IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KEWHAN ROBEY,

Petitioner,

v.

THE SUPERIOR COURT OF SANTA BARBARA COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

S19 [illegible]

Case No. S_____

Second Appellate District, Division Six, No. B231019
Santa Barbara County Superior Court No. 1349412
The Honorable Edward Bullard, Judge

PETITION FOR REVIEW

JOYCE E. DUDLEY
District Attorney of Santa Barbara
MICHAEL J. CARROZZO (161078)
Deputy District Attorney
1112 Santa Barbara Street
Santa Barbara, CA 93101
Telephone: (805) 568-2399
Facsimile: (805) 560-1077
E-mail: mcarrozzo@co.santa-barbara.ca.us
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... i

PETITION FOR REVIEW 1

ISSUE PRESENTED..... 2

STATEMENT OF THE CASE..... 2

REASON FOR GRANTING THE PETITION..... 3

I. The Issues for Review are Important and Review is Needed to Secure Uniformity of Decision..... 3

A. The Court of Appeals decision Fails to Apply Current Fourth Amendment Law..... 3

B. The Court of Appeal Decision Creates Conflict With Published Authority and Treatises..... 4

II. Mobile Nature of Package Justify the Seizure and Search of a Package that Probable Cause Shows May Contain Controlled Substance..... 5

III. The Search of the Package was Supported by Probable Cause 8

CONCLUSION..... 13

CERTIFICATION OF COMPLIANCE 14

PROOF OF SERVICE..... 15

COURT OF APPEAL DECISION..... 16

TABLE OF AUTHORITIES

CASES

Carroll v. United States, (1925) 267 U.S. 132..... 2,3

Chambers v. Maroney (1970) 399 U.S. 42..... 2,3,7,8

Guidi v. Superior Court (1973) 10 Cal.3d 1..... 4,5,10

In re Rudy F. (2004) 117 Cal.App.4th 1124..... 9

Johnson v. United States (1948) 333 U.S. 10..... 11

People v. Benjamin (1999) 77 Cal.App.4th 264..... 9,12

People v. Bock Leung Chew (1956) 142 Cal.App.2d 400..... 11

People v. Christensen, (1969) 2 Cal. App. 3d 546..... 8,10

People v. Cook (1975) 13 Cal.3d 663..... 2,5,9

People v. Divito (1984) 152 Cal.App.3d 11..... 11

People v. Duncan (1986) 42 Cal.3d 91..... 11

People v. Gale, (1973) 9 Cal. 3d 788..... 2,3,9

People v. Marshall (1968) 69 Cal.2d 51..... 4,5

People v. Mayberry (1982) 31 Cal.3d 335..... 11

People v. McKinnon (1972) 7 Cal. 3d 899..... 4,5,6

People v. Pereira (2007) 150 Cal. App. 4th 1106..... 12

People v. Racklin (2011) 195 Cal.App.4th 872..... 10

People v. Shandloff (1985) 170 Cal.App.3d 372..... 11

People v. Yackee (1984) 161 Cal. App.3d 843..... 6

United States v. Angelos (10th Cir. 2006) 433 F.3d 738..... 9

United States v. Clayton (8th Cir. 2000) 210 F.3d 841..... 9

United States v. Haley (4th Cir. 1982) 669 F.2d 201..... 9

United States v. Jacobson (1984) 466 US 109..... 6

United States v. Johns (1985) 469 U.S. 478..... 9

United States v. Place (1983) 462 U.S. 696..... 8

STATUTES

Health and Safety Code, § 11359..... 2
Health and Safety Code, § 11360..... 2
Cal Rules of Ct 8.500..... 1

MISCELLANEOUS

California Judges Benchbook Search and Seizure (CEB) 4
Witkin & Epstein, Cal. Criminal Law (3d Ed. 2000)..... 5
LaFave, 3 Search & Seizure § 5.5 (4th ed.)..... 8

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **KEWHAN DONELLE ROBEY,** Defendant and Petitioner.	Court of Appeal No. B231019 Superior Court No. 1349412

Appeal from the Superior Court of Santa Barbara County
The Honorable Edward Bullard, Judge

PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

The People of the State of California respectfully petition this Honorable Court to grant review, pursuant to California Rules of Court, rule 8.500, of the published decision of the California Court of Appeal, Second Appellate District, Division Six, filed on October 24, 2011. A copy of the court's decision is attached to this petition.

ISSUES PRESENTED

1. Whether warrantless seizures of highly mobile packages from common carriers are constitutional, if based upon probable cause?

2. Whether the "plain smell" of marijuana from a container sensed by police officer is an exception to the warrant requirement?

