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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.

LEODIS LAMONT BUTCHER,

Defendant and Appellant.

A142085

(Contra Costa County Super. Ct. No.  
51326024)

Defendant Leodis Lamont Butcher appeals from his conviction after jury trial for unlawful possession of cocaine base. He argues the evidence obtained as a result of his detention, pat-search and arrest was improperly seized in violation of his state and federal constitutional rights against unlawful search and seizure. We conclude he has forfeited his appellate claims by not raising them first below and affirm the judgment.

**BACKGROUND**

**I.**

*Defendant is Held to Answer.*

In August 2012, the Contra Costa District Attorney filed a complaint alleging that on July 30, 2012, defendant was in unlawful possession of cocaine base for sale and purchase (Health & Saf. Code, § 11351.5). At a preliminary hearing, the court found there was sufficient evidence to hold defendant to answer the charge. In March 2013, the Contra Costa County District Attorney filed an information in case number 5-130502-8 making the same allegations.

## II.

### *The Court Denies Defendant's Motion to Suppress in Case No. 5-130502-8.*

In April 2013, defendant moved before the superior court pursuant to Penal Code section 1538.5 to suppress the evidence obtained as a result of his warrantless detention, search and arrest. At the May 17, 2013 special hearing on defendant's motion, Daniel Reina, a police officer for the City of Richmond, California, testified that on July 30, 2012, at 5:15 p.m., he and two other officers were patrolling in a marked vehicle in the Sante Fe District of Richmond, which Reina had patrolled for about a year. He had served search warrants, arrested people with narcotics and firearms, and responded to homicide and shootings calls there.

Reina saw defendant and another man, Jason West, standing on a sidewalk. Reina had previously contacted defendant when defendant was "with other individuals where arrests were made where narcotics and firearms were located." Reina recalled a specific occasion when defendant, a man named David Duff and several others were standing on a street in front of a house in the same neighborhood. When police arrived, Duff attempted to run and was found to be in possession of a firearm. Defendant was searched and not found to possess a firearm. As far as Reina knew, defendant had never been found with a firearm. Reina had never arrested him.

However, Reina had previously arrested Jason West, the man who was with defendant on the day in question, July 30, 2012, "for narcotic-related offenses." Also Reina saw that defendant and West were standing in front of a house where Reina had previously served a search warrant for narcotics.

As the officers drove onto the street, Reina saw defendant, dressed in what Reina indicated at the hearing were loose and baggy pants in the style worn in that neighborhood. Reina saw defendant turn away from Reina's patrol vehicle and place his hands near his waistline, although Reina could not see what defendant was doing with his hands. Reina found this "very suspicious. Based on the location where they were standing at, his behavior . . . it was nervous behavior." Reina had been involved in several incidents involving this behavior, and the people involved "were often

concealing either a firearm, concealing narcotics, or attempting to destroy some kind of narcotics.”

Reina walked up behind defendant, who kept his hands in his front waistline. Reina asked him to put his hands on top of a vehicle, which defendant did, and Reina conducted a “pat-search” because “based on the area and my previous contacts with him to be associated with firearms and the area which we were in, I was in fear that he was maybe trying to attempt to conceal a firearm or some type of weapon.”

During this pat-search, Reina testified, he “felt a hard, lumpy substance” wrapped in plastic in defendant’s waistband that Reina “immediately recognized to be consistent with cocaine base packaged up.” Reina had made over 100 arrests for possession of cocaine base. He had “arrested individuals and felt the same hard lumpy substance on their waistline;” “each time . . . it was cocaine base in a plastic baggie.” He also had “formal training regarding the recognition and possession for sales of controlled substances,” including cocaine base.

Reina said defendant “pushed his body forward, pinning my hand against the vehicle. . . . At that time is when I felt it.” Reina pulled defendant away from the vehicle and continued to feel around his front waistline area. Reina shook loose what he thought was cocaine base and thought he saw it fall to the ground. He could not find it however, and then saw defendant “fidgeting at his waistline still” with his hands. Reina thought defendant still possessed the cocaine base and was trying to destroy it. Reina grabbed defendant, leaned him across Reina’s patrol vehicle, put defendant’s hands in handcuffs and placed him under arrest for possession of narcotics.

