No. A125956

In the Court of Appeal

Of the State of California

First Appellate District

Division 2

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

BOBBY B. MCWOODSON,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

Appeal from
San Mateo County Superior Court Case No. SC065141
The Honorable Stephen Hall

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By appointment of the court of Appeal
under the First District Appellate
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STATEMENT OF APPEALABILITY

This appeal is taken from a final judgment and sentence following a jury trial. It is authorized by Penal Code section 1237.

STATEMENT OF THE CASE

In an Information filed on December 10, 2007, the San Mateo County District Attorney alleged that appellant Bobby Byers McWoodson had: possessed cocaine base for sale in violation of Health and Safety Code[1] section 11351.5 (**Count One**); possessed marijuana for sale in violation of section 11359 (**Count Two**); and falsely identified himself to a police officer in violation of Penal Code section 148.9, subdivision (a) (**Count Three**). (Clerk's Transcript on Appeal ("CT") 27-28.) The Information further alleged that McWoodson had suffered a prior conviction for second degree robbery (Pen. Code § 211), which was a strike within the meaning of Penal Code section 1170.12, subdivision

[1] Unless otherwise indicated, all further statutory references are to the Health and Safety Code.

(c)(1). (CT 28.)

Trial was set for November 17, 2008. (CT 77.) On November 13, 2008, McWoodson moved to continue trial to allow time for a motion to suppress based on his counsel's belated realization that such a motion should have been made. (CT 82-84.) The prosecution opposed the motion (CT 78-81), and the trial court denied it on November 14, 2008. (CT 85; November 14, 2008 Reporter's Transcript on Appeal ("11/14/08 RT") 4.)

On the date set for trial, November 17th, McWoodson orally moved to suppress his statements to police based on a *Miranda* violation, which the court denied. (CT 89-95; Reporter's Transcript on Appeal, Volume II ("RT-II") 8, 17, 36-38.)[2] The court also granted the prosecution's *Castro* motion to use McWoodson's prior juvenile adjudication for impeachment. (CT 89, 96-100; RT-II 17.)

Jury trial proceeded on November 18, 19 and 20, 2008, with the prosecution dismissing Count Three at

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[2] The magistrate had denied a motion to strike McWoodson's statements to police based on a *Miranda* violation during the Preliminary Hearing. (CT 20-23.)

the start of the second day. (CT 105-111, 115, 115-120, 125-128; RT-IV 79-80.) On the afternoon of November 20, 2008, the jury found McWoodson guilty on Count One (possession of cocaine base for sale), not guilty on Count Two (possession of marijuana for sale), but guilty of the lesser included offense of misdemeanor possession of marijuana on Count Two. (CT 127, 154-157; RT-V 302-303.) The court found the allegation of a strike prior to be true. (CT 128-153, RT-IV 246-247, RT-V 307.)

On March 6, 2009, the court rejected McWoodson's suggestion to strike his strike prior pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (CT 223-245), and sentenced him to the lower term of three years on Count One (possession of cocaine base for sale), doubled to six years pursuant to Penal Code section 1170.12, subdivision (c)(1), and to time served on Count Two (simple possession of marijuana). (CT 250-253; RT-VI 324-326.) The court found total credit for time served of 525 days. (CT 251, 253; RT-VI 326.)

McWoodson did not timely appeal, but this Court on September 22, 2009 granted his motion for permission to

file a late notice of appeal, which he did on October 5, 2009. (CT 263, 265.)

STATEMENT OF FACTS

A. BACKGROUND – RELATIONSHIP BETWEEN APPELLANT AND HORTON

McWoodson's birth name was Bobby Joseph Byers, but his name was changed to Bobby Byers McWoodson after he was taken away from his birth mother, a cocaine abuser, and adopted by the McWoodson family in 1993. (RT-IV 191, 209.) McWoodson had been convicted of robbery on May 1, 2007. (RT-IV 223.)

In September 2007, McWoodson was living with his girlfriend, Tiera Horton, in various locations. (RT-IV 168-169, 180, 192.) They had known each other since high school, had been together for 6 months, and had been living together for 3 months, but were in the process of breaking up. (RT-IV 169-170, 188, 192-194.)

B. SEPTEMBER 15, 2007 – HORTON AND X

On September 15, 2007, Horton was with her new boyfriend, X, who asked her to hold some money for him

for safekeeping while he went into a store in Alameda. (RT-IV 170-172.) Horton believed there was around $2,000 in cash, and thought that X was concerned that the police might stop him, or that the store might be robbed. (RT-IV 187.) X advised her that he was going to be meeting people at a movie theater in San Mateo in a few hours, and would be picking up some more money there. (RT-IV 176, 183-184, 187.) (RT-IV 183-184, 187.) X apparently left his jacket in Horton's car when he went into the store, though she did see him do so, and she did not notice the jacket until later, when McWoodson had it. (RT-IV 182-183.)

