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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GEORGE CONSTANTINE XINOS, Defendant and Appellant.	H034305 (Santa Clara County Super. Ct. No. CC649614)

After an unsuccessful motion to suppress, George Constantine Xinos was convicted by a jury of vehicular manslaughter while violating Vehicle Code[1] section 23153 (former Pen. Code, § 192, subd. (c)(3)) (count one), failing to stop at scene of an accident resulting in the death or permanent, serious injury of another person (§ 20001, subds. (a), (b)) (count two), driving under the influence of alcohol and causing injury (§ 23153, subd. (a)) (count three), and driving under the influence of alcohol with a blood alcohol level of at least 0.08 percent and causing injury (§ 23153, subd. (b)) (count four). The jury also found true that defendant fled the scene after committing vehicular manslaughter (§ 20001, subd. (c)) and, with respect to counts three and four, defendant personally inflicted great bodily injury upon the victim within the meaning of Penal Code sections 12022.7, subdivision (a), and 1203, subdivision (e)(3). The court sentenced

[1] All further statutory references are to the Vehicle Code unless otherwise stated.

defendant to a total prison term of seven years for vehicular manslaughter and fleeing the scene after committing that offense (former Pen. Code, § 192, subd. (c)(3); § 20001, subd. (c)) and stayed imposition of sentence on the remaining convictions and enhancements.

In a case of first impression in California, defendant argues that the downloading of data from his vehicle's sensing and diagnostic module (SDM), also sometimes referred to as an event data recorder (EDR), following the fatal vehicle-pedestrian collision violated his Fourth Amendment rights and the trial court erred in denying his motion to suppress. He also claims instructional error. We conclude defendant's suppression motion should have been granted and reverse.

A. *Trial Evidence*

At about 12:30 a.m. on May 6, 2006, a white SUV driven by defendant struck and killed Marcus Keppert, who was crossing Almaden Expressway at Camden Avenue. Keppert was six foot, seven inches tall and weighed approximately 260 pounds. His blood contained no drugs, and he had a blood alcohol content of .00.

Kay Hoagland, a driver on southbound Almaden Expressway who was waiting to turn left onto Camden Avenue, witnessed the collision. She saw a pedestrian, who was wearing dark clothing, walking toward the intersection at Almaden Expressway on the sidewalk on Camden Avenue. She was watching him on and off as he approached the intersection and saw him looking at a car traveling southbound. She saw the pedestrian go out into the intersection and she saw a white SUV strike him in lane number one, next to the left turn lane. She had thought that the pedestrian had gone a "little bit" into lane number one and the SUV would miss him but the SUV's right front side, close to the mirror area, struck the pedestrian.

She estimated that the driver of the SUV was traveling near or just over the speed limit. She did not see anything to indicate that the SUV driver applied the brakes before

striking the pedestrian. She thought the SUV driver had reacted by stepping on the brake but "it wasn't a full brake . . . ." Following the collision, she turned left and then called 9-1-1.

Aaron Weiss was driving northbound on Almaden Expressway at "roughly 50, 55 miles an hour." Weiss believed the SUV was traveling at about the same speed as was he. Weiss never suspected that defendant was driving under the influence based upon how the SUV was being driven.

The signal light was green for northbound traffic on Almaden Expressway. As Weiss approached the intersection at Camden, he saw the pedestrian's legs in stride lit up by the SUV's headlights and "then almost simultaneously thereafter [he saw] brake lights and then the collision." It had appeared to him that the pedestrian had just barely gotten into the roadway when he was hit. At most, a second or two passed between the illumination of the pedestrian's legs and the collision. Weiss heard a thud.

Weiss agreed that a pedestrian wearing dark clothing would be difficult to see against the dark background and he had not anticipated anybody stepping out into the pedestrian walkway against a red light. He would not have been able to see the pedestrian if the lights of the SUV had not illuminated him.

Weiss saw the SUV stop north of the intersection. Weiss crossed the intersection and pulled up behind the SUV. His assessment, as he passed the body, was that the pedestrian had been killed.

Defendant did not get out of the car or return to the location of the body. He drove away and Weiss followed. The SUV turned into the first side street off the expressway. When Weiss located the SUV, he called 9-1-1 and gave the license plate number. Defendant was standing outside his car toward the front on the passenger side. He looked a bit dazed and in shock; he did not try to flag Weiss down. Weiss drove back to the scene of the collision.

Sometime after midnight on May 6, 2006, San Jose Police Officer Robert Forrester responded to a citizen report that a suspicious vehicle was parked in front of the person's house. He was also aware of a fatal hit and run collision in the area. When he arrived at Cloverhill Drive at 1:04 a.m., he observed a vehicle with fresh body damage and blood and biological fluids on it. He spoke to the person who had called. The officer then began taking photos of the vehicle, which was locked. As he was doing so, the fog lamps flashed once, which indicated to him that "someone with a key fob set off the button." Officer Forrester "began to walk door to door because [he knew] the remote normally only works within about 150 feet."

Officer Forrester made contact with defendant in the doorway of a house on the same side of the street. Defendant said the vehicle belonged to him. He indicated that he did not know what had happened and he admitted to having had "a little" to drink that night. Defendant was obviously intoxicated; he had "red bloodshot watery eyes, slurred speech, and a stagger in his gait." The officer arrested defendant, searched him incident to arrest, and recovered the key fob from a pocket. He filled out a tow sheet to have the vehicle, which was suspected to have been in a hit and run collision, moved from that location to the police warehouse. Police protocol in the case of a fatal collision required the vehicle to be towed to the police warehouse for further inspection.

San Jose Police Officer Jaime Almaraz arrived at Cloverhill Street and took defendant into custody on May 6, 2006 at about 0132 hours. At that time, defendant displayed the objective symptoms of alcohol, including slurred speech, a non-steady gait, and the smell of alcohol. He refused to take a breathalyzer test in the field. Defendant said he did not know what he hit. Officer Almaraz reported that defendant's weight was 160 pounds and he was five foot, eight inches tall.

San Jose Police Officer Liz Checke, the lead investigator on the case, and her partner San Jose Police Officer Kevin Cassidy went to the intersection of Almaden

Expressway and Camden Avenue in the early morning hours of May 6, 2006. After she learned that the driver and vehicle were nearby, she proceeded to that location and took photographs of the vehicle. She then returned to the scene of the collision. Officers Checke and Cassidy took photographs of the scene.

At 2:35 a.m. on May 6, 2006, defendant's blood was drawn. His blood alcohol content was 0.18.

Officer Checke completed her investigative report in November 2006. She determined, based upon reconstruction of the accident, that the vehicle's minimum speed was 48 miles per hour (mph) and the maximum speed was 61 mph. Her calculations were consistent with the physical evidence and witness statements. The posted speed limit was 45 mph. She had no evidence that defendant had been braking prior to the collision. She concluded that "the probable and likely speed" was 55 mph. The officer did not consider 55 mph to be an excessive speed at that location, at that time.

Photographs of the damage to defendant's vehicle indicated that the pedestrian was struck in front of the vehicle, went up onto its hood and into the windshield, and then rotated off the vehicle. Body fluids, blood, and "flesh debris" were located on the vehicle. In this case, the officers were not looking for trace evidence inside the vehicle.

