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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,		C067658
	Plaintiff and Respondent,	(Super. Ct. No. 11F00281)
v.		
MARCO JEROME PALMER,		
	Defendant and Appellant.	

A law enforcement agent reached into a small light-weight duffel bag belonging to defendant Marco Jerome Palmer, believing there was a weapon inside. Prior to reaching into the bag, the agent did not patdown the bag's exterior, and there was no testimony the bag was of a nature that a patdown of the bag's exterior would have been insufficient to confirm or dispel the agent's belief the bag contained a weapon. The bag turned out to have two weapons that defendant was not allowed to carry.

The judge, sitting as a magistrate, denied defendant's motion to suppress evidence of the guns and held defendant to answer. Thereafter, defendant pled no contest to six firearm-

related charges. At the time defendant pled no contest, defense counsel and the magistrate stated their belief that defendant had preserved his right to challenge on appeal the ruling on the suppression motion. Their belief was wrong because defense counsel had to reraise the suppression motion after defendant was held to answer to preserve defendant's right to appeal the ruling on the suppression motion.

We hold defense counsel was ineffective for failing to reraise the suppression motion because the motion was meritorious and the evidence against defendant should have been suppressed. We therefore reverse the judgment against defendant. Based on our holding, we do not address defendant's remaining contentions.

FACTUAL AND PROCEDURAL BACKGROUND

About 1:00 p.m. in January 2011, state and federal law enforcement officers working together boarded an Amtrak train in Roseville headed for Sacramento. They were engaging in "consensual encounters" with passengers to determine if any were carrying drugs or weapons. About five hours before boarding the train, one of the officers, United States Department of Justice Special Agent Jim Delaney had learned from a law enforcement detective in Reno that one passenger had "his legs draped over a bag in sort of a protective or suspicious manner." There was no information about any illegal activity. Defendant matched the description of that passenger. Agent Delaney also had learned of a "somewhat suspicious ticket purchase. It was a . . . third-party Visa purchase that someone had purchased for

[defendant]" that "had been reserved within a day or two" for a ticket from Lincoln, Nebraska, to Sacramento.

California Department of Justice Special Agent James Meek approached defendant, who was sitting down at one of the last seats of the train's car. Defendant had a bag tucked under his foot. Agent Meek told defendant he was a police officer and asked to question him. Defendant became "agitated" but "somewhat calmed down" when Meek told him they had not singled him out and were talking to passengers on the train to ensure everybody's safety. Defendant said he had two bags -- the first was to the left of him and the second was at his feet on the floor -- both of which he had packed himself. He denied Agent Meek's request for consent to search the bags. Defendant, however, granted Meek's request to "visually inspect" the bags. Meek told defendant three times to keep his hands out of the bag so the agent could see them during the visual inspection. Defendant complied in a "[v]ery calm" manner and after moving some items around inside the first bag and opening it up so the agent could "look well inside of it," Meek felt "comfortable" the bag "most likely" did not contain any contraband.

While Meek was visually inspecting the first bag, he noticed defendant was pushing the second bag under his seat out of sight. While not afraid for his safety because defendant's "hands were out," Meek became concerned defendant was trying to hide something in that bag. Meek then asked for and received permission to patdown defendant's waist area. That search revealed no weapons.

Meek asked defendant to "retrieve the second bag, bring it up closer." Defendant put the second bag where the first had been, "which was next to him to his left." It was a "small gym bag" "light-weight" "[d]uffel bag" with a zipper on the top. When Meek asked to visually inspect the second bag, defendant became "immediately nervous" and "agitated." It was "clear and obvious" to Meek "this bag could pose a danger or threat or have contraband inside of it." About that time, Agent Delaney was passing by. Agent Meek asked Agent Delaney if he could stop and told Delaney he was concerned about the second bag.

After defendant pulled the bag up, he reached into the bag with both hands and said, "'Hey, there's nothing here.'" "[T]he way he reached in that bag, made [Agent Delaney's] hair stand up, what hair [he] ha[d] left." Defendant had reached in the bag with both hands in a manner hiding them from the agent's view. Agent Delaney asked defendant to take his hands out of the bag and not do that again. Defendant then covered up the bag with a jacket and moved them to his right. Agent Delaney told defendant, "'You are scaring me and I am really worried about what is in that bag.'" Defendant agreed to pull out one item of clothing at a time without his hands going into the bag. He moved the bag "back over to the aisle side where Agent Meek was" and removed one or two items of clothing. Defendant then put his hands back in the bag and started "moving the clothing from one side to the other." He was "moving a pair of underwear over an item and gripping it and holding it as he did it." Agent Delaney thought the item was "maybe three, four inches"

