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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN EDWARD McGEE, JR.,

Defendant and Appellant.

E053113

(Super.Ct.No. RIF10004661)

OPINION

APPEAL from the Superior Court of Riverside County. Jeffrey Prevost and Patrick F. Magers, Judges.<sup>1</sup> Affirmed with directions.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

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<sup>1</sup> Judge Magers is a retired judge of the Riverside Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Prior to trial, defendant filed a motion to suppress evidence challenging the initial detention (Pen. Code, § 1538.5); the People filed an opposition to the motion; and defendant filed a reply to the opposition. The motion was heard and denied by the trial court.

A jury found defendant and appellant John Edward McGee, Jr., guilty of possession of cocaine base for sale (Health & Saf. Code, § 11351.5, count 1); possession of methamphetamine for sale (Health & Saf. Code, § 11378, count 2); transportation of cocaine base (Health & Saf. Code, § 11352, subd. (a), count 3); transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a), count 4); and resisting a police officer by force or violence (Pen. Code, § 69, count 5). In a bifurcated proceeding, the trial court found true that defendant had suffered three prior convictions for selling or possessing a controlled substance for sale (Health & Saf. Code, §§ 11351.5, 11370.2, subd. (a), 11378) and that defendant had served a prior prison term (Pen. Code, § 667.5, subd. (b)). Defendant was sentenced to a total term of 15 years eight months in state

prison, with credit for time served.<sup>2</sup> Defendant's sole contention on appeal is that the trial court erred in denying his suppression motion because the detention was unlawful. We reject this contention and affirm the judgment.

## I

### FACTUAL AND PROCEDURAL BACKGROUND<sup>3</sup>

On December 22, 2009, about 4:00 p.m., Riverside County Sheriff's Deputy Tavaréz and his partner were parked on Weston and Lukens in the Enchanted Heights area. Deputy Tavaréz observed a blue Chevy Impala driving south on Lukens, with a broken or cracked windshield. Deputy Tavaréz believed this to be in violation of Vehicle Code section 26710 and followed the vehicle, which immediately turned into a driveway of a residence.

After the deputies activated the patrol unit's overhead lights and pulled into the driveway behind the Chevy Impala, they approached the vehicle. Upon approaching the vehicle, Deputy Tavaréz smelled fumes of marijuana emanating from inside the vehicle. The sole occupant of the vehicle was defendant. Deputy Tavaréz asked defendant if he had any marijuana in the vehicle, since he could smell it. Defendant responded, "I just

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<sup>2</sup> We note that the clerk's minute order and the abstract of judgment incorrectly note defendant's total sentence as 13 years eight months. These documents also incorrectly state that defendant's sentence on count 3 was four years and that count 4 was stayed pursuant to section 654. We will direct the superior court clerk to correct the minute order and abstract of judgment accordingly. (*People v. Mesa* (1975) 14 Cal.3d 466, 471 [court's oral pronouncement of judgment controls over any discrepancy in the clerk's minute order or abstract of judgment].)

<sup>3</sup> The factual background is taken from the suppression hearing held on January 11 and 20, 2011, and presided over by Judge Prevost.

finished smoking the marijuana.” Defendant Tavaréz then asked defendant if he could search his person and the vehicle. Defendant replied in the affirmative. The deputy thereafter conducted a patdown search of defendant. Deputy Tavaréz explained that defendant was “detained for the investigation of marijuana.”

On cross-examination, Deputy Tavaréz acknowledged that he did not issue a citation for the broken windshield. The deputy explained that he did not issue the citation because “[t]he other circumstances led to different charges.”

Riverside County Sheriff’s Deputy Thomas completed a vehicle report; he inspected defendant’s vehicle and took an inventory of the vehicle’s contents. Deputy Thomas stated that the vehicle had dents and scratches, as well as a cracked windshield. However, he did not note the cracked windshield in the report because he “didn’t think it was relevant to the report.” Additionally, Deputy Thomas did not take any pictures of the windshield, but unequivocally testified that the vehicle had a cracked windshield.

The tow truck driver who removed the vehicle from the scene testified that he did not remember whether or not the windshield was cracked.

Defendant, in propria person, filed a suppression motion, among others, challenging the initial detention. The People subsequently filed an opposition asserting (1) the stop was lawful due to a traffic violation, (2) defendant consented to the search, and (3) the arrest of defendant was based on probable cause.

