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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT**

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE MANUEL FIGUEROA,

Defendant and Appellant.

C078108

(Super. Ct. No. CRF 14-1707)

A jury convicted defendant Jose Manuel Figueroa of transportation of methamphetamine for sale through noncontiguous counties (Health & Saf. Code, § 11379, subd. (b)—count 1),¹ possession of methamphetamine for sale (§ 11378—count

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

2), and conspiracy to commit a violation of section 11379, subdivision (b) (Pen. Code, § 182, subd. (a)(1)—count 3).² In bifurcated proceedings, the trial court sustained allegations of a prior drug conviction (Health & Saf. Code, § 11370.2) and a prior prison term (Pen. Code, § 667.5, subd. (b)).

Sentenced to an aggregate term of 13 years in state prison, defendant appeals. He contends: (1) the trial court erroneously denied his motion to suppress; (2) his conviction for possession of methamphetamine for sale should be reversed because it is a lesser included offense of transportation for sale; (3) his conviction for conspiracy should be “vacated” because it was the same offense as transportation; and (4) he is entitled to one additional day of custody credit. We agree that defendant is entitled to one additional day of custody credit. We reject defendant’s remaining contentions and will otherwise affirm.

FACTUAL BACKGROUND³

At 8:45 p.m. on April 12, 2014, a deputy sheriff on patrol in Dunnigan pulled into a gas station and noticed a white Chevrolet Tahoe with expired registration tags parked next to a gas pump. As the deputy drove around the front of the Tahoe, he conducted a registration check. Defendant, the front seat passenger, got out of the vehicle and started to pump gas. The deputy parked behind the Tahoe, got out, and contacted defendant. The deputy then contacted the driver’s side back seat passenger—Tommy Reyes—who claimed to have recently purchased the vehicle and was trying to get it registered. As the deputy spoke with Reyes, he noticed a strong odor of marijuana coming from inside the

² Codefendant Tommy Paul Reyes II was convicted of the same offenses and has separately appealed (see case No. C078063).

³ The facts are taken from the evidence adduced at trial. The facts adduced at the hearing on defendant’s suppression motion will be recounted in our discussion of defendant’s contention challenging the trial court’s ruling on the motion (pt. 1.0, *post*).

vehicle. The deputy asked Reyes to step out of the vehicle and as Reyes did so, a glass methamphetamine pipe with residue fell from his lap and broke when it hit the ground. The deputy handcuffed both defendant and Reyes and searched them. On defendant, the deputy found ten \$100 bills and a baggie containing 11.87 grams of methamphetamine. The deputy found nothing on Reyes's person.

A search of the vehicle revealed loose marijuana and four cell phones around the center console. Behind a panel in the tailgate or trunk area behind the driver's side passenger seat where Reyes had been sitting, the deputy found a gallon-size bag containing smaller baggies with a total of 849 grams of methamphetamine. Eight of the smaller bags contained about 56 grams each, or about two ounces, another bag contained almost eight grams, and the last bag contained 391 grams. During the search of the vehicle, Victoria Garibaldi approached and was identified as the driver. Her purse was inside the vehicle. Later, for a couple of minutes, the deputy examined the contents of the cell phones and determined that the users of two of them—defendant and Reyes—had been communicating with each other.

An officer trained in cell phone extraction testified that he extracted information from defendant's cell phone and Reyes's cell phone found in the vehicle. Cell phone extraction reports were introduced into evidence. These reports revealed that defendant, whose phone number had a 619 area code, and Reyes, whose phone number had a 510 area code, exchanged numerous messages with each other as well as with "Sandman," whose phone number had a 408 area code (Santa Clara and Santa Cruz Counties). In one message to Reyes, defendant said he was in Long Beach and asked for a ride, stating that he would "make it worth your while." Reyes responded that he would leave soon. Defendant told Reyes that he was "stuck" with his " 'baggage' " and thanked Reyes. When Reyes sent defendant a message asking him where he was, defendant responded it would be better if Reyes wired some money rather than coming "all the way down here"

and “shoot me some greyhound cash,” and that defendant would “make it up” to Reyes. Reyes’s cell phone showed messages from defendant who listed addresses in National City (San Diego County). Defendant’s cell phone showed that on April 11 and 12, he conducted searches for Oakland, Redding, and Gilroy. On April 11, he conducted searches for Anderson and a particular street in Los Angeles, and distance searches between Redding and Anderson and between Gilroy and Anderson. On April 10, 2014, Sandman sent a text message to defendant asking, “If you come tomorrow and see me will you be leaving anything with me?” Defendant responded, “Of course.” At 11:32 p.m. on April 12, 2014, (after defendant and Reyes had been arrested) Sandman sent a text message to Reyes asking, “Where are u 2?”