Horton was double-parked and waiting for X to come back from the store when the police made her move her car. (RT-IV 170-172.) She saw X after the move but he did not return to the car, so after 15 minutes Horton simply went home. (RT-IV 172-173.)

C. SEPTEMBER 15, 2007 – HORTON DRIVES APPELLANT TO SAN MATEO

McWoodson called Horton about an hour later, trying to convince her to get back together. Horton picked up

McWoodson at around 5:30 and they drove around. (RT-IV 170-174, 193-194.) Horton told McWoodson she needed to go to San Mateo, and he said he also needed to go there to meet a friend of his who had music "beats,", so they drove there together. (RT-IV 174-175, 195, 218-219.)

The car Horton was driving was McWoodson's, even though it was in Horton's name, and McWoodson said he wanted the car back. (RT-IV 178, 220-221.) Although she had not discussed the matter with X, Horton decided to use the money she had gotten from X to buy another car from a friend of McWoodson's who had a car for sale. (RT-IV 178, 187-188, 195-196.) The person selling the car was the friend in San Mateo who had the music beats. (RT-IV 219-220.) McWoodson fell asleep during the drive. (RT-IV 195-196, 220.)

D. ACTIVITIES AND ARREST IN SAN MATEO

1. Argument Upon Arrival, And Split

Horton and McWoodson got into an argument as they arrived in San Mateo; McWoodson accusing Horton of cheating, and she ordered him to take his stuff and get out of the car. (RT-IV 175, 196-198, 225, 228-229.)

Horton's statement depressed McWoodson, who grabbed a jacket in the back seat that he thought at the time was his. (RT-IV 198, 203, 225.) Trying to get rid of McWoodson, Horton gave him X's money, and told him to "to take [it], get the car, and it was over." (RT-IV 188-190, 196-198, 220.) McWoodson put the money in his pant's pocket, intending to return it if he could not buy the car. (RT-IV 198, 200-201, 210.) He did not know where Horton had gotten the money, but suspected it was from a man. (RT-IV 210.) When McWoodson got out of the car, Horton did not notice if he took anything because she was slamming the door and walking away herself. (RT-IV 175.)

Horton went toward the theater to meet X, while McWoodson went the other way looking for the condominium where his friend lived. (RT-IV 175-176, 198-99, 218-220.) Horton sat on one of the benches near the theater to see if X would show up. (RT-IV 176-177.) McWoodson had an address for his friend but not the apartment number and could not find him, so he went back to the car hoping to see Horton again to give her back the money. (RT-IV 199-200, 218-220.) When he

did not find Horton at the car, he began walking toward the theater. (RT-IV 199-200.) He had marijuana with him that he planned to consume over the next few days, which he took out of his pant's pocket and put in the right front pocket of the jacket. (RT-IV 201-204, 221-222, Exhibit A.) At the time, he did not notice anything else in the pocket. (RT-IV 204.)

2. Reunion At Theater

McWoodson was carrying the jacket in his hand as he arrived at the theater, where began talking to Horton. (RT-IV 176-177, 181-182, 199-200, 204, Exhibit A.) Horton did not know where McWoodson had gotten the jacket, but it belonged to X. (RT-IV 182.) McWoodson apologized to Horton, asked her to go to the movies, and told her that he would check back later to see if he could locate his friend with the car. (RT-IV 178-179, 200, 205.)

Horton and McWoodson smoked a small amount of marijuana that McWoodson had tucked behind his right ear. (RT-IV 178-179, 200, 204-205, 216-217.) He used a paper to light the joint which he left on the bench,

and did not have any papers, lighters or matches on him. (RT-IV 222-223.) It was still daylight, and McWoodson was not wearing the jacket while they were smoking. (RT-IV 180-181, 216-217.)

Although Horton had declined the movie invitation before, she changed her mind shortly after smoking the marijuana, because she had seen X, who seemed to be looking for someone himself. (RT-IV 179-180, 184, 205.) Horton did not believe X saw her, and she did not try to talk to X, to avoid any conflict between him and McWoodson.[3] (RT-IV 176-177, 184-186.) She and McWoodson did not discuss what movie they were going to see, and did not know whether one was starting soon, or they would have to wait until 8:30 or 9:00. (RT-IV 216-217.) They had halfway made up at this point. (RT-IV 223-224.)

When Horton told McWoodson she would go to the movies, he put on the jacket for the first time, as it was getting cold. He put his hand into the pocket, realized that it was not his jacket, and said so to

[3] X had told Horton to get rid of McWoodson or X would, and had threatened Horton. (RT-IV 188-189.)

