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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GUILLERMO PONCE SALCEDO, Defendant and Appellant.	F062809 (Super. Ct. No. BF136199A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Michael E. Dellostritto, Judge.

David D. Martin, 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, Carlos A. Martinez and Stephen G. Herndon, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Gomes, J. and Kane, J.

Appellant, Guillermo Ponce Salcedo, pled no contest to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and was placed on Proposition 36 probation. On appeal, Salcedo contends the court erred when it denied his motion to suppress. We affirm.

FACTS

On March 29, 2011, Salcedo was arrested at the Tropicana Motor Inn in Bakersfield after searches of his person and his room at the motel uncovered separate quantities of methamphetamine.

On April 18, 2011, defense counsel filed a motion to suppress, which he scheduled to be heard at Salcedo's preliminary hearing.

On May 5, 2011, at Salcedo's preliminary hearing, Bakersfield Police Officer William Wesbrook testified that on March 29, 2011, he was in his patrol car when he saw Salcedo in the courtyard of the Tropicana Motor Inn. Wesbrook got out of the car, walked up to Salcedo, and asked if he was staying at the motel. Salcedo responded that he was. Wesbrook then asked Salcedo if he had any weapons. Salcedo replied that he did not, and immediately turned around and put his hands behind his head. Wesbrook conducted a patsearch of Salcedo, but did not find any weapons.

Wesbrook asked Salcedo if he was on probation or parole and Salcedo replied that he was not. When Wesbrook asked Salcedo if he had identification, Salcedo replied that he did and that it was in his wallet. Salcedo then "turned toward" Wesbrook and "showed [him] his back pocket."

Wesbrook removed Salcedo's wallet, took out Salcedo's identification, and put the wallet back. He then conducted a records check and discovered that Salcedo had several outstanding arrest warrants and that he was on probation subject to a search condition.[1] After arresting Salcedo on the outstanding warrants, Wesbrook searched him again and

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[1] Although defense counsel objected to this testimony on hearsay grounds, the court overruled the objection.

found two small baggies containing .22 grams and .23 grams of a crystal substance that Wesbrook suspected was methamphetamine. Wesbrook searched Salcedo's room and found .063 grams of a crystal substance that he believed was methamphetamine. During a post-arrest interview, Salcedo admitted the substances were methamphetamine and belonged to him.

In support of the motion, defense counsel argued that the encounter between Wesbrook and Salcedo became an unlawful detention once Wesbrook searched Salcedo's wallet and obtained his identification without Salcedo's permission. He further argued that Officer Wesbrook exploited the illegal search by using the information obtained from Salcedo's wallet to run a warrant check on Salcedo that ultimately led to the discovery of methamphetamine on him. Defense counsel also argued that the officer unlawfully entered and searched Salcedo's room because there were no exigent circumstances permitting him to do so.

The prosecutor argued that the encounter was consensual through the point that the officer ran the records check and that the search of Salcedo's room was justified by Salcedo's probation search terms.

The magistrate denied the suppression motion as to the methamphetamine obtained from the search of Salcedo's person and granted it as to the search of Salcedo's room because the prosecutor did not provide the court with Salcedo's terms of probation.

On May 19, 2011, the district attorney filed an information charging Salcedo with transportation of methamphetamine (count 1/Health & Saf. Code, § 11379, subd. (a)) and possession of methamphetamine (count 2/Health & Saf. Code, § 11377, subd. (a)).

On June 8, 2011, Salcedo renewed his suppression motion in superior court as to the methamphetamine found on his person, arguing that Salcedo's actions in turning his hip toward Officer Wesbrook did not constitute implied consent for the officer to seize and search his wallet. Thus, according to Salcedo, he was unlawfully detained when Officer Wesbrook took his wallet and the court was required to suppress the

methamphetamine found on his person because it was the product of an unlawful detention.

On June 24, 2011, the court denied the suppression motion.

