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

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM PORTER,

Defendant and Appellant.

F063717

(Super. Ct. No. SF016100A)

OPINION

THE COURT*

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

John K. Cotter, 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, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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

Following the denial of his motion to suppress evidence (Pen. Code, § 1538.5), appellant, William Porter, pled no contest to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). The court placed appellant on Proposition 36 probation, i.e., probation under the Substance Abuse and Crime Prevention Act of 2000, enacted by the voters as Proposition 36 (Pen. Code, § 1210 et seq.).

On appeal, appellant's sole contention is that the court erred in denying his suppression motion. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Prior Motion

Appellant has made two suppression motions in the instant case, the second of which is the subject of this appeal. The court granted appellant's first such motion following a hearing on February 16, 2011 (first hearing), based on the People's failure to comply with what is commonly called the *Harvey-Madden* rule.¹ Immediately thereafter, the People announced their intention to refile, and did so on February 28, 2011. Appellant again moved to suppress evidence and a hearing was conducted on the second suppression motion on October 5, 2011.

Facts²

Officer Stacy Parra of the City of Shafter Police Department (SPD) testified to the following: On Saturday, December 4, 2010 (December 4), at approximately 3:00 p.m., she was on patrol, doing a security check of a certain construction site (the site) in Shafter when she saw a white pickup and two persons on the site. One person was standing on

¹ See *People v. Harvey* (1958) 156 Cal.App.2d 516 and *People v. Madden* (1970) 2 Cal.3d 1017. The *Harvey-Madden* rule “govern[s] the manner in which the prosecution may prove the underlying grounds for arrest when the authority to arrest has been transmitted to the arresting officer through police channels” (*People v. Gomez* (2004) 117 Cal.App.4th 531, 540.)

² Our factual statement is taken from the reporter's transcript of the second hearing.

top of a large bin, “handing some sort of item down to the second [person] on the ground.” Officer Parra became suspicious because she did not expect to see any workers on the site on a weekend day, and, in fact, she saw no other workers on the site. Officer Parra called the SPD communications center and reported to the dispatcher, Rene Camacho, what she had seen.

Camacho testified that after receiving a call from Officer Parra at approximately 3:05 p.m. on December 4, he “immediately logged onto” a video camera that was providing a “live feed” of the site, and saw “two subjects loading items onto a white pickup,” at which point he called Officer Joseph Hayes to come up to the communications center.

Officer Hayes testified that after receiving a call from Camacho at approximately 3:05 p.m. on December 4, he went to the communications center where, on a live video feed of the construction site, he saw a white pickup “loaded down with a high number” of “items” he could not identify.³ Camacho told Officer Hayes he (Camacho) had seen two persons “loading items into [the pickup].”

Officer Hayes determined the matter required further investigation because the SPD had received information that tools and vehicles had been stolen from the site at night and on weekends. After speaking to Camacho and observing the video feed, he ran to his patrol car and drove to the area of the site. He was alone. As he drove, he was in contact with Camacho, who “continued to broadcast the vehicle’s direction of travel to [Hayes].”

After driving for approximately five minutes, Officer Hayes saw a white pickup, “weighted down” with various items in the bed, including metal poles and a stop sign. Suspecting that he “was dealing with a grand theft,” the officer effected a stop of the

³ The remainder of our factual statement is taken from Officer Hayes’s testimony.

pickup. Prior to doing so, the officer “observed a Vehicle Code violation,” viz., driving with an “unsafe load,” i.e., a load that “was not tied down in any ... manner” and was a “hazard.”⁴

After stopping the pickup, Officer Hayes walked up to the driver’s side of the vehicle. Appellant was the driver, and there was one other person in the vehicle. Officer Hayes made contact with appellant and observed that he was “speaking rapidly,” he “wasn’t able to really sit still,” and “he just appeared to be stimulated”

Officer Hayes asked appellant to step out of the vehicle. Appellant did so. Appellant was still speaking rapidly and he “was unable to stand still.” Hayes, based on his training and experience which included an “800-hour POST academy,” training from SPC “field-training officers,” and contacts with “numerous” methamphetamine users, knew that the signs of being under the influence of methamphetamine included rapid speech, constant motion and an inability to stand still. The officer “formed the opinion that [he] was dealing with a methamphetamine user.”

