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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. VINCENT A. MOJICA, Defendant and Appellant.	B268057 (Los Angeles County Super. Ct. No. BA421008)

APPEAL from a judgment of the Superior Court of Los Angeles County, William N. Sterling, Judge. Affirmed.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant and appellant Vincent Mojica guilty of possessing child or youth pornography, which was discovered on his cell phone. On appeal, Mojica contends that the evidence should have been suppressed under the Fourth Amendment. He also contends that the erroneous admission of evidence he was on probation requires reversal. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background

On January 30, 2014, at 7:00 p.m., Deputy Sheriff David Silverio searched Mojica and found a cell phone in Mojica's pocket. The phone's home screen was of a nude young girl. The deputy saw 10 or 12 additional pictures either of "nude little girls" or of girls wearing underwear. After being given his *Miranda*[1] rights, Mojica told the deputy the phone was his and he had downloaded pictures of nude little girls from the internet. Mojica thought the girls were about 10 years old.

Sixty-two photographs downloaded from Mojica's cell phone were shown to the jury.

The defense stipulated that the cell phone belonged to Mojica.

II. Procedural background

On October 27, 2015, a jury found Mojica guilty of possession of or control of matter depicting a minor engaging in or simulating sexual conduct (Pen. Code, § 311.11, subd. (a).)[2] He was sentenced that day to the midterm of two years, doubled due

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

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

to a prior strike which Mojica admitted, plus one year for a prison prior (§ 667.5, subd. (b)).

CONTENTIONS

Mojica raises two contentions on appeal: I. the search of his cell phone violated the Fourth Amendment, and II. his motion for a mistrial should have been granted when his probationary status was disclosed to the jury.

DISCUSSION

I. Motion to suppress

A. *Additional facts*

Mojica moved to suppress the cell phone and its contents. His written motion moved to suppress all evidence seized and demanded "the source of probable cause in this case (*Harvey/Madden*)."[3]

At the suppression hearing, Deputy Silverio testified that it's his practice to approach people walking with a "[c]ourteous hello. Hi. How you doing? Do you live around here?" The discussion leads to whether the person has been arrested. The deputy does this although he doesn't have any individualized suspicion about the person he is engaging.

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[3] *People v. Harvey* (1958) 156 Cal.App.2d 516 and *People v. Madden* (1970) 2 Cal.3d 1017. The *Harvey-Madden* rule "[i]n its most conventional application" is "nothing more than the hearsay rule adapted specifically to motions to suppress." (*People v. Romeo* (2015) 240 Cal.App.4th 931, 944 (*Romeo*).) The cases establish the evidentiary rules the prosecution must satisfy to prove the underlying grounds for arrest or detention "when the authority to arrest [or detain] has been transmitted to the arresting officer through" police or official channels. (*People v. Collins* (1997) 59 Cal.App.4th 988, 993.)

On January 30, 2014, at 7:03 p.m., Deputy Silverio was with his partner in their police car. Upon seeing Mojica walking on the sidewalk, they drove alongside him and asked where he was going. Mojica said he was getting a beer. Deputy Silverio asked if Mojica lived in the neighborhood, and Mojica replied he lived off Winter Street. When asked if he'd ever been arrested, Mojica said yes. The deputy then asked if Mojica was on probation or parole, and Mojica said he was, for robbery.

The deputies then "[d]etained him, pending probation compliance search." They told Mojica to stop and asked if he had search conditions, and Mojica said he did. At some point, using "department resources on our vehicle," the deputies verified that Mojica was on probation with search conditions. After Mojica said he had search conditions, Deputy Silverio "[p]ulled out [defendant's] items from his pockets and grabbed his cell phone." The deputy put the cell phone, a Metro P.C.S. Alcatel, on the car's hood. "I guess I remember putting it on the hood. There was a picture [of a nude little girl] that appeared on his phone." The deputy could not remember if, when he placed the phone on the hood, he hit any buttons or anything on the phone.[4] When asked if that first image was "like a wallpaper, like some type of background on the phone, or whether it was just pictures that

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[4] At the subsequent trial, Deputy Silverio testified that when he removed the cell phone from Mojica's pocket, the deputy "pressed and slide [*sic*] a button and a picture, uhm, was depicting the home screen," which was of a nude, young girl. Defense counsel did not then renew the motion to suppress. We evaluate the trial court's suppression order, however, based on the facts known to the court at the time of the suppression hearing. (*In re Arturo D.* (2002) 27 Cal.4th 60, 77-78, fn. 18.)

had been up and were being scrolled through," the deputy said "[t]o me, it was pictures that it was being scrolled by." After the first image appeared, the deputy searched the phone, which required no passcode or going into folders. Rather, he was able to continue scrolling based on the photo on the initial screen. He saw 10 to 12 more photographs. Mojica was arrested. After being given his *Miranda* rights, Mojica said he downloaded the photographs from a website.