Horton. (RT-IV 180-181, 205-206, 217, 225.) In the pocket he felt not only his marijuana but also something else under the marijuana that he pulled out for a couple of seconds, but did not recognize. (RT-IV 205-206, 211-214.)

3. Arrival of Officers

McWoodson saw police officers watching him, and then approaching, and unconsciously put everything back in the jacket pocket. (RT-IV 206, 211-215.) He then greeted the officers, who arrived just after he had said the jacket was not his, and a few minutes after Horton had seen X. (RT-IV 181, 186, 206-207.)

San Mateo police officers Michael Schlegel and Shandon Murphy were on uniformed patrol in the theater area of San Mateo, which included the Century 12 Theater, at approximately 7:30 that evening. (RT-III 55-57, RT-IV 81-82.) The manager of the theater had complained that she had seen someone smoking marijuana. (RT-IV 96-97.)

The officers saw McWoodson and Horton standing and talking on the side of a mall area in front of the

theater, slightly more than half way between the front of the theater and the street. (RT-III 58-59, RT-IV 82, 96, 100, 231-232.) The mall area is a rectangular area, 30 to 50 feet wide and 100 yards long, with benches and flower boxes. (RT-III 58, RT-IV 82-83, 92-95, Exhibit A.) Schlegel said McWoodson was about 50 feet away when they first saw him, while Murphy said the distance was 75 feet. (RT-III 60, RT-IV 232.) Schlegel did not recall anyone else in the area, but Murphy recalled perhaps 15 people sitting on the benches. (RT-III 60, RT-IV 83, 94-95.)

Murphy, who never lost sight of McWoodson, did not see him reach into his jacket pocket, or observe the officers approaching. (RT-IV 233-238.) If Murphy had seen someone put his hand in a pocket and look at him, he would be concerned and would give a verbal command, which he did not do in this case. (RT-IV 234-235.) Murphy never saw McWoodson without the jacket during the 8-10 seconds that it took to arrive at where he was standing, or at any time after. (RT-IV 106, 235-239.)

Schlegel at first noticed nothing unusual as he approached McWoodson. (RT-III 60.) Both officers then

smelled what they believed was burnt marijuana, though they had not seen anyone smoking marijuana. (RT-III 57-58, 60-61, RT-IV 83-84.) Schlegel recognized the smell from his training, while Murphy had smoked marijuana in high school. (RT-III 57-58, RT-IV 102.) The smell got stronger as they got closer to McWoodson. (RT-III 60, RT-IV 83.)

4. Pat Search for Identification

Officer Murphy arrived before Schlegel, explained why they were coming to the area, and asked for identification. (RT-III 60-61, RT-IV 84, 97-99, 236.) He had never seen McWoodson before, and planned to say that the manager of the cinema had complained that she saw him smoking marijuana. (RT-IV 96-97.) According to McWoodson, the officers did say they had received a call that a black male was smoking weed. (RT-IV 215-216.)

McWoodson was not under arrest at the time of the first contact. (RT-IV 97.) Murphy testified that he requested identification due to the statements of the manager and the strong odor of burnt marijuana, but

acknowledged he did not need identification to determine if McWoodson had used marijuana. (RT-IV 98.)

McWoodson did not have his driver's license in his possession, and told the officers he had no identification on him. (RT-III 61, RT-IV 84, 87, 99, 207.) According to the officers, McWoodson then threw up his hands and said "it's nothing but a doobie,[4] or words to that effect," though Schlegel had not observed any cigarettes or cigars in the area (RT-III 61, RT-IV 84, 97, 99.)

According to Murphy, Schlegel then advised McWoodson that he was going to "check for a wallet." (RT-IV 84.) Murphy explained that people often have identification even though they have denied it, and officers will "pat[] down the outside of the clothing to see if there's a bulge for a wallet." (RT-IV 99.) Both officers asked McWoodson several times for identification, but he said he had none. (RT-III 61, 75-76, RT-IV 84, 98-99.) McWoodson testified that after asking him twice for identification, the officers announced they would conduct a pat search. (RT-IV 207.)

[4] Slang for marijuana. (RT-III 61.)

Schlegel said that McWoodson appeared to become a bit more anxious after being asked several times for identification, and began looking around as if possibly considering fleeing. (RT-III 61-62.) Schlegel said that he grabbed McWoodson's left arm near the wrist and advised that he would pat McWoodson down to see if he had a wallet or some other type of identification on him. (RT-III 62, RT-IV 84, 99.)

McWoodson then became uncooperative or defensive, according to the officers. (RT-III 62, RT-IV 84.) Schlegel testified that McWoodson said that he was only 16 years old and that Schlegel should not have contacted or stopped him, and that McWoodson turned quickly as Schlegel tried to pat him down, making a quick, jerky movement with his right hand near the right front pocket of his coat. (RT-III 62, RT-IV 85.) Schlegel told McWoodson to quit moving but McWoodson kept moving, so Schlegel grabbed McWoodson's right shoulder or arm and pulled him back and away from the pocket and Murphy in case McWoodson was reaching for a weapon. (RT-III 62-63.)