Officer Checke determined that the crash occurred in lane number one, the lane closest to the median, and that the pedestrian had been in the intersection for three to five seconds. He had been wearing a black T-shirt, dark blue jeans, and dark shoes. She had information that defendant's blood alcohol level was .18, which was "an associated collision factor." She concluded, however, that speed was not a factor and the primary cause of this collision was the pedestrian stepping out into the intersection. The stretch of roadway between intersections was very dark and it would be difficult for a driver to see someone wearing dark clothing, especially if the driver did not expect to see anyone crossing against a red light. She further concluded that defendant could not have avoided

this accident because of the pedestrian's lack of visibility. An unimpaired driver, traveling at 45 to 55 mph, would have about a second and a half reaction time in response to an unexpected danger in the roadway. Even if defendant's vehicle had been traveling at exactly 45 mph, a reasonable driver would not have been able to react quickly enough to avoid hitting a pedestrian stepping out unexpectedly against a red light at night.

On May 11, 2007, she and another officer went to the vehicle impound location and downloaded the data contained in the vehicle's SDM. They accomplished the download using a cable connected to the diagnostic link connector (DLC), which was located underneath the vehicle's dash area on the driver's side. An SDM receives data from various inputs related to the vehicle's restraint systems, seat belt pretensioners and airbags. The data includes information regarding engine speed, vehicle speed and deceleration, throttle percentage, braking, airbag deployment, and the restraint system. The officers did not expect any data from the collision to have registered because none of the airbags had deployed.

During subsequent training in November 2007, Officer Checke learned that there could be data in the SDM even if the airbags did not deploy. Deceleration of the vehicle, for any reason, can cause the module to "wake up." The module does not date stamp the data. Every time the ignition is turned on, a cycle registers. The cycle corresponding to the collision needed to be identified.

Using software, Checke produced a crash data retrieval (CDR) report. It showed information captured during the five seconds before defendant's vehicle experienced a change in velocity. It disclosed the vehicle's speed during the five seconds before the incident. The data indicated that there had been brake activation but the braking "could just be covering the pedal" and was not necessarily hard braking.

If Officer Checke had that additional data when she wrote her investigative report, she would have added speed as "an associated factor." But she still would have found the

pedestrian, his action of stepping out against a red light and lack of visibility, was the primary collision factor.

Russell Haight, who ran the Collision Safety Institute and did accident reconstruction, crash research and training, was recognized as a expert in accident reconstruction and EDR technology. He explained that the EDR is a component of the airbag control module and the module's first priority is to decide whether or not the airbags need to be deployed. When an "algorithm wake-up" occurs, the airbag control module analyzes the event. The raw hexadecimal data recorded by EDR can be subsequently copied onto a computer. The data is then analyzed using special CDR system software.[2] Haight relied on Officer Checke's downloaded data and reopened the original file using the most recent version of the CDR software.

Although Haight acknowledged that a module's data can be incorrect under certain conditions, Haight concluded that the data in this case was reliable. The module in defendant's vehicle[3] recorded vehicle speeds of 69 to 76 mph immediately before the crash. The data indicates that the brake switch was on at minus one second before impact and there was a loss of speed before the crash, from which it may be inferred that defendant saw the pedestrian and was braking. He determined that defendant began braking 1.3 to 2.1 seconds before impact. Haight determined that the actual speed of defendant's vehicle at the time of impact was between 57 and 65 mph, and Haight believed that the pedestrian was struck at about 60 to 61 mph. In Haight's view, defendant "could have swerved easily at that speed and missed the pedestrian." If defendant had swerved the vehicle two feet to the left, he would have avoided killing the pedestrian. In Haight's opinion, defendant could have also avoided this accident by going

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[2] The Vetronix company made this software technology publicly available in 2000. Bosch bought Vetronix in 2003.

[3] Haight testified that, at the time of trial, there were 20 different GM airbag control modules.

slower. He did not think that conspicuity of the pedestrian against the background was an issue because, although the pedestrian was wearing dark clothing, he was moving and six foot, seven inches tall and conspicuity is usually tied to movement.

Haight explained that the GMC module has limited memory space and can store only one non-deployment event. The recorded data regarding the non-deployment event is overwritten by a more severe event and, after 250 ignition cycles, the module clears itself. There is no date and time stamp. He concluded that the non-deployment event reflected in the data was from the pedestrian collision. Haight concluded, based upon his experience and testing, that the collision occurred in northbound lane number one. He believed that speed was a substantial factor in the crash and alcohol contributed to the crash by lengthening perception and reaction time.

Karina Patel, a criminologist employed by the Santa Clara County Crime Laboratory, opined that individuals with a 0.08 percent alcohol concentration are too impaired to safely operate a motor vehicle. When individuals reach a concentration of 0.04 to 0.12, they experience vision impairment and are "less likely to be aware of their peripheral surroundings and be more focused straight ahead." Such individuals have decreased judgment and decreased fine muscle control and coordination. Their ability to process information is slower and it takes longer to react to a situation. When individuals reach an alcohol concentration of 0.08 to 0.25, they experience more decreased gross muscle control, resulting in a loss of balance, a staggering gait, and slurred speech.

According to the criminologist, a person with a 0.18 blood alcohol content is not able to safely operate a motor vehicle. A person weighing 160 who has a blood alcohol concentration of 0.18 at 2:30 a.m. could possibly have had a 0.22 blood alcohol concentration at 12:30 a.m. Such person could not have safely operated a vehicle at 12:30 a.m.

B. *Suppression Motion*

1. *Evidence Presented at the Suppression Hearing*

On the morning of May 6, 2006, Elizabeth (Liz) Checke, a police officer for the City of San Jose, responded to a collision between a vehicle and a pedestrian at Almaden Expressway and Camden Avenue. Officer Checke arranged for the removal and storage of the suspect vehicle, a white 2002 GMC Denali sport utility vehicle (SUV), after it was located. The SUV was taken into custody as evidence in a crime. The parties stipulated that the vehicle was lawfully in the possession of the police department. The vehicle was stored at the police evidence warehouse.

On May 9, 2006, three days after the collision, Officer Checke checked the condition of the SUV's battery and determined there was no power. Power to the battery could not be easily restored because the hood metal was displaced and crumpled as a result of the collision, which prevented normal access to the vehicle's engine compartment. She decided not to force the hood open with a crowbar because they did not want to disturb "the evidentiary value of the crumple of the vehicle's hood and body fluids on the vehicle."

The SUV was stored continuously from May 6, 2006 to May 11, 2007, when, at the request of the District Attorney's Office, Officer Checke and Officer Keven Cassidy downloaded the data from the vehicle's crash data recorder or SDM. Data recorded on the SDM is "based on the vehicle's restraint system in response to some type of collision." The module is not in plain view. Upon the legal advice of a deputy district attorney, the officers did not seek a search warrant permitting the download of the data.

On May 11, 2007, the officers used crowbars to open the hood and restored battery power to the vehicle. Using a cable, they connected a laptop computer equipped with CDR software to the module through a DLC port in the vehicle's interior. They turned on

the ignition with a key and executed the download. The data was preserved on a CD. Software interpreted the downloaded data and a permitted a printout of the stored information. The download was done in connection with the criminal prosecution and not for the purpose of research on safety.

