

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT,
DIVISION EIGHT

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

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 REPLY BRIEF

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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.

Respondent's brief ignores some critical issues. One is that the police had conducted a protective pat-down search and determined that appellant was not armed *before* the search that resulted in finding the cell phone. (SRT 31-32.) Once a "protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid. [Citation deleted]" (*People v. Avila* (1997) 58 Cal.App.4th 1069, 1075.) Conducting a second "pat down" after the police had already determined that appellant was not armed was therefore invalid.

The second is the reliance on the trial court's conclusions that the description at issue here (black male, approximately 5'9", wearing black tee-shirt and red sweatpants) is significantly "more detailed" than the description of "a male Negro, about six feet tall, wearing a white shirt and tan trousers" that was held by the California Supreme Court to be too " cursory" to support a finding of probable cause to arrest. (*People v. Curtis* (1969) 70 Cal.2d 247, 350 [description] and 358 [holding] and RT 25-26, 28 [description here].)

Neither of respondent's arguments justify affirmance in this case.

A THE SEARCH AT ISSUE CANNOT BE JUSTIFIED AS A "PAT-DOWN" FOR WEAPONS SINCE THAT "FRISK" HAD ALREADY BEEN COMPLETED WITHOUT FINDING THE CELL PHONE

Appellant does not dispute that the police acted properly in conducting a brief pat down search to make sure he had no weapon. However, the police did *not* find the cell phone during this "pat down". Instead, , the police "did a brief one [pat down search] to make sure he didn't have a weapon ...". (SRT 31, lines 14 to 18, esp. at lines 15 to 17.) The cell phone was *not* discovered during this search. Instead, the cell phone was discovered during a *second* search. (SRT 31, line 26 to 32, line 6.) It wasn't until "the second time" that the police "knew most likely it was a cell phone". (SRT 33, lines 22 to 27.)

Nothing in the many authorities cited by respondent allows multiple "pat down" searches. Appellant has found nothing authorizing repeated "pat downs". Once a "protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid. (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 373-374 [113 S.Ct. 2130, 2136, 124 L.Ed.2d 334].)" (*People v. Avila, supra* 58 Cal.App.4th at 1075.) The second "pat down" should be invalid. Since the first "pat down" established that appellant was not armed, the second went "beyond what is necessary to determine" that appellant was not armed.

This is not a case, such as *People v. Mack* (1977) 66 Cal.App.3d 839, 850-851 or *People v. Limon* (1993) 17 Cal.App.4th 524, 534-536, where the officer discovered something during the initial pat down search that justified further investigation. Instead, this is a case where an officer conducted a “pat down” search and found nothing, but conducted a second “pat down” search anyway.

It is difficult to see how this second search could be a “frisk” for officer safety in this case. Furthermore, the right of the police to conduct a protective “pat down” does not extend into a right to search for evidence. (*People v. Garcia* (2006) 145 Cal.App.4th 782, 788.)

The second search should be valid only if supported by probable cause to 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.)

B THE DESCRIPTION WAS TOO GENERALIZED TO PROVIDE
PROBABLE CAUSE TO SEARCH.

Again, in *People v. Curtis, supra*, 70 Cal.2d 247, a suspect was described as “a male Negro, about six feet tall, wearing a white shirt and tan trousers”. (*Id* at 350.) This description was held to “cursory” to provide probable cause. (*Id* at 358.) The description here is similar to the “cursory” description in *Curtis*.

The description at issue here is that of “a black, about 5-9, thin build, dark complexion, he was wearing a dark baseball hat or beanie, a black t-shirt, and red sweat pants”. (SRT 28, lines 1 to 5.) The description too “cursory” to support probable cause is that of “a male Negro, about six feet tall, wearing a white shirt and tan trousers”. (*People v. Curtis, supra*, 70 Cal.2d at 350.)

Appellant respectfully submits that there is nothing in his complexion or headgear that alters the fundamental similarity between the description at issue here and the description found too “cursory” to support probable cause in *Curtis*. In both cases, the description is that of race, gender, approximate height and clothing. The trial court’s conclusion that the descriptions in this case are “detailed” does not alter the fact that *Curtis*, although forty years old, is still good law from the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

CONCLUSION

This case involves the constitutional right to freedom from unreasonable search and seizure. (U.S. Const., Amends. IV and XIV.) Here, a “pat down” had established that appellant was unarmed. Although the description did not give rise to probable cause, appellant was subjected to a second “pat down” and it was as a result of this second search that the cell-phone was found.

As shown, the search at issue was not justified by probable cause. 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: February 6, 2014

LAW OFFICES OF ESTHER R. SORKIN

A handwritten signature in cursive script, reading "Esther R. Sorkin", is written over a horizontal line.

Esther R. Sorkin
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 1,049 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: February 6, 2014

LAW OFFICES OF ESTHER R. SORKIN

A handwritten signature in cursive script that reads "Esther R. Sorkin".

Esther R. Sorkin
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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.

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