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Opinion on remand from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW GORDON LAMONT, Defendant and Appellant.	G032369 (Super. Ct. No. 02NF1341) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla M. Singer, Judge. Affirmed.

Edward A. Hoffman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry J. T. Carlton and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

After the trial court denied Matthew Gordon Lamont's motion to suppress, he pleaded no contest to possessing a destructive device or explosive on a public street, possessing a destructive device or explosive with the intent to injure or destroy property, transporting a destructive device, and possessing materials with the intent to make a destructive device or explosive. The court sentenced him to three years in state prison.

On appeal, Lamont challenged the trial court's denial of his suppression motion. Lamont argued that as a *passenger* in the car, he was seized when the police officer illegally stopped the car in which he was riding in violation of his Fourth Amendment rights. In this court's prior published opinion *People v. Lamont* (2004) 125 Cal.App.4th 404 (*Lamont*), we agreed and reversed the judgment.

The California Supreme Court granted review in *Lamont*[1] and has now remanded the case to this court with directions to vacate our decision and reconsider our decision in light of *People v. Brendlin* (2006) 38 Cal.4th 1107 (*Brendlin*) and *People v. Saunders* (2006) 38 Cal.4th 1129 (*Saunders*). We have followed the court's directions and now reject Lamont's challenge to the trial court's denial of his suppression motion. We affirm the judgment.

FACTS[2]

Long Beach Police Officer Erik Herzog was conducting surveillance of the "Southern Kalifornia Anarchist Alliance" (SKAA) at its headquarters in the City of Long Beach because of reports SKAA might try to disrupt a celebration of Adolf Hitler's birthday being held by the Aryan Nation in Orange County. Herzog saw Lamont standing outside SKAA's headquarters, talking with a small group of people. Lamont is

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[1] Review granted March 30, 2005 (S131308).

[2] Because Lamont pleaded no contest, the facts are taken from the transcript of the preliminary hearing, the transcript of the motion to suppress, and the police reports.

a member of SKAA, and Herzog knew Lamont because he was arrested at a demonstration turned riot the previous year.

Lamont walked towards a parking lot carrying clothes and two white plastic jugs. One jug appeared to be a three-gallon water jug with a spout and the other a one-gallon milk jug, both jugs looked to be empty. Lamont, Maxwell Lucas, and another unidentified male got into a car and left. Herzog followed. They drove to a "hard-core punk concert" at the Unitarian Church in the City of Anaheim. The unidentified male stayed at the church, and Lucas and Lamont drove to a nearby grocery store. Lamont and Lucas went into the store, exited the store, got into the car, and drove towards the presumed location of the Aryan Nation celebration.

Lucas and Lamont stopped at a gas station. Herzog saw the car next to a gas pump, but he could not see what they were doing. Lucas and Lamont left the gas station, and Herzog briefly lost sight of them. When Herzog found them, the car was parked alongside a curb with the passenger door opened slightly. Lucas was sitting in the driver's seat and Lamont was sitting in the back passenger seat. Herzog called the City of La Habra Police Department and asked them to stop the car. Lucas and Lamont drove away.

La Habra Police Officer Kim Razey stopped Lucas and Lamont. Lucas was driving and Lamont was sitting in the rear passenger seat. Razey asked Lucas for his driver's license and he complied. Razey told Lucas he pulled him over because there was a strong odor of gasoline coming from the car. Lucas said the gas cap was leaking. Razey asked Lucas and Lamont whether they had ever been arrested or were on parole or probation. They said, "no." Razey asked them to get out of the car so he could investigate where the gasoline odor was coming from. Two undercover detectives arrived.

Razey asked Lamont and Lucas whether he could search them for safety reasons. Lamont consented to a pat down and Lucas consented to be searched. Razey

asked them again whether they had ever been arrested. Lamont said he had been arrested and was on probation, but he did not know whether he was subject to a search and seizure condition.[3] One of the detectives searched Lamont and found three cigarette lighters in his pants pocket. Razey looked inside the car and saw an unopened bottle of Tequila Rose on the floor of the right passenger side of the car. Because Lamont and Lucas were under the age of 21, Razey conducted a full search of the car for contraband. Razey searched the rear passenger portion of the car where Lamont was sitting and found the following: a one-gallon jug with flammable liquid; two sponges soaked with flammable liquid, one of which had two candles embedded in it; a pair of rubber gloves; a bandana; anarchist materials; and articles on nazi gatherings.

DISCUSSION

In his opening brief, Lamont argued the trial court erroneously denied his motion to suppress evidence because as a *passenger* in the car, he was seized when Razey illegally stopped the car in violation of his Fourth Amendment rights. The Attorney General, relying on *People v. Cartwright* (1999) 72 Cal.App.4th 1362 (*Cartwright*), contended Lamont, a passenger in the car Razey stopped, was not seized within the meaning of the Fourth Amendment.

