

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KELLY J. GONZALEZ,

Defendant and Appellant.

A131155

(San Mateo County  
Super. Ct. No. SC070755)

Appellant Kelly J. Gonzalez was convicted, after a jury trial, of possession of methamphetamine for sale and possession of a hypodermic needle or syringe. On appeal, he contends the trial court erred when it denied his motion to suppress evidence, which was based on his allegedly unlawful detention. We shall affirm the judgment.

***PROCEDURAL BACKGROUND***

On April 19, 2010, appellant was charged by information with one count of felony possession of methamphetamine for sale (Health & Saf. Code, § 11378), and one count of misdemeanor possession of a hypodermic needle or syringe (former Bus. & Prof. Code, § 4140). The information further alleged that appellant had four prior narcotics convictions pursuant to Penal Code section 1203.07, subdivision (a)(11)<sup>1</sup>; four prior

---

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

convictions pursuant to Health and Safety Code section 11370.2, subdivision (c); and two prior prison terms pursuant to section 667.5, subdivision (b).<sup>2</sup>

On June 10, 2010, appellant filed a motion to suppress evidence (§ 1538.5). On July 1, 2010, following a hearing, the trial court denied the motion.

On January 7, 2011, at the conclusion of appellant's trial, the jury found him guilty as charged. Appellant waived jury trial on the priors and, on February 4, 2011, the trial court found four of the prior conviction and prison term allegations true and ordered the remaining allegations stricken in the interest of justice.

On February 4, 2011, the trial court sentenced appellant to a total of nine years in state prison.

On February 4, 2011, appellant filed a notice of appeal.<sup>3</sup>

### ***DISCUSSION***

Appellant contends the trial court erred when it denied his motion to suppress evidence, which was based on his allegedly unlawful detention.

#### ***A. Trial Court Background***

South San Francisco Police Officer James Portolan, who had been a police officer for almost 12 years, was the sole witness at the hearing on the motion to suppress evidence. He testified that, on March 28, 2010 at about 7:45 p.m., he was dispatched to an address on Mclellan Drive in San Mateo County based on the report of a disturbance outside that location. It had been reported that a male and female were having an argument. He also received information that the female had shoved the male. The

---

<sup>2</sup> An amended information was subsequently filed, correcting the dates of the alleged priors.

<sup>3</sup> Because the sole issue on appeal concerns the propriety of the trial court's denial of appellant's motion to suppress evidence, the factual background will be limited to the evidence presented at the hearing on the motion to suppress. (See *Discussion, post.*)

female reportedly was white, with brown hair, and wearing blue jeans. The male reportedly was wearing dark clothing and was bigger than the female.

Portolan, who was in uniform, approached the address alone in his marked patrol car. When he arrived, neither the car's lights nor its siren were on. As he drove up to the area described in the report, he saw a female and a male sitting on a bench, holding each other. They appeared calm, although the female's eyes were watery and he could tell she had been crying. Portolan made a U-turn and parked by the sidewalk, about 15 feet from where the two people were sitting. He then walked up to them and said hello. He did not have his weapon drawn. Portolan identified appellant as the male he saw sitting on the bench that day.

After Portolan said hello, he explained why he was there. The female then said she had been yelling at a different person, who was no longer present. She said that appellant was her boyfriend and she had not been yelling at him. At that point, Portolan "casual[ly]" asked appellant and the female for their identification. They said that they did not have any identification with them and that it was upstairs in their apartment. Portolan then asked them for their names.

After appellant told Portolan his name and date of birth, Portolan turned his attention to the female to get her information. At that time, appellant "leaned forward and took a couple of short breaths and said that he needed his asthma inhaler." Portolan "was a little surprised, because he had been calm and was breathing fine." He asked appellant if there was someone in his apartment who could bring the inhaler to him. Appellant said there was no one.

