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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ALESSANDRA DIAZ AGUADO, Defendant and Appellant.	H037439 (Monterey County Super. Ct. No. SS082922)

After the trial court denied her motion to suppress evidence (Pen. Code, § 1538.5)[1] obtained during a warrantless search of her vehicle, defendant Alessandra Diaz Aguado pleaded no contest to one count of transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)) and received a three-year grant of probation. On appeal, defendant challenges the denial of her motion to suppress, arguing (1) that her detention was unreasonable because the officer had no reason to believe she was involved in criminal activity; and (2) that the impoundment and inventory search of her vehicle violated the Fourth Amendment. The Attorney General contends that the warrantless search of defendant's vehicle was valid under both the automobile exception and the inventory search exception to the Fourth Amendment. We conclude that there was probable cause to stop the vehicle after the officer observed the driver commit traffic violations and that

[1] All further statutory references are to the Penal Code unless otherwise specified.

the search was valid under the automobile exception. We will, therefore, affirm the judgment.

FACTS

The facts are based on the evidence presented at the hearing on defendant's motion to suppress. The only witness was Officer Edie Anderson of the Marina Police Department. The parties stipulated that there was no arrest or search warrant.

On December 6, 2008, at approximately 12:20 a.m., Officer Anderson was on patrol in a marked car, driving southbound on Del Monte Boulevard in Marina. As Officer Anderson approached the intersection of Del Monte Boulevard and Cosky Drive, he observed a black Toyota Tundra pickup truck turn left from Cosky Drive onto southbound Del Monte Boulevard and accelerate at a high rate of speed. The officer attempted to catch up to the pickup to obtain a "bumper-to-bumper" pace, but could not get an accurate pace on the pickup because of its speed. He testified that the pickup exceeded the 35 mile-per-hour speed limit.

At the intersection of Del Monte Boulevard and Beach Road, the officer saw the pickup slow to five miles per hour and turn right onto westbound Beach Road, without stopping at the stop sign. Officer Anderson followed the pickup onto Beach Road and saw it enter a left-turn lane (used to enter the parking lot of a retail store); then swerve abruptly to the right, back into the westbound traffic lane; and continue westbound on Beach Road. Officer Anderson activated his lights and initiated a traffic stop; the pickup stopped near the intersection of Reservation Road and Cardoza Avenue.

Officer Anderson approached the pickup from the driver's side and spoke with the driver, Albert Lee. As he talked to the driver, the officer noticed "a mild odor of alcohol and marijuana" coming from inside the truck. Officer Anderson testified that at the time of the incident, he had worked for the Marina Police Department for 11 years and that he had received on-the-job training in drug recognition. He stated that he had handled

investigations involving marijuana "quite a few times" and that he could not "begin to estimate" the number of marijuana cases he had worked on.

The driver appeared nervous and told the officer he was giving his female passenger a ride because she was under the influence of alcohol. Officer Anderson identified defendant as the woman who was seated in the passenger seat at the time of the traffic stop.

Officer Anderson asked Lee for his driver's license, the vehicle's registration, and proof of insurance. Defendant told the officer the pickup truck belonged to her. However, she could not produce her registration or proof of insurance. At that point, Officer Anderson did not tell defendant she could not leave, but if she had tried to walk away, he would have prevented it.

Instead of a driver's license, Lee handed the officer his California identification card. Officer Anderson asked county communications to perform driver's license and warrants checks on both Lee and defendant. The dispatcher told the officer that neither party had any warrants, that defendant's driver's license was valid, but that Lee's license had been suspended.

The officer returned to the pickup truck and spoke with Lee. This time, he noticed the odor of alcohol on Lee's breath, which made him suspect Lee was driving under the influence of alcohol. Officer Anderson asked Lee to step out of the pickup and conducted four or five field sobriety tests on Lee, which Lee passed. The officer also did a preliminary alcohol screening (PAS) breath test. It indicated that Lee's blood alcohol level was 0.05 percent, which was under the legal limit.

Officer Anderson did not do any field sobriety or PAS testing on defendant. Lee had said defendant was under the influence and defendant's demeanor confirmed that: She was "very talkative" and "seemed to be a little irrational."

