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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. JIMMIE L. ROBERSON, Defendant and Appellant.	A154179 (San Francisco City and County Super. Ct. No. SCN227995)

Appellant Jimmie L. Roberson was convicted, pursuant to a plea agreement, of possession of a firearm by a felon. On appeal, he contends the trial court erred in denying his motion to suppress evidence because his Fourth Amendment right to be free from unreasonable search and seizure was violated when a police officer reached inside his backpack without a warrant, under the guise of a *Terry*[1] patsearch. We shall affirm the judgment.

PROCEDURAL BACKGROUND

On September 18, 2017, appellant was charged by information with possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1)—count I);[2] possession of a concealed weapon as a felon (§ 25400, subd. (a)(2)—count II); carrying a loaded firearm as a felon (§ 25850, subd. (a)—count III); possession of ammunition (§ 30305, subd. (a)(1)—count IV); and possession of a large capacity magazine (§ 32310, subd. (a)—

[1] *Terry v. Ohio* (1968) 392 U.S. 1 (*Terry*).

[2] All further statutory references are to the Penal Code unless otherwise indicated.

count V). The information also alleged that appellant had served a prior prison term (§ 667.5, subd. (b)).

On November 15, 2017, appellant filed a motion to suppress evidence, pursuant to section 1538.5. On January 12, following a hearing, the court denied the motion to suppress.

On February 9, 2018, appellant pleaded guilty to count I, possession of a firearm by a felon in exchange for dismissal of all other charges and the prior prison term allegation, and a two-year sentence.

On March 6, 2018, the court sentenced appellant to two years in state prison.

On April 18, 2018, appellant filed a notice of appeal.

FACTUAL BACKGROUND

The following evidence was presented at the January 12, 2018 hearing on appellant's motion to suppress evidence.

San Francisco Police Sergeant Shaughn Ryan testified that on July 2, 2017, he "received information from a confidential, reliable informant that there was an individual on the 400 block of Ellis Street that was armed with a gun." Ryan therefore contacted two Tenderloin patrol officers, Officer Snadow and Officer Lee, "and advised them that the subject with a gun was an older black male wearing a black hat, black jacket, blue jeans, in possession of a black backpack and pushing or riding a bicycle." The gun the man was believed to have in his possession was a Glock handgun.

Ryan had previously received tips from the informant more than 12 times and each tip had proved to be accurate. When asked on cross-examination whether the informant was on the San Francisco Police Department payroll, Ryan testified that he did not know, but that he had never paid the informant. Nor had he given the informant any sort of quid pro quo for providing tips. He did not know whether anyone else in the police department had given the informant any incentive to provide confidential tips. Ryan did know the informant had worked with other police officers as well.

San Francisco Police Officer Sam Snadow testified that he and his partner, Officer Lee, contacted appellant on the evening of July 2, 2017, in the area of Jones and Ellis

Street in San Francisco, based on the information Sergeant Ryan had received from the confidential informant. When they arrived at the 400 block of Ellis Street, they saw an individual—appellant—who matched the description Ryan had given them. Appellant was wearing a black hat and a black sweatshirt. He had a black backpack strapped to his back and was pushing a bicycle along the sidewalk.

Snadow testified that he and Lee parked their vehicle and walked up to appellant. Snadow removed appellant's backpack and handed it to Lee before patsearching appellant by patting down his chest, abdomen, belt line, and the rear of his waistband. Snadow did not find a firearm on appellant's person. After Lee told Snadow that he had found a firearm in appellant's backpack, Snadow placed appellant in handcuffs. There were initially other pedestrians nearby on the sidewalk, but "everyone kind of scattered and it was just us," i.e., Snadow, Lee, appellant, and the other officers who had arrived on the scene.

