FULLERTON POLICE DEPARTMENT
TRAINING BULLETIN
ROBERT DUNN, CHIEF OF POLICE

OCTOBER 2018, TB # 18-03

PETITIONER ENTITLED TO RETURN OF SEIZED MARIJUANA PROPERTY UNDER CALIFORNIA LAW

On August 16, 2018 in the case of *Smith v. Superior Court of San Francisco*, 2018 Cal. App. LEXIS 931 (San Francisco County Superior Court – Appellate Division, Aug. 16, 2018), the Appellate Division of the San Francisco County Superior Court granted the petition for writ of mandate seeking return of a lawful amount of marijuana seized during arrest. The Court ruled that there was no conflict between relevant federal and State law in the matter.

Background

In January 2018, a San Francisco Police Department police officer went to a downtown address in response to a report of a man making threats with a possible gun. The officer ultimately arrested Robert T. Smith, the petitioner here. The officer searched Smith's backpack, seizing 21.8 grams of marijuana and $574.21 in cash. Smith was charged by misdemeanor complaint with two counts of criminal threats (Pen. Code, section 422) and one count of disturbing the peace (Pen. Code, section 415, subd. (3)). These charges subsequently were dismissed under Penal Code section 1385 in March 2018.

In April 2018, the trial court heard and denied Smith's non-statutory motion to return the 21.8 grams of marijuana. Smith filed a petition for writ of mandate, seeking review for the return of his marijuana. The Appellate Division of the San Francisco County Superior Court (the "Court") ordered the SFPD to show cause why it should not be ordered to return Smith's property under *City of Garden Grove v. Superior Court*[1] (and any other applicable law).

Discussion

The Court confirmed that the petition for writ of mandate was the proper avenue of redress for denial of a defendant's non-statutory motion to return seized property.[2] The Court then reminded that no state can "deprive any person of life, liberty, or property, without due

[1] 157 Cal.App.4th 355 (4th Dist. 2007).

[2] *People v. Hopkins*, 171 Cal.App.4th 305, 308 (4th Dist. 2009).

process of law," under the Fourteenth Amendment to the United States Constitution. Therefore, "'[c]ontinued official retention of legal property with no further criminal action pending violates the owner's due process rights.' (*Garden Grove*, supra, 157 Cal.App.4th at p. 387.)"

Proposition 64, approved in November 2016, drastically reduced criminal punishments for some marijuana offenses. Proposition 64 added Health and Safety Code section 11362.1, which legalized the possession of 28.5 grams or less of cannabis for persons at least 21 year old.

Under Health & Safety Code, section 11473.5: "All seizures of controlled substances … which are in possession of any city, county, or state official as found property, or as the result of a case in which no trial was had or which has been disposed of by way of dismissal or otherwise than by way of conviction, shall be destroyed by order of the court, unless the court finds that the controlled substances, instruments, or paraphernalia were lawfully possessed by the defendant." The Court explained that "lawfully possessed" per this section meant lawfully possessed pursuant to California law, and the "*Garden Grove* court found that principles of due process and fundamental fairness dictate the return of lawfully possessed marijuana." (*Garden Grove*, supra, 157 Cal.App.4th at p. 388–89.) However, under the federal Controlled Substances Act (21 U.S.C. section 801 et. seq.; "CSA"), "simple possession" of marijuana is a misdemeanor,[3] and it is unlawful for any person to knowingly and intentionally distribute marijuana. (21 U.S.C. section 841(a)(1).)

The Court explained that the Supremacy Clause of the United States Constitution grants Congress the power to preempt state law,[4] but the traditional police powers of the States are not superseded by a federal enactment unless that is the clear and manifest purpose of Congress. Federal law preempts state law when: (1) Congress explicitly proclaims that its enactment preempts state law; (2) the enactment regulates conduct in a field that Congress intended the federal government to occupy exclusively; or (3) the state law conflicts with federal law, making it impossible for a private party to comply with both state and federal requirements.[5]

21 U.S.C. section 903 of the CSA simplifies the Supremacy Clause's preemption test as applied here. The section provides: "No provision of [the CSA] shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision … and that State law so that the two cannot consistently stand together." Thus, the CSA explicitly proclaims that its provisions do not preempt State law and are not intended to exclusively occupy any field to the exclusion of State law. The

[3] 21 U.S.C. section 844(a).

