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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RICKY PAUL PEETE,

Defendant and Appellant.

D059518

(Super. Ct. No. FSB1000761)

APPEAL from a judgment of the Superior Court of San Bernardino, Harold T. Wilson, Judge. Affirmed.

I.

INTRODUCTION

A jury found Ricky Paul Peete guilty of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1) (count 1)),¹ and found not true an attendant gang allegation (§ 186.22, subd. (b)(1)). In a bifurcated court trial, the court found that Peete had

¹ Unless otherwise specified, all subsequent statutory references are to the Penal Code.

suffered one prior strike (§ 1170.12, subds. (a)-(d)) and one prior prison term conviction (§ 667.5, subd. (b)). The court sentenced Peete to a total term of five years in prison.

On appeal, Peete contends that the trial court erred in refusing to exclude statements that he made to a police officer immediately after being advised that he was under arrest, on the ground that the statements were obtained during a custodial interrogation without proper *Miranda*² warnings. We conclude that the trial court did not err in determining that the statements were admissible because they were not the product of an interrogation within the meaning of *Miranda* and its progeny.

II.

FACTUAL BACKGROUND

At approximately 10 p.m. on February 23, 2010, San Bernardino Police Officer Jose Vasquez responded to a call reporting gunshots at an apartment complex in San Bernardino. When Officer Vasquez arrived at the apartment complex, he saw Peete standing on a staircase of the complex. Peete was making a gang sign with one hand, while his other hand was tucked near his waistband. According to Officer Vasquez, Peete was repeatedly yelling both an abbreviation for a gang name and " 'Where you niggas at?' " Officer Vasquez remained out of Peete's sight, and called for back up. After another officer arrived, Officer Vasquez walked up the stairs and ordered Peete to stop. When Peete saw Officer Vasquez, he said, " 'Oh shit . . . [t]he cops are here,' " and fled into a nearby apartment.

2 *Miranda v. Arizona* (1966) 384 U.S. 436.

Approximately a minute to a minute and a half later, Peete opened the door to the apartment. Officer Vasquez asked Peete if he lived in the apartment, and Peete replied that he lived there with his girlfriend. After Officer Vasquez indicated that he was going to search the apartment, Peete claimed that he did not live in the apartment.

During an ensuing search, Officer Vasquez found an unloaded handgun in a bedroom, underneath a dresser. Officer Vasquez also found a photograph of Peete and his girlfriend displayed on a stand in the bedroom. Peete admitted that numerous items of clothing and shoes found in the apartment belonged to him.

III.

DISCUSSION

The trial court did not err in refusing to exclude Peete's statements to Officer Vasquez on the ground that the statements were obtained in violation of Miranda

Peete contends that the trial court erred in refusing to exclude statements that he made to Officer Vasquez immediately after being advised that he was under arrest, on the ground that the statements were obtained during a custodial interrogation without proper *Miranda* warnings. Specifically, Peete contends that the court erred in admitting statements that Peete made to Officer Vasquez in which Peete denied ownership of the gun and said that the gun belonged to his friend. We conclude that the trial court did not err in admitting the statements.³

³ With respect to prejudice, Peete contends that the admission of the statements was harmful because the prosecution used the statements to demonstrate that Peete was aware that there was a gun in the apartment. We need not consider Peete's claim as to prejudice because we conclude that the trial court did not err in admitting Peete's statements.

A. *Standard of review*

"In reviewing *Miranda* issues on appeal, we accept the trial court's resolution of disputed facts and inferences as well as its evaluations of credibility if substantially supported, but independently determine from undisputed facts and facts found by the trial court whether the challenged statement was legally obtained. [Citations.]" (*People v. Smith* (2007) 40 Cal.4th 483, 502.)

B. *Governing law*

"*Miranda v. Arizona, supra*, 384 U.S. 436, and its progeny protect the privilege against self-incrimination [contained in the Fifth Amendment of the United States Constitution] by precluding suspects from being subjected to custodial *interrogation* unless and until they have knowingly and voluntarily waived their rights to remain silent, to have an attorney present, and, if indigent, to have counsel appointed. [Citations]." (*People v. Gamache* (2010) 48 Cal.4th 347, 384, italics added.) However, "[v]olunteered statements of any kind are not barred by the Fifth Amendment," and such statements are not inadmissible under *Miranda*. (*Miranda, supra*, at p. 478.)

In *Rhode Island v. Innis* (1980) 446 U.S. 291, 301 (*Innis*), the United States Supreme Court defined interrogation for purposes of *Miranda* as "not only . . . express questioning, but also . . . any words or actions on the part of the police (*other than those normally attendant to arrest and custody*) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (Italics added, fn. omitted.)

