Constitutional Law—Probation Searches—Probation Condition Requiring Probationer's Consent to Searches by Any Law Enforcement Officer at Any Time or Place Is Unconstitutional. *Tamez v. State,* 534 S.W.2d 686 (Tex. Crim. App. 1976).

On October 24, 1973, appellant Tamez was placed on probation after pleading nolo contendere to possession of marihuana.[1] Two of the conditions of his probation were: (1) that he "[c]ommit no offense against the laws of this state or any other state or of the United States . . . ;"[2] and (2) that he "[s]ubmit his person, place of residence and vehicle to search and seizure at any time of the day or night, with or without search warrant, whenever requested to do so by the probation officer or any law enforcement officer."[3] Later in 1973 Tamez was arrested at an inland, stationary checkpoint[4] after a search of the car he was driving revealed a pistol under the driver's seat. The arresting border patrol officer later testified that he had never seen Tamez before, did not know he was on probation, and had no reason to believe the car had crossed the international border.[5]

The State thereafter filed a motion to revoke probation alleging, among other things, that Tamez "did . . . possess firearms in violation of the penal laws of the United States" and was in violation of condition *a* of his probation.[6] Tamez argued that the search that led to the discovery of the firearm was made without probable cause and therefore violated the fourth and fourteenth amendments.[7] The State replied that not only was the search justified as a border search, but also that Tamez had consented to the search through condition *h-1* of his probation judgment. The trial court agreed with the State's contentions and revoked Tamez' probation.

On appeal, the court of criminal appeals reversed the trial court and held that the State's allegations in its revocation motion were

1. Tamez v. State, 534 S.W.2d 686, 688 (Tex. Crim. App. 1976).
2. *Id.* This was identified as condition *a.*
3. *Id.* This was identified as condition *h-1. Id.* at 690.
4. *Id.* at 688. The checkpoint was 25 or 30 miles from the Mexico-Texas border. It is also interesting to note that two or three minutes earlier a Ramon Martinez had been arrested at this checkpoint after a search of his truck revealed approximately 300 pounds of marihuana. Apparently the arrival of Tamez so closely behind Martinez aroused the officer's suspicion. The discovery of Martinez' billfold in the car driven by Tamez further aroused the suspicion of a connection between the two. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 689. Evidence seized in an illegal search cannot be used in a probation revocation hearing. *See,* Rushing v. State, 500 S.W.2d 667 (Tex. Crim. App. 1973).

vague and indefinite, and did not give Tamez the fair notice to prepare a defense.[8] The court also found that the search in question could not be justified as a border search, and that the blanket consent condition, *h-1*, was an unreasonable infringement on the probationer's federal and state constitutional guarantees.[9]

The first issue faced by the court in *Tamez v. State* was the appellant's contention that the revocation motion was vague and indefinite.[10] The court found that contention to be correct.[11] Because another revocation hearing would likely ensue, the court decided that it should resolve a second issue raised by Tamez. Tamez had argued on the merits that the firearm seized was the fruit of an illegal search and hence inadmissable as evidence. To resolve this issue, the court decided to first examine whether the seizure could be justified as a border search, and if not, whether condition *h-1* was a valid condition of Tamez' probation.[12]

The court quickly determined that the search of Tamez was not a border search.[13] The court then examined the validity of condition *h-1* in light of the Texas probation statute.[14] The statute, according to the court's interpretation, requires all probation conditions to have a "reasonable relationship to the treatment of the accused and the protection of the public."[15] The court failed to find any reasonable relationship between condition *h-1* and rehabilitation of the probationer or protection of the public. Because the court could not find a reasonable relationship between the condition and any permissible state goal, the court concluded that condition *h-1* was too broad in its sweep and thus it infringed on Tamez' constitutional rights. In addition, the court held that Tamez could not be said to have consented to the search by accepting the probation with condi-

8. 534 S.W.2d at 689.

9. *Id.* at 690, 692.

10. *Id.* at 689.

11. *Id.* The second count of the revocation motion specified no statute that Tamez had violated, but alleged only violation of "Penal Laws." The court found that such general notice denied Tamez due process because he had no notice of how he violated his probation condition. *Id.* at 688-89.

12. *Id.* at 689.

