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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. DEMOND DUPREE BUTLER, Defendant and Appellant.	C064170 (Super. Ct. No. SF112462A)

Defendant Demond Dupree Butler appeals the trial court's denial of his motion to suppress evidence that includes a loaded handgun the police found underneath the driver's seat of the car defendant was driving. The police searched under the seat as part of a "parole search" because the front seat passenger, Johnny Duckworth, was on parole. Defendant argued in the trial court, as he does on appeal, that the search under the driver's seat went beyond the permissible reach of a parole search. We disagree and affirm.

BACKGROUND

I. Factual Background[1]

Just after midnight on July 25, 2009, Officers Mohammed and Guerrero of the Stockton Police Department were driving behind a 1999 Honda Accord. Officer Mohammed noticed the red lens on the left brake light was cracked and initiated a traffic stop. The car pulled over, and the officers approached the vehicle. Officer Mohammed asked defendant (the driver) for his driver's license, registration, and insurance. Defendant provided the information. Officer Mohammed also obtained the names and birth dates of the front seat passenger and the two passengers in the back seat. Officer Mohammed returned to his patrol car and ran a records check on all of the vehicle occupants. The records check indicated that the front seat passenger, Johnny Duckworth, was on parole for residential robbery.

Upon learning of Duckworth's parole status, the officers decided to conduct a parole search and had everybody exit the vehicle. During this time, Duckworth was handcuffed and placed in the back of the patrol car. The other vehicle occupants were seated on the curb. During the parole search, Officer Guerrero found a handgun directly underneath the driver's seat. Additional officers arrived on the scene, and the remaining vehicle occupants were handcuffed and placed into patrol cars.

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[1] The background facts are taken from evidence presented at a combined preliminary and suppression of evidence hearing held on September 24, 2009.

Officer Guerrero had Officer Mohammed look under the driver's seat to observe the gun. Before the officers handled the gun, an evidence technician was called to the scene for photographing. Eventually Officer Mohammed removed the gun from under the driver's seat and discovered it was loaded with six bullets.

After being read his *Miranda* rights,[2] defendant spoke with Officer Mohammed about the gun. Defendant stated that his cousin was involved in an altercation earlier that night, and defendant took the gun away from his cousin before the matter escalated. Defendant placed the gun in his vehicle and forgot about it. Defendant indicated that he knew the gun was loaded, but was unaware that it was illegal to carry a gun in the vehicle.

II. Procedural Background

On September 28, 2009, the San Joaquin County District Attorney filed a two-count information against defendant charging him with possession of a firearm by a felon (count 1) and possession of ammunition by a felon (count 2). The information further alleged that defendant had committed one prior strike and served two prior prison terms. A combined preliminary and suppression of evidence hearing was held on September 24, 2009. The superior court judge, sitting as a magistrate, denied the suppression motion and held defendant to

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

answer on the charges against him. In denying the suppression motion, the magistrate stated: "Next issue would be the issue of a parole search. . . . A Honda, not a lot of distance between the driver's seat and passenger seat. The officers would be allowed to look. [¶] . . . [W]hat I have here indicates Mr. Duckworth was on parole and therefore there would be a basis for a parole search. Also, though he's the passenger, that doesn't mean they can't search the car or areas particularly in his control. On a bus, that is a different deal. This is a small car. We're not talking about officers plowing through the trunk. We're talking the search of the front seat where Duckworth was seated apparently next to [defendant] that night. [¶] I would deny the [motion] for those reasons."

On December 7, 2009, defendant sought review of the magistrate's suppression ruling and filed a renewed motion to suppress pursuant to Penal Code section 1538.5, subdivision (i) (section 1538.5(i)).[3] On January 11, 2010, after reviewing the parties' briefing and preliminary hearing transcript, the trial court denied the motion. In its ruling, the trial court stated: "I am going to deny the motion based on the notion that this was a parole search. And the gun was found in a place that was

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[3] Defendant also filed a Penal Code section 995 motion to dismiss the information. Defendant, however, expressly made this motion contingent upon obtaining a successful result on his renewed motion to suppress under section 1538.5(i), which contingency never occurred.