After hearing argument, the court denied defendant’s suppression motion. It agreed with the defense that defendant’s turning away from Reina and putting his hands near his waistband did not provide reasonable suspicion for a detention, but only if Reina “had not had previous experience in this particular high-crime area and if he had not had experience with [defendant].” The court continued:

“I think when you look at the totality of the circumstances here, you have an officer who has made arrests in the area for narcotics and for guns. He has recognized

the defendant from being with people who have had guns. And then when he rounds the corner that particular day in his vehicle, immediately he sees the defendant reaching for his waistline. To an experienced officer such as Detective Reina, that only signifies two things: He's trying to hide a gun or he's trying to hide narcotics.

“So I think it was perfectly reasonable for him to walk up to the defendant and ask him to put his hands onto the car which, you're right, does constitute a detention. But I think there were ample facts before him that—at that particular point for him to at least conduct a pat-search.

“In terms of the arrest, my notes reflect that the officer testified that when he felt the hard, lumpy substance, he, quote, unquote, ‘Immediately recognized it to be cocaine base.’ And he based that on his 100-plus investigations and his 100-plus arrests for individuals with cocaine base.

“So I do believe that he had reasonable suspicion sufficient to satisfy the detention, and he did have probable cause for the arrest.”

## **II.**

### ***Dismissal and Refiling***

On November 13, 2013, months after the court ruled on the suppression motion, it dismissed case number 5-130502-8 for an unrelated reason. The court's minutes, which provide the only information in the record regarding this dismissal, state only, “People unable to proceed.” Defendant's appellate argument implies the case was dismissed pursuant to Penal Code section 1385.

That same day, November 13, 2013, the district attorney filed a new complaint in case number 02-315397-0 with the same allegations against defendant, charging him again with possession of cocaine base for sale and purchase (Health & Saf. Code, § 11351.5). After holding a preliminary hearing, the court found there was sufficient evidence to hold over defendant to answer the charges. The defense did not move to suppress any evidence.

In December 2013, the district attorney filed an information in case number 5-

132602-4 with the same allegations against defendant. Defendant does not contend that he objected in this case to the admission of the evidence he had sought to suppress in the prior case as violative of his constitutional rights against unlawful search and seizure. Subsequently, a jury found defendant not guilty of possessing cocaine base for sale, but convicted him for possession of cocaine base, a lesser included offense. The court sentenced defendant to four days in county jail and placed him on probation for three years. Defendant timely appealed from the judgment.

## **DISCUSSION**

### **I.**

#### ***Defendant Has Forfeited His Suppression Claims.***

Defendant argues that his conviction should be reversed because the totality of the circumstances did not give rise to (1) a reasonable suspicion that he was engaged in criminal activity and, therefore, Reina had no right to detain him, and (2) a reasonable belief that he was armed and dangerous and, therefore, Reina had no right to conduct a pat-search of him for weapons. Thus, defendant's Fourth Amendment rights against unlawful search and seizure were violated and the forbidden fruits obtained, i.e., the evidence obtained as a result, "must be suppressed."

The People disagree for two reasons. First, they argue, defendant has forfeited his appellate claims by not first raising them below in the case from which he has appealed. Second, defendant's claims are without merit. We agree with the People that defendant has forfeited his appellate claims and affirm the judgment on this basis.

Neither defendant nor the People cite a case or statute relating to the precise circumstances before us, i.e., whether defendant, when a superior court denies his suppression motion at a special hearing and later dismisses the first case because of the People's inability to proceed, and the People then file a second complaint and information against him with the same allegations, may claim on appeal from a judgment in the second case that the evidence against him should be suppressed without having so moved in the trial court in the second case. We have not found a case on point in our

own research. Nonetheless, the statutory framework indicates that defendant has forfeited his appellate claims.

As the People point out, Penal Code section 1538.5 (section 1538.5), subdivision (m) provides in pertinent part: “A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that the judgment of conviction is predicated upon a plea of guilty. Review on appeal may be obtained by the defendant provided that *at some stage of the proceedings* prior to conviction he or she has moved for the return of property or the suppression of the evidence.” (Italics added.) Our Supreme Court has held that this phrase in section 1538, subdivision (m)—“at some stage in the proceedings”—requires that a defendant raise the suppression issue in the superior court in order to preserve it for review on appeal. Otherwise, “it would be wholly inappropriate to reverse a superior court’s judgment for error it did not commit and that was never called to its attention.” (*People v. Lilienthal* (1978) 22 Cal.3d 891, 896.)

