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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS GARZA,

Defendant and Appellant.

F063157

(Super. Ct. No. VCF246730B)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Gerald F. Sevier, Judge.

Rex Williams, 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, Julie A. Hokans and J. Robert Jibson, Deputy Attorneys General, for Plaintiff and Respondent.

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

STATEMENT OF THE CASE

On July 7, 2011, pursuant to a plea bargain, appellant Jesus Garza pled no contest to possession of heroin for sale (Health & Saf. Code, § 11351, count one) and possession of heroin (Health & Saf. Code, § 11350, subd. (a), count two). Garza also admitted allegations that he had four prior felony drug convictions (Health & Saf. Code, § 11370.2, subd. (a)). Under the agreement, Garza would be sentenced to a fixed term of five years on count one.

On August 11, 2011, the trial court sentenced Garza to the low term of two years on count one, plus three years pursuant to the prior felony drug conviction enhancement for a total prison term of five years. The court sentenced Garza to a concurrent sentence of two years on count two, but stayed the sentence on count two pursuant to Penal Code section 654.¹ The court also imposed a laboratory analysis and drug program fees pursuant to Health & Safety Code sections 11372.5 and 11372.7 respectively.

On appeal, Garza contends the trial court erred in denying his section 1538.5 suppression motion.² Garza further contends, and respondent concedes, that count two should have been stayed pursuant to section 654 and laboratory analysis and drug program fees were also improperly imposed on count two.

FACTS

At 3:30 p.m. on January 5, 2011, Detective Timothy Haener of the Visalia Police Department was on surveillance at Lincoln Oval Park because of numerous complaints concerning the high traffic of narcotics sales in the park. Haener is a seven-year veteran

¹ Unless otherwise designated, all statutory references are to the Penal Code.

² The initial suppression motion was made in conjunction with the preliminary hearing on March 28, 2011. The magistrate denied the suppression motion which was renewed on May 12, 2011, and denied on May 17, 2011. No new evidence was presented on May 12, 2011, and the parties stipulated that the court could use the preliminary hearing transcript as the factual basis for the motion.

peace officer and has specialized narcotics training that included an 80-hour course through the Orange County Sheriff's Department. Haener had investigated 20 prior cases involving heroin.

Haener observed Garza in the park with another man named Garcia.³ The two men were among a group of 10 people on the west side of the park. Garza and Garcia were standing within two feet of each other next to a large oak tree and a trash can. Garcia and Garza were talking to each other and looking around.

A person walked up to Garcia, gave Garcia something, and received something back from Garcia in a hand-to-hand exchange. Garza made contact with another person who retrieved an item from his pocket and handed it to Garza. In exchange, Garza retrieved something from inside the front waistband of his pants and handed that item to this person. During the hand-to-hand transactions, the individuals would clinch their hands to conceal what they were holding, touch hands with Garza and Garcia, and walk away. Haener explained it was easy to conceal a \$10 bill and heroin in one's hand. A third person then went up to Garcia. These contacts lasted no more than two minutes. From Haener's training and experience, these appeared to be narcotics transactions.

Garza and Garcia then exited the park. Garcia went northwest on Third Street and entered a vehicle with the person with whom he made contact in the park. Garza went north on Court Street. The testimony about Garza's next contact is confusing but, generally, Haener observed Garza make contact with a new person in a red Suburban parked at a 99 Cent Store. After Garza entered the Suburban, Haener saw Garza moving around inside the vehicle, making what he described as a hand-to-hand transaction, although he could not see Garza's hands while he was inside the vehicle.

³ Garza goes by many aliases, including the last name of Ortega. During the preliminary hearing, Haener referred to Garza as Ortega.

Haener and other detectives, including Detective Gonzalez, detained Garza. Haener also detained the person who had been with Garza in the Suburban. Although Garza was detained during this search, Haener testified he was not yet under arrest. Gonzalez searched Garza's pockets for narcotics and any weapons, but did not find anything. Garza appeared to Haener to be clenching his buttocks and, having found no drugs in his pockets, Haener believed Garza still had narcotics hidden in his groin area inside his pants.

