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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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THE PEOPLE,

Plaintiff and Respondent,

v.

YURIY PENKOV,

Defendant and Appellant.

C075049

(Super. Ct. No. CRF13-1348)

This appeal challenges the trial court's denial of a motion to suppress evidence. Defendant Yuriy Penkov pleaded not guilty to charges of transporting and possessing methamphetamine (Health & Saf. Code, §§ 11379, subd. (a); 11377, subd. (a)), receiving stolen property (Pen. Code, § 496, subd. (a)), and acquiring card account information with intent to defraud (Pen. Code, § 484e, subd. (d)).<sup>1</sup> He filed a motion under section

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<sup>1</sup> Subsequent undesignated references to sections are to the Penal Code.

1538.5 to suppress evidence obtained from a warrantless search of his pickup truck and from a warrantless blood draw. The trial court denied the motion.

On the date set for trial, defendant agreed to plead no contest to possessing methamphetamine and receiving stolen property in return for a stipulated prison term of two years eight months. The trial court ultimately sentenced defendant to the agreed term in local custody.

Defendant appeals, claiming the trial court erred when it denied his motion to suppress. We conclude the trial court did not err when it denied the motion as to the evidence seized from defendant's truck, as defendant voluntarily consented to that search. However, we conclude the court erred when it denied the motion as to evidence derived from the blood draw, as no exigent circumstances justified taking the test without a warrant.

Because defendant's decision to plead no contest may have resulted from the erroneous denial of his motion to suppress, we must remand the case to give defendant an opportunity to withdraw his plea.<sup>2</sup>

#### FACTS

Yolo County Sheriff's Deputy Jose Pineda was on patrol by himself around 7:05 a.m., on April 1, 2013, when he saw a pickup truck parked on the shoulder of Old River Road. The truck was not displaying a rear license plate, a violation of the Vehicle Code. The truck was facing the wrong direction of travel, and it was parked in an area that was regularly posted as a no parking area.

Deputy Pineda parked his car about a half a car length behind the truck. He did not activate his lights or siren. He radioed in to his dispatch his location and that he was about to contact the driver of a white truck with no plates. He contacted the person

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<sup>2</sup> Defendant raises other grounds of appeal, but in light of our ruling on the motion to suppress, they are moot.

sitting in the truck's front seat, who was defendant, and informed him the reason for his contact.

As Deputy Pineda talked to defendant, he noticed defendant was constantly moving his right hand, and there were about four fixed-blade knives within his reach. The knives were about six to eight inches in total length. One hung from the rear view mirror, and one was on the transmission shifter. Another knife was on the center console among other large items, backpacks, and bags. Although the knives were not illegal to possess, Deputy Pineda became concerned because he could not see defendant's right hand and the knives were within reach. He asked defendant to step out of the truck.

Once defendant stepped out, Deputy Pineda noticed he was wearing two pairs of pants, and both were unbuttoned at the waist. Deputy Pineda asked him to button his pants, and the two continued talking at the rear of the truck. At some point, Deputy Pineda asked defendant for his driver's license, but he could not recall if he asked while defendant was seated in the truck or standing at the back of the truck.

Deputy Pineda asked defendant if he had any illegal weapons and drugs. Defendant said he did not. Deputy Pineda noticed defendant had large bulges in his pant's front pockets, and he asked if he could search him. Defendant consented. Deputy Pineda removed from defendant's pockets a couple of screwdrivers, a ratchet, and a large drill bit.

Deputy Pineda asked about the rear license plate. Defendant said it had fallen off and was somewhere in the truck. He asked Deputy Pineda if he could retrieve it, but Deputy Pineda said no because he was concerned for his own safety.

Deputy Pineda asked defendant who owned the truck. Defendant said his father owned it. Deputy Pineda also asked defendant if he was on probation or parole. Defendant said he was not. Asked if he had ever been arrested, defendant said he had been arrested "for a bunch of stuff" and had been in prison. Deputy Pineda commented

that defendant had a lot of stuff in the truck. Defendant said, "I know, I've been having problems with my wife. We're not getting along right now."

Deputy Pineda placed defendant in the backseat of his patrol car, but he did not place him in handcuffs. Standing outside the car with the rear door open, Deputy Pineda asked defendant if he could search the vehicle for the license plate. Defendant again asked if he could retrieve the plate, and Deputy Pineda again refused because the knives were a safety concern to him.

