

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE ARAIZA TRILLO,

Defendant and Appellant.

C069161

(Super. Ct. No. 106289)

Defendant Jesse Araiza Trillo did not expressly plead guilty to the substantive charge against him, felony possession of methamphetamine, but the ultimate effect was the same as if he had. After an unsuccessful motion to suppress, a jury waiver, and a submission of the case without argument, the court found defendant guilty of the substantive charge. He was sentenced to the lower term of 16 months, doubled for a prior strike offense, making the total term of imprisonment two years and eight months.

On appeal, defendant raises two contentions. First, he asserts the trial court erred in denying his motion to suppress

because the evidence against him was obtained through an unlawful detention. Second, he argues the trial court's failure to advise him of his constitutional rights when the case was submitted requires reversal. We agree with the People that the trial court properly denied defendant's motion to suppress. We find merit in the second contention, however, and conclude the submission in this case was a "slow plea," tantamount to a guilty plea. Therefore, the trial court's failure to advise defendant of his constitutional rights is reversible because the record does not establish that defendant knowingly and intelligently waived his rights. Accordingly, we reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Officer Nolan McManus was on patrol, in uniform and driving a marked police car, about 1:15 a.m. when he saw defendant walking down the sidewalk. Concerned about problems with transients camping at night on private property nearby, Officer McManus decided to ask defendant if he lived in the area. Officer McManus pulled over without turning on his siren or flashing his lights. He got out of the car, approached defendant, and asked him how he was doing. Officer McManus may have had a flashlight in his hand but did not have his hand on a weapon.

Defendant told Officer McManus he lived nearby and was on his way home from school. The officer asked if he was on probation or parole, and he said he was not. Officer McManus asked if defendant had any identification, and when he said he

did, the officer asked if he could see it. Defendant gave him his California ID card. Because defendant seemed particularly nervous, Officer McManus asked him if "anything was going to pop up" when he ran the ID. Defendant then admitted he was on parole. Officer McManus confirmed his parole status and performed a parole search of his person. The officer found two small baggies in the coin pocket of his pants. He told Officer McManus there was methamphetamine in both baggies. Test results later confirmed the baggies contained methamphetamine.

The trial court held defendant to answer following a preliminary hearing in which defense counsel conducted only brief cross-examination, offered no defense evidence, and made no argument. He moved to suppress the evidence against him on the grounds it had been obtained during an unlawful detention. Following the trial court's denial of the motion, defense counsel indicated defendant would "admit the possession," but there would be a dispute over whether a prior conviction was a strike offense. When counsel agreed to waive jury trial, the trial court advised defendant of his right to a jury, which he also waived. The trial court clearly indicated defendant was not waiving trial entirely; he was simply agreeing to a bench trial. After the jury waiver, there was some discussion of submitting the case on "the paperwork," but the possibility of a full evidentiary hearing was left open.

When the time came for the next step, however, defense counsel and the prosecution agreed to submit the case without further evidence or argument. The court immediately announced

its ruling finding defendant guilty of possessing methamphetamine. Defendant said nothing throughout this exchange and was not invited to participate. There were additional proceedings related to the enhancements, but no further discussion of the substantive charge and conviction.

DISCUSSION

I

Motion To Suppress

Defendant asserts the trial court erred in denying his motion to suppress because the evidence against him was obtained through an unlawful detention. We agree with the People that the trial court properly denied the motion.

A

Standard Of Review

"In reviewing the trial court's ruling on the suppression motion, we uphold any factual finding, express or implied, that is supported by substantial evidence, but we independently assess, as a matter of law, whether the challenged search or seizure conforms to constitutional standards of reasonableness." (*People v. Hughes* (2002) 27 Cal.4th 287, 327.)

B

Defendant Was Not Detained

Defendant contends the trial court erred when it found he was not detained during his encounter with Officer McManus and denied his motion to suppress on that basis. Defendant admits "courts have held that police officers may approach an individual on the street and ask him/her questions without

implicating the Fourth Amendment so long as the individual is free not to answer and to go on his/her way." Defendant goes on to assert, "[h]owever, once the officer or circumstances would convey to a reasonable person that [he/she] w[as] not free to terminate the encounter and go about [his/her] business, a detention has occurred, the Fourth Amendment is implicated, and reasonable suspicion is required." We disagree. As we explain, defendant focuses too narrowly on only part of the applicable test.

"[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." (*Terry v. Ohio* (1968) 392 U.S. 1, 16 [20 L.Ed.2d 889, 903].) "[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free 'to disregard the police and go about his business,' [Citation], the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." (*Florida v. Bostick* (1991) 501 U.S. 429, 434 [115 L.Ed.2d 389, 398].) "[M]ere police questioning does not constitute a seizure." (*Ibid.*)

"[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests

or otherwise terminate the encounter." (*Florida v. Bostick*, *supra*, 501 U.S. at p. 439 [115 L.Ed.2d at pp. 401-402].)

"Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." (*Terry v. Ohio*, *supra*, 392 U.S. at p. 19, fn. 16 [20 L.Ed.2d at p. 905, fn. 16].) "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." (*United States v. Mendenhall* (1980) 446 U.S. 544, 554 [64 L.Ed.2d 497, 509].) The test for whether a seizure has taken place is "an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." (*California v. Hodari D.* (1991) 499 U.S. 621, 628 [113 L.Ed.2d 690, 698].)

By focusing on only one aspect of the test, whether a reasonable person would feel free to terminate the encounter, defendant ignores that a show of authority is required for an encounter to rise to the level of a detention. Defendant relies on a number of the cases above, *Florida v. Bostick*, *supra*, 501 U.S. 429 [115 L.Ed.2d 389] in particular, to support his articulation of the standard. Defendant's reliance on this case is misplaced.

Bostick makes very clear that a show of authority is required; this is one of the main points of analysis in that case. (*Florida v. Bostick, supra*, 501 U.S. at pp. 434, 439 [115 L.Ed.2d at pp. 398, 401-402].) The key portion of the language quoted above is "*whether the police conduct would have communicated to a reasonable person that the person was not free to . . . terminate the encounter.*" (*Id.* at p. 439 [115 L.Ed.2d at pp. 401-402], italics added.) Absent a show of authority to convey to a reasonable person that he or she is not free to leave, there can be no detention.

Here, Officer McManus did not turn on his siren or flash his lights when he pulled over. When he approached defendant, he asked him how he was doing. Defendant's response, he lived nearby and was headed home from school, volunteered where he was going. According to Officer McManus's testimony, he had asked defendant how he was doing, not what he was doing or where he was going. This set a casual tone for the conversation, which continued through when Officer McManus asked defendant if "anything was going to pop up" when he ran his ID. Officer McManus did not use coercive words at any point during the encounter, and his actions were equally innocuous. He may have been holding a flashlight, and he did not put his hand on a weapon at any time. The show of authority necessary to turn this consensual encounter into a detention simply was not present here.

II

Slow Plea

A slow plea is "an agreed-upon disposition of a criminal case via any one of a number of contrived procedures which does not require the defendant to admit guilt but results in a finding of guilt on an anticipated charge and, usually, for a promised punishment." (*People v. Tran* (1984) 152 Cal.App.3d 680, 683, fn. 2.) A clear example of a slow plea is the "bargained-for submission on the preliminary hearing transcript, in which the only evidence is the victim's credible testimony, defendant does not testify, and counsel presents no arguments on defendant's behalf." (*People v. Jackson* (1987) 192 Cal.App.3d 209, 216.) A submission cannot be considered tantamount to a guilty plea if the defendant advanced a substantial defense. (*People v. Wright* (1987) 43 Cal.3d 487, 497.)

In *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605, our Supreme Court held "in all cases in which the defendant seeks to submit his case for decision on the transcript or to plead guilty, the record shall reflect that he has been advised of his right to a jury trial, to confront and cross-examine witnesses, and against self-incrimination. . . . Express waivers of the enumerated constitutional rights shall appear. In cases in which there is to be a submission without a reservation by the defendant of the right to present evidence in his own defense he shall be advised of that right and an express waiver thereof taken. If a defendant does not reserve the right to present additional evidence and does not advise the court that he will

contest his guilt in argument to the court, the defendant shall be advised of the probability that the submission will result in a conviction of the offense or offenses charged."

In *Wright*, however, the court held "*Bunnell's* requirement of a self-incrimination advisement and waiver is not constitutionally compelled for submissions that are not tantamount to a plea of guilty." (*People v. Wright, supra*, 43 Cal.3d at p. 495.) In that context, *Boykin-Tahl*¹ advisements and waivers are "required only to effectuate the judicial policies of minimizing error, maximizing protection of defendants' constitutional rights, and eliminating the necessity of requiring trial and appellate courts to determine whether a submission is a slow plea. A trial court's failure to comply with this judicial rule of criminal procedure requires reversal only if it is reasonably probable a result more favorable to the defendant would have been reached if he had been properly advised." (*Wright*, at p. 495.) In the context of a slow plea, however, the court in *Wright* held that failure to advise is reversible per se. (*Id.* at pp. 493-494.)

In *Bunnell* the court had attempted to simplify submission cases on appeal by eliminating the need for appellate courts to determine whether a submission was a slow plea. (*People v.*

¹ *Boykin v. Alabama* (1969) 395 U.S. 238 [23 L.Ed.2d 274] and *In re Tahl* (1969) 1 Cal.3d 122 [establishing the trial court must, before accepting a guilty plea, expressly advise the defendant and obtain waivers of his or her constitutional rights to trial by jury, to confront and cross-examine witnesses, and against self-incrimination].