An expert in the area of possession for sale opined that the 849 grams, almost two pounds, of methamphetamine was possessed for sale. He opined that the methamphetamine found on defendant could be possessed for sale and/or personal use and could have been payment for transporting the 849 grams. The cash (\$1,000) found on defendant supported the opinion that the methamphetamine on defendant was possessed for sale but could also have been partial payment for transport. The expert also noted that defendant sent a text message asking for Greyhound money and three days later had \$1,000 in cash. The expert believed a text message (“in pocket”) to Reyes suggested he was holding contraband or methamphetamine and in another (\$1,400) suggested an attempt to purchase the drug from Reyes. The expert believed defendant’s text message using the word “baggage” referred to drugs. A text message from Sandman to defendant on March 22 asked about “any product” which the expert opined meant methamphetamine.

DISCUSSION

1.0 Motion to Suppress

Defendant contends the trial court erroneously denied his suppression motion, arguing the warrantless search of his cell phone violated his Fourth Amendment rights. He asserts his convictions must be reversed because the admission of the cell phone evidence at trial was not harmless beyond a reasonable doubt. We reject defendant's contention.

1.1 *Background*

Defendant filed a motion to suppress all evidence seized including observations and defendant's statements during and after the detention, search, and arrest, as well as "[a]ll evidence seized as a result of the search of [his] cell phone." He argued that the search without a warrant was presumptively illegal, the deputy lacked reasonable suspicion to detain him, and the deputy lacked grounds to arrest him without a warrant, or to search his person, cell phone, or the vehicle. He argued all evidence flowing from the unlawful detention, search, and arrest, was tainted by the illegality and "fruit of the poisonous tree."

Reyes also filed a motion to suppress the evidence but the written motion is not part of the record on appeal in defendant's case.

In written opposition, the prosecutor argued the initial contact was a consensual encounter, not a detention; even if a detention, it was justified by the expired registration on the vehicle; the detention was reasonably prolonged based on Reyes's inability to produce proof of ownership of the vehicle, the methamphetamine pipe that fell from Reyes's lap when he got out of the vehicle, and the odor of marijuana; the search of the vehicle was justified by the odor of marijuana from the vehicle; the warrantless search of the vehicle, Reyes, and defendant was authorized by the automobile exception supported by probable cause, that is, the odor of marijuana and the methamphetamine pipe; and

even assuming the search of defendant was improper when it was conducted, the methamphetamine in his pocket would have been inevitably discovered after the deputy found the two pounds of methamphetamine in the vehicle and discovered that defendant was on postrelease community supervision.

At the hearing on the motions of defendant and Reyes, defendant's attorney stated that he was seeking to suppress the 11 grams of methamphetamine found in defendant's pocket and the evidence derived from the search of his cell phone. The prosecutor represented to the court—and defendant's counsel acknowledged—that a search warrant was obtained for the cell phone and that defendant's counsel had not moved to quash the search warrant. Defendant's counsel stated that the cell phone was searched prior to obtaining a warrant and the evidence obtained led to the search warrant and was thus "fruit of the poisonous tree." The court did not discuss the issue. Instead, the court directed the parties to proceed with the hearing and stated, "We'll see where this ends up."

Yolo County Deputy Sheriff Jose Vera was the only witness at the suppression hearing. At 8:45 p.m. on April 12, 2014, while in uniform and on patrol alone in a marked vehicle in Dunnigan, the deputy pulled his car into the gas station and noticed a white Chevrolet Tahoe with expired registration tags. Several other vehicles were at the pumps. The deputy drove past the Tahoe and saw a man in the front passenger seat—defendant—and another person in the back seat, later identified as Reyes. Defendant got out, walked around the vehicle, and started to pump gas into the vehicle. The deputy parked his patrol car about 20 feet behind the vehicle, immediately approached defendant, and asked who owned the Tahoe. Defendant said it belonged to his friend who was sitting in the back seat of the Tahoe. Through the open driver's side door of the two-door Tahoe, the deputy asked the back seat passenger, Reyes, about the Tahoe. Reyes claimed the Tahoe belonged to him, he had recently purchased it, and he was in the

process of obtaining the registration. He was unable to produce any paperwork verifying his ownership of the Tahoe. While the deputy spoke with Reyes, the deputy noticed a strong odor of marijuana inside the Tahoe. While looking for paperwork and when asked by the deputy, Reyes admitted he was on probation out of Alameda County. The deputy asked Reyes to get out of the Tahoe and as Reyes did so, a glass methamphetamine pipe fell out of his lap and broke when it hit the ground. The deputy put defendant and Reyes next to each other, near the hood of the patrol vehicle, and searched them both. The deputy did not find any contraband on Reyes. The deputy found 11.87 grams of methamphetamine in defendant's jacket pocket. Thereafter, the deputy handcuffed them, and put them both in his patrol car. The deputy estimated that he detained and searched defendant and Reyes less than five minutes after making contact with them. The deputy then searched the Tahoe and found seven grams of marijuana in the center console next to where defendant had been seated. The deputy continued to search inside the Tahoe and found a gallon-size plastic bag containing about 860 grams of methamphetamine in a compartment behind the driver's side rear passenger seat near where Reyes had been sitting. The deputy stated that he discovered the methamphetamine in the Tahoe about 20 minutes after detaining defendant and Reyes. About 30 to 45 minutes after detaining defendant and Reyes, the deputy found four cell phones in the console area. There were no identifying markings on the outside of the cell phones to indicate ownership.

Sometime after seeing the methamphetamine pipe and Reyes's admission that he was on probation, dispatch informed the deputy that Reyes was on searchable probation for a drug conviction in Alameda County. When asked whether dispatch had stated whether defendant was on searchable probation, parole, mandatory supervision or postrelease community supervision, the deputy answered affirmatively. When the prosecutor asked the deputy to explain, defendant's counsel objected on the grounds of foundation and hearsay and the trial court sustained the objection but ruled the answer

would be admissible for a nonhearsay purpose—the deputy’s state of mind—but the prosecutor did not thereafter ask the deputy again to explain. On cross-examination, however, the deputy testified that defendant had denied being on probation but that defendant was actually on probation. Defendant’s counsel again objected based on hearsay and lack of foundation. The trial court overruled the objection and found that the information came in for a nonhearsay purpose.

After finding the contraband, the deputy looked at the contents of the cell phones and noticed text messages had been exchanged between “Tommy” (Reyes) and “Jose” (defendant) on two of the phones. The deputy admitted that he did not have a search warrant when he looked at the contents of defendant’s cell phone. On defendant’s phone, the deputy found text messages with Reyes that the deputy believed were drug related.

The deputy stated that a woman associated with the Tahoe had been arrested and that she too was on searchable probation. Sometime thereafter, the deputy’s supervisor, Sergeant Yenne, arrived on scene.

The prosecutor claimed Reyes’s status of being on searchable probation and the odor of marijuana emanating from the Tahoe justified the vehicle search. Citing Reyes’s status as a probationer, the driver’s status as a probationer, and the discovery of methamphetamine in the Tahoe, the prosecutor argued the search of the cell phones was justified. The prosecutor argued the deputy could rely on the law prior to *Riley v. California* (2014) 573 U.S. ___ [189 L.Ed.2d 430, 451-452] (*Riley*) to search the digital information on a cell phone without a warrant, citing *Davis v. United States* (2011) 564 U.S. 229 [180 L.Ed.2d 285] (*Davis*).⁴ The prosecutor argued that the detention and limited search of defendant was justified by the odor of marijuana and Reyes’s methamphetamine pipe, which fell to the ground. The prosecutor also argued that the

⁴ *Riley* was decided on June 25, 2014, after the search here.

methamphetamine found on defendant would have inevitably been discovered after the discovery of the 860 grams in the Tahoe and the text messages. The prosecutor claimed defendant's arrest and search was justified as a search incident to arrest based on the marijuana in the center console next to defendant's seat. The prosecutor argued that transportation of less than an ounce of marijuana was a misdemeanor. The prosecutor also cited defendant's probation status.

Defendant's counsel argued that defendant was unlawfully arrested immediately after Reyes was handcuffed. He argued defendant's cell phone was thereafter searched by the deputy without a search warrant. Defendant's counsel noted that discovery showed that a search warrant for the cell phone was obtained by law enforcement in May 2014.

The prosecutor objected to defendant's counsel's argument "outside the four corners of this motion," noting that defendant's counsel "was on notice that there was a search warrant well before he filed a motion." The court noted that there was not any evidence of a search warrant and the prosecutor stated that he did not present evidence of a search warrant because "it was not noticed in the motion." The court responded, "Fair enough." Defendant's counsel claimed that he stated in his written motion that he was challenging "all evidence seized as a result of the defendant's [cell] phone." The prosecutor argued that defendant's counsel had failed to file a motion to quash. The court commented, "Since there is no evidence of a search warrant, there is no reason to discuss it." Defendant's counsel argued that since the cell phone search was unlawful under *Riley*, the search of the cell phone and the search of defendant's person must be suppressed.

The court asked defendant's counsel to respond to the prosecutor's argument that the chain of events would have led to defendant's arrest. Defendant's counsel claimed that had defendant not been unlawfully arrested and searched, he would have been free to

leave with his cell phone and the methamphetamine in his pocket would not have been found.

The prosecutor added that defendant was detained when the deputy put him in handcuffs for officer safety reasons.

Reyes's counsel concurred "with a lot" of defendant's counsel's arguments without specifying which ones. She claimed that the compartment in the vehicle where the methamphetamine was found was a manufacturer's compartment, not a secret compartment. She argued that there was no evidence that there had been a period of coordination between defendant and Reyes. Citing defendant's counsel's argument in his written motion that the cell phone search had been without a warrant, Reyes's counsel claimed *Riley* should apply and that exigent circumstances did not apply.

In denying both motions, the trial court stated:

"I would like to address two questions initially that will be relevant to all the issues raised here.

"The first is the question of whether or not the information received by Officer Vera on the cell phones should be excluded. I have reviewed [*Davis*], which is a 2011 case found at [564 U.S. 229, 180 L.Ed.2d 285]. That court case does stand for the proposition that when an officer reasonably relies on the state of existing appellate precedence, the exclusionary rule should [*sic*] apply.

"Based upon the Court's research I find that before the Supreme Court decision in *Riley*, no warrant was required, and therefore based upon that, the information in the cell phones was properly obtained by Officer Vera.

"The next question that I would like to address is whether or not the search by Officer Vera of [defendant] was justified. In my view, [defendant] was arrested at that

time. At the time that Officer Vera conducted the search, in my view, he did not have probable cause for the arrest and for—neither for the search.

“Next we deal with the question of inevitable discovery. Had Officer Vera not arrested [defendant], his investigation would almost certainly have continued. He would have searched the car, having searched the car, he would have found the marijuana in the console next to where [defendant] and the driver were sitting. He also would have found the methamphetamine, the 800 or so grams in the rear of the car, and as I previously mentioned, he would have found the cell phones, and he was justified in searching the cell phones.

“Given all of that, the Court finds that the inevitable discovery doctrine does apply. Counsel argue[s] that [defendant] could have simply walked away, and that is true. In order to find that the application of the inevitable discovery doctrine is appropriate, there does not need to be true inevitability. Instead there only needs to be a reasonably strong probability that the evidence would have been gathered in a lawful manner.

“I find there is such a reasonably strong probability. Officer Vera would have continued his search and within a few minutes later would have gathered the evidence necessary to, at that point, arrest [defendant], conduct a search incident to arrest at the time.

“So I am denying *both* motions based upon the inevitable discovery doctrine.”
(Italics added.)

1.2 *Analysis*

“ ‘Our review of issues related to the suppression of evidence seized by the police is governed by federal constitutional standards.’ [Citations.] ‘In reviewing a trial court’s ruling on a motion to suppress evidence, we defer to that court’s factual findings, express or implied, if they are supported by substantial evidence. [Citation.] We exercise our

independent judgment in determining whether, on the facts presented, the search or seizure was reasonable under the Fourth Amendment.’ [Citation.] [¶] . . . ‘The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that “searches 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.” ’ ’ ’ (*Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1223 (*Robey*); *People v. Lenart* (2004) 32 Cal.4th 1107, 1119.)

1.2.1 Warrantless search of the Chevy Tahoe

“[A] warrantless search of an automobile, based upon probable cause to believe that the vehicle contained evidence of crime in the light of an exigency arising out of the likely disappearance of the vehicle, [does] not contravene the Warrant Clause of the Fourth Amendment.” (*California v. Acevedo* (1991) 500 U.S. 565, 569 [114 L.Ed.2d 619] (*Acevedo*), citing *Carroll v. United States* (1925) 267 U.S. 132, 158-159 [69 L.Ed. 543]; *People v. Strasburg* (2007) 148 Cal.App.4th 1052, 1059.) The automobile exception “applies only to searches of vehicles that are supported by probable cause.” (*United States v. Ross* (1982) 456 U.S. 798, 809 [72 L.Ed.2d 572] (*Ross*).) “In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.” (*Ibid.*) “In other words, the police may search without a warrant if their search is supported by probable cause.” (*Acevedo, supra*, 500 U.S. at p. 579.) “The scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause.” (*Ross, supra*, 456 U.S. at p. 823.) Where there is probable cause, the search extends to closed containers. “The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.” (*Acevedo*, at p. 580.)

Here, the trial court did not rely on the automobile exception or find probable cause to search the vehicle or rely on Reyes's probation search condition; instead, it relied upon inevitable discovery. "Although it is not improper for a reviewing court to decide the merits of an alternate ground for affirming the judgment of a trial court even if that ground was not argued by the parties below [citation], [the California Supreme Court has] cautioned that appellate courts should not consider a Fourth Amendment theory for the first time on appeal when 'the People's new theory was not supported by the record made at the first hearing and would have necessitated the taking of considerably more evidence . . . ' or when 'the defendant had no notice of the new theory and thus no opportunity to present evidence in opposition.' " (*Robey, supra*, 56 Cal.4th at p. 1242.)

In his written points and authorities, the prosecutor argued that the automobile exception to the warrant requirement applied. At the hearing, the prosecutor presented evidence of the expired registration of the Tahoe, the odor of marijuana, Reyes's searchable probation status, and the methamphetamine pipe that fell from Reyes's lap when he got out of the Tahoe. The prosecutor argued that Reyes's status of being on searchable probation and the odor of marijuana from the Tahoe authorized the vehicle search.

Defendant did not discuss the automobile exception or probable cause in either his written motion or at the hearing. Instead, defendant argued in his written motion the search without a warrant was presumptively illegal, the deputy lacked reasonable suspicion to detain him, and the deputy lacked grounds to arrest him without a warrant, or to search his person, cell phone, or the vehicle. He also argued that all evidence flowing from his unlawful detention, search and arrest, was tainted by the illegality and fruit of the poisonous tree.

As noted earlier, Reyes's attorney concurred "with a lot" of defendant's attorney's arguments but did not specify which ones. She argued that the compartment in the Tahoe

where the methamphetamine was found was a manufacturer's compartment, that there was no evidence of coordination between Reyes and defendant, and that *Riley* should apply.

We conclude that the automobile exception applies here and justified the search of the Tahoe.

“If there is probable cause to believe a vehicle contains evidence of criminal activity, [*Ross, supra,*] 456 U.S. [at pages] 820 [to] 821 authorizes a search of any area of the vehicle in which the evidence might be found.” (*Arizona v. Gant* (2009) 556 U.S. 332, 347 [173 L.Ed.2d 485].) The automobile exception applies where a car is being used as a car because it was readily mobile and there is a reduced expectation of privacy. (*People v. Hochstraser* (2009) 178 Cal.App.4th 883, 903-904.) “Under the automobile exception to the warrant requirement,” the police have probable cause to search if they believe “ ‘an automobile contains contraband or evidence’ ” of a crime (*People v. Waxler* (2014) 224 Cal.App.4th 712, 718 (*Waxler*)) and may search “ ‘ ‘ ‘every part of the vehicle and its contents that may conceal the object of the search.’ ” ’ ” (*Id.* at p. 719.) We apply the totality of the circumstances test to determine whether there was probable cause for the warrantless search. (*Illinois v. Gates* (1983) 462 U.S. 213, 230-231, 238 [76 L.Ed.2d 527].)

Here, after seeing that the Tahoe had registration tags that were expired, the deputy approached defendant who was outside the Tahoe pumping gas. Defendant said Reyes was the owner of the car. Reyes was unable to provide paperwork establishing his ownership of the Tahoe. It would have been reasonable for the deputy to believe that Reyes had violated the registration requirement or that the Tahoe was possibly stolen. (Veh. Code, §§ 2805, 4000, 4454; *People v. Webster* (1991) 54 Cal.3d 411, 430; see *In re Arturo D.* (2002) 27 Cal.4th 60, 68-70.)

When the deputy spoke with Reyes through an open door, the deputy detected an odor of marijuana. The odor of marijuana provided sufficient probable cause to search the Tahoe for the source of the odor. (*People v. Strasburg, supra*, 148 Cal.App.4th at p. 1059; *People v. Dey* (2000) 84 Cal.App.4th 1318, 1320-1322.) “Under current State of California law, nonmedical marijuana—even in amounts within the statutory limit set forth in section 11357, subdivision (b)—is ‘contraband’ and may provide probable cause to search a vehicle under the automobile exception.” (*Waxler, supra*, 224 Cal.App.4th at p. 715.)

When asked, Reyes admitted that he was on probation. The deputy had Reyes step out of the Tahoe. As Reyes did so, a glass methamphetamine pipe fell from his lap to the ground and broke. It would have been reasonable for the deputy to believe that Reyes had been smoking methamphetamine while in the Tahoe. The deputy then learned from dispatch that Reyes was on searchable probation for a “drug” conviction out of Alameda County. The deputy then conducted a patdown search. Although a patdown of Reyes revealed nothing, a patdown of defendant revealed 11 grams of methamphetamine in his pocket.

In considering all of the circumstances, rather than each one in isolation, the deputy had probable cause to believe the Tahoe was possibly stolen (expired registration tags and Reyes’s failure to produce registration documents although he claimed ownership), contained contraband (based on the odor of marijuana emanating from the Tahoe, the broken methamphetamine pipe that fell from Reyes’s lap when he got out of the Tahoe, and Reyes’s prior drug conviction for which he was on searchable probation), and was being used to transport contraband. The methamphetamine found on defendant was not a necessary circumstance to establish probable cause to search the Tahoe. The automobile exception, which was supported by probable cause, authorized the deputy’s search of the Tahoe.

