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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ERIC EMILE DELERY, Defendant and Appellant.	B240204 (Los Angeles County Super. Ct. No. PA065867)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dalila C. Lyons, Judge. Affirmed.

D. Inder Comar, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Roberta L. Davis and Connie H. Kan, Deputy Attorneys General, for Plaintiff and Respondent.

Eric Emile Delery entered a negotiated plea of guilty to possessing a controlled substance, Oxycodone, for sale (Health & Saf. Code, § 11351), and he admitted that he had a prior conviction amounting to a strike pursuant to the three strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170. 12, subd. (a)-(d)). Before entering a plea, appellant moved to suppress unlawfully seized evidence (Pen. Code, § 1538.5), a motion the trial court denied. At sentencing, the trial court imposed the agreed-to term of four years in state prison, consisting of a doubled lower term of two years, enhanced by the doubled one-year enhancement.

CONTENTIONS

He contends that we must reverse the judgment, set aside his plea and dismiss the charges as the trial court improperly denied his Penal Code section 1538.5 motion. He asserts that (1) no specific and articulable facts were presented at the hearing justifying a limited *Terry v. Ohio* patdown search for weapons (*Terry v. Ohio* (1968) 392 U.S. 1 [20 L.Ed. 2d 889] (*Terry*)) and (2) the officer violated the Fourth Amendment by patting his pocket and reaching into it, removing in the absence of probable cause for an arrest the two pill vials that underly the charges.

BACKGROUND

At about 4:55 p.m. on Friday, January 8, 2010, California Highway Patrol Officer Eric Stevenson (Officer Stevenson), a trained and experienced highway patrol officer, was on patrol northbound in Los Angeles County on the Sierra Highway. He received a "be-on-the-lookout" broadcast indicating that the occupants of a white Cutlass vehicle, with a particular license plate, were driving southbound on Highway 14 near the Red Rover Mine. The broadcast indicated that the Cutlass's occupants were drinking alcoholic beverages.

Stevenson parked at the southbound onramp of Highway 14 at Sand Canyon Road and waited for the Cutlass. Shortly thereafter, at about 5:00 or 6:00 p.m., it drove by, and he stopped it. He briefly conversed with its driver. He saw no evidence of the use of alcoholic beverages in the Cutlass, but smelled the odor of burnt marijuana emitting from inside. He had the driver step out and conducted a driving under the influence

investigation. Stevenson asked the driver whether he had smoked marijuana, and the driver replied that he had smoked marijuana at about 10:00 a.m. that morning. The officer had the driver perform field sobriety tests, and the officer concluded that the driver displayed signs of marijuana use, but the driver was not under the influence of alcohol or marijuana.

Stevenson asked the driver whether there were marijuana or drugs in the Cutlass and whether his passengers possessed such substances. The driver replied that "there shouldn't be any in the car, but he didn't know if the passengers had any." Stevenson requested a back-up unit. When another one-man Highway Patrol unit, arrived, Stevenson had the two passengers in the Cutlass alight and "searched" the passengers. As the officer had the passengers step out, the officer smelled the odor of burnt marijuana emitting from the persons of the passengers.

Stevenson addressed himself to appellant, one of the passengers. Officer Johnson, the backup officer, spoke to the other passenger. Initially, Stevenson asked appellant whether he had any weapons or drugs, and appellant replied, "I have no weapons" failing to reply to his question about whether he had any drugs. Stevenson searched appellant by patting down appellant's right front pants pocket. He felt two small, cylindrical items. He concluded that these items felt as if they were prescription medicine vials or film canisters. Based on his training and experience, Stevenson believed that what he felt were containers commonly used to hold drugs.

Stevenson asked appellant what was inside the vials, and appellant "kind of hesitated." Stevenson gave appellant a short time to reply, but appellant stood mute. Stevenson reached into appellant's pocket and removed two prescription pill vials and examined them. Before he opened the pill vials, he could see they contained white pills. On one pill vial, the label was torn off; the other's label was missing. Thus, he was

unable to determine the nature of the medication prescribed and to whom it had been prescribed. He opened the vials and inside observed prescription medication. [1]

Stevenson asked appellant to whom the medication belonged. The officer determined that appellant was the owner of the vials and arrested him.

