



People v. Smith

2002 | Cited 0 times | California Court of Appeal | December 6, 2002

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OPINION

THE COURT ¹

Appellant Larry Russell Smith pled guilty to one count of possession of heroin after the trial court denied his motion to suppress evidence pursuant to Penal Code section 1538.5. The heroin was found on appellant's person during a traffic stop. The car appellant was driving matched one associated with a wanted subject, and appellant matched the description of the wanted person. The officer followed appellant's car and observed the tow ball on the rear of the truck was blocking the license plate which lead to the traffic stop. Appellant was asked to step from the car and to provide his driver's license.

When appellant got out, the officer noticed a bulge in appellant's pant pocket. The officer asked and was given permission to search appellant. ² The search produced the heroin. Appellant was sentenced to a two-year suspended sentence and placed on probation for a period of three years with the condition that he serve 300 days in the county jail.

Appellant raises two issues on appeal: 1) that his detention during the traffic stop was unreasonably prolonged because the officer retained his driver's license while asking for consent to search, and 2) that if his conviction is affirmed, he should be resentenced under Proposition 36.

DISCUSSION

I. Motion to suppress evidence

The detention was not unduly prolonged and the officer acted reasonably. (See *People v. Valencia* (1993) 20 Cal.App.4th 906, 918 [once having properly stopped a vehicle, an officer may ask for and examine the license of the driver and may remove the driver from the car in order to do so]; see also *People v. Brown* (1998) 62 Cal.App.4th 493, 497-500 [during routine traffic stop, officer may run



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warrant check and ask permission to search while awaiting results of such check]; *People v. Stoffle* (1991) 1 Cal.App.4th 1671, 1679 [three- to four-minute detention to run warrant check pursuant to standard police procedure while officer checked the driver's license and the car registration was proper].)

At the suppression hearing, the arresting officer stated he asked appellant to exit the vehicle and produce his driver's license, which appellant did. After appellant exited the vehicle, the officer noticed a bulge in appellant's pocket that the officer suspected contained drugs, so he asked appellant for consent to search his person. Although the officer was uncertain whether he had returned appellant's driver's license to him before asking consent to search, he believed he had not yet received information back from dispatch regarding the status of appellant's license. He testified approximately three or four minutes had elapsed from the time appellant stepped out of the vehicle to the time he was searched. Looking to the totality of the circumstances, we do not find the detention during the traffic stop to be unreasonably prolonged. (*People v. Souza* (1994) 9 Cal.4th 224, 230-231 [in evaluating reasonableness of challenged search, we look to the totality of the circumstances].) Thus, there was no Fourth Amendment violation.

II. Resentencing request

Appellant is not entitled to be sentenced under the Substance Abuse and Crime Prevention Act of 2000 (Proposition 36) because he was convicted and sentenced prior to the effective date of the statute. (Prop. 36, § 8 [Proposition 36 applies prospectively only, effective July 1, 2001]. Appellant argues the statute applies to him because his conviction has not become final due to the pendency of his appeal. This argument is currently pending before the California Supreme Court in *People v. Floyd* (2002) 95 Cal.App.4th 1092, review granted May 1, 2002, S105225, and *People v. Fryman* (2002) 97 Cal.App.4th 1315, review granted July 31, 2002, S107283. *Floyd* is a decision out of this court in which the majority opinion rejected appellant's argument, reasoning that the term "convicted" or "conviction" occurs once judgment is pronounced and sentence imposed and the term does not include a requirement that the judgment be affirmed on appeal. We see no reason to revisit the issue until the California Supreme Court has resolved the current split among the appellate districts.

DISPOSITION

The judgment is affirmed.

1. *Before Dibiaso Acting P.J., Vartabedian, J., and Levy, J.

2. Although appellant's version of events conflicts with the officer's, the trial court was free to believe the officer over appellant and we will not disturb the trial court's factual findings where supported by the record. (See *People v. Glaser* (1995) 11 Cal.4th 354, 362 [appellate court must defer to the trial court's factual findings, implied or expressed, where supported by substantial evidence when reviewing denial of a Penal Code section 1538.5 motion].)

