Filed 11/16/12 P. v. Colvin CA3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY WARDELL COLVIN, Defendant and Appellant.	C066988 (Super. Ct. Nos. 08F07055 & 10F03429) ORDER MODIFYING OPINION; NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed in this case on October 19, 2012, be modified as follows:

On page 14, remove the current content of footnote 5, and modify footnote 5 to read as follows:

"The People suggest at various points in their briefing that defendant's trial testimony was somehow *consistent* with his unwarned statement to the police. We do not agree."

This modification does not change the judgment.

FOR THE COURT:

_____BLEASE_____, Acting P.J.

_____HULL_____, J.

_____DUARTE_____, J.

Filed 10/19/12 P. v. Colvin CA3

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Is a car passenger who is removed at gunpoint, handcuffed, and made to sit on a sidewalk, in "custody" for *Miranda* purposes? (See *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].) Contrary to the trial court's conclusion, we hold the answer is "yes," and therefore the trial court should have suppressed incriminating statements defendant made under such circumstances. Because we conclude the error is not harmless beyond a reasonable doubt (see *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711] (*Chapman*)), we reverse without reaching defendant's other contentions.

BACKGROUND

Procedure

After a joint trial with two juries, defendant Anthony Wardell Colvin's jury convicted him of knowing receipt of a stolen vehicle (Pen. Code, § 496d, subd. (a)), but acquitted him of unlawfully taking that vehicle (Veh. Code, § 10851, subd. (a)). The trial court found six prior prison term allegations to be true and found defendant was in violation of his probation in another case (No. 08F07055). Codefendant Fredrica Shamone Alexander's jury convicted her of both offenses; she received probation, and is not a party to this appeal. The court sentenced defendant to prison for nine years. Defendant timely appealed.

Facts at Suppression Hearing[1]

About 2:00 a.m. on May 23, 2010, CHP Officers Manciu and Galley were on Business 80 when Manciu saw a Honda Accord without a rear license plate, and stopped it.

Manciu spoke with the driver, Alexander. She had no driver's license and said she was driving defendant home because he had been drinking, and it was defendant's car. Manciu saw a strip of paper taped to the rear window, which did not look like a valid registration. He also saw that the car's ignition had been "punched" and wires were hanging out. Defendant was wearing gloves. Based on the gloves, the apparent false

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[1] The procedures leading to the *Miranda* hearing, combined with a suppression hearing, are not relevant.

registration, and the punched ignition, Manciu suspected the car was stolen.

Officer Manciu asked Alexander where the key was, and she said the key had bent as "they" put it in, and she showed him a key with a rubber sleeve from the glove box, claiming it was the car key. The key was not bent and appeared to be a house key. Manciu ordered Alexander out of the car, handcuffed her, and directed her to sit on the curb, telling her he was detaining her until he could positively identify her. From dispatch, Manciu learned the car was stolen.

At that point, Officers Manciu and Galley drew their guns, pointed them at defendant, and ordered him to show his hands and get out of the car; defendant complied.

Officer Manciu explained that he considered the stop to be a "modified felony vehicle stop" because only he and his partner were present. Manciu always drew his gun in a felony vehicle stop, and testified that "[w]henever there is a second person in the vehicle, I have always placed them under arrest." But he also testified he had both detained and arrested the second person and had arrested the passenger for a vehicle theft only on this occasion.

When defendant got out of the car, Officer Manciu re-holstered his gun, handcuffed defendant, and said he was being detained (not arrested) while the officer "investigate[d.]" Officer Galley re-holstered his gun, and Manciu sat defendant down on the curb, away from Alexander.

Officer Manciu asked for and obtained defendant's identification. When Manciu asked defendant whose car it was, defendant said it belonged to an unnamed "guy" he had met at a gas station at 24th and Florin, who gave it to defendant. Officer Manciu's conversation with defendant lasted a "couple minutes" and occurred within "five minutes or less" after the stop. Officer Manciu did not advise defendant of his *Miranda* rights because "I was trying to determine if they were innocent victims that came into possession of this vehicle maybe through purchasing it through a private party, or if they were maybe involved in the unlawful taking of this vehicle."

Officer Manciu then advised Alexander of her *Miranda* rights. She stated that she saw defendant standing by the car at a gas station at 24th and Florin, she asked him for a ride, and he agreed. She saw another man whom she could not identify walking away. She noticed the ignition was punched, and admitted using a screwdriver to start the car.

