

No. 19 - _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

TUAN DUC LAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAY 22 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 18-10221

Plaintiff-Appellee,

D.C. No.

v.

3:16-cr-00532-EMC-1

TUAN DUC LAM,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California
Edward M. Chen, District Judge, Presiding

Argued and Submitted May 13, 2019
San Francisco, California

Before: McKEOWN and GOULD, Circuit Judges, and BASTIAN,** District
Judge.

Defendant-Appellant Tuan Duc Lam was convicted of fraudulent use of an
unauthorized access device, in violation of 18 U.S.C. § 1029(a)(2), and aggravated
identify theft, in violation of 18 U.S.C. § 1028A(a)(1), in connection with his use

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Stanley Allen Bastian, United States District Judge for
the Eastern District of Washington, sitting by designation.

of a fake license and credit card to purchase an expensive Rolex watch. Lam appeals his conviction on the ground that the district erred in denying his motion to suppress the license and credit card, which Lam contends were seized during an unlawful search of his person. We have jurisdiction under 28 U.S.C. § 1291, and we affirm. We hold that Sergeant Joseph and Officer McGoon seized the license and credit card during a valid search incident to arrest. *See United States v. Henderson*, 241 F.3d 638, 649 n.1 (9th Cir. 2001) (noting that we may affirm on any basis fairly presented in the record).

First, Sergeant Joseph and Officer McGoon had probable cause to arrest Lam at the time of the search. *See United States v. Johnson*, 913 F.3d 793, 799 (9th Cir. 2019); *United States v. Valencia-Amezcu*a, 278 F.3d 901, 906 (9th Cir. 2002). A store employee had told them that it was unusual for a person to purchase a \$14,000 watch one day and then return for a \$13,000 watch the next day, which is what Lam did. When Lam first saw the officers, it appeared to them as if Lam was going to flee. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 587 (2018); *Criswell v. Comstock*, 396 F.2d 857, 859 (9th Cir. 1968). Finally, the officers had strong evidence that Lam had used a fake license to purchase the watch. The officers reviewed a photocopy of the license, taken by the jewelry store at the time of Lam's purchase, before their interaction with Lam. The license Lam used showed that "Henry Lee" was 40 years old and showed a picture of a

man who looked about 40 years old. But, based on DMV records, the officers knew the real Henry Lee was 70 years old.

Contending that the officers lacked probable cause, Lam urges that the age discrepancy on the license could have been error on the part of the DMV, or it could have some other innocent explanation. He also contends that Officer McGoon’s statement that “without the actual card, [Officer McGoon] could not verify its validity” shows that the officers did not have probable cause to believe Lam had committed a crime. But Lam’s arguments ignore that there need only be a “fair probability that [Lam] had committed a crime.” *Valencia-Amezcu*a, 278 F.3d at 906. The information available to the officers need not demonstrate that Lam committed a crime beyond a reasonable doubt, or even by a preponderance of the evidence. *See Herring v. United States*, 555 U.S. 135, 139 (2009). Here, we conclude that the evidence known to the officers was sufficient to establish probable cause.

Second, “the arrest . . . follow[ed] during a continuous sequence of events.” *Johnson*, 913 F.3d at 799. Although the parties dispute the precise moment that Lam was under “arrest,” we conclude that the arrest occurred at least once Lam was handcuffed and read his *Miranda* rights. At that point, a “reasonable person” would not “feel that he or she [would] be free to leave after brief questioning.” *United States v. Guzman–Padilla*, 573 F.3d 865, 884 (9th Cir. 2009); *see also*

Berkemer v. McCarty, 468 U.S. 420, 440 (1984); *United States v. Bravo*, 295 F.3d 1002, 1010 (9th Cir. 2002). Lam's arrest occurred less than two minutes after the search and without intervening acts. The officers merely asked Lam his name, where the watch was, and provided the credit card information to dispatch. *Cf. United States v. McLaughlin*, 170 F.3d 889, 893 (9th Cir. 1999); *United States v. Hudson*, 100 F.3d 1409, 1413, 1419 (9th Cir. 1996).

