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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN BUTLER,

Defendant and Appellant.

A137161

(Solano County  
Super. Ct. No. FCR294431)

Brian Butler (appellant) appeals from a judgment entered after he pleaded no contest to possession of heroin for sale (Health & Saf. Code, § 11351, subd. (a)) and the trial court sentenced him to four years in prison. He contends the trial court erred in: (1) ruling that the search-incident-to-arrest exception to the Fourth Amendment’s warrant requirement applied; (2) ruling that the inventory-search exception applied; and (3) not suppressing certain evidence despite the prosecution’s failure to establish the reliability of the narcotics-detection dog that was used in the search. For the reasons set forth below, we affirm the judgment.

**FACTUAL AND PROCEDURAL BACKGROUND**

On September 17, 2012, the Solano County District Attorney filed an amended information charging appellant with transportation of heroin for sale (Health & Saf. Code, § 11352, subd. (a)<sup>1</sup> (count 1)); possession of heroin for sale (§ 11351 (count 2)); possession of heroin (§ 11350, subd. (a) (count 3)); transportation or sale of

<sup>1</sup>All further statutory references are to the Health and Safety Code unless otherwise stated.

methamphetamine (§ 11379, subd. (a) (count 4)); possession of methamphetamine for sale (§ 11378 (count 5)); and possession of methamphetamine (§ 11377, subd. (a) (count 6)). The information further alleged that appellant had previously served eight prior prison terms (Pen. Code, § 667.5, subd. (b)). On September 19, 2012, appellant filed a motion to suppress evidence (Pen. Code, § 1538.5).

At the hearing on the motion to suppress evidence, California Highway Patrol (CHP) Officer Greg Eddy testified that he was on patrol on Interstate 80 at approximately 7:40 p.m. on June 25, 2012, when he pulled over a black Honda Del Sol (the Honda). The Honda stopped on “like a side road” of the “Green Valley off ramp” to Interstate 80. As Eddy approached the Honda on foot he saw two people inside—appellant, the driver, and Melissa Tankersley Carpenter, a passenger. Appellant had a suspended driver’s license. Eddy sent the names of both appellant and Carpenter to dispatch and learned that each had an outstanding felony arrest warrant. Eddy placed both of them under arrest and put them in different patrol cars. Eddy then called a tow truck for the Honda to have it impounded. Eddy testified that he planned to conduct an inventory search of the vehicle.

Thereafter, another officer, Jacob Johnson, arrived on the scene with a drug-detection dog. Eddy asked Johnson if he wanted to have his dog search the car, and Johnson responded that he did. Eddy used canines when conducting inventory searches of vehicles as often as he could. The use of a canine was not a CHP procedural requirement for inventory searches. Eddy testified: “It is not a requirement, it’s another tool in our tool bag that we can use to assist us in completing our job . . . . So, [in] this instance I have a dog . . . . I could use my dog to search the vehicle, which I routinely do.”

Before deploying the dog inside the Honda, Eddy began the inventory search with a “preliminary” search to make sure there was nothing inside the car (e.g., “knives, needles, food”) that would harm the dog. Inside the vehicle’s center console Eddy found a scale with some brown residue on it and some white crystalline substance on the top of the scale. The dog then entered the Honda and “alerted” to underneath the passenger seat and to the center heat/air vent above the radio and heating controls. Eddy searched

underneath the passenger's seat and found a purse that had a knife inside. The knife had on it a brown tar-like residue substance, "consistent with heroin." Eddy found three plastic bags inside the center air vent. Two of the bags contained heroin and the other contained methamphetamine. Eddy also found two knives between the driver's seat and center console.

A tow truck arrived on the scene during Eddy's search of the Honda. The truck waited until Eddy completed his search and another officer completed the "CHP-180" form that Eddy had already begun to fill out. The tow truck driver then took the Honda away. Eddy followed the written policies and procedures for impounding a vehicle. He testified that he performed the inventory search because he needed to "make sure everything's indicated on the CHP-180, valuables put on there, that way nobody can come back and claim a week later that they had \$10,000 earrings left in the glove box."

