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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL ACOSTA, JR.,

Defendant and Appellant.

F062392

(Kern Super. Ct. No. BF119844B)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II and John R. Brownlee, Judges.*

Linda M. Leavitt, 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, Eric L. Christoffersen and Paul A. Bernardino, Deputy Attorneys General, for Plaintiff and Respondent.

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* Judge Twisselman ruled on the motions to suppress held on April 16 and May 13, 2008; Judge Brownlee presided over the trial and remaining issues on appeal.

INTRODUCTION

Appellant Miguel Acosta, Jr., stands convicted of transportation of methamphetamine, narcotic possession for sale, narcotic possession while armed, felon in possession of a firearm, and felon in possession of ammunition. Multiple enhancements also were found true. Acosta challenges the sufficiency of the evidence to support the convictions, contending there was a lack of evidence he was in possession. He also contends the trial court erred in denying his suppression motion and in calculating the penalty assessments imposed at sentencing. The penalty assessments imposed are incorrect. Acosta's other contentions lack merit. We will correct the penalty assessments and in all other respects affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On June 13, 2007, around 4:10 p.m., Rebecca Long was in her Chevy SUV, along with her five children and nephew, traveling on Highway 99. Acosta was in his pickup with his daughter. When Acosta merged into Long's lane, both drivers flipped each other off with their middle fingers.

Acosta was enraged and tailgated Long's vehicle at speeds of up to 70 miles per hour. As Acosta sped up and pulled up alongside the passenger side of Long's vehicle, one of Long's children yelled, "[T]he guy has a gun." The children saw that Acosta was pointing a gun at their mother. Acosta appeared to be shouting at them.

Long passed a California Highway Patrol vehicle and honked to signal for help. Long asked the children to write down Acosta's license plate number. Acosta immediately turned off at the next exit; Long drove home and dialed 911.

The officer who responded to the 911 call retrieved the license plate number and tracked it to a residence, where the officer saw Acosta washing his pickup. Acosta admitted to an incident on the freeway involving an SUV and a female driver; he denied pointing a gun at Long.

About two weeks later, on June 24, around 10:30 p.m., Jolene Clement picked up Acosta in an alley in East Bakersfield. Clement was driving her Mustang; Acosta sat in the front passenger seat. Clement drove to a nearby gas station and Acosta paid for the gas for the car. Clement drove back through the alley and spotted a patrol car. She pulled over and parked. Acosta told Clement to step out of the vehicle with him and they both exited the Mustang.

Officers Claudia Payne and Charles Sherman asked Clement for permission to search the Mustang. Clement gave permission and handed over the keys to the Mustang. Clement felt she had nothing to hide. Clement told the officers she was on probation for the crime of being under the influence of methamphetamine.

While Clement and Acosta were detained by Sherman, Payne walked over to the Mustang and used a flashlight to look through the front passenger window; she saw a clear plastic baggie and some type of metal object between the passenger seat and the center console. Payne walked around the Mustang, entered the car through the driver's door, and leaned over to look at the passenger side. Payne notified Sherman she had found a gun and that Clement and Acosta should be handcuffed. Sherman called for backup.

Officer Daniel Champness arrived in response to the request for backup. Sherman directed Champness to search the car while the other officers detained Clement and Acosta. Champness found a loaded .22-caliber revolver under the front passenger seat, along with 17.89 grams of methamphetamine, a large amount of marijuana, a pack of Marlboro cigarettes, and an Altoids mint tin. There was no drug paraphernalia commonly associated with use of the drugs.

Clement expressed surprise that the drugs and gun had been found in her car. Clement told Sherman her fingerprints would not be on the items. Acosta and Clement were arrested. As a result of a search incident to arrest, Acosta was found to have \$125

in cash in his possession. Acosta did not have a cell phone, but one was found on Clement. The phone continued to ring during the search and investigation.

On April 10, 2008, Acosta was charged with transportation of methamphetamine, in count 1, narcotic possession for sale in count 2, narcotic possession while armed with a loaded and operable firearm in count 3, being a felon in possession of a firearm in count 4, and being a felon in possession of ammunition in count 5. In the same amended information, charges of drawing a firearm in a motor vehicle and being a felon in possession of a firearm were added as counts 6 and 7, respectively. Enhancements also were alleged.

