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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

KEWHAN ROBEY, Petitioner, v. THE SUPERIOR COURT OF SANTA BARBARA COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	2d Crim. No. B231019 (Super. Ct. No. 1349412) (Santa Barbara County)

Petitioner Kewhan Robey consigned a sealed package to a common carrier for shipment. The package reeked of marijuana. The carrier notified the police, who seized the package and later opened it at the police station. The police did not seek a warrant even though no exigent circumstances existed at the time of the search.

Was the warrantless search justified based on smell alone? Not according to the California Supreme Court. (*Guidi v. Superior Court* (1973) 10 Cal.3d 1; *People v. Marshall* (1968) 69 Cal.2d 51.) To smell it is not the same as to see it.

The trial court erred in denying Robey's motion to suppress evidence of the marijuana. We grant his petition for writ of mandate.

FACTS

On Friday afternoon, July 23, 2010, Federal Express ("FedEx") employee Nancy Her smelled the odor of marijuana emanating from a package received for shipment from Santa Maria to Illinois. She followed company protocol; she withheld the package from the shipping line and telephoned the Santa Maria Police Department. Officer Nathan Totorica responded. When Totorica walked into the FedEx office, he smelled the distinct odor of marijuana. As he approached the counter where the box was located, the odor became stronger. Her told Totorica that FedEx "could not deliver the package" and asked what he wanted done with it. Totorica seized the unopened box "as evidence."

Totorica took the package to the police station, where his supervisor, Lieutenant Jerel Haley, also noted the strong odor of marijuana. Both officers have significant training and experience in identifying controlled substances, including the odor of marijuana. When the narcotics unit declined to investigate, Totorica and Haley opened the package, which contained 444 grams (approximately 15 ounces) of marijuana. The officers did not seek a search warrant.

A few days later, Robey brought the packing slip for the box back to FedEx and asked why it had not been delivered. Her telephoned Totorica, who subsequently arrested Robey. The slip confirmed that Robey had used a false name.

Robey is charged with possession of marijuana for sale (Health & Saf. Code, § 11359) and sale or transportation of marijuana (*id.*, § 11360, subd. (a)). The trial court denied his motion to suppress evidence of the marijuana. The court held that exigent circumstances justified the seizure of the package and that the inevitable discovery doctrine justified the search. Robey petitioned for a writ of mandate directing the trial court to grant the motion. We issued an order to show cause.

DISCUSSION

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures of a person's effects. (*Chambers v. Maroney* (1970) 399 U.S. 42, 51.) Letters and sealed packages are among the personal effects entitled to Fourth Amendment protection. (*United States v. Jacobsen* (1984) 466 U.S. 109, 114.) Subject to certain exceptions, police must have probable cause to search items protected by the Fourth Amendment and must obtain a warrant before the search is made. (*Chambers*, at p. 51.)

One such exception applies to automobiles. When probable cause exists to search an automobile, it may be searched with or without a warrant due to its mobility. (*Chambers v. Maroney*, *supra*, 399 U.S. at p. 52.) In *People v. McKinnon* (1972) 7 Cal.3d 899, 909, our Supreme Court expanded this exception to permit the warrantless seizure of goods or chattels consigned to a common carrier for shipment. The court held that when the police have probable cause to believe that a package consigned to a common carrier contains contraband, they are entitled either to search it immediately without a warrant or to seize and hold it until they can obtain a warrant. (*Ibid.*) Totorica elected to seize the package.

Robey contends that *McKinnon* has been overruled, and, therefore, the police violated the Fourth Amendment by seizing the package without a warrant. In *People v. Yackee* (1984) 161 Cal.App.3d 843, 848, footnote 2, the appellate court rejected the rule that packages consigned to a common carrier may be searched without a warrant. The court observed that "[t]his holding of *McKinnon* has been impliedly overruled both by *United States v. Chadwick* (1977) 433 U.S. 1 . . . and *People v. Dalton* (1979) 24 Cal.3d 850 . . . ." (*Ibid.*)

Chadwick and *Dalton* once stood for the proposition that when a closed container in an automobile comes under the exclusive control of law enforcement officers, a warrantless search is permissible only if both probable cause and exigent circumstances are present. (*United States v. Chadwick*, *supra*, 433 U.S. at p. 13; *People*

v. Dalton, supra, 24 Cal.3d at pp. 856-857.) The United States Supreme Court overruled those cases in *California v. Acevedo* (1991) 500 U.S. 565, by eliminating the exigent circumstances requirement. The court held that "[t]he police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." (*Id.* at p. 580.) The court emphasized that this rule applies only to automobiles. (*Id.* at pp. 578, 580.) Because the instant case does not involve an automobile, the cases discussing this exception do not apply.

We need not decide, however, whether *McKinnon* permitted Totorica to seize the package from FedEx without a warrant. Once he elected to seize the package, *McKinnon* did require that the police officers hold the package until they obtained a search warrant. (*People v. McKinnon, supra*, 7 Cal.3d at p. 909.) They failed to do so. Consequently, even if we assume the seizure was legal, the search was per se unreasonable unless another exception to the warrant requirement applies. (*Katz v. United States* (1967) 389 U.S. 347, 357.) Here, there is no such exception.

