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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BRENTON GILMORE, Defendant and Appellant.	B250238 (Los Angeles County Super. Ct. No. BA400468)

APPEAL from a judgment of the Superior Court of Los Angeles County. Renee F. Korn, Judge. Affirmed.

Lyn A. Woodward, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Louis W. Karlin, Deputy Attorneys General, for Plaintiff and Respondent.

Following the denial of his motion to suppress evidence recovered from a duffle bag, appellant Brenton Gilmore pled no contest to two felonies—possession for sale of methamphetamine (Health & Safety Code, § 11378) and possession for sale of heroine (Health & Safety Code, § 11351). Appellant was sentenced to three years eight months in county jail. Finding no error in the denial of his suppression motion, we affirm the judgment.

BACKGROUND[1]

Prosecution Case

On July 18, 2012, at 7:15 a.m., Los Angeles Police Department (LAPD) Officer Jose Galvez was performing hotel registration compliance checks at the Relax Motel on La Brea Boulevard. Officer Galvez ran the guests' names for warrants and found a drug-related felony arrest warrant for appellant. The motel manager confirmed that appellant had checked into room 17 and that he was the only occupant.

Officer Galvez obtained a room key from the manager and knocked on the door stating, "room service." Appellant responded, "I don't need anything." The officer repeated the ruse, but appellant refused to open the door. Officer Galvez then identified himself as a police officer with LAPD and told appellant to open the door. Appellant replied, "I do not believe you. And if you come in, I will do what I have to do to protect myself."

Using the key, Officer Galvez and three other officers entered the room. Appellant was sitting in a chair. Officer Galvez advised appellant that he was being arrested pursuant to a felony warrant, and handcuffed him. Appellant asked the officers to take his iPad and his belongings and not to leave anything behind.

A green duffle bag was on the bed, about two feet away from appellant. Based on appellant's statement about protecting himself and his request to take his property, Officer Galvez searched the duffle bag. He was concerned that a weapon might be

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[1] The facts are taken from the hearing on the motion to suppress.

inside. The search took place approximately two minutes after the handcuffing. Inside the bag, Officer Galvez found a whiskey box that was large enough to hide a knife or small caliber gun. Opening the box, he found a rolled-up T-shirt. When he picked up the T-shirt, it unraveled and several clear plastic bags containing substances resembling crystal methamphetamine and black tar heroin fell on the bed. Officer Galvez seized the items.

Defense Case

Appellant testified that he asked the officers to take his iPad, which he had purchased the day before, but told the officers not to take anything else in the room "because it didn't belong to [him]." Appellant testified that he did not own the duffle bag. The motel manager came to the room and said appellant could not leave anything behind, so appellant said to throw away the bag. After his release on bail, appellant retrieved his iPad and the duffle bag from the jail warehouse. He immediately threw out the duffle bag in a trash bin and kept the iPad.

DISCUSSION

Appellant contends that the trial court erred in denying his motion to suppress the drugs found in the duffle bag. He argues that because he was handcuffed and under police control when the bag was searched, no officer safety or evidentiary concerns existed and therefore the search violated his Fourth Amendment protection against unreasonable search and seizure. We disagree.

A. Standard of Review and Relevant Law

In reviewing a trial court's ruling on a motion to suppress evidence, we defer to the trial court's express or implied factual findings if they are supported by substantial evidence. (*People v. Tully* (2012) 54 Cal.4th 952, 979.) "[W]hile we ultimately exercise our independent judgment to determine the constitutional propriety of a search or seizure, we do so within the context of historical facts determined by the trial court." (*Ibid*.) We view the evidence "'in a light most favorable to the order denying the motion to suppress.'" (*Ibid*.)

"One of the specifically established exceptions to the Fourth Amendment's warrant requirement is 'a search incident to a lawful arrest.'" (*People v. Diaz* (2011) 51 Cal.4th 84, 90, quoting *United States v. Robinson* (1973) 414 U.S. 218, 224.) As noted in *People v. Nottoli* (2011) 199 Cal.App.4th 531, 546–547: "In *Chimel v. California* (1969) 395 U.S. 752, 762–763 [23 L.Ed.2d 685, 89 S.Ct. 2034] (*Chimel*), the Supreme Court established that, incident to a lawful custodial arrest, the arresting officer could search the arrestee and the area within the arrestee's immediate control. The two justifications for the authority to search were officer safety and preservation of evidence."

"'When a custodial arrest is made, there is always some danger that the person arrested may seek to use a weapon, or that evidence may be concealed or destroyed. To safeguard himself and others, and to prevent the loss of evidence, it has been held reasonable for the arresting officer to conduct a prompt, warrantless "search of the arrestee's person and the area 'within his immediate control'. . . ."'" (*People v. Diaz*, *supra*, 51 Cal.4th at p. 90, quoting *United States v. Chadwick* (1977) 433 U.S. 1, 14–15 [97 S.Ct. 2476].) "The area within an arrestee's immediate control was construed to 'mean the area from within which he might gain possession of a weapon or destructible evidence.'" (*People v. Nottoli*, *supra*, 199 Cal.App.4th at p. 547, quoting *Chimel*, *supra*, 395 U.S. at p. 763.)

