Principles

The Fourth Amendment to the United States Constitution bans all unreasonable searches and seizures. (*United States v. Ross* (1982) 456 U.S. 798, 825.) “The ultimate standard set forth in the Fourth Amendment is reasonableness.” (*Cady v. Dombrowski* (1973) 413 U.S. 433, 439; *Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 652 (*Vernonia School Dist.*.) “The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.” (*Bell v. Wolfish* (1979) 441 U.S. 520, 559.) “The inquiry is substantive in nature, and consists of a subjective and an objective component.” (*People v. Ayala* (2000) 23 Cal.4th 225, 255.) To claim Fourth Amendment protection, the defendant must show “ ‘a subjective expectation of privacy that was objectively reasonable.’ [Citation.]” (*Ibid.*) “ ‘[Whether] a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case.’ ” (*South Dakota v. Opperman* (1976) 428 U.S. 364, 375.)

“Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant, [citation].” (*Vernonia School Dist., supra*, 515 U.S. at p. 653.) Thus, the general rule is that “ ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’ ” (*Arizona v. Gant* (2009) 556 U.S. 332, 338.) Those exceptions include searches conducted under the auspices of a properly imposed parole search condition.

C. Parole Searches

Parolees are automatically subject to the condition that parole agents and other law enforcement officers may search them and their residences at any time without a warrant. (Former § 3067, subd. (a)⁴; see also *People v. Lewis* (1999) 74 Cal.App.4th 662, 668.) This statutory requirement is constitutional. (*Samson v. California* (2006) 547 U.S. 843 (*Samson*)). Therefore, police officers may make a warrantless search of the residence of a parolee, even in the absence of particularized suspicion of criminal activity. (*People v. Reyes* (1998) 19 Cal.4th 743, 753 (*Reyes*)). However, “ ‘a parole search could become constitutionally “unreasonable” if made too often, or at an unreasonable hour, or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the searching officer.’ [Citations.]” (*Id.* at pp. 753-754.)

In *Reyes, supra*, 19 Cal.4th at p. 754, our State Supreme Court explained that “even in the absence of particularized suspicion, a search conducted under the auspices of a properly imposed parole search condition does not intrude on any expectation of privacy ‘society is “prepared to recognize as legitimate.” ’ [Citations.]” The court recognized “that whether the parolee has a reasonable expectation of privacy is inextricably linked to whether the search was reasonable. 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.” (*People v. Sanders* (2003) 31 Cal.4th 318, 333 (*Sanders*)). In *Reyes*, the court observed, “The level of intrusion is de minimis and the expectation of privacy greatly reduced when

⁴ From 1996 until the time of the events at issue, former Penal Code section 3067, subdivision (a), provided: “Any inmate who is eligible for release on parole pursuant to this chapter shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.” (Stats. 1996, ch. 868, § 2; see Historical and Statutory Notes, 51B, pt. 2, West’s Ann. Pen. Code (2012 supp.) foll. § 3067, p. 48.)

the subject of the search is on notice that his activities are being routinely and closely monitored. Moreover, the 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.” (*Reyes, supra*, at p. 753.) The court held that “a parole search may be reasonable despite the absence of particularized suspicion.” (*Ibid.*)

Although “ ‘a person subject to a search condition has a severely diminished expectation of privacy . . . those who reside with such a person enjoy measurably greater privacy expectations in the eyes of society.’ ” (*Sanders, supra*, at p. 329, citing *People v. Robles* (2000) 23 Cal.4th 789, 798 (*Robles*).)

The validity of a search does not turn on the actual subjective motivations of the officers involved. Instead, the reasonableness of the search is determined based upon “ ‘an objective assessment of an officer’s actions in light of the facts and circumstances known to [the officer]’ ” when the search is conducted. (*Sanders, supra*, 31 Cal.4th at p. 334, citing *Scott v. United States* (1978) 436 U.S. 128, 137 and other cases.)

“ ‘The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined “by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” [Citation.]’ [Citation.]” (*Sanders, supra*, 31 Cal.4th at p. 333, quoting *United States v. Knights* (2001) 534 U.S. 112, 118-119.) “A suspicionless parole search is constitutionally permissible because the parolee lacks a legitimate expectation of privacy and the state has a substantial interest in supervising parolees and reducing recidivism.” (*People v. Hunter* (2006) 140 Cal.App.4th 1147, 1152.)

