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

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Appellant,

v.

REYES BRIANO,

Defendant and Respondent.

E063491

(Super.Ct.No. RIF1304276)

OPINION

APPEAL from the Superior Court of Riverside County. Patrick F. Magers, Judge. (Retired judge of the Riverside Super. Ct., assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Affirmed.

Michael A. Hestrin, District Attorney, and Matt Reilly, Deputy District Attorney, for Plaintiff and Appellant.

Frank J. Torrano, under appointment by the Court of Appeal, for Defendant and Respondent.

## I

### INTRODUCTION<sup>1</sup>

Defendant Reyes Briano was charged by information with count 1, felony possession of methamphetamine (Health & Saf. Code, § 11378); count 2, possession of a collapsible baton (§ 22210); count 3, receiving stolen property (§ 496, subd. (a)); count 4, felony possession of heroin (Health & Saf. Code, § 11350, subd. (a)); count 5, felony possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a), and § 12022.1); count 6, being under the influence (Health & Saf. Code, § 11550, subd. (a)); five prior offenses (§ 667.5, subd. (b)); and two special prior offenses (§§ 667, subds. (c) and (e)(2)(a), and 1170.12, subd. (e)(2)(A).)

The People appeal from a March 2015 order granting defendant's motion to suppress evidence obtained in an illegal search and dismissing the case. (§§ 1238.7, subd. (a)(7), 1538.5.) We affirm.

## II

### THE SECTION 1538.5 HEARING

#### *A. Acosta's Testimony*

One morning in April 2013, a Riverside police detective, Jeffrey Acosta, was on vehicle patrol in a high crime area. Near the intersection of University and Sedgewick,

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<sup>1</sup> All statutory references are to the Penal Code unless stated otherwise.

Acosta saw defendant and two other people involved in an argument next to a parked car. One person walked away and the two others got in the car. Defendant was the driver.

Although Acosta did not observe any criminal activity, he stopped defendant's car to investigate. Acosta did not remember whether he used lights or siren to make the stop. Defendant raised his hand, volunteered, "I'm on parole," and produced his California Department of Corrections (CDC) parole card. Acosta detained defendant and the passenger. Acosta testified defendant consented to a search, which defendant disputes. The police found a backpack containing defendant's wallet and cash, a collapsible baton, and stolen property. The detective also looked at defendant's cell phone, found information about drug sales, and obtained a search warrant.

Next the police performed a parole search at defendant's residence and found seven grams of methamphetamine, a scale, balloons, glass pipes, computers, and electronic equipment.

#### *B. Defendant's Testimony*

Defendant testified he was talking to two friends when the police blocked his car with the patrol car. Defendant recalled the police used the car's lights and siren. Defendant cooperated by raising his hands and announcing he was on parole. Defendant denied that he consented to a search of his car or phone.

### *C. The Court's Ruling*

The trial court found that, when Acosta used his lights and siren to stop defendant, it was an illegal detention and the subsequent police search was illegal. After granting the suppression motion and based on the lack of evidence, the court dismissed the case.

## III

### ATTENUATION

We use a deferential standard of review: “In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated. (*People v. Ayala* (2000) 24 Cal.4th 243, 279.) We review the court’s resolution of the factual inquiry under the deferential substantial evidence standard. The ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review. (*Ibid.*)’ (*People v. Ramos* (2004) 34 Cal.4th 494, 505.) In evaluating whether the fruits of a search or seizure should have been suppressed, we consider only the Fourth Amendment’s prohibition on unreasonable searches and seizures. (*People v. Carter* (2005) 36 Cal.4th 1114, 1141.)” (*People v. Brendlin* (2008) 45 Cal.4th 262, 268.)

The People appeal, arguing that the taint of an illegal search was purged by attenuation by an intervening cause. (*Murray v. U. S.* (1988) 487 U.S. 533; *People v. Sesslin* (1968) 68 Cal.2d 418, 428; *People v. Brendlin, supra*, 45 Cal.4th at pp. 268-269.) The People contend the issue may first be raised on appeal. (*Brendlin*, at p. 267, fn. 1.)

Defendant strenuously argues the issue was waived or forfeited. Notwithstanding, we find in favor of defendant on the merits.

