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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. VICTOR JONATHAN GUDINO, Defendant and Appellant.	B278883 Los Angeles County Super. Ct. No. BA445583

APPEAL from a judgment of the Superior Court of Los Angeles County, Dennis J. Landin and Michael A. Tynan, Judges. Reversed and remanded with directions.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Kathy S. Pomeranz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Following the denial of his renewed motion to suppress, defendant Victor Jonathan Gudino pled no contest to felony possession of a firearm by a juvenile offender. On appeal, defendant contends evidence of the shotgun seized from the trunk of his car should have been suppressed as the fruit of an unlawful warrantless search. The People initially argued the search was justified under the inventory search, search incident to arrest, and automobile exceptions. In a supplemental brief, the People concede the search was not justified under the search incident to arrest or automobile exception, but maintain the search was valid under the inventory search exception. Because there is insufficient evidence to justify the warrantless search of defendant's car under any of these exceptions, we reverse defendant's conviction and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Stop, Arrest, and Search

Around 4:00 p.m. on April 5, 2016, Los Angeles Police Department (LAPD) Officers Andrew Romero and Thomas Harrison were on patrol near Hoover and 51st Streets in Los Angeles when they stopped a silver BMW because the car's windows were too darkly tinted. Defendant was driving the BMW, with his pregnant girlfriend sitting in the front passenger seat and a male companion sitting in one of the rear passenger seats. Before approaching the BMW, the officers directed the occupants to roll down the car's windows. Someone inside the car told the officers the windows could not be rolled down because they had recently been tinted; instead, the occupants raised their

hands through the sunroof. After the officers again requested that the windows be rolled down, the occupants complied.

Defendant did not have identification with him at the time of the traffic stop. Harrison conducted a "want and warrant" check using defendant's name, which revealed defendant had an outstanding arrest warrant for assault with a deadly weapon and robbery.[1] The officers ordered defendant and the other occupants out of the vehicle, placed defendant in handcuffs, and took "him into . . . custody for the warrants." The officers then searched the BMW and found an unloaded 12-gauge shotgun in the car's trunk. Romero claimed the officers searched defendant's car "[p]ursuant to impound authority 22651(h)"[2] and because defendant had been arrested.

After the officers found the shotgun in defendant's trunk, Romero read defendant his *Miranda*[3] rights. Defendant agreed to speak to Romero and admitted that everything in the car

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[1] No evidence was introduced at either suppression hearing that shows when the arrest warrant was issued or when the underlying crimes were committed. In the statement of facts of a joinder motion filed before the underlying suppression hearings, the People claimed the assault and robbery occurred on February 16, 2016.

[2] It appears Romero was referencing Vehicle Code section 22651, subdivision (h)(1), which provides in relevant part: "A peace officer . . . who is engaged in directing traffic or enforcing parking laws and regulations, of a city, county, or jurisdiction of a state agency in which a vehicle is located, may remove a vehicle located within the territorial limits in which the officer or employee may act, [if]: [¶] . . . [¶] [the] officer arrests a person driving or in control of a vehicle for an alleged offense and the officer is, by this code or other law, required or permitted to take, and does take, the person into custody."

[3] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

belonged to him, including the shotgun, which he had purchased two days earlier for $100. The officers did not impound the BMW; they released the car to defendant's girlfriend. There is nothing in the record showing the officers found any other items inside defendant's car.

2. The Charges, Defendant's Suppression Motions, and Defendant's No-contest Plea

The People charged defendant with one count of felony possession of a firearm under Penal Code[4] section 29820, subdivision (b). The People alleged defendant had previously been adjudged a ward of the court in November 2015 for a robbery he committed as a juvenile.[5] The People further alleged defendant's adjudication for robbery as a juvenile qualified as a prior conviction for a serious or violent felony within the meaning of the Three Strikes law (§§ 667, subd. (d), 1170.12, subd. (b)).

In June 2016, defendant filed a motion to suppress the evidence obtained during Romero's search of his car, arguing the warrantless search violated his Fourth Amendment right against unreasonable searches and seizures. Among other contentions, defendant asserted there was insufficient evidence to allow the search under the inventory search exception.