Following argument from defendant and the prosecutor, the trial court denied the suppression motion. It found, by a preponderance of the evidence, that there was reasonable cause to stop defendant’s vehicle. The trial court stated: “[T]he vehicle . . .

did have a cracked windshield of the nature such that it gave reasonable cause for Deputy Tavaréz and his partner to initiate a stop [of] the vehicle to investigate further, and as suggested by [the prosecutor's] argument, to investigate whether or not there was in fact a violation of Vehicle Code Section 26710 and whether the break was such that it might impair the vision of the vehicle's driver." The trial court further noted, "there is no evidence with respect to the extent of the cracked windshield, but I believe that there was still reasonable cause for a stop of the vehicle for investigation of that particular issue upon the stop. And I further note and accept Deputy Tavaréz's testimony that the cracked or broken windshield was observed by him . . . while the vehicle driven by [defendant] was in motion, and therefore I do find that the break or crack was of sufficient visibility that it did warrant further investigation."

## II

### DISCUSSION

#### A. *Motion to Suppress*

Defendant contends that the trial court erred in denying his suppression motion because the deputies lacked an objectively reasonable suspicion that the crack in his windshield impaired his vision.<sup>4</sup> We disagree.

The standard of appellate review of a trial court's ruling on a motion to suppress evidence is well established. In reviewing the denial of a suppression motion pursuant to

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<sup>4</sup> We note that on appeal defendant is challenging the detention only. Although not raised by either party, we also observe, based on the totality of circumstances found in the record, the initial encounter to be consensual in nature. (See *El Centro Grain Co. v. Bank of Italy, Etc.* (1932) 123 Cal.App. 564, 567 [appellate court assesses judicial action, not judicial reasoning]; *People v. Selz* (1955) 138 Cal.App.2d 205, 210 [the appellate court applies the long-settled principle that it must affirm a correct decision, even if that decision is based on erroneous reasoning].) It is well settled that “[c]onsensual encounters do not trigger Fourth Amendment scrutiny.” (*In re Manuel G.* (1997) 16 Cal.4th 805, 821, citing *Florida v. Bostick* (1991) 501 U.S. 429, 434.) A detention does not occur when a police officer merely approaches an individual in a public setting and asks a few questions. (*In re Manuel G.*, at p. 821.) “As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required on the part of the officer. Only when the officer, by means of physical force or show of authority, in some manner restrains the individual’s liberty, does a seizure occur.” (*Ibid.*)

Here, it was undisputed that only two officers approached defendant as defendant pulled into a driveway; that as the officers approached defendant, they immediately smelled marijuana emanating from inside defendant’s vehicle, thereby giving them reasonable suspicion to detain defendant thereafter; that defendant admitted to just having smoked marijuana; and that defendant gave consent to search his person and vehicle. The record also shows that defendant was cooperative; that he voluntarily answered the officer’s questions; that the officers did not confront defendant in an apprehensive manner; and the encounter occurred in a public setting. The most significant factor is that the officers detected an odor of marijuana while being in a location where they were entitled to be present. Essentially, the encounter of defendant by the officers and the officers’ detection of the odor of marijuana were simultaneous events.

Penal Code section 1538.5, we evaluate the trial court's express or implied factual findings to determine whether they are supported by substantial evidence; but we exercise our independent judgment to determine whether, on the facts found, defendant's Fourth Amendment rights have been violated. (*People v. Glaser* (1995) 11 Cal.4th 354, 362; *People v. Williams* (1988) 45 Cal.3d 1268, 1301.)

In assessing the reasonableness of searches and seizures, we apply federal constitutional standards. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1156, fn. 8.) At trial, the "prosecution has the burden of establishing the reasonableness of a warrantless search." (*People v. Jenkins* (2000) 22 Cal.4th 900, 972.) On appeal, it is defendant's burden to demonstrate error. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549.) We review the evidence in the light most favorable to the trial court's ruling. (*People v. Renteria* (1992) 2 Cal.App.4th 440, 442.) We will affirm that ruling if it is correct on any applicable legal theory. Our review is confined to the trial court's ruling, not the reasons given for its ruling. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)

"[A] police officer can legally stop a motorist *only* if the facts and circumstances known to the officer support at least a reasonable suspicion that the driver has violated the Vehicle Code or some other law. [Citations.]" (*People v. Miranda* (1993) 17 Cal.App.4th 917, 926; accord, *People v. Wells* (2006) 38 Cal.4th 1078, 1082.) A traffic stop is reasonable if the detaining police officer can point to specific articulable facts that objectively suggest the detainee is violating the law in light of the totality of the circumstances. (*People v. Colbert* (2007) 157 Cal.App.4th 1068, 1072) "Reasonable

suspicion is a lesser standard than probable cause, and can arise from less reliable information than required for probable cause.” (*People v. Wells*, at p. 1083.)