Murphy's testimony was similar, except that he

recalled McWoodson making the comments after Schlegel had secured both arms. (RT-IV 84-85.)

5. Discovery of Contraband

Schlegel then grabbed the outside of the jacket pocket and felt a clump of something that seemed to crunch or crumble as he squeezed it. (RT-III 63.) In feeling the items inside the pocket, Schlegel went beyond what he considered a "pat search." (RT-III 73.) He did so because McWoodson was quickly darting his hand to that pocket, and Schlegel wanted to determine why he was grabbing that pocket, with the biggest concern being a weapon. (RT-III 74-75, RT-IV 85.)

The officers did not discover a wallet on McWoodson, and found nothing else in the pocket. (RT-IV 99-100.) Schlegel believed what he felt was consistent with a "twenty sack" of dried marijuana, or some other controlled substance, and elected to remove it because he was concerned McWoodson might be trying to destroy it. (RT-III 64-66, 74-75.)[5] He then pulled

[5] The court sustained objections about whether Schlegel was violating McWoodson's constitutional rights. (RT-III 74-75.)

out of the pocket a plastic bag about the size of a fist with green leafy materials, along with another bag with 12-15 individually wrapped small white granular type objects, consistent with rock cocaine. (RT-III 64-66, RT-IV 85-86, 101, 104-105, 123-124, Exhibits 1-4 (CT 121-124).)[6] Both bags came out together. (RT-IV 105.)

McWoodson testified that the officers had grabbed his pocket, crunched it, and then went inside his pocket, pulling out the marijuana and another substance, saying "Look what we have here." (RT-IV 207-208.) To McWoodson the second substance appeared to be Motrin pills, and he did not realize that it might be contraband. (RT-IV 208, 210.) McWoodson was not familiar with drugs except for marijuana, and in the 90-120 seconds since he had first seen the second substance, he had made no decision about what to do with it. (RT-IV 209-210.) He was biased against cocaine because of what it had done to his mother, and would not sell it or any other drug. (RT-IV 191, 209-

[6] Two bags were tested and found to contain usable amounts of cocaine base. (RT-IV 113.)

211.) He had only seen rock cocaine on television. (RT-IV 224-225.)

The officers did not know how the substances had gotten into the jacket pocket, who put them there, or how long they had been there. (RT-III 69-71, RT-IV 104.) Murphy admitted that the marijuana was not packaged for sale in small units, and that the manner of packaging was consistent with personal use. (RT-IV 102-103.) The street value was probably $30-$40, and could last anywhere from a few days to a week. (RT-IV 104.)

In full view of McWoodson, Schlegel extended his arm and handed both bags to Murphy. (RT-III 66-67, RT-IV 85-87.) Schlegel, who had already used a bent wrist arm bar control on McWoodson's left arm, now brought the right arm back and handcuffed McWoodson. (RT-III 67, RT-IV 87, 100, 208.) At that point, he was arrested. (RT-IV 100.)

Murphy said that they then had McWoodson and Horton sit down, but Schlegel said that he then patted McWoodson down, searching only for weapons, by patting the outside of the clothing. (RT-III 67-68, 71-72, RT-

IV 87.) McWoodson was not carrying any devices or papers for ingesting marijuana or cocaine base, and did not have a lighter. (RT-III 68-69, 222.)

No one arrived to claim ownership of the jacket, which appeared to fit McWoodson, and Horton never advised the officers that the jacket was not McWoodson's. (RT-III 69, 76, RT-IV 89-90, 106.) McWoodson, who was in shock because of the arrest, did not tell them that the jacket was not his, but was not asked. (RT-IV 221-223.) McWoodson also did not deny responsibility for the items in the jacket pocket, but again was not asked. (RT-IV 89-90, 221-223.) Schlegel did not search the jacket beyond the pat search, and did not check for identification. (RT-III 71.)

The officers did not ask any questions except about McWoodson's identification. (RT-IV 91, 223.) They did not ask about who owned the contraband, but left that up to the sergeant and detective who were coming to take over the investigation. (RT-IV 91-92, 101, 223.) They did not explain what they were doing after the initial contact. (RT-IV 101, 223.)

6. Interrogation by Riccardi

Schlegel had radioed Narcotics Enforcement Team Detective Anthony Riccardi to come to the location, along with Sergeant Molloy. (RT-III 67-68, RT-IV 87, 114.) According to Schlegel, McWoodson made no statements during the 3-4 minutes before Molloy and Riccardi arrived, but Murphy recalled that McWoodson provided a name, Bobby Byers, in the 5 minutes before the other officers arrived. (RT-III 67, RT-IV 88.) Riccardi also recalled one of the officers saying that McWoodson had given a bad name, which was Bobby Byers. (RT-IV 141-142.)