In *Lamont, supra,* 125 Cal.App.4th 404, after reviewing and considering the relevant decisional authority on both sides of the issue, the majority opinion, over Justice Sills' dissent, concluded Lamont was seized within the meaning of the Fourth Amendment, and because the district attorney conceded the stop was illegal, all evidence seized as a result of the stop should have been suppressed under the "'fruit of the poisonous tree'" doctrine. (*U.S. v. Kimball* (1st Cir. 1994) 25 F.3d 1, 6; *People v. Butler*

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[3] In his opening brief, Lamont states, "Razey's claim that [he] acknowledged being on probation appears to be demonstrably false in light of a subsequent discussion between the [trial] court and the [district attorney], in which the court said to the [district attorney], ' . . . [Lamont] does not have a criminal record. Is that correct?' and the [district attorney] responded, 'Yes, that's correct, Your honor.'"

(1988) 202 Cal.App.3d 602, 607.) The California Supreme Court granted review in *Lamont,* and subsequently issued its opinion in *Brendlin, supra,* 38 Cal.4th 1107. The Supreme Court transferred *Lamont* back to us to reconsider our decision in light of *Brendlin*. Although authorized by California Rules of Court, rule 8.200(b)(1) to do so, Lamont did not file a supplemental opening brief. As we explain below, based on the California Supreme Court's holding in *Brendlin, supra,* 38 Cal.4th 1107, we conclude Lamont, a passenger in the car in which Razey illegally stopped, was not seized within the meaning of the Fourth Amendment.

In ruling on Lamont's suppression motion, the trial court stated: "The question for the court is whether you can distinguish what happened with . . . Lamont from the holding in [*Cartwright, supra,* 72 Cal.App.4th 1362], based on the fact that there is a concession by the [district attorney] that there was no probable cause nor reasonable suspicion, or traffic violation, that preceded the stop of the vehicle. [¶] Now, I have read and reread *Cartwright,* and I do think that *Cartwright* does apply. And I think that the emphasis in *Cartwright* is what can a passenger in a vehicle expect in terms of [a] legal obligation on the part of the officer. And I don't see that the court should not consider *Cartwright* in determining this issue. [¶] So having considered all of the arguments and all of the items that I identified on the record, and in light of the stipulation that has been presented to this court as a factual basis on which the court should rule, the court now denies the motion . . . ." (Italics added.)

"'In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated. [Citation.] We review the court's resolution of the factual inquiry under the deferential substantial evidence standard. The ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review. [Citation.]' [Citation.] In evaluating whether the fruits of a search or seizure should have been suppressed, we consider only the Fourth Amendment's

prohibition on unreasonable searches and seizures. [Citation.] 'The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.' [Citation.]" (*Brendlin, supra,* 38 Cal.4th at pp. 1113-1114, fn. omitted.)

Both parties spend much time discussing whether Lucas's and Lamont's conduct justified the traffic stop, i.e., whether Herzog saw Lucas and Lamont commit Vehicle Code violations and informed the La Habra Police Department of the violations or whether Razey smelled gasoline coming from the car before stopping them. However, the district attorney stipulated "there was no reasonable suspicion that justified the vehicle stop." Therefore, Razey's stop was illegal. We must now consider what effect, if any, this fact has in light of *Brendlin*.

As the *Brendlin* court thoroughly explained, there is a split of authority in federal and state courts as to whether a passenger in a vehicle has a reasonable expectation of privacy[4] and may challenge the legality of a traffic stop. (*Brendlin, supra,* 38 Cal.4th at pp. 1114-1115.) In *Brendlin,* an officer stopped a car with expired registration tabs. Prior to the stop, the officer confirmed "the car's registration had expired two months earlier but that [a renewal] application was 'in process[.]'" Although the officer observed that a valid temporary operating permit was "taped to the rear window, he could not determine . . . whether the permit matched the [car] and decided to stop [it] to investigate . . . ." The officer approached the car's driver's side and asked the driver for her driver's license. "He also asked the defendant, the passenger, to identify himself, since he recognized [him] as" someone who "had absconded from parole supervision." The officer "observed receptacles in the car containing substances used [to

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[4] The United States Supreme Court and California Supreme Court have directed all other courts to abandon use of the word "'standing'" in Fourth Amendment discussions. (*People v. Ayala* (2000) 23 Cal.4th 225, 254, fn. 3 [avoid the term "'standing'" but nature of inquiry remains the same].)

produce] methamphetamine. In response to the [officer's] inquiry, the defendant falsely identified himself," and the officer returned to his car and verified the defendant "was a parolee at large and had an outstanding no-bail warrant for his arrest. During this period, [the] defendant opened and then closed the passenger door of the [car]. [¶] After requesting backup, [the officer] pointed his weapon at [the] defendant, ordered him out of the car, and placed him under arrest for the parole violation." (*Id.* at pp. 1111-1112.)

