

Appendix A

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUSTIN MORLEY PULLMAN,

Defendant and Appellant.

H043168

(Santa Cruz County

Super. Ct. No. F27959)

Defendant Justin Morley Pullman was convicted of manufacturing a form of concentrated cannabis known as butane honey oil. He challenges the trial court's order denying his motion to suppress evidence and quash a search warrant, and he claims his trial counsel was ineffective for failing to produce evidence of the seized property at the suppression hearing. For the reasons stated here, we will affirm the judgment.

I. BACKGROUND

A. THE SEARCH WARRANT

On October 9, 2014, police officers obtained a warrant to search defendant's residence for all forms of marijuana, including marijuana by-products and derivatives such as hash and honey oil extract, and items used to manufacture butane honey oil. According to the statement of probable cause supporting the warrant, the Santa Cruz Police Department received an anonymous tip of a drug lab at a residence on Fairland Way. Later that day, Santa Cruz County Anti-Crime Team agents responded to the residence for what they later called a "knock and talk." The officers noticed a strong

odor of marijuana emitting from inside the home when defendant opened the front door. Defendant asked “[d]o you want to come in?” Then he asked “[w]hat’s going on?” Officer Voorhees, the search warrant affiant, explained the reason for the visit, and told defendant he smelled marijuana. He asked defendant if there was a meth lab inside the house, and defendant said no. Then he asked about the marijuana smell and defendant said “[t]here’s no marijuana either.”

Sergeant Hansen told defendant the officers were part of a narcotics task force following up on an anonymous tip. He told defendant the officers could clearly smell marijuana coming from the house, and defendant said he had a medical marijuana card which allowed him to have “a couple grams of [m]arijuana [b]ud.” Sergeant Hansen asked defendant, who was 34 years old, about his medical need for marijuana. He said he had “lower back pain from life and standing up straight.” Sergeant Hansen asked defendant if he was cooking butane honey oil or methamphetamine, or whether he had a large amount of marijuana or an indoor grow. Defendant answered no to every question. Sergeant Hansen asked defendant if he would mind the officers taking a look around inside the house. Defendant said he would mind and it was his right to refuse. Sergeant Hanson asked defendant for his medical marijuana card, which defendant produced.

Based on the officers’ observations while speaking with defendant, the strong odor of marijuana in the house, defendant’s nervousness, his invitation to enter the home before learning the purpose of the officers’ visit, and the anonymous tip, the officers decided to “freeze” the residence while they obtained a search warrant. The officers then walked down the driveway to the backyard to look for anyone outside the residence. From his vantage point on the driveway, Officer Voorhees saw a table near the back door to the house with several items used for butane honey oil manufacturing. Officer Voorhees was familiar with the process for making butane honey oil. Based on his training and experience, he knew that THC is an oil-based resin which liquefies when exposed to butane, and that butane is used to extract THC from the female marijuana

plant using a tubular instrument made from impervious material. Officer Voorhees also knew from his training and experience that selling marijuana is profitable, that people who grow marijuana often sell it, and that some persons who illegally grow and sell marijuana, and who manufacture honey oil, claim to be medical marijuana patients and seek protection from arrest and prosecution on that basis.

Defendant's residence was searched later that evening. Over 1,000 grams of honey oil, 200 pounds of marijuana, honey oil manufacturing paraphernalia, several digital scales, packaging materials, and bank records (including information for a PMP Labs account) were found in drawers, cabinets, closets, refrigerators, freezers, ice chests, and garbage cans throughout the house and garage. Defendant was carrying \$1,633 in cash and a \$500 money order payable to PMP Labs. Defendant was arrested and charged with manufacturing concentrated cannabis (Health & Saf. Code, § 11379.6, subd. (a); count 1) and possession of marijuana for sale (former Health & Saf. Code, § 11359; count 2).

B. MOTION TO SUPPRESS EVIDENCE AND QUASH THE SEARCH WARRANT

Defendant moved to suppress evidence and quash the search warrant. He argued that when they entered the driveway to look in the backyard, the officers conducted a warrantless search of the fenced, private curtilage of his home violating the Fourth Amendment. He argued that without the evidence of butane honey oil manufacturing they saw in the backyard, the officers lacked probable cause for a search warrant because the anonymous tip was insufficient to support the warrant, and the odor of marijuana coupled with "the nervous production of a valid medical marijuana card ... add[ed] nothing" to the probable cause inquiry.