On July 1, 2011, Salcedo entered his plea to the possession charge in exchange for the dismissal of the transportation charge and a grant of Proposition 36 probation. After Salcedo waived time for sentencing, the court placed him on Proposition 36 probation as per his plea agreement.

DISCUSSION

Introduction

Salcedo contends his encounter with Officer Wesbrook was converted into an unlawful detention when Officer Wesbrook asked him about weapons and patsearched him, when the officer asked him whether he was on probation or parole, or when Wesbrook took Salcedo's identification from his wallet. Salcedo also contends that it is impossible to determine the voluntariness of his consent to be patsearched and to have his wallet seized because the prosecution did not explain why Wesbrook contacted him, which Salcedo claims is an "essential detail regarding the determination of voluntariness." Salcedo further contends that there was no proof of any outstanding warrants for his arrest because, in addressing his hearsay objection, the court ruled that Officer Wesbrook's testimony regarding the warrants was not admitted for the truth of the matter stated. Thus, according to Salcedo, the court erred when it denied his motion to suppress with respect to the methamphetamine found on his person. We will reject these contentions.

> "Where, as here, a motion to suppress is submitted to the superior court on the preliminary hearing transcript, 'the appellate court disregards the findings of the superior court and reviews the determination of the magistrate who ruled on the motion to suppress, drawing all presumptions in favor of the factual determinations of the magistrate, upholding the magistrate's express or implied findings if they are supported by substantial evidence, and measuring the facts as found by the trier against the constitutional standard of reasonableness.' [Citation.] 'We exercise our

independent judgment in determining whether, on the facts presented, the search or seizure was reasonable under the Fourth Amendment. [Citation.]' [Citation.] We affirm the trial court's ruling if correct under any legal theory. [Citation.]" (*People v. Hua* (2008) 158 Cal.App.4th 1027, 1033 (*Hua*).)

Salcedo Voluntarily Consented to a Patsearch

"Police contacts with individuals may be placed into three broad categories ranging from the least to the most intrusive: consensual encounters that result in no restraint of liberty whatsoever; detentions, which are seizures of an individual that are strictly limited in duration, scope, and purpose; and formal arrests or comparable restraints on an individual's liberty. [Citations.] … Consensual encounters do not trigger Fourth Amendment scrutiny. [Citation.] Unlike detentions, they require no articulable suspicion that the person has committed or is about to commit a crime. [Citation.]

"The United States Supreme Court has made it clear that a detention does not occur when a police officer merely approaches an individual on the street and asks a few questions. [Citation.] 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. [Citations.] '[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.' [Citation.] This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation. [Citation.] Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer'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 officer's request might be compelled. [Citations.] The officer's uncommunicated state of mind and the individual citizen's subjective belief are irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred. [Citation.]" (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.)

Consent to search is a factual question, and the determination of the superior court or the magistrate will be upheld if supported by substantial evidence. (*People v. James*

(1977) 19 Cal.3d 99, 107 (*James*).) Consent need not be express and may be implied from conduct. (*People v. Guyette* (1964) 231 Cal.App.2d 460, 464 [consent to enter and search room implied from woman's conduct in throwing key to room on table in front of officer in response to the officer's statement that he would have to get in the room]; *People v. Cove* (1964) 228 Cal.App.2d 466, 468, 470 [consent to enter residence found where officer at door told defendant he was investigating a report of a disturbance and defendant swung open door, stepped back and claimed absence of any disturbance]; *People v. Harrington* (1970) 2 Cal.3d 991, 995 [consent to enter residence implied from defendant's conduct at entrance in stepping aside and extending left hand out about two feet from left leg]; *People v. Martino* (1985) 166 Cal.App.3d 777, 791 [consent implied where defendant, after hearing knock at door and announcement that police officer was conducting narcotics investigation, stepped back and opened door].)

Preliminarily we hold that since Salcedo did not argue in the trial court that he was unlawfully detained when Officer Wesbrook patsearched him, he is precluded from raising this contention on appeal. (*People v. Williams* (1999) 20 Cal.4th 119, 129 (*Williams*) [defendants who move to suppress evidence under Penal Code section 1538.5, must inform the prosecution and the court of the specific basis for their motion or forfeit the omitted basis as an issue on appeal].)

