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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

FREEMAN MARKUS PARKER,

Defendant and Appellant.

A137756

(San Francisco County
Super. Ct. No. 12017296)

Appellant Freeman Parker entered into a plea agreement that resulted in his conviction of a misdemeanor charge of possessing more than 28.5 grams of marijuana. (Health & Saf. Code, § 11357, subd. (c).) The plea was entered after a motion to suppress evidence of the marijuana was denied. On appeal, Parker argues that the motion was wrongly denied because the marijuana was obtained incident to an unlawful arrest. We disagree and affirm.

I.
FACTUAL AND PROCEDURAL
BACKGROUND

In the afternoon of July 2, 2012, a police officer was conducting surveillance of an area around Jones and Market Streets in the Tenderloin neighborhood of San Francisco. The officer was looking out an open window in a building approximately 80 feet from the intersection, using binoculars to magnify his unobstructed view. He saw a man walk up to Parker and give him a “fist pump.” The men walked approximately 20 feet, and the man gave Parker “cash, U.S. currency,” which the officer recognized because of its shape. Parker took the cash, produced a glass or plastic bottle, and handed the man some

items from the bottle. The man put the items in a plastic bag and handed Parker more money.

The officer believed he had just witnessed an illegal drug sale. He based his belief on “years of experience of watching individuals sell narcotics. I base it on the area, I base it on the fact that one person gave the other person money and the other person gave him something from a bottle. It’s just basing it on experience.” The officer instructed an arrest team to detain the suspected buyer to “make sure he did, indeed, buy marijuana.” A plastic baggie containing marijuana was seized from the man. Parker was then arrested, and a search incident to his arrest revealed a corked bottle containing marijuana.

A felony complaint charged Parker with various drug offenses, including the sale and possession of marijuana. (Health & Saf. Code, §§ 11360, subd (a), 11359.) Parker filed a motion to suppress (Pen. Code, § 1538.5, subd. (m)),¹ alleging that the evidence of the marijuana was obtained in violation of the Fourth Amendment. A hearing on the suppression motion was heard concurrently with the preliminary hearing.

At the hearing, the officer who had witnessed the transaction testified as an expert in the identification and recognition of marijuana and in the possession of marijuana for sale. He testified that he had made thousands of narcotics arrests and hundreds of arrests for marijuana in the 12 years he had worked at the local police station. He reported that he had bought marijuana more than 100 times while working undercover, and that he had spent many hours conducting surveillance of drug dealers and users. He also discussed his familiarity with how marijuana is packaged and testified that he had seen marijuana in glass and plastic bottles and in plastic bags. He testified that people sell marijuana “pretty much 24 hours a day, seven days a week” on the corner of Jones and Market.

In his motion to suppress, Parker argued that this evidence was insufficient to establish probable cause for his arrest and that the marijuana confiscated from him was therefore obtained illegally and was inadmissible. The trial court denied the motion without comment, and an information was filed. Parker subsequently moved to set aside

¹ All statutory references are to the Penal code unless otherwise indicated.

the information under section 995, and this motion was also denied. He then entered into a plea agreement in which he pleaded no contest to one misdemeanor count of possessing more than 28.5 grams of marijuana under Health and Safety Code section 11357, subdivision (c), and the original charges were dismissed. The court suspended imposition of Parker's sentence and placed him on probation. This timely appeal followed.

II. DISCUSSION

The sole issue on appeal is whether there was probable cause for Parker's arrest. If there was, the marijuana was obtained lawfully as part of a search incident to the arrest. (*People v. Diaz* (2001) 51 Cal.4th 84, 90.) If there was not, the marijuana was obtained illegally, and Parker's motion to suppress should have been granted. We conclude that the police had probable cause to arrest Parker and that the marijuana was therefore obtained lawfully.

A. The Standard of Review

We begin by discussing the applicable standard of review. "On appeal from a section 995 review of the denial of a defendant's motion to suppress, we review the determination of the [trial court] at the preliminary hearing. [Citations.] We must draw all presumptions in favor of the [trial court]'s factual determinations, and we must uphold the [trial court]'s express or implied findings if they are supported by substantial evidence." (*People v. McDonald* (2006) 137 Cal.App.4th 521, 529.) We exercise our independent judgment in determining whether, on the facts found by the trial court, the search or seizure was reasonable. (*Ibid.*)

B. The Police Had Probable Cause to Arrest Parker

The Fourth Amendment, applicable to the states through the Fourteenth Amendment, guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." (U.S. Const., 4th Amend.; *Mapp v. Ohio* (1961) 367 U.S. 643, 655 [federal prohibition against unreasonable searches and seizures and exclusionary rule applies to the states].) "[S]earches conducted outside the judicial process, without prior approval by judge or

magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” (*Katz v. United States* (1967) 389 U.S. 347, 357, fns. omitted.)