The district court held that the search of Lam was not a valid search incident to arrest because the officers did not need to search Lam's wallet once they seized it. The court reasoned that the officers could have instead obtained a warrant. The district court erred on this point. We have long held that law enforcement may search the contents of a wallet incident to lawful arrest. *See United States v. Passaro*, 624 F.2d 938, 944 (9th Cir. 1980); *see also Riley v. California*, 573 U.S. 373, 392–93 (2014); *United States v. Molinaro*, 877 F.2d 1341, 1346–47 (7th Cir. 1989); *United States v. Richardson*, 764 F.2d 1514, 1527 (11th Cir. 1985).

Because the search was incident to lawful arrest, we affirm the district court's decision denying Lam's motion to suppress. We do not reach the alternative contention that the license and credit card would inevitably have been discovered.

AFFIRMED.

1 **MS. KOTIYA:** Your Honor, just one thing. In looking back
2 through *Smith* to find the scope, addressing the scope of the
3 search incident to arrest, the Court states (As read):

4 "Such searches have long been considered valid
5 despite the absence of a warrant because of the need
6 to remove any weapons that threaten the arresting
7 officers or bystanders, and the need to prevent
8 concealment or destruction of evidence."

9 And I think prior to that, they talk about that in this case
10 it was --

11 **THE COURT:** Well, once you have the wallet, what's the
12 danger of concealment and destruction? Still, I understand, but
13 I don't see a search incident to arrest just based on that, on
14 that ground. Even under *Smith*, what you have just read.

15 All right, I'm going to deny the motion to suppress. I find
16 that there was going to be an arrest made; there was substantial
17 evidence, even before the point of any arguable arrest, of guilt
18 in this case. Including the circumstances that were discussed,
19 and the observations made by the clerk and the observations --
20 or both clerks, I guess, said at the jewelry shop; as well as
21 the observations by the officer; the fact that this was a fairly
22 -- fairly evident that this was a fraudulent ID that was used,
23 both because of the font that was different and the huge
24 discrepancy in the age that was represented on that card,
25 birthdate, given the fact that the same individual came back the

1 second day to buy a second Rolex watch.

2 So there was already substantial evidence of guilt. And
3 even though there had not been consent until that phone call was
4 made to H.L., certainly a reasonable inference, when you look at
5 a credit card in somebody's name and you look at the driver's
6 license and it clearly was either forged or faked or altered in
7 some way, it's hard to imagine why someone -- the victim in that
8 circumstance would consent to a forgery or alteration of a
9 driver's license.

10 Now, whether the arrest was effectuated at the moment of the
11 handcuffing through some objective standard, or whether it is
12 based on the intent of the officers as to the precise timing of
13 effectuating an arrest, i.e. the giving of the Miranda rights, I
14 don't think is critical here because I also find that this
15 cannot be justified as a search incident to an arrest. Whenever
16 that arrest was made, this was not a valid search.

17 That is, obtaining the wallet may have been a valid search,
18 but opening that wallet and looking through it and finding the
19 driver's license was not necessary to officer safety, was not
20 necessary to prevent the destruction or concealment of
21 contraband, and cannot be justified under the usual rationale
22 for a search incident to arrest.

23 The proper thing for the police to have done in this case
24 would have been to go get a warrant. Because they had custody,
25 he was safe, and there was no urgency at that point.

1 And, at that point, even without that warrant, without the
2 wallet, they had probable cause certainly by the time they
3 contacted H.L. to effectuate the arrest. So, there was no real
4 need. And I don't think you can use an arrest -- the search
5 incident to arrest doctrine to justify obtaining evidence then
6 used to substantiate probable cause. But in this case, I don't
7 think it was necessary for probable cause. But nonetheless, it
8 was not a valid search incident to arrest.

9 However, I find that given the sequence of events, given the
10 way things unfolded, I think it's clear that this defendant was
11 going to be arrested, particularly when there was substantiation
12 that there had not been consent. And therefore, the wallet
13 would have been inventoried and searched at that point, opened
14 up, and therefore, the driver's license would have been
15 uncovered through the process of an inventory search, and
16 therefore, it would have inevitably come to light in terms of
17 the actual document in question, the -- the -- the driver's
18 license.

19 **MS. LINKER:** Your Honor, if I may, since we didn't address
20 this in the argument and I wish that we had, given Your Honor's
21 ruling, the inventory procedure that Officer McGoon put in his
22 declaration does not state that it is the standard procedure for
23 Marin County, as their inventory, to look at each individual
24 document. It's to take narcotics, contraband, dangerous items.
25 But that he did not state anywhere in his declaration that they

1 would look through the individual documents.

