Filed 10/4/17 P. v. Stoney CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOHN STONEY, JR., Defendant and Appellant.	2d Crim. No. B281098 (Super. Ct. No. 1503918) (Santa Barbara County)

John Stoney, Jr. appeals an order of probation granted after his nolo contendere plea to carrying a concealed firearm. (Pen. Code, § 25400, subd. (a)(2).)[1] We conclude that the trial court properly denied Stoney's motion to suppress evidence, and affirm.

This appeal concerns legal justification for the warrantless search of Stoney's backpack following his detention for possession of methamphetamine and drug paraphernalia. At

[1] All further statutory references are to the Penal Code unless stated otherwise.

a hearing to exclude evidence of a firearm found inside the backpack, the prosecutor asserted that a police officer searched the backpack incident to Stoney's arrest. At the time of the search, the backpack was inside a residence and Stoney was detained outside. The trial court rejected that legal justification, however, and decided that exigent circumstances justified the warrantless search.

FACTUAL AND PROCEDURAL HISTORY

By a first-amended information, the prosecutor charged Stoney with possession of a concealed firearm, possession of a firearm by a felon, possession of methamphetamine, and possession of drug paraphernalia. (§§ 25400, subd. (a)(2), 29800, subd. (a)(1); Health & Saf. Code, §§ 11377, subd. (a), 11364, subd. (a).) Pursuant to section 1538.5, Stoney filed a motion to suppress evidence of a firearm found during the search of his backpack. The trial court held a hearing and received oral and written argument regarding the search-incident-to-arrest and exigency exceptions to the warrant requirement.

At the suppression hearing, Santa Maria Police Sergeant Jesus Valle testified that he drove to a residence at 326 West Orchard Street following a dispatch regarding "some type of argument" and "a male with a gun." Specifically, a female caller stated that her boyfriend, Christopher Sprouse, had a gun. As Valle and Officer Ernest Salinas approached the residence, they coincidentally met two probation officers who had performed a routine probation check there concerning probationer "Smalley." Salinas was already familiar with the residence, having previously responded there regarding municipal code and drug law violations.

Valle, Salinas, and Corporal Louis Tanore announced their presence at the open front door and requested the residents to come outside. Two or three women left the residence and walked outside. The officers again announced their presence, walked inside through the open door, and requested that all residents leave. Another woman left a bedroom and Stoney emerged from a bedroom with a backpack "strapped over his shoulder."

Tanore then directed Stoney to set the backpack on the floor. Valle asked Stoney if he had "any weapons on his person, anything [Valle] should be concerned about." Stoney replied, "I got a piece in my pocket." In Valle's experience, "a piece" could mean a gun, weapon, or methamphetamine pipe. During a pat-down of Stoney's clothing, Valle found a methamphetamine pipe, a pocket knife, and a baggie of white powdery residue.

Valle escorted Stoney outside and directed him to wait there with the two probation officers and another police officer. Valle believed that Stoney would be arrested for the drugs and drug paraphernalia, but "didn't know which officer was going to handle the arrest." Valle and Tanore then continued to search the residence for occupants. At some point, Tanore opened Stoney's backpack, which was sitting on the living room floor. Inside the backpack, in immediate view, was a revolver. At the time Tanore opened the backpack, Stoney was detained outside in the driveway, approximately 25 feet away. During the residence search, the officers did not find Sprouse or probationer Smalley.

At the suppression hearing, the prosecutor asserted that Tanore searched the backpack incident to Stoney's arrest.

Defense counsel responded that Stoney stood 25 feet away from the backpack when Tanore opened it, and that the only warrant exception that could apply was exigency ("we're really looking at exigency, and that's the essence of all the exceptions to the warrant requirement"). The trial court then denied the motion to suppress because of "the exigency reason," commenting that police officers were "worried about the whole scene."

Following denial of his suppression motion, Stoney pleaded nolo contendere to possession of a concealed firearm. (§ 25400, subd. (a)(2).) In accordance with a plea agreement, the trial court suspended imposition of sentence and placed Stoney on formal probation for five years, with terms and conditions that included confinement in county jail with credit for time served. At the prosecutor's request, the court then dismissed the remaining counts.

Stoney appeals and contends that the trial court erred by denying his suppression motion.

DISCUSSION

Stoney argues that the trial court erred by applying the exigent circumstances exception to the warrant requirement because the prosecutor did not argue that theory and, in any event, it does not apply.

In ruling upon a motion to suppress, the trial court determines the facts, selects the rule of law, and applies it to the facts to determine whether the law has been violated. (*People v. Brendlin* (2008) 45 Cal.4th 262, 268; *People v. Leath* (2013) 217 Cal.App.4th 344, 350.) We review the court's factual findings pursuant to a substantial evidence standard. (*People v. Suff* (2014) 58 Cal.4th 1013, 1053 [reviewing court defers to trial court's express or implied factual findings that are supported by

substantial evidence]; *People v. Tully* (2012) 54 Cal.4th 952, 979 [in suppression hearing, trial court determines credibility of witnesses, weighs the evidence, and draws reasonable inferences therefrom].) We independently determine the legality of a search or arrest upon the established facts. (*Suff*, at p. 1053.) We also affirm the court's ruling if it is correct on any theory of law applicable to the case, even if for reasons different than those stated by the trial court. (*People v. Evans* (2011) 200 Cal.App.4th 735, 742.)