STATEMENT OF THE CASE

On November 17, 2010, following a preliminary hearing in the Santa Barbara County Superior Court, Petitioner was held to answer for charges of possession of marijuana for sale (Health and Saf. Code, § 11359) and sale or transportation of marijuana (Health and Saf. Code, § 11360, subd. (a)). On January 20, 2011, the Superior Court conducted a hearing on Petitioner's motion to suppress evidence and denied that motion. On February 18, 2011, Petitioner filed a petition for writ of mandate in the Court of Appeal. On March 3, 2011, the Court of Appeal sent a letter to the Santa Barbara County District Attorney's Office, requesting that the People submit an informal opposition to the petition for writ of mandate. On April 7, 2011, the Court of Appeal issued an order to show cause. The Office of the Attorney General submitted an amicus curiae brief and the matter was heard on August 18, 2011.

The Court of Appeal issued a published decision on October 24, 2011. The decision failed to properly follow prevailing state and federal case law, e.g., *People v. Cook* (1975) 13 Cal.3d 663, *People v. Gale*, (1973) 9 Cal. 3d 788, 794, *Chambers v. Maroney* (1970) 399 U.S. 42, *Carroll v. United States*, (1925) 267 U.S. 132. Likewise the Court of Appeal has published a decision contradicting treatises, misconstrued other California decisional, to wit, and authority and failed adhere to federal standards on

sensory use for probable cause. Respondent did not file a Petition for Rehearing, but rather has filed the instant Petition for Review.

REASONS FOR GRANTING THE PETITION

I. THE ISSUES FOR REVIEW ARE IMPORTANT AND REVIEW IS NEEDED TO SECURE UNIFORMITY OF DECISION

A. The Court of Appeals decision Fails to Apply Current Fourth Amendment Law

Prevailing case law holds, where law enforcement detects narcotics by smell from a highly mobile object, law enforcement may seize and search the object. The key to this line of cases is the interaction of the sensing of the narcotic via the senses combined with its placement in a highly mobile object.

In *People v. Gale*, the California Supreme Court concluded, when an officer smelled marijuana from a vehicle that law enforcement officer has "probable cause to believe ... that contraband may be present." (*People v. Gale*, (1973) 9 Cal. 3d 788, 794, 511 P.2d 1204). The Court then held, that when the marijuana was located "...in an automobile parked in a public lot - unlocked, accessible, and readily movable - the same probable cause would have justified the subsequent search of each vehicle under the rationale of *Carroll v. United States*, 267 U.S. 132 69 L.Ed. 543, 45 S.Ct. 280, 39 A.L.R. 790, and its progeny." *Ibid.* The *Gale* case is significant in that it provides a close analogy to the instant case as to a highly mobile object containing a narcotic that is readily sensed with smell that is in a public location. When the holding is combined with *Chambers v. Maroney* (1970) 399 U.S. 42, 52, it reveals that law enforcement may search the mobile object either at the scene or at the police station. Neither location matters for a Fourth Amendment analysis.

Likewise, the Court of Appeals fails to correctly apply the rationale of *People v. McKinnon* (1972) 7 Cal. 3d 899. The Petitioner contends that *People v. McKinnon* does not require a search warrant, contrary to the decision issued by the Court of Appeal. The McKinnon Court expressly holds that a warrant is not required to search a package where probable cause exists. (Ibid at 916-917).

B. The Court of Appeal Decision Creates Conflict with Published Authority and Treatises

Petitioner contends black letter treatise law holds that plain smell is an exception to the warrant requirement under the Fourth Amendment akin to plain view. For instance, California Judges Benchbook Search and Seizure, 2nd edition 2002 (CEB), Published by Judicial Counsel of California, lists "Plains Smell", under the heading of plain view, Section 5.13. In the benchbook guide, it simply states, "plain view principles apply by analogy to other senses other, such as: Plain smell ..." The bench guide then goes on to list several of the authorities Petitioner has likewise submitted to the Court. Yet, the Second District Court of Appeal states their reluctance to find a plain smell in this case noting, "We recognize that a number of exceptions exist, but we are wary of creating another one under the facts of this case." (COA Decision p. 7).

The Court of Appeal's interpretation of prior decisional authority in California was in error. The Court of Appeal's interpretation of *Guidi v. Superior Court* (1973) 10 Cal.3d 1 and *People v. Marshall* (1968) 69 Cal.2d 51, that the California Supreme Court has rejected the plain smell exception to the warrant requirement is incorrect. The *Marshall* Court held that a warrantless search on the basis of odor alone was unconstitutional, and that "plain smell" is not equivalent to "plain view." (*People v. Marshall, supra,* 69 Cal.2d at p. 59.) However as *Witkin* points out, this

portion of *Marshall* has been overruled by *People v. Cook, supra*, 13 Cal.3d at p. 668, fn. 4. (4 Witkin & Epstein, Cal. Criminal Law (3d Ed. 2000) Illegally Obtained Evidence § 286, pp. 947-950 & *id.* (2010 supp.) p. 308 [noting *Marshall* has been repudiated and citing several treatises providing that warrantless search based on odor of narcotics is constitutional].)