[4] U.S. Const. art. 6, cl. 2.

[5] *Jevne v. Superior Court*, 35 Cal.4th 935, 949-950 (2005).

Court explained that the CSA would therefore preempt State law "only to the extent of an actual conflict, making it impossible for a private party to comply with both state and federal requirements."

The Court observed that California law enforcement officers are required to return "lawfully possessed" marijuana to its owner, per State law. The CSA prohibits the distribution of marijuana, whether or not a state permits the recreational use of marijuana. Would a police officer returning marijuana to its owner under California law be "distributing" marijuana under the CSA? The *Garden Grove* court found that 21 U.S.C. section 841(a)(1) did not apply to people who "regularly handle controlled substances in the course of their professional duties."[6] Here, SFPD would be acting under a court order in returning Smith's 21.8 grams of marijuana, clearly in a professional capacity. Consequently, the Court held there was no "positive conflict" between the CSA and California law such that compliance was impossible here.

21 U.S.C. section 885(d) of the CSA declares that "no civil or criminal liability shall be imposed by virtue of this subchapter … upon any duly authorized officer of any State … who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." Under *U.S. v. Cortés-Cabán*,[7] Section 885(d) protects accepted law enforcement tactics "in which officers handle and transfer drugs." The Court concluded that "any law or municipal ordinance relating to controlled substances" necessarily included the California statutory scheme for the return of "lawfully possessed" marijuana to its owner, "further eliminat[ing] any positive conflict between California's return law and the CSA's prohibition on distribution of marijuana." The Court thus held that SFPD was immune from federal prosecution under the CSA when complying with California's return provisions.[8]

The Court, having found no positive conflict between the CSA and the pertinent California law at issue here, noted that petitioner Smith was over 21 and the amount of marijuana he sought to have returned was less than 28.6 grams. Thus he had ""lawful possessed" the marijuana at the time of seizure. The Court had concluded that there was no positive conflict between the CSA and California's marijuana return laws and that the SFPD was

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[6] *Garden Grove*, (2007) 157 Cal.App.4th at p. 390.

[7] 691 F.3d 1, 20 (1st Cir. 2012).

[8] See *People v. Crouse* (2017) 388 P.3d 39, 45 (dis. opn. of Gabriel, J.); see also *State v. Okun* (2013) 231 Ariz. 462, 466 [296 P.3d 998] [concluding that 21 U.S.C. section 885(d) immunizes law enforcement officers from federal prosecution for complying with a court order to return the defendant's marijuana]; *Garden Grove*, (2007) 157 Cal.App.4th 355, 390 [same]; *State v. Kama* (2002) 178 Or.App. 561, 564 [39 P.3d 866] [same].

immune from federal prosecution under the CSA when complying with California's return laws. Accordingly, the Court granted Smith's petition for writ of mandate, and ordered the lower court to vacate its previous denial for return of property, and enter a new order in compliance with the Court's decision.

HOW THIS AFFECTS YOUR AGENCY

The Court found that officers are immune from prosecution under the CSA when agency officers comply with California's marijuana return regulations. This decision builds upon the prior holding of *Garden Grove*. While the Smith decision is a State law case from the Superior Court Appellate Department, it should provide some reassurance that officers returning marijuana pursuant to Proposition 64 and the *Garden Grove* decision will not be subject to prosecution under federal law if they are acting in the course and scope of their professional duties.

As always, if you wish to discuss this matter in greater detail, please feel free to contact me at (714) 446 – 1400 or via email at jrt@jones-mayer.com.

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Source: California Police Chiefs Association (CPCA) Legal Alert - Client Alert Memorandum October 29, 2018

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