It almost goes without saying that “proceedings” in this context refers to events that occur *within* the particular case in which they occur. (See, e.g., Evid. Code, § 901 [defining a “[p]roceeding” as “any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given”]; *People v. Williams* 10 Cal.App.4th 827, 833–834, quoting Black’s Law Dict. (6th ed. 1990) p. 896, col. 2 [“ ‘Legal proceedings’ are defined as ‘all proceedings authorized or . . . instituted in a court . . . [for] the enforcement of a remedy’ ”].) To conclude that “proceedings” extends to subsequent cases, as defendant suggests, makes no sense.

Defendant disagrees. He contends that since, as indicated by section 1538, subdivision (j)<sup>1</sup> and *People v. Cooper* (2003) 114 Cal.App.4th 713, 717, the People may

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<sup>1</sup> Section 1538.5, subdivision (j) states in relevant part: “If the case has been dismissed pursuant to Section 1385, either on the court’s own motion or the motion of the people after the special hearing, the people may file a new complaint or seek an

relitigate a suppression motion in a second case filed after the court grants a suppression motion at a special hearing in a first case that is then dismissed pursuant to section 1385, but section 1538.5 makes no mention of defendant's right to do so when his or her suppression motion is denied, the case is dismissed and a second case is filed, that right must not exist. Defendant relies on *People v. Jackson* (2002) 96 Cal.App.4th 1265 (*Jackson*), which held that when the prosecution in a first case does not seek to reverse a magistrate's grant of a suppression motion before the superior court as statutorily provided after defendant was held to answer, the magistrate's ruling is binding in the second case.

Defendant's arguments relate to whether a superior court's denial of a suppression motion in a first case is binding in a second case. The question before us is different than the question of binding effect in *Jackson*, which we do not determine here. We merely conclude that if defendant wants to *preserve the suppression issue for appeal*, he or she must raise it in a second case because a court's ruling in a first case is not a part of the "proceedings" in the second case.<sup>2</sup>

Defendant makes a number of other arguments that are not persuasive in the face of this statutory framework. He first points out that, as stated in *People v. Superior Court (Green)* 10 Cal.App.3d 477, the original purpose of section 1538.5 was to "streamline our criminal court processes, cut down the number of times a defendant can raise the search and seizure issue prior to conviction and provide an orderly system for litigating the validity of a search and seizure." (*Green*, at pp. 480–481.) He further points out that section 1538.5 was amended again in 1987 " [t]o eliminate the "duplicat[ive] litigation

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indictment after the special hearing, and the ruling at the special hearing shall not be binding in any subsequent proceeding, except as limited by subdivision (p)."

<sup>2</sup> Notably, the procedural facts in *Jackson* indicate the defendant, although he won a suppression motion in the first case, brought another suppression motion in the second case, in which he asserted in the alternative that the ruling in the first case was binding. (*Jackson*, *supra*, 96 Cal.App.4th at p. 1268.) This approach is consistent with the statutory framework. By bringing the second motion, the *Jackson* defendant preserved the issue for an appeal from a judgment in the second case.

of issues and repeat testimony.” ’ ’ ( *People v. Bennett* (1998) 68 Cal.App.4th 396, 404.) Defendant argues that we should allow his appeal in order to interpret section 1538.5 consistent with this legislative intent. However, nothing in the cases he cites indicates the courts intended via section 1538.5 to enable a defendant in an appeal from a judgment to challenge a suppression ruling in a *previous* case. Therefore, his argument is of little significance here.

Similarly, defendant quotes section 1538.5, subdivision (m), which states, “The proceedings provided for in this section, and Sections 871.5, 995, 1238, and 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case . . . .” This supports our analysis, however, because it further clarifies that section 1538.5’s remedies are exclusive “in a criminal case,” meaning that they apply in *each* case.

