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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID ALLEN BLY et al.,

Defendants and Appellants.

C068111

(Super. Ct. No. 09F6924)

Defendants David Allen Bly and Nathan Nopson were traveling on Interstate 5 when a California Highway Patrol officer stopped them for speeding. The officer smelled marijuana and Bly gave the officer a Washington medical marijuana card or recommendation. Although Bly refused permission to search the vehicle, the officer searched the car anyway and found, among other things, 927 pills of Oxycontin.

After the trial court denied their motion to suppress evidence, Bly pleaded guilty to possession of Oxycontin for sale and Nopson pleaded guilty to transportation of

Oxycontin. Bly was sentenced to three years in prison and Nopson was granted formal probation for three years.

Defendants contend (1) the trial court erred in denying their motion to suppress evidence, (2) the trial court's implicit failure to recognize Bly's medical marijuana recommendation from Washington violated the full faith and credit clause of the United States Constitution, and (3) the trial court's ruling infringed upon their constitutional right to travel.

We conclude the trial court correctly ruled that Bly's medical marijuana recommendation did not preclude the search of the car, and there was no violation of the full faith and credit clause or defendants' constitutional right to travel. Accordingly, we will affirm the judgments.

BACKGROUND

California Highway Patrol Officer Larios conducted a traffic stop for speeding on Interstate 5 in Shasta County. The driver, defendant Nopson, and the passenger, defendant Bly, were both from Washington. Officer Larios smelled marijuana in the vehicle. Bly told the officer he had a Washington medical marijuana card or recommendation and gave it to Larios, along with a baggie containing under an ounce of marijuana. Bly, who owned the vehicle, refused permission to search the car but Officer Larios searched the car anyway to make sure that Bly was in compliance with his medical marijuana recommendation.

In the trunk of the car Officer Larios found a .45 caliber semiautomatic handgun, and a zippered bank bag in which there was another bag containing 927 pills of Oxycontin. There were two boxes of ammunition and two cellular phones in the passenger compartment. Bly had \$1,680 in cash, which he stated was from working in his vending machine company in Washington. Nopson admitted owning the handgun. The two men were arrested and booked into the Shasta County Jail.

Defendants were not arrested for, or charged with, any criminal offense with respect to the marijuana Bly possessed. Both defendants were charged with the possession of Oxycontin, the sale or transportation of Oxycontin, and carrying a loaded firearm with the intent to commit a felony. In addition, it was alleged they were armed with a firearm in the commission of the Oxycontin offenses.

The trial court denied defendants' motion to suppress the evidence obtained during the search of the vehicle. Relying on *People v. Strasburg* (2007) 148 Cal.App.4th 1052 (*Strasburg*), the trial court found that once Officer Larios smelled marijuana he had probable cause to search the vehicle even though Bly had a medical marijuana recommendation.

Following denial of the motion to suppress, defendant Bly pleaded guilty to possession of Oxycontin for sale (Health & Saf. Code, § 11351),¹ and defendant Nopson pleaded guilty to the transportation of Oxycontin (§ 11352). All other charges and allegations against defendants were dismissed. The trial court sentenced Bly to the midterm of three years in prison. It granted Nopson formal probation for a period of three years, on the condition he serve 120 days in jail.

DISCUSSION

I

Defendants contend the trial court erred in denying their motion to suppress the evidence found during Officer Larios's search of the car. They maintain that once Bly produced his medical marijuana recommendation and surrendered his baggie of marijuana, Officer Larios had no probable cause to search the car. Furthermore, they contend he had no probable cause to open the zippered bag he found in the trunk because,

¹ Undesignated statutory references are to the Health and Safety Code.

as Larios acknowledged, it would not accommodate more than the legally permissible amount of eight ounces of marijuana.

In reviewing a trial court's ruling on a motion to suppress evidence, we apply the substantial evidence test to the factual determinations made by the court, with all presumptions favoring the trial judge's findings. (*People v. Camacho* (2000) 23 Cal.4th 824, 830; *People v. Manderscheid* (2002) 99 Cal.App.4th 355, 359.) Whether, on the facts found, a search is unreasonable is a question of law upon which we exercise our independent judgment. (*People v. Camacho, supra*, 23 Cal.4th at p. 830; *People v. Manderscheid, supra*, 99 Cal.App.4th at p. 359.)

A

It is a crime to possess, cultivate, sell or transport marijuana. (§§ 11357, 11358, 11359, 11360.) However, the Compassionate Use Act (CUA) allows a patient or the patient's primary caregiver to possess or cultivate marijuana for the personal medical purposes of the patient upon the written or oral recommendation of a physician. (§ 11362.5, subd. (d).) The CUA provides an affirmative defense to prosecution for the crimes of possession and cultivation, but does not grant immunity from arrest for those crimes. (*People v. Kelly* (2010) 47 Cal.4th 1008, 1013 (*Kelly*); *People v. Mower* (2002) 28 Cal.4th 457, 464 (*Mower*).)

