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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

VAEGAFI FIU,

Defendant and Appellant.

A131437

(Contra Costa County
Super. Ct. No. 51014448)

Defendant Vaegafa Fiu seeks reversal of a final judgment and sentence entered after his plea of no contest, arguing court error in denying his motion to suppress evidence of methamphetamine possession. We affirm the judgment.

BACKGROUND

In November, 2010, the Contra Costa County District Attorney filed a felony complaint charging defendant with one count of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), and specially alleged that defendant had nine prior “strikes” (Pen. Code, §§ 667, subds. (b) through (i), and 1170.12), had served a prior prison term (Pen. Code, § 667.5, subd. (b)), and was not eligible for probation (Pen. Code, § 1203, subd. (e)(4)).

Defendant pleaded not guilty and filed a motion to suppress evidence pursuant to Penal Code section 1538.5. The motion and preliminary hearing occurred at the same time, and the motion was denied.

The district attorney filed an information in December 2010 that contained the same charges and special allegations that were in the complaint. Defendant again pleaded not guilty.

Defendant filed a motion renewing his motion to suppress evidence pursuant to Penal Code section 1538.5, and also moved to dismiss the information pursuant to Penal Code section 995; both of which the People opposed. The court denied the motions.

Defendant subsequently pleaded no contest to the possession count, admitted all of the special allegations, and waived his custody credits. The court accepted the plea, found defendant guilty of the count charges and found the special allegations to be true. The court struck the nine “strike” allegations in the interest of justice pursuant to Penal Code section 1385 and identified its reasons for doing so.

The court imposed an upper term sentence of three years for possession of methamphetamine and an additional one year upon finding the prior prison term allegation to be true, for an aggregate term of four years in state prison. It suspended execution of sentence, placed defendant on formal probation for five years, and ordered him to complete a two-year Delancy Street program. The court indicated it would credit two years against defendant’s sentence if he successfully completed the program, but otherwise would find him in violation of probation and have the opportunity to impose sentence.

Defendant filed a timely notice of appeal from the denial of his motion to suppress evidence.

DISCUSSION

Defendant argues that a cigarette box containing a baggie of methamphetamine was seized from his pocket in violation of his Fourth Amendment rights against warrantless search and seizure because there was no probable cause to detain him under Welfare and Institutions Code section 5150 (section 5150) prior to the search, the search unlawfully exceeded the scope of a permissible pat down search, the search of the cigarette box was unreasonable, and, assuming there was probable cause to detain defendant pursuant to section 5150, it was unreasonable to search the cigarette box itself.

The People disagree with each of these arguments. They also argue that defendant has waived any appellate challenge to his being taken into custody pursuant to section 5150 by his failure to first raise the issue before the magistrate in the court below, that defendant relies on the wrong legal standard for evaluating whether a search was properly conducted in the course of a section 5150 detention, that the pat search and inspection of the cigarette box did not violate defendant's Fourth Amendment rights, and that in any event the court's ruling should be affirmed because the baggie of methamphetamine inevitably would have been discovered when defendant was properly taken into custody pursuant to section 5150.

We conclude the trial court did not err. Substantial evidence exists to support the determination that there was probable cause to take defendant into custody pursuant to section 5150 and, as the court determined, that discovery of the baggie of methamphetamine in the cigarette box by lawful means after he was taken into custody was inevitable. We affirm the judgment based on this analysis and do not address the remainder of the parties' arguments.

A. The Proceedings Below

1. Defendant's Motion to Suppress

Prior to defendant's preliminary examination, he filed a written motion pursuant to Penal Code section 1538.5 to suppress evidence of the suspected methamphetamine and all other evidence, including the testimony of witnesses, that, was the fruit of an allegedly illegal detention, arrest, and search of his person.

2. Officer Melgoza's Testimony

At the preliminary examination, San Pablo Police Officer Enrique Melgoza testified that about 10:30 p.m. on August 4, 2010, he went to a residence on 21st Street in San Pablo, California, in response to a report that a man was saying people were after him and he wanted to hurt himself. Melgoza had been to the same address about three times in the previous two weeks on similar calls, which involved a person at the residence saying he needed help and some people were after him. On those three previous occasions, defendant was "5150'd."

Melgoza further testified that when he arrived at the residence on the evening of August 4, 2010, he saw about three or four of defendant's family members through the front doorway. They were inside the house by the front door trying to physically restrain defendant. Over the screaming and yelling, Melgoza heard one of the family members say defendant was trying to grab a knife.

Melgoza ordered defendant to exit the house, which defendant did. Melgoza handcuffed defendant, who did not resist, and moved him less than 10 feet to a spot in front of the house and away from defendant's family.