readily accessible to the defendant. [¶] The Court made sort of a factual finding on that, about the size of the car and the, quote, relatively small car. [¶] A gun was found under the driver's seat, next to wherever Mr. Duckworth, the parolee, was seated, so that he had access to it. I'm not disagreeing with the notion that he didn't have an ownership interest in the car, or even have a possessory interest in the car. But he had the ability or right to control those items underneath the driver's seat. [¶] And so a parole search clause requiring access to places that a person has control is imposed just for that purpose. The place where the parolee might be able to put, place[,] secret or have access to contraband. And, certainly, that could have been the case here. [¶] So for all those reasons, the Court's going to deny the [section] 1538.5 motion. But that's an interesting issue. Let's see where it goes from here." This appeal followed.

DISCUSSION

Motion to Suppress

On appeal from a renewed motion to suppress brought under section 1538.5(i), we review the determination of the magistrate at the preliminary hearing. (*People v. Nonnette* (1990) 221 Cal.App.3d 659, 664.) We defer to the magistrate's factual findings, whether express or implied, when supported by substantial evidence, and we independently determine whether the facts of the challenged search and/or seizure violated defendant's Fourth Amendment rights. (*People v. Lomax* (2010)

49 Cal.4th 530, 563; *People v. Hua* (2008) 158 Cal.App.4th 1027, 1033.)

A warrantless search is "'*per se* unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions.' [Citation.]" (*Arizona v. Gant* (2009) 556 U.S. __ [173 L.Ed.2d 485, 493] (*Gant*); see also *People v. Redd* (2010) 48 Cal.4th 691, 719.) A search pursuant to a properly imposed parole search condition is one such exception. (*People v. Reyes* (1998) 19 Cal.4th 743, 751 (*Reyes*); *People v. Smith* (2009) 172 Cal.App.4th 1354, 1360 (*Smith*).) California parolees are subject to a standard search condition, which provides that their person, their residence, and any property under their "control" may be searched without a warrant at any time by any law enforcement officer. (Cal. Code Regs., tit. 15, § 2511, subd. (b); *Reyes*, *supra*, 19 Cal.4th at p. 746; *People v. Lewis* (1999) 74 Cal.App.4th 662, 666, fn. 1 (*Lewis*); *People v. Williams* (1992) 3 Cal.App.4th 1100, 1105 (*Williams*).)[4] This condition has long been regarded as valid.

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[4] Given no evidence to the contrary, we assume that Duckworth was subject to this standard search condition. (See *Lewis*, *supra*, 74 Cal.App.4th at p. 666, fn. 1 [assuming standard search condition applied]); Cal. Code Regs., tit. 15, § 2356 [requiring prison staff to provide parolee documentation that includes the standard search condition]; Evid. Code, § 664 ["It is presumed that official duty has been regularly performed"].) Our assumption is especially well-founded given that defendant cited California Code of Regulations, title 15, section 2511, subdivision (b) in his trial court briefing and also represented, during oral argument at the renewed suppression hearing, that the officers searched the car "pursuant to the

(*People v. Wagner* (1982) 138 Cal.App.3d 473, 479; *People v. Montenegro* (1985) 173 Cal.App.3d 983, 988.) While parole searches need not be based on probable cause or reasonable suspicion of criminal activity (*People v. Sanders* (2003) 31 Cal.4th 318, 332-333 (*Sanders)*; *Reyes*, *supra*, 19 Cal.4th at pp. 751, 754), they are subject to constitutional limits. Among other things, the scope of a parole search may render the search constitutionally unreasonable. (See *Smith*, *supra*, 172 Cal.App.4th at p. 1362.)

No party disputes that Officers Mohammed and Guerrero had knowledge that Duckworth was on parole and were authorized to conduct a parole search. (See *Smith*, *supra*, 172 Cal.App.4th at p. 1360 [officer was aware that defendant was on parole and was therefore authorized to conduct a parole search]; see also *Samson v. California* (2006) 547 U.S. 843, 856, fn. 5 [165 L.Ed.2d 250, 262].) Rather, the parties dispute whether the scope of their search went beyond the parameters of a legitimate parole search.