Nevertheless, even if this issue were properly before us we would reject it. The magistrate's finding that Salcedo consented to a patsearch is supported by Salcedo's conduct in turning around and putting his hands on his head following the officer's question whether he had any weapons on him, which allowed the officer to patsearch Salcedo.

Salcedo contends that an "inference of consent" should be rejected because: 1) there is no authority for a "pat down stop and search" being consensual; 2) there is no conceivable reason why anyone would consent to a patsearch; and 3) Salcedo reasonably believed that a patsearch was inevitable because in Salcedo's neighborhood, when a

police officer asks about weapons, a search is inevitable; and 4) the "[o]rder's reasoning should be rejected because it indicated a false presumption in favor of finding 'voluntary consent'" and "a contrary presumption was evident from the fact that there was no testimony nor claim of any such consent." Salcedo also contends that there is an inherent difficulty in applying the standard whether a "reasonable person would feel free to disregard the police and go about his or her business" because an officer's show of authority is normally difficult to accurately ascertain and this standard requires consideration of the defendant's circumstances, which in Salcedo's case includes living in a neighborhood where the police found it expedient to ask for weapons and do a frisk search as soon as they made any contact. Salcedo is wrong.

Since a person can consent to a search of his person, his car, his house, or other property, it follows that he may also consent to a patsearch of his person. Further, "[t]here may be a number of 'rational reasons' for a suspect to consent to a search even though he knows the premises contain evidence that can be used against him: for example, he may wish to appear cooperative in order to throw the police off the scent or at least to lull them into conducting a superficial search; he may believe the evidence is of such a nature or in such a location that it is likely to be overlooked; he may be persuaded that if the evidence is nevertheless discovered he will be successful in explaining its presence or denying any knowledge of it; he may intend to lay the groundwork for ingratiating himself with the prosecuting authorities or the courts; or he may simply be convinced that the game is up and further dissembling is futile. Whether these or any other reasons motivated defendant in the case at bar was at most a matter for the trial court to consider in weighing this factor with all the others bearing on the issue of voluntariness." (*James, supra,* 19 Cal.3d at p. 114.)

Moreover, since consent can be implied from a defendant's conduct, the absence of explicit consent does not mean that in denying his suppression motion the trial court applied a presumption in favor of finding consent or that a presumption against finding

voluntary consent should arise from the absence of testimony, or a claim, of voluntary consent.

Further, there was no evidence introduced at the hearing on Salcedo's suppression motion that Salcedo lived at the Tropicana[2] or what police practices were with respect to searching residents for weapons in that area or in Salcedo's neighborhood. Thus, we also reject Salcedo's claims that his actions in submitting to a patsearch reflected his personal knowledge that in his neighborhood a search is inevitable whenever a police officer asks about weapons because it does not rely on facts contained within the record. (*In re Rogers* (1980) 28 Cal.3d 429, 437, fn. 6.) For this same reason we also reject Salcedo's claim that his acquiescence to a patsearch was not consensual but rather a reaction to the reality of living in a neighborhood where police find it expedient to ask for weapons and do a frisk search every time they contact someone there.

The Inquiry into Salcedo's Probation and Parole Status Did Not Convert the Encounter into an Unlawful Detention

Salcedo forfeited his contention that Officer Wesbrook's inquiry regarding Salcedo's probation or parole status converted his encounter with the officer into an unlawful detention by his failure to raise it in the trial court. (*Williams*, *supra*, 20 Cal.4th at p. 129.) However, even if this contention were properly before us we would reject it.