Deputy Pineda asked defendant if he had any drugs in the truck.<sup>3</sup> Defendant said no. Deputy Pineda again asked if he could search the truck for the license plate and any illegal drugs. After a brief hesitation, defendant nodded his head up and down and said yes. Defendant said the plate could be in the center console or the driver's door compartment. Deputy Pineda was still holding defendant's driver's license when he asked defendant if he could search the truck.

Deputy Pineda closed his car door, which locked defendant in the car. Deputy Pineda then radioed in defendant's driver's license number. He did this about three minutes and 10 seconds after he first informed dispatch of his location.

Inside the truck, Deputy Pineda found the license plate in the driver's door compartment. The truck's interior was "loaded to the roof," and the only space available was the driver's seat. In addition to the plate, Deputy Pineda found a pouch that contained a broken meth pipe, two Ramos fuel cards bearing the name Pegasus Pest Control, and a 16-inch double-edge knife. Deputy Pineda said it did not take long to locate the plate and these items. They "were just right there."

While searching the truck, and about 20 seconds after giving dispatch defendant's driver's license number, Deputy Pineda requested assistance from another deputy.

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<sup>3</sup> At this point, Deputy Pineda had not observed anything that would lead him to believe there were illegal drugs in the truck.

Deputy Eric Grow responded he was on his way. Some seconds later, dispatch informed Deputy Pineda that defendant's driver's license was valid, that he had no warrants and was not on parole, but he was known by local law enforcement officers.

About 50 seconds after that message, Deputy Pineda relayed to dispatch the truck's license plate number and asked for the last four numbers of the truck's vehicle identification number. About 20 seconds later, dispatch reported that the truck had a valid registration, it was not stolen, and it was registered to an Anna and Pablo Penkov. About five-and-a-half minutes had passed since Deputy Pineda first radioed in his position.

At some point after retrieving the rear license plate, Deputy Pineda looked for the front license plate. It was not visible on the truck because it was covered by a floor mat. Deputy Pineda lifted the floor mat and noticed the plate was bent backwards behind the truck's grill and was attached by a jumper cable. He did not remember if he observed the mat covering the license plate before he searched the truck.

Deputy Grow and another deputy arrived to assist with the search. They located two bindles of methamphetamine and a nine-piece lock pick set inside the truck. The deputies searched the truck for approximately three hours.

Upon completing the search, Deputy Pineda arrested defendant and transported him to the Yolo County Jail. He arranged for medics to test defendant's blood. It was the policy of the Yolo County Sheriff's Department at the time that a blood test was to be conducted with every felony drug arrest. Deputy Pineda did not recall if he asked defendant for his consent to draw blood. He did not attempt to obtain a warrant to draw defendant's blood.

## DISCUSSION

### I

#### *Standard of Review*

“ ‘The standard of appellate review of a trial court’s ruling on a motion to suppress is well established. We defer to the trial court’s factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment.’ [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 384.) We may affirm the denial of a suppression motion on a different ground than that relied upon by the trial court. (*People v. French* (2011) 201 Cal.App.4th 1307, 1325, fn. 5.)

### II

#### *Search of the Pickup*

Defendant contends the trial court erred in denying his motion to suppress evidence from the search of this pickup truck because his detention was overly prolonged and he did not voluntarily consent to the search. We conclude defendant forfeited the first argument, and we find he voluntarily gave his consent.

#### A. *Reasonableness of the Detention*

Before the trial court, defendant contended the scope of his detention was unreasonable because placing him in the back of a patrol car was a de facto arrest without probable cause. On appeal, defendant admits a custodial arrest of a person for a minor traffic violation does not violate the Fourth Amendment. (*Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 323 [149 L.Ed.2d 549, 558].) He now argues only that his detention was unreasonable because it was overly prolonged. Because defendant failed to raise this argument before the trial court, he forfeits it here.

Defendant contends he has not forfeited his claim of an unreasonable detention because in his motion papers before the trial court he cited the case law governing the reasonableness of detention and challenged his detention as unreasonable. Defendant,

however, did not argue to the trial court that his detention was unreasonable because it was overly prolonged.

In fact, defendant argued just the opposite. At the hearing on his motion, defendant argued there was not enough time for Deputy Pineda to do all that he said he did in the first three minutes of the contact. Defendant contended that given the shortness of time, a more reasonable interpretation of the facts, in his opinion, showed Deputy Pineda put defendant in the back of the patrol car, retrieved the license plate number from the truck's front license plate, and then returned to defendant and asked for consent to search the truck.