and was a weapon, but he could not tell if the item was hard. He told defendant to take his hand out of the bag slowly. The agent then grabbed the bag and moved it to the other side of the aisle. Defendant stood up to see what Agent Delaney was doing, but did not make any threatening motions. Agent Meek could not see defendant's right hand, so Meek "placed [his] hand on [defendant's] back and made sure [he] could secure [defendant's] hand." Defendant did not resist in any way. "Agent Delaney was to [Agent Meek's] back with that bag." Agent Delaney reached into the bottom of the bag and did a "quick sweep on the bottom, underneath the clothes in the bag" and felt a gun and said, "[g]un.'" The gun was a .40-caliber unloaded Beretta.

When Agent Delaney said "[g]un,'" defendant (who was being held by Agent Meek) stepped into the aisle away from Delaney, "[b]ut in that motion" the agents "were able to place both hands on [defendant's hands]." "Delaney came in between [Meek's] hands with handcuffs, and [the agents] placed handcuffs on [defendant] with no incident." "[O]nce [the agents] got control of [defendant] and he was in handcuffs, [Delaney] went back through and found a25 caliber automatic that was loaded."

After calling dispatch, Agent Meek found out the Berretta was stolen and the .25-caliber firearm was registered to someone other than defendant. Defendant was on probation and could not carry firearms.

Defendant was charged with six counts, including unlawful possession of a firearm on probation, misdemeanor in possession

of a firearm, possession of a concealed firearm, and possession of a loaded firearm in public. Defendant moved to suppress evidence of the guns in front of the trial court judge who was sitting as a magistrate. The magistrate denied the motion, reasoning the agents had "an actual and real concern" there were weapons inside the second bag based on defendant's conduct, "[t]he patdown [of that bag] was limited in nature and was for weapons," and it "was not a general search for contraband."

After the denial of his suppression motion, defendant was held to answer on the charges against him. The magistrate, now sitting as a superior court judge, accepted defendant's pleas of no contest to all six counts. Prior to accepting the pleas, defense counsel and the judge stated their understanding that defendant was reserving his right to appeal the court's ruling on the suppression motion.

Thereafter, the court placed defendant on probation for five years. Defendant filed a timely notice of appeal from that judgment and obtained a certificate of probable cause.

DISCUSSION

Defendant contends trial counsel was ineffective for failing to renew the suppression motion after defendant was held to answer on the charges against him because a renewed motion should have been meritorious. Defendant is correct defense counsel was deficient in not reraising the motion to preserve for appeal the issue of the legality of the search and he was prejudiced by counsel's deficiency because the motion should have been granted.

Defense counsel and the magistrate both were wrong in their belief, stated on the record, that defendant had preserved his right to appeal the denial of the suppression motion. Our Supreme Court has held that a motion to suppress evidence must be renewed in the superior court to preserve the issue for appeal. (*People v. Lillenthal* (1978) 22 Cal.3d 891, 896.) As this court has explained, the *Lillenthal* rule "continues to apply even in the wake of trial court unification because that rule never rested on the distinction between the municipal court and the superior court; rather, it rests on the distinction between magistrates and superior court judges--a distinction that remains valid even following unification." (*People v. Richardson* (2007) 156 Cal.App.4th 574, 589.) Where the record demonstrates that defense counsel's failure to reraise the suppression motion was not based on trial strategy but on a mistaken understanding of the law, the issue is reachable on appeal. (Cf. *People v. Hinds* (2003) 108 Cal.App.4th 897, 902 [rejecting the defendant's claim of ineffective assistance of counsel for failing to renew a suppression motion in front of the superior court judge because "the availability of the plea bargain accepted by the defendant may have been dependent upon not further pursuing the suppression motion"].)

We turn then to whether trial counsel was ineffective for failing to renew the motion, as defendant now claims on appeal. He argues the search was unconstitutional because "[b]y placing his hand inside of [defendant's] bag, the agent exceeded the limits of a proper *Terry* pat-down for weapons." There was "no

evidence whatsoever that a simple pat-down of the exterior of the bag would have been insufficient to allay the agents' fear that there might be a weapon inside." We agree.

The Fourth Amendment protects against unreasonable searches and seizures. (U.S. Const., 4th Amend.; *Terry v. Ohio* (1968) 392 U.S. 1, 20 [20 L.Ed.2d 889, 905].) After a stop, police officers may conduct a limited search of a suspect if they have reason to believe the suspect is armed and dangerous. (*Terry*, at p. 27 [20 L.Ed.2d at p. 909].) Although a *Terry* search does not require probable cause, it is justified only when "specific and articulable facts . . . taken together with rational inferences from those facts," warrant a suspicion that a suspect is armed and dangerous. (*Terry*, at p. 21 [20 L.Ed.2d at p. 906].)