The doctrine of attenuation has often been articulated: “‘Relevant factors in this “attenuation” analysis include the temporal proximity of the Fourth Amendment violation to the procurement of the challenged evidence, the presence of intervening circumstances, and the flagrancy of the official misconduct.’ [Citation.]” (*People v. Brendlin, supra*, 45 Cal.4th at p. 269.) The People contend the parole search condition attenuates the connection between the unlawful detention and the discovery of incriminating evidence. Two appellate decisions have reached opposing conclusions on this issue, the First District in *People v. Durant* (2012) 205 Cal.App.4th 57, and the Sixth District in *People v. Bates* (2013) 222 Cal.App.4th 60.

The People rely on *Durant* which applied the *Brendlin* factors to conclude that any illegality in an initial traffic detention was attenuated by a defendant’s probation search condition. *Durant* explained: “Although the patdown search and discovery of the gun occurred shortly after the traffic detention, they did not occur until after Officer Taylor had recognized appellant as a person subject to a search condition. (*Brendlin, supra*, 45 Cal.4th at pp. 270-271.) The search condition supplied legal authorization to search that was completely independent of the circumstances leading to the traffic stop. (*Id.* at p. 271.) Nor is there any flagrancy or purposefulness to the alleged unlawful conduct by Taylor—though the trial court found that the traffic stop was made without reasonable

suspicion, it specifically found Taylor did not act in an arbitrary, capricious, or harassing manner. (*Id.* at pp. 271-272.)” (*People v. Durant, supra*, 205 Cal.App.4th at p. 66.)

The *Bates* decision both distinguished and criticized *Durant*: “We do not read *Durant* to stand for the proposition that discovery after the fact of a probation search condition will sanitize any unlawful detention without regard to the circumstances surrounding that seizure. We are not comfortable with applying *Durant* to the facts here, as doing so would open the door to random vehicle detentions for the purpose of locating probationers having search conditions. We take no issue with the lawfulness of probation search conditions, nor with the ability of law enforcement to conduct suspicionless searches of known probationers. Our discomfort is in extending these concepts to situations where an individual’s probation status is wholly unknown to law enforcement at the time of the initial detention and is used only after the fact to justify an otherwise unlawful search.” (*People v. Bates, supra*, 222 Cal.App.4th at p. 70.)

*Bates* emphasized the significance of the third *Brendlin* factor: “The third factor from *People v. Brendlin*, flagrancy and purposefulness of police misconduct, ‘is considered the most important because it is tied directly to the rationale underlying the exclusionary rule, deterrence of police misconduct.’ (*U. S. v. Reed* (7th Cir. 2003) 349 F.3d 457, 464-465.) Bad faith need not be shown for police misconduct to be purposeful. Instead, this factor is met ‘when officers unlawfully seize a defendant “in the hope that something might turn up.”’ (*U. S. v. Williams* (6th Cir. 2010) 615 F.3d 657, 670, quoting *Brown v. Illinois* (1975) 422 U.S. 590, 605.) Unlike the officer in *Durant*, who stopped a

car based on a perceived traffic violation, Deputy Gidding stopped the tan car without any observation of possible wrongdoing. As we discussed previously, Deputy Gidding's conduct was based on a hunch that defendant might be in the vehicle. Though we do not suggest Deputy Gidding acted in bad faith, we find his suspicionless stop of the tan car nonetheless purposeful for our attenuation analysis. Based on this finding, together with our determination that defendant's probation search condition was an insufficient attenuating circumstance, we conclude that the evidence obtained as a result of the detention and search should have been suppressed." (*People v. Bates, supra*, 222 Cal.App.4th at pp. 70-71.)

The reasoning of *Bates* is more persuasive here than *Durant*. Although Officer Acosta candidly admitted he observed no criminal activity, he stopped defendant—apparently based on a mere hunch or a hope of finding something. Acosta even doubted that he had activated his siren and lights when he stopped defendant, suggesting he believed he had no cause to act. For this reason, as did the appellate court in *Bates*, we conclude the information about defendant's parole search condition did not serve to attenuate the taint of the illegal detention and search. We also reject the People's alternative argument based on Proposition 8, the Right to Truth-in-Evidence (Cal. Const., art. I, § 28, subd. (f)(2)), which the People acknowledge has been raised only to preserve the issue for further review.

IV

DISPOSITION

No attenuation based on defendant's parole search condition cured the illegal stop and search. We affirm the judgment.

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CODRINGTON  
J.

We concur:

KING  
Acting P. J.

MILLER  
J.