Haener therefore wanted to search Garza more thoroughly, but without having him remove his pants publically. So Garza was taken a half block to the district station and searched a second time.⁴ During the search at the station, Haener found a torn plastic shopping bag on Garza with 16 individual bindles of black tarry substance that tested positive for heroin in a field test. Haener also found \$43 on Garza. The heroin weighed 2.3 grams, a usable amount of heroin.

SUPPRESSION MOTION

Garza contends the detectives did not have probable cause to arrest him and therefore both searches and his ultimate arrest were unlawful. He argues that the trial court erred in denying his suppression motion. We find that the detectives had probable cause to arrest appellant and that both searches were incident to a lawful arrest.

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*

⁴ The deputy district attorney described the second search as a "courtesy search".

and Tobin (2010) 50 Cal.4th 99, 145.) 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.)

Probable cause to arrest a person exists if facts known to the officer would lead a person of ordinary care and prudence to believe an honest and strong suspicion that the person is guilty of a crime. In turn, a lawful arrest justifies a full custodial search of the person. (*People v. Guajardo* (1994) 23 Cal.App.4th 1738, 1742 (*Guajardo*)).

There is no exact formula to determine whether there was probable cause to make an arrest. We look to the totality of the surrounding circumstances and decide each case on its own facts, taking into account things such as: the officer's experience, which can render suspicious conduct that may appear innocent to a layman; prior contacts between the officer and the suspect; the officer's awareness that the area is known for street drug transactions; the defendant's conduct, including covert or secretive display, transfer, or exchange; caching of an object given or received in a peculiar receptacle designed for a different, specialized purpose; some indication by the defendant of a consciousness of guilt; any other relevant evidence. (*Guajardo, supra*, 23 Cal.App.4th at p. 1742.)

In *Guajardo*, the investigating officer had substantial experience with drug transactions, and the defendant was standing at the side of a house in an area known for a high rate of street drug transactions. The defendant then handed a small object to a companion, who in turn secreted the object into a cigarette case, which the companion then placed in his pocket. The officer had just arrested the defendant a month earlier for sale of narcotics. The defendant also demonstrated consciousness of guilty by appearing nervous and looking around as he approached the officer's patrol car. The *Guajardo* court found probable cause to arrest the defendant. (*Guajardo, supra*, 23 Cal.App.4th at pp. 1742-1743.)

Garza argues that there was no probable cause for the detectives to arrest him, and therefore to search him, relying on *Cunha v. Superior Court* (1970) 2 Cal.3d 352 (*Cunha*).⁵ In *Cunha*, the California Supreme Court held that there was no probable cause for officers to arrest a suspect who was seen in broad daylight walking down Dwight Way near Telegraph Avenue in Berkeley, an area known for frequent narcotics traffic, where the suspect looked around, and made a hand-to-hand exchange. (*Id.* at pp. 357-358.)

Cunha was decided just prior to a case with similar facts, *Remers v. Superior Court* (1970) 2 Cal.3d 659 (*Remers*). The officers in *Remers* were on Telegraph Avenue in Berkeley in an area known for frequent narcotics traffic, when they witnessed the defendant standing outside Pepe's Pizza Parlor with a male who looked like a hippie. The defendant looked over her shoulder, removed a tinfoil package from her purse, and with a nodding motion indicated to the male that they should enter Pepe's. The officer could not see what was inside the tinfoil, but believed a drug transaction was happening. The officer reached into the defendant's purse and removed the tinfoil which contained Seconal tablets. (*Id.* at pp. 662-663.) The *Remers* court held, inter alia, that the defendant's presence in an area known for narcotics sales and the officer's knowledge that dangerous drugs are often packaged in tinfoil did not justify a detention or search of the defendant. (*Id.* at pp. 665-666.)

