Filed 6/16/17 In re Chris G. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re CHRIS G., a Person Coming Under the Juvenile Court Law.	B271994 Los Angeles County Super. Ct. No. VJ45309
THE PEOPLE, Plaintiff and Respondent, v. CHRIS G., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Fumiko Wasserman, Judge. Affirmed.

Bruce G. Finebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, and Idan Ivri, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Minor Chris G. (the minor) appeals from the judgment of wardship (Welf. & Inst. Code, § 602) entered following a determination that he was a minor in possession of a firearm (Pen. Code, § 29610), a felony. Pertinent here, the juvenile court's determination followed the denial of the minor's motion to suppress evidence (the firearm) obtained during a warrantless search of his backpack. Appellate counsel filed an opening brief in which he raised no issues (*People v. Wende* (1979) 25 Cal.3d 436), and we requested briefing on the validity of the search.

The minor now contends the court erred in denying his motion to suppress evidence under *Terry v. Ohio* (1968) 392 U.S. 1, 24 (*Terry*), as the deputies had no reasonable basis to believe he was armed and, even if they did, plainly exceeded the scope of a *Terry* "stop and frisk" when they searched his backpack after removing it from his person. The People impliedly concede the search was not valid under *Terry*, and argue instead that the search of the minor's backpack was a valid search incident to arrest. We agree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Underlying facts

At approximately 5:30 p.m. on April 6, 2016, two Los Angeles County Sheriff's Deputies, Jonathan Islas and Ruben Macias, were on duty in a marked patrol car in Norwalk near Curtis and King Road and Foster Road. Both Islas and Macias understood the surrounding area had a history of crime and narcotics use. The officers drove toward an area near a path leading down to a river bed. The deputies parked their patrol car

and, after smelling the heavy scent of burnt tobacco and marijuana, proceeded on foot toward the path.

As Islas and Macias walked down the path, they saw two young men (the minor and another person) who were trying to conceal themselves from the deputies. The young men were approximately 20 feet away from the deputies and had positioned themselves behind a concrete pillar so that only their heads, which were peeking out from behind the pillar, were visible. Out of concern for his safety, Islas directed the two men to come out from behind the pillar, which they did.

Islas and Macias approached the two men. Islas addressed the minor and asked his name and his age, while Macias made inquiries of the other man. The minor responded, stating that he was 17 years old. Because the smell of tobacco and marijuana grew stronger as Islas approached the minor, Islas investigated whether the minor was in possession of marijuana or tobacco. Islas asked the minor whether he had anything illegal in his possession, and the minor responded that he had cigarettes. Islas then searched the minor and found a pack of cigarettes in his front pants pocket, along with a cigarette lighter, a metal cigarette case, and a bottle of eye drops. Both officers knew that eye drops are often used to reduce eye redness caused by smoking marijuana.

Throughout the minor's interaction with the deputies, he was argumentative and challenged the deputies' authority to question him. In order to assist Islas, who was unable to control the minor, Macias placed the other man in the rear of the patrol car. Islas became concerned for his safety, and observed that the minor was wearing a backpack. Islas removed the backpack from the minor, and placed him in the rear of the patrol car. Islas

then opened the backpack and immediately saw a semi-automatic pistol inside the main compartment of the backpack. Islas examined the gun and determined it was unloaded and appeared to be in working condition.

2. Procedural history

On April 8, 2016, a petition was filed under Welfare and Institutions Code section 602, charging the minor with possession of a firearm by a minor (Pen. Code, § 29610),[1] a felony. The minor denied the allegations and the matter was set for a jurisdictional hearing.

On April 12, 2016, the minor filed a motion to suppress evidence seeking to exclude all the evidence discovered by the deputies during the initial patdown search and the subsequent search of his backpack. As pertinent here, the motion asserted the firearm was obtained during a warrantless search which was presumptively illegal and conducted in violation of the minor's Fourth Amendment rights. The People did not file a written opposition.

On April 27, 2016, the court conducted a hearing on the motion to suppress at which both deputies and the minor testified. The parties stipulated the search of the backpack was conducted without a warrant. The People argued the deputies had probable cause to search the backpack because they encountered the minor in an area known for narcotics use, the minor smelled of cigarettes and marijuana, and he was in possession of eye drops, which can be used to diminish eye redness caused by smoking marijuana. Further, the prosecutor

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

asserted, "You don't need a warrant to search a backpack." Defense counsel asserted no exigent circumstances justified the warrantless search of the backpack; once the deputies conducted the patdown search and seated the minor in the back of their patrol car, they should have obtained a warrant to conduct any further search of his possessions.