Based on this evidence, the defense argued that the encounter was not consensual and that it was improper for police officers to "be able to stop any citizen, whether or not they have a criminal record, to start to inquire whether they themselves, do have a criminal record, for the purposes of what I would consider harassment."

The trial court found that the initial encounter was consensual, and "[w]hen the conversation comes around to probation or parole, that gives the officer justification to conduct a pat-down or search. And now what's interesting in this case is when the officer retrieves the phone, according to his testimony, the picture is already up, so he really didn't have to go into the cell phone. [¶] Now, the sliding of the phone today may require a warrant, but we're really in a plain-view situation."

The prosecutor agreed, and added that the probationary search and seizure conditions justified the search. Defense counsel said he didn't think that Mojica had search conditions.

B. *The search did not violate the Fourth Amendment.*

The Fourth Amendment to the United States Constitution guarantees the right to be free of unreasonable searches and seizures. (U.S. Const., 4th Amend.) Warrantless searches are presumed to be unreasonable, subject only to a few specifically

established and well-delineated exceptions. (*People v. Macabeo* (2016) 1 Cal.5th 1206, 1213 (*Macabeo*).) Accordingly, when a defendant challenges "the legality of a warrantless search or seizure, the People are obligated to produce proof sufficient to show, by a preponderance of the evidence, that the search fell within one of the recognized exceptions to the warrant requirement." (*Romeo*, *supra*, 240 Cal.App.4th at p. 939.) We evaluate challenges to the admissibility of a search or seizure solely under federal constitutional standards. (*Macabeo*, at p. 1212.) We defer to the trial court's express or implied factual findings if supported by substantial evidence, but exercise our independent judgment to determine whether, on the facts found, the search or seizure was reasonable under the Fourth Amendment. (*Ibid.*)

Mojica first challenges the search on the ground he was illegally detained, based on Deputy Silverio's testimony that it was his custom and practice to approach individuals and engage them in conversation. Officers, however, may approach a person in a public place and ask if the person is willing to answer questions. (*People v. Brown* (2015) 61 Cal.4th 968, 974.) "Such consensual encounters present no constitutional concerns and do not require justification." (*Ibid.*; see also *People v. Bailey* (1985) 176 Cal.App.3d 402, 405.) In contrast, a detention occurs when an officer, by means of force or show of authority, restrains a person's liberty. (*People v. Zaragoza* (2016) 1 Cal.5th 21, 56; see also *Terry v. Ohio* (1968) 392 U.S. 1, 19.) Here, there was no force or show of authority; the deputies merely drove alongside Mojica and asked him questions. Until Mojica said he was on probation and the deputies told him to stop, Mojica was unrestrained and free to leave or to ignore the officers' questions.

(See, e.g., *Zaragoza*, at pp. 56-57; *People v. Zamudio* (2008) 43 Cal.4th 327, 344-345 [record showed no threat, application of force, intimidating movement, brandishing of weapons, blocking of exits].) Until that point, the encounter was consensual and no illegal detention occurred.

Next, we consider whether the deputy's removal of Mojica's cell phone from his pocket implicated the Fourth Amendment. First, although Mojica argues on appeal there is no evidence the terms of his probation permitted a search of his cell phone, he does not address whether *removing* the cell phone from his pocket was a permissible probation search. The issue is therefore forfeited. (See, e.g., *People v. Camel* (2017) 8 Cal.App.5th 989 [failure to renew argument in opening brief on appeal or cite relevant authority constitutes forfeiture of appellate review].)

Second, and notwithstanding any forfeiture, the deputy removed the cell phone from Mojica's pocket *after* Mojica admitted he was on probation or parole and subject to search conditions, which the deputy, at some point, verified using the police car's computer system. Deputy Silverio therefore had advance knowledge that Mojica was generally subject to search conditions. (See generally *Romeo*, *supra*, 240 Cal.App.4th at pp. 939-940 [terms of probation define allowable scope of a search, and searching officer must therefore "have 'advance knowledge of the search condition' before conducting a search [citations]. Without such advance knowledge, the search cannot be justified as a proper probation search, for the officer does not act pursuant to the search condition"]; see also *People v. Sanders* (2003) 31 Cal.4th 318, 333.)