After completing the sobriety testing on Lee, Officer Anderson asked Lee to return to the pickup truck and decided to cite him for failing to stop at the stop sign. Officer

Anderson concluded that he could not release the pickup truck to Lee because Lee had a suspended license and that he could not release it to defendant because she was under the influence, so the officer decided to store the vehicle. Officer Anderson asked both defendant and Lee to step out of the pickup and wait by his patrol car. About that time, Officer Baroccio arrived.

Officer Anderson told the court that it is "customary" to do an inventory search when impounding a vehicle. Officer Baroccio did the inventory search in this case. While conducting the inventory search, Officer Baroccio found a black backpack in the rear seat of the pickup. Officer Anderson looked inside the backpack and saw a large quantity of marijuana, which was packaged in sandwich-sized plastic bags. Officer Anderson could not recall how many sandwich bags there were. He testified that it was "quite a few" and that the backpack contained a "large amount of marijuana."[2] Officer Anderson asked defendant whether the backpack belonged to her; she said it belonged both to her and to Lee.

After the officers discovered the marijuana in the backpack, Officer Anderson searched the pickup further, looking for more marijuana or other contraband. He did not find any more drugs, but did find a digital scale in the backpack.

Officer Anderson testified that the Marina Police Department has a written inventory policy relating to the storage of vehicles. Officer Anderson learned about that policy on the job. He could not tell the court "exactly what the written policy says" and testified that it "is probably four or five --" but was cut off by defense counsel.

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[2] Defendant's motion sought to suppress 10 items. Items 1 through 4 were 28 grams, 20.5 grams, 55.5 grams, and 330.5 grams of marijuana respectively, for a total of 434.5 grams (15.3 ounces) of marijuana. Items 5 and 6 were cash, totaling $1,357. Items 7 through 10 were a digital scale, a digital camera, the black backpack, a brown purse, and a "medical marijuana recommendation." In her moving papers, defendant told the court that the officers seized "[a]dditional marijuana" "from a brown purse in which her checkbook was found." At the hearing on the motion, neither side elicited any evidence regarding the purse.

Presumably he was referring to the number of pages or paragraphs in the written policy. Officer Anderson testified that the purpose of the inventory search is to inventory the contents of the vehicle to protect the owner from loss and the police from liability for missing items.

Officer Anderson was familiar with California Highway Patrol (CHP) 180 form, which is a standard CHP form used "to preserve a record of the physical condition of the vehicle and its contents when police take possession of it." (*People v. Williams* (1999) 20 Cal.4th 119, 123.) He said a CHP 180 form was completed in this case. Initially, he could not recall whether he or Officer Baroccio completed the CHP 180 form; he believed it was Officer Baroccio. Later, Officer Anderson stated that the police report indicated that the CHP 180 form was completed by Officer Baroccio. Officer Anderson did not bring a copy of the CHP 180 form to the hearing. Although he had a copy of the police report, he did not print the attachments to the report, which included the CHP 180 form.

At the time of the traffic stop, the pickup was parked in a lawful spot and was not blocking road access.

PROCEDURAL HISTORY

Although a complaint was filed on December 9, 2008, the court did not conduct a preliminary hearing until March 24, 2010, due to multiple requests for continuances by both sides.

At the conclusion of the preliminary hearing, defendant was held to answer. She was subsequently charged by information with one felony count of transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)), one felony count of possession of marijuana for sale (Health & Saf. Code, § 11359), and one misdemeanor count of possession of more than 28.5 grams of marijuana (Health & Saf. Code, § 11357, subd. (c)). All three offenses were alleged to have occurred on December 6, 2008. The information contained enhancement allegations pursuant to section 12022.1 that

defendant committed the felony offenses while she was released on bail in a prior matter (Monterey County Superior Court case No. SS081761A) in which she had been charged with cultivation of marijuana (Health & Saf. Code, § 11358) and transportation of marijuana (Health & Saf. Code, § 11360). Those offenses were alleged to have occurred in May 2008.

Defendant filed her motion to suppress in August 2010; the hearings on the motion were held in October and November 2010. In the trial court, defendant challenged the search and seizure on a variety of grounds, including: (1) that there was no probable cause or reasonable suspicion to stop the vehicle; (2) that she was unlawfully detained because the officer lacked reasonable suspicion that she was involved in criminal activity and that there was no reason to continue to hold her after the officer decided to cite Lee; and (3) that the officers did not conduct a valid inventory search. Defendant argued that to justify the search as a valid inventory search, the prosecution must demonstrate (1) that the search was done in accordance with standard policies and procedures, which included a policy or practice regarding the opening of containers, and (2) that the inventory search was not used as an excuse to " 'rummage' " for evidence.