People v. Pereira (2007) 150 Cal.App.4th 1106 is instructive. The defendant mailed a package via a private shipping company. The proprietor of the company became suspicious of the package, opened it and found a teddy bear inside. (*Id.* at p. 1110.) After observing some abnormal stitching on the bear, the proprietor telephoned the police, who transported the package to the police station. A few hours later, an officer cut into the bear without a search warrant and discovered marijuana. (*Ibid.*) In affirming the trial court's order suppressing evidence of the marijuana, the court observed that "[e]ven when an officer lawfully seizes a package, the Fourth Amendment requires that in the absence of exigent circumstances, the officer obtain a warrant before examining the contents of the package." (*Id.* at p. 1112.) The court upheld the trial court's finding that no exigency justified the warrantless search. (*Ibid.*)

The same analysis applies here. Totorica took the package to the police station, where it remained in police custody and control. There was no risk the package would leave the station. The officers had time to consult with the narcotics unit before

opening the package. They also had time to seek a warrant. Here there is no evidence of exigent circumstances.

The People contend that even without exigent circumstances, the warrantless search was permissible under a "plain smell" theory. This theory is an offshoot of the "plain view" exception to the warrant requirement. Under this exception, incriminating evidence or contraband in the plain view of an officer who has the right to be in the position to have that view is subject to seizure without a warrant. (*People v. Mack* (1980) 27 Cal.3d 145, 150.) The People argue that no distinction exists between something that is apparent to the sense of smell and something that is apparent to the sense of sight. We comprehend the logic of the argument. But we cannot hold the seizure proper. Our Supreme Court has not endorsed this view when probable cause is based on odor alone.

People v. Marshall, supra, 69 Cal.2d 51 held that the odor of contraband creates probable cause to seek a search warrant but does not justify a warrantless search. "To hold . . . that an odor, either alone or with other evidence of invisible contents can be deemed the same as or corollary to plain view, would open the door to snooping and rummaging through personal effects. Even a most acute sense of smell might mislead officers into fruitless invasions of privacy where no contraband is found." (*Id.* at p. 59.) The court concluded that "'[i]n plain smell,' therefore, is plainly not the equivalent of 'in plain view.'" (*Ibid*.)

Guidi v. Superior Court, supra, 10 Cal.3d 1 disapproved of *Marshall* to the extent it suggested that police may not consider odor along with other corroborating factors in assessing whether contraband is in plain view. (*Guidi*, at p. 17, fn. 18.) In both cases, a witness had provided a visual description of the bag containing the contraband. After visually locating the bag based on that description, the searching officer used his sense of smell to confirm the bag's contents. The *Marshall* court held that this was insufficient to justify a warrantless search on a plain view theory. (*People v. Marshall, supra,* 69 Cal.2d at p. 59.) In contrast, the *Guidi* court concluded that the

warrantless search was permissible because the odor corroborated prior visual confirmation of the contraband's location. (*Guidi*, at p. 17, fn. 18.) The court cautioned, however, that "[w]e do not here hold that only the smell of contraband and nothing more would justify seizing a supposed container of the contraband, nor do we mean to accord 'plain smell' a place in Fourth Amendment doctrine equivalent to that occupied by 'plain sight.'" (*Ibid.*)

The *Guidi* court refused to revisit the debate in *Marshall* as to whether the "plain smell" of contraband justifies a warrantless search for the source of that odor. Nonetheless, the justices were divided on that issue. (*Guidi v. Superior Court*, *supra*, 10 Cal.3d at p. 17, fn. 18.) In a concurring opinion, signed by four of the seven justices, Justice Mosk reiterated his belief, as stated in his dissent in *Marshall*, "that the sense of smell, and indeed all the senses, may be employed, not merely in confirmation of what is already visible, but in equal weight with the sense of sight in the determination of probable cause to search and seize." (*Guidi*, at p. 20 (conc. opn. of Mosk, J.).)

Does the passage of 43 years since *Marshall* was decided warrant (pardon the expression) reconsideration of Mosk's view? Perhaps not. Courts require an experienced peace officer's testimony to establish the presence of marijuana through its odor. (*People v. McKinnon*, *supra*, 7 Cal.3d at p. 917.) Indeed, both Totorica and Haley testified about their training and experience in identifying the odor of marijuana. We wisely do not speculate whether marijuana's alleged pungent odor is familiar to a larger segment of the population today than it was in 1968.

