

Recent Case Report

Date posted: November 7, 2011

Date updated: December 10, 2011

Robey v. Superior Court

(2011) 220 Cal.App.4th 1

Issue

If officers are in lawful possession of a container, and if they have probable cause to believe it contains drugs, are they required to obtain a warrant before searching it?

Facts

Police in Santa Maria received a call from an employee at a local FedEx office who said she could smell the odor of marijuana coming from a package that Kewhan Robey had dropped off for delivery. When officers arrived, they confirmed that the odor emanating from the package was, in fact, that of marijuana. They did not, however, search the package there; instead, they took it to the police station where they opened it and found approximately 15 ounces of marijuana. After Robey was arrested and his motion to suppress the marijuana was denied, he appealed.

Discussion

Robey contended that the search of his package was illegal because the officers did not obtain a warrant. Although the Court of Appeal acknowledged that the officers had probable cause to believe that the package contained marijuana, and although it ruled that they had a legal right to search it at the FedEx office, it held that the search was illegal because it occurred at the police station. Citing the California Supreme Court's decision in *People v. McKinnon*,¹ the court said, "Once [the officers] elected to seize the package, *McKinnon* did require that the police officers hold the package until they obtained a search warrant."

The court also rejected the People's argument that the search was lawful under the "plain smell" variant of the "plain view" doctrine. Under the "plain view" rule, an intrusion into a container in an officer's lawful possession does not constitute a "search" under the Fourth Amendment if the officer had probable cause to believe there were drugs or other evidence of a crime inside. But the court, based on its interpretation of another California Supreme Court opinion, ruled that there is a difference—of constitutional magnitude—between probable cause based on plain smell and probable cause based on other factors; and that plain smell alone is insufficient to justify a warrantless search of a container.

For these reasons, the court ruled the search of Robey's package was illegal, and the marijuana should have been suppressed.

Comment

There are several problems with the court's reasoning. First, it is apparent that the officers' act of opening Robey's package did not constitute a "search" under the Fourth Amendment—and thus a search warrant was not required—because its contents were

¹ (1972) 7 Cal.3d 899.

self-evident. As the United States Supreme Court explained, “[A] Fourth Amendment search does not occur ... unless the individual manifested a subjective expectation of privacy in the object of the challenged search, and society is willing to recognize that expectation as reasonable.”² But Robey could not have reasonably expected that the contents of his package would remain private because (1) the contents consisted of an illegal substance that has a notoriously distinct and unusual odor,³ and (2) he did not take adequate measures to prevent this odor from escaping from the package.

In fact, in another odor-of-marijuana-in-a-container case, the California Supreme Court expressly rejected the reasoning employed in *Robey*. The case was *People v. Mayberry*⁴ and, although *Robey* did not even cite it, the following passage seems pertinent:

In our view, the escaping smell of contraband from luggage may be likened to the emanation of a fluid leaking from a container. The odor is detectable by the nose, as the leak is visible to the eye. We discern no constitutionally significant difference in the manner of escape, and conclude that any privacy right is lost when either escapes into the surrounding area.

Strangely, the *Robey* court seemed perplexed as to whether the odor of marijuana can generate probable cause. At one point it said that Robey’s package “reeked of marijuana” and elsewhere it said the odor of marijuana “gave the officers probable cause to obtain a search warrant.” But elsewhere, it claimed that marijuana has only an “alleged pungent odor,” and that to smell marijuana “is not the same as to see it.” On this subject, it is noteworthy that while the *Robey* court believes that marijuana has only an “alleged” pungent odor, the justices of the United States Supreme Court have stated without qualification that it has a “distinct” odor.⁵ (This seems to undermine the suspicion that the justices of the U.S. Supreme Court live sheltered lives. But it raises questions about certain justices of the Court of Appeal.)

Second, the court’s bold announcement that there is a difference of constitutional magnitude between probable cause based on plain smell and probable cause based on plain view or other circumstances is groundless, which probably explains the court’s failure to provide an analysis of the issue. In reality, probable cause is probable cause—regardless of the circumstances upon which it was based. This was settled almost 30 years ago when the United States Supreme Court ruled in *Illinois v. Gates* that if officers are aware of a fact or facts that demonstrate a “fair probability” that something contains contraband or other evidence of a crime, they have probable cause—and no further

² *Kyllo v. United States* (2001) 533 U.S. 27, 33. Also see *Minnesota v. Dickerson* (1993) 508 U.S. 366, 375 [“The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no ‘search’”]; *Illinois v. Andreas* (1983) 463 U.S. 765, 771 [“The plain view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner’s privacy interest in that item is lost.”].

³ See *People v. Benjamin* (1999) 77 Cal.App.4th 264, 273 [“Odors may constitute probable cause if the magistrate finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance.”].

⁴ (1982) 31 Cal.3d 335, 342.

⁵ *United States v. Johns* (1985) 469 U.S. 778, 482. Also see *People v. Gale* (1973) 9 Cal.3d 788, 794 [“the strong odor of fresh marijuana which [the officer] smelled after entering [the vehicle] would have given him probable cause to believe that contraband may be present”].

discussion is necessary.⁶ Similarly, in his concurring opinion in *Guidi v. Superior Court*, Justice Mosk explained that “the sense of smell, and indeed all the senses, may be employed, not merely in confirmation of what is already visible, but in equal weight with the sense of sight in the determination of probable cause to search.”⁷

Third, the court in *Robey* represented that its ruling was mandated by the California Supreme Court’s decision in *People v. McKinnon* (cited earlier), a case which also involved the search of a marijuana-filled package that was discovered by a common carrier. Here is what the *Robey* court said:

The court [in *McKinnon*] held that when the police have probable cause to believe that a package consigned to a common carrier contains contraband, they are entitled either to search it immediately without a warrant or to seize and hold it until they can obtain a warrant.

Note the word “immediately.” It was this word that, according to the *Robey* court, rendered the search of *Robey*’s package illegal because the search did not occur immediately at the FedEx office. But the court in *McKinnon* did not say the search must occur “immediately.” In fact, the *McKinnon* court did not place any temporal restrictions on when the search must occur. Here is what the court actually said: “[W]hen the police have probable cause to believe a chattel consigned to a common carrier contains contraband, they must be entitled either (1) to search it without a warrant or (2) to “seize” and hold it until they can obtain a warrant” Elsewhere, the court said, “[W]e conclude that . . . a chattel consigned to a common carrier for shipment may lawfully be searched upon probable cause to believe it contains contraband.”⁸

While it is true that the search in *McKinnon* occurred at the carrier’s office, as the above passages demonstrate, the court did not rule this was a requirement. And that is not surprising because the intrusiveness of the search of a package does not depend one iota on whether it occurred where it was found or whether it occurred later at another location. As the United States Supreme Court observed, “[R]equiring police to obtain a warrant once they have obtained a first-hand perception of contraband, stolen property or incriminating evidence generally would be a needless inconvenience.”⁹

Finally, it should be noted that the Santa Barbara County District Attorney’s Office has filed a Petition for Review with the California Supreme Court, and that the California Attorney General’s Office will be submitting an amicus brief. [POV](#)

⁶ (1983) 462 U.S. 213, 237.

⁷ (1973) 10 Cal.3d 1, 20 [conc. opn. of Mosk, J.].

⁸ (1972) 7 Cal.3d 899, 902-903.

⁹ *Texas v. Brown* (1983) 460 U.S. 730, 739.