EMERYVILLE POLICE DEPARTMENT

PROFESSONIAL

SERVICES DIVISION

20-11 Training Bulletin

To: Sworn Personnel

From: Officer M. Shepherd

Date: 7/29/20

Re: People v. Johnson

Please review the People v. Johnson automobile exception to the search warrant requirement proposition 64, HS 11352.1(c) and the lawful possession of marijuana.

Supervisors, please review with all team members.

Thank you,

Officer M. Shepherd #351
Professional Service Division
Emeryville Police Department

Case Law:
The Automobile Exception to the Search Warrant Requirement:
Proposition 64, H&S § 11362.1(c), and the Lawful Possession of Marijuana:
People v. Johnson (June 15, 2020) __ Cal.App.5th __ [2020 Cal.App. LEXIS 533]

Rule: The plain sight observation of a legal amount of marijuana, enclosed in a container not open at that time, even with the odor of marijuana emanating from the vehicle, fails provide the necessary probable cause to search for more marijuana. Proposition 64 and H&S § 11362.1(c) provide an adult person in lawful possession of less than ounce of marijuana protection from being detained, searched, or arrested.

Facts: Stockton Police Officers Aron Clark and William Hall were on patrol (in uniform and in a marked patrol car) when they observed defendant Dammar Darrell Johnson sitting in a parked car on the side of the road. Noting the absence of a valid vehicle registration tab, the officers decided to stop and check him out. Activating their emergency lights, Officer Clark got out of the patrol car as an agitated defendant got out of his. Defendant refused to return to his car despite being told to do so, demanding to know (as he "yelled" at the officers) why he had to get back into his car. When Officer Clark grabbed defendant's arm to maintain control, defendant tensed up and pulled away. Defendant continued to pull away and yell at the officers, resulting in his arrest for resisting (i.e., P.C. § 148). Defendant was handcuffed and placed in the patrol car.

Finding the vehicle's registration to be expired, the officers intended to do an inventory search in preparation for towing it (see Note, below). As Officer Clark approached the driver's side door, he could smell the odor of marijuana emanating from the vehicle. After checking underneath the driver's seat, the officer "went to the center console where (he) found a small bag," of "possibly a couple of grams" of marijuana, "knotted at the top." Believing he now had probable cause to search the entire vehicle for more marijuana, Officer Clark did so, finding a loaded pistol. Charged in state court with being a felon in possession of a firearm (among other charges), defendant's motion to suppress the gun was denied. After pleading "no contest" to this charge, defendant appealed.

Held: The Third Circuit Court of Appeal reversed. With the People failing to argue the possible applicability of an "inventory search" theory, or that the search of defendant's vehicle was a valid "search incident to arrest" (see Note, below), the sole issue on appeal was whether, given what the officers knew at the time, they have sufficient probable cause to search defendant's car? The magistrate at defendant's preliminary examination as well as the Superior Court trial judge both ruled that they did. The Appellate Court disagreed. Under the so-called "automobile exception" to the search warrant requirement, "police who have probable cause to believe a lawfully stopped vehicle contains evidence of criminal activity or contraband may conduct a warrantless search of any area of the vehicle in which the evidence might be found." The "totality of the circumstances" must be considered in determining whether such probable cause exists.

On November 8, 2016, prior to defendant's arrest, California's voters passed the "Control, Regulate and Tax Adult Use of Marijuana Act of 2016," also known as "Proposition 64." Prop. 64 included the enactment of Health & Safety Code § 11362.1(a)(1), legalizing the possession of up to 28.5 grams (an ounce) of marijuana (aka; "cannabis") by adults, 21 years of age or older. Subdivision (c) of Section 11362.1 provides marijuana users with protection from being detained, searched, or arrested, when all that is known is that the user has in his or her possession a legal amount of marijuana. Specifically: "Cannabis and cannabis products involved in anyway with conduct deemed lawful by this section are not contraband nor subject to seizure, and no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest." Thus the legal possession of marijuana is not to be considered when assessing whether "probable cause" exists. The People argued, however, that Section 11362.1(c)'s protection from detention, search, or arrest is inapplicable in this case because defendant was not in lawful

possession of marijuana, having violated both H&S Code § 11362.3(a)(4) (operating a vehicle with an open container of marijuana), and/or Vehicle Code § 23222(b) (driving a vehicle with an unsecured container of marijuana).

Although the record was not clear, the Court assumed for the sake of argument that defendant's baggie of marijuana was both observed in plain sight (i.e., before any search of the car had been initiated) and "knotted" at the top. Based upon these assumptions, what Officer Clark knew at the time he initiated the search of defendant's car that ultimately resulted in the recovery of the gun was that there was an odor of marijuana emanating from the vehicle and that under an ounce of marijuana was observed in plain sight. The People cited three pre-Prop. 64 cases, all indicating that possession of marijuana in under these circumstances was illegal. In People v. Strasburg (2007) 148 Cal.App.4th 1052, the odor of marijuana coming from defendant's car even though defendant offered proof to the effect that he was a lawful "medical marijuana" user—was held to justify a warrantless search of the car. It was held in Strasburg that the medical marijuana law (Medical Cannabis Regulation and Safety Act; Bus. & Prof. Code §§ 19300 et seq.), effective at the time, provided immunity from prosecution, but did not act as a shield from a reasonable investigation and did not detract from the officer's probable cause. When Strasburg was decided, however, "nonmedical" marijuana was still illegal. Thus, the odor of marijuana would always, at that time, provide probable cause to search a car. However, since passage of Prop. 64 (Nov. 2016) and enactment of H&S Code § 11362.1(c), such a circumstance as occurred in Strasburg (i.e., possession of a legal amount of marijuana, along with its odor), now being lawful, no longer constitutes probable cause justifying the search of a car for more.