In its written opposition, the prosecution argued that the inventory search was valid because it was done in accordance with Marina Police Department policy, which required the officer to impound the vehicle when the registered owner (defendant) was intoxicated and the driver had a suspended license. Alternatively, the prosecution argued that even if the inventory search was invalid, there was probable cause to stop the vehicle after Officer Anderson observed Lee commit three traffic violations, that the scope and duration of defendant's detention was reasonable, and that the odor of marijuana coming from the pickup truck established sufficient probable cause to detain both occupants and search the vehicle.

The court rejected all of defendant's arguments and denied the motion to suppress. The court stated: "[T]he officer did observe the vehicle speeding and it failed to come to

a complete stop. He had reasonable suspicion to detain the vehicle. Upon contacting the occupant of the vehicle, he noticed a mild odor of alcohol and marijuana emitting from the vehicle. That further heightened his suspicions. [¶] He verified that the driver had a suspended license, which is a misdemeanor violation of the law. Based on the driver's comments that he was giving the passenger a ride because she was under the influence of alcohol and that the car was hers, he at that point had in his mind no other person to give the vehicle to and decided to store the vehicle because the driver was not properly licensed and the passenger was presumably under the influence. [¶] The Court does agree that the defendant who was a passenger in the vehicle is—she was not free to leave. That is consistent with the United States Supreme Court case of *Brendlin*[3]. . . . [¶] The officer did testify that Marina Department of Public Safety does have a policy regarding inventory searches. And during that inventory search, some contraband was found. [¶] I don't find that the detention or the seizure was particularly prolonged. I think based on what happened during that time that the time the car was stopped was reasonable, and therefore, I don't find any Fourth Amendment violations."

After the court denied the motion to suppress, defendant pleaded no contest to one count of transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)). The court suspended imposition of sentence and placed defendant on probation for three years. Pursuant to the parties' plea agreement the remaining charges and enhancements in both cases were dismissed.

DISCUSSION

On appeal, defendant contends that her detention was unreasonable because Officer Anderson had no reason to believe that she was involved in criminal activity. She also asserts that the search and seizure cannot be justified as an inventory search "because the prosecution did not establish that it was based on or done in compliance with policy."

[3] *Brendlin v. California* (2007) 551 U.S. 249 (*Brendlin*).

The Attorney General responds that the police did not unlawfully detain defendant and that the warrantless search and seizure was justified under both the automobile exception and the inventory exception to the Fourth Amendment.[4]

Standard of Review

"As the finder of fact in a proceeding to suppress evidence (Pen. Code, § 1538.5), the superior court is vested with the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences in deciding whether a search is constitutionally unreasonable." (*People v. Woods* (1999) 21 Cal.4th 668, 673 (*Woods*).) On appeal, all factual conflicts must be resolved in the manner most favorable to the trial court's disposition. (*Ibid.*)

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362; accord, *People v. Panah* (2005) 35 Cal.4th 395, 465.) In assessing the reasonableness of searches and seizures, we apply federal constitutional standards. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1156, fn. 8.) In the trial court, the "prosecution has the burden of establishing the reasonableness of a warrantless search" by a preponderance of the evidence. (*People v. Jenkins* (2000) 22 Cal.4th 900, 972; *People v. James* (1977) 19 Cal.3d 99, 106, fn. 4, citing *United States v. Matlock* (1974) 415 U.S. 164, 177-178, fn. 14.) On appeal, the appellant bears the burden of demonstrating error. (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 718.) We will affirm the trial court's ruling if it is correct on any applicable theory of law. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)

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[4] Although the prosecution briefed the issue below and the Attorney General relied on the automobile exception in its respondent's brief, defendant did not address this justification in her opening brief or file a reply brief.

General Search and Seizure Principles

The Fourth Amendment to the United States Constitution bans all unreasonable searches and seizures. (*United States v. Ross* (1982) 456 U.S. 798, 825 (*Ross*).) "The ultimate standard set forth in the Fourth Amendment is reasonableness." (*Cady v. Dombrowski* (1973) 413 U.S. 433, 439; *Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 652.) "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." (*Bell v. Wolfish* (1979) 441 U.S. 520, 559.) "The inquiry is substantive in nature, and consists of a subjective and an objective component." (*People v. Ayala* (2000) 23 Cal.4th 225, 255.) To claim Fourth Amendment protection, the defendant must show " 'a subjective expectation of privacy that was objectively reasonable.' [Citation.]" (*Ibid.*) " 'Whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case.' " (*South Dakota v. Opperman* (1976) 428 U.S. 364, 375.)

"Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant, [citation]." (*Vernonia School Dist. 47J v. Acton, supra*, 515 U.S. at p. 653.) Thus, the general rule is that " 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' " (*Arizona v. Gant* (2009) 556 U.S. 332, 338 (*Gant*), quoting *Katz v. United States* (1967) 389 U.S. 347, 357, which was superseded by statute on another ground as stated in *United States v. Koyomejian* (1991) 946 F.2d 1450, 1455.) One of those exceptions is the automobile exception, which applies when there is probable cause to believe a vehicle contains evidence of criminal activity. (*Gant*, at p. 347, citing *Ross*, *supra*, 456 U.S. at pp. 820-821.)

Automobile Exception

The automobile exception permits searches for evidence relevant to offenses other than the offense of arrest. (*Gant, supra*, 556 U.S. at p. 347.) It is rooted in "the historical distinctions between the search of an automobile or other conveyance and the search of a dwelling." (*People v. Superior Court (Nasmeh)* (2007) 151 Cal.App.4th 85, 100.) These distinctions recognize a vehicle's inherent mobility (*ibid.; California v. Carney* (1985) 471 U.S. 386, 394, fn. 3) and acknowledge a reduced expectation of privacy in a vehicle compared to a dwelling. (*Gant, supra*, at p. 345.) "[A]n individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband." (*Ross, supra*, 456 U.S. at p. 823.)

"In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained." (*Ross, supra*, 456 U.S. at p. 809, fn. omitted.) This threshold standard means " 'a fair probability that contraband or evidence of a crime will be found,' [citation]. . . ." (*Alabama v. White* (1990) 496 U.S. 325, 330.) Probable cause to search thus exists "where the known facts and circumstances are sufficient to warrant a [person] of reasonable prudence in the belief that contraband or evidence of a crime will be found, see [citations]." (*Ornelas v. United States* (1996) 517 U.S. 690, 696.) Said another way, "[p]robable cause for a search exists where an officer is aware of facts that would lead a [person] of ordinary caution or prudence to believe, and conscientiously to entertain, a strong suspicion that the object of the search is in the particular place to be searched." (*People v. Dumas* (1973) 9 Cal.3d 871, 885.)

Under the automobile exception, "If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross* . . . authorizes a search of any area of the vehicle in which the evidence might be found." (*Gant, supra*, 556 U.S. at p. 347, citing *Ross, supra*, 456 U.S. at pp. 820-821.) This means the search may extend to "every part of the vehicle and its contents that may conceal the object of the search."

(*Ross, supra*, 456 U.S. at p. 825; see also *Wyoming v. Houghton* (1999) 526 U.S. 295, 307 [passenger's belongings]; *People v. Chavers* (1983) 33 Cal.3d 462, 466 [glove compartment and shaving kit within it].)

Analysis

As we have noted, defendant contends that her detention was unreasonable because Officer Anderson had no reason to believe that she was involved in criminal activity. She also asserts that the search and seizure cannot be justified as an inventory search "because the prosecution did not establish that it was based on or done in compliance with policy." The Attorney General argues that the police did not unlawfully detain defendant and that the warrantless search and seizure was justified under both the automobile exception and the inventory exception to the Fourth Amendment requirement of a warrant. We conclude, on the facts of this case, that there was probable cause to stop the vehicle after the officer observed the driver commit traffic violations and that the search of defendant's pickup truck, including the search of the black backpack and the brown purse, was constitutionally permissible under the automobile exception.

"A traffic stop constitutes a detention under the Fourth Amendment. [Citation.] 'As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred' [citation] or where they can at least ' "point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity" ' [citation]. '[T]he constitutional reasonableness of traffic stops' does *not* 'depend[ ] on the actual motivations of the individual officers involved.' " (*People v. Torres* (2010) 188 Cal.App.4th 775, 785.) When an officer stops a vehicle, both the driver and passenger are seized and detained within the meaning of the Fourth Amendment; the passenger therefore is entitled to challenge the constitutionality of the stop. (*Brendlin, supra*, 551 U.S. at pp. 251, 263.) "A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic

violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." (*Arizona v. Johnson* (2009) 555 U.S. 323, 333, citing *Brendlin*, at p. 258.)