One factual similarity that *Cunha* and *Remers* share is that the arresting officers only witnessed what appeared to them to be a single drug transaction. In contrast to these

⁵ Garza argues that his case is like *People v. Jones* (1991) 228 Cal.App.3d 519. The *Jones* case, however, analyzed whether there was reasonable suspicion for a detention, not whether there was probable cause to arrest the defendant. (*Id.* at pp. 522-524.) The parties also discuss *People v. Limon* (1993) 17 Cal.App.4th 524. That case also confronted the issue of reasonable suspicion to detain a defendant, not whether there was probable cause to make an arrest. (*Id.* at pp. 533-536.)

cases, the investigating officers in *People v. Maltz* (1971) 14 Cal.App.3d 381, 386-387 (*Maltz*), witnessed more than one transaction. Officers were conducting surveillance of a parking lot in Laguna Beach in an area known for frequent drug transactions between the hours of 7:00 p.m. and 10:00 p.m. The investigating officers were experienced. (*Id.* at pp. 386-387.)

At 7:50 p.m. one summer evening, the defendant was in the parking lot where he approached a man in a green vest and stopped in front of him. The man handed the defendant currency as the defendant extended his hand toward the man. The two then walked away in different directions. Forty minutes later, the defendant then approached a man named Monroe who extended his left hand toward the defendant with the palm turned up. The defendant extended his hand toward Monroe with his palm turned down. As Monroe withdrew his left hand, he placed it in his left pants pocket and walked away with the defendant. Monroe looked extremely nervous. (*Maltz, supra*, 14 Cal.App.3d at p. 387.)

As the defendant came and went, he was twice seen at a house a short distance from the parking lot. One of the officers testified that in his experience with drug traffic, sellers frequently have a so-called stash somewhere near the point of sale to which they return to resupply themselves with drugs. (*Maltz, supra*, 14 Cal.App.3d at p. 387.) Based on their observations, the officers stopped the defendant and Monroe, informed them that they were conducting a narcotics investigation, and searched Monroe. The officers found LSD on Monroe. The defendant was arrested for sale of narcotics. (*Id.* at p. 388.) The officers went to the residence the defendant had gone to, found a hole in the garage, looked through the hole with a flashlight, and found LSD. (*Id.* at pp. 388-389.)

The court in *Maltz* found substantially more evidence there than existed in *Cunha and Remers*. (*Maltz, supra*, 14 Cal.App.3d at pp. 391-393.) The officers in *Maltz* were experienced in narcotics traffic, they observed two apparent exchanges in the same area

within 40 minutes, Monroe was acting nervously, one of the officers testified about how narcotics dealers often use a stash for their drugs, and the defendant was seen going to his likely stash. The *Maltz* court found that the circumstances of that case were such as to cause a person of ordinary care and prudence to entertain an honest and strong suspicion that the defendant was selling drugs and had sold drugs to Monroe. (*Id.* at p. 393.) The *Maltz* court also found the retrieval of drugs from the garage to be constitutional. (*Maltz, supra*, 14 Cal.App.3d at pp. 393-399.)

We find the facts of *Cunha* and *Remers*, to be inapposite to those of the instant action. Each of those cases involved a single hand-to-hand transaction, albeit in a high crime area. Here, like the *Maltz* case, detectives witnessed Garza conduct two apparent drug transactions in an area known for frequent narcotics sales. Garza's companion, Garcia, was also engaged in at least two apparent narcotics sales while standing only two feet away from Garza. Garcia and Garza appeared to the detectives to be acting as lookouts for one another. There is a clear nexus between Garcia and Garza and their multiple hand-to-hand transactions. It is reasonable to infer from this evidence that Garcia and Garza were working together.