The subsequently enacted Medical Marijuana Program (MMP) (§ 11362.7 et seq.) was intended to “[c]larify the scope of the application of the [CUA] and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers.” [Citations.]” (*Kelly, supra*, 47 Cal.4th at p. 1014, italics omitted.) To that end, section 11362.71, subdivision (e) provides: “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.” As relevant to the issues raised on appeal, the “amount established pursuant to this article” is eight ounces of dried marijuana. (§ 11362.77, subd. (a).)²

B

Relying on *Strasburg, supra*, 148 Cal.App.4th 1052, the trial court ruled that once Officer Larios smelled marijuana he had probable cause to search the vehicle even though Bly had a medical marijuana recommendation.

In *Strasburg, supra*, 148 Cal.App.4th 1052, the defendant moved to suppress evidence obtained when an officer, approaching a car parked at a gas station with two people inside, “smelled the odor of marijuana” emanating from the car. (*Id.* at p. 1055.) The smell of marijuana led him to investigate the driver and ultimately to search the car. (*Id.* at pp. 1055-1057.) The court found “[t]he operative issue is whether [the officer] had probable cause to search [the] defendant’s car at the moment he smelled the odor of marijuana, at the outset of his encounter with defendant who was with another person in a parked car in a public parking area.” (*Id.* at p. 1058.) The court concluded that the

² *Kelly, supra*, 47 Cal.4th 1008, which was decided *after* Officer Larios conducted the traffic stop, held that section 11362.77 amended the CUA by prescribing a specific amount of marijuana that may be possessed by a “qualified patient,” i.e., “a person who is entitled to the protections of [the CUA], but who does not have an identification card issued pursuant to [the MMP]” (§ 11362.7, subd. (f)). (*Kelly, supra*, at pp. 1012, 1016, fn. 7.) This quantity limitation amended the CUA because the defense established by that act applies to “any quantity of marijuana reasonably necessary for [the patient’s] current medical needs.” (*Kelly, supra*, 47 Cal.4th at pp. 1017, 1043.) And while subdivision (b) of section 11362.77 also “allows *possession* of a quantity ‘consistent with the patient’s needs’ that is greater than the amount set out in subdivision (a), it affords this protection only if a physician so recommends -- a qualification not found in the CUA.” (*Kelly, supra*, at pp. 1017, 1043.) Because this amendment was not approved by the electorate, our Supreme Court held section 11362.77 to be invalid to the extent that it burdened the CUA defense. (*Id.* at pp. 1043, 1048–1049.)

officer had probable cause to search defendant's car for further marijuana. (*Id.* at p. 1059.)

“Armed with the knowledge that there was marijuana in the car, ‘a person of ordinary caution would conscientiously entertain a strong suspicion that even if defendant makes only personal use of the marijuana found in [the passenger area], he might stash additional quantities for future use in other parts of the vehicle, including the trunk.’ ” (*Strasburg, supra*, 148 Cal.App.4th at p. 1059, citing *People v. Dey* (2000) 84 Cal.App.4th 1318, 1322.) The defendant's medical marijuana recommendation did not detract from the officer's probable cause to search and investigate whether the defendant in fact possessed the marijuana for personal medical needs, and was adhering to the eight-ounce limit on possession set forth in the MMP. (*Strasburg, supra*, 148 Cal.App.4th at p. 1060.)

Here, like in *Strasburg*, Bly was not “sitting at home nursing an illness with the medicinal effects of marijuana.” (*Strasburg, supra*, 148 Cal.App.4th at p. 1060.) Rather, Officer Larios smelled marijuana when he stopped Nopson for speeding. Although Bly was not driving the vehicle, a qualified patient may not use medical marijuana under certain circumstances, including “[w]hile in a motor vehicle that is being operated.” (§ 11362.79, subd. (d).) Officer Larios had probable cause to investigate further and determine whether Bly was in compliance with the laws governing medical marijuana, given that the possession and transportation of marijuana is unlawful absent such compliance. “Otherwise, every qualified patient would be free to violate the intent of the medical marijuana program expressed in section 11362.5 and deal marijuana from his car with complete freedom from any reasonable search.” (*Strasburg, supra*, 148 Cal.App.4th at p. 1060.) Bly did not have “an unfettered right to take [his] marijuana with [him] wherever [he went], regardless of [his] current medical needs. The medical marijuana laws were never intended to be ‘a sort of “open sesame” regarding the possession,

transportation and sale of marijuana in this state.’ [Citation.]” (*People v. Wayman* (2010) 189 Cal.App.4th 215, 223.)