At the hearing on the motion, appellant asserted no probable cause was demonstrated in the circumstances allowing a search of his person incident to his arrest. He also urged an invalid *Terry* patdown for weapons as the officer failed to testify at the hearing to any specific facts supporting a belief that appellant was armed and dangerous. Consequently, any fruits of an unjustified patdown were properly suppressed. The People argued that the *Terry* patdown was valid, or, in the alternative, the patdown was justified as it was the initial step in a continuing investigation into whether appellant possessed marijuana or dangerous drugs. The prosecutor reasoned that when the officer found the pill vials after an "investigative patdown," the officer's expertise provided a valid basis for his conclusion that appellant possessed a controlled substance and the removal of the vials from the pants pocket and the subsequent arrest.

The trial court denied the motion to suppress.

DISCUSSION

1. *The applicable law.*

"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.) In cases where the facts are essentially undisputed, we independently determine the constitutionality of the challenged search or seizure. (*People v. Balint* (2006) 138 Cal.App.4th 200, 205.)

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[1] The record apart from that of the Penal Code section 1538.5 motion demonstrates that the prescription vials contained 190 Oxycondone pills in all, 100 in one bottle and 90 in the other.

The prosecution bears the burden of demonstrating a legal justification for the search. (*People v. Redd* (2010) 48 Cal.4th 691, 719*; People v. Superior Court (Nasmeh)* (2007) 151 Cal.App.4th 85, 101.) If there is a legitimate reason for a search or seizure, an officer's subjective motivation is generally irrelevant. (*Kentucky v. King* (2011) ___ U.S. ___, ___ [179 L.Ed.2d 865, 877, 131 S. Ct. 1849, 1859] [the high court's cases " 'have repeatedly rejected' a subjective approach, asking only whether 'the circumstances, viewed objectively, justify the action' "]; *Whren v. United States* (1996) 517 U.S. 806, 811-813; *People v. Lomax* (2010) 49 Cal.4th 530, 564.)

"[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment. [Citations.]" (*Mincey v. Arizona* (1978) 437 U.S. 385, 393-394 [57 L.Ed. 2d 290, 98 S.Ct. 2408]; see, e.g., *Chimel v. California* (1969) 395 U.S. 752, 763 [23 L.2d.2d 685, 89 S.Ct. 2034] (*Chimel*)[establishing the scope of a search incident to arrest]; *Arizona v. Gant* (2009) 556 U.S. 332 [173 L.Ed. 2d 485, 129 S.Ct. 1710] [overruling in part *Chimel*'s rule concerning vehicle searches].) When an officer has probable cause to arrest a person, a warrantless search is justified as a search incident to arrest. (*Virginia v. Moore* (2008) 553 U.S. 164, 177-178 [170 L.Ed.2d 559, 128 S. Ct. 1598]; *People v. Diaz* (2011) 51 Cal.4th 84, 90.) " 'When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.' [*Chimel, supra,*] 395 U.S. at [pp.] 762-763.)" (*United States v. Robinson* (1973) 414 U.S. 218, 226, 235 ["In the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."].)

"An arrest is valid if supported by probable cause. Probable cause to arrest exists if facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that an individual is guilty of a crime. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1037.)

"When an officer reasonably suspects that an individual whose suspicious behavior he or she is investigating is armed and dangerous to the officer or others, he or she may perform a patsearch for weapons. (*Terry . . . , supra,* 392 U.S. at pp. 24, 30; [citations].) The sole justification for the search is the protection of the officer and others nearby, and the search must therefore be confined in scope to an intrusion reasonably designed to discover weapons. (*Terry . . . , supra*, at p. 29.)" (*In re H.M.* (2008) 167 Cal.App.4th 136, 143.)

California courts have repeatedly held that a police officer's patdown of a suspect for weapons may be a reasonable exercise of authority when considered in light of the totality of the circumstances. However, "a patdown for weapons is less than a 'full search' and may be conducted in the absence of probable cause to arrest if the officer has reasonable grounds to believe the suspect is armed and dangerous. (*Terry . . . , supra,* 392 U.S. at p. 26; see also *People v. Superior Court* [(1970)] 3 Cal.3d [807,] 829.) The patdown 'must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.' (*Terry. . . , supra,* 392 U.S. at p. 20.) In determining what more is required, ' "[t]here is no exact formula for the determination of reasonableness. Each case must be decided on its own facts and circumstances [citations] – and on the total atmosphere of the case . . . ." ' (*People v. Superior Court, supra,* 3 Cal.3d at p. 827.)" (*In re Frank V.* (1991) 233 Cal.App.3d 1232, 1240.)

