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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. JUAN BERUMEN, Defendant and Appellant.	A154830 (Mendocino County Super. Ct. No. SCUKCRCR18935381)

Appellant Juan Berumen was charged by the Mendocino County District Attorney with possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1)), and possession of ammunition by a felon. (Pen. Code, § 30305, subd. (a)(1).) After his motion to suppress evidence of the firearm and ammunition was denied, appellant pled no contest to the offenses in exchange for a maximum prison term of three years eight months. Pursuant to the plea agreement, appellant was sentenced to two years in state prison on count 1 with a concurrent two-year term on count 2.

This timely appeal challenges denial of the motion to suppress.

FACTS AND PROCEEDINGS BELOW[1]

Appellant's Detention and Arrest

On March 11, 2018 (all subsequent dates are in the year 2018), while he was on patrol on Highway 162 near Willits, Mendocino Deputy Sheriff Jack Woida saw a Dodge Charger with a missing front license plate and initiated a traffic stop. Appellant, the driver, was accompanied by a female sitting in the front passenger seat. After Deputy

[1] The facts we relate are those elicited at the May 31, 2018 suppression hearing.

Woida asked appellant and the passenger for their driver's licenses he asked appellant several questions. Appellant responded to most of the inquiries with silence, and most were answered instead by the passenger. When appellant did speak he was slow to respond and his speech "seemed slow and lethargic," which Woida considered "unusual." Woida also noticed that while appellant was seated in the car, he was constantly "twitching his fingers around." When asked where he was going, appellant said he lived in San Leandro and was driving from San Leandro to Covelo "to visit," which Woida also found strange. Based on his training and experience,[2] Woida considered appellant's silence, slow speech, the constant twitching of his fingers, and his driving from San Leandro to Covelo in the middle of the night (which suggested he had been "tweaking" on a stimulant) indicative of the recent use of a controlled substance.

After obtaining appellant's and his passenger's driver's licenses, Woida asked dispatch to check them for "for wants and warrants or any probation status." Dispatch responded that there was an unconfirmed warrant for appellant out of Alameda County for a felony offense. Woida asked dispatch to confirm the warrant.

Woida testified at the suppression hearing that based on his interactions with appellant before and after he learned of the possible warrant, he felt appellant was under the influence of a controlled substance, "either a stimulant or possibly a depressant." Based on that determination, and to insure a possibly impaired person was "not allowed to endanger others on the roadway," Woida directed appellant to exit his vehicle and conducted field sobriety tests, which consumed about 15 or 20 minutes.[3] As a result of

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[2] Woida stated that during police academy training, he received "no less than 10 hours of training in identifying people who are under the influence of controlled substances," and "additionally while on FTO, received more training and experience in recognizing people who were under the influence of controlled substances." The defense never questioned the sufficiency of Woida's training and experience.

[3] The motion to suppress states that Woida administered "the Rhomburg test" and explains that "Berumen required repeated instructions in order to perform the test properly. During the test, Berumen's eyelids fluttered. Berumen performed the test twice. The first time, he estimated 30 seconds in what was actually 35 seconds. The

the tests, Woida concluded that appellant was driving under the influence of a controlled substance and arrested him for that offense.

Pursuant to that arrest, Woida conducted a pat down search and found a loaded .44 caliber handgun with approximately a 7-inch barrel in his waistband that had been concealed by his jacket, and ammunition in his pocket. At that point, Woida asked dispatch to conduct a criminal history records search. When appellant was taken to the Mendocino County jail, corrections staff confirmed that appellant was wanted on a warrant out of Alameda County for a felony offense.

The Trial Court's Ruling on the Motion to Suppress

The public defender contended that appellant's silence, lethargic speech, and twitching fingers did not provide reasonable suspicion he was under the influence and a field sobriety test was inappropriate. He also argued that the unwarranted tests caused an unlawfully prolonged detention. Finally, the public defender stated that "[v]isiting Covelo at midnight from San Leandro is weird, but it's not reasonable suspicion to do tests, and it's not probable cause to arrest. What it is, is something that would give rise to a hunch, which isn't sufficient to justify search and seizure."

The district attorney responded that "visiting Covelo at midnight from San Leandro is a symptom of being a tweaker, because they are awake at night when they probably shouldn't be, which further corroborates the evidence that the officer was able to articulate here in court, was able to articulate at the time. And so what we have is an officer who absolutely did his job and protected the public from an under the influence driver."