D. The Trial Court Applied the Proper Test for Determining the Validity of the Parole Search

Defendant contends the trial court used the wrong test in determining the legality of the parole search. She argues “the trial court erred when it found that the search was

justifiable because the officers had ‘reasonable suspicion’ that [Franks] resided in [defendant’s apartment].” Citing *United States v. Franklin* (9th Cir. 2010) 603 F.3d 652 (*Franklin*), defendant argues that “an officer must have probable cause – not ‘reasonable suspicion’ – to believe that a parolee is living at an unreported address, before that address may be searched under [a] parole search clause.” We disagree.

The defendant in *Franklin* was subject to “community custody” under Washington state law, which the appellate court assumed was the equivalent of probation. (*Franklin, supra*, 603 F.3d at p. 654 & fn. 1.) The defendant’s community custody agreement authorized “ ‘search and seizure of [his] person, residence, automobile, or other personal property [without a warrant upon] reasonable cause . . . to believe’ ” that he had violated the conditions of his community custody. (*Id.* at p. 655.) The issue in *Franklin* was whether the officers, who searched his motel room, had sufficient basis to believe that the motel room was the defendant’s residence. Quoting *Motley v. Parks* (9th Cir. 2005) 432 F.3d 1072, 1080 (*Motley*) (overruled on another ground in *United States v. King* (9th Cir. 2012) 687 F.3d 1189), the court held that before conducting a warrantless parole search of a residence, “ ‘law enforcement officers must have probable cause to believe that the parolee is a resident of the house to be searched.’ ” (*Franklin*, at p. 656.)

The Court of Appeal for the Fourth District, Division Two, recently addressed the applicability of the probable cause standard to the determination of residency in *People v. Downey* (2011) 198 Cal.App.4th 652 (*Downey*). The defendant in *Downey*, Kima Rashan Downey, argued that the trial court erred in denying his motion to suppress because the officers who searched his apartment did not have a “good faith belief” that probationer George Roussell resided there and asked the court “to adopt the probable cause standard from several cases holding that entry of a home pursuant to an arrest warrant requires probable cause to believe the defendant is inside.” (*Id.* at pp. 657, 660.) Reviewing case law on point, the court declined to adopt such a standard. (*Id.* at pp. 661-662.)

Citing *Payton v. New York* (1980) 445 U.S. 573, 603, the court explained, “An arrest warrant ‘founded on probable cause’ that the suspect has committed a crime gives law enforcement officers ‘the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.’ [Citations.]” (*Downey, supra*, 198 Cal.App.4th at pp. 660-661.) The court observed that seven federal appellate courts had adopted a “reasonable belief” standard and that most had held that “the ‘reason to believe’ standard is satisfied by something less than would be required for a finding of ‘probable cause.’ ” (*Id.* at p. 661 & fn. 3, citing *U.S. v. Thomas* (D.C. Cir. 2005) 429 F.3d 282, 286 (*Thomas*); *Valdez v. McPheters* (10th Cir. 1999) 172 F.3d 1220, 1225–1226; *U.S. v. Route* (5th Cir. 1997) 104 F.3d 59, 62; *U.S. v. Risse* (8th Cir. 1996) 83 F.3d 212, 216 (*Risse*); *U.S. v. Lauter* (2d Cir. 1995) 57 F.3d 212, 215; *U.S. v. Magluta* (11th Cir. 1995) 44 F.3d 1530, 1535; *U.S. v. Graham* (1st Cir. 2009) 553 F.3d 6, 12.) The court concluded that “[t]he majority of circuits have interpreted *Payton* to mean that officers entering a residence to execute an arrest warrant must have a ‘reasonable belief’ that the targeted suspect (1) lives at that residence, and (2) is within the residence at the time of their entry.” (*Downey*, at p. 661.) The court observed that among the circuits that have directly confronted the issue, only the Ninth Circuit “has adopted a different standard, holding that *Payton* requires police officers to have probable cause that a suspect lives at the residence in question and is present at the time of their entry.” (*Ibid.*, citing *U.S. v. Gorman* (9th Cir. 2002) 314 F.3d 1105, 1110 (*Gorman*) & *Motley, supra*, 432 F.3d at p. 1080.) *Downey* concluded that *Gorman* was not persuasive. Borrowing the District of Columbia Circuit’s observation in *Thomas*, the *Downey* court stated, “‘[w]e think it more likely . . . that the Supreme Court in *Payton* used a phrase other than ‘probable cause’ because it meant something other than ‘probable cause.’ ” [Citations.]” (*Downey*, at p. 661, citing *Thomas, supra*, 429 F.3d at p. 286.)