One of the reasons that the officers had not retrieved the SDM's information prior to May 11, 2007 was that the officers did not believe it was "necessary based on the fact that there were no air bags deployed in this vehicle." "Prior to going in, [the officers] did not believe there would be anything based on the fact that there were no air bags deployed." "At that point, [they] believed that it would require deployment of the air bag in order to trigger relevant information."

When they downloaded the data from the SDM on May 11, 2007, there had already been a disposition of the case based on the accident reconstruction and eyewitness testimony.[4] At that time, Officer Checke was not familiar with section 9951, which prohibits the downloading of data from a SDM except as statutorily permitted.

2. *Trial Court's Ruling*

The People argued that no search warrant was required because defendant had no reasonable expectation of privacy in the SDM's data, analogizing to electronic beepers and emphasizing the diminished expectation of privacy in vehicles. The People maintained that the year delay in conducting the download was immaterial, citing *People*

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[4] Defendant represents in his briefs that on May 3, 2007, he pleaded no contest to felony hit and run (§ 20001, subds. (a), (b)(2)), misdemeanor driving under the influence (§ 23152, subd. (a)), and misdemeanor driving with an unlawful blood alcohol level (§ 23152, subd. (b)), as alleged in a complaint filed in November 2006, and he was scheduled to be sentenced on July 3, 2007. According to defendant's briefs, the court vacated the plea on motion of the prosecutor following the download of the SDM's data. The record on appeal does not include records of all those proceedings. The appellate record does contain a complaint filed on November 22, 2006, which does not charge vehicular manslaughter, and a first amended complaint filed on July 6, 2007, which does charge vehicular manslaughter.

v. Superior Court (Nasmeh) (*People v. Superior Court (Nasmeh)* (2007) 151 Cal.App.4th 85).[5]

Defense counsel contended that the passage of section 9951 created privacy rights for individuals. Defense counsel maintained that the *Christmann* case (*People v. Christmann* (2004) 776 N.Y.S.2d 437) was not persuasive and pointed out that the decision was issued by a lower level court, similar to a justice court. He argued that the situation in this case was not analogous to the beeper case.

The prosecutor pointed out that section 9951, by its own terms, applied only to "motor vehicles manufactured on or after July 1, 2004."

The trial court found no Fourth Amendment violation: "In this matter the Court is satisfied that the police were permitted to conduct tests and discover data because the vehicle was an instrumentality of the crime of vehicular manslaughter as well as hit-and-run. Therefore, the retrieval of the data in the SDM was not a search within the meaning of the Fourth Amendment." It further stated that, even if downloading the information was "not a test or a diagnostic event" and it was a search, the search fell "within the automobile exception to the warrant requirement because the police officers had probable cause to believe that evidence pertaining to the crime was contained in the SDM."

C. *Fourth Amendment Analysis*

On appeal, defendant argues that he had a reasonable expectation of privacy in the data contained in his vehicle's SDM and that downloading of the data from the SDM constituted a search unsupported by probable cause in violation of the Fourth Amendment. He asserts that neither the search incident to arrest exception nor the automobile exception to the warrant requirement applied. The Attorney General argues

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[5] In *People v. Superior Court (Nasmeh), supra,* 151 Cal.App.4th 85, 99-100, this court determined, among other Fourth Amendment issues, that forensic examination of a vehicle completed 12 days after issuance of a search warrant did not violate the Fourth Amendment.

that defendant had no reasonable expectation of privacy in the SDM's data and, in any case, police had probable cause to search the SDM.

1. *Standard of Review and General Principles*

"In California, issues relating to the suppression of evidence derived from governmental searches and seizures are reviewed under federal constitutional standards. (*People v. Ayala* (2000) 23 Cal.4th 225, 254-255 . . . .)" (*People v. Rogers* (2009) 46 Cal.4th 1136, 1156, fn. 8.) " 'The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]' (*People v. Glaser* (1995) 11 Cal.4th 354, 362 . . . ; *People v. Laiwa* (1983) 34 Cal.3d 711, 718 . . . .)" (*People v. Redd* (2010) 48 Cal.4th 691, 719, fn. omitted.)

"The Fourth Amendment says that the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.' U.S. Const., Amdt. 4. Its 'central requirement' is one of reasonableness. See Texas v. Brown, 460 U.S. 730, 739, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983)." (*Illinois v. McArthur* (2001) 531 U.S. 326, 330 [121 S.Ct. 946].) "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." (*Katz v. U.S.* (1967) 389 U.S. 347, 357 [88 S.Ct. 507].) The prosecution bears the burden of demonstrating a legal justification for a warrantless search. (*People v. Johnson* (2006) 38 Cal.4th 717, 723.)

2. *Warrantless Seizure*

At the suppression hearing the parties stipulated that defendant's vehicle was lawfully in the police department's possession when the officers downloaded the data

from the vehicle's SDM. The evidence showed that it had been seized as evidence of crime. There is no argument that the warrantless seizure contravened the Fourth Amendment.

"While it is true . . . that 'lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it,' *ibid*., the reason for and nature of the custody may constitutionally justify the search." (*Cooper v. State of Cal.* (1967) 386 U.S. 58, 61 [87 S.Ct. 788].)

3. *Reasonable Expectation of Privacy in Vehicle and Component SDM*

In *Katz v. U.S.* (1967) 389 U.S. 347, the Supreme Court stated: "[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. [Citations.]" (*Id*. at p. 351-352.)

Defendant asserts that section 9951[6] creates a reasonable expectation of privacy in the information recorded by his vehicle's SDM. We are not persuaded by this particular contention. First, it did not apply to defendant's vehicle by its own terms, which limited

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[6] Section 9951 provides: "(a) A manufacturer of a new motor vehicle sold or leased in this state that is equipped with one or more recording devices commonly referred to as 'event data recorders (EDR)' or 'sensing and diagnostic modules (SDM),' shall disclose that fact in the owner's manual for the vehicle. [¶] (b) As used in this section, 'recording device' means a device that is installed by the manufacturer of the vehicle and does one or more of the following, for the purpose of retrieving data after an accident: [¶] (1) Records how fast and in which direction the motor vehicle is traveling. [¶] (2) Records a history of where the motor vehicle travels. [¶] (3) Records steering performance. [¶] (4) Records brake performance, including, but not limited to, whether brakes were applied before an accident. [¶] (5) Records the driver's seatbelt status. [¶] (6) Has the ability to transmit information concerning an accident in which the motor vehicle has been involved to a central communications system when an accident occurs." Section 9951 strictly limits the right to download or retrieve a SDM's data to the vehicle's registered owner with additional narrowly defined exceptions, including consent and court order. (§ 9951, subds. (c), see § 9951 subds. (d), (e).)

its application to "all motor vehicles manufactured on or after July 1, 2004." (§ 9951, subd. (f).) Second, even if the section did apply, statutes do not dictate the parameters of the Fourth Amendment. (See *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 323, 352 [121 S.Ct. 1536] [Fourth Amendment does not forbid warrantless arrest for minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine even though many jurisdictions "have chosen to impose more restrictive safeguards through statutes limiting warrantless arrests for minor offenses"]; *Knowles v. Iowa* (1998) 525 U.S. 113, 114-119 [119 S.Ct. 484] [full search of vehicle after officer issued citation for speeding was unconstitutional even though state statute authorized the search].) "The United States Supreme Court has held that, as far as the federal Constitution is concerned, 'whether state law authorized the search [is] irrelevant.' (*Virginia v. Moore* (2008) 553 U.S. 164, ----, 128 S.Ct. 1598, 1604 (*Moore*); accord, *Whren v. United States* (1996) 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89; *California v. Greenwood* (1988) 486 U.S. 35, 43-44, 108 S.Ct. 1625, 100 L.Ed.2d 30; *Cooper v. California* (1967) 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730.)" (*People v. Robinson* (2010) 47 Cal.4th 1104, 1122.)