Murphy said that they also had to repeatedly ask Horton to move away from McWoodson on the bench, where they were both sitting and quietly talking to each other. (RT-IV 88-89, 221.) At some point, McWoodson also provided a date of birth, October 8, 1987, which made him 19 years old at the time. (RT-IV 90.)

Schlegel explained what had happened to Riccardi and turned the investigation, and the evidence, over to him. (RT-III 69, RT-IV 89, 114-116, 140-141, 143, 155-162, Exhibits 1-4.) Riccardi did not recall whether

either officer said that he had questioned McWoodson or Horton. (RT-IV 140-141.) Riccardi understood McWoodson was under arrest, but did not advise McWoodson of his rights. (RT-IV 116, 141.)

When Riccardi asked for his name, McWoodson provided the name of Bobby Byers. (RT-IV 116.) Riccardi did not know whether Bobby Byers was McWoodson's birth name, and never asked McWoodson. (RT-IV 142.) McWoodson was seated, and the discussion lasted 3-5 minutes. (RT-IV 137-140.) Riccardi conducted a further search and found $1,750 in McWoodson's pant's pocket, with the vast majority in $20 bills. (RT-IV 122.)

McWoodson was taken to the police station, where Riccardi finally *Mirandized* him from his department-issued card. (RT-IV 117, 141.) Prior to that time, Riccardi had not asked any more questions, and McWoodson had made no comments. (RT-IV 141-142.) McWoodson answered affirmatively when asked if he understood his rights, stating "yes." (RT-IV 117.) Riccardi did not ask him if he wanted to call an attorney, or have one present. (RT-IV 118.) Riccardi

understood it was his duty to conduct a fair investigation, and was doing what he was supposed to do in admonishing McWoodson regarding his rights. (RT-IV 119.)

Riccardi asked McWoodson for his true name, and was told Bobby Byers McWoodson. (RT-IV 120, 142-143.) When asked what he was doing in San Mateo, McWoodson said he did not know, that his girlfriend had picked him up in Oakland and he fell asleep while they were driving; McWoodson did not recall saying he did not know how he got to San Mateo. (RT-IV 120, 225-226, 228.) McWoodson said he and his girlfriend got into an argument after they arrived, and she asked him to get out of the car. (RT-IV 120, 149-150, 226.) As he was leaving, he grabbed a jacket without paying attention to it, and walked away. (RT-IV 120-121, 154, 226.)

McWoodson said that he had taken marijuana out of his pant's pocket and put it in the jacket pocket, then walked around until eventually meeting up again with his girlfriend. (RT-IV 121, 149-150, 153.) McWoodson said he had gone back to her car and waited for her. (RT-IV 151.) He saw a sign for a movie theater, and

walked toward the theater, where he found his girlfriend. (RT-IV 151-152.) The walk would take a minute or two. (RT-IV 160.) They made up, smoked some marijuana, and were contacted by the police. (RT-IV 121, 152.)

McWoodson told Riccardi the marijuana was his, but denied using cocaine, knowing what rock cocaine was, or having any prior knowledge of the cocaine. (RT-IV 121-122, 149, 153, 156, 226.) Riccardi found it unreasonable that McWoodson had put the marijuana in the same pocket without knowing the cocaine was there. (RT-IV 156.) The marijuana was the size of a tennis ball; combined, the 16 twists of cocaine would be the size of a golf ball. (RT-IV 160-163.)

McWoodson showed no signs of having used cocaine. (RT-IV 156.) According to Riccardi, McWoodson said the jacket did not belong to him, but he did not know whose it was, while McWoodson said Riccardi did not ask about the jacket, or about the cocaine. (RT-IV 122, 153-154, 226-227.) Regarding the money, McWoodson said that his girlfriend had given him the money to buy a car for her. (RT-IV 123, 156.)

E. EXPERT TESTIMONY RE POSSESSION

Testifying as an expert over objection (RT-IV 135-136), Riccardi opined that the marijuana and the cocaine had been possessed for sale, because McWoodson had no means of consuming it, and had a large amount of cash on him. (RT-IV 127-128, 143-144.) Riccardi believed that McWoodson was a user who sold marijuana to support his use, and understood that McWoodson had admitted to using marijuana just before Riccardi arrived. (RT-IV 128-129, 143-146.) Riccardi did not believe McWoodson's use of marijuana was necessarily consistent with him possessing the marijuana for personal use, though he acknowledged that some of it could be for personal use. (RT-IV 145-146, 158-159.) He estimated the street value of the marijuana to be $80-$120. (RT-IV 133-134.)