Appellant took the stand and testified he had borrowed the car that he was driving on the day of the incident from a friend named Kelly Harris.

After hearing argument, the trial court denied appellant's suppression motion, stating there were three "potential theories" justifying the warrantless search and seizure here: "One is incident to arrest, because both of the two individuals were subject to being arrested, each of their particular areas were subject to being searched as a result of those arrested in this proximity." The court then ruled that the second theory was "a different theory, which relies a bit on the search incident to the arrest, is once the officer went in there and located the scale, then there was evidence of potential criminality, that's available in the law, the automobile is subject to different searches than someone's home or other situation[s]." Thirdly, the court ruled that Eddy conducted a valid inventory search: "The transcript will speak for itself, but in this particular situation, the officer testified that he was in the process of impounding the vehicle, as well, because both the driver and the occupant were going to be arrested. I don't think there's a need for a policy to be written that specifies which officers and how many officers did participate in an inventory search. K-9 officers are also sworn officers, although they don't swear and lift their paw or anything of that matter, they are considered officers and have various

protections under the statute. They're recognized in their particular role. So, I don't think it's inappropriate to use, whether they were used outside during the course of detention, whether they were used inside after the arrest, I think it was appropriate to use a K-9 officer to assist the human officers in conducting that inventory and probable cause search. [¶] So, under any of those theories, I think that there was a sufficient basis to search the car and I will deny the [motion].”

On October 9, 2012, appellant and the People entered into a negotiated disposition under which appellant pleaded no contest to possession of heroin for sale, admitted one prior-prison-term allegation, and entered a *Harvey* waiver,<sup>2</sup> in exchange for a dismissal of the remaining charges and prior-prison-term allegations, and a four-year prison sentence. On November 9, 2012, the trial court sentenced appellant to four years in state prison, per his plea bargain. The court imposed a three-year term on appellant's conviction for possession of heroin for sale (§ 11351), plus a consecutive one-year term on his prior prison term (Pen. Code, § 667.5, subd. (b)). Appellant timely appealed.

#### DISCUSSION

When ruling on a suppression motion, “the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated.” (*People v. Williams* (1988) 45 Cal.3d 1268, 1301; see *People v. Davis* (2005) 36 Cal.4th 510, 528–529.) This court reviews the first inquiry, which involves questions of fact, under a deferential substantial-evidence standard. (*People v. Stillwell* (2011) 197 Cal.App.4th 996, 1003.) This court evaluates the second and third inquiries under the independent-review standard, because they are predominantly questions of law. (*Id.* at pp. 1003–1004.) It is the “ ‘ultimate responsibility of the appellate court to measure the facts, as found by the trier, against the constitutional standard of reasonableness.’ ” (*People v. Williams, supra*, 45 Cal.3d at p. 1301.) In California it is the federal Constitution, as interpreted by the United States Supreme Court, not state law, to the extent state law is

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<sup>2</sup>*People v. Harvey* (1979) 25 Cal.3d 754 [a *Harvey* waiver permits a trial court to consider information related to a dismissed count at sentencing].)

inconsistent, that controls the questions surrounding the exclusion of evidence. (*In re Lance W.* (1985) 37 Cal.3d 873, 890, 896; *In re Tyrell J.* (1994) 8 Cal.4th 68, 76, overruled on other grounds in *In re Jaime P.* (2006) 40 Cal.4th 128, 130.)

Appellant contends the trial court erred in denying his suppression motion for three reasons.

### ***1. Search incident to arrest***

First, appellant contends the trial court erred in denying his suppression motion because the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement did not apply. The Attorney General (respondent) concedes the issue, and we agree the trial court erred.

A search incident to a lawful arrest is among the exceptions to the warrant requirement. The purpose of the exception is to protect the interests in officer safety and evidence preservation that are typically implicated in arrest situations. (See *United States v. Robinson* (1973) 414 U.S. 218, 234–235.) A search incident to arrest is constitutionally reasonable only if the arrestee is within reaching distance of the vehicle during the search, or if the police have reason to believe that the vehicle contains evidence relevant to the crime of arrest. (*Arizona v. Gant* (2009) 556 U.S. 332, 343–344.)