The trial court expressed skepticism about this argument, so defendant moved on to another argument. He contended the scope of his detention was unreasonable because placing him in the back of a patrol car was a de facto arrest without probable cause. Defendant has conceded the error of this argument.

By not specifically arguing to the trial court the detention was overly prolonged, defendant has forfeited that contention on appeal. “[I]f defendants have a specific argument *other than the lack of a warrant* as to why a warrantless search or seizure was unreasonable, they must specify that argument as part of their motion to suppress and give the prosecution an opportunity to offer evidence on the point. [Citation.] . . . ¶] Moreover, once the prosecution has offered a justification for a warrantless search or seizure, defendants must present any arguments as to why that justification is inadequate. [Citation.] Otherwise, defendants would not meet their burden under section 1538.5 of specifying why the search or seizure without a warrant was ‘unreasonable.’ . . . [I]f defendants detect a critical gap in the prosecution’s proof or a flaw in its legal analysis, they must object on that basis to admission of the evidence or risk forfeiting the issue on appeal.” (*People v. Williams* (1999) 20 Cal.4th 119, 130, original italics.)

Defendant contends he preserved the contention by challenging the detention’s reasonableness in general and by quoting in his trial brief *People v. Torres* (2010) 188

Cal.App.4th 775, to the effect that when “a detention becomes overly intrusive—by becoming unreasonably prolonged or involving unreasonable protective measures, for example—it evolves into a de facto arrest.” (*Id.* at p. 786.) These generic references to reasonableness and the standard of reasonableness were insufficient to preserve the argument, as they did not specify defendant’s contention. Nowhere in his moving papers or his oral argument did defendant specify he was challenging the detention’s reasonableness based on its length.

Defendant argues counsel went to great lengths “to pin down the sequence of events as they occurred in relationship to the dispatch tape’s time parameters,” but he did this not to show the detention went long, but to show it went too short for Deputy Pineda to have done what he said he did before he searched the truck. This argument did not put the court and the prosecution on notice that defendant was contending the detention was overly prolonged. Because defendant did not argue at trial his detention was overly prolonged, he forfeits that contention.

B. *Voluntariness of Defendant’s Consent*

Defendant contends the court erred in denying the motion to suppress because he did not voluntarily consent to a search of his truck. He argues his consent was not voluntary under the circumstances because Deputy Pineda did not advise him of his right to withhold consent, he was in custody when he gave consent, Deputy Pineda still had his driver’s license, and Deputy Pineda used psychologically coercive techniques to pressure him to consent. We conclude substantial evidence supports the trial court’s determination.

“The voluntariness of consent is a question of fact to be determined from the totality of circumstances. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 227 [36 L.Ed.2d 854] (*Schneckloth*); [*People v. Jenkins*] [(2000)] 22 Cal.4th 900, 973, [*Jenkins*].) If the validity of a consent is challenged, the prosecution must prove it was freely and voluntarily given—i.e., ‘that it was [not] coerced by threats or force, or granted

only in submission to a claim of lawful authority.’ (*Schneckloth, supra*, at p. 233; see [*Florida v. Royer* [(1983)] 460 U.S. 491, 497 [75 L.Ed.2d 229].)” (*People v. Boyer* (2006) 38 Cal.4th 412, 445-446.) “We view the record in the light most favorable to the trial court’s ruling, deferring to those express or implied findings of fact supported by substantial evidence. [Citations.]” (*Jenkins, supra*, 22 Cal.4th at p. 973.)

Some of the factors relevant to determining the voluntariness of consent are (1) whether the person was in custody at the time the consent was given; (2) whether law enforcement officers had their guns drawn; (3) whether *Miranda*<sup>4</sup> warnings had been given; (4) whether the person was informed of his right not to consent; and (5) whether the person was told that a search warrant could be obtained. (*People v. Ramirez* (1997) 59 Cal.App.4th 1548, 1558.) However, to advise defendant that he can deny permission to search is not a precondition to obtaining valid consent. (*Schneckloth, supra*, 412 U.S. at p. 233; *United States v. Watson* (1976) 423 U.S. 411, 424-425 [46 L.Ed.2d 598, 609-610]; *People v. James* (1977) 19 Cal.3d 99, 106.) And the failure to give proper *Miranda* warnings before asking consent does not vitiate an otherwise valid consent. (*People v. James, supra*, 19 Cal.3d at p. 115; *People v. Ramirez, supra*, 59 Cal.App.4th at p. 1560.)

