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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL GUZMAN,

Defendant and Appellant.

A140919

(Solano County
Super. Ct. No. FCR292465)

Appellant Samuel Guzman was convicted, pursuant to a plea agreement, of possession of a controlled substance with a firearm. On appeal, he first contends the trial court erred in denying his motion to suppress evidence because (1) the police unreasonably stopped his vehicle for driving with tinted windows; (2) under the Medical Marijuana Program (MMP), the scent of unburned marijuana did not provide probable cause to search the vehicle; (3) police unlawfully frisked appellant and his passengers without reasonable suspicion that they were armed and presently dangerous; and (4) absent the illegal pat search, there would not have been inevitable discovery of cocaine and weapons inside the vehicle. Appellant also contends the trial court abused its discretion in imposing a probation condition prohibiting him from using medical marijuana. We shall affirm the judgment.

PROCEDURAL BACKGROUND

Appellant was charged by information with transportation of a controlled substance (Health & Saf. Code, § 11352, subd. (a)—count 1);¹ possession for sale of a controlled substance (§ 11351—count 2); possession of a controlled substance with a firearm (§ 11370.1, subd. (a)—count 3); sale or transportation of marijuana (§ 11360, subd. (a)—count 4); carrying a stolen and loaded firearm (Pen. Code, § 25850, subd. (a)—count 5); and having a concealed firearm in a vehicle (Pen. Code, § 25400, subd. (a)(3)—count 6).²

On October 18, 2013, appellant pleaded no contest to count 3 (possession of a controlled substance with a firearm) in exchange for dismissal of the other charges, a term no greater than six months, and no initial prison term.³

On December 12, 2013, the trial court suspended imposition of sentence and placed appellant on three years formal probation.

On January 24, 2014, appellant filed a notice of appeal.⁴

DISCUSSION

I. *Motion to Suppress*

Appellant contends the trial court erred when it denied his motion to suppress evidence because (1) the police unreasonably stopped his vehicle for driving with tinted windows; (2) under the MMP, the scent of unburned marijuana did not provide probable

¹ All further statutory references are to the Health and Safety Code unless otherwise indicated.

² The information also charged a codefendant, Alejandro Jimenez, with four counts.

³ In the plea agreement, appellant did not give up his right to appeal the judgment or rulings of the court.

⁴ Because the factual issues raised on appeal concern only the propriety of the trial court's denial of appellant's motion to suppress evidence and its imposition of the marijuana-related probation condition, the factual background will be limited to the evidence relevant to those issues, and will be set forth in the applicable portions of this opinion, *post*.

cause to search the vehicle; (3) police unlawfully frisked appellant and his passengers without reasonable suspicion that they were armed and presently dangerous; and (4) absent the illegal pat search, there would not have been inevitable discovery of cocaine and weapons inside the vehicle.

A. Trial Court Background

On October 31, 2012, appellant filed a motion to suppress evidence, pursuant to section 1538.5. The subsequent preliminary hearing and hearing on the motion to suppress were part of the same proceeding.

At the preliminary hearing, Fairfield Police Officer Tom Shackford testified that, around 7:22 p.m. on April 16, 2012, he and his partner were in uniform in a marked police car. Their car was stopped at a signal behind another vehicle, a four-door Chevy Tahoe with a tinted rear window. As the Tahoe turned right, Shackford noticed that its front passenger's side window was also tinted and he "couldn't see into the vehicle." He had stopped vehicles before for having tinted front windows. It is common for a vehicle's rear window and back side windows to have a factory tint, but the front windows do not usually have a film or tint on them.

Shackford activated his car's lights and conducted a stop of the vehicle. Once the vehicle stopped, he approached the driver's side and noticed that the front driver's side window had the same tint as the front passenger's side window. As he approached, because he could not see into the vehicle through the tinted front driver's side window, Shackford initially could not tell how many people were inside. "Walking up to the vehicle, you aren't able to see anything." Even after activating the emergency lights on the police vehicle, Shackford was unable to see inside the Tahoe. Not until he got close to the vehicle could he see "figures" through the window, which was rolled down "a little ways," including a figure in the back seat.

Appellant was seated in the driver's seat of the vehicle. As Shackford approached, he noticed a "strong odor" of "unburnt marijuana coming from within the vehicle." Shackford advised appellant of the reason for the stop and then asked him if there was any unused marijuana in the vehicle. Appellant responded that "there was, but he had a

cannabis club card,” though he did not have it in his possession. Shackford obtained appellant’s identification card.⁵ There were two other occupants of the vehicle, including Alejandro Jimenez in the front passenger’s seat and Orlando Vidana, seated in the back of the vehicle.

Once appellant said there was marijuana in the vehicle, Shackford had him step out of the vehicle. Shackford conducted a pat search of appellant, but did not locate anything. He then had appellant take a seat on the curb. Shackford next removed Vidana from the vehicle, conducted a pat search, and had him sit on the curb. Shackford then removed Jimenez from the vehicle and, while patting him down, felt a bulge consistent with a firearm in his waistband. Shackford handcuffed Jimenez and removed a Glock .40 caliber handgun from his waistband. There was no round in the chamber, but the magazine was fully loaded. Officer Ponce, another officer now at the scene, searched Jimenez and, in his left front pocket, found a pill bottle with seven individual baggies inside, each of which contained a white powdery substance.

Shackford placed appellant and Vidana in handcuffs before he and another officer searched the Tahoe. Ponce found a blue gun case with a “Springfield” label on it in plain view on the floor behind the driver’s seat. It was empty except for an empty magazine. Ponce also located a Springfield semiautomatic firearm with a fully loaded magazine and a “golf ball size of a white powder substance” under the vehicle’s center console.⁶ The serial number on the gun matched the number on the gun case.

