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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. CHASE KILLION, Defendant and Appellant.	2d Crim. No. B239876 (Super. Ct. No. 2010020120) (Ventura County)

Chase Killion appeals his conviction by plea to cultivating marijuana (Health & Saf. Code, § 11358) and possession of a controlled substance for sale (Health & Saf. Code, § 11351), entered after the trial court denied his motion to suppress evidence (Pen. Code, § 1538.5, subd. (i)). Appellant was granted probation with 180 days county jail. We affirm.

Facts and Procedural History

On June 4, 2010, Ventura County Sheriff Detectives Odilon Malagon and Victor Fazio set up a surveillance on Garrett Stevens' residence based on reports that Stevens was selling prescription drugs and marijuana at Westlake High School. Deputy Jeramy Adams assisted in the investigation and drove to the house to verify that Stevens lived there. Deputy Adams spoke to Stevens and Martin Beylin and left.

Minutes later, appellant drove up to the house on a motorcycle. Detective Malagon saw appellant, Stevens, and Beykin "load up" into a red SUV and leave. Appellant

drove Stevens and Beylin to an Orchard Supply Hardware store (OSH). The three left the store with a white plastic bag.

Later in the day, Deputy Adams stopped the SUV for an inoperable brake light and smelled the odor of marijuana emitting from the vehicle. (Veh. Code, § 24250.) Appellant was driving; Stevens and Beylin were passengers.

Beylin was arrested with $2,200 cash, a backpack, and Urban Garden and Home Depot receipts on his person. The backpack contained a quarter pound of marijuana, a digital scale, Oxycontin and Tramedol prescription bottles, glass mason jars, and a plastic baggy. The white OSH plastic bag had clippers and sprinkler tubing for marijuana cultivation.

Deputy Sheriff Gene Martinez assisted in the traffic stop and observed that appellant was unkempt, nervous, and fidgety. Appellant denied using drugs but said that he had recently overdosed on heroin. Deputy Martinez believed appellant was under the influence of a central nervous system (CNS) stimulant based on appellant's dilated pupils, eyelid tremors, abnormal pulse rate, and Romberg score.

Appellant was arrested for being under the influence of a controlled substance (Health & Saf. Code, § 11550) and transported to the sheriff's substation where he provided a urine sample that tested positive for marijuana. Detective Fazio was executing a search warrant at Steven's house and ordered Deputy Martinez to detain appellant because of possible involvement in a conspiracy to sell marijuana. Deputy Martinez told appellant that he was not charging appellant "with the 11550, [but] that he was being detained for other Health & Safety [Code] violations and that detectives would come talk to him about that."[1]

Officers found 95 marijuana plants, processed marijuana, a rifle, and a digital scale in Stevens' house. Detective Fazio believed that appellant was part of a conspiracy to sell marijuana and inspected appellant's cell phone at the sheriff's substation. The cell phone

[1] Being under the influence of marijuana is not a crime. (Health & Saf. Code, § 11550, subd. (a); *In re Johnny O.* (2003) 107 Cal.App.4th 888, 896-897.)

had a photo of the "marijuana grow" and text messages indicating that appellant was selling marijuana and prescription drugs.

Waiving his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694]), appellant admitted selling marijuana and prescription drugs and said that drug buyers were texting him on the cell phone. Appellant said it was Stevens' first marijuana cultivation and that he was helping Stevens. Appellant told the police that he had prescription drugs and marijuana at his house and consented to a search. Officers searched appellant's bedroom, finding six ounces of marijuana, a scale, cash, and prescription drugs (79 hydrocodone pills, 55 Diazepam pills 47, Oxycodone pills, and 245 Alprazolam pills).

The magistrate denied appellant's motion to suppress evidence. After appellant was arraigned in superior court, he filed a motion to set aside the information and motion to suppress evidence. Denying the motions, the trial court found it was a lawful detention and arrest and that "the investigative process in this particular instance supports what might otherwise be described as a lengthy detention."

