

Transcript, “Search Incident to Infraction Arrest”

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[discussing *People v. Macabeo* (2014) 229 Cal.App.4th 486]

Hello, welcome back. This week we have a California Court of Appeal decision that builds on two prior U.S. Supreme Court decisions and one prior California Supreme Court decision to reach a conclusion that may be surprising to some folks but it’s consistent with the direction the law has been going. This is *People v. Macabeo* —I don’t know how you say that, but I’m gonna say “Macabeo” — *People v. Macabeo* from the Court of Appeal.

What happened is Paul Macabeo was riding his bicycle and he went right through a red light or a stop sign, I forget which it was — and it was a stop sign. And so the police officer stops him, because he’s violated 22450A, he didn’t stop at the stop sign, and those rules—even though the bicyclists don’t all seem to know it — those rules apply to them when they’re out there on the road. So there’s this stop of Macabeo with a bicycle infraction. And then there’s the police officer trying to establish some means for searching him. He asks him about probation and the guy was on probation but now he’s off. He asks for consent but he limits it to just searching the pockets. And he gets consent, but in the pocket he finds

a cell phone. And according to the facts at least, he doesn't ask for consent to search the cell phone, he had just asked for consent to search the pockets to see what was in there. So it's kind of difficult to justify — and then he pats him down and then searches the cell phone and finds child pornography on it.

The question is does the evidence of the child pornography come in under these circumstances. And so, you know, everybody here, the prosecutor, the magistrate who's hearing the motion, everybody's scratching around trying to come up with the right way to justify the search. And there is a right way. And they find it.

It begins with a 2001 decision from the U.S. Supreme Court called *Atwater v. Lago Vista*. That case said, "A custodial arrest may be made for a traffic violation without violating the United States Constitution." They said we don't care what the state court may say, we don't care what the state statutes may say about arresting. You can arrest under the Fourth Amendment if you have probable cause to believe the person committed any offense. In that case, it was driving with no seat belt on. That was an offense, the officer had probable cause because he saw it, therefore the arrest was good under the Fourth Amendment, said *Atwater*.

Seven years later, in *Virginia v. Moore*, U.S. Supreme Court said, and like we said in *Atwater*, the arrest doesn't have to be authorized by some state statute to be lawful under the Fourth Amendment. "An arrest

need not be authorized by state law to be constitutional under the Fourth Amendment,” they said, because the Fourth Amendment, the U.S. Constitution is the supreme law of the land, it’s not subject to amendment by state statutes. State legislatures cannot amend the U.S. Constitution, the Fourth Amendment means what we say it means and we already told you in *Atwater*, it means an officer can arrest with probable cause for any offense.

So in *People v. McKay*, the California Supreme Court faithfully applied the *Atwater* rule and upheld a search incident to arrest for a bicycle infraction. Guy was riding his bicycle the wrong way, on the wrong side of the road. Supposed to stay on the same side as the traffic, on the right side. He was on the wrong side. So the officer stopped him, searched him, found drugs. The drugs come in, said *People v. McKay*. Arrest for riding a bicycle on the wrong side of the street justified the search, which yielded admissible narcotics.

Okay, then we come to *Macabeo*. So the court here says, the trial court hearing the motion, the defense attorney’s saying, “well, that’s not what the police officer said in his report, he didn’t say it was a search incident to arrest, he said it was either probation or consent or something, he never tried to justify it on the basis of search incident to an arrest.” The trial court said this, which was quoted in the Court of Appeal opinion: “What was going through the officer’s mind does not have any bearing on the legality of what the officer did.” It’s not a question of the officer’s

analysis, it's a question of objectively can we justify what the officer did. And the court said yeah, "Under *Atwater*, all that's needed to justify a custodial arrest is a showing of probable cause." We had probable cause. He went right through the stop sign. And the court said, "There's nothing inherently unconstitutional about effecting a custodial arrest for a fine-only offense." Although ordinarily you might just give a warning or cite and release, there's nothing unconstitutional about making an arrest, and if you have the PC to make an arrest, then you have the right to make a search incident to arrest either before or after making the arrest.

So *Macabeo* said, "Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." Therefore, even though subsequently the U.S. Supreme Court came down and said you cannot search a cell phone incident to arrest, at the time this search occurred the rule under *People v. Diaz* was yes, you can. And so you can't blame the police officer for not anticipating that the U.S. Supreme Court three years later is going to reverse that. So the evidence came in.

The takeaway:

—PC to arrest for an infraction justifies a search incident to arrest, under the Fourth Amendment.

—If the search yields evidence of a bookable offense, suspect can be arrested for both the infraction and the bookable offense. Don't forget the infraction. Dance with the girl that brung you.

—And if nothing is found during the search, the suspect could be released from arrest, either on citation, or with no citation, no further action, under 849(b)(1) of the Penal Code.

So those are your options when you have somebody who commits an infraction in front of you. You have PC to arrest him for that, which gives you the right to search. And what that search yields will determine whether you book him or release him on citation or with no further action.

You're up to date on the rules of *Macabeo*. I'll see you next time.