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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DANA DERRELL CARTER,

Petitioner,

v.

THE SUPERIOR COURT OF
SAN BERNARDINO COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

E056039

(Super.Ct.No. FVI1102926)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Lorenzo R.

Balderrama, Judge. Petition granted.

Phyllis Morris, Public Defender, and John Zitny, Chief Deputy Public Defender,
for Petitioner.

No appearance for Respondent.

Michael A. Ramos, District Attorney, and Eric M. Ferguson, Deputy District Attorney, for Real Party in Interest.

In this case, we issued an order to show cause to consider the legality of a search that resulted in the seizure of a baggie of marijuana from the person of defendant and petitioner Dana Carter (defendant). We conclude that the seizure was illegal and that the trial court erred in denying his motion to suppress the evidence from the seizure. Accordingly, we will grant defendant's petition for writ of mandate.¹

STATEMENT OF FACTS

Defendant is charged with possession of marijuana for sale (Health & Saf. Code, § 11359) with a criminal street gang allegation (Pen. Code, § 186.22, subd. (b)(1)(A)). He was separately charged with a felony violation of Penal Code section 186.22, subdivision (a).

Defendant filed his motion to suppress (Pen. Code, § 1538.5) before the preliminary hearing, so the motion was decided based on the evidence presented at that time. The primary witness was Deputy Quintard. He testified that on December 28,

¹ Defendant cites Penal Code section 1538.5, subdivision (i), as authorizing the petition. In fact, that subdivision deals with an original or renewed motion in the superior court after the preliminary hearing, and provides that, "After the special hearing is held, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his or her motion at the special hearing." At least one practice text comments that if the motion is denied at the preliminary hearing, the defendant may not then seek review either by appeal or writ. (1 Erwin et al., Cal. Criminal Defense Practice (2012) Search and Seizure Motions, ch. 23, p. 23-66.) However, as authority they cite only Penal Code section 1466, which only prohibits the defendant from *appealing* the ruling. As the People did not object, and the matter being fully briefed, we see no impediment to considering the petition on its merits.

2011, he observed a vehicle pull up to a stop sign beyond the limit line. He also observed that the vehicle had illegally tinted windows. (Veh. Code, §§ 22450, 26708.5.) When he contacted the driver (defendant), the deputy smelled “the unique odor of marijuana emitting from the car.”

The deputy asked defendant when he had last smoked marijuana. Defendant replied that he had come from a house where many people were smoking marijuana. The deputy then had defendant get out of the vehicle “[t]o see if he was possibly under the influence. . . .” He then conducted a patdown search because it was his experience that people involved with drugs often carried weapons. The deputy felt a “large, I guess it would be a bulge inside the top of his shorts” and removed it. It was a baggie of marijuana. A further search of defendant’s person revealed three more packages of marijuana, \$609 in cash, and incriminating materials on defendant’s cell phone.²

On cross-examination the deputy was asked if the “bulge” felt like a weapon, and he replied, “No. It didn’t feel like a weapon. I didn’t know what it was at that time.”

The trial court denied defendant’s motion to suppress evidence, reasoning that the right to conduct a patdown or frisk was “basically automatic” when drugs were believed to be involved. This petition followed.

² The cell phone contained several text messages, which the deputy testified referred to drug sales and a price list for marijuana. The deputy also answered two incoming calls from persons asking about purchasing marijuana.

DISCUSSION

First, the trial court's legal conclusion was incorrect. There is no dispute that the detention of defendant was proper both based on the traffic violations and the smell of marijuana. (See *infra* for further discussion.) On the other hand, the propriety of the patdown search is at least debatable. The basic rule is that a peace officer may conduct such a search when he "is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others." (*Terry v. Ohio* (1968) 392 U.S. 1, 24.) The test for permissibility has evolved to the well-established "totality of the circumstances . . . which is of necessity fact driven." (*People v. Osborne* (2009) 175 Cal.App.4th 1052, 1059 (*Osborne*)). In the same case, the court goes on to recognize that "[c]ourts have consistently recognized that certain crimes carry with them the propensity for violence, and individuals being investigated for those crimes may be patsearched without further justification." (*Ibid.*) *Osborne* applied this approach to a burglary investigation on the theory that a burglar might be reasonably expected to possess sharp "tools of the trade," which might be used as weapons. (*Id.* at pp. 1060-1061.)