Discussion

On appeal, we defer to the magistrate's and trial court's factual findings which are supported by substantial evidence and determine whether, on the facts so found, the search was reasonable under the Fourth Amendment. (*People v. Laiwa* (1983) 34 Cal.3d 711, 718 [magistrate's denial of suppression motion]; *People v. Glaser* (1995) 11 Cal.4th 354, 362.) The denial of a motion to suppress will be affirmed "if the ruling is correct on any theory of law applicable to the case, even if the ruling was made for an incorrect reason. [Citation.]" (*People v. McDonald* (2006) 137 Cal.App.4th 521, 529.)

Probable Cause

Appellant does not dispute that Deputy Martinez had probable cause to arrest him for being under the influence of a controlled substance. (Health & Saf. Code, § 11550, subd. (a); *Gilbert v. Municipal Court* (1977) 73 Cal.App.3d 723, 727.) Appellant claims that probable cause "evaporated" after he provided a urine sample which showed that he was

not "11550." (See fn. 1, *ante*.)[2] Detective Fazio testified that appellant was not free to leave because of possible involvement in a conspiracy to sell marijuana. The detective stated that he would have detained appellant for conspiracy to sell marijuana even if appellant had "not shown symptoms of 11550 . . . . [¶] . . . [¶] Based on the thousands of investigations I've conducted with drug sales. I know that drug dealers travel in packs for safety and security of the drug deal."

Under the doctrine of escalating probable cause, an entirely innocent encounter can provide increasing justification to detain, question, and search. (See *People v. Leyba* (1981) 29 Cal.3d 591, 599; *People v. Lusardi* (1991) 228 Cal.App.3d Supp. 1, 4; 4 Witkin & Epstein, Cal. Criminal Law, Illegally Obtained Evidence (4th ed. 2012) § 333, pp. 1188-1190.) That was the case here. Detectives were advised that Stevens was selling marijuana and drugs at school, staked out Steven's residence, and saw appellant visit the house and drive Stevens and Beylin to a hardware store to buy marijuana cultivation equipment. After the vehicle was stopped, officers smelled marijuana and found a quarter pound of marijuana, a digital scale, and drug prescription bottles. Appellant appeared to be under the influence of a narcotic, was arrested, and tested positive for marijuana but was not free to leave. The contemporaneous search of Stevens' residence confirmed that Stevens was operating a ”marijuana grow" complete with 95 marijuana plants, processed marijuana, a rifle, cash, and a digital scale.

Based on the totality of the circumstances, an experienced officer would entertain a strong suspicion that appellant was part of a conspiracy to sell marijuana. (*People v. Williams* (2007) 156 Cal.App.4th 949, 960.) The fact that appellant was arrested for being under the influence of a narcotic, detained at the sheriff's substation and charged

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[2] At the hearing on the motion to suppress, defense counsel argued: "Essentially, what we're going after here is what happened after Mr. Killion tested negative for narcotics. [¶] . . . [¶] Once he was at the police station, and it sounds like if you read through the factual basis, it's probably somewhere between an hour after the stop or hour an[d] a half after the stop, while's he's at the station that he's nonnegative for narcotics based on the urinalysis . . . . At that point it's our position that the deputies had no reason to continue him in an arrest status."

with a different offense does not vitiate the validity of the arrest. (*Johnson v. Lewis* (2004) 120 Cal.App.4th 443, 452; *People v. Wilkins* (1972) 27 Cal.App.3d 763, 770.) Probable cause exists "even if that offense was not invoked by the arresting officer, as long as it involves the same conduct for which the suspect was arrested. [Citation.] It is immaterial that the officer did not have in mind the specific charge upon which the arrest can be justified. [Citation.]" (*Gasho v. United States*. (9th. Cir. 1994) 39 F.3d 1420, 1428, fn. 6.) Here there was probable cause to arrest for driving under the influence of marijuana (Veh. Code, § 23153, subd. (a)), transportation of marijuana for sale (Health & Saf. Code, § 11360, subd. (a)), conspiracy to cultivate marijuana, conspiracy to possess marijuana for sale, and conspiracy to transport marijuana for sale. (Pen. Code, § 182, subd. (a)(1); Health & Saf. Code, §§ 11358, 11359, 11360, subd. (a).)

