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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS ADOLFO SERRANO,

Defendant and Appellant.

H042471

(Santa Cruz County

Super. Ct. No. F26503)

After the trial court denied his motion to suppress, defendant Jesus Adolfo Serrano pleaded no contest to possession of a short-barreled shotgun (Pen. Code, § 33210)<sup>1</sup> (count 1) and unlicensed operation of a motor vehicle (Veh. Code, § 12500, subd. (a)) (count 3 as amended). The court suspended imposition of sentence and placed defendant on probation for 36 months on certain terms and conditions.

On appeal, defendant challenges the denial of the suppression motion. (§ 1538.5, subd. (m).) Defendant does not dispute the legality of his arrest or the fact that the search of the cell phone was incident to arrest. Rather, defendant claims that, under *Riley v. California* (2014) 573 U.S. \_\_ [134 S.Ct. 2473] (*Riley*), the warrantless search of his cell phone incident to arrest violated the Fourth Amendment and that all evidence obtained as a result of the search of the cell phone must be suppressed. He asserts that the good faith exception to the exclusionary rule for a search conducted in objectively reasonable reliance on binding appellate precedent (see *Davis v. United States* (2011) 564 U.S. 229

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise stated.

(*Davis*)) does not apply.<sup>2</sup> Defendant also challenges a probation condition on the ground it is unconstitutionally vague and overbroad.

We hold that the good-faith exception to the exclusionary rule applies because binding California Supreme Court precedent at the time of the search, namely *People v. Diaz* (2011) 51 Cal.4th 84 (*Diaz*), although now abrogated by *Riley*, established an objectively reasonable basis for the arresting officer to search defendant's cell phone incident to arrest at the time. We also determine that the challenged probation condition is unconstitutionally vague as written. Accordingly, we modify the probation condition and affirm the order granting probation.

## I

### *Discussion*

#### A. *Motion to Suppress*

##### 1. *Proceedings Below*

Citing *Riley, supra*, 573 U.S. \_\_ [134 S.Ct. 2473], which was decided subsequent to the search of defendant's cell phone, defendant moved to suppress all evidence "obtained as a result of, and flowing from, the illegal search of [his] cell phone," which an officer had seized incident to defendant's arrest. The People argued that, although the warrantless search of defendant's cell phone turned out to be unlawful under *Riley*, the police conduct in searching defendant's cell phone fell within the good faith exception to the exclusionary rule because it complied with the then-binding precedent of *Diaz, supra*, 51 Cal.4th 84. The trial court denied the motion to suppress.

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<sup>2</sup> The following issue is pending before the Supreme Court in *People v. Macabeo* (2014) 229 Cal.App.4th 486, review granted Nov. 25, 2014, S221852: "Did *Riley v. California* (2014) \_\_ U.S. \_\_ [134 S.Ct. 2473] require the exclusion of evidence obtained during the warrantless search of the suspect's cell phone incident to arrest, or did the search fall within the good faith exception to the exclusionary rule (see *Davis v. United States* (2011) 564 U.S. \_\_ [131 S.Ct. 2419]) in light of *People v. Diaz* (2011) 51 Cal.4th 84?"

(<[http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc\\_id=2090026&doc\\_no=S221852](http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2090026&doc_no=S221852)> [as of Oct. 10, 2016].)

## 2. *Standard of Review*

“A warrantless search is presumptively unreasonable, and the prosecution bears the burden of demonstrating a legal justification for the search. (*People v. Redd* (2010) 48 Cal.4th 691, 719.) In reviewing a trial court’s ruling on a motion to suppress, we defer to the trial court’s factual findings, express or implied, where supported by substantial evidence. (*Ibid.*) And in determining whether, on the facts so found, the search was reasonable for purposes of the Fourth Amendment to the United States Constitution, we exercise our independent judgment. (*Ibid.*)” (*People v. Simon* (2016) 1 Cal.5th 98, 120.) “Under the current provisions of the California Constitution, evidence . . . is subject to suppression as the fruit of an unconstitutional search and seizure ‘only if exclusion is . . . mandated by the federal exclusionary rule applicable to evidence seized in violation of the Fourth Amendment [of the United States Constitution].’ (*In re Lance W.* (1985) 37 Cal.3d 873, 896.)” (*People v. Maikhio* (2011) 51 Cal.4th 1074, 1089.)

## 3. *Applicable Fourth Amendment Law*

In *United States v. Robinson* (1973) 414 U.S. 218, the United States Supreme Court held: “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 requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and . . . in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.” (*Id.* at p. 235.) Applying those principles, the court concluded that, “[h]aving in the course of a lawful search [of a person incident to arrest] come upon the crumpled package of cigarettes, [the arresting officer] was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as ‘fruits, instrumentalities, or contraband’ probative of criminal conduct. [Citations.]” (*Id.* at p. 236.)