Bunnell, supra, 13 Cal.3d at p. 605.) *Wright*, however, reestablished the need to assess on appeal whether a submission was a slow plea in order to determine the standard of review when trial courts failed to advise. (*People v. Wright, supra*, 43 Cal.3d at p. 495 ["Unfortunately, when trial courts fail to obey the *Bunnell* requirement to advise defendants in submission cases of their rights, the bifurcated standard of review we announce today compels appellate courts to make the burdensome determination *Bunnell* was intended to avoid"].)

People v. Howard (1992) 1 Cal.4th 1132, 1178 and *People v. Mosby* (2004) 33 Cal.4th 353, 361 added another layer to the appellate inquiry by requiring an examination of the entire record to determine whether the defendant's plea was voluntary and intelligent, superseding *Wright's* rule of automatic reversal in slow plea cases when the trial court failed to advise. *Mosby* cemented the need to determine initially whether a submission was a slow plea, because *Mosby* requires that a defendant's criminal history be taken into account when assessing whether he or she knowingly and intelligently waived constitutional rights. (*Mosby*, at p. 365.) Accordingly, we must assess first the circumstances of the entire proceeding to determine whether a submission is a slow plea. (*People v. Wright, supra*, 43 Cal.3d at p. 496.) Then, assuming the submission was a slow plea, we must examine the entire record to determine whether defendant knowingly and voluntarily waived his constitutional rights. (*Mosby*, at p. 365.)

Here, after the trial court denied defendant's motion to suppress, defense counsel indicated defendant would "admit the possession." Defendant waived the right to a jury trial after being properly advised of that right, but the trial court clearly indicated defendant was simply agreeing to a bench trial and nothing more. Next, there was some discussion of submitting the case, but there were also references to the possibility of a full evidentiary hearing.

At the next proceeding, however, defense counsel and the prosecution agreed to submit the case without further evidence or argument. The court immediately announced its ruling finding defendant guilty of possessing methamphetamine. Defendant said nothing throughout this exchange and was not invited to participate. This concluded discussion of the substantive conviction.

The People argue this was neither a slow plea nor a submission. Instead, they argue this was a bench trial, because there was no bargaining between defendant and the prosecution and no negotiated punishment. Through this argument, the People imply either bargaining or a negotiated punishment is required for a slow plea, perhaps even for a submission. As we explain, this overstates the requirements.

A submission requires only that: submitting the case to be decided by the trial court based on prior proceedings. A slow plea requires a bit more: "an agreed-upon disposition . . . [that] . . . results in a finding of guilt on an anticipated charge and, *usually* for a promised punishment." (*People v.*

Tran, supra, 152 Cal.App.3d at p. 683, fn. 2, italics added.) This language demonstrates that although a promised punishment is often involved in a slow plea, it is not required. All that is required is an "agreed-upon disposition," an anticipated charge, and a finding of guilt. (*Ibid.*) Because the prosecution must at least accept a defendant's submission, a unilateral submission is not possible, and an agreement is inherently required to submit a case. (*Id.* at p. 683.) Therefore, a submission can be an "agreed-upon disposition," which can, in turn, result in a finding of guilt on an anticipated charge. (*Id.* at p. 683, fn. 2.) That is exactly what transpired here when defendant did not present evidence or argument.

The example of a slow plea cited above is a "bargained-for submission on the preliminary hearing transcript, in which the only evidence is the victim's credible testimony, defendant does not testify, and counsel presents no arguments on defendant's behalf." (*People v. Jackson, supra*, 192 Cal.App.3d at p. 216.) The only differences between that example and this case are that the submission here was not expressly bargained-for, and the only evidence was the officer's credible testimony. These distinctions are not meaningful, and do not distinguish this case from the example. Accordingly, the submission here was a slow plea, and the only question that remains is whether the record shows that defendant knowingly and intelligently waived his constitutional rights in connection with that plea.

As the People correctly point out, *Mosby* requires us to take into account defendant's criminal history when assessing whether he knowingly and intelligently waived his constitutional rights. (*People v. Mosby, supra*, 33 Cal.4th at p. 365.) The People are also correct that defendant is "not a newcomer to the criminal justice system." This, however, is not the end of the inquiry. Defendant was on parole when he was arrested for this offense, but there is no evidence in the record regarding whether his prior convictions involved full trials. Therefore, we cannot infer he knowingly and voluntarily waived his constitutional rights based solely on his criminal history.

After examining the entire record and assessing the totality of the circumstances, we see nothing from which we can conclude defendant knowingly and voluntarily waived his constitutional rights -- in particular, his rights to confront and cross-examine witnesses and against self-incrimination. Therefore, the lack of proper advisements and waivers requires reversal.

DISPOSITION

The judgment is reversed.

We concur: ROBIE, J.

NICHOLSON, Acting P. J.

MAURO, J.