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

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME SANTOS,

Defendant and Appellant.

C069518

(Super. Ct. No. 10F00319)

A jury convicted defendant Jaime Santos of assault with a deadly weapon upon a peace officer, driving with disregard for safety while fleeing a pursuing peace officer, driving opposite traffic while fleeing a pursuing peace officer, possession of morphine, carrying a loaded firearm, and possession of diazepam. The trial court found true a prior felony conviction allegation and sentenced defendant to an aggregate of 13 years in state prison.

Defendant now contends his trial counsel rendered ineffective assistance by arguing defendant's motion to suppress evidence at the preliminary hearing but then failing to reassert the motion after defendant was held to answer.

Having reviewed the legality of the search and seizure, we conclude defendant has failed to demonstrate that counsel rendered ineffective assistance. But we have identified a clerical error in the abstract of judgment. We will affirm the judgment and direct the trial court to correct the abstract of judgment.

BACKGROUND

The facts set forth are those adduced at the combined hearing for the preliminary examination and defendant's suppression motion.

Twin Rivers Police Officer Justin Stanley was on duty, in uniform, and driving a patrol car on the evening of January 9, 2010. His car was marked "police" and was equipped with a siren, overhead lights, and a red and blue light bar on top. He was on patrol alone in a residential area near Hamilton Street Park where illicit activity had occurred, including drug sales, trespassing and vandalism, and where neighbors had reported parked cars that did not belong in the area. One of Officer Stanley's duties was to lock the exterior gates of the park after it closed at dusk.

Officer Stanley saw a white Chevy pickup parked five feet from the park and facing the open gates. The pickup's engine and headlights were off, the driver's window was rolled up, the dome light was on, and defendant, the sole occupant, was sitting in the driver's seat looking down toward his lap. Officer Stanley made a U-turn, parked seven to 10 feet behind the pickup, and illuminated the truck with his white spotlight.

Officer Stanley wanted to do a welfare check and ensure there was no illicit activity. The officer approached the truck on the driver's side, noting that the window had been rolled down. The pickup engine was still off. Officer Stanley asked defendant, "[H]ey man, what's up" and "what's going on." Officer Stanley did not have a weapon or night stick in his hand. Showing the officer a disposable camera, defendant said he

was looking at the photos and trying to decide which ones to develop. Officer Stanley asked defendant where he lived and what he was doing there. Defendant replied that he lived with family members on Taylor Street, which the officer knew was one-half mile away. Less than a minute into the contact, the officer asked for identification. Defendant claimed that he either did not have a driver's license or that his license was somewhere in the car but never produced one. The officer asked for any other form of identification. Defendant produced a credit card and also provided his date of birth in response to the officer's request. Officer Stanley returned the credit card to defendant and asked whether defendant minded if he "r[a]n [his] name." Defendant asked "what for" and said he had not done anything wrong. The officer walked back to his patrol car. The officer did not draw a weapon, tell defendant that he was not free to leave, or activate his overhead red and blue lights or siren. The officer conducted a criminal records check and learned that defendant had a criminal history and was on searchable probation. About this time, two other officers in another vehicle arrived to help lock up the park.

Officer Stanley and one of the other officers approached the driver's side of the pickup. The driver's window was now partially rolled up. Defendant rolled the window all the way up and started the truck's engine. The officers ordered defendant to stop and to get out. Instead, defendant fled the scene. Officers pursued defendant for more than five miles with their overhead red and blue lights and sirens activated. No further evidence was adduced on the suppression motion.

The prosecutor argued the interaction was not a temporary detention but instead a consensual encounter. Defendant's attorney argued the encounter constituted a temporary detention for purposes of interrogation, and that defendant was not free to leave.

The magistrate denied the suppression motion, noting that defendant's reliance upon cases where the driver had been pulled over were inapplicable because defendant was already parked. The magistrate ruled the contact was "not a detention" but instead a

consensual encounter, noting that an officer could walk up to anyone on the street or in a parked car and “engage in a conversation.” The magistrate concluded that the officer could ask for identification because defendant appeared to have driven to the location since he was the only one in the car. The magistrate noted that defendant lacked a driver’s license, a Vehicle Code violation. After obtaining defendant’s credit card and returning it to him, the officer walked back to his patrol car. The court determined that defendant was free to leave at that point but did not do so. The magistrate also determined that the officers could lawfully conduct a probation search after the officer learned defendant was on searchable probation.