Finally, defendant argues that it would be “contrary to the purpose of the dismissal statutes to allow respondent to invoke them to eliminate review of the denial of a defense motion to suppress,” particularly because the dismissal statutes “exist to protect a defendant’s right to a speedy trial and must be construed to serve that overriding purpose.” ( *People v. Paredes* (1999) 77 Cal.App.4th 24, 28–29 ( *Paredes* ).) This too is underwhelming. We see no danger of prosecution gamesmanship when, as we have indicated, the defense’s raising of suppression issues in a second case would in any event preserve these issues for appeal.

Further *Paredes* actually rejected an argument similar to the one defendant makes here and reached the same conclusion as we do. A trial judge denied Paredes’s motion pursuant to Code of Civil Procedure section 170.6 (sometimes referred to as an affidavit) to disqualify the trial judge. The trial judge reasoned that the current prosecution was a continuation of a previous prosecution that had been dismissed pursuant to Penal Code sections 1382 and 1387 after the prosecutor had been unable to proceed. ( *Paredes, supra*, 77 Cal.App.4th at p. 27.) Paredes filed a petition for writ of mandate ordering the judge to accept his affidavit.

The appellate court reviewed statutes in the same chapter as Penal Code section 1385 (Penal Code sections 1382, 1384, 1387 and 1387.2). It concluded that “[r]ead together, these statutes mean that a felony case once dismissed for delay can be refiled . . . . When the first action is terminated under this procedure and the People file a new complaint, a second preliminary hearing must be held and the evidence subjected anew to a magistrate’s evaluation.” (*Paredes, supra*, 77 Cal.App.4th at p. 28.) The court specifically rejected the argument that dismissed and refiled cases should be treated as one and the same, concluding this “would make a mockery of the procedure permitted by Penal Code sections 1382 and 1387.” (*Id.* at p. 34.)

In short, defendant’s failure to raise the suppression issue in the second case filed against him is fatal to his appellate claims.

## II.

### *A Comment on the Merits.*

Even if defendant had preserved his appellate claims regarding his detention and arrest, we are very skeptical about their merit.

As the People explain, “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.) Here, Reina identified a number of facts that suggest there was a basis for an objectively reasonable suspicion that defendant was engaged in criminal activity. This included that Reina observed that defendant, upon seeing the patrol car, turned away and engaged in nervous behavior, raised his hands to his waistline upon turning around and kept his hands there as Reina approached him. The Supreme Court “recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.” (*Illinois v. Wardlow* (2000) 528 U.S. 119, 124; see *People v. Osborne* (2009) 175 Cal.App.4th 1052, 1058 [defendant, upon seeing a police car, closed the trunk of a car, walked away and appeared “ ‘real nervous’ ”]; *United States v. Mays* (6th Cir. 2011) 643 F.3d 537, 542 [reasonable suspicion formed in part because the “defendant acted

nervously, . . . turned away from the officers as if to leave[,] . . . and . . . frantically dug his hands into his pockets and would not remove them”].)

Further, we are not offended that Reina conducted a pat-search of defendant under the circumstances, including because defendant continued to keep his hands in his waistline. “When an officer detains a suspect, the officer may pat down the suspect’s outer clothing if he or she has reason to believe the suspect may be armed.” (*Giovanni B. v. Superior Court* (2007) 152 Cal.App.4th 312, 320, citing *Terry v. Ohio* (1968) 392 U.S. 1, 30 [explaining that an officer “is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of [persons reasonably suspected to be armed and dangerous] in an attempt to discover weapons which might be used to assault him”].)

Finally, Reina’s undisputed testimony indicates that he recognized, based on his training and experience, which included making over 100 arrests for possession of cocaine base, that the hard, lumpy object he felt inside defendant’s waistband was cocaine base. This, along with defendant’s continuing suspicious behavior, appears to provide sufficient probable cause to arrest defendant. (See, e.g., *People v. Berutko* (1969) 71 Cal.2d 84, 88 [officer, based on his experience in narcotics investigations and the circumstances of the case, had probable cause to arrest the defendant after seeing on a table a finger stall or condom which contained some “ ‘lumpy’ ” material and was tied off at one end].)

### **DISPOSITION**

The judgment is affirmed.

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STEWART, J.

We concur.

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KLINE, P.J.

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MILLER, J.

*People v. Butcher* (A142085)