The trial court agreed with the public defender "that if the only fact was that the vehicle was pulled over for violating infraction Vehicle Code failure to have a front license plate, and the only other information . . . Woida had was that [appellant] was travelling to Covelo after midnight from San Leandro, that probably isn't enough to

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second time he estimated 30 seconds in what was actually 45 seconds. Woida checked Berumen's pupils again, and they did not constrict when exposed to indirect light."

detain to further investigate whether or not another crime had been committed. But that really wasn't the totality of the circumstances."

The court stated its awareness "of a line [of] cases that law enforcement officers based on their training and experience in investigating other crimes and particularly . . . investigation of people being under the influence of controlled substances sometimes see things that may appear innocent to those of us who are lay people who are not so trained. Deputy Woida observed that at the time of the contact with [appellant], appellant was responding [in] an unusual manner to his verbal inquiries. He was initially not responding to questions, he was allowing his passenger to respond to the deputy's questions. When he did choose to respond verbally his answers were in a low voice, his voice was lethargic. At the same time Berumen was twitching, which can be a sign and symptom of somebody who is under the influence of a controlled substance, particularly a stimulant."

For these reasons, the court found "that under the totality of the issues, this was enough based on the officer's training and experience to warrant a brief detention to warrant whether or not another crime had been committed; namely, whether the defendant was under the influence of a controlled substance, a violation of Health and Safety Code Section 11550. This warranted attention long enough to do field sobriety tests, which occurred in the case over a period of approximately 15 to 20 minutes, possibly more." The court felt that the tests were not an unduly prolonged detention in order to investigate the DUI charge, which revealed not just the commission of that offense but as well the firearm and offenses to which appellant entered his pleas.

Accordingly, the court concluded that there are "no grounds to suppress the evidence. The motion to suppress will be denied."

DISCUSSION

Standard of Review

In reviewing the denial of the motion to suppress, we defer to the factual findings of the trial court where supported by substantial evidence and exercise our independent judgment in determining whether, on the facts found, the search and seizure was

reasonable under the Fourth Amendment. (*People v. Redd* (2010) 48 Cal.4th 691, 719; *People v. La*wler (1973) 9 Cal.3d 156, 160.) The People bear the burden of proving by a preponderance of the evidence that the warrantless search or seizure was constitutionally justified. (Pe*ople v. Johnson* (2006) 38 Cal.4th 717, 729.)

Analysis

Appellant did not contest the initial traffic stop below, nor does he do so here. His arguments on appeal are that (1) Woida's investigation was not justified by reasonable suspicion appellant was engaged in criminal activity and (2) investigating appellant's passenger without any reasonable suspicion she was engaged in criminal activity unconstitutionally prolonged the traffic stop.

The second argument, which relies primarily on *Rodriguez v. United States* (2015) 135 S.Ct. 1609,[4] was not made by the pleadings in support of the motion to suppress[5] or at the hearing on the motion, so the People had no opportunity to rebut the new theory. (*People v. Auer* (1991) 1 Cal.App.4th 1664, 1670.) Nor does the record show that Woida's inquiry of dispatch about the passenger, which was made concurrently with the inquiry about appellant, consumed more time than that consumed by his investigation of appellant. The only time period identified by the record is the 15 or 20 minutes it took

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[4] *Rodriguez*, which was the primary focus of oral argument, holds that police may not extend an otherwise completed traffic stop absent reasonable suspicion of criminal activity justifying detention of a motorist beyond completion of the traffic stop. As will be seen, Woida justifiably entertained such suspicion.

[5] The motion to suppress was based solely on the proposition that the "defacto arrest" of appellant prolonged his detention. As stated in the points and authorities in support of the motion, "[i]t was this further questioning [of appellant], which occurred while Deputy Woida waited to see if the warrant could be confirmed as valid, that eventually led to Deputy Woida suspecting that [appellant] was under the influence and requiring him to perform field sobriety tests. None of the questioning and investigation was necessary to complete the lawful purpose of the initial detention (citing [appellant] for the license plate). Thus, Deputy Woida continued to question him and investigate for an unreasonable amount of time given the initial purpose of the stop."

The points and authorities never asserted that the investigation of the passenger prolonged the detention beyond the period of time consumed by the investigation of appellant.