Consistent with the ambit of the standard parole search condition, the searching officer may look into areas or containers that it is reasonable to believe are within the complete or joint "control" of the parolee. (*People v. Boyd* (1990) 224 Cal.App.3d 736, 745, 749-751 (*Boyd*); *People v. Britton* (1984) 156 Cal.App.3d 689, 703 (*Britton*), disapproved on

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parole condition" of Duckworth but that the area under the driver's seat was not under Duckworth's "control."

another ground in *People v. Williams* (1999) 20 Cal.4th 119, 135; *United States v. Davis* (9th Cir. 1991) 932 F.2d 752, 760 (*Davis*).) As there was no evidence that Duckworth owned or possessed the vehicle, some other indication of Duckworth's control of the area searched was necessary for the search to be reasonable. From the record, it is clear that the magistrate (and the trial court) concluded that the area underneath the driver's seat was within Duckworth's "control" based on his immediate access to that area.

As the magistrate correctly found, a Honda Accord is a "small car."[5] Duckworth was sitting in the front passenger seat of the vehicle, which put him within immediate reach of the area under the driver's seat. Moreover, there was no evidence Duckworth suffered from a physical limitation that rendered him unable to utilize his hands or that the area under the driver's seat was partitioned off or excluded from other passengers. As the trial court put it, and as the magistrate impliedly found, the area underneath the driver's seat was "readily accessible" to Duckworth. We defer to this finding.

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[5] A judge, as with any fact finder, may appropriately consider matters within common knowledge. (See Evid. Code, § 452, subd. (g) [matters of common knowledge are judicially noticeable]; *People v. Godinez* (1992) 2 Cal.App.4th 492, 500 [recognizing that fact finders may rely on common knowledge].) Given that in *Maryland v. Pringle* (2003) 540 U.S. 366, 373 [157 L.Ed.2d 769, 776] the United States Supreme Court, apparently relying on its own common knowledge, considered a Nissan Maxima a "relatively small automobile," we see no reason to quarrel with the magistrate's similar observation that a Honda Accord is a "small car."

The issue remains, however, whether it was reasonable to believe that this area, which was readily accessible to Duckworth, was within his "control." (See *Boyd*, *supra*, 224 Cal.App.3d at p. 750 [reasonable suspicion standard used to determine whether an object is within the scope of a parole search].) We conclude that it was.[6]

Because Duckworth was within immediate reach of the area underneath the driver's seat and it was readily accessible to him, it was reasonable to believe that Duckworth could personally exercise power over that area (and any contraband therein), rendering it within his control. (See Merriam-Webster's Collegiate Dict. (11th ed. 2006) p. 272, col. 1 [defining "control" as, among other things, "to have power over"]; cf. *People v. Pompa* (1960) 178 Cal.App.2d 62, 65 ["control [over contraband] might be inferred from its presence in a place to which the accused and others had joint access"); *United States v. Tirrell* (7th Cir. 1997) 120 F.3d 670, 676 ["Indeed, in close quarters such as a car, a jury likely would have an easier time concluding that multiple individuals exercised control over a particular weapon"].)

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[6] The California Supreme Court has recently granted review in *People v. Schmitz* (2010) 187 Cal.App.4th 722, review granted December 1, 2010, S186707. According to the case summary appearing on the Supreme Court's Web site, *Schmitz* "presents the following issue: When conducting a vehicle search authorized by a passenger's parole condition, can the police search any areas of the vehicle's interior that appear reasonably accessible to the passenger?"

Although we have not located any authority that purports to delineate or establish criteria for determining what areas inside a vehicle are within a passenger-parolee's control for parole search purposes, our conclusion that it was reasonable to believe the area searched was within Duckworth's control, and thus within the proper scope of a parole search, is consistent with the rationale for permitting warrantless, suspicionless parole searches. (See *Cupp v. Murphy* (1973) 412 U.S. 291, 295 [36 L.Ed.2d 900, 905-906] (*Cupp*) ["the scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement"]; see also *Gant*, *supra*, 556 U.S. at p. ___ [173 L.Ed.2d at p. 493] [explaining that "'the area "within [an arrestee's] immediate *control*"'" is defined as the "'area from within which he might gain possession of a weapon or destructible evidence'" so that the scope of the search-incident-to-arrest exception remains "commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy" (italics added)].)

