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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE GUILLERMO ORIARTE,

Defendant and Appellant.

A145065

(Napa County  
Super. Ct. No. CR171798)

Defendant Jose Guillermo Oriarte appeals his conviction for unlawful possession of ammunition. He contends that the trial court erred in denying his motion to suppress evidence and that he received ineffective assistance of counsel in arguing the motion. We find no error and therefore shall affirm.

**Statement of the Case**

Defendant was charged with three felony counts: felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1) (count 1)); possession of ammunition by a prohibited person (Pen. Code, § 30305, subd. (a)) (count 2); and possession of a concealed firearm in a vehicle, with a prior felony conviction (Pen. Code, § 25400, subd. (c)(1)) (count 3). The trial court denied defendant's motion to suppress evidence on the ground that consent had been given to the search that produced the contraband. Following the denial of the motion, defendant pled no contest to count 2 and the remaining charges were dismissed. The court placed defendant on formal probation for three years. Defendant filled a timely notice of appeal.

At the evidentiary hearing on the motion to suppress evidence, the following testimony was received:

Defendant's girlfriend, Dusty Kocher, testified that on July 5, 2014, she, defendant, and their son drove to Lake Berryessa, planning to camp. However, the campground was full and they began to return home. While returning, around 10:00 p.m., they ran out of gas, parked on the side of a public road, and set up a tent while awaiting roadside assistance from Triple A.

Around 10:30 p.m., Napa County Deputy Sheriff Chris Carlisle, while on patrol, arrived on the scene. Carlisle testified that he pointed a spotlight toward the tent as he pulled up. Defendant came out of the tent "very sweaty" with his hands up, and Carlisle told him that he could put his hands down because "it was just a casual contact." Defendant and Kocher told the officer that they had been driving for 12 hours and decided to camp on the side of the road. While Carlisle was speaking to them, minutes after his arrival, three other police officers arrived with a trained narcotics detection dog.

Napa County Deputy Sheriff Erik Olson testified that he asked Kocher for permission to search their tent and vehicle and received permission from her to do so. Kocher at one point in her testimony denied giving Olson such permission but at another point testified that she consented to a search of her tent. Olson testified that Kocher told him that she was the primary driver and that her mother owned the car. He did not request consent from defendant to search the tent and car because he observed that defendant was sweating profusely, his pupils were dilated, and his eyes were slow to constrict when light was flashed in his eyes, leading him to believe that defendant was under the influence of a controlled substance. Olson searched the tent and walked the dog around the tent but found nothing.

Olson testified that when he then brought the dog next to the car, he asked defendant if the dog would alert to anything in the vehicle and defendant responded that he might find marijuana. The dog sniffed the outside of the car and alerted to the presence of narcotics. Olson and another officer then searched the car's interior and found marijuana inside the center console. Olson then searched the trunk of the car

where he found a blue duffle bag which he opened and in which he found a handgun containing ammunition. Olson testified that Kocher told him that the gun did not belong to her, that the bag belonged to defendant, and that she was unaware of a gun being inside the car. Kocher testified that the duffle bag belonged to both her and defendant, that she did not pack any of the bags, and that defendant had packed all the bags and placed them in the car. Carlisle estimated that 10 to 15 minutes passed from the time the officers arrived at the scene to the commencement of the search of the car. The officers found the handgun and ammunition within a few minutes of beginning their search of the car.

The court denied the motion to suppress, finding that “consent was given by Miss Kocher to search the car and it seems reasonable to assume that. So on account of her having no idea, as she testified, that there was anything to worry about in the car and so it seems quite reasonable and believable that the officers’ testimony regarding consent was obtained.”

### **Discussion**

#### **1. The motion to suppress was properly denied.**

“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.” (*People v. Nishi* (2012) 207 Cal.App.4th 954, 960.)