Officer Wesbrook's conduct in approaching Salcedo in the courtyard of the Tropicana Motor Inn and asking him if he was on parole or probation did not convert the encounter into a detention. (*People v. Bennett* (1998) 68 Cal.App.4th 396, 402 (*Bennett*).) Further, Salcedo misplaces his reliance on *People v. Garry* (2007) 156 Cal.App.4th 1100 (*Garry*) to contend that it did. In *Garry*, Officer Crutcher was patrolling in a high-crime, high-drug area where illegal drugs were often sold and police officers had been assaulted when he saw the defendant standing by a parked car on a

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[2] The evidence showed only that Salcedo was staying in a room at the Tropicana on the day that Officer Wesbrook approached him.

corner. (*Id.* at pp. 1103-1104.) The officer illuminated the defendant with his patrol car's spotlight from a distance of approximately 35 feet. He then exited the car and began walking briskly toward the defendant, reaching him in "two and a half, three seconds," causing the defendant to walk backwards and spontaneously state that he lived there. The officer asked the defendant whether he was on probation or parole and the defendant answered affirmatively. Shortly thereafter the officer reached out and grabbed the defendant, but he violently pulled away. The officer arrested the defendant and, during a search incident to arrest, found a small paper bag on him that contained 13 individually wrapped pieces of suspected rock cocaine. (*Id.* at p. 1104.)

In reversing the trial court's denial of the defendant's suppression motion the *Garry* court stated,

> "… Crutcher's testimony makes clear that his actions, taken as a whole, would be very intimidating to any reasonable person. Crutcher testified that *after only five to eight seconds of observing defendant from his marked police vehicle, Crutcher bathed defendant in light, exited his police vehicle, and, armed and in uniform, 'briskly' walked 35 feet in 'two and a half, three seconds' directly to him while questioning him about his legal status*. Furthermore, Crutcher immediately questioned defendant about his probation and parole status, disregarding defendant's indication that he was merely standing outside his home. In other words, rather than engage in a conversation, Crutcher immediately and pointedly inquired about defendant's legal status as he quickly approached. We think only one conclusion is possible from this undisputed evidence: that Crutcher's actions constituted a show of authority so intimidating as to communicate to any reasonable person that he or she was '"not free to decline [his] requests or otherwise terminate the encounter."' [Citation.]" (*Garry, supra*, 156 Cal.App.4th at pp. 1111-1112, italics added.)

Garry is distinguishable from the instant case because Officer Wesbrook did not shine a spotlight on Salcedo and he did not get out of his car and immediately rush towards Salcedo asking about his probation or parole status. Salcedo, nevertheless, contends that his case presents a stronger case of an unlawful detention because Officer Wesbrook patsearched Salcedo prior to asking whether Salcedo was on probation or parole. We disagree. As discussed previously, since Salcedo consented to a patsearch,

the patsearch did not convert the encounter into a detention. Nor do we find anything inherently coercive in a brief patsearch that a defendant voluntarily consents to.

Salcedo Voluntarily Consented to the Seizure of Identification from His Wallet

Salcedo contends that the most reasonable interpretation of Officer Wesbrook's testimony is that when Wesbrook asked for identification, Salcedo's back pocket containing his wallet was directly in front of Wesbrook because Salcedo was still facing away from Wesbrook after being patsearched. Thus, according to Salcedo, Wesbrook's testimony that Salcedo "turned towards [Wesbrook]" meant that at that point Salcedo turned his body to face Wesbrook, causing the wallet to move away from Wesbrook and out of his sight. In view of this, Wesbrook's testimony that Salcedo "showed [Wesbrook] his back pocket" had to mean that Salcedo pointed at his wallet. Thus, according to Salcedo, it cannot be deemed that he consented to Officer Wesbrook taking his wallet when he pointed to his wallet because his actions in doing so "only inferred that his identification was in his back pocket, not that he was inviting the officer to take it." We disagree.