13. *Id.* at 690. The Texas court reviewed Supreme Court cases on border search and seizure to determine that the search could not be justified as a border search. Finally relying on United States v. Ortiz, 422 U.S. 891 (1975), the Texas court held that the search was not a border search. *Id.*

14. TEX. CODE CRIM. PROC. ANN. art. 42.12 (1966).

15. Tamez v. State, 534 S.W.2d 686, 691 (Tex. Crim. App. 1976), *citing* Porth v. Templar, 453 F.2d 330, 333 (10th Cir. 1971).

tions. The court stated that consent is not freely given when one has to choose between rejecting probation or accepting the offensive condition.[16]

As the *Tamez* court recognized, Texas courts have wide discretion concerning the conditions they may impose on a defendant who has received a probated sentence.[17] The only restraint on that discretion is one of reasonableness.[18] Previous Texas courts have upheld as reasonable those conditions that require the probationer to observe a night curfew,[19] observe all laws with no violations,[20] or abstain from alcohol in any form.[21] At the same time, Texas courts have struck down probationary conditions that were vague,[22] or unauthorized delegations of authority.[23] The reasonableness of imposing a blanket consent condition, however, is a question of first impression for Texas courts.

Various courts in other jurisdictions have upheld blanket consent conditions as valid exercises of their power. In *People v. Mason,*[24] the California Supreme Court presented a strong argument supporting the validity of the blanket consent condition that has been followed by other courts.[25] That court, relying on a previous decision,[26] found that the "conditional nature" of the freedom afforded a probationer could justify the loss of "traditional" fourth amendment protections.[27] The court reasoned that this loss was

16. 534 S.W.2d at 691. The *Tamez* court, in discussing this issue, cited United States *ex rel.* Coleman v. Smith, 395 F. Supp. 1155 (W.D.N.Y. 1975) as authority. *Coleman* had invalidated a blanket consent condition, but in a "parole" agreement, not a probation agreement. This is indicative of the trend by courts, including the *Tamez* court, to consider parole and probation conditions as almost identical issues. *See* United States v. Consuelo-Gonzalez, 521 F.2d 269 (9th Cir. 1975) (limits on parole officer's search applicable in a probation case); People v. Mason, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), *cert. denied,* 405 U.S. 1016 (1972) (using parole case reasoning in a probation case as applicable to "persons conditionally released to society").

17. TEX. CODE CRIM. PROC. ANN. art. 42.12 (1966).

18. *Id.* § 3(d)(a).

19. Salinas v. State, 514 S.W.2d 754 (Tex. Crim. App. 1974).

20. Guinn v. State, 163 Tex. Crim. 181, 289 S.W.2d 583 (1956).

21. Perkins v. State, 386 S.W.2d 286 (Tex. Crim. App. 1965).

22. Glenn v. State, 168 Tex. Crim. 312, 327 S.W.2d 763 (1959).

23. McDonald v. State, 442 S.W.2d 386 (Tex. Crim. App. 1969).

24. People v. Mason, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), *cert. denied,* 405 U.S. 1016 (1972). For a discussion of *Mason, see* 1 AM. J. CRIM. L. 235 (1972).

25. *See* Himmage v. State, 496 P.2d 763 (Nev. 1972); State v. Schlosser, 202 N.W.2d 136 (N.D. 1972). But, the scope of *Mason* has been disputed, *see* 14 SANTA CLARA LAWYER 153 (1973).

26. *In re* Martinez, 1 Cal. 3d 641, 647 n.6, 463 P.2d 734, 738 n.6, 83 Cal. Rptr. 382, 386 n.6 (1970).

27. 5 Cal. 3d at 764-65, 488 P.2d at 633, 97 Cal. Rptr. at 305.

"necessitated by the legitimate demands" of the probation process.[28] The court concluded that searches which were conducted in a manner considered unreasonable in light of the probation condition, not the fourth amendment, would be barred.[29]

The *Mason* court also used the "advance waiver" rationale[30] to justify the imposition of the blanket consent condition. The court reasoned that the probationer, in order to obtain probation, had waived in advance his fourth amendment rights against unreasonable searches and seizures. In addition, the court concluded that the proper challenge to this condition should be on appeal or in a habeas corpus proceeding, not in a suppression or revocation hearing.[31]

Inherent in the arguments used to uphold blanket consent conditions is the view that probation is given as an act of grace by the state with supervision and control of the probationer as its main objectives.[32] But when courts adopt rehabilitation and reform as the main objectives of probation, blanket consent conditions become unsupportable.[33] Therefore, the validity or invalidity of a blanket consent provision often turns on the forum jurisdiction's view of the objectives of probation.

In *United States v. Consuelo-Gonzalez,*[34] the Ninth Circuit rejected the ideas that probation is a privilege or that conditions of probation are the outcome of bargaining between the state and the criminal.[35] The court found that the constitutional protections afforded probationers have some limitations, but that those limitations must serve the central objectives of probation, rehabilitation and reform.[36] A blanket consent condition allowing searches by any law enforcement officer at any time would permit searches that did not serve these ends of probation.[37] According to the *Consuelo* court, therefore, blanket consent conditions impermissibly limit the probationer's fourth amendment protection.