Further, *Guidi* is not precedent rejecting the plain smell doctrine. Rather, *Guidi* constitutes precedent which effectively overrules *Marshall*, since a majority of the Court (three Justices plus Justice Mosk) agreed with that part of Justice Mosk's concurring opinion stating that smell has "equal weight" as sight in determining probable cause to search and seize. (*Guidi v. Superior Court, supra,* 10 Cal.3d at p. 20; see *People v. Cook, supra,*, 13 Cal.3d at p. 668, fn. 4. Therefore, the result in *Guidi* was a *pro tanto* overruling of *Marshall* as to the particular issue.

Therefore, this Petition for Review raises issues that the California Supreme Court needs to address. The ongoing battle against criminals that grow marijuana in California and ship it out of state through common carriers warrants that the California Supreme Court clarify whether law enforcement may seize and search a package turned over to a common carrier which plainly smells of a specific controlled substance.

II. MOBILE NATURE OF PACKAGE JUSTIFY THE SEIZURE AND SEARCH OF A PACKAGE THAT PROBABLE CAUSE SHOWS MAY CONTAIN CONROLLED SUBSTANCE

Law enforcement in seizing a common carrier package, smelling the marijuana from the package acted appropriately under the law. *McKinnon* states that "when 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; absent these remedies, the chattel will be shipped out of the jurisdiction or claimed by its owner or by the consignee."

People v. McKinnon (1972) 7 Cal. 3d 899 is stood good law when read in conjunction with other proceeding authority. It has not been overruled by *People v. Yackee* (1984) 161 Cal. App.3d 843 and *United States v. Jacobson* (1984) 466 US 109. In fact, those decisions support the People's position in this case. In *People v. Yackee,* the court held that an airline employee's search of a suitcase and uncovering of a suspicious baggie, which lead to a police seizure, was legal.

A box consigned to a common carrier for shipment to another destination is a "thing readily moved" and not a "fixed piece of property." To be sure, such a box has neither wheels nor motive power; but these features of an automobile are legally relevant only insofar as they make it movable despite its dimensions. A box, which is a fraction of the size and weight of an automobile, is movable without such appurtenances. It is also true that a box or trunk, as distinguished from an automobile, may serve the double purpose of both storing goods and packaging them for shipment. But whenever such a box is consigned to a common carrier, there can be no doubt that it is intended, in fact, to be moved.

In this case, law enforcement relied on *McKinnon* and complied with its mandates by searching the item once they had probable cause to believe marijuana was located inside the package. The search was even less intrusive than the extensive manipulation of the package permitted by *Jacobsen.* The court in *Yackee and Jacobsen,* both concluded that the trial court did not abuse its discretion in denying defendant's motion to suppress. Therefore, *People v. McKinnon, supra* is still good law and has been followed by numerous courts. In its decision, the Court of Appeal cited *McKinnon* to hold that a search warrant was required. Ironically, this portion of the *People v. McKinnon, supra,* holds the exact opposite, that

packages may be search where probable cause exists. In this case, the probable cause that existed was the plain and obvious smell of marijuana emanating from the box that was about to be shipped by common carrier.

The Court of Appeal concedes that law enforcement had probable cause to search the package. However, the Court of Appeal's logic is that by moving the package to a police station, the officers somehow lost probable cause to search the package. This is contrary to **binding** United States Supreme Court authority under *Chambers v. Maroney,* (1970) 399 U.S. 42, 65. The fact that the package was very mobile and potentially valuable created exigent circumstances for the officers to remove the package from the Federal Express office.

In *Chambers v. Maroney* (1970) 399 U.S. 42, the United States Supreme Court held where there is probable cause to search an automobile, it may be searched with or without a warrant due to its mobility. The car in question was seized by the police, impounded at the police station, and then searched without a warrant back at the police station. The Court considered the question of whether a search later at the police station without a warrant was still permitted based on the characteristic of mobility. The Court held that the warrantless search was constitutional. Law enforcement officers could not leave the package inside the store because the marijuana was mobile and created a known danger.

Therefore, the mobility of the marijuana package created exigent circumstances which allowed the search and seizure of the package based on the probable cause acquired by law enforcement. The probable cause consisted of the statement of witnesses that marijuana was believed to be inside the package, the odor observed by multiple officers and the inaccurate information contained on the Federal Express shipping label.

III. THE SEARCH OF THE PACKAGE WAS SUPPORTED BY PROBABLE CAUSE

The Court of Appeal decision invited this Court to rule on the issue of plain smell by stating "Does the passage of 43 years since Marshall was decided warrant (pardon the expression) reconsideration of Mosk's view?" (COA Decision p. 6) The decision went even further by suggesting that the logic of the People's argument was sound, but the Court of Appeal was restrained by precedent:

> The People argue that no distinction exists between something that is apparent to the sense of smell and something that is apparent to the sense of sight. We comprehend the logic of the argument. But we cannot hold the seizure proper. Our Supreme Court has not endorsed this view when probable cause is based on odor alone. (COA Decision p. 5)

As another Court of Appeal succinctly noted, "*Marshall* does not state a rule applicable to the use of smell in determining probable cause to believe a crime has been committed or contraband is present. (*People v. Christensen*, (1969) 2 Cal. App. 3d 546, 548-49. The Court of Appeal's reliance on Marshall and it's holding is misplaced in denying that odor could be a basis for probable cause and a search of the package.

