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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. LARRY BRAND, Defendant and Appellant.	D063951 (Super. Ct. No. SCD244891)

APPEAL from a judgment of the Superior Court of San Diego County, Lorna A. Alksne, Joseph P. Brannigan and Eugenia Eyherabide, Judges. Affirmed.

Sheila Quinlan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Tami Hennick and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

Following the denial of his motion to suppress evidence under Penal Code section 1538.5, Larry Brand entered a guilty plea to one count of possession of

methamphetamine while armed with a loaded firearm. (Health & Saf. Code, § 11370.1, subd. (a).) The plea was pursuant to a plea agreement under which the parties stipulated to a two-year prison sentence, concurrent with the sentence on a probation violation in another case. Brand was sentenced in accordance with the plea agreement.

Brand appeals contending the trial court erred in denying his motions to suppress evidence obtained when he was detained by police. Brand contends there was not reasonable suspicion to detain him and even if there was justification for a detention, the police used unreasonable force by handcuffing him and thus his detention became a de facto arrest accomplished without probable cause.

The People contend the detention and the use of handcuffs were justified on this record. The People further argue that since Brand was on probation at the time, with a valid waiver of his Fourth Amendment rights, the evidence obtained should not be suppressed based upon the court's decision in *People v. Brendlin* (2008) 45 Cal.4th 262 (*Brendlin*). Because we find the detention and the use of restraints reasonable on this record, we decline to consider whether the application of the reasoning in *Brendlin* would render the exclusionary rule inapplicable to the facts in this case.

STATEMENT OF FACTS[1]

Since the facts in this case are not in dispute, we will adopt the factual recitation of the evidence at the suppression hearing from the respondent's brief.

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[1] The only testimony taken on the motion to suppress was at the preliminary hearing. The renewed motion under Penal Code section 1538.5, subdivision (i) was based on the transcript of the preliminary hearing.

At the preliminary hearing, San Diego Police Officer Chris Raagas testified that he has been a police officer in San Diego for eight and a half years. Prior to this, he worked for four years as a deputy probation officer and four and a half years as a special agent with the California Department of Justice, Bureau of Narcotics Enforcement. While at the bureau, Officer Raagas received training on narcotics transactions. He has participated in about 100 narcotics-related investigations.

Around 3:20 p.m. on December 10, 2012, Officer Raagas and his partner were patrolling the area near the Linda Vista recreational center. Officer Raagas had patrolled the area for the past five months and knew from other officers and gang detectives that the area had a high volume of gang and narcotic activity. Officer Raagas saw appellant in the parking lot of the recreation center, standing near the rear of his Cadillac with the trunk and driver's side door open. Appellant was talking with a man who was parked next to him and wearing a red shirt, a color "kind of consistent with the gang set in that area." The two cars were parked off to the side, away from the other cars. Officer Raagas parked about 10 to 15 feet away from appellant. He and his partner then approached appellant and the other man "just to find out if they live around there and/or if they're involved in any sort of gang activity or narcotic activity." Officer Raagas intended to have a consensual encounter with appellant and the other man. As he approached, Officer Raagas said, "Hi. How is it going?" He then heard the sound of a can falling to the ground near appellant. Based on his knowledge of the area, Officer Raagas suspected that appellant was trying to conceal a weapon or narcotics. He stepped

over to appellant, asked him to put his hands behind his back and handcuffed him "due to officer safety."

After he handcuffed appellant, Officer Raagas saw a pepper spray canister on the roof of the Cadillac. He also saw a blue canister of pepper spray on the ground by the Cadillac, which he determined was responsible for the sound he had just heard. Officer Raagas moved appellant about five feet away for "officer safety." He asked appellant if he was on probation. Appellant said he was on probation but did not say that one of the conditions of his probation was a Fourth Amendment search waiver. Appellant consented to a search of his person.

Officer Raagas's partner did a records check of appellant and verified within five minutes or less that appellant was on probation with a search condition. Officer Raagas then searched appellant's car and found a loaded revolver under the driver's seat and a holster next to the center console. In the trunk, he found one bag that contained a plastic baggy of methamphetamine and clothes, and a second bag that contained a plastic baggy of methamphetamine and two glass pipes that could be used to smoked controlled substances.