Osborne cites some of the numerous cases that allow patdown searches in cases of suspected drug trafficking due to the frequency with which persons committing such crimes are armed. For example, in *People v. Limon* (1993) 17 Cal.App.4th 524, 534-535 (*Limon*), the frisk was held justified where the officers were outnumbered,³ the officers

³ The court commented that this factor alone "might not justify a pat-search" (*Limon, supra*, 17 Cal.App.4th at p. 534.)

had reason to believe that drug transactions were taking place, and the area was known for the prevalence of weapons. More recently, in a case factually very similar to this, the court upheld a patdown search of a passenger in a car detained for a traffic violation when the investigating officer recognized the smell of marijuana emanating from the vehicle. (*People v. Collier* (2008) 166 Cal.App.4th 1374, 1378.) However, the decision does not approve patdowns in *all* such cases as the court repeatedly stresses that the driver in that case was larger than the investigating deputy and was also dressed in “baggy shorts that hung down to his ankles and an untucked shirt that extended to his midlegs.” (*Id.* at pp. 1376, 1378.) The court simply held that it was reasonable to suspect that the baggy clothing concealed a weapon. (*Id.* at p. 1378.) With respect to the female driver, who was wearing “tight-fitting clothing,” the court noted that she was not patted down and commented that “[h]ad appellant been wearing nonbaggy clothing, we doubt that [the deputy] would have entertained a suspicion that appellant might be armed.” (*Id.* at p. 1377, fn. 1.) The inference may be drawn that any such suspicion on the deputy’s part would not have been objectively reasonable and would not have justified a patdown.

In this case, at the time the deputy patted defendant down, he had no reason to suspect drug trafficking, just marijuana use and/or driving under the influence. Nor is there any indication in the record that there was anything else suspicious or threatening about either defendant or the area in which the traffic stop was made. Hence, the legality of the patdown itself is very tenuous insofar as it was based on “officer safety.”

However, we need not determine the legality of the patdown because the seizure of the baggie was clearly unlawful as it exceeded the scope of a protective frisk. The deputy testified candidly that he did not know what the bulge was and actually testified that it did not feel like a weapon. This concession was reasonable, as it is apparent that since it was, in fact, a baggie of marijuana, it could not have felt like a weapon of any sort. (Cf. *Limon, supra*, 17 Cal.App.4th at p. 535 [hard magnetic key box reasonably believed to possibly be a knife and properly removed].) Nor is there any testimony to support a theory that the deputy recognized the bulge as probable contraband. (Cf. *Minnesota v. Dickerson* (1993) 508 U.S. 366, 375-376 [the “plain touch” doctrine]; *People v. Dibb* (1995) 37 Cal.App.4th 832, 836-837.) The removal of the baggy was unnecessary for “officer safety” and cannot be justified on that basis.

Apparently recognizing the weakness of their position in the trial court, before this court the People have proffered a different legal theory to justify the seizure of the baggy. They argue that defendant could have been arrested (or *was* arrested) and the search was therefore justifiable as one “incident to arrest.” We disagree. Although we dispose of these new arguments on the merits, we feel constrained to stress that with the People’s failure to develop evidence in the trial court relating to these claims, we are left in an appellate never-never land, expected to rule on the basis of suppositions, “what-ifs,” and “within the realm of possibilities.” We cannot, and do not, say that the People’s additional theories are all necessarily factually unfounded; only that no facts to support them appear in the record. And of course it is well established that as to facts and evidence, we are bound by that record. (*Mission Imports, Inc. v. Superior Court* (1982)

31 Cal.3d 921, 927 at fn. 5; see also *Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993, 997 at fn. 4.)

The first argument is that defendant could have been arrested for possession of marijuana.⁴ The People rely on *People v. Fitzpatrick* (1970) 3 Cal.App.3d 824, 826-827 for the principle that the odor alone, in that case also emanating from a vehicle, justifies the arrest of the driver for possession. On the other hand, in *People v. Collier, supra*, 166 Cal.App.4th at page 1377, the court acknowledged that although the recognizable odor of marijuana certainly justified the deputy in detaining defendant for investigation, it did not, in and of itself, constitute probable cause to arrest him. We agree with the latter approach. Although possession of marijuana and driving under the influence of marijuana (or any drug) are public offenses (Health & Saf. Code, § 11357; Veh. Code, § 23152), merely smoking, or having smoked, it is not; and, in our view, the suspicion that marijuana *has* been smoked in a vehicle does not justify an arrest for possession at the moment.⁵

⁴ The People describe the argued point that smell alone justified an *arrest* as “critical and underappreciated.” Of course, the trial court did not “appreciate” it because the argument was not made before that court. Defendant obviously cannot be expected to “appreciate” it either. Insofar as this opinion reflects a final “underappreciation” of the argument, we plead guilty.

⁵ An interesting body of law is evolving concerning the smell of marijuana and the right to make a warrantless search of a home. In *People v. Hua* (2008) 158 Cal.App.4th 1027, 1035-1036, the court held that if the police only have probable cause to believe that less than 28.5 grams of marijuana are present in a house where they smell burning marijuana, this minor, nonjailable offense will not support a warrantless entry and search. (Accord, *People v. Torres* (2012) 205 Cal.App.4th 989, 997.) It would seem anomalous to allow the intrusion of a personal search where a home search is forbidden, but we need not decide this precise issue.