Search Incident to Arrest

Stoney asserts that the backpack search is not justified as a warrantless search incident to his arrest because the backpack was not then within his immediate control. (*Chimel v. California* (1969) 395 U.S. 752, 768 [there is no constitutional justification, in the absence of a search warrant, to search an area beyond the defendant's person and the area from which he could have obtained a weapon or destroyed contraband].) The Attorney General concedes. (*People v. Macabeo* (2016) 1 Cal.5th 1206, 1214 [search incident to arrest limited to area from which arrestee might gain access to weapon or destroy evidence].) At the time Tanore searched the backpack, Stoney was 25 feet away, outside the residence, and did not have access to the backpack. As such, this exception to the warrant requirement does not apply.

Exigent Circumstances

A warrantless entry into a home to conduct a search is presumptively unreasonable. (*Welsh v. Wisconsin* (1984) 466 U.S. 740, 748-749; *People v. Rogers* (2009) 46 Cal.4th 1136, 1156.) The government bears the burden of establishing that exigent circumstances or another exception to the warrant requirement

justifies the entry. (*People v. Troyer* (2011) 51 Cal.4th 599, 605; *Rogers*, at p. 1156.) "[T]he exigent circumstances doctrine constitutes an exception to the warrant requirement when an emergency situation requires swift action to prevent imminent danger to life." (*Rogers*, at p. 1156.) Each claim of an extraordinary situation must be measured by the facts known to the officers. (*Id.* at p. 1157.) "Generally, a court will find a warrantless entry justified if the facts available to the officer at the moment of the entry would cause a person of reasonable caution to believe that the action taken was appropriate." (*Ibid.*) The exigency exception does not depend upon the officer's subjective intent; it requires only an objectively reasonable basis for believing there exists an exigency. (*Troyer*, at p. 605.)

Here the exigency theory was properly before the trial court. Although the prosecutor did not assert the exception, the court considered and applied it. Stoney thus had notice of the exception and the opportunity to argue and present evidence. (*Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1242.)

The trial court properly applied the exigency exception because the officers had probable cause to believe there was a disturbance in the residence involving a man with a gun. The police dispatcher was notified by a female caller that there had been an argument and that Sprouse was armed with a gun. Officers entered through an open door after announcing their presence and demanding that occupants of the residence leave. Three or four women and one man - Stoney - eventually left. Officers continued to clear the residence, but did not locate Sprouse, probationer Smalley, or a firearm, none of whom or which had been accounted for. Thus, a risk existed that another occupant who had not yet left the residence could have used a

firearm against the officers or other occupants. "Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that [defendant] was the only man present and that the police had control of all weapons which could be used against them . . . ." (*Warden, Maryland Penitentiary v. Hayden* (1967) 387 U.S. 294, 299.)

When the officers asked Stoney about weapons, Stoney replied he had "a piece" in his pocket. Under the circumstances, it was reasonable to believe that Stoney could have had a weapon in his backpack.

Inevitable Discovery Doctrine

The Attorney General asserts that the firearm would have been inevitably discovered during a booking search following Stoney's arrest for drug charges.

"Under the inevitable discovery doctrine, illegally seized evidence may be used where it would have been discovered by the police through lawful means." (*People v. Robles* (2000) 23 Cal.4th 789, 800.) The rule prevents setting aside convictions that would have been obtained without police misconduct. (*Ibid.*) The prosecution bears the burden of establishing the predicates to application of the doctrine. (*Ibid.*) The doctrine may be raised for the first time on appeal only "if the factual basis for the theory is fully set forth in the record." (*Id.* at p. 801, fn. 7.)

To establish inevitable discovery, the prosecution must demonstrate by a preponderance of the evidence that due to application of routine police procedures or other circumstances, the unlawfully seized evidence would have been discovered by lawful means. (*People v. Hughston* (2008) 168 Cal.App.4th 1062, 1071-1072.) In deciding whether the inevitable discovery exception applies, we determine whether, viewing the

circumstances as they existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred. (*Id.* at p. 1072.)

Here Stoney carried a backpack "strapped over his shoulder" as he left the West Orchard Street residence. Valle testified that Stoney would be arrested for the possession of methamphetamine and drug paraphernalia. The backpack was associated with Stoney's person when he was detained and would have been seized by the officers when arresting Stoney and transporting him to custody. Officers would have inevitably inventoried the contents of the backpack at the police station during a booking or inventory search. (*Illinois v. Lafayette* (1983) 462 U.S. 640, 648 [upholding inventory search of shoulder bag carried by arrestee].) "[I]t is not 'unreasonable' for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures." (*Ibid.*)

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

James F. Rigali, Judge

Superior Court County of Santa Barbara

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

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