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

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK TATE,

Defendant and Appellant.

F062199

(Super. Ct. No. BF134106A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Lee Phillip Felice, Judge.

Richard L. Fitzer, 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, R. Todd Marshall and Jeffrey Grant, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Kane, J., and Detjen, J.

STATEMENT OF THE CASE

On November 3, 2010, appellant, Mark Tate, was charged in an information with possession of heroin, a felony (Health & Saf. Code, § 11350, subd. (a), count one) and possession of narcotics paraphernalia, a misdemeanor (Health & Saf. Code, § 11364, count two). After conducting a hearing on appellant's suppression motion on December 15, 2010, the trial court issued a minute order denying appellant's motion.

On February 14, 2011, appellant waived his rights and entered into a plea bargain, admitting count one in exchange for Proposition 36 probation and the dismissal of count two. The court granted the prosecutor's motion to dismiss count two and placed appellant on Proposition 36 probation. Appellant filed a timely notice of appeal. Appellant contends that the trial court erred in denying his suppression motion.

FACTS

On October 11, 2010, at about 4:00 p.m., Bakersfield Police Officers Ronk and Diaz were on patrol around the 1300 block of Murdock Street in Bakersfield. The area was known to the officers for its high incidence of narcotics activity. According to Ronk, there was more narcotics activity at that location than "any other place in Bakersfield."

As the officers drove past, they observed a parked Ford Escort where appellant and Rayshawn Brown were standing. Appellant was near the rear passenger side door facing the front of the car. Brown was facing appellant. As appellant and Brown shook hands, Ronk saw a plastic bag hanging from the bottom of their hands. Ronk made a U-turn, pulled in behind appellant's car, and exited the patrol car. Appellant opened the rear passenger door of his car and entered the car. Brown quickly walked into a nearby residence. Ronk could see appellant hunched over inside his car moving his shoulders up and down with his right leg protruding from the car.

Diaz went to the nearby residence to contact Brown. Ronk approached the passenger side of appellant's car. Neither officer had drawn his weapon. The lights and

sirens of the patrol car were not activated. Without any prompting or comment from Ronk, appellant exited his car and stood by a nearby fence. Ronk did not order or ask appellant to exit his car.

When Ronk looked down at the seat where appellant had been sitting, he saw a syringe in plain view directly in the middle of the floorboard of the car. Syringes are used to consume controlled substances. Based on Ronk's training and experience, he believed appellant used the syringe to inject narcotics. After seeing the syringe, Ronk asked appellant if he was a diabetic. Appellant replied, "No, sir."

Ronk searched appellant. Ronk found a clear plastic bag of what appeared to be marijuana and a glass smoking pipe in the change pocket of appellant's pants. The glass pipe had burn residue on one end of the pipe. Based on his training and experience, Ronk believed the pipe was used to ingest narcotics. In appellant's sock, Ronk found two bags of what Ronk believed to be heroin.

On cross-examination, Ronk testified that before he searched appellant, he had appellant place his hands on his head. After Ronk found the pipe and the marijuana, he handcuffed appellant prior to finding the baggies of heroin.

DISCUSSION

Appellant argues that because he had not been arrested at the time the police conducted a full search of his person, evidence found on him should have been suppressed. Appellant contends that because there was no arrest, there could be no search incident thereto. Appellant argues the officer could not conduct a full search of appellant while appellant was being detained because a pat-down search is limited to suspicion that a defendant is armed and dangerous. Finally, appellant contends that unless what the officer touches during a search has the feel of a weapon, the officer cannot confiscate it. We disagree with appellant's characterization of the search and affirm the judgment.

In ruling on a motion to suppress, the trial court finds the historical facts, selects the law, and applies it to determine if the law, as applied, has been violated. We review the trial court's resolution of the factual inquiry under the deferential standard of substantial evidence. The ruling by the trial court is a mixed question of law and fact subject to independent review. On appeal, we do not consider the correctness of the court's reasons for its decision, only the correctness of the ruling itself. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145 (*Letner*).)

A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity. (*People v. Souza* (1994) 9 Cal.4th 224, 231 (*Souza*).) The appellate court reviews the objective reasonableness of the facts known to the officer, not the officer's legal opinion about those facts. (*People v. Limon* (1993) 17 Cal.App.4th 524, 539 (*Limon*).) The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. The principal function of the officer's investigation is to resolve that very ambiguity and establish whether the activity is legal or illegal. (*In re H.M.* (2008) 167 Cal.App.4th 136, 145.)

Even where an officer lacks probable cause to arrest a suspect, the officer may temporarily detain a suspect when the officer reasonably believes a crime has occurred or criminal activity is afoot. The detention can last no longer than necessary to effectuate the purpose of the stop. The stopping, handcuffing, and detention of a suspect for a few minutes can constitute a legal investigative detention. (*People v. Celis* (2004) 33 Cal.4th 667, 674.)

The Fourth Amendment permits an officer to "conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot"

and that the person detained is engaged in that activity. (*Illinois v. Wardlow* (2000) 528 U.S. 119, 123 (*Wardlow*); *Souza, supra*, 9 Cal.4th at p. 230.) Courts look to the totality of circumstances of each case in determining whether the ““detaining officers [had] a particularized and objective basis for suspecting [the detainee] of criminal activity. [Citations.]”” (*Souza, supra*, 9 Cal.4th at p. 230; *Brown v. Texas* (1979) 443 U.S. 47, 52; *United States v. Arvizu* (2002) 534 U.S. 266, 273.) This approach allows officers to draw on their own training and experience in deciding whether criminal activity is afoot. (*United States v. Arvizu, supra*, 534 U.S. at p. 273.) We defer to the trial court’s factual findings, express or implied, where supported by substantial evidence. (*People v. Garry* (2007) 156 Cal.App.4th 1100, 1106.)