Downey applied the reasonable belief test to the question whether a probationer resided in a particular place and noted that “California case law is clear that the

appropriate test is whether the facts known to the officers, taken as a whole, gave them *objectively reasonable grounds to believe* that Roussell lived at the apartment. [Citations.]” (*Downey, supra*, 198 Cal.App.4th at pp. 661-662, citing *Robles, supra*, 23 Cal.4th at pp. 795–796; *Woods, supra*, 21 Cal.4th at pp. 673–682; *People v. Tidalgo* (1981) 123 Cal.App.3d 301, 306–307 (*Tidalgo*); & *People v. Palmquist* (1981) 123 Cal.App.3d 1, 11–12 (*Palmquist*), disapproved on another point in *People v. Williams* (1999) 20 Cal.4th 119, 135.) Following *Downey*, we conclude that the reasonable belief standard applies.

In this case, although the court used the phrase “reasonable suspicion,” it referred specifically to the “reasonable belief standard” and cited *Woods* in its order. For these reasons, we reject defendant’s contention that this case must be reversed or remanded because the court applied the wrong legal standard in deciding the motion to suppress.

E. Sufficiency of the Evidence to Support a Reasonable Belief the Franks Resided with Defendant

Defendant contends the officers had no probable cause to believe that the parolee was a resident of her home. We address this contention applying the reasonable belief standard.

“[W]hether a search is reasonable must be determined based upon the circumstances known to the officer when the search is conducted.” (*Sanders, supra*, 31 Cal.4th at p. 334.) As the court explained in *Downey*, “ ‘It is settled that where probation officers or law enforcement officials are justified in conducting a warrantless search of a probationer’s residence, they may search a residence reasonably believed to be the probationer’s. [Citations.] [T]he question of whether police officers reasonably believe an address to be a probationer’s residence is one of fact, and we are bound by the finding of the trial court, be it express or implied, if substantial evidence supports it.’ ” (*Downey, supra*, 198 Cal.App.4th at p. 658, quoting *Palmquist, supra*, 123 Cal.App.3d at pp. 11–12; *Woods, supra*, 21 Cal.4th at pp. 673–682; & *Tidalgo, supra*, 123 Cal.App.3d

at pp. 306–307.) “Additionally, the California Supreme Court has held that a warrantless search of a probationer’s house, undertaken to discover incriminating evidence against a third party residing there, is not constitutionally invalid if the circumstances, viewed objectively, justified the officer’s actions.” (*Downey*, at p. 658, citing *Woods*, at pp. 671–672.) “In *Woods*, the officers relied on a probationer’s search condition to justify a search designed to obtain evidence against her boyfriend, who shared the residence. The court noted that a probationer consents in advance to warrantless residential searches, conducted without reasonable suspicion or probable cause. ([*Woods*,] at pp. 674–675.) Thus, the officers could search all portions of the residence over which they reasonably believed the probationer exercised control. (*Id.* at pp. 676, 681, 682.)” (*Downey*, at p. 658.) Although *Downey* addressed the validity of a probation search, the United States Supreme Court held in *Samson*, *supra*, 547 U.S. at page 850 that “parolees have fewer expectations of privacy than probationers.” We, therefore, apply the same analysis to the parole search in this case.

In *Risse*, *supra*, 83 F.3d at page 217, the court found no authority to support the defendant’s assumption that a person can have only one residence for Fourth Amendment purposes and reasoned that, so long as a third party “possesses common authority over, or some other significant relationship to, the . . . residence, . . . that dwelling ‘can certainly be considered [his] “home” for Fourth Amendment purposes, . . . even if [the third party] concurrently maintains a residence elsewhere as well.’”