Melgoza searched defendant's person "for any weapons or anything that may be harmful to himself or myself, or any medical staff that was called on the scene." Melgoza was concerned for medical staff "due to the past two weeks of [defendant] being 5150'd, there was the possibility that he would be 5150'd again today based on the nature of the call and that situation search of his person, due to him needing if it was him to be 5150'd he'd be placed in the back of an ambulance and would need to be searched as to not have any weapons to harm staff." Asked how he went about searching defendant, Melgoza stated, "[s]tandard search procedure," and indicated that he checked defendant's waistband and all of his pockets, and removed everything in his pockets or on his person.

Melgoza removed a cigarette box from defendant's front left pocket. He searched the box because, he testified, "[b]ased on training and experience I note people carry various things from drugs to needles to nails." Melgoza found a plastic baggie containing a crystal-like substance that was visible through the baggie.

The parties stipulated that a duly qualified criminalist had tested the substance in the baggie and found that it weighed .19 grams and contained methamphetamine. Melgoza testified that, based on his training and experience, and his manipulation of the substance, it was "[f]ar more than a usable amount."

3. Officer Prince's Testimony

San Pablo Police Officer Luke Prince arrived on the scene about a minute after Melgoza arrived, and saw that defendant was handcuffed. He testified that he was

dispatched to the scene because a male had called the police and said he was in trouble, then dropped the phone and would not respond.

When he arrived, Prince saw Melgoza was conducting a search of defendant's person. Prince went to talk to defendant's family members to find out what was going on and to evaluate defendant's conduct to determine whether he was a danger to himself or others pursuant to section 5150. In particular, he wanted to find out about defendant's mental stability and whether he might be experiencing a drug-induced psychosis.

Prince spoke with defendant's family members for a few minutes. They told him that defendant recently had been under the influence of methamphetamine constantly, had been released from the county mental health facility that morning after being taken there the day before pursuant to section 5150, and had called his family on the bus ride home and said that the cars were changing colors to disguise themselves so they could get him. They also told Prince that defendant was carrying a kitchen knife to protect himself from people.

Prince then went back outside and conducted a 5150 evaluation of defendant. Prince had specific training and experience regarding the standards for holding individuals pursuant to section 5150. He had police academy training and field experience in determining whether a person is a danger to themselves or anyone else. He had heard of people who, while in a methamphetamine-induced psychosis, killed themselves to get away from imaginary threats and killed family members and loved ones who they perceived as threatening for some unknown reason. Therefore, while doing section 5150 evaluations, Prince typically asks subjects if they wanted to hurt themselves or others and whether they were on prescription drugs.

Prince asked defendant questions, and noted that he could not speak clearly and could not form "well-thought sentences." Prince observed that defendant was sweating and appeared to be in a methamphetamine-induced psychosis. Defendant seemed unable to answer him, did not talk very much at all, and seemed aggravated.

Prince had also received training at the police academy to determine whether someone was under the influence of methamphetamine. In the two years that he had been

a police officer, he had seen people under the influence of methamphetamine not less than 100 or 200 times. Based on his training and experience, he understood that a person under the influence of methamphetamine would generally be unable to control the functioning of their eyes, have shaking pupils, sweat profusely, and do things they would not normally do.

Prince noticed that defendant exhibited rapid eye movement, sweating, agitation, and stiffness, seemed angry, and was physically tense. He concluded that defendant was under the influence of methamphetamine. Defendant was placed in an ambulance and transported for further evaluation by a mental health official.

Prince was somewhat familiar with drug recognition tests used to determine whether a person is under the influence, having been trained in the field to perform such tests, although he did not receive formal training for such testing. He did not perform any drug recognition tests on defendant.

After evaluating defendant, Prince spoke with Melgoza, who showed him the cigarette box and baggie that he had found in defendant's pants pocket. Prince looked at the baggie and concluded that the substance was probably methamphetamine.

4. The Ruling on the Motion

After hearing argument, the court denied defendant's motion to suppress the evidence as follows: The "court is satisfied that the officer with the history with [defendant] at the location of a 1550,^[1] was entitled to conduct the search that he did, and even if he should have waited until he got to the hospital to do the search, there was reasonable cause to do the search and to look into the box, cigarette box for razor blades given all the information. [¶] So either it was okay at that time, or if it wasn't[,] it was inevitable in any case as the defendant was taken 5150. [¶] So the 1538.5 is denied."

The court then ordered that defendant be held to answer for the charge of possession of methamphetamine.

¹ It appears from the context of the court's statement that it intended to refer to "a 5150."

