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

THE PEOPLE,

Plaintiff and Appellant,

v.

RICHARD BARNES,

Defendant and Respondent.

C070605

(Super. Ct. No. 11SCR07210)

After an evidentiary hearing, the magistrate granted defendant Richard Barnes's motion to suppress evidence obtained during a traffic stop and ensuing search of his person. After denying the People's motion for reconsideration, the magistrate ordered the matter dismissed. The People appeal.

The People contend, and defendant concedes, the order dismissing the matter must be reversed. We remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Orland City Police Officer Grant Carmon testified at the suppression hearing. He said on July 15, 2011, he saw defendant talking on a cellular telephone while driving a car. Carmon knew defendant and was aware he had a drug problem.

Officer Carmon said he conducted a traffic stop based on the cell phone violation. He contacted defendant and advised him of the reason for the traffic stop. Defendant apologized for talking on the phone. He explained his mother was in the hospital and he thought the call was about his mother. Rather than issue a traffic citation, Carmon gave defendant an oral warning for the cell phone violation. Carmon returned to defendant the materials defendant had provided him.

While defendant was standing outside his car, Officer Carmon asked him "if he had anything illegal inside the vehicle or on his person." Defendant said, "no." Carmon then asked, "Do you mind if I check?" and defendant said, "Go ahead." Defendant put his hands out to the side, and Carmon started searching defendant's pockets. In the front right coin pocket, Carmon found a "small round little canister" that contained "a crystalline substance consistent with methamphetamine." No contraband was found in defendant's car.

After Officer Carmon testified, defense counsel sought to have defendant testify. The magistrate stated: "This is a [Penal Code section] 1538.5 motion. I don't need to hear from the defendant. There have been absolutely no specific and articulable facts giving rise to this officer asking for permission to search his car. The motion is granted. All of the evidence is suppressed. That's the order."

When the prosecutor indicated he did not "follow" the magistrate's reasoning, the magistrate responded, "There's absolutely no basis in fact for this officer to ask permission to search. He has to have specific and articulable facts on that occasion to ask permission to do anything. And he does have -- nothing has been said here. He has some history in the past. That does not qualify him on this particular occasion that is -- it's without reasonable suspicious cause whatsoever to ask permission to search. The search was illegal, and the motion is granted."

The prosecutor asked for a trial date because he believed the trial “court’s simply wrong on the legal issue here.” The prosecutor attempted to explain his position, but the magistrate interrupted, stating, “Well, then file an appeal.”

DISCUSSION

The People contend, and defendant concedes, the trial court improperly granted defendant’s suppression motion based on an erroneous belief an officer must have reasonable suspicion before requesting consent to search. The parties agree that, based on its mistaken belief, the magistrate improperly terminated the suppression hearing.

The People further contend the traffic stop had reverted to a consensual encounter before Officer Carmon requested consent to search. Thus, the People argue the order granting the suppression motion must be reversed. Defendant counters that whether the detention had concluded, and whether the contact had transformed into a consensual encounter, requires evaluation of the totality of the circumstances following completion of the presentation of evidence.

“In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated. We review the court’s resolution of the factual inquiry under the deferential substantial-evidence standard. The ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review. [Citation.]” (*People v. Saunders* (2006) 38 Cal.4th 1129, 1133-1134.)

“A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity.” (*People v. Souza* (1994) 9 Cal.4th 224, 231.) This standard of reasonable suspicion applies to vehicle stops. (*United States v. Sharpe* (1985) 470 U.S. 675, 682 [84 L.Ed.2d 605, 613].)

“ ‘[T]he foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations,’ [citation], which afford the ‘ “quantum of individualized suspicion” ’ necessary to ensure that police discretion is sufficiently constrained [citation].” (*Whren v. United States* (1996) 517 U.S. 806, 817-818 [135 L.Ed.2d 89, 100].) The officer may detain the motorist for the period of time necessary to discharge the duties related to the traffic stop. (*People v. Brown* (1998) 62 Cal.App.4th 493, 496-497.)

Vehicle Code section 23123, subdivision (a), provides: “A person shall not drive a motor vehicle while using a wireless telephone unless that telephone is specifically designed and configured to allow hands-free listening and talking, and is used in that manner while driving.”

In this case, Officer Carmon had reasonable suspicion to perform a traffic stop because he saw defendant talking on a cellular telephone while driving. There is no dispute that defendant, the driver, was lawfully detained.

The People argue the lawful detention ended when Officer Carmon gave defendant an oral warning and returned the documents defendant had given him. Thus, in the People’s view, the request for consent to search was proper because it occurred during a consensual encounter.

A detention may become a consensual encounter when the detained person becomes free to leave and no longer is subject to an officer’s force or show of authority. (E.g., *U.S. v. Hernandez* (10th Cir. 1996) 93 F.3d 1493, 1498.) “A traffic stop may become a consensual encounter if the officer returns the license and registration and asks questions without further constraining the driver by an overbearing show of authority. [Citation.] A consensual encounter is the voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement officer. If the individual is free to leave at any time during the encounter, he or she is not seized under the Fourth Amendment. Whether an encounter is a detention or a consensual encounter depends on

whether the police conduct would have conveyed to a reasonable person that he or she was not free to decline the officer's requests or otherwise terminate the encounter.

[Citations.] A person is seized only when that person has an objective reason to believe he or she is not free to end the conversation with the officer and proceed on his or her way. [Citation.]” (*Ibid.*)

Because the magistrate terminated the suppression hearing without allowing the parties to fully develop the evidence, the record does not reveal whether the totality of circumstances reasonably suggested defendant was free to terminate the encounter. Thus, while we must reverse the order dismissing the action, we cannot conclude as a matter of law the request to search occurred during a consensual encounter.

Even if the detention did not become a consensual encounter, Officer Carmon did not need reasonable suspicion to request consent to search, unless the request unduly prolonged the detention. (E.g., *People v. Gallardo* (2005) 130 Cal.App.4th 234, 238.)

In *Gallardo* a deputy sheriff stopped the defendant for driving a truck with a smashed taillight. (*People v. Gallardo, supra*, 130 Cal.App.4th at p. 236.) The deputy told the defendant the reason for the stop and inspected his license and registration. (*Ibid.*) Then the deputy asked the defendant “if there was anything illegal in the car, like weapons or drugs.” (*Id.* at p. 237.) The defendant said there was not, and the deputy asked for permission to search. The defendant agreed and stepped out of the car. (*Ibid.*) The search revealed drugs and paraphernalia. (*Ibid.*)

The defendant appealed the denial of his suppression motion, arguing, among other things, “before requesting consent to search, the police must have an articulable suspicion of wrongdoing.” (*People v. Gallardo, supra*, 130 Cal.App.4th at p. 238.) The appellate court rejected this argument, concluding an officer may request consent to search so long as requesting consent does not unduly prolong the traffic stop. (*Id.* at pp. 238-239.)

In this case, the People concede that, because the magistrate terminated the suppression hearing without allowing the parties to fully develop the evidence, the record is insufficient to determine whether Officer Carmon's request for consent to search unduly prolonged the traffic stop. On remand, the parties will be free to further litigate that issue.

DISPOSITION

The orders suppressing evidence and dismissing the action are reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

DUARTE, J.