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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH MARTIN PEREZ,

Defendant and Appellant.

F062131

(Super. Ct. No. F10905056)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan B. Conklin, Judge.

Tara K. Hoveland, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Rachelle A. Newcomb, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Poochigian, J. and Franson, J.

Appellant Joseph Martin Perez appeals from the judgment entered after a jury convicted him of vehicle theft (Veh. Code, § 10851, subd. (a)) and he admitted a strike allegation (Pen. Code, §§ 667, subds. (d) & (e)(1); 1170.12, subds. (b) & (c)(1)) and a prior prison enhancement allegation (Pen. Code, § 667.5, subd. (b)). The court imposed the midterm of two years doubled to four years for the strike allegation, plus one year for the prior prison enhancement allegation, for a total term of five years. On appeal, Perez contends the court erred by: (1) denying his suppression motion because he was detained without reasonable suspicion; and (2) admitting his un-*Mirandized*¹ statements made while he was illegally detained. We affirm.

FACTS

On October 3, 2010, at about 1:55 p.m., Fresno County Sheriff's Deputy Jose Diaz was patrolling the area of McKinley and Brawley, a rural county area and his usual beat for the last two years. He saw a bronze-colored Honda that was headed in his direction make a quick right turn into the driveway of an old gas station that was being used as a residence. Deputy Diaz had been at the residence, a known narcotics location, "numerous, numerous" times. He was aware that gang members and drug users "frequent that location," and he knew the people who lived at the residence. The structure was not the usual tract house in a residential neighborhood. As Deputy Diaz described it, "[t]he location ... is burned out, but there's a canopy that you can see from the roadway. The driveway runs ... north/south from the roadway, to the west of it is a big open field. Then [the driveway] goes back and opens up quickly to the east ..., and then it goes back a little bit, behind there there's a trailer."

Deputy Diaz saw the car proceed along the driveway, and make another quick right turn, and park behind the building. Diaz turned into the driveway and parked. As he did so, the three occupants of the Honda quickly got out and walked toward the

¹ *Miranda v. Arizona* (1996) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

structure. Perez was the driver. One of the passengers said he was there to visit his cousin, Gary Mack, who Diaz knew lived in the house. Diaz asked the passengers who the vehicle belonged to. They did not know. He asked Perez the same question. Perez answered he did not know but added that “some lady” had given him the car and he did not know if it was stolen or not.

Perez’s statement made Deputy Diaz suspicious because he had found stolen vehicles on that property before. At that point he told all three occupants to stop and they complied. Diaz ordered Perez to his knees because Perez appeared to be very nervous and had started sweating. Diaz thought Perez was going to run so he drew his gun and told Perez not to move as he called for backup deputies. When those deputies arrived, Diaz handcuffed Perez and patsearched him. Diaz found several sets of keys in Perez’s pocket and a shaved ignition key that started the Honda.

As Deputy Diaz parked in the driveway, he ran the Honda’s license plate. The car did not show in the system as stolen. However, when Diaz learned the identity of the registered owner from a document in the car, he called the Fresno Police Department who told him they had received a call reporting the Honda stolen but had not had time to respond to the call. A deputy was dispatched to contact the Honda’s registered owner. Eventually, the owner arrived at the scene. She said the car had been stolen from her driveway in Clovis earlier that day. Perez did not have permission to take the car.

The court denied Perez’s motion to suppress finding that the initial encounter was consensual. When Deputy Diaz pulled into the driveway, Perez’s car had already stopped and its occupants were getting out. Diaz did not draw his gun or tell anyone to stop. He asked them who the car belonged to as they walked toward the structure. Only when the occupants could not identify the owner of the vehicle and Perez stated that “some lady” had given him the car, did Diaz detain the trio. The court concluded the detention at that point was justified based on Deputy Diaz’s ten years of experience, and his knowledge and experience with that specific area, which included that there were

gang crimes, drug crimes and auto theft crimes occurring at that location. That information, coupled with Perez's sudden turn into the property, its occupants quickly fleeing the vehicle and their responses to his questions provided reasonable suspicion. The court added, it did not find the testimony sufficient to justify the patsearch for officer safety, but the shaved key would have been found inevitably in a search incident to Perez's arrest for vehicle theft.