A *Terry* search 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." (*Terry v. Ohio, supra*, 392 U.S. at pp. 25-26 [20 L.Ed.2d at p. 908].) If the protective search goes beyond what is necessary to determine if the person is armed, the search is invalid and its fruits will be suppressed. (*Sibron v. New York* (1968) 392 U.S. 40, 65-66 [20 L.Ed.2d 917, 936].) In *Sibron*, the Court suppressed heroin found in defendant's pocket, explaining as follows: "The search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Only when he discovered such objects did the officer in *Terry* place

his hands in the pockets of the men he searched. In this case, with no attempt at an initial limited exploration for arms, [the patrolman] thrust his hand into Sibron's pocket and took from him envelopes of heroin. . . . The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception--the protection of the officer by disarming a potentially dangerous man. Such a search violates the guarantee of the Fourth Amendment, which protects the sanctity of the person against unreasonable intrusions on the part of all government agents." (*Sibron*, at pp. 65-66 [20 L.Ed.2d at p. 936].)

Here, defendant argues the *Terry* search of the duffel bag violated the Fourth Amendment as well. We agree. Nonintrusive, reasonable means other than a *Terry* patdown are permissible where those other means are *necessary* under the circumstances to ensure the person is not armed. (See, e.g., *United States v. Thompson* (9th Cir. 1979) 597 F.2d 187, 191; *People v. Brisendine* (1975) 13 Cal.3d 528, 542-543.) In *Brisendine*, our Supreme Court held that when the exterior of a knapsack was "so resistant or resilient" that a patdown of its exterior would be insufficient to "prevent the police from determining whether there are weapons present," police were justified in looking inside the knapsack for weapons. (*Brisendine*, at pp. 542-543.) In *Thompson*, the Ninth Circuit Court of Appeals held that where a defendant was wearing a "long, bulky overcoat" that one of the officers testified made it impossible for him to determine from a patdown search whether the pocket contained a weapon, the

officer was justified in reaching into the defendant's coat pocket. (*Thompson*, at pp. 189, 191.)

Here, there was no evidence it was necessary for Agent Delaney to, as he described it, "reach[] right into the bottom of the bag" and do a "quick sweep on the bottom, underneath the clothes in the bag" to check for a weapon. For example, there was no testimony from the agent such as that in *Thompson* that "[j]ust to pat it you couldn't feel sufficiently to find anything out.'" (*United States v. Thompson*, *supra*, 597 F.2d at p. 189.) There was also no testimony from the agent such as that in *Brisendine* "when [the officer] touched the knapsack it felt 'substantially solid,' that he was unable to determine its contents by squeezing." (*People v. Brisendine*, *supra*, 13 Cal.3d at p. 542.) The agent failed to articulate why an exterior patdown of the duffel bag would not have sufficed to determine whether the bag contained a weapon.

On appeal, the People do not address this problem with the search.¹ Rather, they argue that the "quick[] search[]" of the duffel bag for "a weapon" was permissible because Delaney

¹ The People seem to miss defendant's point that the agent should have conducted an exterior patdown of the bag or explained why an exterior patdown would not have sufficed before he reached into the bag.

The People also repeatedly misstate the pertinent facts here, erroneously stating, "Agent Delaney looked into the duffel and saw a handgun inside." As we have explained, Agent Delaney discovered the firearm not by looking into the bag but by "reach[ing] right into the bottom of the bag" and doing a "quick sweep on the bottom, underneath the clothes in the bag."

"reasonably feared that [defendant] might have a weapon secreted in his duffel bag" based on defendant's "interference with the agent's inspection of the bag." Specifically, the People note defendant had "undertaken to conceal the bag with his jacket and then kept putting his hands into the bag despite repeated admonitions to keep his hands out of the bag while the agents looked at its contents." In support, they cite the case relied on by the magistrate here in upholding the search, *People v. Ritter* (1997) 54 Cal.App.4th 274.

The facts in *Ritter* were these: "During an ongoing, on-the-street, close range investigation of a report of defendant's threatening conduct, the deputy observed what he suspected was the outline of a handgun in the outer compartment of defendant's fanny pack. After the deputy's concerns for his safety were heightened by defendant's responses to the deputy's questions and request regarding the fanny pack, the deputy searched the compartment of the pack that he believed contained a weapon." (*People v. Ritter, supra*, 54 Cal.App.4th at p. 280.)