The Court similarly rejected the continuing validity of People v. Waxler (2014) 224 Cal.App.4th 712. In Waxler, it was held that the odor of burnt marijuana and the observation of a marijuana pipe containing what appeared to be burnt marijuana residue in the pipe's bowl established the necessary probable cause to justify the search of defendant's car for more. Waxler, however, was also decided pre-Prop. 64, and at a time when the observation of any amount of marijuana provided sufficient probable cause to search a vehicle.

Since enactment of H&S Code §11362.1(c), however, making such simple possession legal, that is no longer the case. Lastly, the Court rejected the People's reference to People v. Souza (1994) 9 Cal.4th 224, where it was held that an opened bottle of tequila in plain view in defendant's car entitled the officer to look for more. In Souza, it was held that the observation of an opened bottle of booze established, as a matter of law, probable cause to believe there might be other such bottles in the car. H&S Code§ 11362.3(a)(4) provides an exception to Section 11362.1(c), making it illegal to possess an "open container" of marijuana while operating a vehicle.

Similarly, V.C. § 23222(b) prohibits driving with a receptacle of cannabis that had been opened or with its seal broken, whether or not that container is open when observed by law enforcement. The Court held here that defendant's baggie of marijuana, being tied and "knotted" at the top, was in fact not open, and that the section (H&S § 11362.3(a)(4)) applies only to a container or package of cannabis that is open when found. The fact that it may have been open at one time, or could easily be reopened, does not constitute a violation of H&S Code § 11362.3(a)(4). Section 11362.1(c) therefore continued to provide defendant with protection from detention, search, or arrest. Also, because there was no evidence presented to the effect that defendant had been driving, the Court held that V.C. § 23222(b) (driving with a container of marijuana that had been opened) did not apply to this case. The only post-Prop. 64 case discussed was People v. Fews (2018) 27 Cal.App.5th 553, where defendant was contacted as a passenger in a car from which emanated the odor of recently burned marijuana, and where the driver was holding a halfburnt cigar which was found to contain marijuana. Noting that it is illegal to drive while under the influence of a drug (V.C. § 23152(f)) and to possess an opened container of marijuana (V.C. § 23222(b)), the Fews Court held that the driver of the car in which defendant was a passenger was potentially in violation of both. As such, the Fews court held that Section 11362.1(c)'s protection from detention, search, and arrest was inapplicable, allowing for the search of the car in which Fews was a passenger. The current case, however, is different. Because defendant here

was shown only to be in possession of a lawful amount marijuana, contained in a closed, knotted, baggie, and not in violation of any other statutory restriction, he was shielded from being detained, searched, or arrested pursuant to Section 11362.1(c). The search of his vehicle was therefore unlawful.

Note: So why wasn't it argued on appeal that the gun would have inevitably been found during a lawful inventory search of defendant's car upon its impoundment? That's probably because the officers could not have impounded the car without first showing compliance with the "Community Caretaker Doctrine" which requires proof that the vehicle, if left at the scene, was parked illegally, is blocking traffic or passage, or stands at risk of theft or vandalism. The fact that there is a statute authorizing such an impoundment does not take precedence over the Community Caretaking rules. (See the lengthy Admin. Note on this topic; California Legal Update, Vol. 24, #12, Nov. 23, 2019, or ask me for it and I'll send it to you.) So how about a "search incident to arrest?" Well, with defendant secured in the patrol car, and it not reasonably believed that evidence related to the cause of the arrest (i.e., resisting the officers) might be found in the car, the U.S. Supreme Court has ruled that this theory for conducting a warrantless search of an arrestee's vehicle is no longer valid. (Arizona v. Gant (2009) 556 U.S. 332.)
The trial court ruled accordingly on both theories (see fn. 1.) and the People wisely chose not to make either an issue on appeal. But the important point of this case is that the plain sight observation of a legal amount of marijuana, enclosed in a container not observed to be open at that time, even with the odor of marijuana emanating from the vehicle but with no other potential violations of the law, does not, by itself, provide the necessary probable cause to search the suspect's motor vehicle. An exception might be if the defendant is observed driving the vehicle (or there otherwise being probable cause to believe he had been driving the vehicle) while smoking the stuff (a possible violation of V.C. § 23152(f); driving while under the influence of a drug, and/or V.C. § 23222(b), having an opened container [even if it has been reclosed] of marijuana in a vehicle). In either case, H&S § 11362.1(c) will no longer shield the driver from being detained, searched, or arrested. And while there's no case law on it yet, we might be able to argue that if an officer of proven expertise can credibly testify that the odor he smelled was of "bulk" marijuana, indicating the illegal possession of more than an ounce, or perhaps "recently burned marijuana," suggesting that the driver may be in violation of V.C. § 23222(b) (See People v. Fews, supra, where the driver also cop'd to smoking a cigar laced with marijuana while driving), then we might have an exception to H&S § 11362.1(c) which would allow for a search of the vehicle. On these issues, we must await further clarifying case law.