Officer Manciu then advised defendant of his *Miranda* rights (15 to 20 minutes after the traffic stop) and asked if he wanted to talk about the car. Defendant said he had nothing to say. Officer Manciu then arrested defendant for vehicle theft and receiving a stolen vehicle.

Trial Court's Miranda Ruling

The trial court found the traffic stop was valid, the initial questioning of Alexander was investigatory and that her statements were admissible against her.

As to defendant, the trial court found as follows:

"You know, I don't think there is any question that at the time the answers were elicited, Mr. Colvin, he was in custody.

"He was taken out at gunpoint, he was cuffed, and he was sat down. I don't think there is any question that there is an interrogation.

"There were questions that were designed to [elicit] answers, perhaps not necessarily incriminating answers, but certainly designed to elicit answers in the investigation of a stolen vehicle.

"What this is going to turn on is whether the investigation focused on Mr. Colvin. And [defense counsel] mentioned and cited *Forster*[2] for the proposition that it was important whether Mr. Colvin would think the investigation focused on him. And I don't think that's quite true.

"It can go to custody, whether somebody thinks that they are free to leave or not, but the question of whether investigation is focused, I think, is a reasonable -- objective determination.

" . . .

" . . .

" . . .

" . . .

"And the question here, the question that this is going to turn on, is whether the investigation focused on Mr. Colvin or not.

"So looking at whether the investigation did focus on Mr. Colvin, we have got punched ignition,

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2 *People v. Forster* (1994) 29 Cal.App.4th 1746 (*Forster*).

and Mr. Colvin with gloves on, and we have Miss Alexander saying it's Mr. Colvin's car.

"So those are all things that could go to the officer focusing on Mr. Colvin. On the other hand, we have him saying that then -- on the other had we have Miss Alexander driving the car.

" . . .

" . . .

" . . .

" . . .

"I am taking into consideration that his questions of Mr. Colvin are fairly short. And also they arguably are directed towards verifying what Miss Alexander is saying or not verifying it.

"His first question is whose vehicle is this. That goes -- that seems to be a question originating from his focus on her, because she has said that it's his car.
" . . .

"Mr. Colvin says, well, the car belongs to a guy at the gas station. Well, that doesn't really answer the officer's question.

"Because it still is, why do you guys have this car. And so the officer asks, how come you have it. And Mr. Colvin says, the guy at the gas station gave it to us.

"And then the last, how much did you pay for it, and he got it for free. Seems to me that those are reasonable investigative questions directed at Miss [Alexander], and also directed at whether or not to focus the attention on -- I am sorry, that they are reasonable to investigate Miss Alexander's role in this, and reasonable to determine whether or not to focus on Mr. Colvin.

" . . .

" . . .

"So I am going to find Mr. Colvin was in custody, that his [answers] were elicited by interrogation. But I am going to find that the focus of the investigation had not . . . sufficiently focused on him as suspect, but whether . . . to determine whether or not the investigation should be focused on him in addition to [Alexander].

"So I am going to find that those three questions are investigative and admissible. It is a good stop. So that's where we are."

Facts at Trial

The trial evidence largely tracked the evidence at the pretrial hearing, except as follows.

After Officer Manciu arrested and handcuffed Alexander, and placed her seated on the curb near Officer Galley, he learned the car belonged to Tran Van Thoung. When he first approached defendant, Manciu smelled alcohol on defendant. When he spoke with defendant, defendant was handcuffed and sitting on the curb, and both officers had re-holstered their guns. Defendant presented an identification card; he did not have a driver's license.

Officer Galley, who inventoried the car, testified a window had been forced down, not broken. Inside, he found house keys, a screwdriver, and other items, including a bag with cans.

Thoung testified his car had been stolen between 11:00 a.m. and 4:00 p.m. on May 21, 2010. When it was recovered, the ignition was broken, the windows did not work properly, and his papers, a crutch, his handicap sticker, and both license plates were missing. A strip of paper had been taped to the back

window, and a garbage bag with cans and keys had been left inside.

Defendant testified and admitted four prior felony convictions (a 1995 failure to appear, 2002 and 2006 felonies involving moral turpitude, and a 2006 grand theft). He lived near Florin Road and made money recycling, and wore gloves for digging into trash. On May 22, 2010, he went to a recycling business to cash in items he had collected. He bought some alcohol at a nearby gas station and drank most of it at a bus stop. He then collected some cans for recycling. He met Alexander later that night at a parking lot at 24th and Florin. He had been talking to some people and drinking some beer that Alexander bought. He left with her but did not remember why. They walked to a car, he opened the door and put his bag of cans inside, and Alexander got in the driver's seat.