At the time of the parole search, the police had the following information. Defendant’s landlord, Jackson, told Detective Fox that a parolee named “Paul” was staying with defendant. He described Paul as defendant’s boyfriend’s brother; Jackson said Paul had cancer, said he believed Paul lived there, and said he had seen Paul taking care of defendant’s dogs. Detective Fox also had information that a person named Paul, who lived on Calaveras Road and had cancer, was engaged in fraudulent activity and that his residence contained items used to counterfeit money. At the traffic stop, defendant

told Detective Fox that Franks stayed with her a couple of times a week. Franks also told the detective he stayed with defendant two to three items per week and said he stayed there to take care of his brother's dogs. Franks told Detective Fox he kept medication at the apartment and a toothbrush in defendant's bathroom. At the traffic stop, both defendant and Franks appeared to be under the influence of a stimulant and the officers found counterfeit money in the passenger seat of defendant's truck. These facts tended to corroborate the tips the officers had received about illegal activity at defendant's apartment and "Paul's" residence on Calaveras Road. This information, obtained from various corroborative sources, was sufficient to support a reasonable belief that Franks used defendant's apartment as a second residence and that he resided there two or three days a week. The landlord assumed he lived there, had seen him caring for the dogs, and was familiar with him. Both defendant and Franks said Franks stayed there part of the week, and he kept medication and a toothbrush there.

Citing *United States v. Howard* (9th Cir. 2006) 447 F.3d 1257 (*Howard*), defendant argues that the officers did not have probable cause to believe that Franks resided in her apartment. In *Howard*, the court reviewed four Ninth Circuit cases that upheld the search of an address not reported by a parolee, and identified four factors that support the conclusion that the police had probable cause to believe that a parolee was residing at a particular location. (*Id.* at pp. 1262-1266.) As summarized in a later Ninth Circuit decision, those factors include: " 'First, in each of these cases the parolee did not appear to be residing at any address other than the one searched. In three of these four cases, the parolee had reported a different address, but officers had good reason to believe that he was not actually residing at the reported address. . . . [¶] Second, in each of these four cases, the officers had directly observed something that gave them good reason to suspect that the parolee was using his unreported residence as his home base[.] . . . [¶] Third, in each of [these cases] the parolee had a key to the residence in question. . . . [¶] Lastly, in two of these cases, either the parolee's co-resident or the parolee himself

identified the residence in question as that of the parolee.’” (*Cuevas v. De Roco* (9th Cir. 2008) 531 F.3d 726, 734 (*per curiam*), quoting *Howard, supra*, 447 F.3d at pp. 1265-1266.)

Defendant argues that the facts do not support a parole search of her residence under the *Howard* factors. She argues there was evidence Franks lived at his parents’ home in San Jose, there was no evidence he used defendant’s apartment as a home base, and he did not have a key. As for the fourth factor, she argues there was conflicting evidence on the question whether Franks stayed at her apartment two or three nights a week, citing her testimony and Jackson’s testimony at the hearing on the motion to suppress.

Defendant’s reliance on *Howard* is misplaced for a number of reasons. First, *Howard*’s analysis is based on the probable cause test. Second, *Howard* reviewed a small sample of Ninth Circuit cases; its survey did not include cases from other federal circuits or California’s appellate courts. Third, *Howard* does not state that all or any particular subset of the factors it identified are necessary to support a finding of probable cause. Fourth, regarding the fourth *Howard* factor, under our standard of review, we defer to the trial court’s factual findings, express or implied, where supported by substantial evidence. (*Glaser, supra*, 11 Cal.4th at p. 362.) Although defendant’s evidence may have supported a contrary finding, there was substantial evidence that supported the trial court’s finding that the officers had a reasonable belief that Franks resided in defendant’s apartment two or three days a week.

F. Sufficiency of the Evidence to Support Trial Court’s Finding that Franks Had Joint Control Over Areas That Were Searched

Defendant asserts that the search of her bedroom was improper because Franks did not have dominion or control over that area of her apartment. Since trial counsel raised this issue below, we address this contention as part of our analysis of the validity of the search.

“As [the court] recognized in *Robles*, and as is demonstrated by the circumstances of the present case, a search of the residence of a person subject to a search condition often affects the rights of cohabitants and guests as well.” (*Sanders, supra*, 31 Cal.4th at p. 335.) Although persons who live with a parolee subject to a search condition have “a reduced expectation of privacy” (*id.* at p. 330; *Robles, supra*, 23 Cal.4th at p. 799), an officer conducting a parole search may enter and search only those portions of a shared residence that the officer reasonably believes the parolee has “complete or joint control over” (*Woods, supra*, 21 Cal.4th at p. 682; see also *People v. Smith* (2002) 95 Cal.App.4th 912, 919 (*Smith*)). Thus, in order to justify a parole search, the prosecution must show that the parolee “possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.” (*Matlock, supra*, 415 U.S. at p. 171, fn. omitted.) “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 p. 676; see also *People v. Baker* (2008) 164 Cal.App.4th 1152, 1159; *Smith, supra*, 95 Cal.App.4th at p. 918.)

