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

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY CUPELLI,

Defendant and Appellant.

F062713

(Super. Ct. No. BF136285A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. Michael E. Dellostritto, Judge.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Doris A. Calandra, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Cornell, J., and Poochigian, J.

After the court denied his motion to suppress evidence, Jeffrey Cupelli pled no contest to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), and admitted enhancements for a prior strike offense and a prior prison term (Pen. Code, §§ 667, subds. (c)-(j), 667.5, subd. (b)). The court imposed the indicated prison term of 3 years 8 months, the low term of 16 months doubled to 32 months and a consecutive one-year term for the prior prison term enhancement.

Cupelli contends the court erred in denying his suppression motion. Specifically, the patsearch that disclosed the drugs was unlawful because there was no reason to suspect he was armed and dangerous and the court erred in finding the search was lawful as incident to a custodial arrest. We affirm the judgment.

### **FACTS**

On April 1, 2011, about 10:19 p.m., Kern County Sheriff's Sergeant Bobby Voth was driving his patrol car with a "civilian ride-along." Voth saw Cupelli riding a bicycle without lights. Sergeant Voth detained Cupelli. Voth observed that Cupelli's eyes were slightly dilated, he had difficulty standing still and spoke rapidly, which indicated he was under the influence of a central nervous system stimulant. Voth also noticed a bulge in Cupelli's right front pants pocket. In response to Sergeant Voth's questions, Cupelli denied he was on probation or parole and said he had identification. He also denied having drugs or weapons and initially consented to Voth's request to search. However, when Voth asked him to turn around and get into the search position, Cupelli stepped back and asked what this was about. Throughout the encounter, Cupelli kept trying to put his hand into his right front pants pocket. Voth could see there was a bulge there and did not know if Cupelli had a weapon because he could not see what was in the pocket.

Cupelli told Voth he could not search him because he was not on probation or parole and Voth responded that he was under arrest for committing the public offense of

riding a bicycle at night without lights.<sup>1</sup> Cupelli continued to back up. Voth said, “Don’t do it,” and grabbed Cupelli’s hand. At that point, Cupelli cooperated with the search.

The bulge in the right front pants pocket was a long, hard object that turned out to be a spoon. Also in that pocket was one or more small ziplock baggies containing what Cupelli said was methamphetamine. Voth then asked Cupelli if he had a syringe because he did not want to “get poked” with it. Cupelli told him it was in his pants pocket and had a cap on it. Voth retrieved it along with more ziplock baggies. Voth retrieved Cupelli’s wallet from his back pants pocket. There was no identification, but there was a card indicating Cupelli was on parole. Cupelli admitted he was on parole for armed robbery.

The court denied the motion to suppress by written ruling:

“Under the circumstances of this case, the defense is correct that a custodial arrest was not authorized by [Vehicle Code section] 40302(A). The defendant was neither without identification or refusing to sign a citation promising to appear. However, [Sergeant] Voth had probable cause to believe a crime ([Veh. Code, §] 21202(d)) was committed in his presence and chose to make a custodial arrest. Having made that decision, he is entitled to search incident to arrest. The [sergeant’s] violation of state law does not result in suppression of the evidence, as a custodial arrest based on probable cause is a reasonable intrusion under the Fourth Amendment. *Virginia v. Moore* (2008) 553 [U.S.] 164; *People v. McKay* (2002) 27 Cal.4th 601.”

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<sup>1</sup> Cupelli argues Voth did not, in fact, make a custodial arrest because he was not handcuffed or placed in the patrol car. We disagree. We review the record in the light most favorable to the judgment and accept as true Voth’s testimony that Cupelli was under arrest when Voth searched him.

## DISCUSSION

Cupelli contends the search was unlawful because Voth had no reason to suspect he was armed and dangerous and he was not subjected to a custodial arrest. Further, although he lied about his parole status, he was not estopped to challenge the search because Voth made no effort to determine his true status.