On September 8, 2016, the trial court conducted a combined motion to suppress and preliminary examination

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[4] All undesignated statutory references are to the Penal Code.

[5] Section 29820 makes it unlawful for an individual who has been adjudged a ward of the juvenile court for any of the offenses enumerated in the statute, including robbery, to possess a firearm before the age of 30. (§ 29820, subds. (a) & (b); see also Welf. & Inst. Code, § 707, subd. (b)(3).)

hearing, at which Romero and Harrison testified. The court denied defendant's motion to suppress, finding the officers' warrantless search of defendant's car and the car's trunk was justified under the Fourth Amendment. The court explained, "I think the officers acted reasonably. I think that it was their duty not just that they were permitted to look in the trunk, but it was their duty to look in the trunk. [Defendant] was wanted on serious charges, including a 211 and 245. That if they hadn't done the inventory, or whatever you want to call it, they ran the risk of exposing themselves to danger if there were weapons in the car, among other things, but I think even without that, they were justified in going into the trunk of the car." Defendant was held to answer.

On October 17, 2016, defendant filed a renewed motion to suppress, which was heard by a different judge. On November 2, 2016, the court denied defendant's renewed motion, concluding the officers' search of defendant's car and the car's trunk was justified based on the officers' discovery of defendant's outstanding arrest warrant for assault with a deadly weapon and robbery.[6] The court stated, "I do believe that the police officers acted appropriately in this matter. While it's true they didn't know when the alleged robbery or alleged assault occurred, it's within reason for one to think that it could have happened fairly recently. If that's the case, then it's perfectly reasonable for the officers to look in the trunk for items, either a weapon and or proceeds of a robbery."

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[6] In ruling on defendant's renewed motion, the court relied on the testimony introduced at the September 8, 2016 hearing; the parties did not introduce any additional evidence.

After the court denied his renewed motion to suppress, defendant pled no contest to the felony possession of a firearm charge and admitted the prior strike allegation. The court sentenced defendant to 16 months in state prison, consisting of one third of the two-year middle term (8 months) for violation of section 29820, subdivision (b), doubled to 16 months under the Three Strikes law. The court ordered defendant's sentence in this case to run consecutively to his four-year sentence in a separate case (Los Angeles Super. Ct. No. BA444166-03).

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant contends the trial court should have suppressed evidence of the shotgun because the prosecution failed to establish the officers' warrantless search of his car was justified under the inventory search, search incident to arrest, or automobile exception to the Fourth Amendment's warrant requirement. After briefing was completed, we requested and received supplemental briefs addressing issues related to each of these exceptions.[7] In their supplemental brief, the People concede

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[7] Specifically, we asked the parties to address three issues:

1. What effect, if any, does the lack of evidence of when defendant's arrest warrant was issued, or the lack of evidence of when the crimes of assault with a deadly weapon and robbery at issue in the arrest warrant were committed, have on the prosecution's ability to rely on the automobile exception to the Fourth Amendment's warrant requirement?

2. Does the search incident to arrest exception authorize a police officer to search the trunk of a suspect's car, like the officers did in this case, or does the exception limit the scope of an officer's search to the car's passenger compartment?

the search of defendant's car was not justified under the search incident to arrest or automobile exception to the warrant requirement. They now rely only on the inventory search exception. As we explain below, the search was not justified under any of these exceptions.

1. General Principles Under the Fourth Amendment and Standard of Review for Motions to Suppress Evidence

The Fourth Amendment to the United States Constitution prohibits the government from conducting unreasonable searches and seizures of private property. (U.S. Const., 4th Amend.; *Arizona v. Gant* (2009) 556 U.S. 332, 338 (*Gant*); *People v. Macabeo* (2016) 1 Cal.5th 1206, 1213 (*Macabeo*).) Warrantless searches "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." (*Katz v. U.S.* (1967) 389 U.S. 347, 357.) "[T]he burden of proving the justification for the warrantless search or seizure lies squarely with the prosecution." (*People v. Johnson* (2006) 38 Cal.4th 717, 723.)

