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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ADOLPH LAUDENBERG, Defendant and Appellant.	B199633 (Los Angeles County Super. Ct. No. NA058372)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anita H. Dymant, Judge. Affirmed.

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

The jury found defendant Adolph Laudenberg guilty of the first degree murder of Lois Petrie in violation of Penal Code section 187, subdivision (a).[1] Defendant received a sentence of life with the possibility of parole. In his timely appeal, he contends the trial court erred in denying his motion to suppress the physical evidence (a Styrofoam cup) from which the police collected the DNA evidence that connected him to the murder. As the trial court found, however, defendant had no enforceable expectation of privacy under the Fourth Amendment because he abandoned the cup. We therefore affirm.

STATEMENT OF FACTS

Because defendant's sole appellate contention arises out of the facts adduced at the suppression motion, only a short summary of the trial evidence is necessary.[2] Lois Petrie was murdered by strangulation on Christmas Eve, 1972, in San Pedro. Three other women were murdered in similar fashion and in similar circumstances in 1974 and 1975—Anna Felch and Catherine Medina in San Pedro, and Lehan Griffin in San Francisco. In 1975, defendant admitted committing those murders to Jeanne Laudenberg nee Mersky, who gave that information to the police. In 2003, defendant made detailed admissions of guilt to Renee Laudenberg.

Detective Robert Dinlocker, who was investigating the Petrie murder, located defendant in 2003. The Los Angeles Police Department had obtained DNA samples from the victim's autopsy. In order to obtain a DNA sample from defendant, the detective employed a ruse: On the pretext of investigating an automobile theft, Detective Dinlocker arranged a meeting with defendant at a Torrance donut shop. When they

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[1] All further statutory references shall be to the Penal Code unless stated otherwise.

[2] Absent the parties' stipulation to expand the record, "we may only consider the testimony adduced during the superior court suppression hearing." (*People v. Flores* (1979) 100 Cal.App.3d 221, 226, fn. 2, citing *People v. Cagle* (1971) 21 Cal.App.3d 57, 60-61; *People v. McKim* (1989) 214 Cal.App.3d 766, 768, fn. 1.)

finished their conversation and defendant walked to the exit, the detective took defendant's used napkin and Styrofoam cup from the table. A DNA sample from the cup linked defendant to the Petrie murder.[3] Defendant presented no evidence in his defense.

DISCUSSION

Defendant contends the trial court erroneously denied his suppression motion because the detective's taking of his disposable coffee cup amounted to an unreasonable seizure of his property in violation of the Fourth Amendment of the federal Constitution.[4]

"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. 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.]" (*People v. Saunders* (2006) 38 Cal.4th 1129, 1133-1134.) That is, we independently review whether "the search or seizure was reasonable under the Fourth Amendment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362; *People v. Ayala* (2000) 24 Cal.4th 243, 279 (*Ayala*) ["We apply the Fourth Amendment standard in deciding what remedy may be available following a claim of unlawful search or seizure"].)

At the suppression motion hearing, Detective Dinlocker testified that he had been assigned to "get a discarded D.N.A. sample" from an elderly male—defendant—

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[3] DNA taken from the inside of defendant's mouth subsequent to his arrest, pursuant to a court order, was also matched to the sample from the cup and the sperm on the sample from the victim's body.

[4] Defendant also purports to argue a violation of the right to privacy under article 1, section 1 of the California Constitution. That argument is forfeited because it was not raised below. (See, e.g., *People v Partida* (2005) 37 Cal.4th 428, 435.) Moreover, we summarily reject it because it is asserted in perfunctory faction without adequate

suspected of being responsible for a series of murders in the 1970's. The detective traced defendant to the motor home, where defendant lived and from which he sold walking sticks. A neighbor gave the detective's telephone number to defendant, who called the detective. Not wanting defendant to know he was being investigated for the murders, Detective Dinlocker said he was investigating an automobile theft. They agreed to meet a few days later on June 26, 2003, at a location defendant chose, a Torrance coffee shop called Circus Doughnuts.

Detective Dinlocker arranged to have an undercover officer in the coffee shop. A surveillance unit videotaped the encounter. The detective planned to use the supposed auto theft investigation as a ruse to have defendant eat or drink something that deposited DNA on an item that could be tested. When the detective arrived at the coffee shop, defendant was already seated inside, as was the undercover officer. Defendant was drinking coffee from a large Styrofoam cup. The detective sat with defendant and discussed various matters for approximately 30 minutes. During that time, defendant continued to drink from his coffee cup. At no time did the detective threaten defendant or attempt to detain him. Defendant suggested they leave, so he could show the detective the walking sticks at defendant's motor home.

Defendant got up and walked to the shop's exit, leaving his coffee cup on the table. Detective Dinlocker "lagged behind," and while defendant was at the exit, the detective picked up the cup and placed it where it could be retrieved by the undercover officer. He also took a napkin defendant had used to wipe his beard and mustache, which had been left on the table next to the cup. Defendant walked to his motor home, and the detective followed him there. Defendant did not return to the coffee shop after spending time with the detective at the motor home.