In *People v. Celestine* (1992) 9 Cal.App.4th 1370, 1373 (*Celestine*), the Court of Appeal considered a defendant's claim that the trial court had erred in determining that

his postarrest statements to a sheriff's deputy were volunteered and had not been given in response to the functional equivalent of questioning under *Innis*. In that case, several sheriff's deputies arrived at a residence to execute a search warrant. (*Celestine, supra*, at p. 1373.) The defendant and his girlfriend were just leaving the residence as the deputies arrived. (*Ibid.*) Some of the deputies "blocked their path" and detained the pair while other deputies went into the residence. After approximately 10 minutes, when the residence had been secured, the defendant and his girlfriend were taken inside the residence and placed on the couch. (*Ibid.*) The defendant stated that he did not live at the residence, but that he sometimes stayed there overnight. The defendant's girlfriend stated that she lived at the residence.⁴ (*Ibid.*) A deputy told "[defendant] and his girlfriend he knew they were selling drugs and if he found rock cocaine and could determine whose it was 'some people will be going to jail.'" (*Ibid.*)

After searching the residence for approximately 30 minutes, deputies found cocaine, money, a gun, and "'pay and owe'" sheets. (*Celestine, supra*, 9 Cal.App.4th at p. 1374.)⁵ After the deputies found this evidence, one of the deputies told both the defendant and his girlfriend that they were under arrest for possession of rock cocaine for sale. "'Immediately' [defendant] and his girlfriend stated 'they don't sell rock cocaine, it was for their personal use.'" (*Id.* at pp. 1373-1374.) The trial court admitted the

⁴ The *Celestine* court did not indicate whether these statements were given in response to questioning. (*Celestine, supra*, 9 Cal.App.4th at p. 1373.)

⁵ The *Celestine* court noted that, "[d]uring the 30-minute search no one asked [defendant] any questions." (*Celestine, supra*, 9 Cal.App.4th at p. 1374.)

defendant's statements after determining that they had not been made in response to police interrogation. (*Id.* at p. 1373.)

On appeal, after noting that in *Innis* the United States Supreme Court had expressly excepted the words and actions of police officers "normally attendant to arrest and custody" from the definition of interrogation (*Innis, supra*, 446 U.S. at p. 301), the *Celestine* court concluded that the statement at issue had not been given in response to an interrogation. (*Celestine, supra*, 9 Cal.App.4th at p. 1374, citing *Innis*.) The *Celestine* court explained, "Far more is required to constitute 'the functional equivalent of questioning' than merely advising a person he is under arrest for a specific offense." (*Celestine, supra*, at p. 1374 [citing numerous cases in which courts concluded that a defendant's statements had been spontaneously volunteered and were not the product of an interrogation].)

C. *Factual and procedural background*

Prior to trial, the People filed a motion in limine in which they requested that the court permit the People to introduce in evidence statements that Peete made to Officer Vasquez near the time of his arrest. At a hearing on the motion, Peete requested that the court conduct a hearing pursuant to Evidence Code section 402 to determine the admissibility of his statements to Officer Vasquez.⁶

⁶ Evidence Code section 402, subdivision (b) provides, "The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests."

The court held an Evidence Code section 402 hearing at which Officer Vasquez testified concerning the circumstances of Peete's arrest.⁷ Officer Vasquez stated that on February 23, 2010, he arrived at an apartment complex in San Bernardino in response to a "shots fired" call. Officer Vasquez observed several people leaving the complex in a white car. Peete was standing on a staircase, yelling out an abbreviation for the name of a gang and " 'Where you niggas at?' "⁸ Officer Vasquez saw Peete making a gang sign with one hand, while holding his other hand near his waistband. At the time Officer Vasquez made these observations, Peete had yet to see Officer Vasquez, who was under the staircase on which Peete was standing. Officer Vasquez called for back up.

While waiting for back up, Officer Vasquez observed Peete twice enter and exit an apartment. After another officer arrived, Officer Vasquez ran up the staircase. Peete, who was at this point outside the apartment, saw Officer Vasquez and said, " 'The cops are here. The police are here.' " Officer Vasquez ordered Peete to stop, but Peete ran back into the apartment. Officer Vasquez knocked on the door. Approximately a minute to a minute and a half later, Peete opened the door, placed himself face down on the ground and put his hands behind his back. Officer Vasquez handcuffed Peete and told him that he was being detained but that he was not under arrest. Officer Vasquez and his back up officer then "cleared the apartment" to make sure that no one else was inside.

⁷ Officer Vasquez's testimony at the Evidence Code section 402 hearing concerning the circumstances of Peete's arrest was similar, albeit not identical, to his trial testimony on the same subject. (See pt. II, *ante*.)

⁸ Officer Vasquez was unable to determine whether Peete was yelling at the individuals who were leaving in the car.