Defendants argue that Officer Larios could only search areas of the vehicle that could conceal the object of the search. (*United States v. Ross* (1982) 456 U.S. 798, 825 [72 L.Ed.2d 572, 594].) As such, he had no reason to open the bank bag in the trunk of the car because it could not hold an amount of marijuana that exceeded the permissible eight-ounce limit of the MMP.³

Defendants’ argument is flawed because it presupposes that all of Bly’s marijuana was necessarily stored in one place in the vehicle. Officer Larios was determining whether Bly’s marijuana possession was lawful; that is, if he possessed only a permissible amount for personal medical use and was not simply using a medical marijuana recommendation as a cover for drug sales. If Bly was doing the latter, he could have stored marijuana packaged for sale in the bank bag, or smaller amounts of marijuana totaling greater than eight ounces throughout the car, including in the bank bag. Officer Larios had probable cause to ensure Bly’s marijuana possession was lawful and that he was not using a recommendation for marijuana as a ruse.

Under the circumstances, the trial court did not err in denying defendants’ motion to suppress evidence on the ground given that Officer Larios had probable cause to search the vehicle.

II

Defendants contend that in denying their motion to suppress evidence, the trial court impliedly deemed invalid Bly’s Washington recommendation for marijuana and

³ For purposes of the present appeal, we assume, without deciding, that defendant Bly’s marijuana recommendation from a physician in Washington afforded him the protections of California’s CUA and MMP.

this violated the full faith and credit clause of the United States Constitution.⁴ They argue that honoring the right to possess medical marijuana conferred by Washington State would not contravene the public policy of California's CUA. Rather, the trial court denied Bly's right, under both the MMP and Washington law, to be protected from arrest for the possession of medical marijuana. Defendants posit that denying a qualified patient visiting from Washington the right to possess medical marijuana in California would subvert the policy of California, and ignore obligations created under the laws of Washington in violation of the full faith and credit clause.⁵

Washington's medical marijuana laws provide an affirmative defense to the enforcement of Washington's laws criminalizing the possession of marijuana. (*State v. Fry* (Wash. 2010) 168 Wash.2d 1, 7 [228 P.3d 1, 4-5] (*Fry*)). But California did not attempt to enforce Washington's criminal laws against defendants. Moreover, defendants were arrested for the unlawful possession of Oxycontin, not for the unlawful possession of marijuana. As such, California honored Bly's rights as a Washington medical marijuana patient. However, the right to be free from arrest for possession of medical marijuana did not prevent Officer Larios from conducting a reasonable investigation nor negate the probable cause arising from his observation of marijuana. This is so even under Washington law.

⁴ Article IV, section one of the United States Constitution provides: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

⁵ On November 6, 2012, the voters in Washington passed Initiative 502, which, among other things, legalizes the possession of marijuana under certain circumstances. Because defendant's conduct occurred prior to this date, we rely on Washington's former marijuana laws in addressing defendant's contention.

“Washington voters [like California voters] created a compassionate use defense against marijuana charges. [Citation.] An affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so. [Citation.] The defendant must prove an affirmative defense by a preponderance of the evidence. [Citation.] An affirmative defense does not negate any elements of the charged crime. [Citation.] [¶] Possession of marijuana, even in small amounts, is still a crime in the state of Washington. [Citation.]” (*Fry, supra*, 168 Wash.2d at p. 7 [228 P.3d at pp. 4-5].) The Washington voters “did not legalize marijuana, but rather provided an authorized user with an affirmative defense if the user shows compliance with the requirements for medical marijuana possession. [Citation.] As an affirmative defense, the compassionate use defense does not eliminate probable cause where a trained officer detects the odor of marijuana. A doctor’s authorization does not indicate that the presenter is totally complying with the Act; e.g., the amounts may be excessive. An affirmative defense does not per se legalize an activity and does not negate probable cause that a crime has been committed.” (*Id.* at p. 10 [228 P.3d at p. 6].)

Under the circumstances, defendants’ full faith and credit clause argument fails because the State of Washington affords them no greater rights than California.

III

Defendants also contend that the trial court’s denial of their motion to suppress evidence was an implicit rejection of Bly’s Washington medical marijuana recommendation in violation of their federal constitutional right to travel. We disagree.

Absent proof of compliance with the CUA, MMP, or Washington’s medical marijuana laws, the possession of marijuana is a crime under the laws of both states. Even with such proof the possession of marijuana remains unlawful under federal law. (*Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 926.) Defendants cite to no state or federal constitutional law demonstrating that a state’s enforcement of criminal laws infringes upon the right to travel. And, as we explained in connection with

defendants' first two contentions, a medical marijuana recommendation does not negate probable cause that a crime has been committed or immunize the holder of the recommendation against an investigatory search for compliance with the requirements of the law. Accordingly, their contention is unavailing.

DISPOSITION

The judgments are affirmed.

MAURO, J.

We concur:

NICHOLSON, Acting P. J.

ROBIE, J.