Respondent, notes that the Court has failed to account for critical facts of this case: the smell of marijuana emanating from a mobile object, i.e. a package. The "plain view" doctrine, as applied **to containers**, has been held applicable to "plain smell" situations, justifying a warrantless search where the incriminating odor is attributed to a container. (3 *LaFave, Search & Seizure*, § 5.5(f), (4th ed.) p. 253.). The United States Supreme Court has recognized the "plain smell" doctrine in *United States v. Place* (1983) 462 U.S. 696. Numerous courts have held that the strong odor of marijuana is sufficient to establish probable cause to search. (*United States*

v. Johns (1985) 469 U.S. 478, 482; *People v. Gale* (1973) 9 Cal.3d 788) This is true whether the odor is of fresh marijuana or burnt marijuana. (*People v. Benjamin* (1999) 77 Cal.App.4th 264, 273-274.) Based upon odor alone, an officer may conduct an immediate search of an automobile from which the odor is emitting or conduct a search incident to an arrest of persons associated with the odor. (*People v. Cook, supra*, 13 Cal.3d 663). Several federal courts have held that a warrantless search of a container is lawful based solely on the fact the container has a strong smell of marijuana. *United States v. Angelos* (10th Cir. 2006) 433 F.3d 738, 747, held that plain smell doctrine is "simply a logical extension" of the plain view doctrine.

The Court of Appeal failed to follow a long line of federal case law as to the plain "smell" rule under federal law as required by Proposition 8. Since adoption of Proposition 8, defendant's right to object to seized evidence is controlled by federal law. (*In re Rudy F.* (2004) 117 Cal.App.4th 1124.) Respondent appropriately cited to a number of federal cases holding probable cause to conduct a warrantless search based on the officers' observations of smell. (E.g., *United States v. Angelos* (10th Cir. 2006) 433 F.3d 738, 747 [upholding search and seizure based on smell of marijuana and evident residue on duffle bags]; *United States v. Clayton* (8th Cir. 2000) 210 F.3d 841, 845 [noting that officer executing arrest warrant "quickly developed probable cause for a search based on his immediate perception of an odor associated with methamphetamine production"]; *United States v. Haley* (4th Cir. 1982) 669 F.2d 201, 203 [holding that the odor emanating from a container in an automobile may justify invocation of the "plain view" doctrine] as cited in the Court of Appeal decision).

In the face of this at least widespread authority, the Court of appeal noted that they were "distinguishable" and therefore not authoritative. The

Court of Appeal though declined to state with any detail in what meaningful manner that any of these cases were distinguishable from the instant case of still good law case of *People v. Christensen* (1969) 2 Cal.App.3d 546, 548-549.

Petitioner disagrees though that these cases were not in direct opposition to California law as the decision suggests. However, if they were in opposition, the court would have been obligated to follow the federal standard: "Federal constitutional standards govern review of issues related to the suppression of evidence seized by the police. (*People v. Racklin* (2011) 195 Cal.App.4th 872.)

In rejecting the Petitioner's position, the Court of Appeal misapplied the holding in *Guidi v. Superior Court* (1973) 10 Cal.3d 1. Chief Justice Wright wrote the main opinion which was joined by two other justices, holding that under the "particular circumstances" of that case, an officer's seizure of a bag was reasonable. In a footnote, Chief Justice Wright "emphasized" that the odor of contraband corroborated prior information, and stated that:

> We do not here hold that only the smell of contraband and nothing more would justify seizing a supposed container of the contraband, nor do we mean to accord "plain smell" a place in Fourth Amendment doctrine equivalent to that occupied by "plain sight." We recognize that the scent of contraband within a residence may well provide, of itself, probable cause to search, and when conjoined with exigent circumstances may justify a warrantless search for and seizure of that contraband. *Guidi v. Superior Court* (1973) 10 Cal.3d 1, p. 17, fn. 18.)

Footnote 18 of Chief Justice Wright's opinion is not binding precedent. Only a total of three Justices concurred in Chief Justice

Wright's Opinion. Indeed, a majority of the Justices specifically disagreed with footnote 18's language that the smell of contraband alone could not justify a warrantless search of a container. Justice Mosk wrote a separate concurring opinion, joined by three other Justices, criticizing footnote 18 (*Id.* at pp. 19-20 [conc. opn. of Mosk, J.]) and stating, in relevant part:

> I insisted then, and continue to believe, 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 and seize. (*Ibid.* at p. 20.)

Accordingly, under the authorities set forth above, law enforcement may conduct a warrantless search based solely on the plain smell, in the absence of any exigent circumstances.