In *Diaz*, law enforcement officers conducted a warrantless search of the text message folder of a cell phone taken from an individual after his arrest. (*Diaz, supra*, 51 Cal.4th at p. 88.) The California Supreme Court held that, “under the United States Supreme Court’s binding precedent, such a search is valid as being incident to a lawful custodial arrest.” (*Ibid.*; see *id.* at 101.)

The *Riley* decision abrogated *Diaz*. In *Riley*, the United States Supreme Court described *Diaz* as holding that “the Fourth Amendment permits a warrantless search of cell phone data incident to an arrest, so long as the cell phone was immediately associated with the arrestee’s person. [Citation.]” (*Riley, supra*, 573 U.S. at p. \_\_ [134 S.Ct. at p. 2481].) The United States Supreme Court recognized that cell phones “place vast quantities of personal information literally in the hands of individuals” and found that “[a] search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*.” (*Id.* at p. \_\_ [134 S.Ct. at p. 2485].) The court “decline[d] to extend *Robinson* to searches of data on cell phones, and [held] instead that officers must generally secure a warrant before conducting such a search.” (*Ibid.*) The court stressed that its holding was “not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest.” (*Id.* at p. \_\_ [134 S.Ct. at p. 2493].) It reversed the California appellate court judgment and remanded the case for “further proceedings not inconsistent with [its] opinion.” (*Id.* at p. \_\_ [134 S.Ct. at p. 2495].)

“[T]he retroactive application of a new rule of substantive Fourth Amendment law raises the question whether a suppression remedy applies; it does not answer that question. See [*United States v. Leon*, 468 U.S. [897,] 906 [(1984)]] (‘Whether the exclusionary sanction is appropriately imposed in a particular case . . . is “an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct” ’).” (*Davis, supra*, 564 U.S. at pp. 243-244.)

#### 4. *Evidence*

Juan Alfonso Trujillo, a police officer with the City of Watsonville, was on duty at approximately 8:19 a.m. on March 13, 2014. He was in full uniform and driving a marked patrol vehicle. The officer noticed a four-door, 1999 silver Mazda parked next to curb in front of 109 Elm Street. As he drove past the car, Officer Trujillo saw that the red lens on its left rear taillight was broken, which he believed was a violation of Vehicle Code section 24252, subdivision (a).

Officer Trujillo observed the car pull away and head eastbound on Elm Street, and the officer turned his patrol vehicle around and tried to catch up to the car. The car's driver, later identified as defendant, performed a three-point turn and drove the car toward Officer Trujillo's vehicle. The officer turned his patrol vehicle around and drove behind the car. Defendant parked the car. As defendant walked toward his house at 109 Elm Street, Officer Trujillo contacted him on the sidewalk directly in front of his house.

Defendant told Officer Trujillo that he was on his way to school. The officer informed defendant that the reason for the contact was the Mazda's taillight. Defendant indicated that he was aware that it was broken because the car had been involved in an accident. Defendant told the officer that his license was suspended, and the officer confirmed the suspension by conducting a check through dispatch.

Corporal Thomas Corral arrived at the scene. Officer Trujillo conducted a pat-down search in the presence of Corporal Corral. Defendant volunteered that he had a knife. Officer Trujillo located a gravity-operated, folding knife, which had a blade more than two inches long, in defendant's right front pants pocket.

Defendant's mother walked out of the residence to "see what was going on," and she began to question the detention. She began making telephone calls from her cell phone.

Officer Trujillo "detained" defendant for possession of the knife and driving with a suspended license and placed defendant in handcuffs. The officer intended to tow the

car. Defendant asked Officer Trujillo to give his cell phone to his mother. The officer found defendant's cell phone in his pocket and removed it. Instead of handing defendant's cell phone to his mother, who was on the sidewalk in front of her house, Officer Trujillo kept the cell phone.

Officer Trujillo, who was concerned for the officers' safety, placed defendant in the back seat of his patrol vehicle. The officer then drove defendant to the police station; Corporal Corral followed shortly thereafter. At the police station, Officer Trujillo completed a search of defendant incident to arrest. As part of that search, the officer looked through defendant's cell phone without a warrant. No more than approximately 15 minutes had elapsed between finding defendant's cell phone in his pocket and looking through the cell phone.

In looking through the cell phone, Officer Trujillo discovered several photographs of defendant holding a shotgun with a pistol grip. The officer concluded that the shotgun was illegal because it appeared to have a shorter barrel than an ordinary shotgun.

Officer Trujillo interviewed defendant after reading him his *Miranda* rights. (See *Miranda v. Arizona* (1966) 384 U.S. 436.) Defendant eventually told the officer that the shotgun was in his bedroom and that he had taken the pictures the previous morning. He confirmed that the shotgun was real, and he indicated that somebody else had shortened it.