Portolan found it suspicious that appellant was "completely fine one minute, and as soon as I got his information, that's when he became, you know, supposedly ill with asthma. . . . [¶] It seemed strange to me that it happened that quickly." Portolan described a prior incident that "popped into [his] head when this happened," in which "an

individual . . . said they had to go do something. The officer let them do it. And it turned out to be a shooting.” Portolan did not allow appellant to go to his apartment.

Portolan then asked appellant if he was on probation or parole and appellant said he was on parole. Portolan became “very concerned” because he thought appellant was attempting to get away from him. No more than two or three minutes had passed between the time Portolan exited his vehicle and the time appellant admitted he was on parole. Portolan did a records check using appellant’s name and date of birth, from which he confirmed that appellant was on parole and known to carry weapons and hypodermic needles. Portolan then handcuffed and searched appellant.<sup>4</sup>

On redirect examination, Portolan explained that the report from dispatch regarding an argument between a male and female meant that he was responding to a “415,” which fell under “the domestic violence umbrella.”<sup>[5]</sup> So, when we contact people, they don’t always admit to what’s going on. They don’t want their significant other to be arrested, or they don’t want issues with the police. [¶] Standard protocol is to interview them separately when you have cover officers available . . . . So, there were several steps that would have been taken concerning the domestic violence issue once officers arrived.” When appellant asked to leave to get his asthma inhaler, Portolan was still waiting for a cover officer to arrive.

At the conclusion of the hearing, the court ruled as follows: “The Court finds that the initial contact by Officer Portolan of the defendant and the female was a consensual encounter.

---

<sup>4</sup> At appellant’s subsequent trial, evidence was presented that, upon appellant’s arrest, police found the following items on appellant’s person: a bag with hypodermic syringes in it, baggies of methamphetamine and cash, a digital scale, and an asthma inhaler.

<sup>5</sup> We assume Portolan was referring to section 415, which addresses offenses related to disorderly conduct or disturbing the peace.

“I’m going to deny the [section] 1538.5 [motion], the reason being or the main reason is Officer Portolan has 12 years’ experience, and was able to articulate a number of what would otherwise be insignificant facts, but when you put them all together, based on his training and experience, they add up to something.

“The woman was observed to have been crying, which corroborates the initial report that there had been something going on, other than just two people sitting there innocuously.

“The officer articulated that when the defendant wanted to leave to get his asthma inhaler, that triggered a memory from a potential—it could be a potential dangerous incident. Either the defendant was trying to flee, or in the earlier one I guess it was a shooting or something like that.

“What I’m trying to say is, there are small facts that all add up to suspicions in the Officer’s mind. I think the consensual encounter turned into a detention at about the point in time when the defendant was—after he took his few short breaths—by the way, the Officer observed that it was unusual because he was just fine, and then a moment later he seemed to be having an—I guess it was an asthma attack, either feigned or otherwise. And the Officer thought that was odd.

“And then, when the defendant wanted to get the inhaler, the Officer was hesitant to allow him to do that. It obviously turned into a detention at that point.

“And this Court is of the view that there are sufficient articulable facts giving rise to a valid detention.

“And we don’t need to address the other issue on the parole status, since the Officer knew the defendant was on parole both by the defendant’s admission and through dispatch.

“The [section] 1538.5 [motion] is denied.”

## **B. Legal Analysis**

The Fourth Amendment of the United States Constitution requires state and federal courts to exclude evidence obtained from unreasonable government searches and seizures. (*People v. Williams* (1999) 20 Cal.4th 119, 125.) Pursuant to section 1538.5, a defendant can move to suppress evidence obtained in an improper seizure. “In reviewing the trial court’s denial of a motion to suppress evidence, we view the record in the light most favorable to the trial court’s ruling, deferring to those express or implied findings of fact supported by substantial evidence. [Citations.] We independently review the trial court’s application of the law to the facts. [Citation.]” (*People v. Jenkins* (2000) 22 Cal.4th 900, 969.)