The officers also found two separate bags of a “green leafy substance”; one was in the center console and the other was under the back passenger’s seat where Vidana had been sitting. One bag weighed 4.6 grams and the other bag weighed 31 grams.

Tony DeTomasi, a police expert on whether drugs are possessed for sale, testified that, in his opinion, the cocaine found in center console was possessed for sale. He based

⁵ During the course of the stop, Shackford determined that appellant was the registered owner of the Tahoe.

⁶ The parties stipulated that this substance was cocaine.

this opinion on the large amount of cocaine found and other items, including the firearm, found with it.

At the conclusion of the hearing, the trial court denied the motion to suppress.

After the prosecution filed the information, appellant filed a renewed motion to suppress evidence on March 15, 2013, pursuant to section 1538.5, subdivision (a)(1)(A) and subdivision (i), which the trial court again denied. The court explained its ruling: “I would spend more time with the pat search issue if I thought that was dispositive. I think it is not dispositive. I think the issue is whether there was a valid traffic stop. As soon as the stop was conducted, the officer smelled fresh marijuana. The pat search becomes somewhat not as significant in terms of the amount of time spent on that, because they didn’t locate any marijuana. The odor was emanating from the interior of the vehicle. It’s a strong odor of fresh marijuana, and there was probable cause to search the interior of the vehicle. So once the interior of the vehicle was conducted [*sic*], not only were there firearms and large amounts of illegal drugs, the point is there was inevitable discovery. It doesn’t really matter at that point. There was just cause to go into the vehicle, do the search and, therefore, arrest the occupants of the vehicle. There were several theories for arrest once the vehicle was searched

“So the question in the court’s mind is the validity of the traffic stop. And Mr. Pori [defense counsel], I did go back to the transcript a couple different times because the officer’s description of the tint, I do concede it certainly wasn’t very detailed. There were certain facts, however, that were articulated that I think do justify the stop. He didn’t just say he thought he saw a tinted vehicle. He included he does have a history and he has done stops for illegally-tinted windows before. Additionally, when he approached the vehicle, it was tinting to the passenger—the front passenger door, which was not typical. And the officer further explained that that is atypical and then thereafter, he further testified that couldn’t see inside until he was even closer and the window was down a little bit.

“So when you look at the totality, I agree it’s certainly not the type of description you’d have if there was going to be a conviction for a traffic violation, but in terms of

whether the officer articulated a sufficient basis to pull the vehicle over, I think he did. So the motions are denied with the comments I have made.

B. Legal Analysis

“In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated. [Citation.] We review the court’s resolution of the factual inquiry under the deferential substantial-evidence standard. [Citation.] The ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review. [Citation.]” (*People v. Hoyos* (2007) 41 Cal.4th 872, 891, overruled on another ground by *People v. McKinnon* (2011) 52 Cal.4th 610, 637-643.)

1. Reasonableness of the Traffic Stop

Appellant first claims the police officers unreasonably stopped his vehicle for driving with tinted windows.

“The Fourth Amendment guarantees ‘[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures. . . .’ (U.S. Const., 4th Amend.) Generally, this means that warrantless searches are per se unreasonable unless the search falls within a recognized exception. [Citation.] One exception involves an investigatory stop of a vehicle based upon an objectively reasonable suspicion that the person stopped has broken the law. [Citation.] If the stop does not meet this test, its ‘ ‘ ‘fruits’ ’ ’ cannot be used against the person whose Fourth Amendment rights were violated and a motion to suppress the evidence is appropriately granted.” (*People v. Reyes* (2011) 196 Cal.App.4th 856, 859-860 (*Reyes*), quoting *Wong Sun v. United States* (1963) 371 U.S. 471, 484-485; see *Terry v. Ohio* (1968) 392 U.S. 1, 22.)

“A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity. . . . [Citation.]” (*People v. Souza* (1994) 9 Cal.4th 224, 231 (*Souza*)). Under the reasonable suspicion standard, “if the circumstances are ‘consistent with criminal activity,’ they permit—even demand—an investigation: the public

rightfully expects a police officer to inquire into such circumstances ‘in the proper discharge of the officer's duties.’ [Citation.] No reason appears for a contrary result simply because the circumstances are also ‘consistent with lawful activity,’ as may often be the case. The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct.” (*In re Tony C.* (1978) 21 Cal.3d 888, 894, superseded on another ground by Cal. Const., Art. I, § 28; accord, *Souza*, at p. 233.)

In this case, the relevant statutes include Vehicle Code section 26708, which prohibits a person from driving a “vehicle with any object or material placed, displayed, installed, affixed, or applied upon the windshield or side or rear windows” (Veh. Code, § 26708, subd. (a)(1)), and from driving “with any object or material placed, displayed, installed, affixed, or applied in or upon the vehicle that obstructs or reduces the driver’s clear view through the windshield or side windows” (Veh. Code, § 26708, subd. (a)(2)). Under subdivision (d) of Vehicle Code section 26708, however, “clear, colorless, and transparent material may be installed, affixed, or applied to the front side windows, located to the immediate left and right of the front seat if” certain conditions are met, including a minimum light transmittance of 70 percent. (Veh. Code, § 26708, subd. (d)(2).)

In addition, Vehicle Code section 26708.5 provides: “(a) No person shall place, install, affix, or apply any transparent material upon the windshield, or side or rear windows, of any motor vehicle if the material alters the color or reduces the light transmittance of the windshield or side or rear windows, except as provided in subdivision (b), (c), or (d) of section 26708. [¶] (b) Tinted safety glass may be installed in a vehicle if (1) the glass complies with motor vehicle safety standards of the United States Department of Transportation for safety glazing materials, and (2) the glass is installed in a location permitted by those standards for the particular type of glass used.”