B. The Search Was Justified Based on Officer Safety and Evidentiary Concerns

We agree with the People that the search of the duffle bag "fell squarely within the contours of the traditional search incident to arrest doctrine." At the time of appellant's lawful arrest, the duffle bag was only two feet away from him, well within "the area from within which he might gain possession of a weapon or destructible evidence." (*Chimel, supra,* 395 U.S. at p. 763.) Both the bag and the whiskey box inside were large enough to hold a weapon and evidence of contraband. And the search was conducted within two minutes of the arrest, before appellant had been removed from the motel room.

Appellant's reliance on *Arizona v. Gant* (2009) 556 U.S. 332 (*Gant*) and *People v. Leal* (2009) 178 Cal.App.4th 1051 (*Leal*), as support for his position that the search of the

bag was no longer justified after he had been arrested, is unavailing. In *Gant*, which involved "circumstances unique to the vehicle context," (*Gant, supra,* at p. 343), the defendant was arrested for driving with a suspended license, handcuffed, and locked in a patrol car. (*Id*. at p. 336.) Officers then searched his parked car and found a gun and cocaine. (*Ibid*.) The *Gant* court held that the search of the defendant's car was unlawful because it did not meet the twin justifications for a search incident to arrest—the defendant could not have accessed his car to retrieve weapons or evidence and he did not commit an offense for which police could expect to find evidence. (*Id*. at p. 335.) But the *Gant* court did conclude that a search incident to arrest would be justified "when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." (*Ibid*.)

Even if *Gant* were applicable outside the vehicle context, both justifications for a search incident to arrest were present here. First, the duffle bag was within reaching distance during the search, and appellant's prior threatening statement—"if you come in, I will do what I have to do to protect myself"—gave Officer Galvez reason to believe the duffle bag contained a weapon or contraband worth defending. Second, as Officer Galvez testified, the fact that appellant was subject to arrest on a narcotics-related felony warrant gave the officer further reason to believe the bag contained narcotics.

In *Leal*, officers arrested the defendant outside his house pursuant to an arrest warrant for two (undescribed) misdemeanors and placed him in a patrol car about 30 to 38 feet away from his place of arrest. (*Leal, supra,* 178 Cal.App.4th at p. 1058.) Several officers searched the house and found no one else present. (*Ibid*.) "Two or three minutes later, with the scene secure, officers' safety assured, and defendant unable to reach or destroy any evidence in the house, a police officer searched the area near the front door—the site of defendant's arrest—and found the handgun under a sweatshirt." (*Id*. at p. 1059.) The *Leal* court found the search unlawful, stating, "'"Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest."'" (*Id*. at p. 1060, quoting *Chambers v. Maroney* (1970) 399 U.S. 42, 47 [26 L.Ed.2d 419, 90 S. Ct. 1975].) Citing *Gant*, the *Leal* court also stated:

"A different rule of reasonableness applies when the police have a degree of control over a suspect but do not have control of the entire situation. In such circumstances—e.g., in which third parties known to be nearby are unaccounted for, or in which a suspect has not yet been fully secured and retains a degree of ability to overpower the police or destroy evidence—the Fourth Amendment does not bar the police from searching the immediate area of the suspect's arrest as a search incident to an arrest." (*Leal, supra,* at p. 1060.)

Here, by contrast, appellant had not been removed from the site of his arrest and remained within reaching distance of the bag. Officer Galvez testified on cross-examination that while he was not especially concerned that appellant would reach into the duffle bag, he was aware of "instances where handcuffed suspects had gotten ahold [*sic*] of weapons and shot actual L.A.P.D. officers."

We find no violation of appellant's Fourth Amendment right; the trial court properly denied the motion to suppress.

C. Alternative Basis for Affirmance

At the suppression hearing, the prosecutor made the alternative argument that the search of the duffle bag was lawful because appellant's denial of ownership of the bag supported a finding that he had no reasonable expectation of privacy in the bag's contents. The trial court agreed, and so do we.

A search of abandoned property is not subject to Fourth Amendment protection. (*People v. Parson* (2008) 44 Cal.4th 332, 345.) "It has long been settled, however, that a warrantless search and seizure involving abandoned property is not unlawful, because a person has no reasonable expectation of privacy in such property." (*Ibid*.) """Abandonment here is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search."'" (*Id*. at p. 346.) "'It is settled law that a disclaimer of proprietary or possessory interest in the area searched or the evidence discovered terminates the legitimate expectation of privacy over such area or items.'" (*People v. Dasilva* (1989) 207 Cal.App.3d 43, 48.) "'The question whether

property is abandoned is an issue of fact, and the court's finding must be upheld if supported by substantial evidence.' [Citation.]" (*People v. Parson, supra*, at p. 346.)

Appellant, by his statements and actions, consistently denied ownership of the duffle bag. He told the arresting officers to take his iPad but not the duffle bag, because "it didn't belong to [him]." He testified at the suppression hearing that he did not own the duffle bag. And when he retrieved his belongings from the jail warehouse, he immediately threw out the duffle bag in a trash bin.

Accordingly, appellant's disclaimer of ownership resulted in his abandonment of any expectation of privacy in the bag's contents, providing an alternative basis for affirmance.

DISPOSITION

The judgment is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