Appellant argues that the six to seven hour detention rendered it an unlawful de facto arrest. "There is no fixed time limit for establishing the constitutionality of an investigatory detention. Rather, such a detention will be deemed unconstitutional 'when extended beyond what is reasonably necessary under the circumstances that made its initiation permissible. [Citation]' [Citation.]" (*People v. Gomez* (2004) 117 Cal.App.4th 531, 537-538.) Appellant does not claim that the officers dallied about searching Stevens' house. Substantial evidence supports the finding that the officers diligently pursued the investigation and had probable cause to detain and arrest appellant for conspiracy to sell marijuana. (*United States v. Sharpe* (1985) 470 U.S. 675, 687 [84 L.Ed.2d 605, 616]; *People* v. *Williams, supra,* 156 Cal.App.4th at p. 960.)

Cell Phone Search

Appellant claims that his cell phone was illegally searched after he was "released on the drug charge, [and] while he was under *de facto* arrest. . . ." There is no evidence that appellant was "released" from custody. After appellant tested positive for marijuana, Deputy Martinez advised him that he was being held on other Health and Safety Code violations. Detective Fazio searched the cell phone six hours later.

In *People v. Diaz* (2011) 51 Cal.4th 84 (*Diaz*), officers saw Diaz sell Esctasy to a police informant and found Esctasy, marijuana, and a cell phone on his person. Diaz

was transported to the sheriff's substation, where, 90 minutes later, a detective searched the text message folder on the cell phone. Our Supreme Court rejected the argument that the search was remote in time and concluded that the detective was "entitled to inspect" its contents without a warrant . . . whether or not an exigency existed." (*Id*., at p. 93.)

Appellant argues there is no evidence connecting him to illegal activity that would give an officer reasonable cause of search his cell phone. Detective Fazio testified that the search was "[b]ased on the vehicle stop, marijuana being found there, the digital scale, a large amount of money on Mr. Beylin, the fact that Mr. Killion was driving that vehicle, and the fact that we were at Mr. Stevens' residence where marijuana was being cultivated and that Mr. Killion had been at the residence prior to us serving the search warrant." Detective Fazio knew that appellant took Stevens and Beylin to OSH to purchase equipment consistent with the cultivation of marijuana and that Stevens was reportedly selling marijuana at a local high school. It raised a reasonable suspicion that appellant was involved in a conspiracy to sell marijuana.

As discussed in *Diaz*, there is no Fourth Amendment requirement that the cell phone search be contemporaneous with the arrest. The United States Supreme Court has upheld warrantless searches of an arrestee's personal property 10 hours after an arrest. (See *United States v. Edwards* (1974) 415 U.S. 800 [39 L.Ed.2d 771] [officer searched defendant's clothing 10 hours after arrest, looking for paint chips].) "[O]nce [an] accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other. This is true where the clothing or effects are immediately seized upon arrival at the jail, held under the defendant's name in the 'property room' of the jail, and at a later time searched and taken for use at the subsequent criminal trial." (*Id*., at p. 807 [39 L.Ed.2d at p. 778].)

The same principle controls here. (*Diaz*, *supra*, 51 Cal.4th at p. 93.) "As long as the administrative processes incident to the arrest and custody have not been completed, a

search of effects seized from the defendant's person is still incident to the defendant's arrest. [Citations.]" (*United States v. Finley* (5th Cir. 2007) 477 F.3d 250, 260, fn. 7.) Appellant's assertion that his post-*Miranda* statements and consent to search his residence was the tainted product of an unlawful arrest is without merit. (*People v. Williams, supra*, 156 Cal.App.4th at pp. 960-961.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Jeffrey G. Bennett, Judge

Superior Court County of Ventura

Stephen P. Lipson, Public Defender, Michael C. McMahon, Deputy Public Defender and Cynthia Ellington, Senior Public Defender, for Appellant.

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