We review " 'issues relating to the suppression of evidence derived from governmental searches and seizures . . . under federal constitutional standards.' " (*Macabeo*, *supra*, 1 Cal.5th at p. 1212.) When reviewing the denial of a motion to suppress evidence, " ' " '[w]e 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

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3. Has any court held that a warrantless search of a defendant's car was a valid inventory search if the police never impounded the car?

was reasonable under the Fourth Amendment, we exercise our independent judgment.' " ' [Citations.]" (*Ibid*.)

2. The officers' warrantless search of defendant's car was not justified under the Fourth Amendment.

2.1. Inventory Search Exception

The United States Supreme Court has repeatedly upheld warrantless inventory searches of lawfully impounded vehicles where the searches were conducted for the purpose of protecting the car and its contents. (See *Florida v. Wells* (1990) 495 U.S. 1, 4 (*Wells*); *Colorado v. Bertine* (1987) 479 U.S. 367, 371 (*Bertine*); *South Dakota v. Opperman* (1976) 428 U.S. 364, 376 (*Opperman*).) An inventory search may extend to the car's trunk, as well as closed containers located within the car. (*Bertine*, at pp. 372–375.) An inventory search is considered standard procedure once the car at issue is impounded. (*Opperman*, at pp. 372–375.) California courts recognize an inventory search as a " 'well-defined exception' " to the Fourth Amendment warrant requirement. (See *People v. Williams* (1999) 20 Cal.4th 119, 126 (*Williams*).)

Courts have also recognized, however, that police might use the inventory search exception "as a pretext for searching a vehicle for contraband or other evidence." (*Williams*, *supra*, 20 Cal.4th at p. 126.) In response to this concern, courts have required law enforcement agencies to establish guidelines for conducting inventory searches to ensure officers do not disguise a " 'general rummaging [for] incriminating evidence' " as an inventory search. (*People v. Wallace* (2017) 15 Cal.App.5th 82, 90 (*Wallace*), quoting *Wells*, *supra*, 495 U.S. at p. 4.) "[T]o prevent such pretext searches, police discretion in performing an

inventory search must be 'exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity.' [Citation.] '[A] valid inventory search must adhere to a preexisting policy or practice.' [Citation.] Further, '[t]he policy or practice governing inventory searches should be designed to produce an inventory.' [Citations.]" (*Wallace*, at p. 90.) "The standardized procedure or established routine authorizing the inventory search need not be written." (*People v. Needham* (2000) 79 Cal.App.4th 260, 266.)

The prosecution bears the burden of establishing a warrantless search was conducted in accordance with the law enforcement agency's preexisting protocol governing inventory searches. (See *Williams*, *supra*, 20 Cal.4th at p. 138 ["the prosecution must always prove the existence of a policy supporting an inventory search"]; see also *People v. Smith* (2002) 95 Cal.App.4th 283, 300 (*Smith*) ["Once the justification of an inventory search [is] raised by the prosecution, the burden of establishing a standardized policy remained with the prosecution"].)

Defendant contends the prosecution failed to establish the warrantless search of his BMW was justified under the inventory search exception. In particular, defendant argues the search was invalid because the police did not impound his car. Defendant also asserts the prosecution failed to present any evidence establishing (1) the LAPD has a standardized policy that its officers must follow when conducting inventory searches of impounded vehicles or (2) Romero or Harrison followed any such

policy when they searched his car.[8] We agree with defendant that the search of his car was not justified under the inventory search exception.

Here, the prosecution raised the inventory search exception at the first suppression hearing, when Romero testified that he and Harrison searched defendant's car "[p]ursuant to impound authority [Vehicle Code section] 22651(h)." The prosecution, therefore, was required to present evidence "establishing a standardized . . . policy" that the LAPD requires its officers to follow when conducting inventory searches. (See *Smith*, *supra*, 95 Cal.App.4th at p. 300.)

The People did not present any evidence establishing such a policy exists. Romero's and Harrison's descriptions of the search

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[8] In their supplemental brief, the People argue defendant forfeited this argument because he did not raise it in the trial court. The People concede they failed to raise any forfeiture argument in their respondent's brief, even though defendant argued in his opening brief that the People failed to establish the LAPD has a standardized policy for conducting inventory searches, and offer no explanation for their omission. The People, therefore, have forfeited their forfeiture argument. (See *People v. Gallardo* (2017) 4 Cal.5th 120, 128.)