Defendant lived in a three-room apartment, and the court concluded that Franks resided with her two or three days a week. Upon opening the front door, the officers entered the kitchen-living room area. There was a single door from the living room into the bedroom, and one had to walk through the bedroom to access the only bathroom. Detective Fox testified that the safe was located in or near the open doorway between the living room and the bedroom, that the safe was visible from the living room, and that the safe was located on the pathway from the living room to the bathroom. On cross-examination, defendant agreed that one had to walk past the safe to get to the bathroom. Franks had told Detective Fox that he kept a toothbrush in the bathroom. Of necessity,

any resident of the apartment would have joint control over the only bathroom and the pathway to the bathroom.

Regarding the question of joint access and control, the court found that the statements of defendant, Franks, and the landlord supported the conclusion that Franks “had sufficiently frequent joint control over shared common areas of the apartment such that they could be searched pursuant to his search condition” and that “given that the layout of the apartment required one to walk from the living room, (the parolee’s area,) through Defendant’s bedroom, to reach the only bathroom, it was reasonable to believe that the parolee had access to these areas. A frequent overnight guest would necessarily be given access to the only bathroom and the pathway to reach it.”

Defendant argues that there was insufficient evidence to support the trial court’s finding that her bedroom was a common area and that the court’s ruling was erroneous as a matter of law because merely passing through the bedroom to access the bathroom did not give Franks dominion or control over the bedroom. However, the court found only that Franks had joint control over the bathroom and the pathway to the bathroom where the safe was located, not defendant’s entire bedroom. Substantial evidence, summarized above, supports that finding.

Defendant also relies on her testimony that during the two occasions that Franks stayed at her apartment, he had to ask her permission to enter her bedroom to use the bathroom. As we have stated, in a motion to suppress, the superior court is vested with the power to judge the credibility of witnesses and resolve conflicts in the evidence; on appeal, all factual conflicts must be resolved in the manner most favorable to the trial court’s disposition. (*Woods, supra*, 21 Cal.4th at p. 673.) Here, the court necessarily rejected defendant’s testimony and there is substantial evidence that supports the court’s findings.

For these reasons, we conclude that the trial court did not err when it held that Franks had joint control over the bathroom and the pathway to the bathroom. Since the

officers had a reasonable belief that Franks resided in defendant's apartment, at least on a part-time basis, and the search, prior to obtaining the warrant, was limited to areas over which Franks had joint control, we conclude that the search did not violate defendant's Fourth Amendment rights.

II. Ineffective Assistance of Counsel

Defendant contends that trial counsel was ineffective because (1) he failed to introduce any evidence at the suppression hearing regarding the seizure of the evidence or what evidence was seized; (2) he did not argue that the dog sniff was unlawful because it was not supported by probable cause or conducted within a lawful protective sweep; and (3) he did not argue that the affidavit in support of the warrant should have been redacted, to eliminate information pertaining to the dog sniff, and retested for probable cause.

“To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel's performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. [Citation.]” (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 (*Strickland*)). “Judicial scrutiny of counsel's performance must be highly deferential. . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.” (*Strickland*, at p. 689.)

“ ‘Tactical errors are generally not deemed reversible; and counsel's decision-making must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner

challenged, we will affirm the judgment “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.” ’ ’ ” (*People v. Hart* (1999) 20 Cal.4th 546, 623-624 (*Hart*).) Case law recognizes that “counsel’s omission legitimately may have been based in part on considerations that do not appear on the record, including confidential communications from the client.” (*People v. Lucas* (1995) 12 Cal.4th 415, 443.) “ ‘Finally, prejudice must be affirmatively proved; the record must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” ’ ’ ” (*Hart, supra*, at p. 624.)

A. Standard of Review

“A claim of ineffective assistance of counsel presents a mixed question of fact and law, which is generally subject to de novo review,” (*In re Alcox* (2006) 137 Cal.App.4th 657, 664.)