2 And as we cited, *Illinois versus Lafayette* and then the
3 District Court opinion in the Central District for *Collier*
4 (Phonetic) of what the exact parameters of the policy are that
5 exist, I don't think Officer McGoon's declaration is sufficient,
6 even if Your Honor -- you know, obviously I don't agree with
7 Your Honor that it's inevitable discovery.

8 But if we are then looking at just the inventory procedures,
9 the government has not met its burden to establish that under
10 the inventory procedures, it would have pulled each license or
11 credit card out of a wallet as part of the inventory procedure.
12 That would be what Your Honor's concerned about.

13 Let's say it's a diary, searching the actual diary. They
14 still would have needed to get a warrant to search the wallet.
15 I often get back from my clients when they've been booked in to
16 jail, their wallet is intact. They do not go through wallets
17 and pull out each and every item. Nor has the government
18 offered any evidence to suggest that they -- that the Marin
19 County booking procedure does that.

20 **THE COURT:** Okay. What's your response to that?

21 **MS. KOTIYA:** Your Honor, if I could direct the Court to
22 Paragraph 20 of Officer McGoon's declaration, it's on Pages 6
23 through 7. And at the end of that paragraph he says:

24 "As part of the inventory search, everything on the
25 individual's person except for clothing is removed

1 and placed into a bag to be inventoried at the jail."

2 And that is what the officer says he does at the point of
3 transport. Then when it is inventoried, he says:

4 "Any illegal items are kept separate from the
5 individual's personal property and kept by CMPA as
6 evidence."

7 So at that point I think what we are dealing with here is a
8 stolen credit card and a fake ID used with that stolen credit
9 card, those are illegal items. Those would be removed from the
10 wallet, and would be kept separately by CMPA as evidence of the
11 crime.

12 **THE COURT:** We're talking about contraband. At this point,
13 that driver's license is not mere evidence. It, itself, becomes
14 contraband. It's an illegal document.

15 **MS. LINKER:** It is evidence of the crime for which he is
16 charged, and it is exactly what a warrant needs to be obtained
17 to search. There is a container -- the wallet is not
18 contraband. The wallet, itself, is not contraband. To go
19 inside the wallet and pull out those cards.

20 If they submitted a declaration with the policy of Marin
21 County that said: We take every card out of a wallet and we
22 inventory every single card so that we know it, then I would
23 lose on Your Honor's ruling. I would lose. They did not submit
24 that.

25 **THE COURT:** You're saying it's a failure of evidence. That

1 would be a legal procedure to go through. And if you believe
2 that a driver's license is forged and a wallet contains it, that
3 that -- that can be obtained if there's proper procedure, it's
4 not unconstitutional.

5 **MS. LINKER:** I'm not claiming that Marin County -- if that
6 is Marin County's booking procedure that they do that in every
7 case, I'm not claiming that's unconstitutional. I don't believe
8 that is what they do, nor has the government provided any
9 evidence that that is what --

10 **THE COURT:** You're saying there is a failure of factual
11 proof that is their normal process to discover and to obtain
12 something like a suspected driver's license, and therefore, it
13 would not have -- as a matter of fact, not a matter of
14 constitutional law --

15 **MS. LINKER:** Correct.

16 **THE COURT:** -- not been discovered.

17 **MS. LINKER:** Correct. Not only the proof -- the proof that
18 they provided in Paragraph 20 doesn't say what they would need
19 to say, which makes me think they couldn't say it, because they
20 had the opportunity to do so.

21 Paragraph 20 does not say -- they knew what they were
22 getting at, it's the driver's license and the credit card in the
23 wallet. And he just generically talks about: We go through
24 everything. That's what he says.

25 And they didn't offer --

1 **THE COURT:** Well, he says that any illegal items are kept
2 separate.

3 **MS. LINKER:** But, to get to that illegal item in the wallet.
4 The wallet, itself, is not illegal.

5 **THE COURT:** Well, it is implied. For instance, if this were
6 a drug case, and that they would have looked for, you know,
7 packs of sealed cocaine or something in a wallet. I mean, that
8 seems to me that's fair a inference from this. It's hard to
9 believe they wouldn't do that.