Appellant is correct that these Vehicle Code sections reflect that driving with tinted windows is not necessarily unlawful, and courts have reached differing conclusions on the reasonableness of traffic stops of vehicles with tinted windows, depending on the

particular facts. In *People v. Butler* (1988) 202 Cal.App.3d 602, 607 (*Butler*), the appellate court “disagree[d] with the People’s suggestion that seeing someone lawfully driving with tinted glass raises a reasonable suspicion of illegality such that a reasonable inquiry is justified. Without additional articulable facts suggesting that the tinted glass is illegal, the detention rests upon the type of speculation which may not properly support an investigative stop. [Citations.]” In *Butler*, the court found no facts in the record to suggest that a police officer had a reasonable suspicion that the windows of the car he stopped “were made of illegally tinted, rather than legally tinted safety glass,” where the officer observed the car from a distance late at night and “simply admitted that he ‘didn’t like the idea of the tinted windows.’” (*Id.* at p. 606; accord, *United States v. Caseres* (9th Cir. 2008) 533 F.3d 1064, 1067, 1069 [officer’s mere observation that defendant’s front passenger compartment windows appeared to be tinted, without more, did not justify traffic stop].)

In *People v. Niebauer* (1989) 214 Cal.App.3d 1278, 1291 (*Niebauer*), the appellate court rejected the defendant’s claim that there was insufficient evidence to support his conviction for driving with illegally tinted side windows. A police officer had “stopped the [defendant] because the windows were darker than normal and he could only see [the defendant’s] outline through the window.” (*Id.* at p. 1292.) Although the officer had no training or expertise regarding light transmittance, “he stated that looking through the windows from where he stood outside the vehicle, his vision was obstructed.” (*Id.* at pp. 1292-1293.) In dictum, the court stated that a vehicle stop would have been justified on the facts of the case. (*Id.* at p. 1293, fn. 10.) In contrast to *Butler*, in which the officer had merely testified that the vehicle had tinted windows, the officer in *Niebauer* had “testified to additional facts giving him reasonable suspicion [the defendant] was driving with illegally tinted windows.” (*Niebauer*, at p. 1293, fn. 10.)

In *People v. Hanes* (1997) 60 Cal.App.4th Supp. 6, 10 (*Hanes*), the appellate division of the superior court also distinguished *Butler*, concluding that there were facts present in *Hanes* that made the vehicle stop to investigate the legality of the tinted windows lawful. Specifically, the officer, who had substantial experience in enforcing

Vehicle Code 26708, saw the defendant's vehicle pass slowly in front of him. (*Hanes*, at p. 10.) The tinting on the right front window "was so dark as to appear black and prevent the officer from seeing the occupants of the front seats." (*Ibid.*; accord, *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1190-1191 [where officer could not see through driver's side window of vehicle as he drove beside it, his belief that vehicle's tinted windows violated Veh. Code established probable cause for stop, even though police wanted to stop defendant for other reasons as well]; *United States v. Wallace* (9th Cir. 2000) 213 F.3d 1216, 1220-1221 [where officer testified that tinting on two front windows was so dark that it was difficult to see into vehicle, officer reasonably believed that tinting was illegal, and traffic stop was lawful].)

Appellant argues that the present case is like *Butler* in that Shackford's observations did not provide reasonable suspicion that appellant's front side windows were illegally tinted. We disagree. Shackford, who had previously stopped vehicles with tinted front windows, testified that he was stopped behind appellant's vehicle at a signal and, as appellant turned right, he saw that the front side passenger window was so darkly tinted that he could not see inside. This testimony shows that Shackford's view of the windows was not from any great distance, as appellant asserts. Shackford also testified that he saw the tinted windows as the vehicle in front of him turned right, and that he was unable to see inside the vehicle until he actually approached it after the stop. As he stated, "Walking up to the vehicle, you aren't able to see anything."

This evidence shows that, unlike in *Butler*, there was more than just an assertion by the officer that the detained vehicle had tinted windows, based on a distant observation. This case is more like *Niebauer* and *Hanes* in that there were "additional articulable facts suggesting that the tinted glass [was] illegal." (*Butler, supra*, 202 Cal.App.3d at p. 607.)⁷ We therefore conclude that Shackford had a reasonable suspicion

⁷ This case is distinguishable from *People v. White* (2003) 107 Cal.App.4th 636, cited by appellant, in which Division Five of this District reversed the trial court's denial of a motion to suppress. The court concluded it was not reasonable for an officer to believe that a small object hanging from the defendant's rearview mirror violated Vehicle

that the front side windows of appellant's vehicle were illegally tinted, and the traffic stop was therefore lawful. (See *Souza, supra*, 9 Cal.4th at pp. 231, 233.)

2. Existence of Probable Cause to Search the Vehicle

Appellant next claims that, under the MMP, the scent of unburned marijuana did not provide police with probable cause to search his vehicle.

“ ‘[T]he Fourth Amendment to the United States Constitution permits the warrantless search of an automobile with probable cause.’ [Citation.] Under the automobile exception to the warrant requirement, ‘[w]hen the police have probable cause to believe an automobile contains contraband or evidence they may search the automobile and the containers within it without a warrant. [Citation.]’ [Citations.]” (*People v. Waxler* (2014) 224 Cal.App.4th 712, 718 (*Waxler*)).

Appellant acknowledges that “California courts have concluded the odor of unburned marijuana . . . may furnish probable cause to search a vehicle under the automobile exception to the warrant requirement.” (*Waxler, supra*, 224 Cal.App.4th at p. 719.) He nonetheless claims that probable cause to search was lacking in this case because he had a physician's recommendation for medical marijuana under the Compassionate Use Act (CUA) (§ 11362.5 et seq.) and participated in the MMP (§ 11362.7 et seq.).