Substantial evidence supports the trial court’s determination. The court found Deputy Pineda was respectful and soft-spoken when he spoke with defendant. It found Deputy Pineda was justified moving defendant out of his truck and into the car, and in not allowing defendant to retrieve the plate from his truck for personal safety reasons. The court found nothing inherently coercive about the way in which consent was achieved.

Defendant contends he did not voluntarily consent to the search under the circumstances because he was in custody at the time and Deputy Pineda did not inform

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<sup>4</sup> *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

him he could withhold consent. However, the fact of custody and the absence of proof that defendant knew he could withhold consent do not by themselves demonstrate coerced consent. (*United States v. Watson, supra*, 423 U.S. at p. 424.) Moreover, defendant was not under arrest at the time, was not held in handcuffs, and was never held at gunpoint.

Defendant argues his consent was not voluntary because Deputy Pineda still had his driver's license when he asked for consent. There was nothing coercive in that fact, as Deputy Pineda had yet to call in the driver's license number and had not determined whether to issue a citation. Nothing in the record indicates Deputy Pineda threatened not to return defendant's drivers license unless defendant consented to the search.

Defendant cites to a few law review articles to contend Deputy Pineda's questions and methods were psychologically coercive and designed to overcome defendant's free will. He specifically argues that Deputy Pineda's requesting to search the truck three times was coercive, and that defendant would have believed resisting the request was futile. But Deputy Pineda testified he asked defendant three times because defendant did not directly respond to the first two requests. On the first two occasions, defendant responded by asking if he could search his own truck. Deputy Pineda had reasonable grounds not to allow him to do that, but at no time did Deputy Pineda say or do anything to suggest he would not honor a refusal of consent.

Viewing the totality of the circumstances, we conclude substantial evidence supports the trial court's determination that defendant voluntarily consented to Deputy Pineda searching his truck. As a result, the trial court correctly denied defendant's motion to suppress evidence seized from his pickup truck.

### III

#### *Blood Draw*

Defendant contends the trial court erred when it denied his motion to suppress the evidence from his blood draw. He claims law enforcement officers had no authority to

perform a blood draw without a warrant solely because they arrested defendant for a felony. We agree.

“We begin with the general rule that warrantless searches are presumptively unreasonable unless conducted pursuant to one of the narrowly drawn exceptions to the warrant requirement. (*Arizona v. Gant* (2009) 556 U.S. 332, 338 [173 L.Ed.2d 485]; see *United States v. Robinson* (1973) 414 U.S. 218, 224 [38 L.Ed.2d 427].) One well-recognized exception applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. (*Kentucky v. King* (2011) 563 U.S. [452, 460] [179 L.Ed.2d 865].) In some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence. [Citations.]” (*People v. Toure* (2015) 232 Cal.App.4th 1096, 1103.)

*Schmerber v. California* (1966) 384 U.S. 757 [16 L.Ed.2d 908] (*Schmerber*) found such an exigency to exist when a police officer arrested a person for driving under the influence of alcohol. The United States Supreme Court determined a warrantless blood draw did not violate the Fourth Amendment where under the totality of the circumstances the arresting officer reasonably believed the delay necessary to obtain a warrant threatened the destruction of evidence, i.e., the diminishing percentage of alcohol in the suspect’s blood. (*Id.* at pp. 770-771.)

“ ‘California cases uniformly interpreted *Schmerber* to mean that no exigency beyond the natural evanescence of intoxicants in the bloodstream, present in every DUI case, was needed to establish an exception to the warrant requirement.’ [Citation.]” (*People v. Youn* (2014) 229 Cal.App.4th 571, 577.) In 1972, the California Supreme Court said: “It is clear that the Fourth Amendment does not bar a compulsory seizure, without a warrant, of a person’s blood for the purposes of a blood alcohol test to determine intoxication, provided that the taking of the sample is done in a medically approved manner, is incident to a lawful arrest, and is based upon the reasonable belief

that the person is intoxicated. [Citations.]” (*People v. Superior Court* (1972) 6 Cal.3d 757, 761 (*Hawkins*).)<sup>5</sup> The same rule applied to blood samples taken from persons arrested for driving under the influence of drugs. (*People v. Ritchie* (1982) 130 Cal.App.3d 455, 457-458.)