B. Failure to Introduce Evidence Seized from the Safe and Bathroom

Defendant contends trial counsel was ineffective because he failed to introduce any evidence at the suppression hearing regarding the seizure of the evidence or which items were seized. She argues this “resulted in the failure to make a prima facie case; the trial court could not suppress evidence where there was no showing of its seizure.” Except for these assertions, defendant does not develop this point further in her brief on appeal. She does not support her claim with citations to legal authority, citations to the record, or further reasoned argument. The Attorney General does not respond to this claim.

When the appellant asserts a point, but fails to support it with reasoned legal argument and citation of authorities, the court may treat it as waived and pass it without consideration. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) Nonetheless, we shall review the issue, to forestall any claim of ineffective assistance of appellate counsel.

When, as in this case, an offense is initiated by complaint and the defendant does not make a motion to suppress at the preliminary hearing, “the defendant shall have the right to fully litigate the validity of a search or seizure on the basis of the evidence presented at a special hearing.” (Pen. Code, § 1538.5, subd. (i).) It has long been the rule that the preliminary hearing transcript is not admissible at the special hearing on a motion to suppress absent a stipulation of the parties or applicability of the hearsay exception for former testimony in Evidence Code section 1291. (*Wilder v. Superior Court* (1979) 92 Cal.App.3d 90, 94, citing *People v. Cagle* (1971) 21 Cal.App.3d 57, 60; *People v. Neighbours* (1990) 223 Cal.App.3d 1115, 1119-1120 [amendment of section 1538.5, subd. (i) in 1986 did not change this rule]; *People v. Fisher* (1995) 38 Cal.App.4th 338, 341.)

As we have noted, at the preliminary hearing, Detective Fox described the items seized from the safe and the bathroom vanity. Defendant’s moving papers sought to suppress evidence obtained from her “residence, specifically but not limited to her bedroom and bathroom,” consisting of “methamphetamine” and “all evidence . . . consistent with possession of controlled substances for sale.” The prosecution’s opposition papers listed the items seized from the safe and the bathroom and described them in detail. Defendant’s reply papers mentioned the “controlled substance found in [her] bathroom and a 9mm handgun seized from a safe in her room.”

But at the special hearing on the motion to suppress, neither party presented any evidence regarding the items seized from the safe or the bathroom, except that Detective Fox identified “the safe where the gun was found” in a photograph. Thus, there was evidence that the officers seized a gun from the safe. There was also photographic evidence and testimony regarding the location of the safe along the pathway from the living room to the bathroom. Although the facts in the prosecution’s opposition papers were based on evidence presented at the preliminary hearing, the parties did not stipulate to the admission of the preliminary hearing transcript at the special hearing on the motion

to suppress and neither side asked the court to consider the preliminary hearing transcript or argued that the evidence contained therein was admissible under the hearsay exception for former testimony.

Although defendant's trial counsel did not present any evidence regarding the seizure of the drugs, scales, and ammunition at the special hearing or list the items he sought to suppress in his moving papers, his points and authorities stated that defendant sought to suppress evidence obtained from her "residence, specifically but not limited to her bedroom and bathroom," consisting of "methamphetamine" and "all evidence . . . consistent with possession of controlled substances for sale." The opposition papers described each of the items seized and defendant's reply papers referred to the "controlled substance found in [her] bathroom" and the "9mm handgun seized from a safe in her room." Since the papers identified the items at issue and defendant sought to suppress everything seized from the safe and the bathroom, we conclude that defense counsel's performance was not deficient for failing to present additional evidence regarding the seizure of the evidence at the hearing.

Even if we assume trial counsel's performance was deficient, defendant cannot establish prejudice. Defendant argues that counsel's failure to identify the evidence seized "resulted in the failure to make a prima facie case." But the court reached the merits of the issues presented and did not find that defendant had failed to make a prima facie case. The court's ruling was not based on the failure to present evidence regarding the items seized. In addition, trial counsel moved to suppress everything seized from the safe and the bathroom and everyone at the hearing knew which items counsel sought to suppress. The court properly found that Franks resided in defendant's apartment and had joint control over the bathroom and the pathway from the living room to the bathroom. Thus, any evidence seized from those areas was properly the subject of the parole search. After the dog alerted on the safe, the officers obtained a warrant before opening the safe

and searching the bathroom. There is no contention that the items seized from the safe or the bathroom were beyond the scope of the warrant.

In summary, defendant has failed to meet her burden to show that counsel's performance was deficient and that she was prejudiced by that deficiency. Consequently, we conclude that trial counsel was not ineffective for failing to present additional evidence regarding the items seized from the safe and the bathroom at the special hearing on the motion to suppress.