Defendant did not recall when the police pulled the car over or how long he had been in the car. Defendant claimed he was drunk, "out of it" and asleep. An officer asked whether he had been drinking and he was told at gunpoint to get out of the car, then he was handcuffed. Defendant was frightened, thought he would get shot and did not know what was going on. Officer Manciu kept asking him to whom the car belonged and defendant did not respond because he did not know what was happening. Officer Manciu kicked defendant's legs, and defendant was scared. Officer Manciu asked two or three times where he got the car, who gave it to him, and what he paid for it. Defendant said someone gave him the car on 24th and Florin because that

was the last area he had been in and because he felt he had to say something, and he denied stealing or driving the car. Defendant got in the car with Alexander because he thought they were going to party and he was high. He never looked at the ignition. He denied hearing any conversation between the officer and Alexander, and he claimed he told a nurse at the jail that Manciu kicked him.

In rebuttal, Officer Manciu testified defendant did not appear to be asleep or just waking up, but seemed to be ignoring the officer. When he told Alexander the reason for the stop and she said the car belonged defendant, defendant did not react. Officer Manciu denied yelling at or kicking defendant.

The jail nursing director testified the intake notes on defendant's chart reflected that he was uncooperative and refused to answer questions, but not that he reported being kicked by an officer. Officer Galley testified that he never saw Officer Manciu kick defendant.

DISCUSSION

Defendant contends he was in custody when he was questioned. We agree. Because we also agree that the error is not harmless beyond a reasonable doubt, we must reverse.

I

Custody Analysis

The People do not contest that Officer Manciu asked defendant questions reasonably likely to elicit inculpatory

responses,[3] but defend the trial court's ruling by contending defendant's interrogation was not a "custodial" interrogation that required *Miranda* warnings.

We apply a deferential substantial evidence standard to the trial court's *factual* findings, but independently determine whether those facts establish whether defendant was in custody. (*People v. Ochoa* (1998) 19 Cal.4th 353, 401-402.)

Although the trial court explicitly found defendant was in custody and was asked incriminating questions, it seems to have reasoned that the issue of "focus" somehow obviated the need for *Miranda* warnings. We disagree.

Miranda held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (*Miranda, supra*, 384 U.S. at p. 444 [16 L.Ed.2d at p. 706].)

Miranda warnings need not be given to a person temporarily detained pursuant to a routine or ordinary traffic stop, because such detainees are not "in custody." (*Berkemer v. McCarty* (1984) 468 U.S. 420, 437-440 [82 L.Ed.2d 317, 333-335]

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[3] See *Rhode Island v. Innis* (1980) 446 U.S. 291 [64 L.Ed.2d 297]; *People v. Haley* (2004) 34 Cal.4th 283, 300.

(*Berkemer*).) However, "If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*." (*Berkemer, supra*, 468 U.S. at p. 440 [82 L.Ed.2d at p. 335].)

We must consider "'how a reasonable man in the suspect's shoes would have understood his situation[,]'" (*People v. Stansbury* (1995) 9 Cal.4th 824, 830) that is, "would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." (*Thompson v. Keohane* (1995) 516 U.S. 99, 112 [133 L.Ed.2d 383, 394].)

"Although no one factor is controlling, the following circumstances should be considered: '(1) [W]hether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of the questioning.' [Citation.] Additional factors are whether the suspect agreed to the interview and was informed he or she could terminate the questioning, *whether police informed the person he or she was considered a witness or suspect*, whether there were restrictions on the suspect's freedom of movement during the interview, and whether police officers dominated and controlled the interrogation or were 'aggressive, confrontational, and/or accusatory,' whether they pressured the suspect, and whether the suspect was arrested at the conclusion of the interview." (*People v. Pilster* (2006) 138 Cal.App.4th

1395, 1403-1404, emphasis added (*Pilster*).) Thus, "focus" is relevant if and only if the officers *communicate* their "focus," which might contribute toward a reasonable person's belief about freedom to leave. (See *Stansbury v. California* (1994) 511 U.S. 318, 323-325 [128 L.Ed.2d 293, 299-300].)

