People v. Johnson

(2020) __ Cal.App.5th __ [2020 WL 3166612]

Issues

(1) Does the odor of marijuana from inside a vehicle provide officers with probable cause to search it for marijuana? (2) Is it illegal to transport a container of marijuana in a vehicle if it is *closed* but not *sealed*?

Facts

A Stockton police officer noticed a man sitting in a car parked by the side of a road. When the officer noticed that the vehicle did not have a registration tag, he pulled behind it and activated his emergency lights. The driver, Dammar Johnson, immediately stepped outside, and the officer ordered him to get back inside. Johnson refused and became "agitated," so the officer "grabbed [his] arm to maintain control," at which point Johnson "tensed and pulled away." After "some resistance," Johnson was placed in the patrol car.

The officer testified that, while standing outside the vehicle, he could smell the odor of marijuana. So he entered and, on the center console, found a small plastic bag containing about two grams. Although the bag was not sealed shut, it was "knotted at the top." While searching the vehicle for more marijuana, the officer found a loaded handgun in the rear cargo area.

Johnson filed a motion to suppress the marijuana and handgun on grounds that the officer's entry and search of the car was illegal because he did not have probable cause to believe that Johnson possessed marijuana in violation of California law. When his motion was denied, he pled no contest to possession of a firearm by a felon. He appealed the ruling.

Discussion

Because California law generally permits adults to possess one ounce or less of marijuana,[1] probable cause to search a place or thing for marijuana can exist only if officers had probable cause to believe the marijuana was possessed in violation of one or both of the California statutes that still criminalize possession.[2] Consequently, Johnson argued that the officer's entry and search of his car was unlawful because the officer had insufficient reason to believe the marijuana was possessed illegally. The court agreed.

MORE THAN ONE OUNCE: Although the odor of marijuana provided the officer with probable cause to believe there was marijuana inside the vehicle, the court ruled that he did not have probable cause to believe that the marijuana in the vehicle weighed more than one ounce. As the court explained, "[T]he odor of marijuana alone no longer provides an inference that a car contains contraband because individuals over the age of 21 can now lawfully possess and transport up to 28.5 grams of marijuana."

It is, of course, possible that an officer who detects an unusually strong odor of marijuana in a vehicle might reasonably believe—based on training and experience—that the amount must have exceeded one ounce. Furthermore, the odor of *burnt* marijuana from a vehicle might constitute probable cause to believe that the driver or other occupant had been smoking marijuana while the car was moving. And this, too, is illegal.[3]

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[1] See Health & Safety Code § 11362.1 *et seq*.
[2] See Health & Safety Code § 11362.3; Veh. Code § 23222(b).
[3] See Health & Safety Code § 11362.3(a)(7-8); Veh. Code § 23221.

But, as the court pointed out, there was nothing in the record that would support either of these conclusions.

WHAT'S AN "OPEN" CONTAINER? Possession of even a small amount of marijuana in the passenger compartment of a vehicle is unlawful if it was inside an "open" container.[4] Unfortunately, neither the Health and Safety Code nor the Vehicle Code define what constitutes an "open" container. Until now, it was arguable that a container of marijuana, like a container of an alcoholic beverage, is "open" unless it was *sealed*. But the court in *Johnson* ruled that a container of marijuana is "open" only if it lacked "a lid or some other type of cover or material separating the content from the outside such that there is no barrier to accessing the content." It then ruled that a plastic bag that is "knotted" is not "open" since a bag that is knotted constitutes "a barrier" to accessing the marijuana.

Accordingly, the court ruled that the marijuana and handgun in the vehicle should have been suppressed.

Comment

The court in *Johnson* also pointed out that, even if the baggie had not been knotted, the officer still would not have had probable cause because the existence of an open container of marijuana in a vehicle is unlawful only if officers had probable cause to believe the vehicle was being "driven."[5] But because the officer did not see Johnson driving the car, the court ruled that this exception did not apply. As the court pointed out, the officer "testified the car was parked when he first saw and approached it and there was no evidence presented to indicate defendant had driven the car with the marijuana baggie inside."

One other thing: In another recent case, *U.S. v. Talley*,[6] the federal district court for the northern division of California ruled that a search for marijuana that is lawful under California law does not become unlawful merely because marijuana is still illegal under federal law. Said the court, "Here, federal law cannot provide an alternate basis for probable cause. To hold otherwise would allow officers to disregard entirely California's directive that no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest." Although rulings by district courts do not provide binding authority, the court's ruling appears correct. POV

Date posted: June 23, 2020

[4] See Health and Safety Code § 11362.3(a)(4); Veh. Code § 23222(b).
[5] See Health and Safety Code § 11362.3(a)(4); Veh. Code § 23222(b).
[6] (2020 N.D. Cal.) __ F.Supp.3d ___ [2020 WL 3275735].