The prosecution countered that for officer safety and to prevent the destruction or removal of evidence, the officers were justified in conducting a cursory check of the premises to secure the residence, and the butane honey oil manufacturing paraphernalia was seen in plain view during a minimally intrusive lawful entry. The prosecution

argued in the alternative that the search warrant would be valid even if the backyard viewing were deemed unreasonable because discovery of the honey oil manufacturing supplies was not necessary to provide probable cause.

Officer Voorhees testified that he and two other officers went to defendant's residence, and he immediately noticed "a very strong smell of fresh marijuana" from the front porch as defendant opened the door. The odor was not consistent with a permissible amount, but rather with "a large amount of fresh marijuana plants growing inside the residence." He clarified that defendant had asked the officers if they wanted to come in before the officers announced the reason for their visit, and the officers spoke with defendant at the front door for about five minutes before deciding to obtain a search warrant. At that time, the third officer detained defendant on the front steps, and Officer Voorhees and Sergeant Hansen secured the outside of the residence as part of their standard procedure when freezing a residence for a search warrant. They walked along the driveway which lead to a detached garage behind the residence, conducting a cursory visual search for officer safety reasons and to confirm that no one was trying to leave by the back door.

Officer Voorhees testified that he was familiar with the Santa Cruz County medical marijuana guidelines, and he agreed with trial counsel that county guidelines permitted defendant to have up to 99 marijuana plants.¹ He also testified that that the anonymous tip was provided by someone who had overheard a conversation about a drug lab at the residence.

¹ The record contains no citation to county guidelines, and defendant provides none in his appellate briefing. Since 2004, the Santa Cruz County Board of Supervisors has authorized a person holding a valid medical marijuana identification card to possess "up to three pounds of dried cannabis bud or conversion per year," and to "cultivate cannabis in an amount not to exceed more than one hundred square feet of total garden canopy, as measured by the combined vegetative growth area." (Santa Cruz County Code, § 7.124.070; former §§ 7.124.030 and 7.124.105.)

Defendant's moving papers did not address whether, in the event the officers' decision to freeze the residence was supported by probable cause, the security sweep was reasonable. When asked by the trial court what the prosecution needed to show to establish a lawful security sweep, defendant argued that "a quick run around the back to see if somebody is back there is one thing, but observations that lead to probable cause ... based on specialized training" rendered the sweep unlawful under *Florida v. Jardines* (2013) 133 S.Ct 1409.

The trial court denied the motion, finding that the decision to freeze the house and obtain a warrant was appropriate under the circumstances. The court based its decision on Officer Voorhees's training and experience, the tip that a drug lab was operating out of the residence, the strong odor of marijuana emitting from the house, defendant's nervousness, and his denial of any marijuana in the residence. The court found that the security sweep was reasonable for officer safety purposes, was not overly intrusive, and that the items used for manufacturing butane honey oil were in plain view during the sweep. It found that probable cause supported the search warrant, even without considering the officer's observations of honey oil manufacturing.

C. TRIAL COURT DISPOSITION

Defendant pleaded no contest to count 1, and count 2 was dismissed. Imposition of sentence was suspended, and defendant was placed on formal probation for three years under conditions that included 180 days in county jail.

II. DISCUSSION

Defendant argues that the officers lacked probable cause to freeze his home and search his backyard because the odor of marijuana is not probative of criminal activity given the decriminalization of marijuana for personal and medical use.² In defendant's

² The search warrant was executed in 2014, when possession of not more than 28.5 grams of marijuana (other than concentrated cannabis) was punishable by a fine not
(Continued)

view, Officer Voorhees’s belief that there was “a large amount of fresh marijuana” in the house was not probative of criminal activity because it was also consistent with lawful possession of medical marijuana.