5. Defendant's Motion Pursuant to Penal Code Section 995

After the information was filed, defendant moved to dismiss the information pursuant to Penal Code section 995 on the grounds that the magistrate erred in denying defendant's motion to suppress and issuing its holding order, and renewed his motion to suppress the evidence pursuant to Penal Code section 1538, subdivision (i). The People opposed the motions. No new evidence was introduced at the subsequent hearing. After hearing argument, the trial court reviewed relevant facts and then stated:

“The analysis for probable cause in the context of 5150 is the same as in the criminal context. I also read California Welfare and Institutions Code [section] 5156 as not requiring that the officer hand over any items that they retrieve from a troubled individual. Rather, that if they choose to leave property with the responsible relative or guardian, that the report can include the name of the relative or guardian so the officer doesn't suffer liability if that property turns up missing.

“The defendant displayed paranoid ideation. He said ‘people were trying to get me.’ And the officer saw this situation—being searched is certainly prior to the formal determination that the defendant was 5150, but it was clear that the situation was headed to taking the defendant into custody for 5150.

“With regard to [*Terry v. Ohio* (1968) 392 U.S. 1] the *Terry* rule does allow only a limited pat search of outer clothing for a weapon that might be used against the officer. However, this officer had particularized knowledge that cigarette boxes could contain razors, needles and nails. And the officer had a very volatile and unpredictable subject on his hands. I believe he had the right to search the defendant for dangerous weapons.

“This case merges *Terry* with the 5150, in that the pat search certainly was warranted; and the officer could search for possible offensive weapons in light of the circumstances that were presenting themselves to the officer.”

B. Standard of Review

As both parties assert, we review the findings of the initial ruling that was made at the same time of the preliminary hearing based on the evidence presented at the preliminary hearing, not the trial court's. “Where the [Penal Code section 1538.5]

motion was made previously at the preliminary hearing and where the evidence at the special hearing is limited to the transcript of the preliminary hearing, the trial court is no longer vested with unrestricted power to determine the facts. Rather, it is bound by the factual findings of the magistrate and, in effect, becomes a reviewing court drawing all inferences in favor of the magistrate's findings, where they are supported by substantial evidence.” (*People v. Ramsey* (1988) 203 Cal.App.3d 671, 678-679, fn. omitted.)

“Because the superior court is the reviewing court rather than the fact-finding court, the appellate court no longer reviews the findings of the trial court. Rather, as with review of a [Penal Code] section 995 motion, the appellate court disregards the findings of the trial court and reviews the determination of the magistrate who ruled on the motion to suppress. [Citation.] The appellate court, in reviewing the magistrate's findings, applies the same standard previously applied to the trial court's findings: ‘all presumptions are drawn in favor of the factual determinations of the [magistrate] and the appellate court must uphold the [magistrate's] express or implied findings if they are supported by substantial evidence.’ ” (*People v. Ramsey, supra*, 203 Cal.App.3d at p. 679.)

C. Taking Defendant Into Custody Pursuant to Section 5150

Defendant argues, among other things, that we should find error because the police were not justified in taking him into custody pursuant to section 5150. The People disagree for three reasons, which we now review.

1. The People's Judicial Estoppel Argument

First, the People argue that defendant cannot raise the propriety of his being taken into custody pursuant to section 5150 on appeal because his counsel conceded at the initial hearing that Melgoza could detain him, and did not otherwise object to his being taken into custody. The People acknowledge the issue was debated before the trial court, but argue that this is not relevant because we are to review the initial ruling only. Therefore, defendant is judicially estopped from asserting the issue now because a party “ ‘is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to

the opposing litigant.’ ” (*In re Blake* (1979) 99 Cal.App.3d 1004, 1022; see also *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 191.)

Defendant replies that the doctrine of judicial estoppel cannot apply here because the prosecutor argued at the initial hearing that defendant’s search was proper “incident to a 5150 hold,” relying extensively on *People v. Triplett* (1983) 144 Cal.App.3d 283 (*Triplett*), which addressed the standard that must be met by police for a person to be taken into custody pursuant to section 5150. Furthermore, the prosecutor did not object before the trial court on the ground of judicial estoppel and, thus, “the issue of waiver was itself waived.”

We agree that the prosecutor put at issue in the initial hearing defendant’s being taken into custody pursuant to section 5150 by the police. Furthermore, the initial ruling regarding the inevitable discovery of the methamphetamine implicitly relied on the propriety of the police taking defendant into custody pursuant to section 5150. Defendant’s counsel conceded at the initial hearing that Melgoza had the right to detain him prior to Melgoza’s search of him, but this was not necessarily a concession regarding the propriety of the police taking defendant into custody pursuant to section 5150 and placing him in an ambulance for further evaluation. Therefore, we find the People’s judicial estoppel argument unpersuasive.