Riccardi also opined that the cocaine base was possessed for sale, based on the packaging, the lack of any means to consume it, the cash, and the amount of cocaine, which would be lethal if consumed all at once. (RT-IV 130-132.) His opinion assumed that McWoodson intended to possess the cocaine, though Riccardi did

not know when the cocaine had been put in the jacket, or who put it there. (RT-IV 148-149.) Riccardi estimated the street value of the cocaine to be $300-$400. (RT-IV 133-134.)

Riccardi acknowledged that McWoodson did not possess pay-owe sheets, a cell phone or digital scales, all items commonly found on drug dealers, but that did not affect his opinion because dealers would normally keep those items in a safe place, not on their person. (RT-IV 132-133.)

Riccardi did not know where the jacket was at the time of trial, and could not state its size or brand. (RT-IV 163-164.) No one had asked the police to return it. (RT-IV 158.)

ARGUMENT

I. THE FOURTH AMENDMENT'S PROHIBITION ON UNREASONABLE SEARCHES AND SEIZURES PRECLUDES AUTOMATIC PAT SEARCH FOR IDENTIFICATION

A. Officer May Detain An Individual Reasonably Suspected of Criminal Activity

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Warrantless searches are "'"*per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions.'" [Citations]" (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 372.

The United States Supreme Court established one of those exceptions in *Terry v. Ohio* (1968) 392 U.S. 1, holding that a police officer may detain an individual without probable cause to arrest if the officer "observes unusual conduct which leads him reasonably to conclude ... that criminal activity may be afoot." (*Terry*, 392 U.S. at 24.) McWoodson acknowledges that the officers had a reasonable suspicion that criminal activity was afoot based on the theater owner's

complaint and the smell of burnt marijuana (RT-II 57-58, 60-61, RT-IV 83-84, 96-97), giving them a right to conduct a brief, investigatory stop. (*Illinois v. Wardlaw* (2000) 528 U.S. 119, 123; *People v. Durazo* (2004) 124 Cal.App.4th 728, 734.)

B. Officers May Not Pat Search An Individual Reasonably Suspected of Criminal Activity

The right to detain an individual does not, however, confer on an officer the right to search that person. Even a pat search is a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and is not to be undertaken lightly." (*Terry*, 392 U.S. at 17, 24.) A pat search of the person being detained is constitutionally permitted only:

> when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,...

(*Terry*, 392 U.S. at 24.)

Since safety is the "sole justification" for the pat search, that search must "be confined in scope to

an intrusion reasonably designed to discover weapons" (*In re H.M.* (2008) 167 Cal.App.4th 136, 143), and must not evolve into a search for contraband or evidentiary material. (*People v. Garcia* (2006) 145 Cal.App.4th 782, 787.) While the "officer need not be absolutely certain that the individual is armed," the officer "must be able to point to specific and articulable facts" that would lead a reasonably prudent person to believe someone's safety was in danger, "not to his inchoate and unparticularized suspicion or 'hunch.'" (*Terry*, 392 U.S. at 21, 27.)

C. Mere Suspicion That Individual May Possess Identification Does Not Make Pat Search Reasonable Under the Fourth Amendment

The officers in this case candidly acknowledged that the pat search of McWoodson was not motivated by any reasonable belief that they or anyone else was in danger, and that they were simply following their standard practice of patting down suspects who say they do not have identification to see if they are carrying wallets. (RT-III 62, RT-IV 84, 99.) As Murphy explained, suspects often have identification even

though they have denied it, and officers will "pat[] down the outside of the clothing to see if there's a bulge for a wallet." (RT-IV 99.) Schlegel grabbed McWoodson's arm, stating that he would pat McWoodson down to check for a wallet or other identification. (RT-III, RT-IV 84, 99.)

Under *Terry*, a routine search for identification is not reasonable under the Fourth Amendment, and the pat search conducted in this case therefore violated McWoodson's constitutional rights. (*Garcia*, 145 Cal.App.4th at 786-788.) In *Garcia*, the officer had stopped a suspect for a Vehicle Code violation and, after being told the suspect had no identification, had "grabbed" the suspect's hand "in order to check his person for identification." (*Garcia*, 145 Cal.App.4th at 784-785.)

The Court rejected the Attorney General's contention that foreign authorities supported a determination that a pat search for identification was constitutional:

> We need not look to other jurisdictions to decide this case. We would have to indulge in legal legerdemain to justify a patdown search

> for identification. In fact, it would require a rewriting of *Terry* ..., which we could not and would not undertake even if we were so inclined.

(*Garcia*, 145 Cal.App.4th at 787.)