San Francisco Police Officer Thomas Lee testified that after he and Snadow contacted appellant on Ellis Street, he conducted a patsearch of appellant's backpack, which had a large main compartment in between a small pouch at the front and a rear compartment that would be closest to the back when wearing the backpack. Specifically, he manipulated the outside of the backpack with his hands and felt a hard, "square-like object" in the main compartment. He also felt a lot of other objects inside the backpack. He knew that "a Glock specifically has a square-like muzzle or barrel to it." He could not rule out that the square object in the backpack was a weapon based on that initial manipulation. He therefore opened the main compartment of the backpack and saw that it contained only "a bunch of chargers and cords and all that." After reaching into the main compartment, Lee used his hand to manipulate the outside of the rear compartment from inside the main compartment, where he "located the trigger guard of the firearm." He then opened the rear compartment of the backpack and located a Glock firearm, after which he advised Snadow of what he had found. At the time of the search of the backpack, Lee was a couple of feet away from Snadow and appellant.

DISCUSSION

Appellant contends the trial court erred in denying his motion to suppress evidence because his Fourth Amendment right to be free from unreasonable search and seizure was violated when a police officer reached inside his backpack without a warrant, under the guise of a *Terry* patsearch.

I. *Trial Court Background*

At the conclusion of the hearing on appellant's motion to suppress evidence, following arguments by defense counsel and the prosecutor, the trial court ruled as follows: "Although I can imagine scenarios where, when people are detained and it's appropriate to do a *Terry* frisk patdown search for weapons, it might not be appropriate to search a backpack under the concept of a patdown search. [¶] In this case and in this circumstance, I think it was justified to search the backpack.

"Because the information from the informant, in terms of the description given of the individual with the Glock gun, was an individual who was carrying a backpack. [¶] So it's not just a random search of somebody where there's no information about a gun, or a random search of somebody where there was no information about a backpack.

"When the confidential, reliable informant is saying that a person who meets the defendant's description, in the very location that he's being described as being in, and it is identical information as to all of the particulars of the description—both the race, the male, the gender, the age, the clothing, all different aspects of the clothing, and the fact that he was wearing a black backpack—I think that combination of factors, and the fact that, in the patsearch of his person, they do not find the gun[.]

"The backpack has been taken from him, is still relatively close to him, he is not prevented from being able to get access to [the] backpack; he has not yet been disabled from doing that[.] [¶] And given that there were other pedestrians in the area initially, I think it is beholden on the police to go ahead and secure and see whether or not they can see that there is a weapon in that very backpack for officer safety and pedestrian safety in the area.

"When Officer Lee does that manipulation from the outside of the pack and is able to feel something that is hard and square-like which, in his experience, would be consistent with the shape of a Glock gun, I think that gives him the right to continue that examination of the pack. [¶] If, in the manipulation of the pack from the outside, he felt nothing hard, then I would agree that, at that point, a further search might have required a search warrant.

"But where, in the context of the pack that the defendant was wearing, he feels something hard that is consistent with the very kind of weapon that's been described, I think he's entitled to open the compartment that had things that were making it difficult for him to actually determine what was hard and square-like. [¶] Once he is in that compartment and he's then able to further feel, from the outside of the final compartment, that he feels the trigger guard of the gun, then I think he's entitled to open it and to retrieve that gun.

"So for those reasons, there was sufficient cause to detain, sufficient cause for the patsearch. [¶] I think that patsearch, in this case, appropriately included the examination of the pack. [¶] And when a hard object consistent with the gun was felt, I think it warranted opening that pack.

"So for those reasons, the motion to suppress is denied."

II. *Legal Analysis*

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. (U.S. Const., 4th Amend.; *Terry*, *supra*, 392 U.S. at p. 20.) As the United States Supreme Court has explained, "*Terry* . . . held that 'when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,' the officer may conduct a patdown search 'to determine whether the person is in fact carrying a weapon.' [Citation.] 'The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . .' [Citation.] Rather, a protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be strictly 'limited to

that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.' [Citations.] If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed. [Citation.]" (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 373.) In addition, "[w]hen the officer has a reasonable belief 'that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.' [Citation.]" (*Michigan v. Long* (1983) 463 U.S. 1032, 1046–1047 (*Long*), fn. omitted, quoting *Terry*, at p. 24.)

