

People v. Fews

(2018) __ Cal.App.5th __ [2018 WL 4560914]

Issues

(1) Did officers have adequate grounds to pat search the defendant? (2) Under what circumstances may officers in California search a vehicle for marijuana?

Facts

Two SFPD officers were on patrol in the city's Tenderloin District at about 4 P.M. when the driver of an SUV in front of them pulled "abruptly" to the curb and stopped. Because the registration on the SUV had expired, the officers stopped behind it and turned on their red lights. There were two men in the vehicle, and both of them immediately started rummaging around. Specifically, the driver, Lindell Mims, quickly stepped outside then reached back inside and began doing something with his hands. Meanwhile, the passenger, Calvin Fews, "continuously reached around the [passenger] compartment with his hands never rising above the window level."

As the officers approached, they saw that Mims was carrying a half-burnt blunt and that there was an odor marijuana coming from both him and the SUV. At that point, the officers had decided to search the vehicle for marijuana. But before doing so, one of them patsearched Fews for the following reasons: (1) his movements were consistent with an attempt to reach for a weapon; (2) he was wearing baggy clothing that "could conceal a weapon"; (3) the stop occurred in a notoriously high-crime district in San Francisco; and (4), because one of the officers would be searching the SUV while the other had to watch two suspects, they wanted to make sure they were unarmed. During the pat search of Fews, the officer found a loaded .32-caliber semiautomatic Beretta in Fews' jacket. After Fews was arrested, the officers searched the SUV for more marijuana and, although the search was unproductive, the legality of the search became an issue on appeal.

Discussion

Fews' main contention was that the Beretta should have been suppressed because the officer did not have sufficient reason to believe he was armed or dangerous. This was frivolous because, as the court pointed out, "the odor and presence of marijuana in a vehicle being driven in a high-crime area, combined with the evasive and unusual conduct displayed by Fews and Mims, were reasonably suggestive of unlawful drug possession and transport."¹

Fews' back-up argument—and the reason we are reporting on this case—was that the pat search was unlawful because the officers did not have probable cause to search the SUV. Fews reasoned that if the officers could not lawfully search the SUV for marijuana, the pat search would have been unlawful because one of the justifications for the pat search was to reduce the risk of being shot while the search was underway. This, too, was a specious argument because, as noted, there were several other reasons for conducting the patsearch.

Nevertheless, the court addressed the legality of the vehicle search because of its importance in interpreting California's new marijuana laws. The court noted that, although possession of small amounts of marijuana by adults is ordinarily lawful, there

¹ Also see *Arizona v. Johnson* (2009) 555 U.S. 323, 332.

are restrictions pertaining to the possession of marijuana in vehicles. Specifically, it is illegal to (1) possess more than one ounce, (2) possess any amount that was not inside a sealed container, (3) ingest any amount, or (4) drive under the influence of marijuana.² As the court explained, the new marijuana laws “still permit law enforcement officers to conduct a reasonable search to determine whether the subject of the investigation is adhering to the various statutory limitations on possession and use.”

Although the officers might not have known whether the amount of marijuana in the vehicle exceeded one ounce, they knew or could infer two things. First, Mims had possessed a blunt in the SUV. And because a blunt hardly qualifies as a sealed container, the search fell within the “open container” rule. Second, because the officers could smell the odor of burnt marijuana inside the vehicle, they could infer that one or both of the men had been smoking it in the vehicle before they were stopped. As the court explained, “[T]he evidence of the smell of ‘recently burned’ marijuana and the half-burnt cigar containing marijuana supported a reasonable inference that Mims was illegally driving under the influence of marijuana, or, at the very least, driving while in possession of an open container of marijuana. Consequently, the court ruled “there was sufficient probable cause for the warrantless search of the SUV.” POV

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² See Veh. Code §§ 23222(b)(1) [possess a container “which has been opened or has a seal broken, or loose cannabis”], 23222(b) [possess more than one ounce]; Health & Saf. Code §§ 11362.3(a)(7) and (8) [smoke or ingest any amount while in a motor vehicle].