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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES BERNARD KENNEY,

Defendant and Appellant.

G045354

(Super. Ct. No. 10WF0388)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John S. Adams, John Conley and Craig E. Robison, Judges. Affirmed.

Roger S. Hanson for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton, Marissa Bejarano and Meredith White, Deputy Attorneys General, for Plaintiff and Respondent.

Following the denial of his motion to suppress (Pen. Code, § 1538.5), appellant James Kenney pleaded guilty to drug charges and was placed on formal probation. He contends the charges stemmed from an unlawful search and seizure, but we disagree and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

On the evening of March 14, 2010, Seal Beach Police Officer Philip Gonshak stopped Kenney for a driving violation. Based on evidence Gonshak obtained during the stop, Kenney was charged in a felony complaint with transporting and possessing for sale oxycodone, which is a controlled substance used in the prescription painkiller Oxycontin.

At the preliminary hearing, Gonshak testified he was on routine patrol in downtown Seal Beach when he noticed Kenney at an intersection. Because Kenney did not have a license plate on the front of his pickup truck, Gonshak decided to stop him for that infraction. However, before doing so, Gonshak ran Kenney's rear license plate number through his dispatcher and discovered there might be a warrant out for Kenney's arrest.

While the dispatcher was looking into that issue, Gonshak pulled Kenney over and contacted him in the truck. After checking Kenney's driver's license, Gonshak asked him to step outside, so he could talk to him about the possible warrant. Kenney agreed and walked to the rear of his truck, while his front seat passenger, Adam Cirillo, stayed in the vehicle.

Before getting into the warrant issue, Gonshak asked Kenney if there were any drugs or weapons inside his truck, and he said there was Oxycontin in the center console. Kenney also said he had just gotten out of rehab for his addiction to Oxycontin and had received a stomach implant to help him in his recovery. When asked if he had a prescription for the Oxycontin in his truck, Kenney said he did, but he did not know where it was.

During this conversation, Gonshak received word from his dispatcher that Kenney did in fact have an outstanding warrant, arising from a traffic matter. At that point, Gonshak arrested Kenney on the warrant and seized \$890 from his back pocket. Gonshak then turned his attention to front passenger Cirillo. Upon speaking with Cirillo, Gonshak saw he appeared to be under the influence of a controlled substance. He had Cirillo exit the truck, placed him under arrest, and sat him down on the curb next to Kenney. While a backup officer watched the two arrestees, Gonshak proceeded to search the truck.

In the center console area, he found three prescription pill bottles in Kenney's name. One of the bottles was empty, one contained a few Xanax pills, and the other had 23 tablets of Oxycontin. Gonshak also found Kenney's cell phone on the driver's seat. Upon examining the phone, Gonshak discovered several text messages showing Kenney was involved in the sale of "beans" and "bars," which are slang terms for Oxycontin and Xanax.

At the preliminary hearing, the defense moved to suppress the evidence found in Kenney's truck. Defense counsel conceded Kenney was lawfully stopped for the traffic violation and arrested on the outstanding warrant. He also conceded Gonshak was lawfully entitled to search Kenney incident to arrest and seize the money in his back pocket. However, defense counsel argued the arrest did not give Gonshak the right to search Kenney's truck, seize his pills and cell phone, and read his text messages. In response, the prosecution claimed that, irrespective of the search-incident-to-arrest rule, Kenney's actions were justified under the "automobile exception" to the warrant requirement, which allows the police to search a vehicle if there is probable cause it contains evidence of a crime.

The preliminary hearing judge was not entirely clear in terms of explaining the basis for his ruling. At several points, he referred to Kenney's arrest on the warrant as being a sufficient justification for Gonshak to search the truck and the items therein.