Unlike a search, which implicates privacy interests, seizure affects only property interests. (*Segura v. United States* (1984) 468 U.S. 796, 806.) A possessory interest in property will give way to society’s interest in discovering and protecting incriminating evidence from removal or destruction without a warrant, at least for a limited period, provided a seizure is supported by probable cause. (*Id.* at p. 808.) Thus, once an officer has probable cause to believe a residence contains contraband, securing the residence to prevent the destruction or removal of that evidence while a search warrant is being sought is not itself an unreasonable seizure of either the home or its contents. (*Id.* at p. 810.) Probable cause exists when, based upon the totality of the circumstances “ ‘there is a fair probability that contraband or evidence of a crime will be found in a particular place.’ ” (*People v. Farley* (2009) 46 Cal.4th 1053, 1098, quoting *Illinois v. Gates* (1983) 462 U.S. 213, 238.) “A ‘practical, nontechnical’ probability that incriminating evidence is involved is all that is required.” (*Texas v. Brown* (1983) 460 U.S. 730, 742.)

A. THE OFFICERS HAD PROBABLE CAUSE TO SEIZE THE RESIDENCE

Officer Voorhees’s decision to seize the residence and obtain a warrant was based not only on the strong odor of fresh marijuana emitting from the residence—an odor

to exceed \$100 (former Health & Saf. Code, § 11357, subd. (b)), and possession of 28.5 grams or more of marijuana (other than concentrated cannabis) was punishable by up to six months in jail, a fine not to exceed \$500, or both (*id.*, § 11357, subd. (c)). Possession of concentrated cannabis was punishable as a wobbler (*id.*, § 11357, subd. (a)), and possession of marijuana for sale, marijuana cultivation, and manufacturing concentrated cannabis were felonies. (*Id.*, §§ 11358, 11359, and 11379.6.)

Proposition 215, also known as the Compassionate Use Act of 1996 (Health & Saf. Code, § 11362.5, et seq.), authorized marijuana use for medical purposes based on a physician’s recommendation, and the 2003 Medical Marijuana Program Act (*id.*, § 11362.7, et seq.) established a voluntary medical marijuana identification card program.

which can provide probable cause for a search warrant (*Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1240)—but also on several other factors. Despite the strong odor, defendant denied having any marijuana in the home, and he appeared nervous. When pressed, he said he had a medical marijuana card which allowed him to possess a couple grams of marijuana. Based on his training and experience, Officer Voorhees knew that people who grow marijuana often sell it because it is very profitable, and that some medical marijuana users illegally grow, sell, and manufacture marijuana by-products such as butane honey oil. The officers were investigating an anonymous tip about a drug lab, and they suspected that defendant could be manufacturing butane honey oil, which Officer Voorhees knew involved extracting THC from the female marijuana plant. Although defendant showed the officers a medical marijuana identification card, he did not volunteer the card or claim to be cultivating marijuana for medical use. Those facts, considered collectively, give rise to a fair probability that contraband or evidence of a crime would be found at the residence, and provide the requisite probable cause to seize the residence and obtain a warrant to search for felony criminal activity.

B. DEFENDANT’S STATUS AS A MEDICAL MARIJUANA USER DOES NOT DISPEL PROBABLE CAUSE

In *People v. Waxler* (2014) 224 Cal.App.4th 712 (*Waxler*), the First District Court of Appeal addressed the ramifications of California’s medical marijuana law on a probable cause determination for possession of marijuana. *Waxler* involved a warrantless vehicle search supported by the odor of burnt marijuana coming from the defendant’s truck and the observation of burnt marijuana in a pipe in the vehicle. The defendant in *Waxler* was a medical marijuana user, and he produced a medical marijuana identification card at some point after the officer started searching his truck. (*Id.* at p. 716 & fn. 2.)