In 1996, the California electorate approved Proposition 215 and adopted the CUA, which provides: “Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.” (§ 11362.5, subd. (d).) “By this and related provisions, the CUA provides an affirmative defense to *prosecution* for the crimes of possession and cultivation.

Code section 26708, subdivision (a)(2), which prohibits driving a vehicle with an object displayed that obstructs or reduces a driver's view through the windshield or side windows. (*White*, at p. 642.) Here, we have found that Shackford's suspicion that the vehicle's windows were illegally tinted *was* reasonable, based on all of the facts.

[Citations.]” (*People v. Kelly* (2010) 47 Cal.4th 1008, 1012-1013 (*Kelly*), fn. omitted.) The CUA does not, however, grant immunity from arrest. (*Id.* at p. 1013.) Nor does it specify an amount of marijuana that a patient or primary caregiver may possess, but only states that the marijuana must be for the patient’s “personal medical purposes.” (§ 11362.5, subd. (d); see *Kelly*, at p. 1013.)

Then, in 2003, the Legislature enacted the MMP, “a voluntary ‘identification card’ scheme,” which provides for both protection against arrest and quantity limitations on the amount of marijuana that may be possessed or cultivated under the program. (*Kelly*, *supra*, 47 Cal.4th at pp. 1014-1016; see § 11362.71, subd. (e) [no person or designated primary caregiver in possession of a valid identification card is “subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana in an amount established pursuant to this article”]; § 11362.77, subd. (a) [qualified patient or primary caregiver may possess up to eight ounces of dried marijuana and may maintain up to six mature or 12 immature marijuana plants].) “‘[T]he MMP’s identification card system is a discrete set of laws designed to confer distinct protections under California law that the CUA does *not* provide[,] without limiting the protections the CUA *does* provide.’ ” (*Kelly*, at p. 1047.)

In *Kelly*, our Supreme Court held that the MMP had improperly amended the CUA, explaining: “By extending the reach of section 11362.77’s quantity limitation beyond those persons who voluntarily register under the MMP and obtain an identification card that provides protection against arrest . . . the challenged language of section 11362.77 effectuates a change in the CUA that takes away from rights granted by the initiative statute. [Citations.]” (*Kelly*, *supra*, 47 Cal.4th at p. 1043.) The *Kelly* court found, however, that “[s]ection 11362.77 continues to have legal significance, and can operate as part of the MMP, even if it cannot constitutionally restrict a CUA defense.” (*Kelly*, at p. 1048.) Because the Court of Appeal had “erred in holding that section 11362.77 must be severed from the MMP and hence voided in its entirety,” the *Kelly* court disallowed the application of section 11362.77 only “insofar as the terms of the

statute purport to burden a defense otherwise available to qualified patients or primary caregivers under the CUA.” (*Kelly*, at pp. 1048-1049.)

Appellant asserts that the holding in *Kelly* means that, “[u]nder the MMP, the protection against arrest extends to medical marijuana patients without reference to the quantity limitations that *Kelly* overturned.” Thus, according to appellant, because he told Shackford, the detaining officer, that he had obtained a medical marijuana identification card under the MMP, he was protected from arrest for possession of marijuana without regard to the MMP’s eight-ounce limit, and the smell of unburned marijuana alone therefore did not provide probable cause to search his vehicle.

Respondent observes, as a preliminary matter, that appellant did not raise this argument in the trial court and that, in fact, defense counsel acknowledged that the odor of marijuana could give rise to probable cause to search a vehicle. Respondent therefore argues that appellant has forfeited the issue on appeal. (See *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640 (*Lorenzana*)). Appellant acknowledges that he “did not raise the specific argument in his points and authorities that his medical marijuana recommendation vitiated probable cause to search his vehicle,” but states that because he “did raise the argument that the odor of marijuana does not give rise to probable cause to search a person inside a vehicle,” the trial court had sufficient notice of the argument he now raises.

In *Lorenzana, supra*, 9 Cal.3d at page 640, the defendants had filed a motion to suppress on the ground that the evidence was the fruit of an illegal search. Both the defendants and the prosecution submitted the issue based on testimony presented at the preliminary hearing and at the suppression hearing. Our high court rejected the Attorney General’s attempt to raise a new legal theory on appeal: “All parties faced the obligation of presenting all their testimony and arguments relative to the question of the admissibility of the evidence at that time. If the People had other theories to support their contention that the evidence was not the product of illegal police conduct, the proper place to argue those theories was on the trial level at the suppression hearing. The People offered no such argument at that hearing and may not do so for the first time on appeal.

To allow a reopening of the question on the basis of new legal theories to support or contest the admissibility of the evidence would defeat the purpose of Penal Code section 1538.5 and discourage parties from presenting all arguments relative to the question when the issue of the admissibility of evidence is initially raised. [Citations.]” (*Lorenzana*, at p. 640, fn. omitted.) Similarly, in the present case, appellant was obligated to raise this theory first in the trial court.

Appellant further argues that, even if his failure to raise this issue would otherwise preclude review on appeal, the question is one of law based on undisputed facts, which we have discretion to address. (See, e.g., *People v. Smith* (1983) 34 Cal.3d 251, 271; *People v. Brown* (1996) 42 Cal.App.4th 461, 471.) The facts are undisputed, according to appellant, because there was no testimony at the preliminary hearing showing that Shackford did not believe appellant’s statement that he had a medical marijuana card. This argument reflects circular reasoning. The only reason there was no evidence regarding whether Shackford believed appellant’s statement was because it was not relevant to the issues raised in the motion to suppress, which did not include the medical marijuana issue raised on appeal. Hence, this so-called undisputed fact is only undisputed because appellant did not raise the issue in the trial court, where the prosecutor and the court could address it.