Perez renewed his suppression motion in the Superior Court. The trial court reviewed the preliminary hearing transcript, heard argument from counsel and denied the suppression motion. The court found Perez was detained after he gave conflicting statements about ownership of the car. That, and the other suspicious circumstances, justified the detention. The trial court also found the shaved key would have been discovered inevitably and the detention was not unduly prolonged.

The trial court also considered Perez's claim that his un-*Mirandized* statements that he did not know who owned the car and that "some lady" had given it to him should have been excluded, and ruled the statements were admissible.

DISCUSSION

Was the Initial Contact a Detention?

Perez contends the court erred in failing to suppress the fruits of his unlawful detention. Specifically, he was unlawfully detained because Deputy Diaz lacked specific, articulable facts that Perez was engaged in criminal activity when Diaz contacted him. And, that contact was a detention because a reasonable person would not have felt free to ignore the deputy's question and walk into the structure. The People respond that the lower court properly found the initial contact was a consensual encounter.

Standard of Review

Where a motion to suppress is submitted to the superior court on the preliminary hearing transcript, we disregard the findings of the superior court and review the magistrate's ruling on the motion to suppress. (*People v. Hua* (2008) 158 Cal.App.4th

1027, 1033.) We defer to the magistrate's factual findings, where supported by substantial evidence, but exercise our independent judgment to determine whether, on the facts found, the search and seizure were reasonable under the Fourth Amendment. (*Ibid.*; *People v. Camacho* (2000) 23 Cal.4th 824, 830.)

Perez contends he was detained when Deputy Diaz pulled into the driveway, parked, approached him and his passengers, and asked who the car belonged to. We disagree.

Not every encounter between a sheriff's deputy and an individual involves a seizure. A seizure occurs when the deputy, "by means of physical force or show of authority," restrains the individual's freedom of movement. (*People v. Celis* (2004) 33 Cal.4th 667, 673.) Whether a seizure has occurred is determined by an objective test that asks not whether the individual perceived that he was being ordered to restrict his movement, but whether the deputy's words and actions would have conveyed that to a reasonable person. (*Ibid.*) When the deputy engages in conduct that would communicate to a reasonable person that he was not free to ignore the officer's presence and go about his business, there has been a seizure. (*Ibid.*) Circumstances establishing a seizure can include the presence of several deputies, a deputy's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the deputy's request might be compelled. (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.)

A seizure does not occur simply because a deputy approaches an individual and asks a few questions--even potentially incriminating questions. So long as a reasonable person would feel free to disregard the deputy and go about his business, the encounter is consensual. (*Florida v. Bostick* (1991) 501 U.S. 429, 434, 439 [111 S.Ct. 2382, 2386, 115 L.Ed.2d 389].) That is true even if the individual reasonably feels that he is the subject of general suspicion at the time. (*People v. Bouser* (1994) 26 Cal.App.4th 1280, 1283, 1287 [no detention where police officer asked to talk to defendant, obtained some

personal information, and engaged in small talk while the officer checked for outstanding warrants, which the defendant may or may not have known he was doing].)

As pertinent to this case, the Fourth Amendment does not preclude police officers from openly entering a residential yard with the intent of asking questions of an occupant. (*People v. Rivera* (2007) 41 Cal.4th 304, 309, 310-311 (*Rivera*), citing by way of example, *People v. Frohriep* (2001) 247 Mich.App. 692 [637 N.W.2d 562, 564–565, 568] [acting on information that defendant might have controlled substances on his property, police approached defendant in an open area near a barn and requested permission to search].)

Perez cites cases illustrating situations where courts found a detention rather than a consensual encounter. (*People v. Wilkins* (1986) 186 Cal.App.3d 804, 807, 809; *United States v. Kerr* (9th Cir. 1987) 817 F.2d 1384, 1386-1387; *United States v. Burton* (7th Cir. 2006) 441 F.3d 509, 510; *United States v. Tuley* (8th Cir. 1998) 161 F.3d 513, 514-515; *United States v. Packer* (7th Cir. 1994) 15 F.3d 654, 655-656; and *United States v. Lechuga* (7th Cir. 1991) 925 F.2d 1035, 1039-1040.) These cases are distinguishable. In every case, the officers blocked the driver's freedom of movement. In contrast, Deputy Diaz stopped his patrol car in the driveway after Perez had parked the Honda behind the house, exited the car, and was approaching the residence. The record did not show that the patrol car blocked the Honda's exit and, in any event, the occupants were walking away from the car when Deputy Diaz approached.