The Second District distinguished two cases from 1987 cited by the Attorney General – *People v. Long* (1987) 189 Cal.App.3d 77, and *People v. Loudermilk* (1987) 195 Cal.App.3d 996. In *Long*, the officer could plainly see that the suspect had a wallet, and the suspect's suspicious actions in checking his wallet raised legitimate safety concerns. (*Garcia*, 145 Cal.App.4th at 786-787, citing *Long*, 189 Cal.App.3d at 88.) In *Loudermilk*, officers were responding to reports that shots had been fired and the suspect lied about not having identification, justifying the seizure of his wallet. (*Garcia*, 145 Cal.App.4th at 787, citing *Loudermilk*, 195 Cal.App.3d at 1004.)

Garcia noted that the Court in *Loudermilk* had been:

> quick to observe: "We must emphasize that we do *not* hold that a suspect may be detained and searched merely because he either refused to identify himself or refused to produce proof of identification. Nor do we hold that each time an officer conducts a *Terry* stop he may immediately conduct a search for identification.

(*Garcia*, 145 Cal.App.4th at 787, quoting *Loudermilk*, 195 CalApp.3d at 1004.)

In *People v. Santos* (1984) 154 Cal.App.3d 1178, 1181-1185, Division 3 of this Court reversed the trial court's denial of a motion to suppress, where a suspect in a high crime area was searched pursuant to standard procedure after saying he had no identification:

> Curiously missing is any mention of the possibility petitioner might possess a weapon. Neither being alone with a police officer nor failing to possess identification signals that a person is armed and dangerous.

(*Santos* 154 Cal.App.3d at 1185.)

The officers in this case similarly had no reason to believe McWoodson was armed and dangerous at the time Schlegel grabbed his arm and announced the intention to pat search him for identification. (RT-III 62, RT-IV 84, 99.) This is not a case like *People v. Collier* (2008) 166 Cal.App.4th 1374, 1378, where officers smelled marijuana during a traffic stop, and were concerned for their safety based on the suspect's size and baggy clothing. Although the officers suspected that McWoodson had been smoking marijuana, there was nothing about his size or clothing that gave

them any additional indication that he presented any danger to anyone. While Schlegel did contend that McWoodson's right hand movements during the search raised concerns, that search had already started prior to any such movement on the part of McWoodson. (RT-III 62-63, 85.)

Unless the prosecution could show a "break in the causative chain" (*People v. Johnson* (1969) 70 Cal.2d 541, 548), which it did not attempt in this case, none of the evidence found during the officers' unreasonable pat search of McWoodson could constitutionally be used against him. (*Segura v. United States* (1994) 468 U.S. 796, 804.)

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Counsel Acknowledged That Failure to Make Timely Motion to Suppress Was Not Based On Strategic Considerations

Unfortunately, this Court does not know whether the trial court would have correctly granted a motion to suppress conducted pursuant to Penal Code section 1538.5, because McWoodson's trial counsel never made such a motion. On November 13, 2008, four days prior

to trial, counsel moved to continue the trial to allow time for a motion to suppress. Counsel stated that in preparation for trial he had visited the scene with two witnesses, and that based on discussions at that time, and afterward with McWoodson, he:

> learned information which under the standards of professional representation require a motion to suppress be made. I believe I made a mistake in not making a motion to suppress the evidence in this case.

(CT 84.)

At the November 14, 2008 hearing on the motion, counsel explained that he had gone to the area about ten days before, had discussed the matter with two witnesses and McWoodson, and then promptly brought the matter to the court's attention, believing "it's better to do it now, than for it to come out on habeas corpus or appeal." (11/14/08 RT 4.) The court agreed with the prosecution that, because the matter had been pending for 14 months and had previously been continued twice, "it's too late to be doing this.... I'm going to deny the request for continuance as being untimely." (3/6/09 RT 4.)

B. Counsel's Failure To Competently Litigate Motion to Suppress Deprived Appellant of the Effective Assistance of Counsel Guaranteed by the Sixth Amendment

A criminal defendant has the right to reasonably effective assistance of counsel under both the Sixth Amendment and Article I, section 15 of the California Constitution. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) Even if counsel in general acted competently in representing a defendant at the trial level, "a single serious error may support a claim of ineffective assistance of counsel" (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 383), including the failure to file a timely suppression motion. (*Kimmelman*, 477 U.S. at 383.)

While reviewing courts should "avoid second-guessing counsel's informed choice among tactical alternatives" (*People v. Pope* (1979) 23 Cal.3d 412, 424), an appellate court can determine that the defendant has been denied the effective assistance of counsel if "there can be no satisfactory explanation" for the counsel's action, or inaction. (*People v. Coddington* (2000) 23 Cal.4th 529, 652.) "[D]eferential

scrutiny of counsel's performance is limited in extent and indeed in some cases may be altogether unjustified. '[Deference] is not abdication.'" (*Ledesma*, 43 Cal.3d at 217, quoting *People v. McDonald* (1984) 37 Cal.3d 351, 377.) In order to ensure that the right to effective assistance has value, the court must subject the counsel's performance to "meaningful scrutiny." (*Ledesma*, 43 Cal.3d at 217.)