However, the "permissible scope of a probation search is circumscribed by the terms of the search clause, and the scope

may vary." (*Romeo*, *supra*, 240 Cal.App.4th at p. 951; see also *People v. Woods* (1999) 21 Cal.4th 668, 674 [probationers may validly consent in advance to warrantless searches in exchange for opportunity to avoid service of a state prison term].) Thus, "mere knowledge that someone is on probation and subject to search, without more, may be insufficient where there is a challenge to the search." (*Romeo*, at pp. 951-952.) In *Romeo*, for example, the appellant lived in a garage attached to the home of two probationers. (*Id.* at p. 935.) A searching officer testified he personally knew that the probationers were on probation with a search clause and he confirmed their status using a countywide computer system. (*Id.* at p. 936.) Because there was no other evidence of the precise search condition, the court could not determine whether the authorized scope of the search extended just to the probationers' person or to all property under their control, including their residence. (*Id.* at pp. 950-951.) The trial court thus erred in denying the suppression motion.

We decline to extend *Romeo* to the situation before us. True, the record does not contain the probation order itself, but even *Romeo*, although it acknowledged that presenting the order might be the better practice, did not view such presentation as mandatory. (*Romeo*, *supra*, 240 Cal.App.4th at p. 952.) *Romeo* also involved an expansive search of a residence, including the garage where the nonprobationer-appellant lived. In contrast, this case involves the limited search of Mojica's immediate person. Being on probation and having search conditions means, at a minimum, that one has given advance consent to a search of one's person. Thus, once Mojica said he was on probation or parole and subject to search conditions (which was possibly verified at that point), the deputy could remove items from

Mojica's pocket, including the cell phone, without running afoul of the Fourth Amendment.[5]

The next step in our Fourth Amendment analysis thus concerns what happened when the deputy put Mojica's cell phone on the car: an image of a "nude little girl" appeared. Although the deputy's testimony was ambiguous—i.e., he said the image "appeared," but he couldn't remember whether he pushed a button—the trial court concluded, and substantial evidence supports that conclusion, that this initial image was in plain view.[6] " 'It is well established that under certain circumstances the police may seize evidence in plain view without a warrant.' " (*Horton v. California* (1990) 496 U.S. 128, 134.) " '[T]he "plain view" doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object.' " (*Id.* at p. 135.) The incriminating character of the item must be "immediately apparent," and, "not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself." (*Id.* at pp. 136-137.) Here, the only description of the initial image on Mojica's cell phone is it was of a "nude little

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[5] That the record doesn't clearly show that the deputy knew the precise parameters of the search conditions may bear on whether the People sustained any burden of proving that Mojica was subject to an *electronics* search condition. As we explain later, we need not reach that issue.

[6] The plain view doctrine does not create an independent "exception" to the warrant clause, but simply is an extension of whatever may be the prior justification for the officers' "access to an object." (*Texas v. Brown* (1983) 460 U.S. 730, 738-739.)

girl." The criminal nature of such an image is immediately apparent. At that point, the deputy had probable cause to arrest Mojica.

Because the deputy had probable cause to arrest Mojica when the first image appeared, the People argue that the continued search of Mojica's phone was valid as a search incident to arrest. Had the continued search occurred after June 25, 2014 we would reject this argument. On that day, the United States Supreme Court decided *Riley v. California* (2014) 573 U.S. ___ [189 L.Ed.2d 430], which held that officers must generally obtain a warrant before searching data on a suspect's cellular phone, even when the phone is seized incident to arrest. (See also *Macabeo*, *supra*, 1 Cal.5th at pp. 1214-1215 ["the ordinary justifications for searches incident to arrest are to secure weapons, prevent escape, and preserve evidence of crime. These apply with less force in the context of cell phone data."].) Therefore, had the search of Mojica's phone occurred *after* June 25, 2014, Deputy Silverio's continued search of the phone would not have been permissible as a search incident to arrest.