"The justification for exempting parole searches from the warrant requirement . . . is that these searches are necessary for effective parole supervision." (*Williams*, *supra*, 3 Cal.App.4th at pp. 1105-1106.) Parolees are "routinely and closely monitored," which greatly reduces their expectation of privacy. (*Reyes*, *supra*, 19 Cal.4th at p. 753.) Warrantless parole searches serve to deter crime and protect the public, and

when randomly done, parole searches enhance the potential for crime deterrence. (*Ibid.*)

Here, given that the area underneath the driver's seat was readily accessible to Duckworth, he could easily utilize that area to store or conceal items, such as weapons or other contraband, and he could easily retrieve items from that area and reduce them to his immediate possession. Accordingly, treating that area as within Duckworth's control and subject to a parole search is commensurate with the purpose of effectively supervising Duckworth, closely monitoring his conduct, protecting the public from any criminal danger he may pose, and deterring him from committing crime. Indeed, it is difficult to imagine that an officer attempting to supervise and monitor a parolee via a warrantless parole search would disregard those areas that are readily accessible to him. (Cf. *United States v. Knights* (2001) 534 U.S. 112, 120 [151 L.Ed.2d 497, 506] ["probationers [and parolees] have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because probationers [and parolees] are aware that they may be subject to supervision and face revocation of probation [or parole], and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond reasonable doubt, among other things, do not apply"].)

We conclude that the facts confronting the searching officers supported a reasonable belief that the area under the driver's seat, which was readily accessible to Duckworth, was

within his control and therefore within the proper scope of a parole search. Accordingly, the search of that area was lawful. While defendant raises arguments to the contrary, none compel a different result.

Defendant claims that this case is "controlled" by *People v. Baker* (2008) 164 Cal.App.4th 1152 (*Baker*), a decision from the Fifth Appellate District, which defendant cites in support of his position that "[i]t is not enough that the parolee had some theoretical access to the area underneath the driver's seat." *Baker*, which we are not bound to follow, is readily distinguishable.

In *Baker*, an officer stopped a vehicle for speeding. (*Baker*, *supra*, 164 Cal.App.4th at p. 1156.) Defendant Baker was sitting in the front passenger seat with a female's purse at her feet. (*Id.* at p. 1156.) After confirming that the vehicle's driver was on parole, the officer decided to conduct a parole search and had Baker exit the vehicle. (*Ibid.*) The officer searched the entire car and found nothing. (*Ibid.*) The officer then searched the purse and found methamphetamine in one of the purse pockets. (*Ibid.*) Baker was later charged with possession of methamphetamine and moved, unsuccessfully, to suppress the contraband found in her purse. (*Id.* at pp. 1155-1156.) The Court of Appeal concluded that the search of the purse went beyond the legitimate scope of a parole search. (*Id.* at pp. 1156, 1161.)

The *Baker* court reasoned that when executing a parole search, "the searching officer may look into closed containers

that he or she reasonably believes are in the complete or joint control of the parolee," and the purse was not such a container. (*Baker*, *supra*, 164 Cal.App.4th at p. 1159.) According to the court, a purse is "not generally an object . . . which two or more persons share" and "there [was] nothing to overcome the obvious presumption that the purse belonged to the sole female occupant of the vehicle." (*Id.* at p. 1160.)

What distinguishes this case from *Baker* is the nature of the area searched and the different "social expectations" (*Georgia v. Randolph* (2006) 547 U.S. 103, 111 [164 L.Ed.2d 208, 220]) that attach. In *Baker*, the area searched was the interior of a female's purse; it obviously belonged to the female nonparolee passenger, and as a matter of common social expectations, a purse is not generally an object that two or more persons share as it is "an inherently private repository for personal items." (*Baker*, *supra*, 164 Cal.App.4th at pp. 1159-1160; see also *United States v. Welch* (9th Cir. 1993) 4 F.3d 761, 764 [recognizing that "a purse is a type of container in which a person possesses the highest expectations of privacy"].) Thus, even though the driver, a male parolee, was likely within reach of the female purse, there was no reason to believe that he was allowed to access it.