2. Analysis

We will not reach the issue of whether further evidence was required at the hearing before the People carried their burden of demonstrating a lawful limited *Terry* patdown for weapons. (See *People v. Garcia* (2006) 145 Cal.App.4th 782, 786-789.) The inquiry is unnecessary as we conclude Officer Stevenson had probable cause to arrest appellant for possessing marijuana prior to the search, i.e., prior to the patdown and reaching into appellant's pocket.

It is well established that odors may constitute probable cause supporting the issuance of a search warrant where an officer recognizes the odor, and the odor is sufficiently distinctive to identify a forbidden substance. (*Johnson v. United States* (1948) 333 U.S. 10, 13; see also *People v. Cook* (1975) 13 Cal.3d 663, 668 [unburned marijuana]; *People v. Gale* (1973) 9 Cal.3d 788, 794, disapproved on another ground as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Benjamin* (1999) 77 Cal.App.4th 264, 273-274 [smell of fresh marijuana]; *United States v. DeLeon* (9th Cir. 1992) 979 F.2d 761, 765 [odor of growing marijuana]; *United States v. Pond* (2nd Cir. 1975) 523 F.2d 210, 212 [hypothetically, the aroma of marijuana emanating from a suitcase alone would support the issuance of a search warrant].) Other decisions mention the probity the odor of marijuana has in determining probable cause during warrantless searches. (See *United States v. Gipp* (8th Cir. 1998) 147 F.3d 680, 685 and authorities cited therein [finding reasonable suspicion to investigate further when officer saw spent roaches and smelled odor of burnt marijuana coming from defendant's car]; *United States v. Loucks* (10th Cir. 1986) 806 F.2d 208, 209-210 [odor of burning marijuana emanating from driver and vehicle justifies vehicle search].)

In *People v. Fitzpatrick* (1970) 3 Cal.App.3d 824 (*Fitzpatrick*), the court found a search of a person for contraband justified on the officer's perception that the person had recently been smoking marijuana.

In *Fitzpatrick*, *supra*, 3 Cal.App.3d at pages 826-827, a police officer stopped a moving automobile for a traffic infraction after observing the vehicle had an inoperative headlight. When the driver rolled his window down and addressed the officer, the experienced police officer smelled the odor of burned marijuana. The officer had the driver step out. The officer smelled the odor on the driver most distinctly, rather than on the car itself or the person of the other passengers. The officer informed the driver he was searching his person and vehicle. He reached into the pocket of defendant's sports jacket and found a plastic bag containing marijuana. He arrested defendant and found another bag of marijuana in the other pocket. (*Id*. at p. 825.) On appeal, the *Fitzpatrick* court rejected the claim that the odor alone was insufficient to constitute probable cause for the arrest and search incident thereto. (*Id*. at p. 827.) It observed that upon smelling the marijuana, the officer reasonably could have inferred that "one who ha[d] recently smoked a marijuana cigarette ha[d] others in his possession." (*Ibid.*.)

In *Fitzpatrick*, the court also rejected the argument proffered on appeal that the odor of "burnt" marijuana was an indication the odor was stale and negated the deduction of recent use. However, the court explained that the officer testified at the hearing that the odor was such that he recognized it as from marijuana that had been burned. He was not asked about, and did not attempt to fix, the period that may have elapsed since the actual smoking to account for the odor he smelled. (*Fitzpatrick*, *supra*, 3 Cal.App.3d at p. 827.) In these circumstances, the court had no difficulty with finding probable cause based on odor alone.

We cannot distinguish the facts in *Fitzpatrick* from what occurred here. The officer similarly smelled the odor of burnt marijuana. The officer was aware of the driver's distancing claim that he did not possess marijuana on his person or in his car but did not know whether his passengers were in possession. Further, when the officer asked appellant directly whether he possessed weapons or drugs, appellant revealingly denied that he had any weapons, apparently refusing to lie about possessing some contraband. As the officer had probable cause to believe appellant possessed marijuana before any

search, the patting down and seizure of the objects in appellant's pocket are justified objectively as a search incident to an arrest for possessing marijuana.