Here, appellant was not in the immediate range of the Honda during the search; rather, he was already in handcuffs and seated in a patrol car. The search was also not performed in order to uncover additional evidence regarding the crime for which Eddy arrested appellant, i.e., on an outstanding felony warrant. The record is silent as to what crime on which the warrant was premised. Accordingly, the search-incident-to-arrest exception did not apply.

### ***2. Inventory-search***

Second, appellant contends the trial court erred in denying his suppression motion because the inventory-search exception did not apply. Specifically, he argues that the prosecution failed to establish, as required, that Eddy's decision to impound the Honda furthered a community caretaking function. We reject the contention.

“As part of their ‘ “ ‘community caretaking functions,’ ” ’ police officers may constitutionally impound vehicles that ‘ “jeopardize . . . public safety and the efficient movement of vehicular traffic.” ’ [Citation.] Whether ‘ “impoundment is warranted under this community caretaking doctrine depends on the location of the vehicle and the police officers’ duty to prevent it from creating a hazard to other drivers or being a target for vandalism or theft.” ’ [Citation.] If officers are warranted in impounding a vehicle, a warrantless inventory search of the vehicle pursuant to a standardized procedure is constitutionally reasonable. [Citation.] When an inventory search is conducted based on a decision to impound a vehicle, we ‘ “focus on the purpose of the impound rather than the purpose of the inventory,” ’ since an inventory search conducted pursuant to an unreasonable impound is itself unreasonable. [Citation.] Although a police officer is not required to adopt the least intrusive course of action in deciding whether to impound and search a car [citation], the action taken must nonetheless be reasonable in light of the justification for the impound and inventory exception to the search warrant requirement. Reasonableness is ‘ “the touchstone of the Fourth Amendment.” ’ [Citation.]” (*People v. Williams* (2006) 145 Cal.App.4th 756, 761–762.)

Vehicle Code section 22651 states in pertinent part that peace officers “may remove a vehicle . . . under any of the following circumstances: [¶] . . . [¶] (h)(1) When an officer arrests a person driving or in control of a vehicle for an alleged offense and the officer is, by this code or other law, required or permitted to take, and does take, the person into custody.” Here, Eddy testified that appellant had a suspended driver’s license, and that he arrested both appellant and his passenger on felony warrants. He did not explain why he decided to impound the car, but testified that the stop took place on “like a side road” of the “Green Valley off ramp” to Interstate 80. Viewing the record in the light most favorable to the trial court’s denial of the suppression ruling (*People v. Jenkins* (2000) 22 Cal.4th 900, 969), we conclude the trial court implicitly and reasonably determined that Eddy’s decision to impound furthered a community caretaking function because leaving it unattended on or near a busy highway off ramp at nighttime could create a hazard to other drivers, or leave the car a target for theft or vandalism.

*People v. Williams, supra*, 145 Cal.App.4th 756, and *People v. Torres* (2010) 188 Cal.App.4th 775, on which appellant relies, are distinguishable. In *People v. Williams*, a police officer stopped the defendant for not wearing a seatbelt while driving. (*People v. Williams, supra*, at p. 759.) The defendant stopped the car at the curb in front of his home and had a valid driver's license. (*Ibid.*) He did not have the registration or proof of insurance for the car, which was a rental, but the car was validly registered to the rental car company and had not been reported stolen. (*Ibid.*) The officer discovered that defendant had a warrant out for his arrest, so he arrested the defendant and impounded the vehicle, and found a loaded gun in the backseat of the car during an inventory search. (*Ibid.*) At the suppression hearing, the officer explained that he impounded the car under Vehicle Code section 22651, subdivision (h)(1), because he was arresting the defendant. (*Id.* at pp. 759–760.) The officer admitted the car was legally parked and could have been locked and left where it was instead of being impounded. The officer also admitted that his department did not have a written policy about when a car should be impounded, and that the decision was left to each individual officer. (*Id.* at p. 760.)