### **1. Initial Encounter**

Appellant first claims that his encounter with Officer Portolan was never consensual but, instead, constituted a detention from its inception. He further asserts that this detention was not supported by reasonable suspicion.

“Police contacts with individuals may be placed into three broad categories ranging from the least to the most intrusive: consensual encounters that result in no restraint of liberty whatsoever; detentions, which are seizures of an individual that are strictly limited in duration, scope, and purpose; and formal arrests or comparable restraints on an individual’s liberty.” (*In re Manuel G.* (1997) 16 Cal.4th 805, 821 (*Manuel G.*)). In *Manuel G.*, the California Supreme Court explained the differences between consensual encounters and detentions: “Consensual encounters do not trigger Fourth Amendment scrutiny. [Citation.] Unlike detentions, they require no articulable suspicion that the person has committed or is about to commit a crime. [Citation.]

“The United States Supreme Court has made it clear that a detention does not occur when a police officer merely approaches an individual on the street and asks a few questions. [Citation.] As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable

suspicion is required on the part of the officer. Only when the officer, by means of physical force or show of authority, in some manner restrains the individual's liberty, does a seizure occur. [Citations.] '[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.' [Citation.] This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation. [Citation.] Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled. [Citations.] The officer's uncommunicated state of mind and the individual citizen's subjective belief are irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred. [Citation.]" (*Manuel G.*, *supra*, 16 Cal.4th at p. 821.)

In the present case, the record reflects that when Officer Portolan approached the location where appellant and the woman were sitting, he was alone in his marked patrol car, with neither the car's lights nor the siren on. He parked 15 feet away, walked up to the couple with his weapon holstered, and said hello. After he explained why he was there, the woman proceeded to explain that she had been arguing with another person. Portolan then casually asked them for their identification and, when they said they did not have it with them, he asked them their names, which appellant immediately provided. When Portolan turned to the woman for her information, appellant, who had been breathing fine, leaned forward, took some "short breaths" and said he need his asthma

inhaler. Portolan became suspicious at that point and asked appellant if he was on probation or parole.<sup>6</sup>

All of these circumstances support a finding that the encounter was consensual until Portolan asked appellant if he was on probation or parole and refused to let him leave to get his asthma inhaler. (See *Manuel G.*, *supra*, 16 Cal.4th at p. 821 [“a detention does not occur when a police officer merely approaches an individual on the street and asks a few questions”].) Unlike the circumstances described in *Manuel G.*, which might demonstrate a seizure, here, there was a single officer, there was no display of a weapon or physical touching, and there was no coercive language or tone of voice that could have indicated that appellant’s compliance with Portolan’s request might be compelled. (See *ibid.*; compare *People v. Garry* (2007) 156 Cal.App.4th 1100, 1112 [any reasonable person who found himself “suddenly illuminated by a police spotlight with a uniformed, armed officer rushing directly at him asking about his legal status, would believe themselves to be ‘under compulsion of a direct command by the officer’ ”].) The totality of the circumstances thus shows that a reasonable person in appellant’s circumstances would have believed he was free to terminate the encounter. (See *Manuel G.*, at p. 821.)

Appellant nevertheless argues that the coercive nature of the encounter is shown by the fact that, upon his arrival, Portolan immediately said he was investigating a public disturbance. The officer’s explanation, however, did not amount to accusatory questioning of appellant as a suspect. (See *People v. Daugherty* (1996) 50 Cal.App.4th 275, 284-285 [where narcotics officer told defendant that he only interviewed people suspected of transporting narcotics, but did not accuse her of transporting narcotics, encounter was consensual].) Appellant also claims that the officer’s request for

---

<sup>6</sup> Respondent does not challenge the trial court’s finding that the encounter became a detention once Portolan asked appellant about his probation/parole status and did not let him leave to get his asthma inhaler. Therefore, in determining whether the encounter was consensual, we shall examine the evidence presented before Portolan refused appellant’s request to leave the area.