But Deputy Silverio's continued search of the cell phone occurred on January 30, 2014, *before Riley* was decided. At that time, *People v. Diaz* (2011) 51 Cal.4th 84 (*Diaz*), which held that cell phones could be searched incident to arrest, was binding appellate precedent, and, the People argue, Deputy Silverio in good faith relied on it.[7] The good faith exception to the

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[7] In *Diaz*, the defendant was arrested after an officer saw him selling Ecstasy. The defendant had a cell phone, which was searched 90 minutes after the defendant's lawful arrest. A text incriminating the defendant in the sale of Ecstasy was found. (*Diaz*, *supra*, 51 Cal.4th at p. 89.) *Diaz* found that the phone was

exclusionary rule applies when a search was conducted in objectively reasonable reliance on binding appellate precedent. (*Davis v. United States* (2011) 564 U.S. 229.) "[T]he 'prime purpose' of the exclusionary rule 'is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures,' " and, "[a]s with any remedial device, application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced." (*Illinois v. Krull* (1987) 480 U.S. 340, 347; see also *Davis*, at pp. 236-237.) Thus, when the police act in an objectively reasonable manner consistent with existing law, "the ' "deterrence rationale loses much of its force," ' and exclusion cannot 'pay its way.' " (*Davis*, at p. 238.) Stated otherwise, a law enforcement officer may not be penalized for an appellate judge's error. (*People v. Youn* (2014) 229 Cal.App.4th 571, 579.)

Our California Supreme Court recently considered the applicability of the good faith exception in this specific context in *Macabeo*. In *Macabeo*, the defendant was riding his bike. (*Macabeo*, *supra*, 1 Cal.5th at p. 1210.) After he rolled through a stop sign (an infraction for which Macabeo could not be arrested), officers stopped him. The officer removed a cell phone from Macabeo's pocket and searched it, finding images of underage girls. (*Id.* at p. 1212.) Macabeo was arrested.

Macabeo acknowledged that the search of defendant's cell phone could not be justified as incident to arrest under *Riley*.

" 'immediately associated with [defendant's] person,' " and, under the court's understanding of United States Supreme Court precedent, the warrantless search of the phone was valid as incident to arrest. (*Id.* at p. 93.)

(*Macabeo*, *supra*, 1 Cal.5th at p. 1216.)[8] Nor, however, could it be justified under *Diaz*. *Diaz* upheld the search of a cell phone as incident to an *actual custodial arrest*; i.e., Diaz was arrested and taken to jail, where his phone was searched 90 minutes after the arrest. In contrast, Macabeo was not under arrest when officers searched his phone. Nor could he have been under legal arrest, because a reasonably well-trained officer would know that state law prohibited Macabeo's arrest for merely rolling through the stop sign. (*Macabeo*, at pp. 1223-1224.) Therefore, the good faith exception to the exclusionary rule did not apply in *Macabeo*.

Macabeo is distinguishable.[9] Unlike the defendant in *Diaz* who was not subject to arrest, Mojica was subject to arrest. Specifically, the initial image of a "nude little girl" that appeared on Mojica's phone gave rise to probable cause to arrest him. Deputy Silverio, in good faith, thus could rely on then binding appellate precedent (*Diaz*) to further search defendant's cell phone. "[W]hen binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will

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[8] *Macabeo* also found that the search was not a valid probation search, because Macabeo gave "somewhat confused" answers to an inquiry whether he was on probation and he, in fact, was not on probation. (*Macabeo*, *supra*, 1 Cal.5th at p. 1211.)

[9] *U.S. v. Lara* (9th Cir. 2016) 815 F.3d 605 is also distinguishable. The defendant's cell phone in *Lara* was searched during a probationary search. The searching officers could not have relied in good faith on *Diaz*, because *Diaz* involved a search incident to a lawful custodial arrest. "It hardly needs saying that a search incident to arrest is not the same thing as a warrantless, suspicionless, probation search." (*Lara*, at p. 614.)

and should use that tool to fulfill their crime-detection and public-safety responsibilities." (*Davis v. United States*, *supra*, 564 U.S. at p. 241.) Excluding evidence in this case thus would have no deterrent effect on illegal searches by police officers, and "all that exclusion would deter" "is conscientious police work." (*Ibid.*)