Defendant contends that the contraband found in the warrantless search of the duffle bag “was obtained as the fruit of an unlawful detention, without reasonable suspicion, and that the search was not justified by consent.” However, none of the evidence suggests that either defendant or Kocher was detained prior to the point at which Olson testified Kocher consented to the search. Police officers do not violate the Fourth Amendment “by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.” (*Florida v. Royer* (1983) 460 U.S. 491, 497.) “Nor would the fact that the officer identifies himself as a police officer,

without more, convert the encounter into a seizure requiring some level of objective justification.” (*Ibid.*) Consensual encounters between police officers and civilians are interactions that “result in no restraint of an individual’s liberty whatsoever — i.e., no ‘seizure,’ however minimal — and which may properly be initiated by police officers even if they lack any ‘objective justification.’ ” (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784.) In order to determine whether there was a detention or consensual encounter, a court must ask whether “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” (*United States v. Mendenhall* (1980) 446 U.S. 544, 554.) This requires considering whether there was a showing of police authority. (*Florida v. Royer, supra*, at p. 502.)

The testimony of the police officers as well as of Kocher make clear that there was no restraint on defendant’s liberty prior to the point at which Olson testified Kocher consented to the search. Carlisle understandably stopped to inquire when he came across persons apparently camping on a highway roadbed. When defendant came out of the tent with his hands up, Carlisle immediately told him that he could put his hands down because “it was just a casual contact.” Although other officers arrived at the scene, no one restricted the movements or conversations of either defendant or Kocher, or did or said anything that could reasonably have led to the belief that they were not free to leave or to refuse consent to the requested search. There is no basis to infer that Kocher did not give her consent to the search freely and voluntarily. As the trial court observed, she had no reason not to do so because, as she testified, she did not believe a search would disclose anything of concern. A search, based on consent, “is a constitutionally permissible and wholly legitimate aspect of effective police activity.” (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 228.)

Although defendant did not give his consent to the search, Kocher told the officers that it was her mother’s car that she was driving, and she appeared to be the person with authority to consent to the search. Defendant, who was present, said nothing to dispute her authority and gave the officers no reason to believe that her consent did not include permission to inspect the contents of the duffle bag within the car.

Moreover, even absent Kocher 's consent, by the point at which the officers entered the vehicle to conduct a search, sufficient facts had emerged to create probable cause to believe, and certainly to justify a reasonable suspicion, that the vehicle contained contraband. Defendant, who appeared to Olson to be under the influence of drugs, told the officer that a search of the car might disclose marijuana, and the trained police dog had alerted to the presence of narcotics. The canine sniff from the trained narcotics detection dog is not considered a search and, therefore, did not require probable cause or a warrant. (*United States v. Place* (1983) 462 U.S. 696, 706-707.) Once the dog alerted, there clearly was reason to believe drugs were in the vehicle. (*People v. Stillwell* (2011) 197 Cal.App.4th 996, 1006 [“California authority does not support the notion that more than an alert from a trained narcotics detection dog is needed to establish probable cause for a search.”].)

Under the automobile exception, police officers may conduct a warrantless search of an automobile and the containers within it when there is probable cause to believe an automobile contains contraband. (*People v. Superior Court (Nasmeh)* (2007) 151 Cal.App.4th 85, 100.) Since the duffle bag was located in the trunk of the car, the search of the bag was within the scope of the search. There was no basis to suppress evidence of the gun or the ammunition found inside the duffle bag.

## **2. There was no ineffective assistance of counsel.**

Defendant contends he did not receive effective assistance of counsel because his attorney failed to argue at the suppression hearing that he was subject to an unlawful detention that negated Kocher's consent. This contention is meritless.

In order to determine whether a defendant's Sixth Amendment right to effective assistance of counsel was violated, defendant must establish (1) his attorney's deficient performance and (2) prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) Here, there was neither deficient performance nor prejudice. For the reasons discussed above, under the circumstances shown by the evidence there clearly was no illegal detention. Counsel cannot be faulted for failing to assert a groundless argument. Moreover, since the alert from the police dog undoubtedly provided reasonable cause to

search the car, the failure to undermine the validity of Kocher's consent in all events gave rise to no prejudice. Thus, the ineffective assistance claim fails.

**Disposition**

The judgment is affirmed.

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Pollak, Acting P.J.

We concur:

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Siggins, J.

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Jenkins, J.