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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME HERNANDEZ,

Defendant and Appellant.

D059220

(Super. Ct. No. SCD230958)

APPEAL from a judgment of the Superior Court of San Diego County, Laura W. Halgren, Judge. Reversed.

Defendant Jaime Hernandez was charged by information with receiving stolen property (Pen. Code, § 496; count 1).<sup>1</sup> The complaint filed against him also alleged prior probation denial offenses (§ 1203, subd. (e)(4)) in two underlying cases. After his section 1538.5 motion to suppress evidence was denied, Hernandez pleaded guilty to receiving stolen property and admitted violating the terms and conditions of his probation

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<sup>1</sup> All further statutory references are to the Penal Code.

in the two underlying cases. The court formally revoked probation on those cases. In this case, the court sentenced Hernandez to three years of formal probation, subject to terms and conditions. The court also reinstated the probation on the two underlying cases to run concurrently with this sentence.

Hernandez timely filed a notice of appeal based solely on the denial of his section 1538.5 motion to suppress evidence. He contends the court erred in determining that (1) San Diego Police Officer Marciniak had a reasonable articulable suspicion of unlawful activity to detain him and (2) the detention did not become a de facto arrest requiring probable cause when Marciniak handcuffed him despite his full compliance. Because we conclude the court erred with respect to his detention, we do not address whether the court also erred with respect to his de facto arrest.

## FACTS

On November 24, 2010, at about 9:15 a.m., Marciniak drove by a Wells Fargo bank in Del Mar while on routine patrol. Because of the heightened possibility of bank robberies during the "holiday season," Marciniak was checking banks in the area. He noticed Hernandez, dressed in all black, walking in front of the bank in a way that "didn't appear natural." Marciniak decided to pull into the parking lot next to the bank; at that time it appeared Hernandez saw him, looked surprised, and then started to walk away. Marciniak yelled at him to "stop" a couple of times, and Hernandez complied. Hernandez turned and put his right hand in his pocket. Marciniak asked him to remove

his hand from his pocket and to put his hands in the air where Marciniak could see them. Hernandez complied with both requests.

Marciniak then approached and handcuffed Hernandez. Marciniak questioned Hernandez about what he was doing in front of the bank and if "he was a fourth waiver." Hernandez responded "yes," and Marciniak conducted a search of his person. Marciniak discovered three items of stolen property and placed Hernandez under arrest for possession of stolen property.

Hernandez's motion to suppress the evidence obtained during this search was denied by the court. In making its determination regarding the initial detention, the court relied on Marciniak's experience that banks are robbed more often during the holiday season, his description of Hernandez's actions outside the bank, and his description of Hernandez's attempt to evade him. The court also determined that handcuffing Hernandez did not turn the detention into a warrantless de facto arrest because Hernandez was a possible armed bank robber, the detention was brief, Marciniak was alone, and Hernandez "put his hand in his right pocket" after he was stopped. In closing, the court noted that it was "a very close case" and a "reasonable court might differ" with its decision.

## DISCUSSION

### I

Hernandez contends the court erred in determining that Marciniak had a reasonable articulable suspicion of unlawful activity to initially detain him and the

resulting arrest, search of his person, and seizure of the items of stolen property were therefore illegal.

In assessing a ruling on a motion to suppress evidence, "we defer to the trial court's findings of fact, whether express or implied, if those findings are supported by substantial evidence." (*People v. Mays* (1998) 67 Cal.App.4th 969, 972.) However, we exercise our independent judgment in determining whether the search in these circumstances was reasonable under the Fourth Amendment. (*People v. Leyba* (1981) 29 Cal.3d 591, 596-597; *People v. Glaser* (1995) 11 Cal.4th 354, 362.)

The Fourth Amendment of the United States Constitution protects persons against unreasonable searches and seizures, and applies to California through the Fourteenth Amendment of the United States Constitution's due process clause. (*People v. Williams* (1999) 20 Cal.4th 119, 125.) "If the challenged police conduct is shown to be violative of the Fourth Amendment, the exclusionary rule requires that all evidence obtained as a result of such conduct be suppressed." (*People v. Williams* (1988) 45 Cal.3d 1268, 1299.)