As our Supreme Court explained in *People v. Smith*, *supra*, 34 Cal.3d at page 271, in response to a similar argument made on appeal by the Attorney General: “The Attorney General urges us to make an exception to the *Lorenzana* rule in this case [on the ground] that the evidence at the suppression hearing was not in conflict. But this is true of most suppression hearings: the issue usually turns on the inferences to be drawn from undisputed evidence. Moreover, the evidence might well have been in conflict if the prosecution had raised at the hearing the additional theories that the Attorney General now proposes: we cannot say that in such event defendant would not have elicited other testimony to meet some or all of those theories. Finally, the *Lorenzana* rule is designed to promote resolution at the trial level not only of issues of fact but also issues of law.”

Here, because appellant did not raise this issue in the trial court, it is not appropriate to address it for the first time now, on appeal.

In any event, appellant's contention would fail on the merits. Appellant misconstrues *Kelly*, which held only that the MMP's quantity restrictions do not apply to a *defense* under the CUA. (See *Kelly, supra*, 47 Cal.4th at pp. 1048-1049.) Its holding plainly did not affect those quantity restrictions with respect to protection from *arrest* under the MMP, given that the CUA does not cover arrests. (See *Kelly*, at p. 1048 ["Section 11362.77 continues to have legal significance, and can operate as part of the MMP, even if it cannot constitutionally restrict a CUA defense"]; see also *People v. Strasburg* (2007) 148 Cal.App.4th 1052, 1059-1060 (*Strasburg*).)

In *Strasburg*, the appellate court explained that the odor of marijuana gave police probable cause to search the defendant's car for marijuana, despite the fact that the defendant had a medical marijuana prescription. The court explained: "The fact that defendant had a medical marijuana prescription and could lawfully possess an amount of marijuana greater than that [the police officer] initially found, does not detract from the officer's probable cause. [The CUA] provides a limited immunity—not a shield from reasonable investigation. An officer with probable cause to search is not prevented from doing so by someone presenting a medical marijuana card or a marijuana prescription. Given the probable cause here, the officer is entitled to continue to search and investigate, and determine whether the subject of the investigation is in fact possessing the marijuana for personal medical needs, and is adhering to the [MMP's] eight-ounce limit on possession." (*Strasburg, supra*, 148 Cal.App.4th at pp. 1059-1060; see also *Waxler, supra*, 224 Cal.App.4th at p. 725 [citing *Strasburg* in concluding that possession of a medical marijuana card "does not preclude a warrantless automobile search where there is probable cause to believe the vehicle contains contraband or evidence of a crime"]; cf. *County of Tulare v. Nunes* (2013) 215 Cal.App.4th 1188, 1203, quoting *Kelly, supra*, 47 Cal.4th at pp. 1015, fn. 5, 1048 [after *Kelly*, except to extent section 11362.77's quantity

limitation burdens a criminal defense available under CUA, section 11362.77 “continued to ‘have legal significance’ [citation], such as a ‘safe harbor’ against prosecution”).⁸

Thus, as these cases make clear, while appellant may have had an affirmative defense to prosecution under the CUA without regard to the MMP’s quantity restrictions, any protection from arrest under the MMP would be based on his possession of eight ounces or less of dried marijuana. (See § 11326.77, subd. (a).) Consequently, appellant’s comment to Shackford that he had a medical marijuana card⁹ did not vitiate the probable cause Shackford had to further investigate and search his vehicle to ascertain whether he possessed eight ounces or less of marijuana, pursuant to section 11326.77, subdivision (a). (See *Strasburg, supra*, 148 Cal.App.4th at pp. 1059-1060 [“[CUA] provides a limited immunity—not a shield from reasonable investigation”]; see also *Waxler, supra*, 224 Cal.App.4th at pp. 723-724.)

In sum, even if appellant had not forfeited this issue, because the officers had probable cause to search appellant’s vehicle, appellant’s argument would fail on the merits.

⁸ Appellant’s argument that *Strasburg* is no longer good law because *Kelly* overturned the eight-ounce limit on marijuana possession is misplaced, given appellant’s misapprehension of the holding in *Kelly*, as discussed in the text, *ante*.

⁹ For purposes of addressing appellant’s argument on this issue only, we have presumed that when appellant told the officer that he had a medical marijuana card, that was sufficient to bring him under the protections of the MMP, despite the fact that it was not in his possession. (But see § 11362.71 (e) [“No person or designated primary caregiver *in possession of* a valid identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana in an amount established pursuant to this article, unless there is reasonable cause to believe that the information contained in the card is false or falsified, the card has been obtained by means of fraud, or the person is otherwise in violation of the provisions of this article”], italics added.)

3. Existence of Reasonable Suspicion to Frisk Appellant and his Passengers

Appellant also claims the officers unlawfully frisked him and his passengers without reasonable suspicion that they were armed and presently dangerous.

“To justify a patdown . . . during a traffic stop, . . . the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.” (*Arizona v. Johnson* (2009) 555 U.S. 323, 327; accord, *Terry v. Ohio, supra*, 392 U.S. at p. 30.) Even so, “[t]he Fourth Amendment has never been interpreted to ‘require that police officers take unnecessary risks in the performance of their duties.’ [Citation.]’ [Citation.]” (*People v. Collier* (2008) 166 Cal.App.4th 1374, 1378 (*Collier*), quoting *Pennsylvania v. Mimms* (1977) 434 U.S. 106, 110.) “‘[I]n connection with a lawful traffic stop of an automobile, when the officer has a reasonable suspicion that illegal drugs are in the vehicle, the officer may, in the absence of factors allaying his safety concerns, order the occupants out of the vehicle and pat them down briefly for weapons to ensure the officer’s safety and the safety of others.’ [Citation.]” (*Collier*, at p. 1378.)

