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

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIO RAYMOND ESPINOZA, JR.,

Defendant and Appellant.

F071891

(Super. Ct. No. CRM38779)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tuolumne County. Donald I. Segerstrom, Jr., Judge.

Kendall Dawson Wasley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, 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 Gomes, Acting P.J., Poochigian, J. and Peña, J.

INTRODUCTION

After his motion to suppress evidence was denied, appellant Mario Raymond Espinoza, Jr., entered into a plea agreement whereby he pled guilty to a felony violation of driving a motor vehicle with a blood-alcohol level of 0.08 percent or greater, within a 10-year period of a prior conviction (Veh. Code, §§ 23152, subd. (b), 23550.5, subd. (a)(1)). Espinoza also admitted two prior felony driving-under-the-influence (DUI) convictions and a prior prison term allegation under Penal Code¹ section 667.5, subdivision (b). In exchange for his plea, other charges and allegations were dismissed.

Espinoza contends the trial court erred in denying his motion to suppress because he was illegally detained and the People failed to meet their burden of demonstrating legal justification for his detention under *People v. Harvey* (1958) 156 Cal.App.2d 516 and *People v. Madden* (1970) 2 Cal.3d 1017 (*Harvey-Madden*).

We conclude the trial court did not err in denying the motion to suppress and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Espinoza was charged in count I with felony driving under the influence of drugs or alcohol within a 10-year period of a prior conviction (Veh. Code, §§ 23152, subd. (a), 23550.5, subd. (a)(1)); count II charged felony driving a motor vehicle while having a blood-alcohol level of 0.08 percent or greater within a 10-year period of a prior conviction (Veh. Code, §§ 23152, subd. (b), 23550.5, subd. (a)(1)); and count III charged misdemeanor driving a motor vehicle while driving privileges had been suspended for a prior DUI conviction (Veh. Code, § 14601.2, subd. (a)). It was further alleged as to counts I and II that Espinoza had suffered two prior felony DUI convictions pursuant to Vehicle Code sections 23540, 23542, 23546, and 23548; and served a prior prison term.

On May 26, 2015, the parties were before the trial court for a trial readiness conference. The defense asked for a continuance of the trial; the People opposed a

¹References to code sections are to the Penal Code unless otherwise specified.

continuance. The defense wanted a continuance in order to file a motion to suppress under section 1538.5 and defense counsel indicated she had the motion with her and ready to file. The People indicated they would be willing to proceed with a motion to suppress the next day, the first day set for trial, in that the witnesses needed for the suppression hearing were available to testify the next day.

The defense indicated the ruling on the motion to suppress would be dispositive of the case. The trial court asked the People if they would waive time on service of the motion to suppress; the People indicated they would. The trial court ordered the defense to file the motion to suppress and scheduled the hearing on the motion for May 27, 2015, at 10:00 a.m.

Espinoza's motion to suppress evidence pursuant to section 1538.5 alleged an unlawful detention without reasonable suspicion, warrantless search and seizure, and unlawful arrest without probable cause as grounds for suppression. The *Harvey-Madden* issue was raised in the motion. Although the motion was signed by defense counsel on May 19, 2015, it was not served on the People or filed with the trial court until May 26, 2015.

The People filed opposition to the motion to suppress on May 27, 2015. The People asserted Espinoza's initial contact with officers was not a detention but a consensual encounter with officers. The opposition to the motion also asserted the officers had reasonable suspicion to detain Espinoza for investigation of DUI and probable cause to arrest Espinoza.

At the hearing on the motion to suppress, the trial court indicated it had read the motion and the People's opposition.

The People called California Highway Patrol Officer Faustino Pulido to testify at the suppression hearing. Pulido testified he was on patrol on June 24, 2012, at approximately 2:05 a.m. He heard a broadcast about a possible DUI driver headed

westbound on Highway 108 in a light-colored Subaru wagon; Pulido and his partner were on Highway 108 headed eastbound.

Pulido and his partner continued heading eastbound, looking for any possible vehicles matching the description. At about 2:13 a.m., he saw a white Subaru wagon headed westbound. After seeing the vehicle, Pulido made a U-turn to follow the Subaru.

When Pulido caught up to the Subaru, the Subaru made a left turn onto a private driveway. The private driveway was “pretty wide” and had a locked gate preventing access to the driveway. Pulido pulled onto the private drive; the Subaru made a U-turn in the driveway and stopped along the side of the patrol vehicle. The patrol vehicle was not blocking the Subaru in any way. Pulido had not activated his patrol lights or siren at any time.

After the Subaru came to a stop next to their patrol vehicle, Pulido and his partner got out of their patrol car. Pulido went up to the driver’s open window and asked the driver if he was all right. The driver, Espinoza, responded he was coming from the Chicken Ranch Casino and had made a wrong turn on the way home.

When Pulido was speaking with Espinoza, he “smelled the odor of an alcoholic beverage.” At this point, Pulido did not know if there was an open alcohol container in the Subaru or if the driver was intoxicated. When Espinoza spoke, he seemed to be mumbling. At this point, Pulido asked Espinoza to step out of the vehicle so Pulido could conduct a field sobriety evaluation.