The court-appointed attorney who made the suppression motion at the preliminary examination was subsequently relieved and newly retained counsel did not seek to suppress the evidence after defendant was held to answer.

The jury convicted defendant of assault with a deadly weapon upon a peace officer (Pen. Code, § 245, subd. (c) -- count one), driving with disregard for safety while fleeing a pursuing peace officer (Veh. Code, § 2800.2, subd. (a) -- count two), driving opposite traffic while fleeing a pursuing peace officer (Veh. Code, § 2800.4 -- count three), possession of morphine (Health & Saf. Code, § 11350, subd. (a) -- count four), carrying a loaded firearm (former Pen. Code, § 12031, subd. (a)(1) -- count five), and possession of diazepam (Health & Saf. Code, § 11375, subd. (b)(2) -- count six). In bifurcated proceedings, the trial court found a prior felony conviction allegation true as a strike prior and as a serious felony. The trial court sentenced defendant to 13 years in state prison.

DISCUSSION

Defendant contends his trial counsel rendered ineffective assistance by not renewing the motion to suppress evidence after defendant was held to answer. The failure to renew the motion in the trial court ordinarily would preclude review on appeal. (*People v. Richardson* (2007) 156 Cal.App.4th 574, 582-589; *People v. Lilienthal* (1978) 22 Cal.3d 891, 896) But because defendant contends counsel’s performance was

prejudicially deficient in failing to preserve the issue for appeal, we will review the legality of the search and seizure in order to determine whether counsel rendered ineffective assistance. (*People v. Hart* (1999) 74 Cal.App.4th 479, 485-487; compare *People v. Hinds* (2003) 108 Cal.App.4th 897, 901-902 [limiting *Hart* to a defendant who proceeds through a jury trial; *Hart* inapplicable where a defendant entered a plea bargain].)

To establish ineffective assistance of counsel, defendant must demonstrate that counsel's performance was deficient and that defendant suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 [80 L.Ed.2d 674, 693, 696]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) On appeal, we will reverse for ineffective assistance of counsel only if the record affirmatively reflects that counsel had no rational tactical purpose. (*People v. Frye* (1998) 18 Cal.4th 894, 979-980, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

We turn to the merits of the suppression motion to determine whether counsel rendered ineffective assistance in failing to renew the motion.

There are three types of police contact. The first type is a “ ‘consensual encounter’ ” which requires no objective justification and in which there is no restraint on a person's liberty. (*People v. Bailey* (1985) 176 Cal.App.3d 402, 405.) The second type, a detention, “involves a seizure of the individual for a limited duration and for limited purposes” and is acceptable “ ‘if there is an articulable suspicion that a person has committed or is about to commit a crime.’ ” (*Ibid.*) The third type, an arrest, requires probable cause. (*Ibid.*)

During a consensual encounter, an officer may ask about the contents of a person's pockets, ask for identification, and even ask the person to submit to a search. In determining whether compliance was voluntary, the manner or mode of the request is considered. (*People v. Franklin* (1987) 192 Cal.App.3d 935, 941 (*Franklin*).) “[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].)

An objective test applies in determining whether a seizure has occurred. The issue is whether the officer’s words and actions conveyed to a reasonable person that he was being ordered to restrict his movement. (*People v. Celis* (2004) 33 Cal.4th 667, 673.) We accept the magistrate’s express or implied findings when supported by substantial evidence and determine independently whether the search or seizure was reasonable. (*People v. Woods* (1999) 21 Cal.4th 668, 673; *People v. Watkins* (2009) 170 Cal.App.4th 1403, 1408.)

Defendant quotes a comment by the magistrate out of context. He notes that the magistrate said at one point, “would the average person drive away? I’ll be honest with you, probably not” Defendant argues the magistrate’s comment amounted to a finding that a reasonable person in defendant’s position would not have felt free to leave, but the trial court then applied the wrong standard in ruling there was no detention.

The entire statement by the magistrate, however, was as follows:

“THE COURT: All right. The motion is denied. Counsel, it’s not a detention. An officer can walk up to any one of us on the street or up to a parked car and engage in a conversation. Case law is very clear on that point. [¶] He asks for ID. One could argue circumstantially that the defendant, with no one else present in the car, drove to that location. The officer could inquire for ID. [Defendant] doesn’t have a driver’s license. Arguably he is in violation of the Vehicle Code at th[at] point. Nonetheless, the officer returns his credit card to him, and walks away. [¶] Now, he didn’t, and would the average person drive away? I’ll be honest with you, probably not, but that does not mean that they are not using their legal rights to have done so at that point.”