The Attorney General maintains that defendant has not demonstrated that he had a subjective expectation of privacy in the SDM's recorded data because he was driving on the public roadway and others could observe his vehicle's movements and speed. The Attorney General further argues that society should not recognize any privacy interest as reasonable. The Attorney General cites *U.S. v. Knotts* (1983) 460 U.S. 276 [103 S.Ct. 1081] and two state cases from New York, *People v. Quackenbush* (1996) 88 N.Y.2d 534 and *People v. Christmann* (2004) 776 N.Y.S.2d 437. We find none of those cases to be determinative.

This case is fundamentally distinguishable from the cases where technology is used to allow law enforcement to capture information that a person is knowingly exposing to the public. In *Smith v. Maryland* (1979) 442 U.S. 735 [99 S.Ct. 2577], the

Supreme Court, citing *Katz*, held that installation of a pen register at the telephone company's central offices, at the request of police, did not constitute a "search" within the meaning of the Fourth Amendment because the pen register merely recorded the telephone numbers dialed from the petitioner's home. (442 U.S. at pp. 741-746.) The court concluded that the petitioner could "claim no legitimate expectation of privacy" because "[w]hen he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business." (*Id*. at p. 744.) It further stated, that even if the petitioner had a subjective expectation of privacy in the phone numbers he dialed, "his expectation was not 'legitimate.' " (*Id*. at p. 745.)

In reaching that conclusion in *Smith v. Maryland*, the Supreme Court discussed the analysis required by *Katz*: "Consistently with *Katz*, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action. [Citations.] This inquiry, as Mr. Justice Harlan aptly noted in his *Katz* concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,' 389 U.S., at 361 [88 S.Ct., at 516]-whether, in the words of the *Katz* majority, the individual has shown that 'he seeks to preserve [something] as private.' *Id*., at 351 [88 S.Ct., at 511]. The second question is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as "reasonable," ' *id*., at 361 [88 S.Ct., at 516]-whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is 'justifiable' under the circumstances. *Id*., at 353 [88 S.Ct., at 512]. See *Rakas v. Illinois*, 439 U.S. [128], at 143-144, n. 12 [99 S.Ct. 421 at 430, 58 L.Ed.2d 387]; id., at 151 [99 S.Ct., at 434] (concurring opinion); *United States v.*

White, 401 U.S. [745], at 752 [91 S.Ct. 1122 at 1126, 28 L.Ed.2d 453] (plurality opinion)." (*Id*. at pp. 740-741, fns. omitted.)

The Supreme Court subsequently invoked *Smith v. Maryland* in *U.S. v. Knotts, supra,* 460 U.S. 276, one of the cases cited by the Attorney General. In *Knotts*, officers, with the consent of a chemical company, installed a beeper inside a five gallon container of chloroform and tracked the beeper signals to a cabin. The court held that the beeper signal did not invade any legitimate expectation of privacy and, consequently, "there was neither a 'search' nor a 'seizure' within the contemplation of the Fourth Amendment." (*Id*. at p. 285.) The court explained: "The governmental surveillance conducted by means of the beeper in this case amounted principally to the following of an automobile on public streets and highways. We have commented more than once on the diminished expectation of privacy in an automobile . . . . [¶] A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When [the driver] travelled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property." (*Id*. at pp. 281-282.)

Likewise, in this case, defendant could not have claimed any reasonable expectation of privacy with respect to governmental observations, including those using enhanced technology, of his driving on public roads. We are more familiar with the examples of law enforcement measuring vehicular speed with radar guns or recording failures to stop at red lights with automated cameras. But in this case, the government was not making any observations of conduct exposed to the public view. Here, defendant's own vehicle was internally producing data for its safe operation. That exceedingly precise data was not being exposed to the public or being conveyed to any other person.

In *People v. Quackenbush, supra,* 88 N.Y.2d 534, a state law authorized police to impound a vehicle for a safety inspection following an injury accident. The defendant's vehicle had been involved in a fatal accident with a bicyclist. (*Id*. at p. 537.) After the police impounded the vehicle for a safety inspection, a mechanic employed by the town inspected the vehicle and completed a standard form "Motor Vehicle Examination Report," in which he reported that he found "metal to metal contact" on the right rear brakes. (*Ibid*.) Defendant was charged with the misdemeanor of operating a motor vehicle with inadequate brakes in violation of a state motor vehicle equipment law. (*Id*. at pp. 537-538.) The defendant successfully moved to suppress the evidence obtained as a result of the safety inspection and the People appealed. (*Id*. at p. 538.)

The New York high court in *Quackenbush* held: "The mechanical areas of automobiles are subject to extensive and long-standing safety regulation analogous to that which has served to except pervasively regulated businesses from the administrative warrant requirement. New York drivers must subject their vehicles to annual inspections of their safety equipment by licensed mechanics before being granted the privilege of driving on our roadways (*see,* Vehicle and Traffic Law § 301; 15 NYCRR part 79). [¶] Because of this extensive regulation of vehicular safety equipment, there is only a diminished expectation of privacy in the mechanical areas of a vehicle. When a fatal accident involving an automobile has occurred, that minimal privacy expectation necessarily yields to the State's legitimate public safety interests in determining all of the circumstances surrounding the death and the cause of the accident (*People v. Ingle,* 36 N.Y.2d 413, 369 N.Y.S.2d 67, 330 N.E.2d 39, *supra*) and in ensuring that the vehicle is not returned to the roadway in an unsafe condition." (*Id*. at pp. 542-543.)

Quackenbush's reasoning is not applicable to this case. The People have not established that California has similar laws requiring an annual inspection of a vehicle's safety equipment or mechanical systems and requiring a safety inspection following an

accident involving injury. Most importantly, the investigative officers in this case were not conducting a safety inspection.

In *People v. Christmann*, *supra*, 776 N.Y.S.2d 437, the defendant was charged with speeding and failure to exercise due care after the car that he was driving struck and killed a pedestrian. At the scene of the fatal collision, a New York state trooper, who had been "assigned to conduct accident reconstruction for the New York State Police," "used computer equipment in his police car to down load information from the Sensing Diagnostic Module (SDM) located in the Defendant's vehicle." (*Id*. at p. 438.) At trial, the prosecution relied in part on the SDM's data, which was retrieved by the CDR system, to prove that the defendant was traveling at a speed of 38 mph in a 30 mph zone. (*Id*. at p. 442.)

The reviewing justice court in *Christmann* concluded that the downloading of data from the vehicle's SDM was "a reasonable extension of *Quackenbush.*" (*Id*. at p. 441.) Without any analysis, the court stated that "[t]he downloading of the information is not analogous to a container search, nor does it extend to the private areas of the vehicle." (*Ibid*.) We find this analysis to be flawed.