Respondent maintains that appellant has no standing to assert this claim because nothing was found during the pat search of his person (see *People v. Fisher* (1995) 38 Cal.App.4th 338, 346 [“We . . . need not consider whether the pat-search was justified because it yielded nothing incriminating”]), and that he may not challenge the frisk of his passenger, Jimenez, on whom the officers found a firearm and suspected drugs. (See *Rakas v. Illinois* (1978) 439 U.S.128, 133-134 [“‘Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted’ ”].) However, even assuming that appellant has standing to assert a constitutional challenge to the frisk of Jimenez, we conclude the officers were justified in frisking appellant and his passengers. (See *Collier, supra*, 166 Cal.App.4th at p. 1377.)

In reviewing a claim that a pat search was not supported by reasonable suspicion, “we defer to the trial court’s factual findings where supported by substantial evidence and independently determine whether, on the facts found, the patdown was reasonable under Fourth Amendment standards. [Citation.]” (*Collier, supra*, 166 Cal.App.4th at p. 1377.)

In *Collier*, two police officers stopped a car because it did not have a front license plate and, upon approaching the vehicle, smelled marijuana. (*Collier, supra*, 166 Cal.App.4th at pp. 1376-1377.) The officers asked the driver and passenger to step out so that they could search the car, at which time they frisked the driver and passenger-defendant based in part on the baggy clothing the defendant wore, which led the officers to believe he could have been concealing a weapon. (*Ibid.*) The appellate court rejected the defendant’s argument that the officers lacked reasonable suspicion to believe that he was armed and dangerous, holding that “[t]he trial court correctly and reasonably ruled that there were specific and articulable facts to conduct a limited patdown based on officer safety and the presence of drugs [since] ‘guns often accompany drugs.’ [Citation.]” (*Id.* at p. 1378.)

Appellant argues that, here, unlike in *Collier*, there was no additional evidence, such as baggy clothing, justifying the pat searches of him and his passengers. We disagree, and conclude there was sufficient evidence to warrant the pat search in the circumstances of this case. When Shackford approached appellant’s vehicle, he smelled the strong odor of unburned marijuana and appellant acknowledged that there was marijuana inside the vehicle.¹⁰ Hence, after removing appellant and the two passengers from the vehicle and before further investigating the smell of unburned marijuana coming from inside the vehicle, it was reasonable for the officers to briefly frisk the three men “ ‘based on officer safety and the presence of drugs.’ ” (*Collier, supra*, 166 Cal.App.4th at p. 1378; cf. *People v. Bradford* (1995) 38 Cal.App.4th 1733, 1739 “[I]t is common

¹⁰ As we have already discussed, the officers had probable cause to further investigate and search the vehicle despite appellant’s statement that he had a “cannabis club card,” which was not then in his possession. For this reason, we reject appellant’s suggestion that, in light of current, more lenient laws concerning marijuana, including the CUA and the MMP, we should disagree with *Collier* to the extent it fails to distinguish marijuana from other drugs. The medical marijuana laws do not change the fact that marijuana remains a schedule I controlled substance in California, which like other drugs, is generally illegal to possess, transport, and sell (see §§ 11357 [possession of marijuana], 11359 [possession of marijuana for sale], 11360 [transportation of marijuana]), with limited exceptions for individuals covered by the CUA or the MMP.

knowledge that perpetrators of narcotics offenses keep weapons available to guard their contraband.”).¹¹)

For all of the foregoing reasons, we conclude the trial court did not err when it denied appellant’s motion to suppress. (See *People v. Hoyos* , *supra*, 41 Cal.4th at p. 891.)

II. Probation Condition

Appellant contends the trial court abused its discretion when it imposed a probation condition prohibiting him from using medical marijuana.

A. Trial Court Background

In the presentence report, the probation officer stated that appellant had “admitted that he sometimes feels anxious and that he was prescribed medicinal marijuana to assist him in dealing with his anxiety. He states that he gets ‘worked up’ easily and needs help

¹¹ Cases cited by appellant in which appellate courts found that officers did not have reasonable suspicion to conduct pat searches are not analogous to the present case, in which the suspected presence of drugs in his vehicle justified the pat searches. (Compare, e.g., *People v. Sandoval* (2008) 163 Cal.App.4th 205, 208-209, 213 [pat search of individual simply sitting in front of house while police were conducting probation search of house was unreasonable]; *People v. Medina* (2003) 110 Cal.App.4th 171, 174, 177 [pat search based solely on traffic stop late at night in high crime area was unreasonable].)

Appellant also points out that the trial court did not focus on the propriety of the pat search, instead finding that there would have been inevitable discovery of the drugs and weapons since there was probable cause to search the interior of the vehicle based on the smell of marijuana. (See *People v. Robles* (2000) 23 Cal.4th 789, 800 [“Under the inevitable discovery doctrine, illegally seized evidence may be used where it would have been discovered by the police through lawful means”].) Whether there was reasonable suspicion justifying a pat search, however, is based on objective factors (*Ybarra v. Illinois* (1979) 444 U.S. 85, 109 [“test of reasonableness under the Fourth Amendment is necessarily objective as opposed to subjective”]), and the trial court’s lack of analysis on this point does not keep us from determining, based on the evidence in the record, that the officers had reasonable suspicion in this case.

Moreover, because we conclude the pat search was lawful, we need not address appellant’s argument that there would not have been inevitable discovery of the cocaine and weapons inside the vehicle.

in calming himself. [He] also explained that he sometimes feels depressed and that marijuana also helps him to cope with his depression. He explained that he uses marijuana about every other day, mainly at night, to assist him in sleeping.” Appellant further informed the probation officer that he would refrain from using marijuana, even for medicinal purposes, if ordered to do so by probation. Appellant had submitted to the probation officer a copy of a medical marijuana recommendation form issued on November 4, 2013, and signed by a physician, which included a preprinted statement that it was the examining physician’s “assessment that the above-mentioned patient qualifie[d] under [section] 11362.5 for the use of cannabis for medical purposes. . . .”