This Fourth Amendment protection extends to even brief investigatory stops or detentions. (*United States v. Arvizu* (2002) 534 U.S. 266, 273; *People v. Butler* (2003) 111 Cal.App.4th 150, 160.) A detention is reasonable when the totality of the circumstances suggest " 'the detaining officer [had] a "particularized and objective basis" for suspecting legal wrongdoing.' " (*Butler*, at p. 160.) The officer must be "able to point to specific and articulable facts which, taken together with rational inferences from those

facts, reasonably warrant that intrusion." (*Terry v. Ohio* (1968) 392 U.S. 1, 21, fn. omitted.) However, a police officer cannot reasonably base a detention on circumstances, when viewed objectively, that only support a "mere curiosity, rumor, or hunch . . . even though the officer may be acting in complete good faith." (*In re Tony C.* (1978) 21 Cal.3d 888, 893; see also *Terry*, at p. 22.)

In determining whether the officer's suspicions were reasonable, we consider the totality of the circumstances, including the officer's training and experience, the time, the location of the act, the area's reputation for criminal activity (*People v. Souza* (1994) 9 Cal.4th 224, 239), and the suspect's "nervous, evasive behavior[.]" (*Illinois v. Wardlow* (2000) 528 U.S. 119, 124; *In re H.M.* (2008) 167 Cal.App.4th 136, 144.) It is not disputed that a person has the right to avoid the police (*Florida v. Royer* (1983) 460 U.S. 491, 497-498; *Loewen*, at p. 126), but is expected to comply with the officer's instructions if the officer detains that person. (*People v. Verin* (1990) 220 Cal.App.3d 551, 557.)

Here, the officer did not articulate sufficient "specific and articulable facts" to justify the detention and make this search reasonable. (*Terry v. Ohio, supra*, 392 U.S. at p. 21.) The court relied on Marciniak's description of Hernandez's conduct that "didn't look natural," the officer's assertion that banks are more likely to be robbed during the "holiday season," and Hernandez's decision to walk away when he saw the approaching police car.

Marciniak's statements regarding Hernandez's demeanor outside of the bank suggest he had a hunch that wrongdoing was afoot, which is insufficient to support a

lawful detention. (*In re Tony C.*, *supra*, 21 Cal.3d at p. 893; see also *Terry v. Ohio*, *supra*, 392 U.S. at p. 22.) Marciniak testified, "it didn't appear natural, the way [Hernandez] was walking in front of the bank" and later emphasized that "it just did not look natural." This language suggests nothing more than a hunch or curiosity. Marciniak does not point to any other articulable fact that made him want to further investigate Hernandez. Hernandez was only walking in front of a busy bank in Del Mar, dressed in all black, in broad daylight. Marciniak's feeling that Hernandez's actions did not look "natural" is insufficiently specific to justify the detention.

Marciniak's assertion that bank robberies occur more frequently during the "holiday season" is also insufficient to justify the detention. Although his training and experience support his assertion, the likelihood of robbery seems mitigated by the other circumstances, including the time of day, the active nature of the adjoining strip mall, the suspect's black outfit in broad daylight, and the location of this bank in Del Mar, which is not a high crime area. This assertion does not justify the search and should not carry much weight. (*People v. Bower*, *supra*, 24 Cal.3d at p. 645; *People v. Medina* (2003) 110 Cal.App.4th 171, 177.)

The fact that Hernandez started to walk away as the police car approached and parked 10 to 15 feet away from him does not support a detention. Hernandez was already pacing in front of the bank when approached by Marciniak, who even testified that Hernandez did not "walk very far" and only took a "couple more steps" after Marciniak

drove up. This conduct does not constitute a flight and it does not support a reasonable suspicion of illegal activity.

Even when considered in the totality of the circumstances, these facts are not enough to support a reasonable suspicion of illegal activity. Therefore, the detention was unreasonable.

## II

Hernandez also contends the court erred in determining that he was not placed under de facto arrest when he was handcuffed.

Because we have already determined the initial detention was unlawful, we conclude the evidence obtained should be suppressed, and therefore we do not analyze the subsequent events. The relevant question is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." (*Wong Sun v. United States* (1963) 371 U.S. 471, 488; *People v. Cox* (2008) 168 Cal.App.4th 702, 711.)

Here, nothing happened between the detention and discovery of the evidence that would "purge" the search of its primary taint. After the detention, Hernandez did nothing but comply with Marciniak's commands, and therefore the search is still tainted by the illegality of the detention and the evidence should be suppressed.

## DISPOSITION

The judgment is reversed. Hernandez's pleas of guilty are vacated. The trial court is directed to grant the motion to suppress the evidence seized on November 24, 2010.

McDONALD, Acting P. J.

WE CONCUR:

McINTYRE, J.

AARON, J.