The officer obtained a search warrant to search for the shotgun at defendant's house.

During the execution of the warrant, Officer Fernando Lopez located a modified shotgun in defendant's bedroom; its barrel had been shortened and a pistol grip had been attached. The original butt stock of the shotgun was also located. The length of the barrel was shorter than 16 inches.

At trial, the court admitted without objection a certified copy of “defendant’s DMV rap” sheet indicating that defendant’s license was suspended when Officer Trujillo saw defendant driving on March 13, 2014.

#### 5. *Violation of the Fourth Amendment*

It is undisputed that, under *Riley*, the warrantless cell phone search violated the Fourth Amendment. But “[t]he fact that a Fourth Amendment violation occurred—*i.e.*, that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies. *Illinois v. Gates*, 462 U.S. 213, 223 (1983).” (*Herring v. United States* (2009) 555 U.S. 135, 140 (*Herring*)). While “there was a time when [the United States Supreme Court’s] exclusionary-rule cases were not nearly so discriminating in their approach to the doctrine” (*Davis, supra*, 564 U.S. at p. 237), the court “has over time applied [a] ‘good-faith’ exception across a range of cases.” (*Id.* at p. 238.) Accordingly, we turn to the question whether a good faith exception applies under the circumstances of this case.

#### 6. *Application of the Exclusionary Rule*

The sole purpose of the exclusionary rule is to “deter future Fourth Amendment violations. *E.g.*, *Herring, supra*, at 141, and n. 2; *United States v. Leon*, 468 U.S. 897, 909, 921, n. 22 (1984); *Elkins [v. United States]*, 364 U.S. 206,] 217 [(1960)] (‘calculated to prevent, not to repair’).” (*Davis, supra*, 564 U.S. at pp. 236-237.) As indicated, the “exclusion of evidence does not automatically follow from the fact that a Fourth Amendment violation occurred. See [*Arizona v.] Evans*, 514 U.S.[ 1,] 13-14 [(1995)].” (*Id.* at p. 244.) “To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in [the United States Supreme Court’s] cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.” (*Herring, supra*, 555 U.S. at p. 144.)

In *Davis*, the United States Supreme Court framed the question as “whether to apply the exclusionary rule when the police conduct a search in objectively reasonable reliance on binding judicial precedent.” (*Davis, supra*, 564 U.S. at p. 239.) It held that “[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.” (*Id.* at p. 241.)

“At the time of the search at issue [in *Davis*], [the United States Supreme Court] had not yet decided *Arizona v. Gant*, 556 U.S. 332 [(2009)], and the Eleventh Circuit had interpreted [its] decision in *New York v. Belton*, 453 U.S. 454 [(1981)], to establish a bright-line rule authorizing the search of a vehicle’s passenger compartment incident to a recent occupant’s arrest. [*United States v.*] *Gonzalez*, 71 F.3d [819,] 825 [(1996)]. The search incident to *Davis*’s arrest . . . followed the Eleventh Circuit’s *Gonzalez* precedent to the letter. Although the search turned out to be unconstitutional under *Gant*, all agree that the officers’ conduct was in strict compliance with then-binding Circuit law and was not culpable in any way.” (*Davis, supra*, 564 U.S. at pp. 239-240.)

The Supreme Court concluded in *Davis*: “The officers who conducted the search did not violate *Davis*’s Fourth Amendment rights deliberately, recklessly, or with gross negligence. [Citation.] Nor does this case involve any ‘recurring or systemic negligence’ on the part of law enforcement. [Citation.] The police acted in strict compliance with binding precedent, and their behavior was not wrongful. Unless the exclusionary rule is to become a strict-liability regime, it can have no application in this case.” (*Davis, supra*, 564 U.S. at p. 240.)

The Supreme Court further observed in *Davis* that application of the exclusionary rule would be counterproductive under the circumstances of that case: “About all that exclusion would deter in this case is conscientious police work. Responsible law-enforcement officers will take care to learn ‘what is required of them’ under Fourth Amendment precedent and will conform their conduct to these rules. *Hudson* [*v. Michigan*], 547 U.S. [586,] 599 [(2006)]. But by the same token, when binding appellate

precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than ‘ “ac[t] as a reasonable officer would and should act” ’ under the circumstances. *Leon*, 468 U.S., at 920 (quoting *Stone [v. Powell]*, 428 U.S. [465,] 539-540 [(1976)] (White, J., dissenting)). The deterrent effect of exclusion in such a case can only be to discourage the officer from ‘ “do[ing] his duty.” ’ 468 U.S., at 920.” (*Davis, supra*, 564 U.S. at p. 241.)