In this case, the officers were dispatched to the location based on a citizen complaint and had a lawful right to be at the location when the plain "view" observation was made by law enforcement. It is clear that a citizen (Federal Express employee) conducted the initial seizure and removed the package from the "shipping line." Once the police arrive, the long standing doctrine that an observation of contraband in plain view provides probable cause to arrest applies.

There is no logical distinction between something being apparent to the sense of smell and something apparent to the sense of sight or the sense of hearing. (*People v. Mayberry* (1982) 31 Cal.3d 335; *People v. Bock Leung Chew* (1956) 142 Cal.App.2d 400) The plain smell of contraband by an experienced officer supplies at least reasonable cause to suspect a crime, if not probable cause to arrest or search. (*People v. Duncan* (1986) 42 Cal.3d 91, 101-104; *People v. Shandloff* (1985) 170 Cal.App.3d 372, 381; *People v. Divito* (1984) 152 Cal.App.3d 11, 14). "If the presence of odors is

testified to before [the court and it] finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of most persuasive character." (*Johnson v. United States* (1948) 333 U.S. 10; *People v. Benjamin* (1999) 77 Cal.App.4th 264, 273.)

Officer Totorica's warrantless search of Petitioner's package that was left for shipment with Federal Express was based upon the fact that that package had a strong odor of marijuana, and other investigative techniques such as the invalid name, address and telephone number listed on the Federal Express receipt. Also, Federal Express employee Her and Officer Totorica both noticed the smell of marijuana from the package when it was at the Federal Express office. Lieutenant Haley also noticed the smell of marijuana coming from the package when it was taken to the police station. Officer Totorica and Lieutenant Haley both had training and experience in identifying marijuana and were familiar with its odor. Thus, the warrantless search in this case was constitutional under the "plain smell" doctrine.

The Court of Appeals also relied upon dicta from *People v. Pereira* (2007) 150 Cal. App. 4th 1106. *Pereira* involved the abandonment of property and standing to claim it in a motion to suppress. The court necessarily relied on dicta because the only question presented in *Pereira* was whether the package, containing a false name and address, was abandoned. There was no discussion of probable cause in the court's analysis in *Pereira* because that was not the issue in that case. There is nothing in *Pereira* that stands for the proposition that probable cause is no longer a valid exception to a warrantless search. The circumstances known to the officer when the search was conducted would certainly include the

suspicious nature of the transaction as well as the undeniable odor of marijuana emanating from the package.

In summation, this decision conflicts with the usual approach of Courts of Appeal on an important question of law, and therefore, this Court should grant the Petition for Review. Respondent contends that in 2011, the odor of marijuana is so distinct and common that the plain smell of marijuana is as reliable as the plain view of marijuana.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Petition for Review be granted.

Dated: November 3, 2011

Respectfully submitted,

JOYCE E. DUDLEY
District Attorney of Santa Barbara

MICHAEL J. CARROZZO
Deputy District Attorney
Attorneys for Respondent

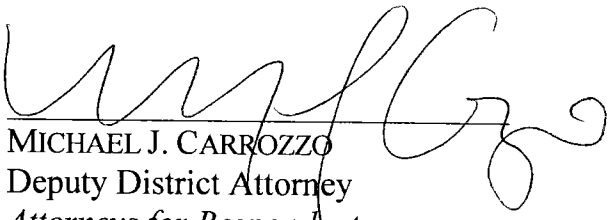
CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 3,948 words.

Dated: November 3, 2011

Respectfully submitted,

JOYCE E. DUDLEY
District Attorney of Santa Barbara



MICHAEL J. CARROZZO
Deputy District Attorney
Attorneys for Respondent

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA BARBARA)

PEOPLE v. KEWHAN ROBEY

Case No. B231019

I am a citizen of the United States and a resident of Santa Barbara County, California. I am over the age of eighteen years, and not a party to the above-entitled action. My business address is the Office of the District Attorney, 1112 Santa Barbara Street, Santa Barbara, CA 93101, telephone: (805) 568-2399.

On NOVEMBER 3, 2011, I served a true copy of the attached PETITION FOR REVIEW on the following, by method(s) indicated below:

☐ **BY PERSONAL SERVICE:** By hand delivering a true copy thereof, at his office with his clerk therein or the person having charge thereof, at the address indicated below:

☒ **BY FIRST CLASS MAIL:** By placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the U.S. Post Office Box addressed as indicated below:

Patty Dark
Deputy Public Defender
312 East Cook Street
Santa Maria, CA 93454

Superior Court
Honorable Edward Bullard
312 East Cook Street
Santa Maria, CA 93454

Attorney General of California
300 S. Spring Street
North Tower-Fifth Floor
Los Angeles, CA 90012

Court of Appeals
Second District
200 East Santa Clara
Ventura, CA 93001

☐ **BY FACSIMILE TRANSMISSION:** By faxing a true copy thereof to the recipient at the facsimile number indicated below:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at Santa Barbara, California.