Clement initially was charged as a codefendant in the first three counts. The charges against her were dismissed when she agreed to testify at Acosta's trial.

At trial, the parties stipulated that the revolver found in the Mustang was operational and functional, meeting the Penal Code requirements. They also entered into a stipulation that the 17.89 grams of methamphetamine were a usable amount and that Acosta had sustained a prior felony conviction.

Sherman testified at trial that the methamphetamine was equal to 80 to 200 doses for a normal user. Sherman opined that the methamphetamine was possessed for sale based upon the large quantity, the absence of any narcotic user paraphernalia, and the presence of a firearm typically used for protection during the business of selling narcotics.

Acosta testified that the cash on his person was money he had earned from his business. He produced a business license and a cash receipt dated June 24, 2007. He stated he did not hide, or attempt to hide, a gun or methamphetamine in the Mustang. Regarding the incident on Highway 99, Acosta admitted being involved in the incident, but denied pointing a gun at Long's car. Acosta stated he did not own or possess a gun because of his status as a felon.

The jury found Acosta guilty of all six counts. As to counts 1 and 2, the jury also found true that Acosta was personally armed with a firearm. In a bifurcated proceeding, the trial court found true that Acosta had a prior felony conviction.

Acosta was sentenced to a total term of 16 years four months in prison; various fines and assessments were imposed.

DISCUSSION

Acosta raises three issues in this appeal: (1) the trial court erred in denying his motion to suppress the evidence found in the Mustang; (2) the evidence was insufficient to support the jury's determination that he was in possession of the drugs, gun, and ammunition described in counts 1 through 5; and (3) the DNA collection fee imposed was erroneous and should be reduced.

I. Motion to Suppress

Acosta claims the trial court erred in denying his suppression motion. We disagree.

Factual summary

On March 6, 2008, Acosta moved to suppress all evidence obtained from the Mustang, claiming there were no grounds upon which to detain him in the alley. The People filed opposition to Acosta's motion, contending in part that Acosta had no expectation of privacy to items in Clement's Mustang, Clement consented to the search of her car, and the items were in plain view.

The trial court held an evidentiary hearing on April 16, 2008. Payne testified that she and Sherman were dispatched to a liquor store. Upon arriving around 10:38 p.m., Payne noticed a motorcycle with a partially peeled registration tag. A Mustang pulled up in the alley and parked; the occupants got out and walked toward Payne.

Payne asked Acosta if the motorcycle belonged to him and Acosta replied affirmatively. Acosta showed Payne the keys to the motorcycle, but stated it was not yet registered in his name. Payne noticed Acosta did not have a motorcycle helmet with him.

Clement spoke up and told Payne she had just given Acosta a ride in her car. Clement volunteered she was on probation for possession of methamphetamine. Payne was alone at this moment and asked Acosta and Clement, “Do you have anything that could hurt me?” Clement turned around with her arms apart and Payne conducted a pat search. Acosta did the same. Payne found no weapon on either of them.

Sherman joined Payne and ran a records check for a valid driver’s license for Acosta and Clement. Payne asked Acosta for his motorcycle license and helmet; Acosta had neither.

Payne asked Clement if the Mustang belonged to her and if anything illegal was inside. Clement replied, “No. You can check if you want,” and handed the keys to Payne. Payne found the clear plastic baggie and the gun on the passenger side floorboard next to the center console.

After extensive argument, the trial court found that Acosta had been illegally detained after showing his motorcycle key to Payne. The trial court also found, however, that there was no causal link between the illegal detention and the search of the vehicle because the search was conducted by virtue of Clement’s consent and probation status. Alternatively, if the search of the car was derivative to the illegal detention of Acosta, the trial court found the evidence could be admitted under the attenuation doctrine (i.e., that the connection between the source and the evidence was so attenuated that it would serve no legitimate purpose to suppress the evidence). Finally, the trial court found that Acosta had no expectation of privacy to Clement’s car. The trial court denied the motion to suppress.

