

People v. Macabeo

(2016) __ Cal.4th __ [2016 WL 7048010]

Issue

May officers conduct a search incident to the arrest of a suspect if officers had not yet decided to take him into custody?

Facts

At about 1:40 A.M., two Torrance police officers stopped Paul Macabeo for riding his bicycle through an intersection without stopping. In response to questioning, Macabeo initially told the officers that he was on probation for possession of drugs. Later, however, he said his case had been dismissed and he was not on probation. Apparently uncertain about Macabeo's probation status, and also because Macabeo was "fidgety," an officer pat searched him but found nothing. An officer then asked if he could remove "stuff" from his pockets. Macabeo said OK. Among the items removed was a cell phone which one of the officers activated and searched, finding images of underage girls engaging in sexual conduct. Macabeo was arrested for violating Penal Code section 311.11. After the phone was searched, an officer confirmed that Macabeo was not on probation. In the trial court, Macabeo's motion to suppress the images was denied and the Court of Appeal affirmed. Macabeo appealed to the California Supreme Court.

Discussion

Pursuant to the "search incident to arrest" exception to the warrant requirement, officers may ordinarily search an arrestee in order to make sure he is not armed and also to secure any evidence in his possession.¹ Although this exception has been the law since 1973,² there has been some uncertainty as to whether such a search is legal only if the arresting officers had made a pre-search decision to take the suspect into actual physical custody, as opposed to citing and releasing him. This uncertainty resulted from three Supreme Court decisions.

In the first one, *United States v. Robinson*, the Court ruled that searches incident to arrest were permitted because the danger to officers "is far greater in the case of the *extended exposure* which follows the taking of a suspect into custody."³ This tended to indicate that the officers must have already decided to take the suspect into actual physical custody; i.e., that there would, in fact, be "extended exposure." Later, however, in *Rawlings v. Kentucky* the Court ruled that if officers had probable cause to arrest a suspect, they could search him incident to the arrest even if they had not yet formally placed him under arrest.⁴ This tended to indicate that a search was permitted if the

¹ See *Riley v. California* (2014) 573 U.S. __ [134 S.Ct. 2473, 2485]; *Knowles v. Iowa* (1998) 525 U.S. 113, 116 ["[T]he two historical rationales for the 'search incident to arrest' exception [are] (1) the need to disarm the suspect in order to take him into custody and (2) the need to preserve evidence for later use at trial."].

² See *United States v. Robinson* (1973) 414 U.S. 218, 234.

³ (1973) 414 U.S. 218, 234-35. Emphasis added.

⁴ (1980) 448 U.S. 98, 111 ["Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa."]. Also see *People v. Limon* (1993) 17 Cal.App.4th 524,

officers *could have* transported the suspect (i.e., if they had probable cause), even though they hadn't yet decided to do so. Finally, in *Riley v. California* the court ruled that a search of a cell phone incident to an arrest was unlawful because a search of a cell phone is ordinarily unnecessary for officer safety or to prevent the destruction of evidence stored inside.⁵ This indicated that a search is not permitted unless officers had decided to transport the suspect.

In *Macabeo*, the California Supreme Court resolved the issue (at least in California), ruling that searches incident to arrest may only be conducted if officers had already decided to take the suspect into custody. Thus, the court essentially adopted the reasoning of *Riley* and concluded there is simply no justification for a routine search of the arrestee unless the decision had been made to take him somewhere, usually to jail, a police station, or a hospital.

Applying this rule to the facts in *Macabeo*, it was apparent to the court that the officers had no intention of taking Macabeo to jail for riding a bicycle through an intersection at 1:40 A.M. In other words, the fact that they *could have* transported him to jail without violating the Fourth Amendment was irrelevant. Consequently, the court ruled that the images in Macabeo's cell phone should have been suppressed.

Comment

At hearings on motions to suppress, it will be safer for prosecutors to expressly ask the arresting officers whether they had made a pre-search decision to transport the arrestee. In most cases, however, we think a court may infer that such a decision had been made based on the seriousness of the crime; e.g., all felony arrests, DUI arrests. Consequently, we would hope that motions to suppress in such cases will not be granted due to a technical failure to elicit such testimony.

One other thing. At one point in its decision, the court said the following: "Even the search-incident exception may be limited when attendant circumstances show the arrestee had no potential to put an officer in jeopardy, to escape, or to destroy evidence." This might be interpreted to mean that officers cannot conduct searches incident to arrest unless they can articulate a reason to believe the search was necessary for their safety or for the integrity of the evidence. Such an interpretation would, however, be contrary to the settled rule that officers are not required to make such case-by-case determinations. As the Supreme Court explained in *Robinson*, "[O]ur more fundamental disagreement with the Court of Appeals arises from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." The Court added that there exists "an adequate basis for treating all custodial arrests alike for purposes of search justification,"⁶ POV

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538 ["An officer with probable cause to arrest can search incident to the arrest before making the arrest."].

⁵ (2014) 573 U.S. __ [134 S.Ct. 2473].

⁶ (1973) 414 U.S. 218, 234.