NOVEMBER 3, 2011

Donna Crawford

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

KEWHAN ROBEY,

Petitioner,

v.

THE SUPERIOR COURT OF SANTA BARBARA COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

2d Crim. No. B231019
(Super. Ct. No. 1349412)
(Santa Barbara County)

Petitioner Kewhan Robey consigned a sealed package to a common carrier for shipment. The package reeked of marijuana. The carrier notified the police, who seized the package and later opened it at the police station. The police did not seek a warrant even though no exigent circumstances existed at the time of the search.

Was the warrantless search justified based on smell alone? Not according to the California Supreme Court. (*Guidi v. Superior Court* (1973) 10 Cal.3d 1; *People v. Marshall* (1968) 69 Cal.2d 51.) To smell it is not the same as to see it.

The trial court erred in denying Robey's motion to suppress evidence of the marijuana. We grant his petition for writ of mandate.

FACTS

On Friday afternoon, July 23, 2010, Federal Express ("FedEx") employee Nancy Her smelled the odor of marijuana emanating from a package received for shipment from Santa Maria to Illinois. She followed company protocol; she withheld the package from the shipping line and telephoned the Santa Maria Police Department. Officer Nathan Totorica responded. When Totorica walked into the FedEx office, he smelled the distinct odor of marijuana. As he approached the counter where the box was located, the odor became stronger. Her told Totorica that FedEx "could not deliver the package" and asked what he wanted done with it. Totorica seized the unopened box "as evidence."

Totorica took the package to the police station, where his supervisor, Lieutenant Jerel Haley, also noted the strong odor of marijuana. Both officers have significant training and experience in identifying controlled substances, including the odor of marijuana. When the narcotics unit declined to investigate, Totorica and Haley opened the package, which contained 444 grams (approximately 15 ounces) of marijuana. The officers did not seek a search warrant.

A few days later, Robey brought the packing slip for the box back to FedEx and asked why it had not been delivered. Her telephoned Totorica, who subsequently arrested Robey. The slip confirmed that Robey had used a false name.

Robey is charged with possession of marijuana for sale (Health & Saf. Code, § 11359) and sale or transportation of marijuana (*id.*, § 11360, subd. (a)). The trial court denied his motion to suppress evidence of the marijuana. The court held that exigent circumstances justified the seizure of the package and that the inevitable discovery doctrine justified the search. Robey petitioned for a writ of mandate directing the trial court to grant the motion. We issued an order to show cause.

DISCUSSION

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures of a person's effects. (*Chambers v. Maroney* (1970) 399 U.S. 42, 51.) Letters and sealed packages are among the personal effects entitled to Fourth Amendment protection. (*United States v. Jacobsen* (1984) 466 U.S. 109, 114.) Subject to certain exceptions, police must have probable cause to search items protected by the Fourth Amendment and must obtain a warrant before the search is made. (*Chambers*, at p. 51.)

One such exception applies to automobiles. When probable cause exists to search an automobile, it may be searched with or without a warrant due to its mobility. (*Chambers v. Maroney*, *supra*, 399 U.S. at p. 52.) In *People v. McKinnon* (1972) 7 Cal.3d 899, 909, our Supreme Court expanded this exception to permit the warrantless seizure of goods or chattels consigned to a common carrier for shipment. The court 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. (*Ibid.*) Totorica elected to seize the package.

Robey contends that *McKinnon* has been overruled, and, therefore, the police violated the Fourth Amendment by seizing the package without a warrant. In *People v. Yackee* (1984) 161 Cal.App.3d 843, 848, footnote 2, the appellate court rejected the rule that packages consigned to a common carrier may be searched without a warrant. The court observed that "[t]his holding of *McKinnon* has been impliedly overruled both by *United States v. Chadwick* (1977) 433 U.S. 1 . . . and *People v. Dalton* (1979) 24 Cal.3d 850 . . . ." (*Ibid.*)

Chadwick and *Dalton* once stood for the proposition that when a closed container in an automobile comes under the exclusive control of law enforcement officers, a warrantless search is permissible only if both probable cause and exigent circumstances are present. (*United States v. Chadwick*, *supra*, 433 U.S. at p. 13; *People*

v. Dalton, supra, 24 Cal.3d at pp. 856-857.) The United States Supreme Court overruled those cases in *California v. Acevedo* (1991) 500 U.S. 565, by eliminating the exigent circumstances requirement. The court held that "[t]he police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." (*Id.* at p. 580.) The court emphasized that this rule applies only to automobiles. (*Id.* at pp. 578, 580.) Because the instant case does not involve an automobile, the cases discussing this exception do not apply.