People v. Garry (2007) 156 Cal.App.4th 1100 (*Garry*), which Perez also cites, is more analogous to his case. There the court reversed the trial court's denial of a suppression motion on the following facts. The officer testified that after only five to eight seconds of observing defendant from his marked police car, he bathed defendant in a spotlight, left the patrol car, and, armed and in uniform, briskly walked 35 feet in two and a half to three seconds directly to defendant while questioning him about his parole or probation status and disregarding defendant's indication that he was merely standing

outside his home. The court concluded the officer's actions were a show of authority so intimidating as to communicate to a reasonable person that he or she was not free to terminate the encounter. (*Id.* at pp. 1111-1112.)

Garry does not compel a different result in this case. Unlike the officer in *Garry*, Deputy Diaz did not use his spotlight, or “all but r[u]n” towards Perez while asking about his legal status. (*Garry, supra*, 156 Cal.App.4th at p. 1112.) Perez's arguments to the contrary, hinge on his assertion that the patrol car blocked the Honda's exit and therefore restrained Perez's freedom of movement, facts not established or reasonably inferable from the record.

A police officer does not detain a person by stopping the police car behind a car where the record does not show that the officer restricted the driver's freedom of movement. (*People v. Perez* (1989) 211 Cal.App.3d 1492, 1495.) Nor does an officer detain an individual merely by walking towards him as the individual is getting out of a car (*People v. Divito* (1984) 152 Cal.App.3d 11, 14), or by approaching him in a residential yard and asking some questions. (*Rivera, supra*, 41 Cal.4th at pp. 310-311.) Thus, we agree with the trial court that Deputy Diaz did not detain Perez by parking his patrol car in the gas station driveway, approaching Perez as he walked into the backyard and asking him who owned the car. Although Diaz was in uniform, he was alone, did not initially draw his weapon, did not touch Perez and did not order him to approach or stop. Therefore, Perez was not detained when he responded to Deputy Diaz's question about ownership of the car.

The consensual encounter became a detention only when Deputy Diaz ordered Perez and the passengers to stop after they were unable to identify the owner of the car. It is unusual and therefore suspicious for a driver to be unable to identify the owner of the car he is driving. Thus, at that point, coupled with the other information Deputy Diaz possessed, he had a reasonable suspicion that the Honda was stolen. None of the cases Perez cites involve such explicit suspicious circumstances. Finally, Deputy Diaz only

ordered Perez to kneel on the ground and drew his weapon when Perez engaged in behavior that led Diaz to believe Perez might flee before additional deputies arrived to assist in the investigation of the suspicious circumstances.

Accordingly, the trial court properly denied the motion to suppress evidence.

Was There *Miranda* Error?

Perez contends the court erred by denying his motion to exclude his un-*Mirandized* statements to Deputy Diaz. (*Miranda, supra*, 384 U.S. 436.) The trial court ruled that when Perez told the deputy he did not know who owned the car and that “some lady” had given it to him he was not in custody and *Miranda* warnings were not required.

Standard of Review

We apply a de novo standard of review to a trial court’s denial of a motion to suppress under *Miranda* when the trial court’s decision involves, as it does here, the assessment of undisputed facts against the law. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 642.)

Perez submits, as he did in his first argument, that he was unlawfully detained when he made the incriminating statements because a reasonable person would not have felt free to ignore Deputy Diaz’s question and walk away. In addition, Diaz’s intent was to find out if the car was stolen, so the question was designed to elicit an incriminating response. We disagree. For the same reasons we concluded Perez was not detained when Deputy Diaz asked him who owned the car, we conclude he was not subject to custodial interrogation.

Miranda safeguards apply only to suspects in custody or otherwise deprived of their freedom of action when they are interrogated. (*Miranda, supra*, 384 U.S. at p. 444; *People v. Mickey* (1991) 54 Cal.3d 612, 648.) *Miranda* warnings are not required during a consensual encounter, even if the officer suspects the individual of some wrongdoing. (*People v. Epperson* (1986) 187 Cal.App.3d 115, 119; *California v. Beheler* (1983) 463 U.S. 1121, 1225 [103 S.Ct. 3517, 77 L.Ed.2d 1275, 1278-1279].)

Perez was not detained, let alone in custody, when Deputy Diaz asked him who owned the car. Therefore, Perez was not subject to custodial interrogation and a *Miranda* warning was not required.

DISPOSITION

The judgment is affirmed.