Much has been written about an individual's diminished expectation of privacy in vehicles. (See *Wyoming v. Houghton* (1999) 526 U.S. 295, 303 [119 S.Ct. 1297] [where police officers have probable cause to search a car, "the balancing of the relative interests weighs decidedly in favor of allowing searches of a passenger's belongings" that are capable of concealing the object of the search since "[p]assengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars"]; *California v. Carney* (1985) 471 U.S. 386, 387, 391-393 [105 S.Ct. 2066] [in upholding warrantless search of a "fully mobile 'motor home' located in a public place" based on probable cause, the court emphasized the reduced expectation of privacy in vehicles and determined that "the overriding societal interests in effective law

enforcement justify an immediate search before the vehicle and its occupants become unavailable"]; *U.S. v. Ross* (1982) 456 U.S. 798, 807, fn. 8 [102 S.Ct. 2157] [historically, individuals have been "on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts"], 823 ["an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband"], *South Dakota v. Opperman* (1976) 428 U.S. 364, 368 [96 S.Ct. 3092] [in upholding inventory search, court stressed the diminished expectation of privacy in automobiles given "the pervasive and continuing governmental regulation and controls" and "the obviously public nature of automobile travel"]; see *id*. at pp. 378-379 [routine inventory searches of vehicles are constitutional because government interests outweigh an individual's diminished expectation of privacy], concurring opn. of Powell, J.; *Cardwell v. Lewis* (1974) 417 U.S. 583, 590 [94 S.Ct. 2464] [upholding warrantless examination of vehicle's exterior based upon lesser expectation of privacy].) But the Supreme Court has consistently recognized some legitimate expectation of privacy in vehicles deserving of protection. (See *Arizona v. Gant* (2009) ___ U.S. ___ [129 S.Ct. 1710, 1720] [rejecting argument that *Belton* searches are reasonable due to "an arrestee's limited privacy interest in his vehicle" regardless whether arrestee could actually access vehicle and recognizing that a motorist's privacy interest in his vehicle, although less substantial than the privacy interest in his home, "is nevertheless important and deserving of constitutional protection"]; see also *U. S. v. Ortiz* (1975) 422 U.S. 891, 896 [95 S.Ct. 2585] ["A search, even of an automobile, is a substantial invasion of privacy. [Fn. omitted] To protect that privacy from official arbitrariness, the Court always have regarded probable cause as the minimum requirement for a lawful search"]; *Coolidge v. New Hampshire* (1971) 403 U.S.

443, 461 ["The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears"].)

In the pre-*Horton*[7] case of *Cardwell v. Lewis, supra*, 417 U.S. 583, the police had probable cause to believe that Lewis's car was used in the commission of a murder under investigation. (*Id*. at pp. 587, 592.) A plurality of the U.S. Supreme Court held that the Fourth Amendment did not prohibit the government from taking paint scrapings from and examining the tire treads on Lewis's automobile, which had been seized in a public parking lot and then towed to the police impoundment lot. (*Id*. at pp. 586-592.) The opinion stated: "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where its occupants and its contents are in plain view. [Citation.] 'What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.' *Katz v. United States*, 389 U.S., at 351, 88 S.Ct., at 511; *United States v. Dionisio*, 410 U.S., at 14, 93 S.Ct., at 771." (*Id*. at pp. 590-591.) It concluded: "With the 'search' limited to the examination of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle left in the public parking lot, we fail to comprehend what expectation of privacy was infringed. . . . Under circumstances such as these, where probable cause exists, a warrantless examination of the exterior of a car is not unreasonable under the Fourth and Fourteenth Amendments." (*Id*. at pp. 591-592.)

In contrast, in *U.S. v. Ross, supra*, 456 U.S. 798, 823, the Supreme Court concluded that "the privacy interests in a car's trunk or glove compartment may be no less

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[7] *Horton v. California* (1990) 496 U.S. 128, 130 [110 S.Ct. 2301] held that the Fourth Amendment does not prohibit warrantless seizure of evidence of crime observed in plain view from a lawful vantage point, even if discovery of evidence was not inadvertent.

than those in a movable container." It declared that that "[a]n individual undoubtedly has a significant interest that the upholstery of his automobile will not be ripped or a hidden compartment within it opened." (*Ibid*.) The Supreme Court made clear that, even where the automobile exception applies, "[t]he scope of a warrantless search based on probable cause is no narrower-and no broader-than the scope of a search authorized by a warrant supported by probable cause." (*Ibid*.) "Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize." (*Ibid*., fn. omitted.) The scope of a warrantless search of an automobile "is defined by the object of the search and the places in which there is probable cause to believe that it may be found." (*Id*. at p. 824.) Thus, the vehicle is protected by the Fourth Amendment and a motorist's reasonable expectation of privacy with regard to the vehicle yields only as to those places where there is probable cause to search.

In *California v. Acevedo* (1991) 500 U.S. 565 [111 S.Ct. 1982], the U.S. Supreme Court eliminated the warrant requirement for searching a closed container located in a vehicle where probable cause supports a search of the container but not a search of the entire vehicle. (*Id*. at pp. 573, 576, 579.) But the court emphasized that its holding did not expand the scope of searches permissible under the automobile exception. (*Id*. at p. 580.) Thus, in *Acevedo*, "the police had probable cause to believe that the paper bag in the automobile's trunk contained marijuana," which justified a warrantless search of the paper bag. (*Ibid*.) But "the police did not have probable cause to believe that contraband was hidden in any other part of the automobile and a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment." (*Ibid*.) Thus, a warrantless search of a vehicle, or the containers within it, under the automobile exception continues to be circumscribed by probable cause. (*Ibid*.) Its holding indirectly confirms that vehicles continue to be protected by the Fourth Amendment.

We do not accept the Attorney General's argument that defendant had no reasonable expectation of privacy in the data contained in his vehicle's SDM. The precision data recorded by the SDM was generated by his own vehicle for its systems operations. While a person's driving on public roads is observable, that highly precise, digital data is not being exposed to public view or being conveyed to anyone else. But we do not agree with defendant that a manufacturer-installed SDM is a "closed container" separate from the vehicle itself. It is clearly an internal component of the vehicle itself, which is protected by the Fourth Amendment. We conclude that a motorist's subjective and reasonable expectation of privacy with regard to her or his own vehicle encompasses the digital data held in the vehicle's SDM.

4. *No Probable Cause for Download*

" 'Probable cause exists where "the facts and circumstances within [an officer's] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed,' *Brinegar v. United States*, 338 U.S. 160, 175-176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925)), and that evidence bearing on that offense will be found in the place to be searched." (*Safford Unified School Dist. No. 1 v. Redding* (2009) ___ U.S. ___, ___ [129 S.Ct. 2633, 2639].) Defendant maintains that there was no probable cause to retrieve the SDM data in May 2007 because, by that time, investigators had "definitively concluded that Xinos was not guilty of any crime other than the DUI and leaving the scene offenses," and "Xinos had already pled guilty to those offenses, and was awaiting sentencing." The People counter that the inquiry into probable cause is objective and, under that standard, probable cause was shown.

While "constitutional reasonableness" does not depend on "the actual motivations of the individual officers involved" and "[s]ubjective intentions play no role in ordinary,

probable-cause Fourth Amendment analysis" (*Whren v. U.S., supra,* 517 U.S. 806, 813), "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (*Terry v. Ohio* (1968) 392 U.S. 1, 21 [88 S.Ct. 1868].) "[T]he reasonableness of a search must be determined based on the circumstances *known to the officer* when the search is conducted. (*Sanders, supra,* 31 Cal.4th at pp. 333-335 . . . .)" (*In re Jaime P.* (2006) 40 Cal.4th 128, 139.) "[A] police officer may draw inferences based on his own experience in deciding whether probable cause exists. See, *e.g., United States v. Ortiz*, 422 U.S. 891, 897, 95 S.Ct. 2585, 2589, 45 L.Ed.2d 623 (1975)" (*Ornelas v. U.S.* (1996) 517 U.S. 690, 700 [116 S.Ct. 1657].) The facts are "judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? [Citations.]" (*Terry v. Ohio, supra*, 392 U.S. at pp. 21-22.) "[T]he probable-cause determination must be based on objective facts that could justify the issuance of a warrant by a magistrate . . . ." (*U.S. v. Ross*, *supra*, 456 U.S. at p. 808.) A search cannot be justified by what it turns up. (*Bumper v. North Carolina* (1968) 391 U.S. 543, 548, fn. 10 [88 S.Ct. 1788].)

The evidence at the suppression hearing established that the vehicle was still being held as evidence of a crime on May 11, 2007 but there had already been a disposition of the case based on "all of the [accident] reconstruction and eyewitness testimony." The investigating officers had not accessed the data recorder prior to May 11, 2007 because they did not believe it held any relevant data since the airbags had not deployed during the collision. Officer Checke explained, "Prior to going in [on May 11, 2007], we did not believe there would be anything based on the fact that there were no air bags deployed." Nevertheless, on May 11, 2007, more than a year after the fatal collision, they downloaded the data from the SDM at the request of the District Attorney's Office. It

was only some months later that Officer Checke learned that "a non-deployment event" may register even if air bags do not deploy.

As stated, the scope of a legitimate warrantless search of a vehicle under the automobile exception "is defined by the object of the search and the places in which there is probable cause to believe that it may be found." (*U.S. v. Ross, supra*, 456 U.S. at p. 824; cf. *Michigan v. Clifford* (1984) 464 U.S. 287, 294 [104 S.Ct. 641] ["If the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched"]; *Steagald v. U.S.* (1981) 451 U.S. 204, 213 [101 S.Ct. 1642] ["A search warrant . . . is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place"].) The scope of a warrantless search authorized by the automobile exception is "no broader and no narrower than a magistrate could legitimately authorize by warrant." (*U.S. v. Ross, supra*, 456 U.S. at p. 825.) Moreover, probable cause to conduct a warrantless search must exist at the time the warrantless search is executed. (See *Dyke v. Taylor Implement Mfg. Co.* (1968) 391 U.S. 216, 221 [88 S.Ct. 1472] [officers conducting warrantless search of automobile must have " 'reasonable or probable cause' to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search"]; cf. *Sgro v. U.S.* (1932) 287 U.S. 206, 210 [53 S.Ct. 138] [Proof of probable cause to support issuance of a warrant "must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time"].)

In cases of fatal collisions between a vehicle and a pedestrian, the particular facts and circumstances may give rise to probable cause to believe the SDM contains evidence of a crime. But in this case, the prosecution failed to show that the objective facts known to the police officers at the time of the download constituted probable cause to search the

SDM for evidence of crime. The download occurred long after the collision and criminal investigation. The officers who conducted the download were merely complying with an unexplained request of the D.A.'s Office and believed no relevant data would be found.[8] The download of the data was not supported by probable cause.

5. *Examination and Testing of Lawfully Seized Evidence of Crime*

In *U.S. v. Edwards* (1974) 415 U.S. 800 [94 S.Ct. 1234], the police had probable cause to believe that the articles of clothing worn by the defendant were "material evidence" of the crime for which he had been arrested. (*Id*. at p. 805.) The Supreme Court stated: "When it became apparent that the articles of clothing were evidence of the crime for which Edwards was being held, the police were entitled to take, examine, and preserve them for use as evidence, just as they are normally permitted to seize evidence of crime when it is lawfully encountered. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); *Frazier v. Cupp*, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969); *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963) (plurality opinion); *Zap v. United States*, 328 U.S. 624, 66 S.Ct. 1277, 90 L.Ed. 1477 (1946), vacated on other grounds, 330 U.S. 800, 67 S.Ct. 857, 91 L.Ed. 1259 (1947)." (*Id*. at p. 806.)

California law has recognized that items lawfully seized as evidence of crime are subject to closer examination and scientific testing. (See *People v. Teale* (1969) 70 Cal.2d 497, 507-511 [upholding scientific examination identifying victim's blood on vehicle's interior following warrantless seizure of vehicle based on reasonable belief that vehicle itself was evidence of murder], 508 ["it is plainly within the realm of police investigation to subject objects properly seized to scientific testing and examination"];

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[8] The evidence at trial additionally showed that, at the time of the download, the investigating officers' investigation and accident reconstruction had led them to believe that defendant had not been speeding and he could not have prevented the collision.

People v. Griffin (1988) 46 Cal.3d 1011, 1023-1025 [upholding warrantless search of defendant's truck where fresh bloody shoe print observed on its floorboard believed to be evidence of murder and concluding that bloodstains soaked into the floorboard were appropriate subject of scientific examination]; *People v. Superior Court (Nasmeh), supra*, 151 Cal.App.4th 85, 97 [no Fourth Amendment violation where police took murder suspect's seized vehicle to crime laboratory to search for and conduct a scientific analysis of trace items], 98, fn. 4 [police entitled to use technology to determine the evidentiary value of trace materials].) Although California courts in the past have sometimes justified this examination and scientific testing under the so-called "instrumentality exception" (see e.g. *People v. Griffin, supra*, 46 Cal.3d at pp. 1023-1025), no such "exception" has ever been recognized by the U.S. Supreme Court.[9]

Nevertheless, such closer examination and scientific testing of items lawfully seized as evidence of crime will ordinarily be justified by the same probable cause that justified seizure. Presumably, technologically-enhanced examination or scientific testing of such items must be judged against the Fourth Amendment's general proscription against unreasonable searches and seizures and the corollary that constitutional reasonableness is tied to the circumstances justifying "interference in the first place." (See *Terry v. Ohio, supra*, 392 U.S. 1, 20.) It is a cardinal principle of Fourth Amendment law that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible. *Warden v. Hayden*, 387 U.S. 294, 310, 87 S.Ct. 1642, 1652 (1967) (Mr. Justice Fortas, concurring); see e.g., *Preston v. United States*, 376 U.S. 364, 367-368, 84 S.Ct. 881, 884, 11 L.Ed.2d 777 (1964); *Agnello v. United States*, 269 U.S. 20, 30-31, 46 S.Ct. 4, 6, 70 L.Ed. 145 (1925)." (*Terry v. Ohio*,

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[9] A defendant may suppress only evidence obtained by search or seizure invalid under the federal Constitution (see *In re Lance W.* (1985) 37 Cal.3d 873, 886-887; Cal. Const., art. I, § 28, subd. (f)(2) ["Right to Truth-in-Evidence"].) The last California Supreme Court case to mention the "instrumentality exception" is over two decades old.

supra, 392 U.S. at p. 19; see e.g. *Arizona v. Gant*, *supra*, ___ U.S. ___ [129 S.Ct. 1710] [search of vehicle incident to arrest of recent occupant]; *Minnesota v. Dickerson* (1993) 508 U.S. 366 [113 S.Ct. 2130] [pat-down search]; *Florida v. Wells* (1990) 495 U.S. 1 [110 S.Ct. 1632] [routine inventory search]; *Chimel v. California* (1969) 395 U.S. 752 [89 S.Ct. 2034] [search incident to arrest].)