We do recognize that courts have questioned the extent of *Guidi's* limitation on the plain smell doctrine but they, too, have been reluctant to apply the doctrine when odor is the sole basis for probable cause. In *People v. Dickson* (1983) 144 Cal.App.3d 1046, 1056, footnote 7 (superseded on another ground as stated in *People v. Hull* (1995) 34 Cal.App.4th 1448, 1455), the court observed that *Guidi's* "limitation loses much of its force . . . because of [the] short concurring opinion filed by Justice Mosk joined by *three* other members of the court." Nonetheless, the court

rejected the argument that the odor of ether alone is enough to supply probable cause for a warrantless entry of a dwelling. (*Id.* at pp. 1057-1058.)

The People cite several federal cases they contend endorse or apply the plain smell doctrine. (E.g., *United States v. Angelos* (10th Cir. 2006) 433 F.3d 738, 747 [upholding search and seizure based on smell of marijuana and evident residue on duffle bags]; *United States v. Clayton* (8th Cir. 2000) 210 F.3d 841, 845 [noting that officer executing arrest warrant "quickly developed probable cause for a search based on his immediate perception of an odor associated with methamphetamine production"]; *United States v. Haley* (4th Cir. 1982) 669 F.2d 201, 203 [holding that the odor emanating from a container in an automobile may justify invocation of the "plain view" doctrine].) These cases are factually distinguishable; also they are contrary to California precedent rejecting the doctrine that odor alone will justify a warrantless search. (*Guidi v. Superior Court*, *supra*, 10 Cal.3d at p. 17, fn. 18; *People v. Marshall*, *supra*, 69 Cal.2d at p. 59.) We are bound by this precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.)

The warrant requirement is not an empty formality. It is the cornerstone of the Fourth Amendment's guarantee of the right to privacy. (*Johnson v. United States* (1948) 333 U.S. 10, 13-14.) We recognize that a number of exceptions exist, but we are wary of creating another one under the facts of this case. The odor of marijuana gave the officers probable cause to obtain a search warrant and they had plenty of time to obtain one. They had no other evidence corroborating the contents of the package. The officers chose not to seek a warrant. The consequence of this decision is the marijuana is not admissible.

The trial court concluded that, notwithstanding the warrantless search, the marijuana is admissible under the inevitable discovery doctrine. We disagree. This doctrine permits the introduction of evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from lawful activities untainted by the initial illegality. (*Murray v. United States* (1988) 487 U.S.

533, 537.) To establish inevitable discovery, the prosecution "must demonstrate by a preponderance of the evidence that, due to a separate line of investigation, application of routine police procedures, or some other circumstance, the [unlawfully obtained evidence] would have been discovered by lawful means." (*People v. Hughston* (2008) 168 Cal.App.4th 1062, 1072.) The People have not met that burden.

In *People v. Superior Court (Walker)* (2006) 143 Cal.App.4th 1183, 1193-1194, campus security had the contractual authority to enter and inspect the defendant's dormitory room. After discovering drugs in his room, the campus security guard contacted the police, who conducted an unlawful warrantless search of the room. The court applied the inevitable discovery doctrine on the basis that even if the unlawful search had not occurred, campus security, having discovered a potentially significant marijuana sales enterprise on the campus, would have turned over the evidence to police by lawful means. (*Id.* at p. 1216.)

The People argue, by analogy, that if Totorica had not seized the box, FedEx would have turned over the contraband to the police by lawful means. This argument assumes that FedEx would have opened the box on its own and then turned in the marijuana. The record does not support this assumption. We do not know what FedEx would have done if Totorica had left the box without any instructions. The FedEx agent could have thrown out the box or returned it to Robey when he appeared with the packing slip. We may not rely on speculation to conclude that the police inevitably would have discovered the marijuana by lawful means. (See *People v. Hughston, supra,* 168 Cal.App.4th at p. 1073 [observing "that the possibility someone would have removed or destroyed the evidence at issue undermines a showing of inevitability"].)

We reject the People's argument that Robey lacks standing to seek suppression of the evidence because he abandoned any expectation of privacy in the package. The use of a false name does not necessarily constitute an abandonment of property for purposes of Fourth Amendment protection. "The appropriate test is

whether defendant's words or actions would cause a reasonable person in the searching officer's position to believe that the property was abandoned." (*People v. Pereira*, *supra*, 150 Cal.App.4th at p. 1113.)

The substantial evidence supports the trial court's determination that Robey did not abandon the package. He obtained a packing slip, with a tracking number, which allowed him to retain significant control over the package while it was in transit. He also returned to FedEx to inquire as to the status of the package, "objectively demonstrating his continuing interest in it." (*People v. Pereira*, *supra*, 150 Cal.App.4th at p. 1113.)

We grant the petition. Let a peremptory writ issue directing the respondent superior court to vacate its order denying Robey's motion to suppress the evidence and to enter a new and different order granting the motion.

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GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Edward H. Bullard, Judge

Superior Court County of Santa Barbara

Raimundo Montes De Oca, Interim Public Defender, Patricia Dark, Deputy Public Defender, for Petitioner.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, Thomas C. Hsieh, Deputy Attorney General, for Respondent.

Joyce E. Dudley, District Attorney, Michael J. Carrozzo, Deputy District Attorney, for Real Party in Interest.