The *Waxler* court upheld the search, explaining that the automobile exception to the warrant requirement (allowing a warrantless vehicle search for contraband or

evidence of a crime based on probable cause) was not limited to situations where an officer sees or smells more than 28.5 grams of marijuana (an amount which constituted a jailable offense under former Health and Safety Code section 11357, subdivision (b)). (*Waxler, supra*, 224 Cal.App.4th at pp. 720, 725.) The observation of any amount of marijuana, which could be contraband, established probable cause to search an automobile, and a medical marijuana card did not preclude a warrantless automobile search otherwise supported by probable cause. (*Id.* at pp. 725–726.) The *Waxler* court noted that the Compassionate Use Act did not shield a medical marijuana user from a reasonable law enforcement investigation, nor was it “ ‘intended to be “a sort of ‘open sesame’ regarding the possession, transportation and sale of marijuana” ’ ” in California. (*Id.* at p. 722, fn. 4.) The *Waxler* court’s view is consistent with *People v. Mower* (2002) 28 Cal.4th 457, where the California Supreme Court explained that the Compassionate Use Act does not immunize a medical marijuana user from arrest when there is probable cause to believe the substance is possessed or cultivated for other than personal medical use. (*Id.* at p. 469.) In our view, the *Waxler* court’s understanding of the law is accurate, and we decline defendant’s invitation to depart from its reasoning.

Defendant argues that we should instead follow *State v. Sisco* (Ariz.Ct.App. 2015) 238 Ariz. 229, an Arizona Court of Appeals decision which held that the odor of marijuana alone was insufficient to establish probable cause of criminal activity in light of Arizona’s medical marijuana law. But that holding was rejected (and the opinion vacated) by the Arizona Supreme Court, which has since held, consistent with our high court’s views, that the odor of marijuana alone can establish probable cause for issuance of a search warrant unless other facts would cause a reasonable person to believe the marijuana use or possession is authorized by state medical marijuana law. (*State v. Sisco* (2016) 239 Ariz. 532, 534 (*Sisco*); accord *Robey v. Superior Court, supra*, 56 Cal.4th at p. 1240; *People v. Mower, supra*, 28 Cal.4th at p. 469 [probable cause depends on all facts including medical marijuana patient status].) The Arizona Supreme Court reasoned

that the Arizona Medical Marijuana Act made marijuana legal in only limited circumstances; in most circumstances the odor of marijuana continued to establish probable cause that contraband is present. (*Sisco*, at pp. 536–537.) A medical marijuana registration card may eliminate probable cause derived from the mere sight or smell of marijuana, but other facts may exist to suggest that the presence of marijuana is not consistent with lawful medical use.

Our conclusion that the officers had probable cause to seize defendant’s residence is supported by the *Mower*, *Robey*, *Waxler*, and *Sisco* opinions. Given the totality of the circumstances here, defendant’s production of a medical marijuana identification card did not undermine the officers’ belief that he was illegally possessing marijuana. Defendant produced the identification card after denying having any marijuana on the premises, telling the officers that the card allowed him to have “a couple grams of bud,” and only after being asked to produce the card. He did not claim to be lawfully growing marijuana for personal medical use, and the card did not shield defendant’s home from a lawful investigation.

C. DEFENDANT’S OTHER AUTHORITIES ARE DISTINGUISHABLE

Defendant’s reliance on *People v. Hua* (2008) 158 Cal.App.4th 1027 (*Hua*) is inapposite. In that case, evidence of marijuana use did not establish exigent circumstances justifying the warrantless entry into a home to preserve from imminent destruction evidence of a crime punishable by incarceration. (*Id.* at pp.1034–1035.) As the *Hua* court explained, a warrantless entry to search for marijuana would require probable cause to suspect the presence of more than 28.5 grams of marijuana, an amount punishable by a jail sentence under former Health and Safety Code section 11357, subdivision (b). Responding to a noise disturbance call, officers in *Hua* smelled burnt marijuana coming from an apartment and saw someone smoking marijuana inside the apartment through a window. (*Hua*, at pp. 1030–1031.) But those observations did not necessarily suggest possession of more than 28.5 grams marijuana and thus did not

support the warrantless entry. (*Id.* at p. 1036.) Similarly, in *People v. Torres* (2012) 205 Cal.App.4th 989, the court held that the odor of burning marijuana coming from a hotel room did not support the belief that more than 28.5 grams of marijuana would be found in the room sufficient to justify an exigent warrantless entry. (*Id.* at pp. 995–996.) In contrast to the facts in *Hua* and *Torres*, officers here observed more than evidence of marijuana being smoked—they observed a strong odor of fresh marijuana plants emitting from the front door of a private residence following a tip that a drug lab was operating out of that location.