As noted earlier, consent is a factual determination and in reviewing the denial of a suppression motion brought at the preliminary hearing we draw "all presumptions in favor of the factual determinations of the magistrate, upholding the magistrate's express or implied findings if they are supported by substantial evidence …. [Citation.]" (*Hua*, s*upra*, 158 Cal.App.4th at p. 1033.) The magistrate implicitly found that Salcedo consented to Officer Wesbrook retrieving his identification from his wallet. Further, the magistrate could reasonably have found from Wesbrook's testimony that just prior to Wesbrook asking about identification, Salcedo was facing Wesbrook and that Salcedo responded to Wesbrook's inquiry by turning his body towards Wesbrook just enough to show Wesbrook his wallet, which was in his back pocket. Therefore, we are bound by the magistrate's finding that Salcedo consented to Wesbrook retrieving his identification from Salcedo's wallet because it is supported by substantial evidence.

Officer Wesbrook's Failure to Testify Regarding His Reasons for Contacting Salcedo Did Not Vitiate Salcedo's Consent

Salcedo contends that in order to show that his consent was voluntary, the prosecutor had to explain why Officer Wesbrook contacted him. He cites several cases, which hold that determining whether a confession was voluntary requires consideration of "'the totality of all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation.' [Citations.]" (*Dickerson v. United States* (2000) 530 U.S. 428.) Salcedo forfeited this issue by his failure to raise it in the trial court. In any event, none of the cases he cites hold that in order for consent to be found voluntary, the record must include, as one of the "details of the interrogation," the reason for the police contact with the person who gave consent. Further, Wesbrook's uncommunicated motivation for contacting Salcedo is irrelevant in determining whether Wesbrook's conduct was constitutionally reasonable. (*People v. Bennett* (1998) 68 Cal.App.4th 396, 402, fn. 5.) Consequently, Officer Wesbrook's failure to testify regarding the reasons he contacted Salcedo does not undermine the magistrate's implicit findings that Salcedo consented through his conduct to Wesbrook retrieving Salcedo's identification from his wallet, and that Salcedo's consent was voluntary.

Officer Wesbrook Lawfully Arrested and Searched Salcedo Pursuant to Salcedo's Outstanding Arrest Warrants

Salcedo contends that by overruling his hearsay objection to Officer Wesbrook's testimony regarding Salcedo's outstanding warrants, the court did not admit the testimony for the truth of the matter stated. Thus according to Salcedo, the court should have granted his suppression motion because there was no evidence that any arrest warrants, which would have justifed the search of his person, existed. Salcedo is wrong.

"Arresting officers are justified in taking a defendant into custody in reliance on information received through official channels. [Citation.] [However,] [t]he existence and sufficiency of the original warrant must still be proven *if challenged* [citation] …." (*People v. Buckey* (1971) 19 Cal.App.3d 183, 187, italics added.)

The hearsay objection was correctly overruled. The out-of-court statement was not offered to prove the truth of the matter stated, but instead to prove that Officer Wesbrook had probable cause to arrest Salcedo. Further, since Salcedo did not challenge the existence or sufficiency of the warrants, Officer Wesbrook's testimony sufficed to prove that he lawfully arrested and searched Salcedo pursuant to those warrants. (*United States v. Robinson* (1973) 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 [police have authority to conduct "a full search of the [arrestee's] person" incident to a lawful custodial arrest].)

Salcedo cites *People v. Collins* (1997) 59 Cal.App.4th 988 in support of his claim that the failure to prove the existence of the arrest warrants requires reversal. *Collins*, however, is inapposite because in that case the defense did challenge the existence and sufficiency of the warrants at issue there by interposing a *Harvey/Madden*[3] objection. (*Collins*, *supra*, 59 Cal.App.4th at p. 991.)

In sum, the record supports the magistrate's implicit findings that Salcedo voluntarily consented to a patsearch and the search of his wallet and that Wesbrook's initial encounter with Salcedo was consensual and remained so through the discovery of the Salcedo's arrest warrants. Therefore, we conclude that the court did not err when it denied Salcedo's motion to suppress.

DISPOSITION

The judgment is affirmed.

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[3] *People v. Harvey* (1958) 156 Cal.App.2d 516, 523-524; *People v. Madden* (1970) 2 Cal.3d 1017, 1021.