When the deputy began his search of the Tahoe, he discovered some loose marijuana in the center console. The discovery of the marijuana and Reyes's possession of a methamphetamine pipe provided probable cause to search the rest of the Tahoe. (*People v. Dey, supra*, 84 Cal.App.4th at p. 1320.) About 20 minutes after detaining defendant and Reyes, the deputy discovered the methamphetamine in the closed compartment behind the rear passenger seat where Reyes had been sitting and which was accessible to him. The search of the entire Tahoe was authorized by the automobile exception supported by probable cause.

1.2.2 *Warrantless search of the cell phones*

Although noticing the cell phones immediately when he started to search the Tahoe, the deputy retrieved the cell phones in or near the center console area about 45 minutes after searching the Tahoe and finding all the contraband. There were no identifying markings on the outside of the cell phones to indicate ownership. The deputy looked at the contents of the cell phones and noticed text messages had been exchanged between "Tommy" (Reyes) and "Jose" (defendant) on two of the phones. On defendant's phone, the deputy found text messages between defendant and Reyes that the deputy believed were drug related.

Relying upon *Riley*, defendant contends the warrantless search of his cell phone violated his Fourth Amendment rights. He argues even though the prosecutor claimed a search warrant was later obtained, no evidence of the same was presented at the suppression hearing. Defendant asserts his case is stronger than the facts in *Riley* where the defendant's cell phone was searched incident to a lawful arrest. Defendant claims he was not arrested lawfully since the trial court found the deputy did not have probable cause for the arrest or the search, instead denying the motion based on inevitable discovery. Defendant argues the rule of *Davis* is inapplicable to the circumstances here

because the search was not incident to a lawful arrest.⁵ Defendant argues the erroneous admission of the evidence from his cell phone was not harmless beyond a reasonable doubt.

The People respond that defendant has forfeited the issue of the cell phone evidence introduced at trial because he did not move to quash the search warrant. The People note that the only other evidence introduced at trial related to the cell phone was Deputy Vera's testimony that, at the scene, he examined the cell phones and observed that users of two of them had exchanged text messages. In response to defendant's claim that the prosecutor's representation of a search warrant should be ignored because a warrant was not introduced at the hearing, the People argue that defendant never met his initial burden of showing the search was made without a warrant and as officers of the court, the prosecutor represented and defendant's counsel confirmed that a search warrant was obtained to extract the evidence from the cell phone.

We agree that defendant's challenge to the cell phone evidence introduced at trial, other than Deputy Vera's testimony of what he observed on the phones, is forfeited. The prosecutor represented and defendant's counsel confirmed that a search warrant had been obtained to extract the information from the cell phones. Defendant's counsel stated at the suppression hearing that he was challenging the deputy's observations of the phone's content and that the deputy's observations tainted the warrant. "[T]he reviewing court must excise all tainted information but then must uphold the warrant if the remaining information establishes probable cause." (*People v. Weiss* (1999) 20 Cal.4th 1073, 1081.) The trial court had no occasion to review the information in the search warrant

⁵ As defendant and the People note, whether the good faith exception to the exclusionary rule applies to cell phone evidence obtained without a warrant before *Riley* is pending before the California Supreme Court in *People v. Macabeo* (2014) 229 Cal.App.4th 486, review granted November 25, 2014, S221852.

affidavit. With respect to the deputy's observations of the phone's content, as we will explain, pre-*Riley* law allowed it and the warrant was thus not tainted by these observations.

Riley held that “a warrant is generally required before [searching the data stored on a cell phone], even when a cell phone is seized incident to arrest.” (*Riley, supra*, 573 U.S. at p. ____ [189 L.Ed.2d at p. 451].) *Riley* declined to extend the rule of *United States v. Robinson* (1973) 414 U.S. 218 [38 L.Ed.2d 427] (*Robinson*) to a search of data on a cell phone. (*Riley, supra*, 573 U.S. at p. ____ [189 L.Ed.2d at p. 442].)

In *Robinson*, the defendant was arrested for driving on a revoked license. The officer conducted a patdown and found a crumpled cigarette package containing capsules of heroin. (*Robinson, supra*, 414 U.S. at pp. 220-223.) *Robinson* held that “[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest required no additional justification.” (*Id.* at p. 235.)

Noting that information on a cell phone is not immune to search, *Riley* stated that “even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone.” (*Riley, supra*, 573 U.S. at p. ____ [189 L.Ed.2d at p. 451].) *Riley* listed one of these exceptions, exigent circumstances. (*Ibid.*) But exigent circumstances is not the only other exception that may apply to a search of a cell phone's data.

Prior to *Riley*, case law permitted the examination of the cell phones under the automobile exception. “ ‘A number of courts have analogized cell phones to closed containers and concluded that a search of their contents is, therefore, valid under the automobile exception’ ” (*People v. Diaz* (2011) 51 Cal.4th 84, 100, fn. 15, overruled on other grounds in *Riley*, quoting *State v. Boyd* (2010) 295 Conn. 707 [992 A.2d 1071, 1089, fn. 17].) Drug traffickers use cell phones. (*Diaz*, at p. 97, fn. 12.)