The other cases cited by defendant do not change our view that Officer Voorhees had probable cause to seize defendant’s home, as they involve the application of other states’ marijuana and procedural laws to automobile searches (*Commonwealth v. Cruz* (2011) 459 Mass 459 and *Commonwealth v. Overmyer* (2014) 469 Mass 16), and searches incident to an arrest (*State v. Ortega* (Minn. 2009) 770 N.W.2d 145).

D. A REDACTED AFFIDAVIT SUPPLIES PROBABLE CAUSE FOR THE SEARCH WARRANT

Responding to the Attorney General’s argument that the officers conducted a lawful protective safety sweep under *Maryland v. Buie* (1990) 494 U.S. 325, defendant argues in his reply brief that the officers’ presence in his backyard was not a lawful security sweep because the record did not provide a basis for the officers to believe that someone in the backyard posed a threat to their safety. We need not address whether the officers’ canvass of the backyard was reasonable under the Fourth Amendment for officer safety purposes under *Buie* or to secure the premises against loss or destruction of evidence, as the prosecutor also argued in the trial court. (See *Illinois v. McArthur* (2001) 531 U.S. 326, 333–334 [recognizing that a temporary seizure involves sealing premises to prevent destruction of evidence].) Nor are we required to address how the United States Supreme Court’s decision in *Florida v. Jardines* (2013) 133 S.Ct 1409 would bear on those issues.

Even if the perimeter sweep here were deemed unreasonable under the Fourth Amendment, it does not necessarily follow that the search was unlawful. A warrant will be upheld if, with any tainted information excised, the remaining information establishes probable cause. (*People v. Weiss* (1999) 20 Cal.4th 1073, 1081.) We agree with the trial court that even with Officer Voorhees's observations of the honey oil manufacturing materials redacted from his affidavit, the affidavit would still provide probable cause to believe that defendant was using the residence as a means of committing a felony, based on the tip, the odor of marijuana, comments made by defendant, and Officer Voorhees's training and experience.

E. TRIAL COUNSEL WAS NOT CONSTITUTIONALLY INEFFECTIVE

Defendant argues that trial counsel had a duty "to produce evidence regarding the items that were seized from [his] home" at the hearing on his motion to suppress "in order to effectively argue that the items should be suppressed." According to defendant, counsel rendered prejudicially deficient assistance if he failed to present adequate evidence of the seizure, despite an attempt to do so.

The occurrence of a seizure leading to criminal charges was not in dispute here, and we are aware of no authority requiring a defendant to produce particular evidence of items being seized in order to move for their suppression. Defendant's notice of motion identified the evidence to be suppressed as "all items of evidence observed or seized from the residence" on Fairland Way, "and specifically those items detailed in the Santa Cruz County Anti-Crime Team evidence and photographic report, attached as the return to the warrant, which is found as Exhibit A" to counsel's declaration filed in support of the motion. Exhibit A contained the search warrant without the return, but the return and its inventory of seized items were attached to the prosecution's opposition to defendant's motion. Counsel's failure to attach the return to his motion was an oversight, not constitutionally deficient performance, and we conclude no prejudice resulted from the omission. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)

III. DISPOSITION

The judgment is affirmed.

Grover, J.

WE CONCUR:

Rushing, P. J.

Premo, J.

Appendix B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,
Plaintiff and Respondent,
v.
JUSTIN MORLEY PULLMAN,
Defendant and Appellant.

H043168
Santa Cruz County No. F27959

BY THE COURT*:

Appellant's petition for rehearing is denied.

Date: _____ P.J.

*Before Rushing, P.J., Premo, J. and Grover, J.

Appendix C

SUPREME COURT
FILED

OCT 11 2017

Court of Appeal, Sixth Appellate District - No. H043168

Jorge Navarrete Clerk

S243429

IN THE SUPREME COURT OF CALIFORNIA

Deputy

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JUSTIN MORLEY PULLMAN, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice