

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT,

DIVISION EIGHT

IN RE W. B.)	Case No. B 249 718
)	
<hr/> THE PEOPLE OF THE STATE OF CALIFORNIA,)	Los Angeles County
)	Superior Court Case
)	No. YJ 39811
Plaintiff and Respondent,)	(Inglewood Juvenile Court)
)	
vs.)	
)	
W. B .)	
)	
Defendant and Appellant.)	
<hr/>)	

On Appeal from the Judgment of the
Superior Court of the State of California, County of Los Angeles
Inglewood Juvenile Court and Compton Juvenile Court
Hon. Tamara Hall and Hon Irma Brown, Judges Presiding

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

Appellant admitted one count of theft, in violation of Penal Code section 484e, subdivision (d) that was charged in a petition filed under section 602 on October 30, 2012. (CT 1-3, 15.) He was made a ward of the court and placed on formal probation. (CT 15-16, 20.)

While on formal probation, a new petition was filed on April 11, 2013, charging two counts of robbery, in violation of Penal Code section 211, occurring on January 23, 2013. The victim in count one was Miguel Ayon; the victim in count two was Graciela Lopez. (CT 17-18.)

The notice of violation of probation was filed May 3, 2013, but did not allege the charged robberies. One violation was admitted. (CT 24-28, esp. 28, 36.)

Following a contested hearing, the motion to suppress under section 700.1 was denied. Both counts of robbery were found true and the petition was sustained. The matter was then transferred for disposition. (CT 33.)

In a consolidated disposition, appellant was placed in the Camp Community Placement Program for three months. (CT 36.) Both robberies were found to be felonies. The maximum time of confinement for both petitions was six (6) years eight (8) months. Appellant received ninety six (96) days pre-disposition credit. (CT 36; RT 14.) A timely notice of appeal was filed May 30, 2013. (CT 38-39.)

STATEMENT OF FACTS

On January 23, 2013, at around 4:30 p.m., Miguel Ayon was with his girlfriend, Graciela Lopez in the area of Gramarcy and Vernon in Los Angeles County. (SRT² 3, 15.) They were approached by two African American males, one of average height, but of slightly bulky build and the other shorter than average and skinny. Appellant was identified as one of the two. (SRT 4, 16.)

The two followed Miguel and Graciela for an entire block; appellant stayed behind, but the other male moved up next to Miguel, eventually asking Miguel where he was from. (SRT 5-6, 7, 11, 13, 22-23.) Appellant was identified as the one who started claiming that he should use his gun to kill Miguel. Neither Graciela nor Miguel saw a gun, but both were afraid that appellant had one (SRT 7, 16-17.)

The male who closed in on Miguel grabbed his wallet; the other grabbed Graciela's cell phone. (SRT 8, 14, 17-19 [appellant grabbed wallet] 23 [appellant grabbed cell phone].) After the two men left, Miguel and Graciela went their respective ways. (SRT 19.) Graciela went home, told her mother what had happened, and contacted the police. (SRT 19.)

² References to "SRT" are to the Supplemental Reporter's Transcript, prepared pursuant to California Rules of Court, rule 8.155, subdivision (b) and filed October 11, 2013.

While on her way to the police station, she saw the two males again, standing at Western and Vernon. She told this to the police also, stating that one was wearing red sweat pants and the other a green hoodie. (SRT 19-21.)

When reporting the crime to the police, one of the robbers was described as black, dark complexion, about 5'9", thin build, and wearing a dark baseball hat or beanie, black tee-shirt and red sweatpants. (RT 25-26, 28.)

The police made contact with appellant at around 5:25 p.m. on the day of the crime, a few blocks from the place where the crimes occurred . He matched the description; he was with another person who matched the height and weight, but did not match the clothing, used to describe the other robber. (SRT 26, 28-29.)

Immediately upon contacting appellant, the police told him not to leave, handcuffed him, and searched him twice. (SRT 30-31.) First, the police conducted a brief pat down to make sure there was no weapon; they then went through his pockets and discovered a black cell phone. The phone was determined to be the one taken from Graciela Lopez. (SRT 28-29, 31-32.) It wasn't until the second search that the police knew that appellant had a cell phone. (SRT 33.)

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ARGUMENT

I THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS BECAUSE THERE WAS NO PROBABLE CAUSE FOR THE SEARCH.

The standard for probable cause to search is the same as that for probable cause to arrest. (*People v. Stout* (1967) 66 Cal.2d 184, 192-193 and *Greene v. Reeves* (6th Cir, 1996) 80 F.3d 1101, 1106.) A description similar to the description of appellant given to the police in this case – race, sex, height, and clothing – is insufficient to establish probable cause to arrest. (*People v. Curtis* (1969) 70 Cal.2d 247, 350 and 358.)