The Court of Appeal held the trial court erred in denying the defendant's motion to suppress the gun because the car was legally parked at the curb in front of the defendant's house, and the "possibility that the vehicle would be stolen, broken into, or vandalized was no greater than if [the officer] had not stopped and arrested appellant as he returned home." (*People v. Williams, supra*, 145 Cal.App.4th at pp. 762–763.) The court further reasoned, "Because appellant had a valid driver's license and the car was properly registered, it was not necessary to impound it to prevent immediate and continued unlawful operation. [Citations.] No other justification that would further a community caretaking function was offered or supported by evidence. Indeed, [the officer] admitted he decided to impound the car simply because he was arresting appellant and almost always impounded the cars of drivers he arrested." (*Id.* at p. 763.)

In *People v. Torres, supra*, 188 Cal.App.4th 775, the officer who had impounded the defendant's truck, which was safely and legally parked in a public lot following a traffic stop, testified that narcotics agents had asked him to manufacture a reason to

detain and search the vehicle. (*Id.* at pp. 780, 786, 789–790.) Given that express admission and the absence of any evidence the truck was illegally parked, that it was at an enhanced risk of vandalism, that it could impede traffic, or that it could be driven away by someone other than defendant, the Court of Appeal held that impounding the truck served no community caretaking function and the subsequent inventory search was unlawful. (*Id.* at pp. 789–790.)

In contrast, here, the Honda was not safely parked in front of a home and would have been left unattended on or near a highway off ramp if not impounded. Further, there was no testimony from Eddy suggesting the impoundment was done in bad faith. (See e.g., *City of Indianapolis v. Edmond* (2000) 531 U.S. 32, 45 [the absence of bad faith and the lack of a purely investigative purpose are relevant to the validity of an inventory search].) Because Eddy’s decision to impound was justified by an objectively reasonable basis, the impoundment of the Honda appellant was driving was lawful, and the resulting search—which began as an inventory search and continued as both an inventory and probable-cause search—was also lawful.<sup>3</sup>

### ***3. Reliability of narcotics-detection dog***

Finally, appellant argues for the first time on appeal that the trial court erred in not suppressing the narcotics found in the center air vent because the prosecution did not establish that the narcotics-detection dog was reliable. Appellant forfeited the claim by failing to raise it below. (See *People v. Williams* (1999) 20 Cal.4th 119, 136 [“Defendants who do not give the prosecution sufficient notice of these inadequacies cannot raise the issue on appeal”].) In any event, it fails on the merits.

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<sup>3</sup>Appellant does not challenge the procedures followed by Eddy in conducting the inventory search. Nor does he disagree that the drug scale Eddy discovered at the beginning of the inventory search provided probable cause and additional justification to continue searching the car under the automobile exception to the Fourth Amendment. (See *United States v. Ross* (1982) 456 U.S. 798, 808–809 [when officers have before them probable cause to believe a vehicle contains evidence of criminal activity, the officers may conduct a warrantless search of the vehicle].)

“[E]vidence of a dog’s satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog’s alert provides probable cause to search.” (*Florida v. Harris* (2013) \_\_\_ U.S. \_\_\_, [133 S.Ct. 1050, 1057, 185 L.Ed.2d 61].) Here, the prosecution did not present evidence that the narcotics-detection dog that was used had performed satisfactorily in a certification or training program. However, as we concluded above, Eddy already had authority to search the Honda under the inventory-search exception to the Fourth Amendment, and the drug scale he discovered provided probable cause and additional justification to continue searching the car under the automobile exception. Thus, Eddy had the authority to search the air vent even without an alert from the narcotics-detection dog. In other words, under the circumstances of this case, even if there existed no evidence of satisfactory performance in a certification or training program by the dog, Eddy could have still constitutionally searched the air vent of the Honda. The trial court did not err in denying appellant’s suppression motion.

**DISPOSITION**

The judgment is affirmed.

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McGuiness, P.J.

We concur:

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Pollak, J.

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Siggins, J.