After noting the Attorney General abandoned its argument the officer had "articulable suspicion" for the stop, the *Brendlin* court noted the Attorney General argued the defendant, "a passenger [in the car], was not seized within the meaning of the Fourth Amendment" as a result of the traffic stop, but only as a result of being ordered out of the car, which was lawful because of the "no-bail warrant[.]" (*Brendlin, supra,* 38 Cal.4th at p. 1114.) The court stated the issue turned on "the definition of a seizure in the Fourth Amendment's prohibition on 'unreasonable searches and seizures.'" (*Id.* at p. 1115.) "A seizure occurs when the police, by the application of physical force or show of authority, seek to restrain the person's liberty [citations]; the police conduct communicated to a reasonable innocent person that the person was not free to decline the officer's request or otherwise terminate the encounter [citation]; and the person actually submitted to that authority [citation] for reasons not 'independent' of the official show of authority [citation]. [¶] . . . [¶] [A]n officer causing a vehicle to pull over in transit is conducting an investigatory stop of the *driver*.' [Citations.] '[T]he display of authority and control is directed at the driver, not the passenger.' [Citation.] [¶] More importantly, [the] defendant, as the passenger, had no ability to submit to the deputy's show of authority. . . . 'The passenger simply has no say in the matter.' [Citation.]" (*Id.* at pp. 1118-1119.)

The court explained a critical factor was *why* the passenger's freedom was curtailed. The court stated a passenger's freedom is curtailed because it is unsafe to exit a moving vehicle or the passenger "prefer[s] to await the completion of the traffic stop

and continue en route in the company of the driver[,]" but neither factor means "the passenger has been seized within the meaning of the Fourth Amendment." (*Brendlin, supra,* 38 Cal.4th at p. 1119.) The court reasoned the liberty contemplated by the definition of seizure refers to whether a person "feel[s] free to depart or otherwise conduct his or her affairs as though the police were not present[]" and not whether the person "has the physical capacity to leave the scene." (*Ibid.*) The court said, "Absent some directive from the police, and as long as the rules of the road are otherwise obeyed, the passenger is free to do what the driver cannot—i.e., exit the vehicle or dismount from the motorcycle or bicycle and thereby terminate the encounter with the officer. [Citation.]" (*Id.* at p. 1120.)

After addressing the dissent's[5] argument that the majority's decision will lead to anomalous consequences because the driver, who has been seized, can suppress the fruits of an unlawful search, but the passenger, who has not been seized, cannot, the court explained passengers are not without constitutional protection. "We emphasize that passengers who are in vehicles subjected to unjustified traffic stops are not without constitutional protection. Once the vehicle has been stopped, the passenger may not be detained thereafter without reasonable suspicion the passenger is involved in criminal activity. [Citations.] Furthermore, neither the passenger nor the passenger's belongings in the vehicle may be searched without lawfully acquired cause to justify an arrest [citation] or a search [citation]. A passenger in a car subjected to an unjustified stop may also be able to prosecute a civil suit against the police under the rubric of substantive due process. [Citation.]" (*Brendlin, supra,* 38 Cal.4th at p. 1123.) The court concluded, "We therefore hold that because the deputy effected a traffic stop of [the driver's] vehicle

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[5] Justices Corrigan, Werdegar, and Moreno dissented. On November 28, 2006, Brendlin filed a petition for writ of certiorari with the Supreme Court of the United States.

without any indication [the] defendant, the vehicle's passenger, was the subject of his investigation or show of authority, [the] defendant was not seized when [the driver] submitted to the deputy's show of authority and brought the vehicle to a stop." (*Ibid.*)

Here, Lamont has not shown that he, as the passenger, was the subject of Razey's show of authority or that he actually submitted to it. Razey's flashing lights were directed at the driver, Lucas, and not at Lamont. Once the car came to a stop, Razey approached the driver's side of the car, without blocking Lamont's exit, brandishing a weapon at him, or making any intimidating movements towards him. In these circumstances, one cannot say that Lamont was the subject of Razey's investigation or show of authority.[6]

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.

[6] Because Lamont claims only the traffic stop itself constituted a seizure, we need not consider whether any of Razey's actions subsequent to that constituted a seizure. Therefore, we need not discuss *Saunders, supra,* 38 Cal.4th 1129.