However, the court also indicated Kenny's arrest was not the only relevant circumstance bearing on the legality of Gonshak's actions. The court reasoned, "The fact [Gonshak] learned, during the entire course of the stop, that [Kenney] had a warrant out for his arrest; that . . . in plain view, there were drugs in the car; [that Kenney admitted] he was not supposed to take those drugs; the fact [Cirillo] was under the influence of controlled substances; and that [Kenney] had his cell phone along with a large amount of cash. *All of those factors* lead the court to conclude, in agreement with the People, that the [suppression] motion should be denied"

After the case was bound over for trial, Kenney renewed his motion to suppress, pursuant to Penal Code section 1538.5, subdivision (i). At the motion hearing, the prosecution recalled Gonshak to the witness stand. He testified that when he spoke to Kenney at the rear of the truck, Kenney said he had recently finished a stint at a rehabilitation center in Michigan for heroin addiction. Kenney said that, as a condition of his release from the center, he received a stomach implant that is designed to counter the effect of any controlled substances he might ingest.

At the motion hearing, Gonshak also provided further details regarding his contact with Cirillo, which occurred after he had arrested Kenney on the warrant. Gonshak testified that when he approached Cirillo in the passenger seat, he noticed his pupils were constricted, his speech was impaired, and there was a white pasty substance around his mouth. In addition, Cirillo admitted he had taken oxycodone and used marijuana that day, and he had previously been addicted to Oxycontin. Therefore, Gonshak arrested him for being under the influence of narcotics and cannabis.

At that point, Gonshak turned his attention to the truck. Upon finding Kenney's cell phone in close proximity to the pills, he began to suspect Kenney might be involved in drug sales activity. In fact, based on his experience investigating narcotics, Gonshak felt the cell phone was a "very important" piece of evidence bearing on that

issue. That is why he read the text messages on the phone; to shed light on whether or not Kenney was dealing drugs.

However, even though the messages were indicative of sales activity, Gonshak did not feel the need to arrest Kenney for a second time. When defense counsel asked him why not, he answered, “How would [I] be able to do that? Once he is in custody, he is in custody. I can’t uncuff him and then arrest him again.” Gonshak stated he did not seek a judicial warrant to search Kenney’s cell phone because it would have taken a considerable amount of time, and he did not believe a warrant was necessary.

As he did at the preliminary hearing, defense counsel argued the warrantless search of Kenney’s truck and cell phone violated the Fourth Amendment. He also claimed the preliminary hearing judge erred by relying on the search-incident-to-arrest exception because at the time Kenney and Cirillo were arrested, they were outside the truck and did not have access to the area where the pills and cell phone were found. The prosecution argued that given Kenney’s admission about having Oxycontin in his truck, and in light of the fact Cirillo was under the influence of that drug, there was probable cause to believe Kenney was Cirillo’s drug supplier. Therefore, Gonshak was lawfully entitled to search Kenney’s truck and cell phone for evidence of illegal drug activity.

Characterizing this as a new legal theory, defense counsel argued that Gonshak, as well as the preliminary hearing judge, appeared to rely on Kenney’s initial arrest under the warrant as the basis for the search. Defense counsel contended it was “intellectually dishonest” for the prosecution to now rely on other grounds in attempting to justify Gonshak’s actions. However, the trial court determined Gonshak’s subjective intentions and understanding of search and seizure law were largely irrelevant to the legality of his conduct. Ultimately, the court agreed with the prosecution that Cirillo’s condition, combined with the other circumstances, justified Gonshak’s decision to search

Kenney's truck and look at the messages on his cell phone for evidence of drug sales activity. Therefore, the court denied Kenney's motion to suppress.

In the wake of that ruling, Kenney pleaded guilty to the charges and was placed on probation. This appeal followed.

DISCUSSION

Kenney renews his claim that the search of his truck and cell phone were illegal under the Fourth Amendment. The claim is unavailing.