The probation officer reported that appellant was arrested for possession of a controlled substance (§ 11350, subd. (a)) on July 24, 2010, but appellant had said that he was placed on deferred entry of judgment in that case. Appellant also had told the probation officer that, at the time of the present offense, he was on probation in Alameda County for a misdemeanor driving under the influence (DUI) conviction from 2011. The probation officer also stated that appellant had denied the current use of any illegal substances other than medical marijuana, but the probation officer believed that the prior drug-related arrest and summary probation for a DUI “indicate[d] that he may be underreporting his drug use.”

The probation officer concluded, “As the defendant has a prescription for medicinal marijuana, it is respectfully recommended that pursuant to [section 11362.795], the court is to determine if the defendant is allowed to use [m]edical [m]arijuana while on probation and indicate such on the minute order.”¹²

At the sentencing hearing, defense counsel told the trial court that, “based upon the medicinal effects that the marijuana offers [appellant], he was requesting that the court allow him to continue to use medical marijuana for his anxiety and depression. I

¹² In his briefing, appellant repeatedly, and incorrectly, refers to this statement as “the probation officer’s recommendation that appellant be able to use medical marijuana on probation.”

think it's better for him to have some, but if the court denies that, he is willing to say, 'Hey, I won't take it, 'but I think it helps him, and I mean, certainly, he could go and get pharmaceutical drugs. Some of those could be very problematic and when the psychiatrist isn't getting it right or when these are not working, it just I—just think medicinal marijuana has the better effect with people with anxiety, and it's less toxic to the body as opposed to some pharmaceuticals.' Counsel also stated that letters related to sentencing showed that appellant's sister has bipolar disorder, "so I think there is some genetic issues going on with [appellant] as well, although not as pronounced. I think the therapeutic value of marijuana would be greatly outweighed than [*sic*] any other kind of treatment modality he may have to try. He may need to go to a psychiatrist and try this election."

The court responded: "My concern is alternative medication could work better and he would not be in possession of marijuana for sale or the inference from some of the facts that the drugs were not possessed solely for personal use and that there was a large amount of marijuana present in the same location, so it would be my intent not to permit medical marijuana terms and conditions of probation." The court then imposed a condition of probation requiring that appellant "totally abstain from the use of illegal drugs. He will not possess a medical marijuana card. He agrees to not utilize medical marijuana during probation and alternate medication is appropriate for medical conditions."

B. Legal Analysis

In *People v. Leal* (2012) 210 Cal.App.4th 829, 833, a panel of this Division addressed the recurring issues that arise when a trial court considers imposing a condition of probation restricting medical use of marijuana under the CUA and the MMP. In *Leal*, we announced "a three-step inquiry into limiting CUA use of marijuana by a probationer[:] First, we examine the validity of any CUA authorization; second, we apply the threshold *Lent* test [(*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*))], for interfering with such authorization; and third, we consider competing policies governing the exercise of discretion to restrict CUA use." (*Leal*, at p. 837.)

With respect to step one—the validity of any CUA authorization—we observed that, while marijuana remains a schedule I controlled substance in this state (§ 11054, subd. (d)(13)), there are limited protections for people who hold a valid medical marijuana authorization under the CUA (§ 11362.5) or a valid medical marijuana identification card under the MMP (§ 11362.7 et seq.). (*Leal, supra*, 210 Cal.App.4th at p. 838.) In *Leal*, neither the trial court nor the prosecutor had questioned the validity of the defendant’s medical marijuana authorization. We therefore presumed its validity and proceeded to the next step of the analysis. (See *Leal*, at p. 840.)

As to step two, we explained that, “ ‘[u]nder the *Lent* test and settled review principles: ‘We review conditions of probation for abuse of discretion. [Citations.] Generally, ‘a condition of probation will not be held invalid unless it ‘(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality’ [Citation.]” [Citation.] This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality. [Citation.]’ [Citations.]” (*Leal, supra*, 210 Cal.App.4th at p. 840; see *Lent, supra*, 15 Cal.3d at p. 486.)

We then explained that because medical use of marijuana as authorized by the CUA is not conduct that is itself criminal for purposes of the *Lent* test, the issues in a case in which a defendant has valid medical marijuana authorization are whether the circumstances show a sufficient nexus to the defendant’s current offenses or future criminality. (*Leal, supra*, 210 Cal.App.4th at pp. 840-841.) In *Leal*, the defendant was convicted of possessing marijuana for sale, and the evidence showed that, as to the current offenses, he had misused his medical marijuana authorization in hopes of escaping arrest and prosecution. (*Id.* at p. 842.) In addition, as to future criminality, “[i]f

allowed to continue medical use, he would have an incentive to keep masking [his] illegal activity with his CUA status” (*Ibid.*)

Finally, as to the third step, we emphasized the discretionary nature of the court’s decision and the need for the court to balance competing public policies. (*Leal, supra*, 210 Cal.App.4th at pp. 843-844.) We noted the tension between the step-one conclusion that a defendant has valid CUA authorization, which “implicates a voter-compelled policy that qualified patients be allowed to alleviate medical problems through the use of marijuana,” and the step-two conclusion that the relationship of that lawful use to the current offenses or future criminality “raises a competing policy consideration: the need to rehabilitate the defendant and protect the public during his or her release on probation.” (*Id.* at p. 844) We explained that “resolution of these competing policies necessarily requires weighing the needs of one against the other before deciding whether and how much to limit the lawful conduct.” (*Ibid.*) We further explained that the “balance will vary widely from case to case,” but that “the rehabilitative/protective need could outweigh a lesser medical need, or one that could be efficaciously met by alternative means.” (*Ibid.*) We stressed “that this third step balancing of competing needs does not allow a court to question the wisdom of voters or the validity of an unchallenged card or the underlying medical authorization. The requisite balancing contemplates a judicial assessment of medical need and efficacy based upon evidence: the defendant’s medical history, the gravity of his or her ailment, the testimony of experts or otherwise qualified witnesses, conventional credibility assessments, the drawing of inferences, and perhaps even medical opinion at odds with that of the defendant’s authorizing physician.” (*Ibid.*)