Officer Vasquez asked Peete if he lived in the apartment and whether he was on parole. Peete responded that he did live in the apartment and that he was on parole for selling cocaine. Officer Vasquez went back inside the apartment to search it. After finding men's clothing and shoes in the apartment, Officer Vasquez asked Peete if the items belonged to him. Peete responded in the affirmative. Officer Vasquez continued his search. Inside a bedroom, the officers found marijuana, an expended shell casing from a handgun, a handgun, and a gun magazine. Officer Vasquez told Peete that he was under arrest.⁹ According to Officer Vasquez, immediately after Vasquez told Peete that he was under arrest, Peete "stated that . . . the gun was not his. It belonged to his friend." Officer Vasquez explained that he did not ask Peete whether the gun was his, but rather, that "[Peete] blurted it out."

On cross-examination, Officer Vasquez acknowledged that after he had handcuffed Peete, but prior to arresting him, Officer Vasquez told Peete, "The reason we're here is because we're getting shots called . . . [¶] . . . [¶] . . . in this area, and you're out here yelling."¹⁰ Officer Vasquez did not state whether Peete responded to this comment. Officer Vasquez also clarified that Officer Vasquez had not shown Peete the handgun that Officer Vasquez found in the apartment prior to placing Peete under arrest.

9 At the Evidence Code section 402 hearing, Officer Vasquez did not testify regarding whether, when he told Peete that he was under arrest, he informed Peete of the crime for which he was being arrested. At trial, Officer Vasquez testified that he informed Peete that he was "under arrest for possession of a firearm."

10 It is not clear from the record exactly when Officer Vasquez made this comment.

On redirect, Officer Vasquez explained that during his initial questioning of Peete, he was "trying to determine who [Peete] was, if he actually lived [in the apartment] . . . and just trying to figure out . . . what's going on with this individual; because at the time we have shots heard, but I don't have a crime to arrest him on at this time."

At the conclusion of Officer's Vasquez's testimony, the trial court heard argument from the prosecutor and defense counsel concerning the admissibility of Peete's statements to Officer Vasquez. During defense counsel's argument, the court asked counsel to clarify which of Peete's statements he sought to exclude. Defense counsel replied that he sought to exclude Peete's statements, " 'The gun is not mine. It's a friend's.' "11

After further argument from defense counsel regarding whether Peete's statements concerning the gun had been "spontaneous," the court ruled that it would admit Peete's statements. The court reasoned in part, "[T]he court can only rule on the testimony that's before the court. Officer Vasquez testified that there was no mention of the gun prior to the alleged statement made by Mr. Peete. And, therefore, the Court can only view that as a spontaneous statement." The court further stated, "Clearly there was a detention from what was elicited from Officer Vasquez. However, I'm going to find that it was a spontaneous statement, therefore, not in violation of *Miranda*."

11 Defense counsel also said that he wanted to exclude Peete's statement that he lived at the apartment. However, Peete does not challenge on appeal the trial court's admission of this statement.

D. *Application*

Officer Vasquez testified that after he told Peete that he was under arrest, Peete "blurted . . . out" that "the gun was not his," and that "[i]t belonged to his friend." As the *Celestine* court noted, in *Innis*, the United States Supreme Court expressly excepted the words and actions of police officers " 'normally attendant to arrest and custody' " from the definition of interrogation (*Celestine, supra*, 9 Cal.App.4th at p. 1374, quoting *Innis, supra*, 446 U.S. at p. 301, italics added by *Celestine*.) Officer Vasquez's statement to Peete that he was under arrest thus did not constitute interrogation under *Miranda* and its progeny.

Peete contends that the questions that Officer Vasquez asked and the statements Vasquez made to Peete prior to his arrest "created a situation," where Officer Vasquez's later arrest advisement became the functional equivalent of questioning. Officer Vasquez testified that he asked Peete a few brief investigatory questions prior to, and while, he conducted a search of the apartment. None of the questions was directed specifically at finding a firearm and Officer Vasquez did not inform Peete that he was looking for a firearm. We reject Peete's speculation in his brief that there were "likely other questions" asked, and that "[n]otwithstanding Officer Vasquez's testimony, without doubt some sort of 'softening up' technique or prodding must have been employed in order for [Peete] to make a spontaneous statement denying ownership of the gun." Accordingly, we conclude that Officer Vasquez did not "create a situation" such that his arrest advisement constituted an interrogation. (See *Celestine, supra*, 9 Cal.App.4th at pp. 1373-1374 [deputy's statement to defendant that "he knew they were selling drugs and if he found

rock cocaine and could determine whose it was 'some people will be going to jail,' " did not convert arrest advisement into interrogation].)

IV.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McINTYRE, J.