Here, at the time he was questioned, defendant was still handcuffed and still sitting on the sidewalk, where he had been ordered to sit and remain by two armed police officers. Although they had re-holstered their guns at the time defendant was questioned, we think any reasonable person in defendant's circumstances would *not* feel free to leave. (See *People v. Bejasa* (2012) 205 Cal.App.4th 26, 38 ["This was not a typical traffic stop. Defendant was handcuffed and placed in the back of a police car before Officer Spates arrived. A reasonable person in that situation would feel completely at the mercy of the police"]; *Pilster*, *supra*, 138 Cal.App.4th at pp. 1404-1406 [absent assurances that handcuffing is temporary and solely for officer safety, "a reasonable person would assume the detention would continue unless he answered the officer's questions"]; cf. *People v. Thomas* (2011) 51 Cal.4th 449, 476-478 [because Thomas had been released from patrol car before he was questioned, he was not in custody]; *Forster*, *supra*, 29 Cal.App.4th at p. 1753 [Forster "was neither restrained nor handcuffed"].)[4]

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[4] For *Fourth Amendment* purposes, stopping a suspect at gunpoint, handcuffing him, and making him sit on the ground, does not necessarily turn a detention into an arrest. (See *People v. Celis* (2004) 33 Cal.4th 667, 675.) But we are reviewing the denial of defendant's *Miranda* motion, and the issue is not

II

Prejudice Analysis

The People assert the error was harmless beyond a reasonable doubt (the *Chapman* standard), without conceding that that is the correct standard of error. The California Supreme court has applied the *Chapman* standard in assessing prejudice from the improper admission into evidence of statements obtained in violation of *Miranda*. (*People v. Sims* (1993) 5 Cal.4th 405, 447; *People v. Johnson* (1993) 6 Cal.4th 1, 32-33, disapproved on another point by *People v. Rogers* (2006) 39 Cal.4th 826, 879.) So shall we.

Under the *Chapman* standard, "an error may be found harmless only when the 'beneficiary of a constitutional error . . . prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*People v. Macklem* (2007) 149 Cal.App.4th 674, 695.) "To find the error harmless we must find beyond a reasonable doubt . . . that it was unimportant in relation to everything else the jury considered on the issue in question." (*People v. Song* (2004) 124 Cal.App.4th 973, 984.)

Here, defendant presented a plausible defense, supported by his testimony and some corroborating evidence, that he was too drunk to know what was happening, and therefore lacked the mental state of knowledge that the car in which he was riding

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whether a detention turned into an arrest, but whether a reasonable person would feel free to leave. (See *Pilster*, *supra*, 138 Cal.App.4th at pp. 1405-1406.)

was stolen. (See Pen. Code, § 496d, subd. (a); see *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425.) Other evidence strongly inculpated Anderson, the driver, and was consistent with defendant's claim that he was an unwitting passenger in a stolen car. The evidence that defendant did not react when Alexander claimed it was his car could have been viewed as an inculpatory adoptive admission, but was also consistent with the evidence that defendant either did not hear or was too intoxicated to understand what was being said. However, his unwarned statement that he had been gifted the car by a man he did not know both evidenced his consciousness of guilt and his clarity of thought, negating his claim of extreme intoxication.[5]

Although the People's case was not weak, "there is no way to ever define just what quantum of evidence is necessary to convince a jury beyond a reasonable doubt of a defendant's guilt." (*People v. Accardy* (1960) 184 Cal.App.2d 1, 4.) Even where the *defense* is weak, that does not make the evidence that should have been suppressed unimportant. (See *People v. Scott* (1978) 21 Cal.3d 284, 295-296.) After all, the defendant had a low burden to satisfy, namely, raising a reasonable doubt in the

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[5] We note with disapproval the People's multiple assertions in their briefing that defendant's trial testimony was somehow *consistent* with his unwarned statement to police. No cites to the record accompany these claims, and for good reason--the record does not support them.

mind of even one juror, to obtain at least a mistrial.[6] (See *People v. Soojian* (2010) 190 Cal.App.4th 491, 518-521.)

We cannot say the tainted evidence was "unimportant" in the context of the other evidence before the jury. Therefore, the error was not harmless and we must reverse. (*Chapman*, supra, 386 U.S. at p. 24 [17 L.Ed.2d at pp. 710-711].) In view of our disposition, we do not reach defendant's remaining contentions.

DISPOSITION

The judgment is reversed with directions to grant defendant's *Miranda* motion.

DUARTE, J.

We concur:

BLEASE, Acting P. J.

HULL, J.

[6] In light of our conclusion that the error was not harmless beyond a reasonable doubt, we need not consider to what extent the erroneous *Miranda* ruling may have motivated defendant to testify.