The United States Supreme Court has made clear that “the harsh sanction of exclusion ‘should not be applied to deter objectively reasonable law enforcement activity.’ [*Leon*, 468 U.S.,] at 919.” (*Davis, supra*, 564 U.S. at p. 241.) In this case, Officer Trujillo was acting reasonably under the then-binding precedent of *Diaz, supra*, 51 Cal.4th 84, when he searched defendant’s cell phone incident to defendant’s arrest. Although the officer did not specifically state that he was relying on *Diaz* at the hearing on the motion, his actions were entirely consistent with and followed the then-binding precedent of *Diaz*. In the absence of any culpable wrongdoing, the exclusionary rule has no application to Officer Trujillo’s search of the cell phone incident to defendant’s arrest.

Defendant complains that Officer Trujillo did not testify that he was subjectively acting in reliance on *Diaz*. *Davis, supra*, 564 U.S. 229, imposed no such requirement. After observing that excluding evidence in cases where law enforcement has scrupulously adhered to governing law “deters no police misconduct and imposes substantial social costs” (*id.* at p. 249), the court reiterated its holding that “when the police conduct a search in *objectively* reasonable reliance on binding appellate precedent, the exclusionary rule does not apply.” (*Id.* at pp. 249-250, italics added; see *id.* at p. 232.)

Defendant additionally suggests that *Diaz*’s holding narrowly applied to only the text message folder of a cell phone. In this case, Officer Trujillo looked at photographs

stored on the cell phone. Nothing in *Diaz* suggested that a different rule would obtain if law enforcement officers searched other places in a cell phone. We do not understand *Diaz*'s holding to have been applicable to only searches of a cell phone's text message folder. In *Riley*, the United States Supreme Court did not read *Diaz*'s holding that narrowly either. (See *Riley, supra*, 573 U.S. at p. \_\_ [134 S.Ct. at p. 2481].)

Defendant also protests that there was no objective rationale to search the cell phone given the grounds for his arrest. The California Supreme Court in *Diaz* reaffirmed that “a ‘lawful custodial arrest justifies the infringement of *any* privacy interest the arrestee may have’ in property immediately associated with his or her person at the time of arrest [citation, italics added], even if there is no reason to believe the property contains weapons or evidence (*Robinson, supra*, 414 U.S. at p. 235).” (*Diaz, supra*, 51 Cal.4th at p. 97.) Officer Trujillo's search of the cell phone under the then-binding precedent of *Diaz* did not require any further justification.

#### B. Probation Condition

The June 17, 2015 minute order states probation terms and conditions imposed on defendant. They include condition number five: “Obey all laws and do not associate with persons whose behavior might lead to criminal activities.” At sentencing, the court ordered defendant to obey all laws, but it did not orally impose a restriction on association.<sup>3</sup>

Defendant now challenges the limitation on association on the ground it is unconstitutional vague and unconstitutionally overbroad. The People agree that the probation condition must be modified by deleting the restriction on association.

“[T]he underpinning of a vagueness challenge is the due process concept of ‘fair warning.’ (*People v. Castenada* (2000) 23 Cal.4th 743, 751.) The rule of fair warning

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<sup>3</sup> We note that ordinarily “[t]he record of the oral pronouncement of the court controls over the clerk's minute order . . . . (See *People v. Mesa* (1975) 14 Cal.3d 466, 471; see also *People v. Mitchell* (2001) 26 Cal.4th 181, 185.)” (*People v. Farrell* (2002) 28 Cal.4th 381, 384, fn. 2 [court relied on oral pronouncement of probation conditions].)

consists of ‘the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders’ (*ibid.*), protections that are ‘embodied in the due process clauses of the federal and California Constitutions. (U.S. Const., Amends. V, XIV; Cal. Const., art. I, § 7).’ (*Ibid.*) The vagueness doctrine bars enforcement of ‘“a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” [Citations.]’ (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115 (*Acuna*).)” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) “A probation condition ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness. (*People v. Reinertson* (1986) 178 Cal.App.3d 320, 324-325.)” (*Ibid.*)

In this case, the challenged restriction on association is too nebulous to give defendant fair warning of what associations are prohibited. Accordingly, we conclude it is unconstitutionally vague and will strike the restriction. The County of Santa Cruz should eliminate this unconstitutional restriction from its standard orders to prevent the unnecessary waste of scarce judicial resources.

In light of our conclusion, it is unnecessary to decide whether the probation condition is unconstitutionally overbroad as well.

#### DISPOSITION

Probation condition number five listed on the June 17, 2015 minute order is modified by striking the language “and do not associate with persons whose behavior might lead to criminal activities.” As modified, the order granting probation is affirmed.

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ELIA, ACTING P.J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.