In *Arizona v. Gant* (2009) 556 U.S. 332 (*Gant*), the United States Supreme Court clarified the rules respecting car searches. The court recognized the search-incident-to-arrest exception to the warrant requirement has been applied liberally to allow the search of an arrestee's vehicle, even when there was "no possibility the arrestee could gain access to the vehicle at the time of the search." (*Id.* at p. 341.) However, the court determined this broad approach was untethered to the underlying objectives of the exception, which are to protect the police and preserve evidence. (*Id.* at p. 343.) Therefore, it fashioned a narrower rule which allows the police to "search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." (*Id.* at p. 351.)

Here, Kenney was not within reaching distance of the passenger compartment of his truck when Gonshak arrested him on the outstanding traffic warrant. Nor was there any evidence to suggest his truck contained evidence relating to the traffic matter. Therefore, Gonshak did not have the right to search Kenney's vehicle incident to his arrest on the warrant. The Attorney General concedes this point. She also acknowledges the preliminary hearing judge was incorrect to the extent he relied on Kenney's arrest warrant as being a sufficient justification for the search of the truck and cell phone.

However, in making his ruling, the preliminary hearing judge did not rely solely on the arrest warrant. Rather, he agreed with the prosecution that the totality of the circumstances, including Cirillo's condition, had to be considered in the case. That brings us back to the *Gant* rule, which, as stated above, allows the police to search a vehicle incident to a recent occupant's arrest if "it is reasonable to believe the vehicle contains evidence of the offense of arrest." (*Gant, supra*, 556 U.S. at p. 351.) *Gant* also reaffirmed the long-standing rule that, "If there is probable cause to believe a vehicle contains evidence of criminal activity," the police may undertake a warrantless search of "any area of the vehicle in which the evidence might be found." (*Id.* at p. 347, citing *United States v. Ross* (1982) 456 U.S. 798.)

Both of these rules apply in this case. By the time Gonshak searched the truck, Kenney had already told him: 1) there was Oxycontin in the vehicle; 2) he did not know where his prescription was; 3) he was a recovering from Oxycontin or heroin addiction; and 4) he had a stomach implant that was designed to counter the effects of any narcotics he ingested. Based on these statements, it was reasonable to infer Kenney was not supposed to have Oxycontin in his possession.

That was not the only information Gonshak had before searching the truck. After arresting Kenney on the warrant, he discovered a large amount of cash in his back pocket (\$890). He also contacted Cirillo in the passenger seat and determined, based on his appearance and statements, he was under the influence of oxycodone and marijuana. Cirillo did not reveal the source of his oxycodone, but the circumstances strongly suggested it came from Kenney. After all, Kenney admitted he had Oxycontin in the center console of his truck, which is right next to where Cirillo was seated, and Kenney admitted he was not supposed to be using the drug himself.

All things considered, it was reasonable to believe the Oxycontin pills that Kenney admitted were in his truck were part of the same supply of drugs that contributed to Cirillo's impaired condition. Therefore, the search of the truck was lawful under *Gant*,

and it was lawful under the traditional automobile/probable cause exception reaffirmed in that case. Because there was probable cause to believe evidence relating to Cirillo's arrest and drug activity in general would be found in the truck, Gonshak did not need a warrant to search the vehicle.

Kenney argues it is unfair to consider the totality of the circumstances in considering the legality of the search because Gonshak and the preliminary hearing judge seemed to believe it was justified based on the arrest warrant alone. However, Gonshak's subjective understanding of search and seizure law "is not dispositive of the legality of his actions. So long as his conduct was objectively reasonable under existing law, no Fourth Amendment violation will be found. [Citations.]" (*In re Justin K.* (2002) 98 Cal.App.4th 695, 699.) This is true regardless of the preliminary hearing judge's reasoning, because on review of a lower court's ruling under Penal Code section 1538.5, our task is to measure the facts against the constitutional standard of reasonableness and independently determine whether the police action in question was lawful. (*People v. Leyba* (1981) 29 Cal.3d 591, 596-597.) In so doing, we exercise our own judgment, irrespective of the lower court's stated rationale for its decision. (*Ibid.*)