In this case, Officer Anderson had probable cause to stop defendant's pickup truck for traffic violations after he observed it speeding on Del Monte Boulevard and after he saw it fail to stop at the stop sign at Del Monte Boulevard and Beach Road. And under *Brendlin*, since defendant was a passenger in the pickup, she had the right to challenge the constitutionality of the stop and the subsequent search.

After Officer Anderson smelled the odor of marijuana, he had probable cause to search for the drug. Officer Anderson testified that in his initial encounter with the pickup truck, while standing on the driver's side of the truck, speaking with the driver, he noticed "a mild odor of alcohol and marijuana" coming from inside the truck. Officer Anderson testified that at the time of the incident, he had been employed by the Marina Police Department for 11 years. During that time, he received on-the-job training in drug recognition and had handled investigations involving marijuana "quite a few times"; he said he could not "begin to estimate" the number of marijuana cases he had worked on, implying that they were numerous. Thus, the evidence supported the conclusion that he was familiar with the smell of marijuana.

It has long been the rule that the odor of unburned marijuana may furnish probable cause to search a vehicle. In *People v. Gale* (1973) 9 Cal.3d 788, 794 (superseded by statute on another ground, as stated in *People v. Johnson* (1984) 162 Cal.App.3d 1003, 1008) the court held that a police officer having made lawful entry into an automobile could rely on a strong aroma of fresh marijuana as giving the officer " 'probable cause to believe . . . that contraband may be present.' " (See also *United States v. Johns* (1985) 469 U.S. 478, 480, 482 [customs agents investigating drug smuggling, who saw pickup trucks meet planes on isolated airstrip but did not see packages loaded onto the trucks,

had probable cause to search trucks after they "detected the distinct odor" of marijuana as they walked towards the trucks]; *People v. Cook* (1975) 13 Cal.3d 663, 667-669, overruled on other grounds as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 421, [rejecting defendant's contention that the odor of marijuana did not furnish probable cause to search the car where an officer who was familiar with the smell of marijuana detected (1) a strong odor of marijuana in the immediate area of the driver, who had stepped out of the car, and (2) a strong odor of fresh marijuana emanating from inside the car when the passenger, who was seated inside the car, rolled down the window]; *People v. Strasburg* (2007) 148 Cal.App.4th 1052, 1055 [officer had probable cause to search the defendant's car for marijuana when officer smelled marijuana immediately after the defendant opened driver's side door; that defendant had a medical marijuana prescription and could lawfully possess more than what the officer initially found, did not render further search of car, which turned up marijuana in excess of the legal limit, unreasonable].)

Where "probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." (*Ross, supra,* 456 U.S. at p. 825.) Accordingly, the "police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." (*California v. Acevedo* (1991) 500 U.S. 565, 580.) In this case, the odor of marijuana provided probable cause to search the backpack and the purse; both were the type of container where marijuana might be located.

Defendant argues that her detention was unreasonable because the officer testified on cross examination: (1) that if defendant had opened the passenger door, gotten out of the pickup and started to walk away, Officer Anderson would have prevented that; and (2) that after he asked Lee and defendant to step out of the pickup, he had no reason to believe that defendant was involved in any criminal activity. Officer Anderson asked

defendant and Lee to step out of the pickup truck after he conducted the sobriety testing on Lee and after he decided to impound the pickup. The fact that Officer Anderson smelled marijuana when he first contacted Lee and defendant provides probable cause to justify the search under the automobile exception. The facts that (1) defendant was detained when the vehicle was stopped and when she was asked to step out of the vehicle and that (2) the officer testified that he had no reason to believe she was involved in criminal activity do not undermine our conclusion that there was probable cause to stop the pickup truck and that the officer was justified in searching the pickup pursuant to the automobile exception after he smelled marijuana coming from inside the pickup.[5]

DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P. J.

WE CONCUR:

_____
MIHARA, J.

_____
DUFFY, J.*

[5] Our conclusion that the search was justified under the automobile exception obviates the need for us to analyze whether the search was valid under any other exception to the warrant requirement.

*Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.