identification demonstrates that he was not free to leave. However, the United States Supreme Court has stated that a police request for identification or questioning related to an individual's identity does not, by itself, constitute a Fourth Amendment seizure. (*Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.* (2004) 542 U.S. 177, 185 ["Asking questions is an essential part of police investigations. In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment"]; compare *People v. Garry, supra*, 156 Cal.App.4th at pp. 1111-1112 ["rather than engage in a conversation, [the officer] immediately and pointedly inquired about defendant's legal status as he quickly approached"].) Portolan's "casual" request for identification after saying hello and explaining his presence did not transform the encounter into a detention.

Based on "all the circumstances surrounding the encounter," we conclude that the initial contact between Officer Portolan and appellant was consensual. (See *Manuel G., supra*, 16 Cal.4th at p. 821.)

## ***2. Detention***

The trial court found, and respondent agrees, that appellant was detained once Officer Portolan asked about his probation and parole status and refused to let him retrieve an asthma inhaler from his apartment. Appellant argues that, even assuming the encounter was consensual up to that point, the subsequent detention was unlawful.

"A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231 (*Souza*).) "The guiding principle in determining the propriety of an investigatory detention is 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' [Citations.] In making our determination, we examine 'the

totality of the circumstances’ in each case. [Citations.]” (*People v. Wells* (2006) 38 Cal.4th 1078, 1083.)

In the present case, the trial court observed that Portolan had testified regarding a number of circumstances in his encounter with appellant that, alone, would be insignificant, but that together provided reasonable suspicion. These circumstances included Portolan’s observation that the woman had been crying, which corroborated “the initial report that there had been something going on, other than just two people sitting there innocuously.” Indeed, Portolan testified that he was responding to a possible domestic violence situation, in which, based on his training and experience, people “don’t always admit to what’s going on. They don’t want their significant other to be arrested, or they don’t want issues with the police.”

Then, Portolan became suspicious when, just after obtaining appellant’s name and date of birth, appellant “leaned forward and took a couple of short breaths and said that he needed his asthma inhaler.” Portolan “was a little surprised, because he had been calm and was breathing fine” up until that moment. Based on his experience and training, Portolan became concerned that a domestic violence incident had in fact taken place and that appellant was either trying to flee or, based on Portolan’s memory of hearing about a shooting in a similar situation, that he could be going to get a weapon.

We do not agree with appellant that Portolan’s suspicion constituted no more than a “vague hunch” and a “purely subjective” suspicion that appellant had been involved in a domestic violence incident. That the circumstances might also have been consistent with innocent activity does not render Portolan’s suspicions unreasonable, in light of all of the circumstances just discussed. (See *Souza, supra*, 9 Cal.4th at p. 233.) “ ‘The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of [police] investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal . . . .’ [Citation.]” (*Ibid.*)

Nor do we agree with appellant’s claim that Portolan’s suspicion was improperly based on a decision by appellant to refuse to answer questions and leave the area. Appellant did not simply decline to answer questions and walk away. Rather, he answered Portolan’s question regarding his identity before then suddenly starting to take short breaths and asking to go retrieve his asthma inhaler. As we have explained, Portolan’s suspicion was reasonably aroused at that point, based on all of the circumstances. As our Supreme Court explained in *Souza, supra*, 9 Cal.4th 224, 234, citing *Florida v. Royer* (1983) 460 U.S. 491, 498: “[T]hat a person approached by police for questioning may decline to answer the questions and ‘may go on his way,’ does not imply that the *manner* in which a person avoids police contact cannot be considered by police officers in the field or by courts assessing reasonable cause for briefly detaining the person.”

In conclusion, we find that Officer Portolan’s suspicion, in the totality of the circumstances of this case, was objectively reasonable. Appellant’s motion to suppress was therefore properly denied.

***DISPOSITION***

The judgment is affirmed.

---

Kline, P.J.

We concur:

---

Haerle, J.

---

Richman, J.