" 'In reviewing a suppression ruling, "we defer to the superior court's express and implied factual findings if they are supported by substantial evidence, [but] we exercise our independent judgment in determining the legality of a search on the facts so found." ' [Citation.]

"Thus, while we ultimately exercise our independent judgment to determine the constitutional propriety of a search or seizure, we do so within the context of historical facts determined by the trial court. 'As the finder of fact . . . the superior court is vested with the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences in deciding whether a search is constitutionally unreasonable.' [Citation.] We review its factual findings ' " 'under the deferential substantial-evidence standard.' " ' [Citation.] Accordingly, '[w]e view the evidence in a light most favorable to the order denying the motion to suppress' [citation], and '[a]ny conflicts in the evidence are resolved in favor of the superior court's ruling.' [Citation.] Moreover, the reviewing court 'must accept the trial court's resolution of disputed facts and its assessment of credibility.' [Citation.]" (*People v. Tully* (2012) 54 Cal.4th 952, 979.)

In this case, appellant does not challenge Officer Snadow's patsearch of his person or Officer Lee's initial patsearch of his backpack. According to appellant, when Lee manipulated the outside of the backpack and felt the square object inside the main

compartment, which he believed might be the muzzle or barrel of a Glock handgun, "he had an articulable basis for opening the backpack to confirm or refute his belief. However, once he opened the backpack and discovered that he was mistaken, he was no longer justified in continuing to search the bag in a manner more intrusive than a patsearch of the exterior of the bag."

The evidence presented at the hearing showed, and the court found, that the officers did not engage in "a random search" of appellant's backpack. Instead, a reliable, confidential informant had reported that a person fitting appellant's description was in the location where appellant was found, riding or walking a bicycle, wearing a black backpack, and in possession of a Glock handgun. Once Snadow had patsearched appellant and did not find the gun, it was reasonable for the officers to be concerned that the gun could be in the backpack. At that point, in addition to the two officers, there were pedestrians in the area. Appellant was not handcuffed and was standing fairly close to the backpack. (See *Terry*, *supra*, 392 U.S. at p. 24 ["we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest"].) When Lee then manipulated the outside of the main compartment of the backpack and felt, in addition to "a lot of other objects," something hard and square that he could not rule out as being the muzzle of a Glock gun, appellant concedes Lee reasonably opened the backpack to further investigate. Once he "saw there was just a bunch of chargers and cords and all that" inside the main compartment, Lee reasonably manipulated the fabric of the rear compartment from inside the main compartment, at which point he felt the trigger guard of a firearm. It was only then that he opened the rear compartment and found the Glock firearm. (See *ibid*.)

Appellant speculates about why Lee's hand was inside the backpack before he used it to manipulate the rear compartment: "[T]he prosecution presented no testimony or evidence that Officer Lee reached inside the backpack because he could not otherwise effectively check for a weapon through a patsearch. From this silent record, it appears that Lee reached inside the bag because either he had finished his patsearch of the outer

backpack, at which point, the *Terry* search should have ended, or he had abandoned that endeavor in favor of conducting the more intrusive search without any cause. Either reason is improper." Appellant's theories regarding what could have occurred ignore the rules that we must view the evidence in the light most favorable to the court's order and must defer to the court's factual findings, express or implied, if they are supported by substantial evidence. (See *People v. Tully*, *supra*, 54 Cal.4th at p. 979.) Here, substantial evidence supports the court's reasonable inference, based on the testimony, that Lee initially reached into the main compartment of the backpack to determine whether the square shape he had felt amidst the many other items inside that compartment was the muzzle of a gun. (See *ibid.*)