The court denied the motion to suppress, found the allegation in the petition true, and declared the minor to be a ward of the court under Welfare and Institutions Code section 602. The court did not indicate the basis of its ruling on the motion to suppress at the hearing or in the minute order. The court found the minor eligible for deferred entry of judgment, placed him on probation, and ordered him to remain in his mother's home for 45 days. The minor timely appealed.

The minor's appointed appellate counsel filed a brief in which he raised no issues and asked us to review the record independently. (*People v. Wende, supra,* 25 Cal.3d 436.) After reviewing the entire record, we ordered the parties to address whether the deputies had a reasonable basis to conduct a patdown search of the minor incident to his detention on suspicion of possession of tobacco and/or marijuana and, if so, whether the deputies exceeded the permissible scope of a search incident to a detention by searching the minor's backpack for contraband after removing it from his person and placing it out of his reach. (See *Terry, supra*, 392 U.S. at p. 24.)

DISCUSSION

The court properly denied the minor's motion to suppress evidence obtained during the warrantless search of his backpack because the search was valid as incident to arrest.

" 'In California, issues relating to the suppression of evidence derived from governmental searches and seizures are reviewed under federal constitutional standards.' [Citations.] ' " '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.' " ' [Citations.]

" 'The Fourth Amendment to the federal Constitution prohibits *unreasonable* searches and seizures.' (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 365.) ' "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.' " [Citation.] Our cases have determined that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant." ' (*Riley* [*v. California* (2014)] 573 U.S. at p. __, 134 S.Ct. at p. 2482], quoting *Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 653.) 'In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.' (*Riley*, at p. __, [134 S.Ct. at p. 2482].) The burden is on the People to establish an exception applies. [Citations.]" (*People v. Macabeo* (2016) 1 Cal.5th 1206, 1212-1213 (*Macabeo*).)

One exception to the warrant requirement is set forth in *Terry, supra*. There, the court held that when an officer has a

reasonable belief that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, the officer has the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm. (*Terry, supra*, 392 U.S. at p. 24.) However, the permissible scope of the officer's patdown is strictly limited. "The sole justification of the search . . . is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." (*Id*. at p. 29.) Because the facts of the present case arguably suggest the deputies were in the process of detaining the minor in order to investigate whether he was engaged in criminal activity, we asked the parties to address the validity of the search under *Terry*. The minor did so, and presented persuasive arguments as to why the search here did not fall within the permissible bounds of a patdown search incident to a temporary detention.

The People impliedly concede, by failing to argue otherwise, that the deputies' search was not valid under *Terry*. Instead, the People contend the search here was a valid search incident to lawful arrest, notwithstanding the fact that the minor had not formally been arrested at the time Islas removed the backpack from him and searched it. Although we invited the minor to file a reply letter brief, he did not do so and we therefore do not have the benefit of an opposition to the People's argument.

Our high court recently considered the warrant exception for a search incident to arrest on facts somewhat similar to the present case. In *Macabeo, supra*, police officers observed the

defendant, who was riding his bicycle, approach an intersection and roll through a stop sign in violation of Vehicle Code section 22450. (*Macabeo, supra*, 1 Cal.5th at pp. 1210-1211.) The officers stopped the defendant and, after extensive questioning, the defendant agreed to allow the officers to search him. (*Id*. at p. 1211.) One of the officers removed the defendant's cell phone during the search, and subsequently discovered photos of underage girls in a file on the phone in violation of Penal Code section 311.11, subdivision (a), at which point the defendant was arrested. (*Id*. at pp. 1211-1212.) The defendant subsequently moved to suppress the evidence found on his phone. (*Id*. at p. 1212.) The trial court denied the motion and the Court of Appeal affirmed.

As pertinent here, the Supreme Court summarized the long-standing exception to the warrant requirement applicable when a search is conducted incident to lawful arrest. Citing *United States v. Robinson* (1973) 414 U.S. 218, 224 (*Robinson*), the court noted that " '[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that 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.' " (*Macabeo, supra*, 1 Cal.5th at p. 1213.) In *Robinson*, for example, the Supreme Court validated a search in which officers searched the defendant incident to arrest and discovered a crumpled package of cigarettes in one of his pockets. Upon opening the package, officers discovered heroin capsules

which were later admitted into evidence at trial. (*Robinson, supra*, 414 U.S. at pp. 223-224, 236.)

In *Macabeo*, the court noted the defendant was not under arrest at the time the officers searched his phone. (*Macabeo, supra*, 1 Cal.5th at p. 1216.) The People conceded the point but argued, citing *Rawlings v. Kentucky* (1980) 448 U.S. 98, 111 (*Rawlings*), that the search was nevertheless a valid search incident to arrest because at the time of the search, the officers *could have* arrested the defendant based upon the traffic violation. (*Ibid*.)