Of course, as we have explained, the preliminary hearing judge did not just consider the arrest warrant in making his decision. Consistent with the prosecution's probable cause argument, he considered the totality of the circumstances in upholding the search of the truck. Therefore, Kenney has no basis to complain that he was somehow sandbagged in the course of the proceedings. All of the basic facts regarding the stop were fairly adduced at the preliminary hearing. And at the renewed motion hearing in the trial court, the prosecution was, as Kenney concedes, properly allowed to recall Gonshak to the stand. (Pen. Code, § 1538.5, subd. (i).) Since Gonshak simply supplemented the record to support one of the prosecution's original theories of the case, no unfairness has been shown.

The only remaining issue is whether Gonshak had the right to look inside Kenney's phone and read his text messages for further evidence of drug activity. By the time Gonshak seized the phone, he had, as explained above, already accumulated enough evidence to entertain a strong suspicion Kenney was involved in illegal drug activity. Therefore, under the automobile/probable cause exception to the warrant requirement, he not only had the right to search Kenney's truck, he also had the right to search *any of its contents* that could conceal evidence of the suspected crime. (*United States v. Ross, supra*, 456 U.S. at p. 825.) That would logically include the cell phone, because, as Gonshak knew from his police experience, cell phones are commonly used by drug dealers to conduct illegal drug activity. (See generally *United States v. Sasson* (1995) 62 F.3d 874, 886 [describing the possession of a cell phone as one of "the usual 'trappings' of a person involved in the drug trade"]; *In re Victor L.* (2010) 182 Cal.App.4th 902, 921 [cell phones and other wireless devices are recognized as "tools of the trade" for drug dealers and their customers].)

Kenney contends that because cell phones are capable of storing a lot of personal information about the owner, they should be exempt from the general rule authorizing the warrantless search of a car's contents based on probable cause alone. However, in discussing that rule in a case involving the warrantless search of a cell phone, the California Supreme Court recently observed that "whether a particular container may be searched without a warrant does not depend on the character of the container" and that the "'scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted.'" (*People v. Diaz* (2011) 51 Cal.4th 84, 95, fn. and italics omitted, quoting *United States v. Ross, supra*, 456 U.S. at p. 824.) Therefore, the search of Kenney's phone was properly based on probable cause alone. (*United States v. Fierros-Alvarez* (D. Kan. 2008) 547 F.Supp.2d 1206, 1213-1214 [noting courts "have not been inclined to suspend general Fourth Amendment jurisprudence on exceptions to the search warrant simply because the

container is a cellular telephone”]; *State v. Boyd* (Conn. 2010) 992 A.2d 1071, 1090 [upholding warrantless search of cell phone under automobile exception].)

Furthermore, while the Attorney General backed away from the contention during oral argument, we believe the search of Kenney’s phone was also proper as occurring incident to his arrest for illegal drug activity. In arguing otherwise, Kenney makes much of the fact Gonshak did not actually arrest him for drug activity *before* reading his text messages. But because Kenney was already in lawful custody per the arrest warrant, and because there was probable cause to arrest him for illegal drug activity, it matters not that no second arrest occurred. A search conducted when there is probable cause to arrest may be carried out before the person is actually arrested for the suspected offense. (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 111; *People v. Simon* (1955) 45 Cal.2d 645, 648-649; *People v. Avila* (1997) 58 Cal.App.4th 1069, 1075.) Because Gonshak *could* have arrested Kenney for drug activity before searching his phone, the search was proper under the search-incident-to-arrest exception to the warrant requirement. (*People v. Diaz, supra*, 51 Cal.4th at p. 93.)

In sum, both the search of Kenney’s truck and the search of the items contained therein, including his cell phone, were lawful under multiple exceptions to the Fourth Amendment’s warrant requirement. Therefore, his motion to suppress was properly denied.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.