The *Consuelo* court did find that some searches without probable cause by a probation officer could be justified, but searches by

28. *Id.*
29. *Id.*
30. *See* State v. Mitchel, 22 N.C. App. 663, 207 S.E.2d 263 (1974).
31. 5 Cal. 3d at 764, 488 P.2d at 632, 97 Cal. Rptr. at 304.
32. *See generally* 1 AM. J. CRIM. L. 235 (1972).
33. *See generally* 44 FORDHAM L. REV. 617 (1973).
34. 521 F.2d 259 (9th Cir. 1975).
35. *Id.* at 265 n.15.
36. *Id.* at 265.
37. *Id.*

law enforcement officers alone could not. The *Consuelo* court reasoned that the objective of a law enforcement officer's search would be enforcement only and not rehabilitation. Thus, fourth amendment protections would apply against searches conducted by police officers in acts of enforcement, but not against probation officers in acts of supervision.[38]

In addition to the basic constitutional question of the validity of the condition itself, there is also the question of whether this condition can act as consent to subsequent searches and seizures. In *People v. Peterson*,[39] a Michigan court invalidated a search conducted under the justification of a blanket consent condition. Consent must be freely given,[40] and this court called the choice between imprisonment and freedom "no choice at all," thus holding that the consent was "in effect coerced and rendered nugatory."[41]

The court in *Tamez v. State* adopted the reasoning and holdings of *Consuelo* and *Peterson*. As discussed previously, these decisions emphasized the rehabilitation objective of probation, and balanced the need to protect society against the goal of returning the probationer to a normal role in society. By adopting the reasoning of the *Consuelo* and *Peterson* courts, the Texas court has also recognized a probationer's fourth amendment rights and rejected such fictions as fair bargaining between clearly unequal parties and the notion that the grant of a privilege carries with it all necessary conditions.[42] But this court did not define the scope of the rights afforded a probationer more precisely than to say that fourth amendment rights cannot be diminished further than is necessitated by the demands of rehabilitation. One may surmise, however, from the heavy reliance of the *Tamez* court on decisions from other jurisdictions, that the scope of the rights delineated in those other decisions will probably be good indicators of future decisions in Texas.[43]

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38. *Id.* at 266.

39. People v. Peterson, 62 Mich. App. 258, 233 N.W.2d 250 (1975).

40. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Bumper v. North Carolina, 391 U.S. 543 (1968).

41. 62 Mich. App. at ___, 233 N.W.2d at 255.

42. The *Tamez* court summarily dismissed the reasoning of decisions that relied on these justifications. 534 S.W.2d at 693, *citing, inter alia*, People v. Mason, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971).

43. The *Consuelo* court limited their exclusion of evidence obtained under a blanket consent condition to a trial on new charges, thereby not passing on the issue of use of evidence seized in a revocation hearing. The Texas Court of Criminal Appeals, however, had previously

A condition that the Texas court might uphold was suggested by the *Consuelo* court.[44] That condition differs from a blanket consent condition because it specifies that a probation officer should conduct the search and emphasizes the reasonableness of time and manner. These two differences, in that court's opinion, satisfy fourth amendment guarantees of reasonableness and the probationary goal of rehabilitation.[45]

If the Texas court adopts the more limited *Consuelo* search condition, it would prevent the patent unfairness of allowing an unconstitutional search by a police officer to be justified by an after the fact discovery of the searched person's probationary status and the consent condition.[46] Any limitation on the probationer's rights would be exercised by the probation officer, who would ideally administer probation as a tool of rehabilitation and not as a means of law enforcement.

There is also a strong possibility that if a blanket consent condition in a parole agreement was challenged in the court of criminal appeals that it too would be held invalid. Though *Tamez* was a probation case, the court's reliance on parole cases as both supporting and contrary authority[47] leads to the conclusion that the *Tamez* court considers blanket consent conditions in both parole and probation as identical issues.

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ruled that evidence seized in an illegal search could not be used in a revocation hearing. Rushing v. State, 500 S.W.2d 667 (Tex. Crim. App. 1973).

44. 521 F.2d at 263. That she "submit to search of her person or property conducted in a reasonable manner and at a reasonable time by a probation officer." *Id.*

45. *Id.*

46. Note 5 *supra* and accompanying text.

47. Tamez v. State, 534 S.W.2d 686, 691, 693 (Tex. Crim. App. 1976).