DISCUSSION

I

THE MOTION TO SUPPRESS

As we have noted, Brand brought a motion to suppress evidence on Fourth Amendment grounds at the preliminary hearing. The motion was denied. Thereafter, Brand renewed the motion in the trial court. The motion was again denied. Brand

contends the evidence should have been suppressed because the police officer was unreasonable in applying handcuffs at the outset of the detention, thus making the detention a de facto arrest, for which concededly there was no probable cause. He further argues that even if the use of handcuffs was reasonable, the police did not have reasonable suspicion of criminal activity taking place and therefore the detention was unreasonable and that his subsequent consent to search and the officers' discovery of his "Fourth waiver" were the product of an unreasonable seizure. We will find the officers' conduct to be reasonable on the record before us.

A. Standard of Review

When we review a trial court decision on a motion to suppress evidence we apply a two-step process. First we determine whether the facts found by the trial court are supported by substantial evidence. In making that determination we draw all reasonable inferences in favor of the trial court's factual findings. We do not make credibility decisions or reweigh the evidence. However, once we find substantial evidence supports the factual findings, we independently apply the law to those facts and make our own decision as to the legal effect of those facts. (*People v. Leyba* (1981) 29 Cal.3d 591, 596-597.)

In this case the essential facts are not in dispute. It is their legal significance which must be decided. (*People v. Tully* (2012) 54 Cal.4th 952, 979.)

B. The Use of Handcuffs

" 'A seizure occurs whenever a police officer, "by means of physical force or show of authority" restrains the liberty of a person to walk away.' " (*People v. Celis* (2004) 33

Cal.4th 667, 673 (*Celis*).) Where the seizure is a temporary detention that falls short of an arrest, police do not need probable cause to conduct such seizure. Rather, it is sufficient if police have reasonable suspicion that criminal activity may be taking place. (*Terry v. Ohio* (1968) 392 U.S. 1, 21-22; *Illinois v. Wardlow* (2000) 528 U.S. 119, 123.)

Where an officer uses restraints such as handcuffs or firearms to effectuate a seizure, the question arises as to whether the seizure has become a de facto arrest. Meaning that instead of a temporary seizure to investigate criminal activity, does it amount to taking a person into custody for a criminal offense. Such questions must be resolved on the unique facts of each case. (*Celis, supra,* 33 Cal.4th at pp. 674-675.)

The court in *Celis* held that the use of handcuffs to restrain a person does not always amount to an arrest. In that case the defendant was stopped at gunpoint. He was handcuffed and required to sit on the ground while police conducted their investigation. The court held that the nature of the encounter raised legitimate concerns about safety and possible flight thus justifying the use of significant restraints during a detention and that such restraints did not change the detention into a de facto arrest. (*Celis, supra,* 33 Cal.4th at pp. 675-676.)

Some of the factors which the courts have identified as justifying restraints, in addition to those recognized in *Celis, supra,* 33 Cal.4th 667, include the nature of the area involved, such as a "high crime area." (*Illinois v. Wardlow, supra,* 528 U.S. at p. 124; *People v. Souza* (1994) 9 Cal.4th 224, 240.) In cases dealing with drug dealers it may be reasonable to suspect such person may be armed. (*People v. Limon* (1993) 17 Cal.App.4th 524, 534-535.)

The unreasonable use of handcuffs has been found to create a de facto arrest. In *In re Antonio B.* (2008) 166 Cal.App.4th 435, 439, police observed two minors on the street. One was smoking a marijuana cigarette, the other was not doing anything suspicious. Police arrested the minor who was smoking. They then handcuffed the second minor. The appellate court concluded there were no facts which would justify the use of restraints on the second minor. The minors were engaged in nonviolent activity. There was no indication they would flee, and the two minors were encountered by two police officers, thus there was no apparent safety risk presented. (*Id.* at p. 442.)

In *People v. Stier* (2008) 168 Cal.App.4th 21, 25 (*Stier*), this court found the use of handcuffs to be unreasonable. There the police had conducted a stop in a high narcotics area. One passenger in the vehicle was arrested. The encounter with the other person was polite and nonthreatening. The apparent reason for the officer's decision to handcuff that passenger was that he was taller than the officer, which made the officer "uncomfortable." This court concluded there was not sufficient justification to use handcuffs and therefore the seizure amounted to a de facto arrest, for which there was no probable cause. (*Id.* at p. 28.)

We think the facts of this seizure are more akin to those presented by *Celis, supra,* 33 Cal.4th 667 and are thus distinguishable from *Stier, supra,* 168 Cal.App.4th 21 and *In re Antonio B., supra,* 166 Cal.App.4th 435. Here the officer was very familiar with the area and knew it to be one with not only a high frequency of narcotics dealing, but that such activity was frequently conducted by street gangs. Brand and his companion were

dressed in a fashion consistent with the "gang set" which frequented the area. The officer had extensive narcotics experience and had patrolled the area for some time.