The People ceased their direct examination of Pulido, noting defense counsel “wanted to limit the scope of this hearing to the detention only.”

On cross-examination, Pulido noted Highway 108 was a wide roadway. He made the U-turn without losing sight of the Subaru. Pulido did not observe any weaving or bad driving by the driver of the Subaru while he was following it. When Pulido was about 30 to 40 feet behind the Subaru, the Subaru turned onto the locked drive and immediately made a U-turn in the driveway.

While he was in his patrol vehicle, Pulido did not gesture to the driver of the Subaru or roll down his window. The Subaru came to a stop beside the patrol vehicle before Pulido ever opened his door to get out. The patrol vehicle was 10 to 15 feet away from the Subaru; the window of the Subaru was already open. When Pulido got out of his patrol car, he did not gesture or speak as he walked over to the Subaru. When he got to the window of the Subaru, Pulido asked the driver “if he was okay.” Pulido did not ask for a driver’s license until after Espinoza had exited the vehicle for the field sobriety test.

On redirect, Pulido stated he went over to the driver to “check on his welfare.” Pulido was familiar with the area and knew the driveway the Subaru turned onto was kept locked. He thought the driver “could have been lost.” Pulido used a calm tone when speaking to the driver; Pulido did not raise his voice. Pulido’s partner was at the rear of the Subaru when Pulido went up to speak to the driver.

Under questioning from the trial court, Pulido stated he had been behind the Subaru for a minute or less and had followed for less than a mile when the Subaru turned onto the locked driveway. Pulido confirmed he had never activated the patrol vehicle’s overhead lights, siren, or the high beams of the headlights.

The defense argued there was a detention when Pulido stepped out of his vehicle and started walking toward the Subaru. The People argued there was no detention until Pulido smelled alcohol and asked Espinoza to step out of the vehicle for a field sobriety test. In ruling on the motion to suppress, the trial court stated:

“[O]ne issue is the detention. The second issue, if we get there, is that whether or not that was a reasonable basis for a detention on the—I don’t even know if I need to get there. Based on what information he received over the transmission, and we have a *Harvey-Madden* objection to that, which requires the People to produce the dispatcher; although, you know, in this situation you’ve got to give adequate notice, and I’m not sure the night before the hearing is adequate notice on the *Harvey-Madden*, to give the People an opportunity to bring in the dispatcher, but [¶] ... [¶] ... I don’t think we need to get there, but I don’t see this as a detention, I think this was a consensual contact. The defendant is the one who stops his car,

he pulls off the road. There's no lights, no sirens. The officer follows him for something approaching a minute, he said it was less than a mile, but still, you know, that would be traveling at the speed limit. You would traverse a mile in approximately a minute.

“So there was—he followed him for some distance. Never turned on his lights and sirens. Defendant pulls into this driveway and then stops. The officer is not blocking him in, just pulls up next to him, gets out of the car and says, ‘Are you okay?’ That—in the Court’s view, that is not a detention.”

The trial court concluded by saying, “So it’s up to the parties whether you want me to reach the other issues, but I’m going to find this is not a detention, this is a consensual encounter.” The trial court denied the suppression motion. The trial court did not rule on, and the defense did not ask for a ruling on, the *Harvey-Madden* issue.

After the motion to suppress was denied, Espinoza entered into a plea agreement wherein he pled guilty to the count II offense, admitted two prior DUI offenses, and admitted a prior prison term enhancement pursuant to section 667.5, subdivision (b) in exchange for dismissal of the other charges and allegations.

On June 22, 2015, Espinoza was sentenced to a term of 20 months in state prison, to be served consecutive to a term for Calaveras County case No. 13F6076.

On June 22, 2015, Espinoza filed a timely notice of appeal.

DISCUSSION

In his original appellant’s brief, Espinoza argued he had been improperly detained and there was no consensual encounter. Therefore, the subsequent blood-alcohol test results should have been suppressed. In his supplemental opening brief, Espinoza contends the People failed to satisfy their burden of demonstrating legal justification for the detention by not addressing the *Harvey-Madden* objection in the trial court.

We conclude, as did the trial court, that the initial encounter with officers was consensual.

Standard of Review

Our standard of review for a motion to suppress is governed by well-established principles. (*People v. Ormonde* (2006) 143 Cal.App.4th 282, 290.)

“As the finder of fact in a proceeding to suppress evidence (Pen. Code, § 1538.5), the superior court is vested with the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences in deciding whether a search is constitutionally unreasonable.” (*People v. Woods* (1999) 21 Cal.4th 668, 673.)

When there is no controversy concerning the underlying facts, the only issue is whether the law, as applied to the facts, was violated. (*People v. Werner* (2012) 207 Cal.App.4th 1195, 1203.)