Since probable cause existed to believe that evidence of drug transactions would be found in the data storage of the cell phones, the automobile exception allowed the search of the cell phones just as it allowed the search of other closed containers found in the Tahoe.

Here, we conclude the automobile exception applied and no additional showing of an emergency was required. Assuming *Riley* can be interpreted to apply even when a cell phone is seized pursuant to the automobile exception, the good faith exception applies—the deputy was entitled to rely on the state of the law prior to *Riley*. (*Davis, supra*, 564 U.S. at p. 249.)

1.2.3 Search of defendant's person

The trial court expressly found that the deputy's search of defendant was not a patdown. Notwithstanding the trial court's ruling, the People claim defendant was not arrested at the time of the search of his person, revealing the methamphetamine in his pocket, but instead was “merely detained” and the search was a “patdown search for officer safety.”

Here, the deputy did not conduct a traffic stop but did approach the Tahoe for expired registration tags. In view of the expired registration tags, Reyes's failure to demonstrate ownership of the Tahoe (suggesting the Tahoe may have been stolen), Reyes's possession of a glass methamphetamine pipe while inside the Tahoe that fell to the ground when he got out, and the strong odor of marijuana inside the Tahoe, the deputy could search the Tahoe for contraband, as we have explained, under the automobile exception supported by probable cause. The deputy was alone at a gas station with two suspects (defendant and Reyes) and at some point, three (Garibaldi, the driver), who had been traveling in the Tahoe, which was about to be legitimately searched for contraband. The deputy had learned that Reyes and defendant (though he denied it) were both on probation, Reyes for a drug conviction out of Alameda County. And “ ‘guns often accompany drugs.’ ” (*People v. Collier* (2008) 166 Cal.App.4th 1374, 1378.) The

deputy searched defendant and Reyes, handcuffed them, and put them both in his patrol car and then conducted his search of the Tahoe. Their detention and patdown search was reasonable under the totality of the circumstances in order to facilitate the deputy's search of the Tahoe without concern for his safety. “ ‘[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.’ ” (*Ibid.*)

Even assuming the patdown search of defendant was unlawful when conducted because the deputy did not expressly testify he feared that defendant was armed and dangerous, we agree with the trial court's conclusion that the search of defendant leading to the discovery of the methamphetamine on defendant was inevitable after the deputy found the 860 grams of methamphetamine, loose marijuana, and cell phones with drug-related messages between defendant and Reyes, all in the Tahoe.

Illegally seized evidence may be introduced into evidence under the “inevitable discovery doctrine” provided the government establishes that the evidence would have been discovered by the police through lawful means. (*People v. Robles* (2000) 23 Cal.4th 789, 800-801.) “[T]he doctrine ‘is in reality an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.’ [Citation.] The purpose of the inevitable discovery rule is to prevent the setting aside of convictions that would have been obtained without police misconduct. [Citation.] The burden of establishing that illegally seized evidence is admissible under the rule rests upon the government.” (*Ibid.*, italics omitted.) “The showing must be based not on speculation but on ‘demonstrated historical facts capable of ready verification or impeachment.’ [Citation.] The inevitable discovery exception requires

the court “to determine, viewing affairs as they existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred.” ” ” (*People v. Hughton* (2008) 168 Cal.App.4th 1062, 1072, italics omitted.)

Defendant claims the inevitable discovery doctrine is inapplicable because the deputy would have obtained a warrant to search the cell phone had he thought about it more carefully. Citing *People v. Temple* (1995) 36 Cal.App.4th 1219 (*Temple*), defendant argues that the methamphetamine pipe that dropped from Reyes’s lap and Reyes’s unsubstantiated claim of ownership of the Tahoe did not provide an independent basis to search his (defendant’s) cell phone since individualized suspicion is required.

Defendant misplaces his reliance upon *Temple* where there was no probable cause particularized with respect to the defendant other than the defendant’s “ ‘mere presence’ ” at the scene which is insufficient alone. (*Temple, supra*, 36 Cal.App.4th at p. 1225.)

Here, the prosecutor relied on inevitable discovery of the methamphetamine on defendant’s person and the drug-related text messages on his cell phone. The search of the Tahoe was justified by the automobile exception supported by probable cause based on the expired registration tags, Reyes’s unsubstantiated claim of ownership, the odor of marijuana, the methamphetamine pipe Reyes possessed while inside the Tahoe, and by Reyes’s status of being on searchable probation as a convicted drug offender. A search of the Tahoe revealed seven grams of marijuana in the center console next to where defendant had been seated, a gallon-size plastic bag containing 860 grams of methamphetamine in a compartment behind the driver’s side rear passenger seat near where Reyes had been sitting, and four cell phones with no identifying markings on the outside to indicate ownership in the console area. After a brief check of the cell phones, the deputy believed defendant and Reyes had exchanged drug-related messages on two of the cell phones. After discovering the items in the Tahoe and defendant’s cell phone with

drug-related messages with Reyes, the deputy would have arrested defendant for possession for sale, transportation for sale, or at least conspiracy to possess or transport methamphetamine for sale. Defendant would have then been subject to a search incident to his arrest and the methamphetamine on his person would have been discovered.