In *Wardlow*, the high court recognized that “nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. [Citations.]” (*Wardlow, supra*, 528 U.S. at p. 124.) California courts have recognized that such behavior, in conjunction with other factors, can form an officer’s reasonable suspicion that criminal activity is afoot. (*Letner, supra*, 50 Cal.4th at p. 146 [flight under suspicious circumstances suggestive of guilt]; generally see *People v. McGaughran* (1979) 25 Cal.3d 577, 590.)

In *Souza*, our Supreme Court found that when an officer is patrolling a high crime neighborhood late at night and two people near a parked car act evasively when the officer directs his patrol car light toward them, the officer is justified in conducting a brief, investigative detention to find out whether activity being engaged in is criminal or legal. (*Souza, supra*, 9 Cal.4th at pp. 240-242.)

Appellant’s behavior in a high crime area known for narcotics transactions did not require an arrest of appellant by Ronk for Ronk to investigate whether or not criminal activity was afoot. Before appellant was detained by Ronk, Ronk approached appellant and asked him if he was a diabetic. Ronk’s question came immediately after seeing an apparent narcotics exchange and a syringe in plain view in appellant’s car. The

conversation that occurred during this early stage of appellant's encounter with Ronk was consensual. (See *People v. Franklin* (1987) 192 Cal.App.3d 935, 941; *People v. Epperson* (1986) 187 Cal.App.3d 115, 118-120.)

Appellant's actions, involving the passing of a plastic bag, his movement into his car and furtive gestures in the back of the car after the officers made a U-turn in their patrol car, his movement out of the car to a nearby fence without direction from the officer, and the presence of a syringe in plain view in appellant's car are all circumstances suggestive of appellant's nervousness and consciousness of guilt. (*Wardlow, supra*, 528 U.S. at p. 124; *Letner, supra*, 50 Cal.4th at p. 146.) Appellant's conduct justified his detention so Ronk could determine what was happening. (See *People v. Warren* (1984) 152 Cal.App.3d 991, 994-997 [detention for suspect to show investigating officer receipts for property suspect claimed to own justified to clarify ambiguity surrounding suspect's statements].)

Ronk had already witnessed what appeared to him to be a narcotics transaction between appellant and Brown. Ronk then saw a syringe in plain view in appellant's car where appellant was located immediately before Ronk asked appellant if he was a diabetic. Respondent notes that the presence of a syringe in appellant's car within his immediate dominion and control, coupled with the fact that appellant acknowledged he was not a diabetic, constituted a violation of Business and Professions Code section 4140. Illegal possession of a syringe is a misdemeanor. (Bus. & Prof. Code, § 4326, subd. (a); see *People v. Ross* (2007) 155 Cal.App.4th 1033, 1041, fn. 7.)

Penal Code section 836, subdivision (a)(1) permits a peace officer to make a warrantless arrest when the officer has probable cause to believe the person to be arrested has committed a public offense in the officer's presence. Cause to arrest, and to search a defendant, exists when the officer witnesses a public offense by the defendant. (*People v. Kraft* (2000) 23 Cal.4th 978, 1037; *People v. Boren* (1987) 188 Cal.App.3d 1171, 1177-

1178 [public intoxication]; *People v. Tarkington* (1969) 273 Cal.App.2d 466, 468-469 [possession of a concealed firearm in public].) We agree with respondent that appellant's misdemeanor violation provided Ronk with probable cause to believe appellant had committed a crime in the officer's presence and justified the search of appellant incident to a lawful arrest. (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 111 (*Rawlings*); *United States v. Robinson* (1973) 414 U.S. 218, 235-236; *Limon, supra*, 17 Cal.App.4th at p. 538.)

We further find that it does not matter whether appellant was formally under arrest when Ronk first began his search, or if appellant was under arrest after Ronk handcuffed him and continued searching appellant. Where a formal arrest follows quickly on the heels of a challenged search of the defendant's person, and there is probable cause for the arrest, it is not "particularly important that the search preceded the arrest rather than vice versa. (*Rawlings, supra*, 448 U.S. at p. 111.) Once an officer has probable cause to arrest a defendant, the officer can open any container in the course of a full body search. (*Limon, supra*, 17 Cal.App.4th at p. 538.)

In his reply brief, appellant argues that Ronk characterized his encounter with appellant as a detention, not an arrest. Appellant maintains that the holding in *Rawlings* is not applicable to this case. In making our determination that Ronk reasonably detained appellant and had probable cause to arrest him prior to commencing the search, we are not bound by the officer's legal opinion about the facts. (*Limon, supra*, 17 Cal.App.4th at p. 539.) We therefore reject appellant's challenge to Ronk's search on the basis that it occurred prior to appellant's arrest.¹

¹ Because Ronk had probable cause to arrest appellant prior to searching him, we also reject appellant's argument that Ronk could only search for weapons, not for contraband. We further find appellant's reliance on *People v. Valdez* (1987) 196 Cal.App.3d 799, 804-808 (*Valdez*) to be misplaced. In *Valdez*, the search was incident to the execution of a search warrant and the officers found drugs in a film canister in

We conclude that the trial court did not err in denying appellant's suppression motion.

DISPOSITION

The judgment is affirmed.

appellant's pocket after they determined he was not armed. (*Ibid.*) Unlike the defendant in *Valdez*, appellant committed an offense in the presence of the investigating officer. We do not reach the issue in *Valdez* of whether an officer is prohibited from removing drug-related items whose tactile contours do not feel like weapons or whether the plain feel exception applies to this case. (*Id.* at p. 805.)