The Attorney General has not cited any Fourth Amendment authority permitting new intrusions into any internal part or component of a vehicle simply because the vehicle was seized as evidence. This case is, of course, distinguishable from a case where police officers reasonably believe that a murder victim was transported in a particular vehicle and seize it and, consequently, have a reasonable basis for examining the vehicle's interior for trace evidence and then testing any trace evidence discovered. The retrieval of raw data from a vehicle's SDM not believed by police to hold any evidence of crime is not a reexamination or closer look at areas of a vehicle already reasonably believed to be or contain evidence of a crime; it is a new and different intrusion. The prosecution failed to show in this case that the download of data was justified by the circumstances warranting seizure of the vehicle and examination of its condition. Further, the download of raw data from a SDM does not qualify as a scientific test, similar to DNA or ballistics testing since downloading is merely the copying or retrieval of electronic data or information. If the retrieval or accessing of an SDM's raw data is constitutionally valid, however, the CDR software analysis or deciphering of that data is akin to scientific testing and may be constitutionally reasonable based upon the circumstances warranting the download.

6. *Harmless Error Standard*

Defendant's motion to suppress should have been granted since the prosecution did not establish that retrieval of the SDM's data was valid under the Fourth Amendment. We review the error in denying defendant's suppression motion under the harmless error

standard of *Chapman v. California* (1967) 386 U.S. 18, 23-24 [87 S.Ct. 824]. (See *People v. Ratliff* (1986) 41 Cal.3d 675, 688; *People v. Minjares* (1979) 24 Cal.3d 410, 424; *Chambers v. Maroney* (1970) 399 U.S. 42, 53 [90 S.Ct. 1975].) There must be proof "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra,* 386 U.S. at p. 24.) Defendant maintains that the improper admission of evidence seized in violation of the Fourth Amendment was not harmless as to his vehicular manslaughter conviction or as to the allegations attached to counts three and four that he personally inflicted great bodily injury upon the victim within the meaning of Penal Code sections 12022.7, subdivision (a), and 1203, subdivision (e)(3).[10] He acknowledges that his convictions on counts two, three, and four were unaffected by the error. The Attorney General offers no argument on this issue. We agree with defendant and will reverse.

D. Enhancement Term for Fleeing Scene After Vehicular Manslaughter

Defendant claims that the trial court committed instructional error by failing to inform the jury that the flight enhancement allegation under former section 20001, subdivision (c), required the prosecution to prove that he left the scene after committing voluntary manslaughter with an intent to avoid arrest or detection. He maintains that proof that he failed to immediately stop at the scene of the accident was not enough to find the allegation true. The People first argue that defendant forfeited this contention

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[10] "Personal infliction" within the meaning of Penal Code section 12022.7, subdivision (a), which provides an enhancement where the defendant "personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony," requires direct causation. (See *People v. Cross* (2008) 45 Cal.4th 58, 68.) The word "willfully" in Penal Code section 1203, subdivision (e)(3), which renders a defendant presumptively ineligible for probation where the defendant "willfully inflicted great bodily injury or torture in the perpetration of the crime of which he or she has been convicted," means that the defendant intended to cause that result. (See *People v. Lewis* (2004) 120 Cal.App.4th 837, 853-854.)

because he did not request a clarifying or amplifying instruction and he did not object when the prosecutor proposed the instruction.

We find no forfeiture. "The trial court must instruct even without request on the general principles of law relevant to and governing the case. (*People v. Sedeno* (1974) 10 Cal.3d 703, 715 . . . .) That obligation includes instructions on all of the elements of a charged offense. (*People v. Dyer* (1988) 45 Cal.3d 26, 60 . . . .)" (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) "This rule applies to the 'elements' of an 'enhancement.' " (*People v. Winslow* (1995) 40 Cal.App.4th 680, 688, fn. omitted.)

We turn to the merits, which we address in case the prosecutor elects to retry the vehicular manslaughter charge. At the time of the fatal collision in May 2006, former Vehicle Code section 20001, subdivision (c), provided for a five-year consecutive prison term enhancement for any person who, after committing certain types of vehicular manslaughter, including a violation of former Penal Code section 192, subdivision (c)(3), "flees the scene of the crime."[11] (Stats.1999, ch. 854, § 1, p. 6129; see Stats. 1998, ch. 278, § 1, pp. 1228-1229.) Subdivision (c) of Vehicle Code section 20001 prohibited the court, as it still does, from striking "a finding that brings a person within the provisions of

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[11] Under former Penal Code section 192, subdivision (c)(3), vehicular manslaughter included "[d]riving a vehicle in violation of Section 23140, 23152, or 23153 of the Vehicle Code and in the commission of an unlawful act, not amounting to felony, but without gross negligence; or driving a vehicle in violation of Section 23140, 23152, or 23153 of the Vehicle Code and in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence." (Stats.1998, ch. 278, § 1, pp. 1228-1229.) Legislation in 2006 deleted former paragraph (3) of subdivision (c) of Penal Code section 192 (Stats. 2006, ch. 91, § 2, p. 1386) and rewrote subdivision (b) of Penal Code 191.5 to describe the crime of vehicular manslaughter while intoxicated (Stats. 2006, ch. 91, § 1, p. 1385). Legislation in 2007 amended section 20001 to omit any reference in subdivision (c) to Penal Code section 192, subdivision (c)(3). (Stats. 2007, ch. 747, § 30, p. 4779.) Section 20001, subdivision (c), applies to persons who flee the scene of the crime after committing a violation of Penal Code section 191.5 (gross vehicular manslaughter while intoxicated and vehicular manslaughter while intoxicated).

this subdivision or an allegation made pursuant to this subdivision." (Stats.1999, ch. 854, § 1, p. 6129; Stats. 2007, ch. 747, § 30, p. 4779.)

At the time of the 2006 collision, subdivision (a) of former Vehicle Code section 20001 provided: "The driver of any vehicle involved in an accident resulting in injury to any person, other than himself or herself, or in death of any person shall immediately stop the vehicle at the scene of the accident and shall fulfill the requirements of Sections 20003 and 20004."[12] (Stats.1999, ch. 854, § 1, p. 6128.) Vehicle Code section 20003 required, and still requires, the driver of a vehicle involved in an accident resulting in injury or death to provide specified information to police and others involved in the accident and to "render to any person injured in the accident reasonable assistance, including transporting, or making arrangements for transporting, any injured person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if that transportation is requested by any injured person." Vehicle Code section 20004 required, and still requires, a driver involved in an accident resulting in a person's death to immediately provide an accident report to the nearest office of the Highway Patrol or police authority where no officer responds to the scene.