Vehicle Code section 26710 in pertinent part provides: “It is unlawful to operate any motor vehicle upon a highway when the windshield or rear window is in such a defective condition as to impair the driver’s vision either to the front or rear.”

Here, Deputy Tavarez testified that he stopped defendant’s vehicle because it had a broken or cracked windshield, which he believed constituted a violation of Vehicle Code section 26710. Deputy Tavarez was parked and sitting in his patrol unit when he observed defendant driving down an adjacent street. From that vantage point, Deputy Tavarez saw a broken or cracked windshield. This caught the deputy’s attention, and gave the deputy reasonable suspicion to make a vehicle stop. Deputy Tavarez’s testimony created a reasonable inference that the windshield was cracked in such a manner that he believed it impaired defendant’s vision. Deputy Tavarez pointed to specific articulable facts to suggest that defendant was violating the Vehicle Code. Accordingly, the stop was reasonable.

Defendant’s reliance on *People v. White* (2003) 107 Cal.App.4th 636 is misplaced. There, an officer stopped the defendant’s vehicle because he believed the defendant had violated the Vehicle Code by hanging an air freshener from his rearview mirror and for having only one Arizona license plate affixed to the vehicle. (*Id.* at pp. 641-643.) There was no law against hanging an air freshener from the rearview mirror, nor was the driver required to have two Arizona plates affixed to the vehicle. (*Id.* at p. 643) At the hearing on the motion to suppress evidence, a civil engineer testified that the air freshener

covered less than 0.05 percent of the total surface of the windshield, and that based on the relative sizes of the air freshener and the windshield, the air freshener would not have obstructed the view of a six-foot tall driver. (*Id.* at pp. 641-642.) The expert witness also testified that he had conducted an experiment, which verified this conclusion. (*Ibid.*) In addition, the defendant testified that the air freshener did not obstruct his view. (*Ibid.*) Moreover, the trial court had itself “stated that it had ‘difficulty accepting’ that such an object would really obstruct a driver’s view.” (*Id.* at p. 642.) On the evidence that was before the trial court, the Court of Appeal concluded that the detention had not been supported by specific and articulable facts supporting the officer’s belief that the driver’s view was obstructed. (*Ibid.*) The court also ruled that the officer was seeking to enforce a nonexistent legal standard and, therefore, had unlawfully detained the driver. (*Id.* at 643-644.)

*White* is distinguishable from the instant case. In contrast to the air freshener in *White*, here, the deputy testified that he observed a broken or cracked windshield from his position across the street and knew it violated Vehicle Code section 26710. Further, unlike in *White*, the situation here was different. Here, the deputy was not investigating a dangling object from the rearview mirror; Deputy Tavarez clearly observed a cracked or broken windshield from a distance and stopped defendant’s vehicle for violating Vehicle Code section 26710. Deputy Tavarez’s testimony suggests that he had already determined that the crack in the windshield impaired the driver’s vision when he initiated the stop; and, therefore, contrary to defendant’s assertion, there was no reason for the prosecution to show the length and size of the crack. Under the Vehicle Code, an officer

may stop a driver for having a cracked windshield; Deputy Tavarez was not seeking to enforce a nonexistent legal standard as the officer in *White*.