2. The Parties’ Debate Over the Legal Standard to Apply

The People assert on appeal that the police taking him into custody pursuant to section 5150 should be reviewed under a different and more relaxed standard than that articulated in *Triplett*. We disagree.

Under section 5150, when a person is detained by a peace officer, a facility into which a person is placed for 72-hour treatment and evaluation “shall require an application in writing stating the circumstances under which the person’s condition was called to the attention of the officer . . . and stating that the officer . . . has probable cause to believe that the person is, as a result of a mental disorder, a danger to others, or to himself or herself, or gravely disabled.” (§ 5150.) Defendant relies on *Triplett, supra*,

144 Cal.App.3d 283, decided by Division Three of this court, to argue that a peace officer cannot detain a person pursuant to 5150 without such probable cause. *Triplett* states:

“To constitute probable cause to detain a person pursuant to section 5150, a state of facts must be known to the peace officer (or other authorized person) that would lead a person of ordinary care and prudence to believe, or to entertain a strong suspicion, that the person detained is mentally disordered and is a danger to himself or herself or is gravely disabled. In justifying the particular intrusion, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant his or her belief or suspicion. [Citations.] Each case must be decided on the facts and circumstances presented to the officer at the time of the detention [citation], and the officer is justified in taking into account the past conduct, character, and reputation of the detainee.” (*Triplett, supra*, 144 Cal.App.3d at pp. 287-288.)

In response to defendant’s contention that the People did not establish probable cause, the People first assert that “[i]n applying the Fourth Amendment to cases where officers are called upon to determine, under section 5150, whether to take an individual into custody and transport him or her to a mental health facility, a new legal paradigm involving the community caretaking doctrine and overall reasonableness under the particular circumstances should control officer behavior.” The People argue that *Triplett* sets out “an outdated standard” and “has now been overshadowed” by *People v. Ray* (1999) 21 Cal.4th 464 (*Ray*). *Ray*, they argue “established a whole new regime for assessing the Fourth Amendment propriety of certain police conduct that is totally unrelated to criminal investigative duties of the police.” This regime, the People assert, involves the “emergency aid exception,” under which police acting in their community care function “ ‘may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance.’ [Citation.] ‘ ‘The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.’ ’ ” (*Ray*, at p. 470.)

Defendant disagrees that *Ray* applies here because the theory was neither presented nor litigated in the suppression hearing below and, therefore, cannot be asserted in this appeal as a basis for the lawfulness of defendant's detention, based on *People v. Camacho* (2000) 23 Cal.4th 824, 837. We agree.

In *Camacho*, our Supreme Court held that police violated a defendant's Fourth Amendment rights when, warrantless, they observed defendant packaging cocaine inside his home through a window from defendant's side yard, and reversed defendant's conviction. (*Camacho, supra*, 23 Cal.4th. at pp. 831-837.) The court specifically "decline[ed] to reach respondent's contention the search was lawful because it occurred in the context of the police officers' "community caretaking function[]," " that is, that it involved a proper police activity "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." ' [*Ray, supra*, 21 Cal.4th at p. 467.] Respondent raised this issue for the first time in this court, making the issue inappropriate for review both because he did not raise it in the Court of Appeal [citation] and also because it was not raised in the hearing on the suppression motion to justify the officers' warrantless entry onto defendant's property [citations]." (*Camacho*, at pp. 837-838, fn. 4.)

We follow *Camacho* here, and do not further address the People's argument.

3. Probable Cause

The People also argue that, even if *Triplett* does apply, the police were justified in taking defendant into custody pursuant to section 5150. We agree.

The undisputed evidence presented to the court was that Melgoza understood he was being dispatched to defendant's residence based on reports that a man there was saying people were after him and he wanted to hurt himself. Melgoza had previously been dispatched to this same residence three times in the previous weeks based on similar calls and knew that on these previous occasions defendant had been taken into custody pursuant to section 5150. Furthermore, when Melgoza arrived at the residence on the evening of August 4, 2010, he saw three or four of defendant's family members trying to

restrain defendant and heard one of them say that defendant was trying to arm himself with a knife.

In addition, Prince testified that he understood from family members that defendant had just been in custody pursuant to section 5150, had recently been using methamphetamine constantly, was carrying a kitchen knife around to guard against people who were out to get him, and had reported to family members that morning that cars were changing colors to disguise themselves in order to get him. In addition, Prince observed defendant's physical condition and, informed by his experience and training, concluded that defendant appeared to be experiencing a methamphetamine-induced psychosis.