Based on the evidence, we concluded that the record provided “ample evidence of rehabilitative need and, on the medical need side, nothing beyond mere possession of a medical-use identification card.” (*Leal, supra*, 210 Cal.App.4th at p. 845.) Indeed, the showing of medical need was nothing more than defense counsel’s unsworn statement at the sentencing hearing that the defendant had a diagnosis of hypertension and posttraumatic stress, which he used marijuana to treat. (*Id.* at pp. 844-845.) Nor did the

record shed light on the “severity of [the defendant’s] asserted ailments, the efficacy of treating them with medical marijuana, or the feasibility and efficacy of any alternative treatments that may be available.” (*Id.* at p. 845.) We therefore held that the trial court did not abuse its discretion when it imposed a probation condition prohibiting the defendant from using medical marijuana. (*Id.* at pp. 833, 845.)

Turning to the present case, the first step of the inquiry into limiting CUA use of marijuana by a probationer addresses the validity of the CUA authorization. Here, as in *Leal*, neither the prosecutor nor the trial court challenged the validity of appellant’s medical marijuana recommendation. We will therefore presume its validity¹³ and proceed to the next step of the analysis. (See *Leal, supra*, 210 Cal.App.4th at p. 840.)

Under step two, in which we analyze the condition of probation under the *Lent* test, we first find, as we did in *Leal*, that because medical use of marijuana as authorized by the CUA is not conduct that is itself criminal, the issues here are whether the circumstances show a sufficient nexus to appellant’s current offenses or future criminality. (See *Leal, supra*, 210 Cal.App.4th at pp. 840-841.)

As to whether the condition relates to the crime of which appellant was convicted, he pleaded guilty to possession of cocaine with a firearm after a large amount of cocaine and a gun were found in his vehicle. Although appellant was not convicted of a marijuana-related offense, a large amount of marijuana was also found in the vehicle and he was originally charged with sale or transportation of marijuana. This charge was dismissed, but appellant agreed to a *Harvey* waiver¹⁴ as part of his plea agreement.¹⁵ In

¹³ We do note that appellant obtained this recommendation on November 4, 2013, well over a year after his arrest in this case.

¹⁴ *People v. Harvey* (1979) 25 Cal.3d 754, 758-759. A *Harvey* waiver permits a sentencing court to consider the facts of dismissed counts in sentencing. (*Ibid.*)

¹⁵ Appellant argues that the *Harvey* waiver was invalid because a written description of what he was agreeing to was missing from his change of plea form and because his counsel objected to the *Harvey* waiver at the time of sentencing. Even were we to assume the *Harvey* waiver was invalid, we would nevertheless conclude that the marijuana probation condition need not be invalidated under *Lent* because of the

addition, the condition forbids conduct that is reasonably related to preventing future criminality in that the record reflects that appellant has been involved with illicit drugs, given his conviction for possessing a great deal of cocaine together with a firearm. He also was arrested some two years before the present offense took place for possession of a controlled substance and had a DUI conviction from the year before the present offense occurred. The record thus reflects that appellant had ongoing issues with drugs, and the court did not abuse its discretion when it concluded that this probation condition would assist in preventing future criminality. (See *Leal, supra*, 210 Cal.App.4th at p. 840.)

Lastly, as to the third step of the inquiry, we must weigh appellant's medical need against the rehabilitative/protective need found in the previous two steps. Here, as in *Leal*, appellant provided no real evidence of his medical history, the gravity of his ailments, the testimony of experts or otherwise qualified witnesses regarding the severity of his asserted ailments, the efficacy of treating them with marijuana, or the likely efficacy of any alternative treatments. (See *Leal, supra*, 210 Cal.App.4th at p. 845.) The minimal showing related to medical need included only the generic, non-specific medical marijuana authorization; appellant's statement to the probation officer that medical marijuana helped him deal with his anxiety and depression; and defense counsel's unsupported statements at the sentencing hearing that marijuana "helps him," that some pharmaceutical drugs "could be very problematic," that "medicinal marijuana has the better effect with people with anxiety and it's less toxic to the body as opposed to some pharmaceuticals," and that the therapeutic value of marijuana "greatly outweighed . . . any other kind of treatment modality he may have to try."

The evidence of rehabilitative/protective need included, as discussed, (1) the circumstances of the present offense, which involved not only possession of illegal drugs, but also possession of a firearm, and (2) reasonable concerns about preventing future

relevance of the condition to the offense of which appellant was convicted, as well because the condition forbids conduct that is reasonably related to future criminality. (See text, *post*; see also *Leal, supra*, 210 Cal.App.4th at pp. 840-841.)

criminality, based on appellant’s current and prior involvement with and issues related to illegal drugs. As the probation officer stated, appellant’s criminal history “indicates that he may be underreporting his drug use.” Weighing the meager evidence of medical need—and the lack of any real dispute that such a need “could be efficaciously met by alternative means” (*Leal, supra*, 210 Cal.App.4th at p. 844)—against the more substantial showing of rehabilitative/protective need, we conclude the trial court did not abuse its discretion when it imposed the probation condition prohibiting appellant from using medical marijuana. (See *id.* at pp. 833, 845.)

DISPOSITION

The judgment is affirmed.

Kline, P.J.

We concur:

Stewart, J.

Miller, J.

People v. Guzman (A140919)