In light of the evidence of the detailed descriptive information the officers had when they stopped appellant and the circumstances leading to the discovery of his gun, we conclude Lee acted reasonably in his search of the backpack. (See *Terry*, *supra*, 392 U.S. at p. 29 [noting that limitations Fourth Amendment places on a protective search for weapons "will have to be developed in the concrete factual circumstances of individual cases"]; cf. *U.S. v. Walker* (6th Cir. 2010) 615 F.3d 728, 732 (*Walker*) ["Outside the scope of the warrant requirement, the Fourth Amendment demands neither best practices nor formulaic adherence to one search method over another—just that the 'searches and seizures' not be 'unreasonable' "].)[3] That is because once Lee reasonably opened and

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[3] In *Walker*, cited by respondent, the Sixth Circuit Court of Appeals upheld an officer's search of a bank robbery suspect's partially unzipped duffel bag in which a firearm was found. (*Walker*, *supra*, 615 F.3d at p. 730.) When an officer stopped the defendant and asked for identification, the defendant—who matched a witness's description of the suspect, who had used a gun in the robbery—said his identification was in the duffel bag, which he then unzipped part way. The officer grabbed the bag and placed it on the ground before escorting the suspect about eight feet away and frisking him for weapons. (*Ibid*.) Another officer arrived and pulled the zipper on the bag open further, where officers saw a skeleton mask like one a witness had described the bank robber wearing lying on top. The officers then obtained a warrant and a more complete search of the bag turned up money from the bank and a firearm. (*Ibid*.)

In rejecting the defendant's claim that the officers exceed their authority when they unzipped the duffel bag instead of frisking the outside of the bag, the court stated

examined the crowded main compartment and ruled out the presence of a gun, he was entitled to manipulate the outside of the rear compartment from that main compartment. In other words, because Lee's hand was already properly inside the main compartment after he determined that the square object he had felt was not a gun, the fact that he then patsearched the rear compartment through the fabric between it and the main compartment rather than through the fabric on the outside of the backpack is not significant. (*Long*, *supra*, 436 U.S. at p. 1046 [reasonableness of police conduct must be determined by "balancing the need to search [or seize] against the invasion which the search entails"]; cf. *People v. Ritter* (1997) 54 Cal.App.4th 274, 280 [where, during on-the-street investigation of a report of defendant's threatening conduct, officer observed possible outline of a handgun in defendant's fanny pack and searched compartment of pack he believed contained a weapon, officer "did not act unreasonably in taking preventive measures to ensure that there were no weapons within defendant's immediate grasp during the ongoing investigation of the reported disturbance"].)

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that a search "is not unreasonable merely because officers did not use the 'least intrusive' means. [Citation.]" (*Walker*, *supra*, 615 F.3d at p. 731.) Given that the defendant matched the description of the armed suspect, the officers had reason to believe he had a weapon in the duffel bag he was carrying. (*Id.* at pp. 731–732.) The court further stated: "The courts' job is to ask what was reasonable under the circumstances, not to poke and prod for lesser-included options that might not occur to even the most reasonable and seasoned officer in the immediacy of a dangerous encounter. [¶] If it is a loaded gun that concerns the officer, moreover, it is by no means clear that poking and prodding the outside of a duffel bag is the most sensible way to find it. No doubt, the frisking of the outside of a bag intrudes less on the privacy of the suspect. But at what cost?" (*Id.* at p. 732.) Considering the officers did not have probable cause to arrest the defendant, the only alternative to performing a limited search of the duffel bag was to return the unsearched bag to him, which would give him access to a potential weapon. (*Id.* at p. 734.) The court concluded that in light of that alternative, the search in that case was justified and reasonable. (*Ibid.*; compare *United States v. Leo* (7th Cir. 2015) 792 F.3d 742, 749 [police could have lawfully patted down defendant's backpack to search for weapons during *Terry* stop, but "safety concerns did not justify opening and emptying the backpack" where defendant "was handcuffed and out of reach of the backpack"].)

For the foregoing reasons, we find that, in the particular circumstances of this case, there was no Fourth Amendment violation. (See *Long*, *supra*, 463 U.S. at pp. 1046–1047.)

DISPOSITION

Judgment is affirmed.

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Kline, P.J.

We concur:

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Stewart, J.

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Miller, J.

People v. Roberson (A154179)