C. Failure to Argue That the “Dog Sniff” Was Unlawful

Defendant contends trial counsel was ineffective because he did not challenge the propriety of the “dog sniff” in the proceedings below. She argues that even if the parole search of her living room was permissible, the “dog sniff” of the safe in her bedroom was illegal since it was not supported by probable cause and was not conducted as part of a lawful protective sweep.

Defendant relies on *Jardines v. State* (Fla. 2011) 73 So.3d 34 (*Jardines*), cert. granted sub nom. *Florida v. Jardines* (Jan. 6, 2012) __ U.S. __ [132 S.Ct. 995], in which the Florida Supreme Court held that a “sniff test” by a narcotics dog at the front door of the home of a suspected marijuana grower, without a warrant, based solely on an informant's tip, was an unreasonable search. Prior to *Jardines*, the United States Supreme Court had held that because a “ ‘sniff test’ ” by a trained drug detection dog is “unique, in the sense that it is minimally intrusive and is designed to detect only illicit drugs and nothing more,” it is not a search and does not implicate Fourth Amendment rights. (*Jardines*, at p. 44; *United States v. Place* (1983) 462 U.S. 696, 706-707 [sniff test of luggage at airport based on reasonable suspicion]; *City of Indianapolis v. Edmond* (2000) 531 U.S. 32, 40 [vehicle at drug interdiction checkpoint]; *Illinois v. Caballes* (2005) 543 U.S. 405, 408-409 [vehicle at lawful traffic stop].) The Florida Supreme Court distinguished *Jardines* because it involved the defendant's home, there was no prior evidence of wrongdoing, the government activity lasted for hours and took place in

view of the defendant's neighbors, subjecting him to public humiliation and embarrassment. (*Jardines, supra*, at pp. 36, 48-49.)

The United States Supreme Court has granted certiorari in *Jardines*, thus casting doubt on the reliability of its holding. In addition, this case is factually distinguishable from *Jardines* since: (1) it involves a parole search; (2) there was evidence of wrongdoing since both defendant and Franks were under the influence of narcotics at the traffic stop, Franks had marijuana in his pocket, and there was counterfeit money in the truck; (3) the "dog sniff" was a brief intrusion; and (4) there was no evidence that use of the narcotics dog prolonged the search or subjected defendant to public humiliation.

That defense counsel failed to cite out-of-state authority that is contrary to prior holdings of the United States Supreme Court, that is the subject of review in that court, and that is factually distinguishable from our case does not persuade us that counsel's performance was deficient.

In addition, defendant has failed to establish that she was prejudiced by counsel's failure to challenge the "dog sniff." The officers were investigating alleged drug sales and fraud based on counterfeit money. Their information was corroborated by the presence of counterfeit money and two individuals who appeared to be under the influence of narcotics at the traffic stop. Detective Fox had sufficient concern for defendant's privacy that he did not believe he could search her room, the safe, or the bathroom without a warrant. The safe was visible from the living room, along the pathway to the bathroom, in an area properly the subject of the parole search. A safe is the type of container one might use to hide drugs, counterfeit money, or money related to drug sales. In his affidavit in support of the warrant, Detective Fox told the court that "[d]rug dealers commonly have large sums of money from their drug sales profits" that they keep in a " 'stash' location" to limit the possibility of its theft and that the tipster had said drugs were being stored in a black safe in the bedroom. There were also printers containing counterfeit money in the living room. Even if the narcotics dog was not

present or had not alerted on the safe, it is likely that Detective Fox would have obtained a warrant based on the other evidence. Since the narcotics dog alerted on the safe in an area over which parolee Franks had joint control, we also conclude that defendant was not prejudiced by counsel's failure to argue that the dog was present as part of an illegal protective sweep.

For these reasons, we reject defendant's contention that trial counsel was ineffective because he failed to challenge the "dog sniff."

D. Failure to Argue That Affidavit in Support of the Warrant Should Have Been Redacted and Retested for Probable Cause

For the same reasons that support our conclusion that trial counsel was not ineffective for failing to challenge the "dog sniff," we hold that counsel was not ineffective for failing to argue that Detective Fox's affidavit in support of the search warrant should have been redacted to eliminate any mention of the dog sniff and retested for probable cause.

DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MÁRQUEZ, J.