Appellant “had on a lot of clothes,” including several t-shirts, and because his clothes were “so thick,” Officer Hayes “wasn’t able to see all of the bulges that [he] would normally be able to see,” so he could not tell if appellant had a gun, knife or some other kind of weapon. Out of concern for his (the officer’s) safety, Hayes asked appellant to consent to a “weapons pat-down search.” Appellant refused, and thereafter also refused the officer’s request to interlock his fingers behind his head and face away from the officer. At that point, the officer “ordered” appellant to place his hands behind his head, and appellant complied.

⁴ Vehicle Code section 23114, subdivision (a) provides, in relevant part and subject to exceptions not applicable here: “... a vehicle shall not be driven or moved on any highway unless the vehicle is so constructed, covered, or loaded as to prevent any of its contents or load ... from dropping, sifting, leaking, blowing, spilling, or otherwise escaping from the vehicle.”

Officer Hayes then began “conducting a search of [appellant’s] outer clothing” by moving his (the officer’s) hand “down [appellant’s] right thigh.” As he did so, he felt, in appellant’s pocket, a “soft lump” that he (the officer) believed, based on his training and experience, to be a bindle of methamphetamine. The officer then moved his head so he could see appellant’s pocket and saw “a piece of clear plastic” that he “immediately recognized ... as a bindle of narcotics.”

As Officer Hayes held appellant’s hands, Sergeant Milligan, who had just arrived on the scene, removed the bindle from appellant’s pocket. The bindle contained a chunky, white crystalline substance that Officer Hayes believed to be methamphetamine.

Ruling

At the close of the hearing, the court took the matter under submission. Subsequently, at the time scheduled for the readiness conference, the court stated: “ ... the Court previously did hear the motion to suppress ..., took it under submission [T]he motion is denied, at this time.”

DISCUSSION

Appellant contends the seizure of evidence on December 4 was the product of (1) an unlawful detention, and (2) an unlawful patdown search, and therefore the court erred in denying the instant suppression motion. We disagree. We first set forth the applicable principles of the standard of review, and then address, in turn, appellant’s challenges to the detention and the patdown search.

Standard of Review

In reviewing the denial of a suppression motion, “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. On appeal all presumptions favor the exercise of that power, and the trial court’s findings on such matters, whether express or implied, must be upheld if they are supported by substantial evidence.” (*In re Arturo*

D. (2002) 27 Cal.4th 60, 77.) “In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment.” (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

The Detention

Governing Principles

“The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, guarantees the right to be free of unreasonable searches and seizures. (U.S. Const., 4th Amend.;)” (*People v. Gallegos* (2002) 96 Cal.App.4th 612, 622.) A “brief investigative stop[]” of a person, commonly referred to in the case law as a detention, is a seizure within the meaning of the Fourth Amendment. (*People v. Souza* (1994) 9 Cal.4th 224, 229 (*Souza*.) “Ordinary traffic stops are treated as ... detentions” (*In re Raymond C.* (2008) 45 Cal.4th 303, 307.)

“To justify ... [a] detention, the circumstances known or apparent to the officer must include specific and articulable facts which, viewed objectively, would cause a reasonable officer to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person the officer intends to stop or detain is involved in that activity. [Citations.] This reasonable suspicion requirement is measured by an objective standard, not by the particular officer’s subjective state of mind at the time of the stop or detention.” (*People v. Conway* (1994) 25 Cal.App.4th 385, 388.)

“Accordingly, the circumstances known or apparent to the officer must be such as would cause a reasonable law enforcement officer in a like position, drawing when appropriate on his or her training and experience, to suspect that criminal activity has occurred, is occurring, or is about to occur and that the person to be stopped or detained is involved in the activity.” (*Id.* at p. 389.) “The corollary to this rule is that an investigative stop or detention predicated on circumstances which, when viewed objectively, support a mere

curiosity, rumor, or hunch is unlawful, even though the officer may be acting in good faith.” (*Ibid.*)

“The touchstone of our analysis under the Fourth Amendment is always ‘the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.’” (*Pennsylvania v. Mimms* (1977) 434 U.S. 106, 108-109.) “Reasonable suspicion cannot be reduced to a neat set of legal rules, but must be determined by looking to ‘the totality of the circumstances—the whole picture.’” (*U.S. v. Jordan* (5th Cir. 2000) 232 F.3d 447, 449, quoting *United States v. Sokolow* (1989) 490 U.S. 1, 7-8.) Under this standard, a detention requires only a “minimal level of objective justification” (*Illinois v. Wardlow* (2000) 528 U.S. 119, 120 (*Wardlow*), and an officer may initiate one “based not on certainty but on the need to ‘check out’ a reasonable suspicion” (*United States v. Clark* (D.C. Cir. 1994) 24 F.3d 299, 303 (*Clark*)). Moreover, “we ‘judge the officer’s conduct in light of common sense and ordinary human experience,’ [citation], and we accord deference to an officer’s ability to distinguish between innocent and suspicious actions.” (*U.S. v. Williams* (10th Cir. 2001) 271 F.3d 1262, 1268.) “[W]hen circumstances are “consistent with criminal activity,” they permit—even demand—an investigation’ [Citation.] A different result is not warranted merely because circumstances known to an officer may also be “consistent with lawful activity.” [Citation.] ... ‘The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of [police] investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal’” (*Souza, supra*, 9 Cal.4th at p. 233.)

Analysis

Appellant argues that the detention—the stop of the vehicle he was driving—was constitutionally unreasonable because the circumstances known or apparent to Officer

Hayes were not sufficient to give rise to a reasonable suspicion that appellant had committed a “traffic violation.” He bases this claim, in turn, on two factors. First, he argues there was “no evidence that any traffic violations actually took place” and “no specific violation of the law was stated or even suggested in the record.” Second, he asserts there were multiple “discrepancies” in Officer Hayes’s testimony at the first hearing⁵ and at the second hearing, and in the police report he prepared. For example, appellant states, Officer Hayes testified at the second hearing that appellant committed a violation of the Vehicle Code, but made no mention of traffic violations in his first hearing testimony or in the police report. These “discrepancies,” appellant argues, “are so gaping” that the officer’s testimony at the second hearing is not worthy of belief and does not constitute substantial evidence supporting the order denying the motion. Appellant’s claims are without merit.

First, appellant’s assertions regarding so-called discrepancies in Officer Hayes’s testimony constitute, in essence, a claim that we must reweigh the evidence. As demonstrated above, this claim must be rejected. (*In re Arturo D.*, *supra*, 27 Cal.4th at p. 77.)

Second, appellant’s claim that there was no evidence appellant committed any traffic violations is belied by the record. As also demonstrated above, Officer Hayes testified that prior to effecting the stop of the pickup he observed that the vehicle was carrying a “hazard[ous],” “unsafe load” that was “not tied down in any ... manner.” This evidence was sufficient to establish that a reasonable officer could suspect that the driver of the pickup was committing a violation of the law—Vehicle Code section 23114, subdivision (a)—and that therefore the detention was justified. (*In re Raymond C.*, *supra*, 45 Cal.4th at p. 307.)

⁵ A reporter’s transcript of the first hearing is also part of the record on appeal.

In addition, based on evidence that thefts had occurred at the site on weekends, and that the occupants of the pickup were observed removing property from the site on a Saturday when no one else was present, a reasonable officer could suspect that the occupants of the vehicle had just committed theft. This provides a separate and independent basis for the vehicle stop.

Appellant suggests that the detention may not be justified on suspicion-of-theft grounds because the People did not argue this point below. (See *People v. Williams* (1999) 20 Cal.4th 119, 137 [“[T]he scope of issues upon review must be limited to those raised during argument This is an elemental matter of fairness in giving each of the parties an opportunity adequately to litigate the facts and inferences relating to the adverse party’s contentions”].) Again, the record establishes otherwise. The People urged this point both in their moving papers and in argument at the second hearing. On this record, the People met their burden of justifying the detention.

The Patdown Search

Appellant also argues that even assuming the detention was lawful, the court erred in denying the suppression motion because evidence was seized as a result of a subsequent unlawful patdown search. Again, we disagree.

Where a vehicle has been stopped, “a driver, once outside the stopped vehicle, may be patted down for weapons if the officer reasonably concludes that the driver might be armed and dangerous.” (*Arizona v. Johnson* (2009) 555 U.S. 323, 331 (*Johnson*).) “The sole justification of [a patdown] search ... is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.” (*Terry v. Ohio* (1968) 392 U.S. 1, 29 (*Terry*).) The “officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts” which reasonably support a suspicion that the suspect is

armed and dangerous. (*Id.* at p. 21.) However, “[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” (*Id.* at p. 27.) The “critical question” in assessing whether a patdown for weapons is permissible is whether this is “the kind of confrontation in which the officer can reasonably believe in the possibility that a weapon may be used against him” or her. (*People v. Superior Court* (1972) 7 Cal.3d 186, 204 [routine traffic stop, *without more*, does not justify patsearch for weapons].) A court looks to the totality of the circumstances in determining the reasonableness of a challenged search. (*Terry, supra*, 392 U.S. at pp. 24, 27.)