Additionally, though the deputy here did not specifically testify that the crack in the windshield obstructed the driver's view, the evidence adduced at the suppression hearing was nonetheless sufficient to establish that the deputy had reasonable suspicion to stop the vehicle based on the crack in the windshield and had specific and articulable facts. We also note that "[t]he possibility [that the crack did not impair the driver's view] does not deprive the officer of the capacity to entertain a reasonable suspicion of [an impairment in violation of the Vehicle Code]. Indeed, the principal function of [the traffic stop] is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal—to 'enable the police to quickly determine whether they should allow the [driver] to go about his business or hold him to answer charges.' [Citation.]" (*In re Tony C.* (1978) 21 Cal.3d 888, 894, superseded by statute on another ground as stated in *People v. Lloyd* (1992) 4 Cal.App.4th 724, 733.) We therefore reject defendant's contention that the deputy did not have a reasonable suspicion that the condition of the windshield was so defective as to impair the driver's vision. The observed crack supported the traffic stop even though, upon closer examination, it could be determined that the crack did not support a violation of the Vehicle Code. Once Deputy Tavarez lawfully stopped defendant's vehicle, his subsequent search for marijuana was lawful based upon the strong odor of marijuana emanating from the vehicle.

Deputy Tavaréz's testimony regarding the crack in defendant's windshield demonstrated a reasonable suspicion sufficient to justify the traffic stop. Accordingly, the trial court did not err in denying defendant's motion to suppress.

B. *Correction of Sentencing Minute Order and Abstract of Judgment*

On February 2, 2011, following a jury trial, defendant was found guilty of possession of cocaine base for sale (Health & Saf. Code, § 11351.5, count 1); possession of methamphetamine for sale (Health & Saf. Code, § 11378, count 2); transportation of cocaine base (Health & Saf. Code, § 11352, subd. (a), count 3); transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a), count 4); and resisting a police officer by force or violence (Pen. Code, § 69, count 5). As to counts 1 through 4, in a bifurcated proceeding, the trial court found true that defendant had suffered three prior convictions for selling or possessing a controlled substance for sale (Health & Saf. Code, §§ 11351.5, 11370.2, subd. (a), 11378) and that defendant had served a prior prison term (Pen. Code, § 667.5, subd. (b)).

Defendant thereafter requested to be immediately sentenced. During the sentencing hearing, the trial court sentenced defendant to a total term of 15 years eight months in state prison as follows: the middle term of six years on count 3, plus additional three-year terms for each of the three drug-related priors, a concurrent middle term of three years on count 4, plus additional concurrent three-year terms for each of the three drug-related priors, and a consecutive eight months on count 5. Sentences on counts 1 and 2, as well as the attendant enhancements, were ordered stayed pursuant to Penal Code

section 654.<sup>5</sup> Additionally, the prior prison term enhancement was ordered stricken pursuant to Penal Code section 1385. Nonetheless, the February 2, 2011, clerk's minute order and the abstract of judgment incorrectly note defendant's total sentence as 13 years eight months. These documents also incorrectly state that the sentence on count 3 was the middle term of four years, and that count 4, along with the attached enhancements, were ordered stayed pursuant to Penal Code section 654.

The court's oral pronouncement of judgment controls over any discrepancy in the clerk's minute order or the abstract of judgment (*People v. Mesa* (1975) 14 Cal.3d 466, 471), and when such a discrepancy appears, the order and abstract must be corrected to reflect the sentence that was orally imposed (*People v. Mitchell* (2001) 26 Cal.4th 181, 185). The February 2, 2011, clerk's minute order and the abstract of judgment should therefore be corrected accordingly.

### III

#### DISPOSITION

The superior court clerk is directed to correct the February 2, 2011, minute order, and the abstract of judgment to reflect that the trial court ordered sentence on count 3 to be the middle term of six years, plus a total term of nine years on the attendant three drug-related enhancements, plus eight months on count 5, for a total sentence of 15 years

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<sup>5</sup> We note that the reporter's transcript incorrectly refers to count 2, a violation of Health and Safety Code section 11378, as count 3. Nonetheless, the record clearly shows that the trial court intended to impose the middle term on all the counts and to sentence defendant to a total term of 15 years eight months. Thus, it does not appear that the total sentence would be affected. Accordingly, while a remand is not futile, judicial economy militates against it. (See, e.g., *People v. Jones* (2000) 82 Cal.App.4th 485, 493.)

eight months, and that count 4 was ordered to be served concurrently. The superior court clerk is also directed to forward a corrected copy of the abstract of judgment to the Department of Corrections and Rehabilitation. (Pen. Code, §§ 1213, 1216.) In all other respects, the judgment is affirmed.

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RICHLI  
Acting P.J.

We concur:

KING  
J.

CODRINGTON  
J.