One of these exceptions is a search incident to a valid arrest. (*People v. Diaz, supra*, 51 Cal.4th at p. 90.) “Such a search is valid, and its evidentiary fruits admissible, only if incident to a lawful arrest predicated on probable cause.” (*Cunha v. Superior Court* (1970) 2 Cal.3d 352, 356 (*Cunha*)). “ ‘To constitute probable cause for arrest, a state of facts must be known to the officer that would lead a man of ordinary care and prudence to believe, or to entertain a strong suspicion, that the person arrested is guilty.’ ” (*Ibid.*) “No exact formula tells us how to decide whether there was probable cause to arrest. Instead, we look to the totality of the surrounding circumstances and decide each case on its own facts.” (*People v. Guajardo* (1994) 23 Cal.App.4th 1738, 1742.)

In arguing that the police lacked probable cause to arrest him, Parker relies on *Cunha, supra*, 2 Cal.3d 352 and *Remers v. Superior Court* (1970) 2 Cal.3d 659 (*Remers*), which were filed around the same time. In *Cunha*, the petitioner was arrested on suspicion of selling drugs in a neighborhood known for narcotics trafficking. (*Cunha*, at p. 357.) The police testified that two suspects looked around as if nervous about being seen, and then one of them “appeared to extract an object [from his pocket]—although [the arresting officer] could not actually see an object—while petitioner extracted what appeared to be money.” (*Id.* at p. 355.) Our Supreme Court held that “[n]either petitioner’s activities nor the location of his arrest provided probable cause for arrest.” (*Id.* at p. 357.)

In *Remers*, the same officers in the same neighborhood in *Cunha* arrested a woman after they observed her looking over both shoulders, removing a tinfoil package from her purse, and motioning to a companion to go inside a restaurant. (*Remers, supra*, 2 Cal.3d at p. 662.) The court held that the woman was arrested unlawfully because the neighborhood’s reputation could not convert her “innocent-appearing activities” into a sufficient basis for probable cause. (*Id.* at pp. 665, 669.)

Parker contends that his case cannot be distinguished from *Cunha* and *Remers* and that we are bound by them. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) He argues that *Cunha* and *Remers* hold that an arrest is unlawful if it is based on activity that is as consistent with innocence as it is with criminality and that the notoriety of a neighborhood and an officer's experience and knowledge are insufficient to establish probable cause. (*Cunha, supra*, 2 Cal.3d at p. 357; *Remers, supra*, 2 Cal.3d at pp. 664-666.) We conclude, however, that these decisions do not control the outcome of this case because more recent authority has undermined their analytical underpinnings and because the facts here are distinguishable in any event.

We first discuss the analytical underpinnings of *Cunha* and *Remers*. The court in *Remers* held that “an arrest and search based on events as consistent with innocent activity as with criminal activity are unlawful.” (*Remers, supra*, 2 Cal.3d at pp. 664-665.) This holding was derived from *Irwin v. Superior Court* (1969) 1 Cal.3d 423 (*Irwin*), which relied on *People v. Moore* (1968) 69 Cal.2d 674, 683 (*Moore*). *Irwin* and *Moore* concerned reasonable suspicion for a detention, and *Cunha* and *Remers* adopted their holdings in the context of probable cause for an arrest. (*Irwin*, at p. 428; *Moore*, at p. 683; *Cunha, supra*, 2 Cal.3d at pp. 357, 358; *Remers*, at pp. 665-666.)

Since *Cunha* and *Remers*, however, our Supreme Court has withdrawn from an expansive interpretation of the holdings in *Irwin* and *Moore*. In *In re Tony C.* (1978) 21 Cal.3d 888, 894, the court characterized the language in *Irwin* as dicta and held that circumstances consistent with criminal activity *can* support reasonable suspicion *even if* those circumstances are also consistent with innocence. (*Tony C.*, at p. 894; see also *People v. Souza* (1994) 9 Cal.4th 224, 233 [flight from police considered when determining sufficient cause to detain even though action could merely reflect innocent desire to avoid police].) In doing so, it explained that the rule in *Irwin* was not directly supported by the authority it cited, i.e., *Moore, supra*, 69 Cal.2d at page 683—the same section of *Moore* that both *Cunha* and *Remers* rely upon in suggesting that otherwise

innocent activity cannot be the basis for establishing probable cause for an arrest.² (*Cunha, supra*, 2 Cal.3d at p. 357; *Remers, supra*, 2 Cal.3d at p. 664.) Because *Tony C.* concludes that conduct that is as consistent with innocent behavior as with criminal behavior *can* under certain circumstances provide reasonable cause to detain, we conclude that it cannot be categorically ruled out as a possible factor that may support probable cause for an arrest. (*Tony C.*, at p. 894; see also *United States v. Arvizu* (2002) 534 U.S. 266, 274 [criticizing Ninth Circuit’s Fourth Amendment analysis that placed “ ‘no weight’ ” on behavior observed by officer that had possible innocent explanation].)