We turn now to an examination of the facts of the instant case in light of the foregoing principles. We find two factors especially significant. First, it is reasonably inferable from Officer Hayes’s testimony that upon making contact with appellant he (the officer) formed the opinion, based on his extensive training and experience, that appellant was under the influence of methamphetamine. Second, Officer Hayes also testified that appellant was wearing multiple layers of clothing that could have obscured a bulge caused by the presence of a weapon. These factors were sufficient to give rise to a reasonable suspicion that appellant was armed. On this point we find instructive *People v. Collier* (2008) 166 Cal.App.4th 1374 (*Collier*).

In *Collier*, a sheriff’s deputy, upon making a lawful vehicle stop and approaching the vehicle on foot, smelled a strong odor of marijuana. The deputy asked the defendant, one of the two occupants of the vehicle, to exit the vehicle. The defendant complied and the deputy saw he was wearing “baggy clothing [that] led [the deputy] to believe that the defendant might be concealing an otherwise bulging item, perhaps a weapon.” (*Collier, supra*, 166 Cal.App.4th at p. 1376.) The deputy patted the defendant down for weapons, and discovered a loaded handgun in the defendant’s pants pocket.

In upholding the patdown search, the court stated: "... appellant's presence in the car" from which the odor of marijuana had been emanating "furnished a rational suspicion that he may have been in the possession and transportation of drugs. [Citation.] [¶] The trial court correctly and reasonably ruled that there were specific and articulable facts to conduct a limited patdown based on officer safety and the presence of drugs. As the Fourth Circuit Court of Appeals has observed; 'guns often accompany drugs.' (*U.S. v. Sakyi* (4th Cir. 1998) 160 F.3d 164, 169.) '[I]n connection with a lawful traffic stop of an automobile, when the officer has a reasonable suspicion that illegal drugs are in the vehicle, the officer may, in the absence of factors allaying his safety concerns, order the occupants out of the vehicle and pat them down briefly for weapons to ensure the officer's safety and the safety of others.' [Citation.]" (*Collier, supra*, 166 Cal.App.4th at pp. 1377-1378.) The court further stated, "Our opinion should not be read as allowing the police carte blanche to pat down anyone wearing baggy clothing. But the wearing of baggy clothing, coupled with other suspicious circumstances, here, being in a car which reeks of marijuana, furnishes the requisite facts to support a patdown for weapons so that the search of the car could be safely performed." (*Id.* at p. 1377, fn. 1.)

Here (1) the fact that appellant appeared to be under the influence of methamphetamine, like the evidence of the presence of marijuana in *Collier*, gave rise to a reasonable inference that appellant was in possession of and/or transporting illegal drugs, and (2) appellant, like the defendant in *Collier*, was wearing clothing that could have concealed a weapon. As in *Collier*, these factors, considered together, constituted specific and articulable facts sufficient to justify a patdown search for weapons. This conclusion is supported by the evidence that Officer Hayes, who was alone, was outnumbered by the two occupants in the vehicle. (*People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1230 [fact that officer who had effected vehicle stop was alone with two detainees was a relevant factor in determining "whether a reasonably prudent man ...

would be warranted in the belief that his safety ... was in danger”]; see *Maryland v. Wilson* (1997) 519 U.S. 408, 414 [The “danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car”].)

The United States Supreme Court “has recognized that traffic stops are ‘especially fraught with danger to police officers.’” (*Johnson, supra*, 555 U.S. at p. 330.) “The judiciary should not lightly second-guess a police officer’s decision to perform a patdown search for officer safety. The lives and safety of police officers weigh heavily in the balance of competing Fourth Amendment considerations.” (*People v. Dickey* (1994) 21 Cal.App.4th 952, 957.) On this record, we uphold the trial court’s implied finding that the patdown search did not violate appellant’s Fourth Amendment rights. The court did not err in denying appellant’s suppression motion.

DISPOSITION

The judgment is affirmed.