We need not decide, however, whether *McKinnon* permitted Totorica to seize the package from FedEx without a warrant. Once he elected to seize the package, *McKinnon* did require that the police officers hold the package until they obtained a search warrant. (*People v. McKinnon, supra*, 7 Cal.3d at p. 909.) They failed to do so. Consequently, even if we assume the seizure was legal, the search was per se unreasonable unless another exception to the warrant requirement applies. (*Katz v. United States* (1967) 389 U.S. 347, 357.) Here, there is no such exception.

People v. Pereira (2007) 150 Cal.App.4th 1106 is instructive. The defendant mailed a package via a private shipping company. The proprietor of the company became suspicious of the package, opened it and found a teddy bear inside. (*Id.* at p. 1110.) After observing some abnormal stitching on the bear, the proprietor telephoned the police, who transported the package to the police station. A few hours later, an officer cut into the bear without a search warrant and discovered marijuana. (*Ibid.*) In affirming the trial court's order suppressing evidence of the marijuana, the court observed that "[e]ven when an officer lawfully seizes a package, the Fourth Amendment requires that in the absence of exigent circumstances, the officer obtain a warrant before examining the contents of the package." (*Id.* at p. 1112.) The court upheld the trial court's finding that no exigency justified the warrantless search. (*Ibid.*)

The same analysis applies here. Totorica took the package to the police station, where it remained in police custody and control. There was no risk the package would leave the station. The officers had time to consult with the narcotics unit before

opening the package. They also had time to seek a warrant. Here there is no evidence of exigent circumstances.

The People contend that even without exigent circumstances, the warrantless search was permissible under a "plain smell" theory. This theory is an offshoot of the "plain view" exception to the warrant requirement. Under this exception, incriminating evidence or contraband in the plain view of an officer who has the right to be in the position to have that view is subject to seizure without a warrant. (*People v. Mack* (1980) 27 Cal.3d 145, 150.) The People argue that no distinction exists between something that is apparent to the sense of smell and something that is apparent to the sense of sight. We comprehend the logic of the argument. But we cannot hold the seizure proper. Our Supreme Court has not endorsed this view when probable cause is based on odor alone.

People v. Marshall, supra, 69 Cal.2d 51 held that the odor of contraband creates probable cause to seek a search warrant but does not justify a warrantless search. "To hold . . . that an odor, either alone or with other evidence of invisible contents can be deemed the same as or corollary to plain view, would open the door to snooping and rummaging through personal effects. Even a most acute sense of smell might mislead officers into fruitless invasions of privacy where no contraband is found." (*Id.* at p. 59.) The court concluded that "'[i]n plain smell,' therefore, is plainly not the equivalent of 'in plain view.'" (*Ibid.*)

Guidi v. Superior Court, supra, 10 Cal.3d 1 disapproved of *Marshall* to the extent it suggested that police may not consider odor along with other corroborating factors in assessing whether contraband is in plain view. (*Guidi*, at p. 17, fn. 18.) In both cases, a witness had provided a visual description of the bag containing the contraband. After visually locating the bag based on that description, the searching officer used his sense of smell to confirm the bag's contents. The *Marshall* court held that this was insufficient to justify a warrantless search on a plain view theory. (*People v. Marshall, supra*, 69 Cal.2d at p. 59.) In contrast, the *Guidi* court concluded that the

warrantless search was permissible because the odor corroborated prior visual confirmation of the contraband's location. (*Guidi*, at p. 17, fn. 18.) The court cautioned, however, that "[w]e do not here hold that only the smell of contraband and nothing more would justify seizing a supposed container of the contraband, nor do we mean to accord 'plain smell' a place in Fourth Amendment doctrine equivalent to that occupied by 'plain sight.'" (*Ibid.*)

The *Guidi* court refused to revisit the debate in *Marshall* as to whether the "plain smell" of contraband justifies a warrantless search for the source of that odor. Nonetheless, the justices were divided on that issue. (*Guidi v. Superior Court, supra*, 10 Cal.3d at p. 17, fn. 18.) In a concurring opinion, signed by four of the seven justices, Justice Mosk reiterated his belief, as stated in his dissent in *Marshall*, "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 and seize." (*Guidi*, at p. 20 (conc. opn. of Mosk, J.).)

Does the passage of 43 years since *Marshall* was decided warrant (pardon the expression) reconsideration of Mosk's view? Perhaps not. Courts require an experienced peace officer's testimony to establish the presence of marijuana through its odor. (*People v. McKinnon, supra*, 7 Cal.3d at p. 917.) Indeed, both Totorica and Haley testified about their training and experience in identifying the odor of marijuana. We wisely do not speculate whether marijuana's alleged pungent odor is familiar to a larger segment of the population today than it was in 1968.

We do recognize that courts have questioned the extent of *Guidi's* limitation on the plain smell doctrine but they, too, have been reluctant to apply the doctrine when odor is the sole basis for probable cause. In *People v. Dickson* (1983) 144 Cal.App.3d 1046, 1056, footnote 7 (superseded on another ground as stated in *People v. Hull* (1995) 34 Cal.App.4th 1448, 1455), the court observed that *Guidi's* "limitation loses much of its force . . . because of [the] short concurring opinion filed by Justice Mosk joined by *three* other members of the court." Nonetheless, the court

rejected the argument that the odor of ether alone is enough to supply probable cause for a warrantless entry of a dwelling. (*Id.* at pp. 1057-1058.)