Here, the area searched was an open space underneath the driver's seat, not a closed, personal possession clearly belonging to another individual. Unlike the female's purse in *Baker*, the area underneath the driver's seat carried with it no social expectation of exclusive or intensely private use. As

the People suggest in their briefing, it is not atypical for passengers apart from the driver to utilize the space underneath the driver's and front passenger's seat for storage purposes (whether to create more legroom or otherwise). In short, unlike in *Baker*, here there was no reason to believe that the parolee was not allowed to access the area searched.

In a related argument, defendant contends there was no evidence that Duckworth had "common authority" over defendant's vehicle. Defendant attempts to invoke the "common authority" theory of consent articulated in *United States v. Matlock* (1974) 415 U.S. 164 [39 L.Ed.2d 242] (*Matlock*), which *Baker* mentions and which the California Supreme Court employed in *People v. Woods* (1999) 21 Cal.4th 668, 675-676 (*Woods*), for purposes of explaining the legitimate scope of a probation (not parole) search. While defendant would have us analyze this case under the "common authority" theory of consent, we decline defendant's invitation to do so.

At its heart *Matlock* is a consent case, and *Woods* imported *Matlock* into the probation search context based on the underlying premise that probationers "may validly consent" to the search terms of their probation. (*Woods*, *supra*, 21 Cal.4th at p. 674.) While probation search terms may be a matter of consent, on more than one occasion the California Supreme Court has indicated that a *parolee* does *not* consent to the search terms of his parole; rather, those terms are imposed upon him. (*Sanders*, *supra*, 31 Cal.4th at p. 329, fn. 3 ["No comparable issue of waiver is raised in the present case, because the

search condition at issue here was imposed as a condition of parole, which defendant could not refuse"]; *Reyes*, *supra*, 19 Cal.4th at p. 749 ["The consent exception to the warrant requirement may not be invoked to validate the search of an adult parolee because, under the Determinate Sentencing Act of 1976, parole is not a matter of choice"]; *People v. Bravo* (1987) 43 Cal.3d 600, 608 ["A probationer, unlike a parolee, consents to the waiver of his Fourth Amendment rights in exchange for the opportunity to avoid service of a state prison term"].) Accordingly, unless and until the California Supreme Court explicitly imports *Matlock's* "mutual authority" theory of *consent* into the *parole* search context, we are reluctant to filter this case through a *Matlock* analysis.

Second, and in any event, there is no need to utilize *Matlock* as the test for assessing the parole search's legitimacy. The standard parole search condition, along with case law, already authorizes a search of the parolee and areas or property within his "control." (Cal. Code Regs., tit. 15, § 2511, subd. (b), item 4; see *Boyd*, *supra*, 224 Cal.App.3d at pp. 745, 749-751; *Britton*, *supra*, 156 Cal.App.3d at p. 703; *Davis*, *supra*, 932 F.2d at p. 760.) Here, it was reasonable to believe that the area underneath the driver's seat (and the contraband therein) was within Duckworth's "control" for parole search purposes. Moreover, the scope of a parole search must be commensurate with the rationale for exempting parole searches from the warrant requirement (*Cupp*, *supra*, 412 U.S. at p. 295 [36 L.Ed.2d at pp. 905-906]), and as previously discussed, the

search underneath the driver's seat was commensurate with this rationale. Therefore, the search was valid and there is no need to separately analyze this case under a consent rubric and independently determine whether the scope of the search was also commensurate with the quite different rationale behind warrantless consent searches. (*Florida v. Jimeno* (1991) 500 U.S. 248, 250-252 [114 L.Ed.2d 297, 302-303] [discussing consent exception rationale]; *People v. Jenkins* (2000) 22 Cal.4th 900, 980 [same].) Because the parole search in this case was lawful without regard to its treatment under *Matlock*, there is no need to further analyze the legality of the parole search under a *Matlock* paradigm.

Despite defendant's arguments to the contrary, the parole search underneath the driver's seat was constitutionally reasonable. Accordingly, we uphold the trial court's ruling.

DISPOSITION

For the reasons stated, we affirm the ruling on defendant's suppression motion.

RAYE, P. J.

We concur:

ROBIE, J.

BUTZ, J.