Cunha and *Remers* also suggested that a neighborhood’s notorious reputation cannot transform otherwise “innocent behavior” into behavior establishing probable cause. (*Cunha, supra*, 2 Cal.3d at p. 357; *Remers, supra*, 2 Cal.3d at pp. 665-666.) But again, more recent authority has clarified that a neighborhood’s characteristics *can* be considered as part of the totality of circumstances in determining whether probable cause existed. (*People v. Nonnette* (1990) 221 Cal.App.3d 659, 668.) This authority includes the passage of Proposition 8 in 1982.³ “We recognize that California courts have traditionally been skeptical of the ‘high crime factor’ in determining probable cause. [Citations.] However, after the passage of Proposition 8 in 1982, we must resolve search and seizure issues by determining whether the evidence should be excluded under federal standards. [Citation.] Under federal law, ‘[t]he reputation of an area for criminal activity is an articulable fact upon which a police officer may legitimately rely.’ ” (*Nonnette*, at p. 668; see also *People v. Souza, supra*, 9 Cal.4th at p. 240 [appropriate to consider area’s reputation for criminal activity in assessing reasonableness of investigative detention].) Thus, a neighborhood’s reputation contributes to probable cause “if it is relevant to the officer’s belief that the suspect is involved in criminal activity.” (*Nonnette*, at p. 668.) In

² *Moore, supra*, 69 Cal.2d 674, 683 was overruled on another ground in *People v. Thomas* (1977) 19 Cal.3d 630, 641, fn. 8.

³ Proposition 8 was enacted in the 1982 June primary election. It added section 28, subdivision (d) to article I of the California Constitution, which “abrogated . . . a defendant’s right to object to and suppress evidence seized in violation of the California, but not the federal, Constitution.” (*In re Lance W.* (1985) 37 Cal.3d 873, 879.)

short, the probable-cause analysis here can properly take into account that the officer's suspicions partly arose because the transaction he observed occurred in a neighborhood notorious for drug sales and on a street corner where individuals sold marijuana "pretty much 24 hours a day, seven days a week." (*Ibid.*)

Not only have the analytical underpinnings of the holdings in *Cunha* and *Remers* been undermined by more recent authority, but also the facts here are distinguishable from the facts in those cases. Although it is true that there are obvious factual similarities, there are also some noteworthy differences. First, the officer's observations here were far more precise. He clearly saw Parker take items out of a bottle and hand them to the other man immediately after he accepted cash from that person. This is in contrast with *Cunha*, where the defendant only *appeared* to take an object out of his pocket, but the officers did not actually see it. (*Cunha, supra*, 2 Cal.3d at p. 355.) Here, the officer's observations were detailed enough to conclude not simply that a " 'narcotic transaction had been made' " (*ibid.*), but also that the items sold were marijuana (the officer deployed an arrest team to "make sure [the man] did, indeed, buy marijuana"). In *Cunha*, the officers' observations were less specific and led the court to characterize the incident as merely an "apparent exchange" or "some sort of transaction." (*Id.* at pp. 355, 357.)

In addition to directly observing the objects in the bottle, the officer here also saw a clear exchange of money. He saw that the suspected buyer had "cash, U.S. currency" in his hand, which he then handed to Parker. The officer recognized the money because of its elongated shape. He also observed the man give Parker more cash after placing the items he received in a plastic bag. Conversely, in *Cunha*, the officers only saw defendant extract what "appeared" to be money, before the two suspects "placed their hands together in an apparent exchange." (*Cunha, supra*, 2 Cal.3d at p. 355.) The officers could not confidently assess whether money had been exchanged for an unseen item because all they saw were two suspicious people put their hands in their pockets and then put their hands together. (*Ibid.*)

Remers provides an even less compelling comparison because, although the officers saw a suspicious tinfoil package, neither money nor the package was exchanged. (*Remers, supra*, 2 Cal.3d at pp. 662-663.) Here, the officer saw every step of the transaction—he saw the cash in the man’s hand as the man passed it to Parker, he saw Parker give the man items out of a bottle, he saw the man place those items in a plastic bag, and he saw the man give more money to Parker.