The People cite several federal cases they contend endorse or apply the plain smell doctrine. (E.g., *United States v. Angelos* (10th Cir. 2006) 433 F.3d 738, 747 [upholding search and seizure based on smell of marijuana and evident residue on duffle bags]; *United States v. Clayton* (8th Cir. 2000) 210 F.3d 841, 845 [noting that officer executing arrest warrant "quickly developed probable cause for a search based on his immediate perception of an odor associated with methamphetamine production"]; *United States v. Haley* (4th Cir. 1982) 669 F.2d 201, 203 [holding that the odor emanating from a container in an automobile may justify invocation of the "plain view" doctrine].) These cases are factually distinguishable; also they are contrary to California precedent rejecting the doctrine that odor alone will justify a warrantless search. (*Guidi v. Superior Court*, *supra*, 10 Cal.3d at p. 17, fn. 18; *People v. Marshall*, *supra*, 69 Cal.2d at p. 59.) We are bound by this precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.)

The warrant requirement is not an empty formality. It is the cornerstone of the Fourth Amendment's guarantee of the right to privacy. (*Johnson v. United States* (1948) 333 U.S. 10, 13-14.) We recognize that a number of exceptions exist, but we are wary of creating another one under the facts of this case. The odor of marijuana gave the officers probable cause to obtain a search warrant and they had plenty of time to obtain one. They had no other evidence corroborating the contents of the package. The officers chose not to seek a warrant. The consequence of this decision is the marijuana is not admissible.

The trial court concluded that, notwithstanding the warrantless search, the marijuana is admissible under the inevitable discovery doctrine. We disagree. This doctrine permits the introduction of evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from lawful activities untainted by the initial illegality. (*Murray v. United States* (1988) 487 U.S.

533, 537.) To establish inevitable discovery, the prosecution "must demonstrate by a preponderance of the evidence that, due to a separate line of investigation, application of routine police procedures, or some other circumstance, the [unlawfully obtained evidence] would have been discovered by lawful means." (*People v. Hughston* (2008) 168 Cal.App.4th 1062, 1072.) The People have not met that burden.

In *People v. Superior Court (Walker)* (2006) 143 Cal.App.4th 1183, 1193-1194, campus security had the contractual authority to enter and inspect the defendant's dormitory room. After discovering drugs in his room, the campus security guard contacted the police, who conducted an unlawful warrantless search of the room. The court applied the inevitable discovery doctrine on the basis that even if the unlawful search had not occurred, campus security, having discovered a potentially significant marijuana sales enterprise on the campus, would have turned over the evidence to police by lawful means. (*Id.* at p. 1216.)

The People argue, by analogy, that if Totorica had not seized the box, FedEx would have turned over the contraband to the police by lawful means. This argument assumes that FedEx would have opened the box on its own and then turned in the marijuana. The record does not support this assumption. We do not know what FedEx would have done if Totorica had left the box without any instructions. The FedEx agent could have thrown out the box or returned it to Robey when he appeared with the packing slip. We may not rely on speculation to conclude that the police inevitably would have discovered the marijuana by lawful means. (See *People v. Hughston, supra*, 168 Cal.App.4th at p. 1073 [observing "that the possibility someone would have removed or destroyed the evidence at issue undermines a showing of inevitability"].)

We reject the People's argument that Robey lacks standing to seek suppression of the evidence because he abandoned any expectation of privacy in the package. The use of a false name does not necessarily constitute an abandonment of property for purposes of Fourth Amendment protection. "The appropriate test is

whether defendant's words or actions would cause a reasonable person in the searching officer's position to believe that the property was abandoned." (*People v. Pereira*, *supra*, 150 Cal.App.4th at p. 1113.)

The substantial evidence supports the trial court's determination that Robey did not abandon the package. He obtained a packing slip, with a tracking number, which allowed him to retain significant control over the package while it was in transit. He also returned to FedEx to inquire as to the status of the package, "objectively demonstrating his continuing interest in it." (*People v. Pereira*, *supra*, 150 Cal.App.4th at p. 1113.)

We grant the petition. Let a peremptory writ issue directing the respondent superior court to vacate its order denying Robey's motion to suppress the evidence and to enter a new and different order granting the motion.

CERTIFIED FOR PUBLICATION.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Edward H. Bullard, Judge

Superior Court County of Santa Barbara

Raimundo Montes De Oca, Interim Public Defender, Patricia Dark, Deputy Public Defender, for Petitioner.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, Thomas C. Hsieh, Deputy Attorney General, for Respondent.

Joyce E. Dudley, District Attorney, Michael J. Carrozzo, Deputy District Attorney, for Real Party in Interest.