For the same reason, we would reject the People’s argument that *a* suspicion that defendant had contraband on his person justified the search. Of course, there was no testimony that the deputy harbored a suspicion of unauthorized possession; rather, he testified only that he conducted the patdown because he believed persons involved with drugs might carry weapons—that is, for “officer safety.” Again, we stress that we are limited to the evidence in the record. In any event, the deputy did not have probable cause to so suspect that actual contraband was on defendant’s person. The People’s reliance on *People v. Coleman* (1991) 229 Cal.App.3d 321 (*Coleman*) is misplaced. In that case, officers had received a tip that drugs were being sold out of a described vehicle at a described location. Arriving at the location, they saw a vehicle matching the description surrounded by numerous people. When the driver attempted to leave and was stopped for a traffic violation, officers saw a hand-rolled cigarette on the car center console and placed the driver under arrest for possession of marijuana. In patting the driver down, an officer felt what he believed to be a baggie of rock cocaine (it was also partially protruding from the driver’s pocket) and removed it. The court simply holds that under all of the circumstances, there was probable cause to believe that he had drugs

on his person and the search was therefore proper. (*Id.* at pp. 326-327.)⁶ In this case, by contrast, there was no specific information that would support a belief that defendant possessed quantities of contraband on his person at that point in time and, as we have noted, the deputy never testified that he believed the “bulge” was, or might be, contraband. The fact that defendant told the officer that he had been at a party where marijuana was smoked added nothing to the odor emanating from the car; neither, separately or together, constituted probable cause to believe that defendant had drugs on his person at that moment.

Although the People now disclaim any intent to rely upon such a theory, arguably under *McKay*, *supra*, 47 Cal.4th 601, defendant could have been arrested for the Vehicle Code violations the deputy testified he had observed, even if defendant had qualified to be merely cited. But as defendant points out, if a detainee is not actually arrested, there is no basis for a “search incident” to arrest. (*Knowles v. Iowa* (1998) 525 U.S. 113, 116-117 (*Knowles*)).) When an officer arrests a person, there is an obvious need to find out whether there is anything dangerous or questionable on the person of the arrestee who is going to be in the back of the patrol car. Furthermore, an arrest is a stressful event that

⁶ The *Coleman* court believed that the search of the defendant could not be justified as a search incident to a custodial arrest because due to the small amount of marijuana found in the car, he was entitled to be cited and released upon proof of identity, which he gave. (*Coleman*, *supra*, 229 Cal.App.3d at p. 326, fn. 2.) This is probably no longer a correct statement of law. In *People v. McKay* (2002) 47 Cal.4th 601 (*McKay*), the court held that (1) the United States Constitution does not prohibit a custodial arrest for even the most minor criminal offense, and (2) a custodial arrest, which in this respect violates *California* law (that is, because California law provides for cite and release), does not require that the evidence seized from a search incident to that arrest be suppressed. Thus, in *McKay* the unlawful arrest of a bicyclist for “going the wrong way” did not lead to suppression of evidence resulting from a search incident to that arrest.

increases the risk that the person arrested might react with violence. (*Ibid.*) These concerns are simply not present when a person is not actually placed under arrest. Indeed, in *McKay*, the court expressly distinguished *Knowles* on the basis that “[n]o one disputes the fact of the custodial arrest here. . . .” (*McKay*, at p. 613, fn. 6.)

The People attempt to justify the search by arguing that *Knowles* does not apply because “a custodial arrest **did** take place.” Yes, it did, but not until *after* the search.⁷ In *Knowles*, the defendant was also arrested *after* the search, which the court found to be illegal. (*Knowles, supra*, 525 U.S. at p. 114.) Insofar as the People rely on the theory of “search incident to arrest,” it is, or should be, self-evident that a search cannot be justified as “incident” to an arrest when it occurs *before* the arrest and when it is only through that search that probable cause to arrest is found.

In short, even if the deputy had legal cause to pat defendant down, on the evidence adduced at the preliminary hearing, he had no legal basis to seize the “bulge” without any expressed belief that it was either a weapon or contraband. (Recall that he testified honestly, “I didn’t know what it was at that time.”) Because defendant had not been arrested for any offense (and there was not even any testimony that the deputy intended to arrest him), the seizure of the baggy cannot be justified as incident to an arrest.

⁷ The People point to the documents showing that a felony complaint was filed on December 29, 2011, and that defendant was arraigned the next day—all consistent with the incident date of December 28, 2011. To our knowledge, there has never been any dispute that defendant was arrested—the crucial fact is *when*.

Accordingly, the trial court erred in denying defendant's motion to suppress, and we will grant the petition for writ of mandate.

DISPOSITION

The petition is granted. Let a peremptory writ of mandate issue directing the San Bernardino Superior Court to vacate its order denying defendant's motion to suppress, and to enter a new order granting said motion. Upon the finality of this decision, the stay previously ordered shall be lifted.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

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KING
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.