The entire quote, in context, conveys the trial court's conclusion that the officer's specific words and actions would not have conveyed to a reasonable person that the officer was ordering the person to restrict his movement.

Here, the magistrate impliedly found that defendant had not been subject to any form of restraint by Officer Stanley and expressly found that defendant was free to drive away when the officer returned to his patrol car to run the criminal records check. Substantial evidence supports both findings. Defendant was not pulled over, he was already parked. As the magistrate noted, it was "no different than if [defendant] were seated at a park bench" or "standing on the sidewalk and leaning against his car."

Citing several cases in which an officer used a spotlight, defendant argues the officer's use of his spotlight here rendered the encounter a detention because a reasonable person would have believed that he was not free to leave, decline the officer's request or terminate the encounter. But as defendant acknowledges, the court in *People v. Perez* (1989) 211 Cal.App.3d 1492 held that the mere use of a spotlight is not sufficient to cause a person to believe his freedom of movement has been restrained. (*Id.* at p. 1496.) "While the use of high beams and spotlights might cause a reasonable person to feel himself the object of official scrutiny, such directed scrutiny does not amount to a detention." (*Ibid.*; see also *Franklin, supra*, 192 Cal.App.3d at pp. 938, 940; *People v. Rico* (1979) 97 Cal.App.3d 124, 128-129, 130; compare *People v. McKelvy* (1972) 23 Cal.App.3d 1027, 1032, 1034 [defendant in spotlight and surrounded by four armed officers]; *People v. Roth* (1990) 219 Cal.App.3d 211, 213, 215 [officer's use of spotlight and command to approach while standing behind the car door would convey to a reasonable person that he was not free to leave]; *People v. Garry* (2007) 156 Cal.App.4th 1100, 1103-1104, 1111 [officer's use of spotlight and action of walking briskly towards defendant, who walked backwards nervously claiming he lived at the adjacent residence, and asking about defendant's legal status would be intimidating to a reasonable person].)

Although the officer here used his spotlight, he did not use his emergency lights, that is, his red and blue lights. The officer parked behind defendant and did not block his path. The officer approached and asked defendant, “what’s up” and “what’s going on.” The officer was speaking casually with defendant instead of commanding a response. The officer did not draw his weapon or nightstick. Defendant showed the officer a disposable camera and said he was trying to decide which photos to develop. The officer asked where defendant lived. When defendant said he lived on a certain street which the officer knew was about one-half mile away, the officer asked for identification and defendant’s date of birth. Defendant was unable to produce a driver’s license. As the trial court noted, driving without a license is a Vehicle Code violation. (Veh. Code, §§ 12500, subd. (a), 40000.11, subd. (b).) Instead, defendant produced a credit card which the officer returned to defendant before the officer walked back to his patrol car to conduct a criminal records check. Defendant voluntarily answered the officer’s questions and provided his credit card and date of birth. Running a records check is not a seizure. (*People v. Bouser* (1994) 26 Cal.App.4th 1280, 1285-1286.) We agree with the magistrate’s conclusion that the initial interaction was a consensual encounter. Once the officer learned that defendant had possibly committed a Vehicle Code violation by driving without a license, the officer could reasonably detain defendant. (*People v. Souza* (1994) 9 Cal.4th 224, 231.)

Defendant’s counsel was not asked to explain his decision not to renew the suppression motion in the trial court, but there is a satisfactory explanation: the motion lacked merit. Defendant has not established ineffective assistance of counsel.

Our review of the record nonetheless identified a clerical error in the abstract of judgment. The abstract incorrectly indicates that defendant was convicted on count two of a violation of Vehicle Code section “2800.3(a)” when it should read “2800.2(a).” We will direct the trial court to correct the abstract of judgment.

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment by replacing “2800.3(a)” in the row for count 2 with “2800.2(a).” The trial court shall send a certified copy of the corrected abstract of judgment to the California Department of Corrections and Rehabilitation.

MAURO, J.

We concur:

BLEASE, Acting P. J.

HULL, J.