### Standard of Review

On review of the denial of a motion to suppress, we defer to the trial court's factual findings, where supported by substantial evidence, but exercise our independent judgment to determine whether, on the facts found, the search and seizure were reasonable under the Fourth Amendment. (*People v. Camacho* (2000) 23 Cal.4th 824, 830.)

### Legality of the Search

Contrary to Cupelli's assertion that the court concluded the search was unlawful under California law, it did not. It found that while Cupelli's custodial arrest was not authorized under Vehicle Code section 40302,<sup>2</sup> under *People v. McKay, supra*, 27 Cal.4th 601 (*McKay*) and *Virginia v. Moore, supra*, 553 U.S. 164 (*Moore*), his arrest and search did not violate the Fourth Amendment. The trial court's conclusion was correct.

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<sup>2</sup> That section provides in pertinent part: "Whenever any person is arrested for any violation of this code, not declared to be a felony, the arrested person shall be taken without unnecessary delay before a magistrate ... in any of the following cases:

"(a) When the person arrested fails to present his driver's license or other satisfactory evidence of his identity for examination.

"(b) When the person arrested refuses to give his written promise to appear in court."

A custodial arrest for an infraction, here riding a bicycle in the dark without the required lighting (Veh. Code, § 21201, subd. (d)), does not violate the Fourth Amendment. Under *Atwater v. Lago Vista* (2001) 532 U.S. 318, if the officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may arrest the individual. (*Id.* at p. 354 [upholding a custodial arrest for a violation of Texas’s seat belt law, an offense punishable by a small fine].)

However, by statute, California has limited an officer’s discretion to arrest Vehicle Code offenders. Vehicle Code section 40302, subdivision (a) (§ 40302(a)) provides that an officer can make a custodial arrest for non-felony Vehicle Code offenses when the offender fails to present a driver’s license or other satisfactory form of identification.

In *McKay*, the defendant sought to exclude a baggie of methamphetamine found in his sock during a search incident to his arrest for the infraction of riding his bicycle in the wrong direction on a residential street. (*McKay, supra*, 27 Cal.4th at p. 605.) The issue was whether the officer’s failure to comply with state arrest procedures affected the validity of an arrest under the federal Constitution. Specifically, whether the arrest, constitutional under *Atwater v. Lago Vista, supra*, 532 U.S. 318, became unconstitutional because it was not authorized by section 40302(a), the same statute at issue in this case. (*McKay, supra*, 27 Cal.4th at pp. 607-608.) The court held that so long as the officer had probable cause to believe the individual had committed a criminal offense, a custodial arrest, even one made in violation of section 40302(a)’s state arrest procedures, did not violate the Fourth Amendment. (*McKay*, at p. 618.)

In *Moore, supra*, 553 U.S. 164, 167, the Supreme Court addressed a similar issue: whether a police officer violates the Fourth Amendment by making an arrest based on probable cause but prohibited by state law. There, the defendant was stopped and arrested for driving on a suspended license. A search of his person turned up drugs and cash. He challenged the denial of his motion to suppress this evidence on the ground

that, under state law, the officers were required to issue him a summons rather than arrest him. (*Moore, supra*, 553 U.S. 164, 166-167.) The Supreme Court held that the police did not violate the Fourth Amendment when they arrested the defendant based on probable cause that he was committing a crime in their presence and conducted a search incident to that arrest, even though a citation rather than arrest was required by state law. (*Moore, supra*, at p. 178.) It was not the province of the Fourth Amendment to enforce state law. Thus, the Fourth Amendment did not require the exclusion of evidence obtained from the constitutionally permissible, albeit improper under state law, arrest. (*Moore, supra*, at p. 178.)

Here, Sergeant Voth had probable cause to believe Cupelli had violated Vehicle Code section 21201, so Cupelli's custodial arrest and search incident to that arrest did not violate the Fourth Amendment and the trial court properly denied his motion to suppress evidence. Because we find the search constitutional on this ground, we need not determine whether it was justified for officer safety reasons or whether Cupelli was estopped to challenge the search because he lied about his parole status.

#### **DISPOSITION**

The judgment is affirmed.