Woida to conduct the field sobriety tests he administered, which may have resulted from the facts that appellant "required repeated instructions in order to perform the test properly" needed to take the test twice. (See discussion, *ante,* at p. 2, fn. 3.) In any event, we decline to entertain this new argument because it was forfeited.[6] (*People v. Bennett* (1998) 68 Cal.App.4th 396, 398.)

Appellant's chief contention on this appeal is that "[a]ppellant's twitching fingers and slow speech were signs of nervousness, and do not, in and of themselves, provide reasonable suspicion supporting an extended detention. (Citing *People v. Loewen* (1983) 35 Cal.3d 117, 126, and numerous federal opinions, typified by *United States v. Chavez-Valanzuela* (9th Cir. 2001) 268 F.3d 719, 726 ["extreme nervousness" during a traffic stop does not alone "support a reasonable suspicion of criminal activity, and does not

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[6] Appellant states in his reply brief that this issue was not forfeited because "[t]he prosecution in this case elicited from Deputy Woida that during the traffic stop he investigated Berumen's passenger by running her driver's license information through dispatch to check for warrants. Dispatch then took some time before it returned information on 'both subjects.' Despite those facts in the record, respondent claims '[t]here is no indication in the record that the license and warrant check for the adult female passenger consumed any time distinct from the time needed to verify appellant's license and warrants. That statement is illogical. It must have taken longer to process two peoples' license and warrant information than it would have taken to process that information for only one person."

We reject this post hoc reasoning. First, even if, as is not the case, there was sufficient evidence, appellant never claimed below that investigation of the passenger unduly prolonged the investigation of appellant; the People were therefore not called upon to rebut such an argument and the court had no need to address it.

Moreover, the only evidence in the record relating to the time consumed by Woida's investigation is that consumed by the field sobriety tests: "about 15 or 20 minutes." There is no evidence of the length of time it took to confirm the warrant, and appellant was arrested for another offense prior to confirmation of the warrant. Finally, there is no evidence regarding the length of time it normally takes, or took Woida, to validate appellant's and his passenger's drivers licenses. The evidence indicates Woida made requests for a warrant check of appellant and license checks for appellant and his passenger at the same time, and no evidence shows those requests cannot all be considered at the same time or that was not what happened here. (See *People v. Bell* (1996) 43 Cal.App.4th 754, 765 and *People v. McGaughran* (1979) 25 Cal.3d 577, 584.)

justify an officer's continued detention of a suspect after he has satisfied the purpose of the stop"].) We have no quarrel with the general proposition that nervousness alone is insufficient to justify a traffic stop, for which these and many other cases stand. However, the principal contention appellant advances is based on a false premise. Woida did *not* testify that he considered appellant's twitching fingers and slow speech signs of "nervousness." He stated instead that they were signs appellant may have been driving while under the influence of a controlled substance, which is not just a criminal offense but a danger to the safety of others. The situation in this case is therefore distinguishable from those in the many state and federal cases appellant unjustifiably relies upon.

Furthermore, as we have said, Woida did not consider appellant's twitching fingers and slow speech "alone." As the parties agree, he relied on four factors: appellant's silence and deferral to his passenger's responses to Woida's initial inquiries, his slow and "lethargic" answers to subsequent and more pointed inquiries, his twitching fingers, and the unusual fact of a late night trip to Covelo from San Leandro.

Keeping in mind that "[t]he good faith suspicion which warrants an officer's detention of a person for investigative reasons is necessarily of a lesser standard than required to effectuate an arrest (*People v. Craig* (1978) 86 Cal.App.3d 905, 911), and that " '[l]aw enforcement officers may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' [Citations.]" [Citation.]' [Citation.]" (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145–146.), we find little difficulty concluding that Woida did not act impermissibly on the basis of mere hunch. (*People v. Wells* (2006) 38 Cal.4th 1078, 1083.) On the contrary, he " 'point[ed] "to specific articulable facts that, considered in light of the totality of the circumstances, provide[d] some objective manifestation that the person detained may be involved in criminal activity.' " (*People v. Hernandez* (2008) 45 Cal.4th 295, 299, quoting *People v. Souza* (1994) 9 Cal.4th 224, 231.)

DISPOSITION

Accordingly, the ruling on the motion to suppress and the judgment are affirmed.

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Kline, P.J.

We concur:

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Richman, J.

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Miller, J.

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