In any event, the People are mistaken. Defendant preserved this argument because he moved to suppress evidence based on the warrantless search and the lack of evidence to establish the inventory search exception. "Because law enforcement personnel, not the defendant, made the decision to proceed without a warrant, they, not the defendant, are in the best position to know what justification, if any, they had for doing so. [¶] Therefore, when the basis of a motion to suppress is a warrantless search or seizure, the requisite specificity is generally satisfied, *in the first instance*, if defendants simply assert the absence of a warrant and make a prima facie showing to support that assertion." (*Williams*, *supra*, 20 Cal.4th at pp. 129–130; see also *Smith*, *supra*, 95 Cal.App.4th at p. 300.)

were very brief. After stating why he searched defendant's car, Romero described the search in a single sentence, stating that he "located a 12-gauge shotgun in the trunk of the vehicle." Romero did not testify that he was following any department policy when he conducted the search. Although Harrison testified that he and Romero "did an inventory of the vehicle," he also did not describe any LAPD policy that would have governed their inventory search. In addition, neither officer's testimony suggests that they actually conducted an inventory of defendant's car. Neither Romero nor Harrison testified that they searched any areas of defendant's car besides the trunk, and, if they did, what other items they found. (See *Wallace*, *supra*, 15 Cal.App.5th at p. 93 [" '[t]he policy or practice governing inventory searches should be designed to produce an inventory' "], quoting *Wells*, *supra*, 495 U.S. at p. 4.) Without presenting any evidence of a standardized policy of the LAPD that would have governed Romero's and Harrison's warrantless search of defendant's car, the People failed to establish that the search was justified under the inventory search exception.[9]

2.2. Search Incident to Arrest Exception

Under the search incident to arrest exception, "a police officer who makes a lawful arrest may conduct a warrantless search of the arrestee's person and the area 'within his immediate control.' [Citation.]" (*Davis v. U.S.* (2011) 564 U.S. 229, 232 (*Davis*).) "The exception derives from interests in officer safety and evidence preservation that are typically implicated in

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[9] In light of this conclusion, we need not address whether the officers' decision not to impound defendant's car removed the search from the scope of the inventory search exception.

arrest situations." (*Gant*, *supra*, 556 U.S. at p. 338.) This exception applies to the search of a car that the defendant was driving or occupying when he was arrested. (*New York v. Belton* (1981) 453 U.S. 454, 458–459.)

To determine whether a warrantless vehicle search under the search incident to arrest exception is justified, the United States Supreme Court in *Gant* developed a two-part test. (*Gant*, *supra*, 556 U.S. at p. 352; see also *People v. Evans* (2011) 200 Cal.App.4th 735, 745 (*Evans*).) A search of the defendant's car " 'is constitutional (1) if the [defendant] is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains "evidence relevant to the crime of arrest." [Citation.]' " (*Evans*, at p. 745, quoting *Davis*, *supra*, 564 U.S. at p. 235.) The first prong of this test cannot be satisfied if the defendant has already been handcuffed and taken into custody, or is otherwise restrained by the police and unable to access the car, at the time of the search. (See *Gant*, p. 335; *Evans*, *supra*, 200 Cal.App.4th at pp. 745–746.) To justify a search under the second prong, the officers must have a reasonable belief that evidence of the offense of arrest is located within the car. (*Evans*, at p. 751.) "[A] reasonable belief to search for evidence of the offense of arrest exists when the nature of the offense, considered in conjunction with the particular facts of the case, give rise to a degree of suspicion commensurate with that sufficient for limited intrusions such as investigatory stops. [Citation.] Reasonable suspicion, not probable cause, is required." (*Ibid*.)

Defendant argues the search of his car also was not a valid search incident to his arrest because (1) he had already been handcuffed and taken into custody at the time of the search; and

(2) Romero and Harrison did not have a reasonable belief that evidence of the crimes for which defendant was arrested would be found inside his car. In their respondent's brief, the People argued the search was justified under *Gant*'s second prong based on the officers' discovery of defendant's arrest warrant and his initial refusal to comply with the officers' request to roll down his car's windows. The People no longer rely on the exception, however, conceding in their supplemental brief that the warrantless search of defendant's car was not a valid search incident to arrest under either prong of *Gant*'s test.