Defendant replies that there is no evidence of probable cause to detain him because, despite his prior 5150 detentions, he had not been committed, there was no evidence that Melgoza was aware of the information obtained by Prince, and, despite what Melgoza observed and heard himself, there was no physical evidence that defendant tried to harm himself.

Defendant's arguments are unpersuasive in light of the evidence we have recited. The previous calls to the house and the fact that defendant was previously taken into custody pursuant to section 5150 lend support to the People's position, even if defendant was subsequently released; defendant fails to establish that a 5150 commitment is unjustified because a person has been previously released after a section 5150 hold. Defendant does not, for example, challenge the possibility that he was experiencing a drug-induced psychosis when Melgoza and Prince took him into custody.

Furthermore, it is not material that Melgoza initially detained defendant without having Prince's information. Prince's testimony indicates he conducted a field evaluation of defendant for the purposes of determining if he should be taken into custody pursuant to section 5150, concluded he appeared to be in a methamphetamine-induced psychosis, and that defendant was placed in an ambulance for further evaluation shortly thereafter. In other words, Prince's testimony indicates he played a direct role in defendant being taken into custody pursuant to section 5150 and placed in the ambulance.

Finally, defendant's argument that there was no physical evidence that he tried to harm himself ignores the evidence that Melgoza observed family members trying to restrain him and heard someone say defendant was trying to grab a knife. Also, both Melgoza and Prince understood from dispatch and/or family members that defendant had been making statements indicating he could be a danger to himself and/or others. In short, under our substantial evidence standard of review (*People v. Ramsey, supra*, 203 Cal.App.3d at p. 679), we conclude the court did not err in its ruling, which implicitly determined there was probable cause for police to take defendant into custody pursuant to section 5150.

D. *Inevitable Discovery*

The court ruled that whether or not the search of defendant properly uncovered the baggie of methamphetamine in the cigarette box, the baggie would have been inevitably discovered in the course of defendant's detention pursuant to section 5150 and, therefore, was legal. We agree.

Once an officer makes a determination to take a person into custody, Welfare and Institutions Code section 5156 states in relevant part:

“At the time a person is taken into custody for evaluation, or within a reasonable time thereafter, unless a responsible relative or the guardian or conservator of the person is in possession of the person's personal property, the person taking him into custody shall take reasonable precautions to preserve and safeguard the personal property in the possession of or on the premises occupied by the person. The person taking him into custody shall then furnish to the court a report generally describing the person's property so preserved and safeguarded and its disposition, in substantially the form set forth in Section 5211; except that if a responsible relative or the guardian or conservator of the person is in possession of the person's property, the report shall include only the name of the relative or guardian or conservator and the location of the property, whereupon responsibility of the person taking him into custody for such property shall terminate.” (Welf. & Inst. Code, § 5156.)

Defendant argues that despite the court's ruling, the prosecution failed to establish "due to a separate line of investigation, application or routine police procedures, or some other circumstance, the [unlawfully obtained evidence] would have been discovered by lawful means," relying on *People v. Hughston* (2008) 168 Cal.App.4th 1062, 1072.) We disagree. As the court found and the People argue, we conclude that, given the officers' statutory duty pursuant to Welfare and Institutions Code section 5156 and the circumstances involved, there is substantial evidence to support the court's conclusion that the baggie of methamphetamine in defendant's cigarette box would have inevitably been discovered. Melgoza's concern that defendant should be searched for anything that might be a danger to himself or others before transported by medical personnel based on defendant's history, what Melgoza observed at the scene, and Melgoza's knowledge that dangerous items are sometimes hidden in cigarette boxes, as well as Prince's testimony about what family members told him and his conclusion that defendant appeared to be in a methamphetamine-induced psychosis, are ample evidence that defendant's person would inevitably have been searched lawfully when he was taken into custody pursuant to section 5150 and placed in the ambulance, or thereafter. The reporting requirement stated in Welfare and Institutions section 5160 would inevitably have led to the police examination of the cigarette box to inventory what it contained.

Defendant also argues that it was not inevitable that the baggie of methamphetamine would have been discovered because, "[i]f concerned about safeguarding [defendant's] property, Melgoza would have handed [defendant's] things, unopened, to members of his family." Defendant does not cite any evidence to support that Melgoza would have done so and the statute does not require him to do so.

In short, under the circumstances, we conclude substantial evidence supports the ruling that the baggie of methamphetamine would have inevitably been discovered.

DISPOSITION

The judgment is affirmed.

Lambden, J.

We concur:

Kline, P.J.

Richman, J.