We agree with the Attorney General that the present case is similar to *People v. Garrett* (1972) 29 Cal.App.3d 535, where an officer observed “all the elements of a completed sale—preliminary negotiation, a delivery of paper currency, and a reciprocal delivery of a suspicious package.” (*Id.* at p. 539.) In distinguishing *Cunha, supra*, 2 Cal.3d 352 and *Remers, supra*, 2 Cal.3d 659 on the basis of the specificity of the officer’s observations, the court in *Garrett* remarked, “It is difficult to imagine what further visual evidence of a street sale of narcotics could be required to establish reasonable cause for an arrest, for here the officer observed each element in the sale carried out before his eyes.” (*Garrett*, at p. 539; see also *People v. Mims* (1992) 9 Cal.App.4th 1244, 1250 [“Based on the totality of the circumstances confronting [the officer], one wonders what activity appellant was engaged in, other than an attempted drug deal”].)

We likewise reject Parker’s argument that the bottle and plastic bag that the officer observed during the transaction were meaningless in determining that there was probable cause to arrest Parker. The officer was asked on direct examination whether he could “explain why . . . these objects were in a bottle,” and he replied, “No, I can’t. I can’t explain why they are in a bottle.” Parker apparently would have us believe that this testimony means that the officer placed no particular significance on the presence of the bottle during the suspected transaction. But the officer went on to testify that marijuana is generally sold in sealed containers to avoid detection based on smell and that he had seen drugs being sold *in both glass and plastic bottles*. He also testified that a popular way to sell marijuana is to place it in little plastic bags.

Parker relies on *People v. Huntsman* (1984) 152 Cal.App.3d 1073 and *People v. Knisely* (1976) 64 Cal.App.3d 110 to argue that there was nothing particularly incriminating about the containers observed here. *Huntsman* held that where probable cause to search is based on an officer's observation of the defendant holding a container that is commonly used for innocent purposes (such as a plastic bag), the People must present evidence indicating the specific basis for the officer's suspicion that the container holds contraband or evidence of a crime. (*Huntsman*, at p. 1078.) *Knisely* likewise held that placing a small item in a cigarette pack could not be considered a suspicious circumstance when there was no evidence presented that cigarette packs are commonly used to hide contraband. (*Knisely*, at pp. 116-117.) This argument, however, overlooks the testimony here that the officer knew containers such as the ones he observed were used to hold marijuana and to conceal the drug's pungent odor.

Moreover, recent cases have relaxed the evidentiary requirement for establishing that certain containers are used to carry contraband. (E.g., *People v. Guajardo*, *supra*, 23 Cal.App.4th at p. 1743, fn. 3 ["we cannot in this day and age (at least in Los Angeles County) give serious consideration to the holding in *People v. Knisely*[, *supra*, 64 Cal.App.3d at p. 117] that, in the absence of some evidence showing a cigarette pack is a common hiding place for narcotics, the fact that a small object is placed in the pack is not a suspicious circumstance"]; *People v. Limon* (1993) 17 Cal.App.4th 524, 537-538 [possession of small "hide-a-key" container supported finding of probable cause, despite fact that officer had only seen narcotics in one other key container, because container gained additional significance in light of other suspicious circumstances observed by officer].)

Parker argues that *People v. Guajardo*, *supra*, 23 Cal.App.4th 1738, is distinguishable because there, in addition to seeing the defendant use a container known to be a common receptacle for drugs, police had the additional information that the defendant had been arrested in the past month for selling narcotics, and he appeared nervous before the arrest at issue. (*Id.* at p. 1743 & fn. 3.) But the officer here also had additional factors upon which to rely in determining there was probable cause to arrest

Parker. The totality-of-the-circumstances test “allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’ ” (*United States v. Arvizu, supra*, 534 U.S. at p. 273; *People v. Mims, supra*, 9 Cal.App.4th at p. 1248.) Here, the officer was admitted as an expert in both the identification and recognition of marijuana *and* the possession of marijuana for sale. He worked at the Tenderloin police station for approximately 12 years and was in a plain-clothes capacity for approximately 10 of those years. He had made thousands of narcotics arrests and hundreds of arrests for marijuana. The officer bought marijuana while working undercover more than 100 times. He was familiar with how marijuana is packaged and knew the popular methods used for its transport and sale. The officer was entitled to rely on his knowledge and experience in forming the belief that Parker was guilty of selling marijuana.

Taken together, the facts that were established at the preliminary hearing were enough to find probable cause for Parker’s arrest. When looking at the totality of the circumstances, a person of ordinary care and prudence could believe, or entertain a strong suspicion, that Parker was guilty of a crime. (*Cunha, supra*, 2 Cal.3d at p. 356.) Probable cause therefore supported the arrest, and the motion to suppress the marijuana confiscated incident to that lawful arrest was properly denied.

III. DISPOSITION

The trial court’s order placing Parker on probation is affirmed.

Humes, J.

We concur:

Ruvolo, P. J.

Rivera, J.