As to the first prong, the People concede the search was not justified because defendant had been removed from the car and handcuffed before the officers conducted the search. We agree that the first prong of *Gant* was not satisfied in this case. (See *Gant*, *supra*, 556 U.S. at p. 335 [when a defendant is handcuffed and outside of reaching distance of the car, the first prong of the test for a search incident to arrest cannot be satisfied].)

As to the second prong, the People concede they failed to prove the officers had reasonable suspicion to believe evidence of the assault and robbery would be found in defendant's car because "there was no evidence before the court at the suppression hearings that demonstrated when the warrant was issued or when the underlying crimes were committed." The People also acknowledge that, "even if that information had been introduced, it would not have supported a search incident to arrest because . . . the underlying crimes were committed almost two months prior to [defendant's] arrest." We also agree with the People that the search of defendant's car was not justified under *Gant*'s second prong. Without any evidence of when the arrest warrant was issued, the mere existence of the warrant considered

in conjunction with defendant's initial refusal to roll down his car's windows would not have established reasonable suspicion for the officers to search defendant's car for evidence of the assault and the robbery. (See *Evans*, *supra*, 200 Cal.App.4th at p. 751 [the reasonable suspicion necessary to justify a search incident to arrest must be based on "the nature of the [arrest] offense, *considered in conjunction with the particular facts of the case*"], italics added.)[10]

2.3. Automobile Exception

Under the automobile exception, "police who have probable cause to believe a lawfully stopped vehicle contains evidence of criminal activity or contraband may conduct a warrantless search of any area of the vehicle in which the evidence might be found." (*Evans*, *supra*, 200 Cal.App.4th at p. 753; see also *California v. Acevedo* (1991) 500 U.S. 565, 580.) "Such a search 'is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.' [Citation.]" (*Evans*, at p. 753.) "The automobile exception is rooted in the reduced expectation of privacy in a vehicle, the fact a vehicle is inherently mobile, and the historical distinctions between searches of automobiles and dwellings." (*Ibid.*)

"Probable cause is defined as ' " 'a fair probability that contraband or evidence of a crime will be found.' " ' [Citations.] Probable cause to search thus exists when the 'known facts and circumstances are sufficient to warrant a [person] of reasonable

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[10] Because we conclude there was insufficient evidence to justify a warrantless search of any area of defendant's car as a search incident to arrest, we need not decide whether the exception authorizes law enforcement officers to search the trunk of a car.

prudence in the belief that contraband or evidence of a crime will be found . . . .' [Citations.] The standard is a ' " 'fluid concept—turning on the assessment of probabilities in particular factual contexts,' " ' and is incapable of precise definition. [Citations.] A probable cause determination must be based on objective facts." (*Evans*, *supra*, 200 Cal.App.4th at p. 753.)

Defendant argues the search of his car was not justified under the automobile exception because Romero and Harrison lacked probable cause to believe evidence of a crime was located inside his car. The People concede in their supplemental brief that the exception does not apply because they did not present any evidence showing when the assault and robbery at issue in defendant's arrest warrant were committed. Both parties are correct. Because application of the automobile and search incident to arrest exceptions in this case involves the same evidence, there necessarily is insufficient evidence establishing Romero and Harrison had probable cause to search defendant's car. (See *Evans*, *supra*, 200 Cal.App.4th at p. 749 [the probable cause standard requires a higher degree of suspicion that evidence will be found inside in a vehicle than the reasonable suspicion standard].)

In sum, because the officers' warrantless search of defendant's car was not justified under the inventory search, search incident to arrest, or automobile exception to the warrant requirement, the trial court should have suppressed evidence of the firearm found in the car's trunk.

DISPOSITION

The judgment is reversed. On remand, the trial court shall vacate its orders denying defendant's motions to suppress, enter a new order granting defendant's first motion to suppress, permit defendant to withdraw his no contest plea, and make other orders consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.