At the time of the fatal collision, Vehicle Code section 20001, subdivision (b), criminalized, as it still does, any violation of subdivision (a). (Stats.1999, ch. 854, § 1, pp. 6128-6129; Stats. 2007, ch. 747, § 30, pp. 4778-4779.) If the hit and run involved an accident resulting in death or "permanent, serious injury" as statutorily defined (§ 20001, subd. (d)), the prescribed punishment under subdivision (b)(2) of Vehicle Code section 20001 was, and continues to be, "imprisonment in the state prison for two, three, or four years" or in county jail or fine or both imprisonment and fine. (Stats.1999, ch. 854, § 1, pp. 6128-6129; Stats. 2007, ch. 747, § 30, pp. 4778-4779.) The obvious difference

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[12] The legislation enacted in 2007 made nonsubstantive changes to section 20001, subdivision (a). (Stats. 2007, ch. 747, § 30, p. 4778.)

between subdivision (b) and (c) of section 20001 is that subdivision (c) provides for greater and consecutive punishment when a person flees after committing vehicular manslaughter and it curtails the court's discretion to avoid imposing such an enhancement when pleaded.

Defendant insists that the word "flees" in subdivision (c) of section 20001 "must mean something different than 'failing to immediately stop[]' " because the Legislature did not use those latter words in that subdivision. We do not find this argument persuasive.

"The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first, to the words of the statute, giving them their usual and ordinary meaning. [Citations.]" (*People v. Flores* (2003) 30 Cal.4th 1059, 1063.) We read the statutory language in the context of the statute as a whole. (*People v. Rizo* (2000) 22 Cal.4th 681, 685.)

Subdivision (a) states an affirmative duty of immediately stopping and fulfilling the requirements of sections 20003 and 20004 while subdivision (c) imposes a consecutive enhancement term for fleeing after committing certain types of vehicular manslaughter. "Flee" can mean "[t]o run away from, hasten away from; to quit abruptly, forsake (a person or place, etc.)." (Oxford English Dictionary (2d ed. 1989) <http://dictionary.oed.com> (as of Oct. 12, 2010); see Merriam-Webster's Collegiate Dictionary (10th ed. 2001) p. 444.) In the context of section 20001 as a whole, there is no basis for concluding that fleeing is anything more than not immediately stopping.

"When the language of a statute is clear, we need go no further." (*People v. Flores*, *supra*, 30 Cal.4th p. 1063.) Even when language is susceptible of more than one reasonable interpretation and we resort to extrinsic aids, we "select the construction that comports most closely with the apparent intent of the Legislature, with a view to

promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.) The purpose of the hit and run statute is to ensure that drivers do not leave the scene of a serious accident and comply with their statutory obligations, including rendering assistance to injured persons. The construction of the word "flee" advocated by defendant does not advance the statutory aims.

Defendant maintains that the word "flight" is a legal term of art, citing several Supreme Court cases discussing flight as evidence of consciousness of guilt. In *People v. Bradford* (1997) 14 Cal.4th 1005, 1055, the Supreme Court stated: "In general, a flight instruction 'is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.' (*People v. Ray, supra,* 13 Cal.4th at p. 345; § 1127c.) ' "[F]light requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested." ' (*People v. Visciotti* (1992) 2 Cal.4th 1, 60 . . . , quoting *People v. Crandell* (1988) 46 Cal.3d 833, 869 . . . .)"

Defendant has not cited any legislative history to show the Legislature had this special meaning of "flight" in mind when it added the enhancement provision to the hit-and-run statute for fleeing the scene after committing vehicular manslaughter. The hit-and-run statute is not at all related to proving another substantive offense at trial. If a person departs a crime scene without a purpose of avoiding observation or arrest it would be unreasonable to infer consciousness of guilt from that departure. This consideration is irrelevant in the context of the hit-and-run statute.

The offense of hit and run (§ 20001, subd. (b)) is recognized to be a general intent crime. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1019.) Nothing in the legislative history of subdivision (c) of section 20001, which was added by statute in 1996

(stats.1996, ch. 645, § 4, p. 3631), suggests that the flight enhancement under that subdivision requires any greater intent than required for the criminal offense of hit and run, which is defined as a violation of section 20001, subdivision (a), that is a failure to "immediately stop the vehicle at the scene of the accident" as required.

The legislative history of the assembly bill that added subdivision (c) to section 20001 indicates that the purpose of the provision was to deter individuals from leaving the scene and penalize persons who fail to stay at the scene. In the arguments in support of the bill, it was stated that, according to the author's office, the judge in the fatal drunk driving case involving the victim after which the bill was named ("Courney's Law") believed that "the person who flees the scene should receive an additional five years because the effect of fleeing is to destroy evidence (by reducing the driver's BAC at time of testing) . . . ." (Sen. Rules Com., Office of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1985 (1995-1996 Reg. Sess.), as amended Aug. 7, 1996, p. 4; see Sen. Com. on Criminal Procedure, Rep. on Assem. Bill No. 1985 (1995-1996 Reg. Sess.), as amended July 1, 1996, p. 4.) A Senate committee report stated: "The sponsor and the author believe this additional penalty is necessary because when a person who is DUI flees the scene of an accident where a death has occurred and they are not caught immediately, it is hard if not impossible to later prove that they were DUI. This will create an added deterrence to keep people from fleeing accidents where a death may have occurred." (Sen. Com. on Criminal Procedure, Rep. on Assem. Bill No. 1985 (1995-1996 Reg. Sess.), as amended July 1, 1996, p. 6.)

According to the legislative committee reports explaining Senate Bill No. 1282, which amended section 20001 in 1999, the bill "[c]onforms the existing hit-and-run with death or serious injury statute to the original legislative intent to provide increased punishment when a driver leaves the scene." (Assem. Com. on Appropriations, Rep. on Sen. Bill No. 1282 (1999-2000 Reg. Sess.) as amended Aug. 16, 1999, p. 1); see Assem.

Com. on Transportation, Rep. on Sen. Bill No. 1282 (1999-2000 Reg. Sess.) as amended April 29, 1999, p. 1; Assem. Com. on Public Safety, Rep. on Sen. Bill No. 1282 (1999-2000 Reg. Sess.) as amended April 29, 1999, p. 1.) Section 20001 was not amended again until after the 2006 collision at issue in this case. (See Stats. 2007, ch. 747, § 30, pp. 4778-4779.)

The People were not required to establish that defendant acted with the purpose of avoiding observation or arrest to prove the enhancement allegation under section 20001, subdivision (c). (See CALCRIM No. 2160 (2009-2010) p. 195.)

Disposition

The judgment is reversed with directions to grant defendant's motion to suppress. Upon remand, the prosecution may elect to retry the vehicular manslaughter charge and the bodily injury allegations attached to counts three and four. If the prosecution does

not retry that charge or those allegations, the trial court shall resentence defendant on only counts two, three, and four.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.

Trial Court:	Santa Clara County Superior Court
Trial Judge:	Hon. Marc Poche
Attorneys for Appellant:	Riordan & Horgan, Dennis P. Riordan, Donald M. Horgan and Layli Shirani
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