When the officer approached the two suspects, his purpose was to merely talk to the men. One was standing next to a car with the door open and Brand was standing next to his car, which had the trunk open. The officer did not take any action to restrain the men until, just as he reached the area of the suspects, he heard the sound of a metal object, which sounded like a can dropping at Brand's side. The officer testified that the noise caused him to fear for his safety. He knew persons involved in narcotics and gangs were frequently armed and he did not know if Brand had dropped a weapon at his side. The officer testified he handcuffed Brand in order to protect himself during the encounter. Clearly the magistrate at the preliminary hearing credited the officer's testimony. The judge at the renewed suppression hearing in the trial court agreed. Accepting the testimony as true, there were legitimate safety concerns to justify the officer's action during the investigative detention. The restraints did not make this seizure a de facto arrest.

C. Reasonable Suspicion

Brand contends the officer did not have a sufficient factual basis for reasonable suspicion that criminal activity may have been taking place at the time he acted. Thus, Brand argues the detention was unreasonable and therefore the evidence seized with consent and pursuant to the probation search should be suppressed as the fruit of the unlawful seizure. The People have responded arguing the detention was reasonable and in any event, we should not apply the exclusionary rule, relying on our Supreme Court's

reasoning in *Brendlin, supra*, 45 Cal.4th 262; see also *People v. Durant* (2012) 205 Cal.App.4th 57. Since we conclude the detention was supported by reasonable suspicion, we will not address the question of whether *Brendlin's* approach to the application of the exclusionary rule should apply to these facts.

In *Illinois v. Wardlow, supra,* 528 U.S.119, the court held that police can consider the nature of the area in which the investigation occurs. Wardlow was walking in what police knew was an area with a high frequency of narcotics activity. When Wardlow observed a caravan of police cars drive by he turned and ran. There the court concluded that taken together with the knowledge of criminal activity in the area police could detain Wardlow briefly for investigation, based on his conduct.

In this case, police went to an area of frequent gang and narcotics activity. As they approached Brand and another man they noticed the two cars were parked some distance away from other cars in the area. The door and trunk of Brand's car were open. As the uniformed officers approached the two men, one of the officers said "Hi" and asked the men what they were doing. That is when a can was dropped next to Brand (a can ultimately determined to be pepper spray). The officer testified that the sound, under the circumstances, including his knowledge of the area and gang activity, caused him to fear for his safety. We believe, under the circumstances of this case that the officer had articulable facts which would cause a reasonable police officer to believe that criminal activity "may be afoot." (*Terry v. Ohio, supra*, 392 U.S. 1, 21-22.) As such, the officer could lawfully detain Brand for the limited purposes of investigating such possible activity. Brand does not contend that the evidence obtained as a result of consent and the

probation search were otherwise unlawful. Thus the trial court properly denied the motions to suppress evidence.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

I CONCUR:

McCONNELL, P. J.

MCINTYRE, J.

I respectfully dissent. As I shall explain, handcuffing Brand was not reasonably necessary under the circumstances, making the detention an unlawful de facto arrest.

In the mid-afternoon on December 10, 2012, Officer Raagas and his partner were patrolling the area around the Linda Vista recreation center, a known high crime area. Officer Raagas noticed a man, later identified as Brand, standing next to the rear of a Cadillac with its driver's side door and trunk open. Brand was talking to another man who was also standing outside another car. The cars were legally parked and, although they were parked away from other cars, Officer Raagas stated there was nothing suspicious about the way they were parked. As Officer Raagas observed the two men, he saw no illegal activity.

After parking about 10 to 15 feet away, Officer Raagas and his partner immediately got out of their car and simultaneously approached the men. As he approached, Officer Raagas asked, "Hi. How is it going?" When Officer Raagas was about four steps out of his vehicle, he heard a can fall on the ground. Officer Raagas did not see Brand throw or touch the can and did not even see the can fall, but believed it had been closer to Brand than the other man. After Officer Raagas heard the can drop, he immediately handcuffed Brand for "officer safety" on the "theory" that Brand "was attempting to conceal" some sort of item, weapons or narcotics. After Officer Raagas handcuffed Brand, his partner immediately handcuffed Brand's companion.

"When a police officer has an objective, reasonable, articulable suspicion a person has committed a crime or is about to commit a crime, the officer may briefly detain the person to investigate. The detention must be temporary, last no longer than necessary for the officer to confirm or dispel the officer's suspicion, and be accomplished using the least intrusive means available under the circumstances. [Citations.] A detention that does not comply with these requirements is a de facto arrest requiring probable cause. [Citations.]" (*People v. Stier* (2008) 168 Cal.App.4th 21, 26-27 (*Stier*).)