Further, in *People v. Cook*, *supra*, 13 Cal.3d at page 668 and footnotes 4 and 5, relying on *People v. Gale*, *supra*, 9 Cal.3d 788, the court approved the proposition that probable cause to believe contraband is present may be grounded upon detection of the distinctive odor of marijuana.

In reaching our conclusion, this court is not bound by Officer Stevenson's claim that he arrested appellant only *after* he removed and opened the vials revealing the prescription medication. After the effective date of Proposition 8, the determination of whether a Fourth Amendment violation has occurred hinges upon an objective assessment of the officer's actions in light of the circumstances at the time of the search, not upon an assessment of the police officer's actual state of mind. (*Maryland v. Macon* (1985) 472 U.S. 463, 470-471; *People v. Hull* (1995) 34 Cal.App.4th 1448, 1454-1456; cf. *Whren v. United States*, *supra*, 517 U.S. at p. 813 ["Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."].) Viewing the facts adduced at the hearing objectively, the officer had ample probable cause for an arrest for marijuana possession after smelling burnt marijuana coming from the vehicle at first contact, as well as the odor of burnt marijuana on appellant's person as he alit from the Cutlass, and after hearing the statements of the driver and appellant concerning their use and possession of "any drugs." (*Florida v. Royer* (1983) 460 U.S. 491, 507 [the fact the officers did not believe there was probable cause did not foreclose the state from justifying a defendant's custody by proving probable cause].)

Appellant argues that the recent changes in the marijuana laws should color this court's decision in determining whether the officer had probable cause. However, the officer was entitled to believe that it was unlikely the three Cutlass occupants were invalids using medicinal marijuana to ameliorate pain as they drove down the freeway.

In *People v. Strasburg* (2007) 148 Cal.App.4th 1052, 1058-1059, in the context of a vehicle search for marijuana, the court similarly found a search justified from the outset on the officer's perception of the odor of marijuana. The court addressed the further

claim that no probable cause was shown when that defendant acknowledged his possession of the marijuana in his car and produced a physician's prescription authorizing the use of marijuana and identifying himself as a qualified patient under the Compassionate Use Act of 1996, Health and Safety Code section 11362.5. As the court observed there, the Compassionate Use Act only provides a limited immunity authorizing the use of marijuana. It does not provide any shield from a reasonable investigation into illegal marijuana possession. (*People v. Strasburg*, *supra*, at p. 1060.) Here also, that California has made marijuana possession legal in some limited conditions provides no bar to the officer investigating and arresting for marijuana possession.

The decision in *People v. Leib* (1976) 16 Cal.3d 869 (*Lieb*) is distinguishable. In *Lieb*, the defendant knocked at the door of a location where the officers were executing a search warrant for illicit narcotics. Defendant said loudly, "I am here for my stuff." (*Id*. at p. 872.) The officers immediately patted him down, questioned him about a "plastic bottle" felt in his pocket, and when the defendant said the bottle contained pills, the officer removed the bottle and arrested defendant. (*Ibid*.) The court found no probable cause for the arrest. *Lieb* is nothing like this case where the officer was entitled to conclude appellant probably possessed marijuana based on the odor of his very recent use of that substance in the Cutlass and the statements by him and the driver evidencing a consciousness of guilt.

To the extent *People v. Marshall* (1968) 69 Cal.2d 51 at pages 58 to 59, suggests that the smell of contraband, even coupled with the exigent circumstances, fails to justify a *warrantless* search, the court in *Guidi v. Superior Court* (1973) 10 Cal.3d at p. 17, footnote 18, overruled that decision. (See *People v. Cook*, *supra*, 13 Cal.3d at p. 668, fn. 4; but cf. *Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1247-1254 (conc. opn. of Liu, J.) ["plain smell" is not the equivalent to "plain view," and unless the officers use their sense of smell to confirm already visible contraband, a warrantless seizure is not permitted pursuant to the Fourth Amendment].)

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.