Furthermore, Haener was an experienced narcotics detective with specialized training. Haener witnessed Garza placing his hand under the belt of his pants to apparently extract something from in or around his underwear. Most citizens do not retrieve items in public from inside their pants or underwear. This conduct made Garza's actions all the more suspicious.⁶

⁶ The facts of Garza's second hand-to-hand transaction in the Suburban are ambiguous concerning whether Haener saw Garza reach into the front of his pants a second time. Haener stated that he did not clearly see everything that transpired inside the Suburban. On the other hand, Haener stated on direct examination that Garza reached into his pants during the second transaction and on redirect examination that the second transaction was just like the first transaction. A reasonable inference from Haener's redirect testimony is that Garza reached into the front of his pants during the second

In placing contraband underneath the waistband of his pants, likely in or about his underwear, Garza was using a place to secrete the contraband just as the defendant in *Maltz* had placed his “stash” in a hole in a nearby garage. We find Garza’s conduct analogous to the conduct of the defendant in *Maltz*. In a similar vein, *Guajardo* noted that one factor establishing probable cause occurs when a suspect caches an object given or received in a peculiar receptacle designed for a different, specialized purpose. (*Guajardo, supra*, 23 Cal.App.4th at p. 1742.) The normal caching of objects would be in one’s pants pockets, not the peculiar location of inside the waistband of one’s pants.

Furthermore, during the initial detention and search of Garza, Haener perceived that he was clenching his buttocks. This was further indicia that Garza was secreting contraband underneath his pants.

We find this case to be factually similar to *Guajardo* and *Maltz*. Here, experienced detectives observed multiple hand-to-hand transactions in a high crime area known for narcotics sales. Garza and Garcia were working together. Garza was seen at least once placing his hands inside the waistband of his pants, his cache, to retrieve something that was subject to an apparent exchange. These observations gave the detectives probable cause to arrest Garza for sale of narcotics and to search him incident to that lawful arrest. The trial court properly denied the suppression motion.

SECTION 654

The parties concur that the trial court failed to stay Garza’s sentence pursuant to section 654. We disagree. The trial court expressly stated during the sentencing hearing that Garza’s concurrent sentence on count two was stayed pursuant to section 654. This fact, however, was not recorded in either the clerk’s minute order or the abstract of

transaction, prior to entering the Suburban. Even if Haener only saw Garza reach into the front of his pants during the first transaction, this conduct was still highly suspicious and analogous to the conduct of the defendant in *Maltz*.

judgment. This was clerical error, not judicial error. Clerical error can be corrected at any time on the motion of the parties or of a court. (*People v. Mitchell* (2001) 26 Cal.4th 181, 184-188; *In re Candelario* (1970) 3 Cal.3d 702, 705-708.) We will order an amendment to the abstract of judgment.

LABORATORY ANALYSIS AND DRUG PROGRAM FEES

The court imposed a fee of \$100 for laboratory analysis pursuant to Health and Safety Code section 11372.5, subdivision (a) and a drug program fee of \$200 pursuant to Health and Safety Code section 11372.7, subdivision (a).⁷ The parties agree that one-half of the amount of each of these fees appears to be applicable to count two, a count that was stayed pursuant to section 654. This was error. (*People v. Sharret* (2011) 191 Cal.App.4th 859, 869-870.) Accordingly, we will order the court to reduce the laboratory analysis and drug program fees by one-half.

DISPOSITION

The case is remanded for the trial court to amend the abstract of judgment to reflect that count two was stayed. The court shall also reduce the laboratory analysis fee to \$50 and the drug program fee to \$100 and to correct the abstract of judgment to reflect these changes. The court shall forward the amended abstract of judgment to the appropriate authorities. The judgment is, otherwise, affirmed.

⁷ Health and Safety Code section 11372.5, subdivision (a) provides that a defendant shall pay a criminal laboratory analysis fee of \$50 for each enumerated drug offense. Health and Safety Code section 11372.7, subdivision (a) provides that a drug program fee of no more than \$150 must be applied to each enumerated drug offense.