To determine whether an impermissible de facto arrest occurred, we review the facts, focusing "'on whether the police diligently pursued a means of investigation reasonably designed to dispel or confirm their suspicions quickly, using the least intrusive means reasonably available under the circumstances.'" (*People v. Celis* (2004) 33 Cal.4th 667, 674-675.) Where, as here, the facts are essentially undisputed, we independently determine the constitutionality of the challenged search or seizure. (*People v. Balint* (2006) 138 Cal.App.4th 200, 205.)

A person's presence in a high crime area, standing alone, cannot serve as a basis for concluding that he or she has engaged, is engaged, or is about to engage in criminal conduct. (*Brown v. Texas* (1979) 443 U.S. 47, 52.) The California Supreme Court has explained, "The 'high crime area' factor is not an 'activity' of an individual. Many citizens of this state are forced to live in areas that have 'high crime' rates or they come to these areas to shop, work, play, transact business, or visit relatives or friends. The spectrum of legitimate human behavior occurs every day in so-called high crime areas. As a result, this court has appraised this factor with caution and has been reluctant to conclude that a

location's crime rate transforms otherwise innocent-appearing circumstances into circumstances justifying the seizure of an individual. [Citations.]" (*People v. Bower* (1979) 24 Cal.3d 638, 645.)

As we pointed out in *Stier*, handcuffing a suspect has been determined to be reasonably necessary for the detention when "(1) the suspect is uncooperative; (2) the officer has information the suspect is currently armed; (3) the officer has information the suspect is about to commit a violent crime; (4) the detention closely follows a violent crime by a person matching the suspect's description and/or vehicle; (5) the suspect acts in a manner raising a reasonable possibility of danger or flight; or (6) the suspects outnumber the officers." (*Stier*, *supra*, 168 Cal.App.4th at pp. 27-28.)

A comparison of these factors with the circumstances of this case show no basis existed for handcuffing Brand. This case presents the classic example of a fishing expedition as Officer Raagas provided no specific, articulable facts to support his handcuffing of Brand. The cars were legally parked in a high crime area in broad daylight and Officer Raagas did not consider this suspicious. Officer Raagas saw no illegal activity.

Officer Raagas testified about his familiarity with how narcotics transactions are carried out, how narcotics are concealed, the mannerisms of individuals trying to evade law enforcement and other clandestine techniques used by individuals to avoid apprehension. He provided absolutely no testimony, however, explaining based on his training and experience, how Brand's or Brand's companion's actions suggested drug activity or any other criminal activity. Rather, Officer Raagas candidly admitted that he

stopped when he saw the cars because he was in a high crime area and contacted the men to determine if they lived in the area or were involved in any sort of gang or narcotic activity.

The record is devoid of evidence suggesting the men became nervous or tried to leave when they saw the police car park and the officers approach. Although Brand's companion wore a red shirt, a color that Officer Raagas knew was associated with a gang, there was no evidence this shirt or Brand's clothing was consistent with that worn by street gangs in the area. Officer Raagas stated he did not know whether either Brand or his companion were armed, but expressed no concern that either man could conceal a weapon based on the type of clothing they wore.

While we will not question the legitimacy of Officer Raagas's fear for his safety when he handcuffed Brand, we note that his safety concerns could have been quickly addressed in a less intrusive manner by asking Brand to step away from the car and keep his hands in view. Put simply, Officer Raagas's decision to handcuff Brand exceeded the restraint reasonably necessary to accomplish the purpose of the detention. (Compare, *People v. Osborne* (2009) 175 Cal.App.4th 1052, 1062 [officer testified that during pat search, suspect became "'real nervous'" and tense as if attempting to remove his hands from officer's grasp, which caused officer to fear a potential assault and justified use of handcuffs].)

In summary, the prosecution failed to establish that Officer Raagas's use of handcuffs was reasonably necessary under the circumstances. The use of handcuffs on Brand constituted a de facto arrest, requiring probable cause. The undisputed facts,

however, show no probable cause existed to arrest Brand when Officer Raagas applied the handcuffs.

Lastly, I reject the People's assertion that, even if the detention was unlawful, Officer Raagas's discovery of Brand's probation search condition before he searched the Cadillac dissipated any taint that might flow from the illegal detention. I agree with the court in *People v. Bates* (2013) 222 Cal.App.4th 60 that where, as here, an individual's probation status is unknown to law enforcement at the time of the initial detention, the probation search condition cannot be used to sanitize an otherwise illegal detention. (*Id.* at p. 70.)

MCINTYRE, J.