Acosta filed a second motion to suppress the evidence obtained from the search of his person and of Clement, claiming it was the fruit of an illegal detention. The People opposed this suppression motion on several grounds, including that the evidence was obtained incident to a lawful arrest and inevitable discovery.

On May 13, 2008, the trial court held a second evidentiary hearing. Sherman testified that he received information from Payne that drugs and a weapon were found in the Mustang on the passenger side, where Acosta had exited. Based on this information, Sherman arrested Acosta. Sherman also walked to the Mustang and saw for himself the firearm and narcotics on the floorboard protruding from under the front passenger seat. Sherman conducted a “booking search” of Acosta.

After oral argument, the trial court ruled that Sherman had cause to arrest Acosta. Accordingly, the second motion to suppress also was denied.

Analysis

The standard of review to determine whether the trial court properly denied a motion to suppress evidence is well established. “ ‘We defer to the trial court’s factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment.’ [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 384.) On review of a motion to suppress evidence, “ ‘the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court.’ ” (*People v. Manning* (1973) 33 Cal.App.3d 586, 599.)

“On appeal we consider the correctness of the trial court’s ruling *itself*, not the correctness of the trial court’s *reasons* for reaching its decision. (*People v. Zapien* (1993) 4 Cal.4th 929, 976 [if the trial court’s ruling is correct ‘ ‘upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion’ ’ ’]; *People v. Braeseke* (1979) 25 Cal.3d 691, 700-701.)” (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145.)

The trial court did not err in denying either the first or second motion to suppress. Regardless of whether Acosta’s detention was illegal, the search of the Mustang was conducted pursuant to the consent of the owner, Clement, and also based on her probation

status. The Mustang was not a focus of any investigation and was not searched until after Clement volunteered that she was on probation for possession of methamphetamine.

Acosta does not argue that Clement lacked authority to grant permission to search the Mustang or that her consent was not freely and voluntarily given. Clement felt she had nothing to hide, freely admitted her probation status, and offered her keys to officers to search her car. Clement, in fact, was surprised that drugs and a gun were found in her car and exclaimed that her fingerprints would not be on the items. If any taint to the search of the Mustang existed from an illegal detention, Clement's consent was "sufficiently an act of free will to purge the primary taint" (*Wong Sun v. United States* (1963) 371 U.S. 471, 486.)

Acosta cannot claim any right to privacy in Clement's Mustang. "[A] warrantless search, justified by a probation search condition, may extend to common areas, shared by nonprobationers, over which the probationer has 'common authority.' [Citation.]" (*People v. Smith* (2002) 95 Cal.App.4th 912, 916.) Thus, "[i]t is true that if persons live with a probationer, common or shared areas of their residence may be searched by officers aware of an applicable search condition. [Citations.]" (*People v. Robles* (2000) 23 Cal.4th 789, 798, fn. omitted.) Moreover, "'[t]hose associating with a probationer assume the ongoing risk that *their property and effects* in common or shared areas of a residence may be subject to search.' [Citations.]" (*Smith*, at p. 919.)

Recently, the California Supreme Court noted that both drivers and passengers of a vehicle have a reduced expectation of privacy in the interior of a car and its contents. (*People v. Schmitz* (2012) 55 Cal.4th 909, 920, 924 (*Schmitz*).) In *Schmitz*, a front seat passenger was on parole and contraband was found in the rear seat. In rejecting a challenge to the reasonableness of the search, the court noted that "a reasonable officer may take all of the circumstances into account when conducting a parole search of an automobile for property, contraband, or weapons" and held that a search based on a

passenger's parole status may extend beyond the parolee's person and seat he or she occupies. (*Id.* at p. 926.)

Here, regardless of whether the Mustang was searched pursuant to a probation search or by virtue of consent, Acosta has no right to privacy in a vehicle owned by Clement that was lawfully searched by officers. Acosta showed no property or possessory interest in the car, no right of control, and no right to exclude anyone. (*Rakas v. Illinois* (1978) 439 U.S. 128, 147-149.)