The trial court properly denied defendant's suppression motion.

2.0 Conviction for Possession of Methamphetamine for Sale

Defendant next contends his conviction for possession of methamphetamine for sale should be reversed because it is a lesser included offense of transportation of methamphetamine for sale through noncontiguous counties. We reject this contention.

“In California, a single act or course of conduct can lead to convictions ‘of any number of the offenses charged.’ [Citations.] However, a judicially created exception to this rule prohibits multiple convictions based on necessarily included offenses. [Citations.] [¶] . . . There are two tests for determining whether one offense is necessarily included in another: the ‘elements’ test and the ‘accusatory pleading’ test. [Citation.] We apply the ‘elements’ test here because this case involves the conviction of multiple alternative *charged* offenses. ‘Courts should consider [both] the statutory elements and accusatory pleading in deciding whether a defendant received notice, and therefore may be convicted, of an *uncharged* crime, but only the statutory elements in deciding whether a defendant may be convicted of multiple *charged* crimes.’ [Citation.] Under the ‘elements’ test, we look strictly to the statutory elements, not to the specific facts of a given case. [Citation.] We inquire whether all the statutory elements of the lesser offense are included within those of the greater offense. In other words, if a crime cannot be committed without also committing a lesser offense, the latter is a necessarily included offense.” (*People v. Ramirez* (2009) 45 Cal.4th 980, 984-985.)

Section 11379 provides, in relevant part, as follows:

“(b) Notwithstanding the penalty provisions of subdivision (a), any person who transports any controlled substances specified in subdivision (a) within this state from one county to another noncontiguous county shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, six, or nine years.

“(c) For purposes of this section, ‘transports’ means to transport for sale.”

As relevant here, the elements of this offense are (1) the defendant transported a controlled substance for the purpose of sale, (2) the transportation occurred through at least two noncontiguous counties, (3) the defendant knew of its presence, (4) the defendant knew of the substance’s nature or character as a controlled substance, (5) the controlled substance was methamphetamine, and (6) the controlled substance was in a usable amount. (See Judicial Council of Cal. Crim. Jury Instns. (Feb. 2014) CALCRIM No. 2300.)

Section 11378 provides, in relevant part, as follows: “[A] person who possesses for sale a controlled substance . . . shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code.”

The elements of this offense are (1) the defendant unlawfully possessed a controlled substance, (2) the defendant knew of its presence, (3) the defendant knew of the substance’s nature or character as a controlled substance, (4) when the defendant possessed the controlled substance, he intended to sell it, (5) the controlled substance was methamphetamine, and (6) the controlled substance was in a usable amount. (See CALCRIM No. 2302.)

Applying the statutory elements test, possession is not an essential element of transportation for sale. A person can transport for sale a controlled substance that is within the exclusive possession of another. (See *People v. Murphy* (2007))

154 Cal.App.4th 979, 983-984; *People v. Peregina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [lesser related, not necessarily included]; see also *People v. Rogers* (1971) 5 Cal.3d 129, 134 [transportation does not require personal possession by the defendant].) Defendant was properly convicted of transporting for sale and possessing for sale.

3.0 Conviction for Conspiracy to Transport For Sale

Defendant next contends his conviction for conspiracy to transport for sale should be “vacated” because it was the same offense as transportation for sale. We reject this contention.

The essence of a conspiracy is the agreement itself to commit an unlawful act. A defendant may be convicted for both the conspiracy to commit a substantive offense and the substantive offense that is the object of the conspiracy. (*People v. Johnson* (2013) 57 Cal.4th 250, 258-259.)

4.0 Custody Credits

Defendant contends, the People concede, and we agree that defendant is entitled to one additional day of custody credit. The trial court awarded 250 actual days and 250 conduct days for a total of 500 days of presentence custody credit. (Pen. Code, § 4019.) Defendant was arrested on April 12, 2014, and was sentenced on December 18, 2014, spending the entire time in custody, 251 days rather than 250 days. We will order the judgment modified accordingly.

DISPOSITION

The judgment is modified to provide for one additional day of actual custody credit for 251 actual days and a total of 501 days of presentence custody credit. The trial court is directed to prepare an amended abstract of judgment accordingly and to forward

a certified copy of the amended abstract to the appropriate parties. As modified, the judgment is affirmed.

BUTZ, Acting P. J.

We concur:

MAURO, J.

HOCH, J.