The court explained the holding of *Rawlings*, and its limitations, as follows:

"There, officers entered a home to serve an arrest warrant. Although the subject of the warrant was absent, there were several occupants in the residence, including Rawlings and his companion Vanessa Cox. While inside, the officers smelled marijuana smoke and saw some marijuana seeds. They detained the occupants 45 minutes while a search warrant was obtained. Based on the warrant, officers asked Cox to empty the contents of her purse. She did so, revealing 1,800 LSD tablets and vials of other drugs. Cox told Rawlings to ' "take what was his" ' and he admitted the drugs belonged to him. Officers then searched Rawlings and found $4,500 in cash and a knife. He was subsequently arrested. [Citation.]

"As relevant here, the court assumed the initial detention of Rawlings and the other occupants was improper. Even so, it concluded his admission to owning the drugs was not the product of that illegal detention. Instead, because of various factors, including that all occupants had been read their *Miranda* rights before the search of Cox's purse, his admissions were 'acts of free

will, unaffected by any illegality in the initial detention.' [Citation.] The court went on to uphold the search of Rawlings's person because his statements provided probable cause for his arrest. It observed, without further elaboration, 'Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.' [Citation.] The court took care to note that the 'fruits of the search of petitioner's person were, of course, not necessary to support probable cause to arrest petitioner.' [Citation.]" (*Macabeo, supra*, 1 Cal.5th at pp. 1216-1217.)

Although the high court cautioned against an overly broad reading of *Rawlings*, it reaffirmed in *Macabeo* that "[w]hen 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.) However, because the Vehicle Code only authorizes citation (and prohibits arrest) for the defendant's particular traffic violation, the court concluded *Rawlings* was inapplicable. (*Id.* at p. 1219 [citing *Knowles v. Iowa* (1998) 525 U.S. 113, which holds no "search-incident" warrant exception exists where a citation is given].)

Applying *Macabeo* and the authorities cited therein to the facts before us, we conclude the warrantless search of the minor's backpack was valid as a search incident to lawful arrest. First, unlike the defendant in *Macabeo*, the minor was subject to arrest for a violation of former section 308, subdivision (b). At the time of the minor's arrest, that section provided: "Every person under the age of 18 years who purchases, receives, or possesses any

tobacco, cigarette, or cigarette papers, or any other preparation of tobacco, or any other instrument or paraphernalia that is designed for the smoking of tobacco, products prepared from tobacco, or any controlled substance shall, upon conviction, be punished by a fine of seventy-five dollars ($75) or 30 hours of community service work." (Former § 308, subd. (b), repealed by Stats. 2016, 2nd Ex. Sess., ch. 8, § 8.5, eff. June 9, 2016.) Although arrest is not expressly contemplated by the statute, a custodial arrest based upon an infraction does not violate the Fourth Amendment. (See *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 354 ["If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender"]; *People v. McKay* (2002) 27 Cal.4th 601, 607 [concluding "there is nothing inherently unconstitutional about effecting a custodial arrest for a fine-only offense"].)

Further, based on the minor's admissions during his initial exchange with Islas, the deputies had probable cause to arrest the minor for violating section 308, subdivision (b), prior to the search of his backpack. Specifically, when the deputies approached the minor, he told them he was 17 years old and that he had cigarettes in his possession. These two facts, without more, provided probable cause to arrest the minor. Although the record does not indicate whether the deputies formally arrested the minor before or after the backpack search, the precise timing is not material. Under *Rawlings*, a valid search incident to arrest may occur before the formal arrest, so long as law enforcement had probable cause to make the arrest independent

of the evidence disclosed by the subsequent search and a timely arrest follows. Such is the case here.

Finally, we note that the search of a backpack worn by an arrestee incident to his or her arrest has been deemed proper under *Chimel v. California* (1969) 395 U.S. 752 (*Chimel*)[2] by numerous courts, including a prior panel of this division. (See *In re Humberto O.* (2000) 80 Cal.App.4th 237, 243 [collecting cases regarding search of backpack incident to arrest]; see also *People v. Ingham* (1992) 5 Cal.App.4th 326, 331 [explaining that the search incident to arrest rule has been interpreted to include a woman's purse as a normal extension of the person so long as it is in use at the time of the arrest].)

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[2] In *Chimel*, the court held that a valid search incident to arrest may include not only the arrestee's person, but also the area within his or her immediate control. (*Chimel, supra*, 395 U.S. at pp. 762-763.)

DISPOSITION

The judgment of wardship is affirmed.

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LAVIN, J.

WE CONCUR:

ALDRICH, Acting P. J.

JOHNSON (MICHAEL), 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.