Acosta's arrest and search incident to arrest were not the result of an illegal detention, contrary to his claim. Sherman testified that Acosta was arrested based upon the discovery of the drugs and weapon in the Mustang.

Once the search of the Mustang was executed and the drugs and weapon were recovered from the passenger floorboard, probable cause to arrest Acosta existed. " 'Probable cause for arrest exists "when the facts known to the arresting officer 'would lead a [person] of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime.' [Citations.]" [Citation.]' " (*People v. Limon* (1993) 17 Cal.App.4th 524, 537.) When an officer has probable cause to arrest a person, a warrantless search is justified as a search incident to arrest. (*Virginia v. Moore* (2008) 553 U.S. 164, 178.) Moreover, when the formal arrest follows quickly on the heels of the challenged search, it is not important that the search precede the arrest rather than vice versa. (*People v. Limon, supra*, at p. 538.)

Conclusion

The revolver and drugs were discovered by officers pursuant to a lawful search of the Mustang – lawful based upon Clement's consent to search her car. Once discovered, these items provided probable cause to arrest Acosta and to conduct a search of his person incident to arrest. We conclude the trial court did not err in denying Acosta's motions to suppress evidence. (*People v. Ayala* (2000) 23 Cal.4th 225, 255.)

II. Sufficiency of the Evidence

Acosta contends the evidence was insufficient to support the convictions in counts 1 through 5 because the evidence did not support the conclusion that he possessed the drugs, gun, or ammunition and these convictions should be reversed. He also contends the jury's true finding that he was personally armed with a firearm should be reversed. We disagree.

Standard of review

“It is the prosecution’s burden in a criminal case to prove every element of a crime beyond a reasonable doubt. [Citation.]” (*People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.) The appellate court, to determine whether the prosecution has introduced sufficient evidence to meet this burden, must determine “ ‘whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.’ [Citations.]” (*People v. Crittenden* (1994) 9 Cal.4th 83, 139, fn. 13.) In making this determination, “ ‘we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] ... We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.’ [Citation.]” (*People v. D’Arcy* (2010) 48 Cal.4th 257, 293.)

“[W]e do not reweigh the evidence; the credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact. [Citation.]” (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790.) “ ‘To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be

apparent without resorting to inferences or deductions.’ ” (*People v. Barnes* (1986) 42 Cal.3d 284, 306 (*Barnes*)). “ ‘ ‘ ‘Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment’ ” ’ ” (*People v. Cantrell* (1992) 7 Cal.App.4th 523, 538 (*Cantrell*)).

Possession

Acosta challenges the evidence of possession of narcotics, a gun, and ammunition. Possession may be actual physical possession or constructive possession, and more than one person may possess the same contraband. (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 831 (*Daniel G.*)). Criminal possession of ammunition, and likewise a gun, may be established by actual possession or constructive possession. (*People v. Williams* (2009) 170 Cal.App.4th 587, 625.) One may be criminally liable for possession for sale or for transportation of a controlled substance, based upon either actual or constructive possession of the substance. (*People v. Rogers* (1971) 5 Cal.3d 129, 134.)

“Actual possession means the object is in the defendant’s immediate possession or control.... Constructive possession means the object is not in the defendant’s physical possession, but the defendant knowingly exercises control or the right to control the object. [Citation.]” (*Daniel G., supra*, 120 Cal.App.4th at p. 831.) A defendant has constructive possession when the weapon, or other contraband, while not in his actual possession, is nonetheless under his dominion and control, either directly or through others. (*People v. Pena* (1999) 74 Cal.App.4th 1078, 1083-1084.) The element of possession may be established by circumstantial evidence and any reasonable inferences drawn from such evidence. (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 (*Palaschak*)).

“[P]ossession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another. [Citation.]”

(*People v. Newman* (1971) 5 Cal.3d 48, 52.) Joint constructive possession may be inferred from joint control and accessibility. (*Id.* at p. 53.)

Analysis

While looking through the window, Payne first observed the baggie and a metal object on the floorboard between the front passenger seat and the center console. Payne made this observation shortly after Acosta stepped out from the front passenger seat of the vehicle. The evidence established that Acosta sat in the front passenger seat the entire time he was in Clement's vehicle – from the time Clement picked him up, during the drive to the gas station, and the return drive to the alley where officers saw Acosta step out of the front passenger side of the Mustang. To Acosta, seated in the front passenger seat, the gun and baggie of drugs would have been in plain view.