*Schmerber* and *Hawkins* were the law when defendant’s blood was taken on April 1, 2013. However, on April 17, 2013, the United States Supreme Court narrowed *Schmerber*’s scope. In *Missouri v. McNeely* (2013) 569 U.S. \_\_ [133 S.Ct. 1552, 185 L.Ed.2d 696] (*McNeely*), the high court held that “before the police may conduct a nonconsensual blood test of a motorist who is arrested on suspicion of driving under the influence (DUI) of alcohol, the police must either obtain a warrant from a detached magistrate or later show that exigent circumstances prevented them from timely obtaining a warrant. (569 U.S. at p. \_\_ [133 S.Ct. at p. 1563].) The high court also held that the natural dissipation of alcohol in a driver’s bloodstream does not create exigent circumstances in every case, and that the government must show on a case-by-case basis that a warrantless blood draw was reasonable under the Fourth Amendment to the United States Constitution. (569 U.S. at pp. \_\_, \_\_ [133 S.Ct. at pp. 1563, 1568].)” (*People v. Harris* (2015) 234 Cal.App.4th 671, 675.)

California courts have disagreed over whether *McNeely* applies retroactively. (*People v. Jones* (2014) 231 Cal.App.4th 1257, 1263 [not retroactive]; *People v. Rossetti* (2014) 230 Cal.App.4th 1070, 1076 [retroactive] (*Rossetti*).) However, even if *McNeely* is retroactive, “the United States Supreme Court also has recognized an exception for Fourth Amendment search and seizures cases, and will not apply the exclusionary rule as a remedy where the police conducted a search in good faith reliance on binding legal

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<sup>5</sup> Proposition 8 invalidated *Hawkins* to the extent it required the search to be incident to a lawful arrest, as federal law did not impose that requirement. (*People v. Deltoro* (1989) 214 Cal.App.3d 1417, 1422.)

precedent in the jurisdiction where the search occurred. (See *Davis v. United States* (2011) 564 U.S. [229, 248-249] [180 L.Ed.2d 285] (*Davis* .).)” (*Rossetti, supra*, 230 Cal.App.4th at p. 1076.)

Here, the prosecutor argued the rule of *Davis* justified not suppressing the evidence from defendant’s blood test. She contended the blood draw was done pursuant to the policy of the Yolo County Sheriff’s Department and there was no law that required a warrant for a draw in these circumstances. The trial court agreed with the prosecutor, ruling the evidence was admissible under *Davis*.

The trial court erred. *Davis* stands for the proposition that the exclusionary rule does not apply “when the police conduct a search in objectively reasonable reliance on *binding judicial precedent*.” (*Davis, supra*, 564 U.S. at p. 239, italics added.) Neither defense counsel at trial nor the Attorney General here points us to any judicial precedent that would exempt a warrantless blood draw from the exclusionary rule where there is no evidence of exigent circumstances. Indeed, the Attorney General states she “is unaware of any California case authorizing the warrantless blood draw of a person arrested for possession of a controlled substance absent exigent circumstances.” We, too, have found none.

There were no exigent circumstances here. In *Schmerber*, the exigent circumstance was the possible loss of evidence that defendant had in fact been driving while intoxicated. Here, defendant was not charged with driving while under the influence. He was charged with transportation and possession of methamphetamine, neither of which requires use of the drug. Moreover, officers searched his truck for three hours before arranging to have his blood drawn, and there was uncontested argument that methamphetamine stays in one’s system for many days. Thus, there were no exigent circumstances to justify drawing defendant’s blood without a warrant. The motion to suppress evidence from defendant’s blood test should have been granted.

Because defendant’s decision to plead no contest may have resulted from the denial of his motion to suppress, he must be allowed to withdraw his plea. (*People v. Ruggles* (1985) 39 Cal.3d 1, 13.) “Aside from the fact that the error is by its nature prejudicial, the concept of harmless error is irrelevant where, as here, a defendant pleads guilty or no contest after the erroneous denial of his suppression motion. [Citations.]” (*People v. Ramirez* (2006) 140 Cal.App.4th 849, 854.)

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with directions to grant defendant’s motion to suppress evidence obtained from the warrantless blood test. Defendant may make a motion to withdraw his no contest plea within 30 days of the date of issuance of the remittitur. If defendant elects not to withdraw his plea, the trial court shall reinstate the judgment. (*People v. Ruggles, supra*, 39 Cal.3d at p. 13.)

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NICHOLSON, Acting P. J.

We concur:

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DUARTE, J.

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HOCH, J.