10 **MS. LINKER:** In a booking procedure, to take a wallet,
11 that's not the normal booking procedure to go through someone's
12 wallet and take out all the individual items in their wallet.
13 It just doesn't happen. It's not their booking procedure. It's
14 not what Officer McGoon said was their booking procedure. It
15 doesn't happen.

16 **THE COURT:** I'll give you the last word on that.

17 **MS. KOTIYA:** Your Honor, I think that is exactly what
18 Officer McGoon says is their procedure, is any illegal items are
19 kept separate from the individual's personal property. In a
20 case, as Your Honor mentions, if this were a drug case, and the
21 wallet, itself, could house any small quantity of drugs, they
22 would open the wallet, take the drugs, keep those items separate
23 from the wallet, itself, as part of the defendant's personal
24 property.

25 Similarly, in a case like this, a fraud case, an

1 access-device fraud case, you're talking about looking in the
2 wallet, removing the illegal items -- the illegal items that
3 have previously been identified, and putting those separate from
4 his personal property. Because those are not items that would
5 be kept as part of his personal property. The personal property
6 is something that will be returned to him if he's released from
7 that facility.

8 **MS. LINKER:** Your Honor, the government just said
9 "previously identified," because of the illegal search. They
10 didn't know at that point whether he had illegal items in his
11 wallet. They had no idea --

12 **THE COURT:** Well, identified -- they knew what the item is
13 in question. This is not like rummaging through and then
14 finding a packet of drugs or something on somebody.

15 **MS. LINKER:** But Your Honor, the inventory search procedure
16 for the jail is an administrative procedure designed to catalog
17 what a person has when they go into custody. It is not designed
18 to seek out additional evidence.

19 If they want to seek out additional evidence, based on what
20 they find, they can get a warrant. It's preserved at that
21 point. There is no reason to do so.

22 Nor does the Marin County --

23 **THE COURT:** Well, now, you're saying there is a
24 constitutional problem if their purpose is to find contraband.

25 **MS. LINKER:** What I'm saying, Your Honor, is they did not

1 follow their own booking procedure.

2 If Your Honor -- because Your Honor is now speculating,
3 because under the inevitable discovery doctrine, while we're not
4 supposed to be speculating what we would have done, and had they
5 not known about this in the wallet from the illegal search,
6 under their booking procedure they would not have gone through
7 the wallet. They wouldn't. Because it's not part of the
8 booking procedure to do so.

9 **THE COURT:** All right. Well, I find that the proof that's
10 been offered by the government is -- is sufficient to satisfy or
11 sustain the finding that the inevitability doctrine would apply
12 here.

13 I will note this declaration was filed in opposition,
14 correct?

15 **MS. KOTIYA:** Yes, Your Honor.

16 **THE COURT:** Is part of the opposition?

17 **MS. KOTIYA:** That's correct.

18 **THE COURT:** If, in reply, you believe that the Marin County
19 procedures were not to include in the inventory process finding
20 alleged contraband, targeted contraband in a wallet in a case
21 such as this, you know, you had an opportunity to submit
22 something. But there's been no submission on that particular
23 point.

24 And so, based on the state of the record, I find that as a
25 matter of fact, that this, the item in question, the driver's

1 license, would have been inevitably found.

2 **MS. LINKER:** Your Honor, just to preserve my record, it
3 wasn't our burden to do so. It was the government's burden.

4 **THE COURT:** Right. My point is you had the opportunity if
5 you wanted to flesh that out and demonstrate why this was a
6 misleading declaration, or incomplete. I'm not saying, you
7 know, you had to. I'm just saying that you had an opportunity
8 to do so.

9 So, based on the record before me, that's my finding. I
10 deny the motion to suppress.

11 So what's the next step?

12 **MS. KOTIYA:** Your Honor, I think we should set the matter
13 over for a status.

14 **MS. LINKER:** That's correct, Your Honor.

15 He has another appearance in Santa Clara County on
16 August 14th. So I think we should set it shortly thereafter.

17 **MS. KOTIYA:** What was the date you said?

18 **MS. LINKER:** August 14th. Is Your Honor available on
19 August 23rd?

20 **THE CLERK:** Yes.

21 **THE COURT:** All right? August 23rd?

22 **MS. KOTIYA:** That's fine, Your Honor.

23 **THE COURT:** 2:30?

24 **MS. KOTIYA:** Fine with the government, Your Honor.

25 **THE CLERK:** Yes, Your Honor.