The only two people in the car, Clement and Acosta, both testified. Clement was surprised to learn that drugs and a gun were found in her vehicle. She said she had nothing to hide, which was why she volunteered that she was on probation for being under the influence of methamphetamine, consented to a search of the car, and offered her car keys to the officers. Although initially jointly charged with Acosta, all charges against Clement had been dismissed approximately one year before she testified. Acosta also testified, claiming that he did not hide the drugs or gun in the Mustang because he was not allowed to legally possess either by virtue of his status as an “ex-felon.”

“Actual or constructive possession is the right to exercise dominion and control over the contraband or the right to exercise dominion and control over the place where it is found. [Citation.] Exclusive possession is not necessary. A defendant does not avoid conviction if his right to exercise dominion and control over the place where the contraband was located is shared with others. [Citations.]” (*People v. Rushing* (1989) 209 Cal.App.3d 618, 622.) The fact that Clement and Acosta were both in the vehicle did not preclude the jury from deciding that Acosta was in possession of the loaded weapon and narcotics.

Although Acosta contends the evidence was insufficient as a matter of law to establish constructive possession, no sharp line can be drawn to distinguish the facts that will and will not constitute sufficient evidence of a defendant's knowledge of the presence of a narcotic, firearm, and ammunition in a place to which he had access, but not exclusive access, and over which he had control, but not exclusive control. (*People v. Redrick* (1961) 55 Cal.2d 282, 287.) As the court stated in *Schmitz*, "the law does not presume that a front seat passenger has nothing to do with items located elsewhere in the passenger compartment of a car." (*Schmitz, supra*, slip opn. at p. 17.)

It was within the province of the jury to credit Clement's testimony and reject Acosta's version of events. (*Barnes, supra*, 42 Cal.3d at p. 303.) Acosta's argument that there was no direct evidence he placed the loaded gun and the drugs in the Mustang misses the point. Direct evidence is not needed as circumstantial evidence suffices. (*Palaschak, supra*, 9 Cal.4th at p. 1242.) Moreover, Acosta's contention appears to constitute an argument that this court should reject the jury's interpretation of the evidence and instead accept his version of events, which we cannot do. (*Cantrell, supra*, 7 Cal.App.4th at p. 538.)

The testimony of even one witness is sufficient to sustain a conviction. (*People v. Provencio* (1989) 210 Cal.App.3d 290, 306.) Here, more than one witness established that Acosta was in the front passenger seat, had ready access to and control of the loaded gun and the narcotics, and the only other person who had access to the vehicle had acted inconsistently with knowledge of the contraband.

II. DNA Collection Fee

Acosta contends, and the People agree, that the DNA collection fee imposed pursuant to Government Code section 76104.7 is an unauthorized amount. Government Code section 76104.7 was enacted in 2006. (Stats. 2006, ch. 69, § 18.) That statute was amended effective June 10, 2010, to increase the amount of the fee. (Stats. 2010, 8th Ex. Sess. 2009-2010, ch. 3X, § 1.)

The DNA collection fee is a penalty assessment. (*People v. Batman* (2008) 159 Cal.App.4th 587, 590-592.) Penalty assessments cannot be imposed in violation of ex post facto laws. (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1374.) For a penalty assessment, the amount of the fine is determined as of the date of the offense. (*People v. Saelee* (1995) 35 Cal.App.4th 27, 30.)

The trial court erroneously imposed the amount of the fee according to the statute in effect in 2010. The amount of the fee should have been determined according to the statute in effect at the time the offenses were committed in 2007 and a lesser fee amount imposed.

DISPOSITION

The trial court is directed to prepare an amended abstract of judgment setting forth the corrected DNA collection fee pursuant to Government Code section 76104.7, determined as of the date of the offenses. In all other respects the judgment is affirmed.

Poochigian, J.

WE CONCUR:

Kane, Acting P.J.

Franson, J.