We make one final point about the discovery of 10 to 12 additional photographs of young girls. The deputy's continued search of the phone technically occurred *before* the arrest. A question therefore could arise whether the search was truly incident to arrest. However, when the formal arrest follows "quickly on the heels of the challenged search of petitioner's person," it is not "particularly important that the search preceded the arrest rather than vice versa." (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 111.) Notwithstanding this statement, our California Supreme Court has cautioned against reading "too much into the *Rawlings* comment about the order in which discovery of probable cause is made and the effectuation of a formal arrest takes place." (*Macabeo*, *supra*, 1 Cal.5th at p. 1217.) "*Rawlings* merely established that when an arrest is supported by probable cause, after-acquired evidence need not be suppressed because an otherwise properly supported arrest was subsequently made formal." (*Ibid.*) *Macabeo* declined to read *Rawlings* for the "broad proposition that probable cause to arrest will always justify a search incident as long as an arrest follows." (*Macabeo*, at p. 1218.) Thus, *Rawlings* did not apply in *Macabeo* because the defendant was detained for ignoring a stop sign, which was an infraction for which he could have been cited but not arrested. There is, however, no exception for a search incident to *citation*, as opposed to arrest. (*Macabeo*, at p. 1218.)

Unlike in *Macabeo*, Mojica here was subject to arrest for possessing that initial image of a "nude little girl." *Rawlings* therefore applies. "When a custodial arrest is made, and that arrest is supported by independent probable cause, a search incident to that custodial arrest may be permitted, even though the formalities of the arrest follow the search." (*Macabeo*, *supra*, 1 Cal.5th at p. 1218.) Mojica's arrest was supported by independent probable cause—the initial image. That he was not formally arrested until perhaps mere minutes after Deputy Silverio saw that initial image giving rise to probable cause does not invalidate the search as one incident to arrest.[10]

II. Mistrial based on the mention of Mojica's probationary status

Although Deputy Silverio was told not to mention Mojica's probationary status, the deputy, when asked to describe the search, answered that it was "during a probation compliance search." Defense counsel immediately objected and, at sidebar, the prosecutor said she had "literally told [the deputy] just as we came in the door not to make any mention of it." Nonetheless, the trial court denied the defense's motion for a mistrial because "it's been made clear to me that the defense is not disputing that the cell phone was the defendant's. You stipulated to that. There's no question that the images were on there. The entire trial is going to be over whether or not the images depict people under the age of 18 engaged in or simulating sexual conduct as defined by statute and case law. So I don't think that the

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[10] Because we decide the continued search was valid as one incident to arrest, we need not decide whether it was valid as a probation search.

mention of a probationary search will have any impact or consequence given the nature of the way this case is going to be tried."

The trial court told the jury it was striking "the portion of answer regarding a probation search. [¶] And I'm going to instruct you . . . to disregard that. Whether or not the defendant was or was not on probation for something else has absolutely no bearing whatsoever on whether or not he possessed photos that depicted people under the age of 18 engaged in or simulating sexual conduct. It's just absolutely irrelevant. It does not mean anything. You're not to consider it in terms of what his character—it does not prove he's a bad person. It does not prove he's likely to do anything. And you're to completely disregard it. It's completely irrelevant to this case."

This limiting instruction, which we presume the jury followed, cured the error. (See, e.g., *People v. Lewis* (2001) 25 Cal.4th 610, 637 [instruction limited any prejudicial impact of uncharged crimes evidence].)

In any event, as the trial court explained, the error was harmless, because it is not reasonably probable a result more favorable to Mojica would have resulted in the absence of the error. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 652, 656, 659 [admission of evidence prohibited by Evid. Code, §§ 352 & 1101 is reviewed under the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 835].) There was no dispute that the cell phone belonged to Mojica and that the images were on his phone. The only question therefore was whether any of the 62 images depicted girls under 18 engaged in or simulating sexual conduct. Those images included ones of young girls with their genitals exposed.

Nor do we agree that the jury's question shows that the case was close. The jury asked for clarification of CALJIC No. 10.83, which provided that, to prove Mojica committed the charged crime, he had to know that the matter depicted a person under 18 engaging in or simulating sexual conduct. In making this determination, the jury should consider "6. Whether th[e] conduct is intended or designed to elicit a sexual response in the viewer." The jury asked for clarification of the word "conduct": " 'Is it person in the photo's conduct, the subject matter?' " The jury's question concerned who intended the conduct to elicit a sexual response, the answer to which is the photographer. Thus, in no way did the question indicate that the question was close on whether Mojica knowingly possessed images depicting underage girls engaging in or simulating sexual conduct.

For the same reasons, admission of the evidence did not render Mojica's trial fundamentally unfair. (See generally *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *People v. Partida* (2005) 37 Cal.4th 428, 439 [evidentiary ruling—whether or not correct under state law—denies a defendant due process of law only if it makes the trial fundamentally unfair].)

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

EDMON, P. J.

LAVIN, J.