Ritter is distinguishable because the gun there was in plain view. "During cross-examination, defense counsel asked the deputy to place the handgun in the pack. The deputy placed the gun in the outer compartment of the bag and zipped the bag closed with the exhibit tag hanging out. With the court's permission, defendant put on the bag and the deputy adjusted its contents. The deputy explained he had seen 'a vertical outline, barrel lines [and] a horizontal outline pointing to [defendant's] left, which gave . . . the impression of an L-

shape, which is generally the shape of a handgun, being the grip and the frame and the slide.' The deputy testified that, based on his experience, he saw a definitive outline of a handgun." (*People v. Ritter, supra*, 54 Cal.App.4th at p. 277.) The prosecutor in *Ritter* had "argued a *Terry* analysis was proper because this was a plain view situation where the deputy, based on his experience, was able to see an outline that was consistent with a gun and was justified in ascertaining whether it was a gun before continuing his investigation; the deputy took the least intrusive means available in the circumstances; and, because defendant's responses raised the deputy's concerns for his safety, he placed defendant in the patrol car and unzipped the compartment which contained the handgun." (*Ritter*, at pp. 277-278.) The appellate court agreed, reasoning: "Given the fact that the intrusion was 'strictly circumscribed by the exigencies which justifi[ed] its initiation' (*Terry v. Ohio, supra*, 392 U.S. at p. 26 [88 S.Ct. at p. 1882]), the deputy's prudence should not be faulted for a failure to pat down the fanny pack while defendant was wearing it." (*Ritter*, at p. 280.)

There was no comparable plain view here. The only details offered about the item Agent Delaney thought was a weapon was that it appeared "maybe three, four inches" and the agent could not tell if it was hard. The only details offered about the duffel bag was that it was a "small gym bag" "light-weight" with a zipper on the top. The People make no attempt to explain why these facts justified the agent reaching into the bag to search

it for a weapon *instead of* the less intrusive means of patting the bag's exterior.

When the protective search goes beyond what is necessary to determine if the person is armed, the search is invalid and its fruits will be suppressed. (*Sibron v. New York, supra*, 392 U.S. at pp. 65-66 [20 L.Ed.2d at p. 936].) The People make no argument that the fruits of the illegal search (here both the first and second gun) would have inevitably been discovered by legal means despite the illegality of the first search. (See, e.g., *People v. Clark* (1993) 5 Cal.4th 950, 993.) Had defense counsel reraised the suppression motion in front of a superior court judge, the motion should have been granted.

Finally, it is not true that regardless of the illegality of the search, the superior court would not have suppressed the evidence against defendant. The People argue the evidence would not have been suppressed because the court would have applied *Herring v. United States* (2009) 555 U.S. 135 [172 L.Ed.2d 496]. They argue there is "certainly nothing in the record to suggest that the agents had engaged in improper racial profiling or were intent upon inventing some spurious reason for contacting [defendant] in particular." While this is an accurate statement of the record, the evidence still should have been suppressed.

Whether evidence should be suppressed "turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." (*Herring v. United States, supra*, 555 U.S. at p. 137 [172 L.Ed.2d at p. 502].) "[E]vidence should be suppressed 'only if it can be said that the law

enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" (*Illinois v. Krull* (1987) 480 U.S. 340, 348-349 [94 L.Ed.2d 364, 374].) "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. . . . [T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." (*Herring*, at p. 144 [172 L.Ed.2d at p. 507].)

Examples where suppression has been held inappropriate include where police have relied on a statute authorizing a warrantless administrative search that was later held to be unconstitutional (*Illinois v. Krull*, *supra*, 480 U.S. at pp. 342, 349 [94 L.Ed.2d at pp. 370, 375]), where police have relied on erroneous entries by a court clerk in a law enforcement database reflecting an outstanding arrest warrant (*Arizona v. Evans* (1995) 514 U.S. 1, 4-5 [131 L.Ed.2d 34, 39-40]), and where police have reasonably relied on an error in a police database regarding warrants and the "error was the result of isolated negligence attenuated from the arrest" (*Herring, v. United States*, *supra*, 555 U.S. at p. 137 [172 L.Ed.2d at p. 502]).

These examples do not fit this situation. Here, the agent's act in reaching into the duffel bag and sweeping the bottom when there was no indication a patdown of the bag's exterior would have been insufficient violated well-established,

long-standing precedent. Application of the exclusionary rule here "serves to deter deliberate . . . conduct" of law enforcement agents that the agents should have known was unconstitutional.

DISPOSITION

The judgment is reversed.

_____ ROBIE _____, J.

We concur:

_____ RAYE _____, P. J.

_____ MAURO _____, J.