That the description in this case included build and numbers is irrelevant. In *People v. Craig* (1978) 86 Cal.App.3d 905, 911-912 and fn. 1, the initial description of a group of three robbers included their race, sex, height, build, and clothing. When found, the clothing worn by one did not match the description given. The court held that the description justified only an initial, investigatory detention. It was not until the victim actually identified some members of the group that there was probable cause to arrest. (*Id.* at 913.)

That the description would justify an investigatory detention in this case does not save the search at issue here.

First, there was no mere “investigatory detention”; appellant was told not to leave and he was handcuffed immediately upon being contacted by the police. (SRT 30-31.) Second, the initial pat down for officer safety did *not* yield the cell phone. It wasn’t until “the second time” that the police were searching appellant that the police “knew most likely it was a cell phone”. (SRT 33, lines 22 to 27.)

Here, the search of appellant’s pockets, without probable cause implicates appellant’s right to freedom from unreasonable search and seizure. (U.S. Const., Amends. IV and XIV.) As such, the erroneous denial of the suppression motion means the order sustaining the petition must be reversed unless respondent can show, beyond a reasonable doubt, that the error was not prejudicial. (*Chapman v. California* (1967) 386 U.S. 18, 22 [17 L.Ed.2d 705, 87 S.Ct. 824]; *People v. Boyer* (1989) 48 Cal.3d 247, 279-280, fn. 23, disapproved on another point in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

Respondent may not meet this standard. First, the record is not sufficiently developed to establish that the same evidence would have been found absent the illegality. (*In re Rudy F.* (2004) 117 Cal.App.4th 1124, 1136.)

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Second, the item found is among the strongest evidence available to support the order sustaining the petition. "Possession of recently stolen property is so incriminating that to warrant conviction there need only be, in addition to possession, slight corroboration ... " (*People v. McFarland* (1962) 58 Cal.2d 748, 754, quoted with approval in *People v. Anderson* (2007) 152 Cal. App. 4th 919, 949.)

Here, it is undisputed that appellant remained behind Miguel and Graciela, so they would not have gotten a good look at him. (SRT 5, line 28 to 6, line 2; 7, lines 26 to 27 ["he was behind me. I had my back to him."]; 11, lines 11 to 13 ["it was like a glance ... I had my back to him the whole time."] and 22, line 27 to 23, line 2 ["... he was a bit behind me, behind my boyfriend ... a bit behind me".])

That the in-court identification made of someone who remained behind them was sufficient to corroborate appellant's possession of the cell phone does not mean that the same identification would necessarily result in the same finding if appellant's possession of the cell phone could not introduced into evidence because the phone had been suppressed.

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CONCLUSION

The description at issue could not give probable cause for the search of appellant's pockets. The motion to suppress the results of that search should have been granted. The failure to grant the motion was prejudicial; absent the unlawfully found evidence, there may have been a more favorable result.

For these reasons, the order sustaining the petition should be reversed.

Respectfully submitted,

Dated: November 14, 2013

LAW OFFICES OF ESTHER R. SORKIN



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Attorney for Appellant
W. B.

CERTIFICATE OF WORD COUNT

Pursuant to the California Rules of Court, rule 8.204, subdivision (c)(1), I certify that the Appellant's Opening Brief contains approximately 1,508 words, including this certificate, but excluding the exhibits as counted by the Microsoft Word version 2000 word processing program used to generate this brief.

Respectfully submitted,

Dated: November 14, 2013

LAW OFFICES OF ESTHER R. SORKIN



Esther R. Sorkin
Attorney for Appellant
W. B.

PROOF OF SERVICE
[C.C.P. §1013a, subd. (3)]

I am over the age of 18 years and am employed in Ventura County, California; I am readily familiar with my employer's business practice for the collection and processing of correspondence for mailing within the United States Postal Service; and I am not a party to the within action. My business address is 1001 Partridge Drive, Suite 330, Ventura, California 93003.

On November 19, 2013, I served the foregoing document described as: **APPELLANT'S OPENING BRIEF** on all interested parties in said action by placing a true copy the original of the foregoing document(s) addressed as follows:

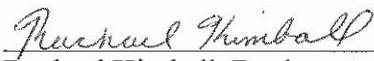
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Federal I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

State I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 19th day of November, 2013, at Ventura, California.



Rachael Kimball, Declarant

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