The defense argued, among other things, that defendant did not willfully abandon the coffee cup because defendant did not place the cup in the trash. The trial court found

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supporting legal authority. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *Valov v. Department of Motor Vehicles* (2005) 132 Cal.App.4th 1113, 1132.)

under the Fourth Amendment that defendant had no reasonable expectation of privacy as to the coffee cup because he abandoned it when he left it on the table. We agree.

A warrantless search and seizure violates the Fourth Amendment only if the defendant "manifested a subjective expectation of privacy" in something that "society accepts as objectively reasonable." (*California v. Greenwood* (1988) 486 U.S. 35, 39 (*Greenwood*); *In re Baraka H.* (1992) 6 Cal.App.4th 1039, 1044 (*Baraka H.*).) "This involves a two-part inquiry: "'first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?'" (*Baraka H., supra,* 6 Cal.App.4th at p. 1044, citing inter alia *California v. Ciraolo* (1986) 476 U.S. 207, 211 and *Greenwood, supra,* 486 U.S. at pp. 39-40.) "The reasonableness of a claimed expectation of privacy depends on the totality of circumstances presented in each case. [Citations.] The burden is on the defendant to prove that he or she had a protectible expectation of privacy in the area or item searched. [Citations.]" (*Baraka H., supra,* 6 Cal.App.4th at p. 1044.)

A long accepted corollary to the reasonable expectation of privacy standard is that "warrantless searches of abandoned property do not violate the Fourth Amendment." (*United States v. Burnette* (9th Cir. 1983) 698 F.2d 1038, 1047 (*Burnette*), citing inter alia, *Abel v. United States* (1960) 362 U.S. 217, 240-241; see also *People v. Ayala* (2000) 24 Cal.4th 243, 279 [by abandoning property, defendant "relinquished any expectation of privacy in them"].) Simply stated, "One who has voluntarily abandoned property has no right to complain of its search or seizure. [Citation.]." (*Burnette, supra,* 698 F.2d at p. 1047.)

Here, the evidence of abandonment was conclusive. There was nothing indicative of defendant's subjective expectation of privacy as to the cup. Contrary to defendant's assertion, his situation was not analogous to that of a diner who temporarily leaves the table with the obvious intent of returning to his or her meal. The record showed that defendant told the detective that he was leaving and was at the door at the time the detective took the cup. Defendant walked home and did not return for the cup. A

comparison with the facts in *Burnette* is instructive. There, the Ninth Circuit found the trial court clearly erred in finding abandonment of a purse where the defendant not only asserted her ownership of the object, but "took all possible precautions to retain her privacy in the contents of the purse," and a police officer had to physically remove it from her possession. (*Burnette, supra,* 698 F.2d at p. 1048.)

Nor would it be objectively reasonable or otherwise consistent with societal standards to recognize an expectation of privacy in a used, disposable item left on a restaurant tables. Customers who walk to a restaurant's exit, having left such items behind, implicitly communicate their intent to abandon them. Contrary to defendant's argument, the possibility that a customer who dashed back to retrieve such an item might have some right to reclaim it, has no application to this case because defendant made no such effort. Moreover, the fact that the onus would be on the customer to interrupt the expected table-clearing efforts lends additional support to the reasonable expectation of abandonment, not privacy.

Defendant does not seriously dispute that one would typically expect the shop employees to clear the table when they had reason to believe a customer had decided to leave. Instead, he argues a typical customer would expect his trash to be tossed out by shop employees, not intercepted by the police. The Supreme Court, however, rejected that kind of argument in *Greenwood*: "It may well be that respondents did not expect that the contents of their garbage bags would become known to the police or other members of the public. An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable." (*Greenwood, supra,* 486 U.S. at pp. 39-40.) Once a citizen leaves an apparent piece of garbage in a location for disposal by third parties, he or she "could have had no reasonable expectation of privacy in the inculpatory items that they discarded." (*Id.* at p. 41.) Defendant's soiled Styrofoam cup was no different from a bag of garbage left for pickup.

Other decision find abandonment in analogous circumstances. (See, e.g., *People v. Juan* (1985) 175 Cal.App.3d 1064, 1069 ["Juan had no reasonable expectation of privacy with regard to his jacket left draped over a chair at an empty table in a restaurant open to the public. An individual who places a jacket at an empty table in a restaurant must reasonably expect that the coat will be touched or handled by either an employee or by a member of the public who wishes to clean up or sit at the table"]; *United States v. Alewelt* (7th Cir. 1976) 532 F.2d 1165, 1168 ["by placing the jacket on a coat rack in the general working area of an outer office where he had no possessory interest, the defendant relinquished that degree of control, and reasonable expectation of privacy, necessary to sustain a challenge to the legality of the subsequent search and seizure on Fourth Amendment grounds"].) Because defendant's cup was a disposable item, the case of abandonment is stronger than in *Juan* and *Alewelt*.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.