A primary job of any defense counsel is to "seek exclusion of evidence that is critical to the prosecution's case or that is highly prejudicial." (*In re Jones* (1996) 13 Cal.4th 552, 582.) In cases involving jury trials, courts have held that where the objection to the evidence would have been resolved outside the presence of the jury, "there could be no satisfactory tactical reason for not making a potentially meritorious objection." (*People v. Nation* (1980) 26 Cal.3d 169, 179.) As the California Supreme Court noted – in a case where defense counsel did not object to the introduction of defendant's taped interview with the police – the lack of objection "could not possibly have related to a competent defense

strategy,... The inadequacy of [defense counsel's] conduct in this regard is manifest." (*In re Cordero* (1988) 46 Cal.3d 161, 188; see also *People v. Guizar* (1986) 180 Cal.App.3d 487, 492.)

In this case, counsel essentially admitted that he had no tactical reason for failing to move to suppress the evidence against McWoodson in a timely fashion, but simply did not realize there was a basis for the motion until just before trial. (CT 82-84; 11/14/08 RT 4.) Counsel could not therefore provide the ten court day's notice required by section 1538.5, subdivision (i), and the Court agreed with the prosecution that the motion to continue the trial was simply too late. (11/14/08 RT 4.)

Counsel's failure to interview witnesses with potentially exculpatory information can certainly constitute ineffective assistance of counsel. (*In re Neely* (1993) 6 Cal.4th 901, 919-920.) Counsel's failure to obtain information on which to base a timely motion to suppress can also support such a finding, as the United States Supreme Court explained in *Kimmelman*:

The trial record in this case clearly reveals

> that [defendant's] attorney failed to file a timely suppression motion, not due to strategic considerations, but because, until the first day of trial, he was unaware of the search and of the State's intention to introduce the bedsheet into evidence. Counsel was unapprised of the search and seizure because he had conducted no pretrial discovery. Counsel's failure to request discovery, again, was not based on "strategy," but no counsel's mistaken beliefs ....

(*Kimmelman*, 477 U.S. at 384.)

Although the record on appeal does not disclose the specific new information that counsel belatedly obtained just before trial, the record does disclose a meritorious basis for moving to suppress, as discussed at length in section I, *supra*. (*Kimmelman,* 477 U.S. at 375.) The California Supreme Court in *In re Jones* (1996) 13 Cal.4th 552, 560-61, issued a writ after concluding that the trial counsel, had he conducted a reasonable investigation, would have had a "principled basis" for moving to suppress the evidence. Similarly, after an evidentiary hearing in *In re Ledesma* (1987) 43 Cal.3d 171, 176, 226-27, the court issued a writ in part because an important piece of evidence "was not beyond challenge" and, while acknowledging that the prosecution might be able to persuade a trial court to admit the

evidence on retrial, the Court vacated the conviction. (*Ledesma*, 43 Cal.3d at 227 and 227 n.11.)

In the absence of any plausible tactical reason for not making a meritorious motion to suppress all of the evidence that was going to be introduced against McWoodson, this Court should determine that Bobby McWoodson received ineffective assistance of counsel.

C. Counsel's Failure To Competently Litigate Motion to Suppress Prejudice Appellant

In order to prevail on a claim of ineffective assistance, of course, defense counsel must not only "have failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates" (*Pope*, 23 Cal.3d at 425), but absent counsel's failings, there must be "a reasonable probability of a more favorable outcome." *(Cordero* 46 at 180.)

> A "reasonable probability" is not a showing that "counsel's conduct more likely than not altered the outcome in the case," but simply "a probability sufficient to undermine confidence in the outcome."

(*In re Cordero* (1988) 46 Cal.3d 161, 180, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 693-94.)

Where the "failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness" (*Kimmelman*, 477 U.S. at 375), the defendant must not only establish that there was meritorious Fourth Amendment claim, but also "that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. (*Kimmelman*, 477 U.S. at 375.)

Without the cocaine base and marijuana that was illegally seized from McWoodson, there was insufficient evidence to convict him of anything. The failure to make a timely motion to suppress all of the evidence used against him definitely prejudiced McWoodson at trial.

CONCLUSION

For all of the above reasons, the Court should reverse this conviction.

DATED: May 1, 2012 LAW OFFICE OF PAUL KLEVEN

by:_____
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Attorney for Appellant

CERTIFICATE OF COUNSEL

I certify that this Appellant's Opening Brief contains 6637 words, as calculated by my WordPerfect 11 word processing program.

_____
PAUL KLEVEN