Our review defers to the trial court’s factual findings and independently applies the requisite legal standard to the facts presented. (*People v. Celis* (2004) 33 Cal.4th 667, 679.) “We review the court’s resolution of the factual inquiry under the deferential substantial-evidence standard.” (*People v. Saunders* (2006) 38 Cal.4th 1129, 1134.) We then independently apply the requisite legal standard to the facts presented. (*People v. Celis, supra*, at p. 679.)

Consensual Encounter v. Detention

A detention does not occur merely because an officer approaches an individual on a street and asks a few questions. As long as a reasonable person would feel free to go about his or her business, the encounter is consensual. (*In re Manuel G.* (1997) 16 Cal.4th 805, 821; *People v. Garry* (2007) 156 Cal.App.4th 1100, 1106.)

Only when an officer, by means of physical force or show of authority, in some manner restrains the individual’s liberty, does a detention occur. (*In re Manuel G., supra*, 16 Cal.4th at p. 821; *People v. Garry, supra*, 156 Cal.App.4th at p. 1106.) The test for the existence of a show of authority is an *objective* test; it does not take into account the perception of the particular person involved. (*Ibid.*) The test is not “whether the citizen perceived that he was being ordered to restrict his movement, but whether the

officer's words and actions would have conveyed that to a reasonable person.”

(*California v. Hodari D.* (1991) 499 U.S. 621, 628; *People v. Celis, supra*, 33 Cal.4th at p. 673.)

Analysis

Here, the uncontroverted evidence is that the officers did not use the patrol vehicle's high beam headlights, siren, or overhead lights while following Espinoza's vehicle for less than one mile in length and one minute in duration; the officers did not order Espinoza to stop; the patrol vehicle did not block Espinoza's vehicle; and the officers did not draw weapons, raise their voices, or command Espinoza in any way when Pulido first approached the driver's window. These facts objectively demonstrate there was no show of authority or force used by the officers in Espinoza's case; the initial contact was consensual.

In *People v. Rico* (1979) 97 Cal.App.3d 124, a police officer was looking for a car suspected of carrying two people involved in a shooting. The officer drove up beside a car possibly matching the description and shined a spotlight into the car to try and see the occupants. Unable to see the occupants, the officer turned off the spotlight and dropped back behind the suspect vehicle. The officer followed the suspect car without using lights, sirens, or in any way attempting to effect a stop. After about five minutes the car stopped on the side of the road, without being pulled over by the officer. The appellate court found this scenario was insufficient to categorize the stop as a detention. (*Id.* at pp. 128-129, 130.)

In *People v. Perez* (1989) 211 Cal.App.3d 1492, an officer parked his patrol vehicle in front of a parked car occupied by two people. The patrol vehicle did not block the other car. The officer shined a spotlight and his high beams headlights, but not the emergency lights, into the parked vehicle to see the occupants. The officer walked to the car, tapped on the driver's window, and asked the driver to roll down the window. (*Id.* at p. 1494.) The appellate court held the “conduct of the officer here did not manifest police

authority to the degree leading a reasonable person to conclude he was not free to leave. While the use of high beams and spotlights might cause a reasonable person to feel himself the object of official scrutiny, such directed scrutiny does not amount to a detention.” (*Id.* at p. 1496.) Of particular importance to the appellate court in *Perez* was that the officer had not blocked the vehicle from leaving and had not activated the patrol vehicle’s emergency lights. (*Ibid.*)

In the case of *In re Frank V.* (1991) 233 Cal.App.3d 1232, police had been dispatched to a location after a report of reckless motorcycle riding. When the patrol vehicle appeared on the scene, the minor of his own volition pulled to the curb and stopped his motorcycle, after which officers approached him and asked the minor how he was doing and to identify himself. The appellate court agreed with the trial court’s conclusion that this scenario characterized a consensual encounter, not a detention, because there was no overt show of authority. (*Id.* at pp. 1237-1238.)

Finally, in *People v. Banks* (1990) 217 Cal.App.3d 1358, the officer parked behind an already parked vehicle and approached the driver to question him. The appellate court rejected the argument that this constituted a detention. (*Id.* at p. 1362.)

The facts of Espinoza’s case place it squarely in the category of a consensual encounter, as demonstrated by *Banks*, *Frank V.*, *Perez*, and *Rico*. The evidence supports the trial court’s conclusion the initial encounter between Espinoza and Pulido was consensual. (*People v. Celis*, *supra*, 33 Cal.4th at p. 679.)

Immediately subsequent to the initial encounter, Pulido was in possession of specific facts, specifically the odor of alcohol emanating from the vehicle, giving rise to a reasonable suspicion Espinoza had committed a crime, namely, he was either driving under the influence of alcohol or driving with an open container of alcohol in his vehicle. Once Pulido had a reasonable suspicion Espinoza may have violated the law, including a traffic violation, Pulido had lawful cause to detain Espinoza. (*People v. Souza* (1994) 9 Cal.4th 224, 231.)

Officers may conduct an investigatory detention, as they did in Espinoza's case after smelling alcohol, to confirm or dispel their suspicion of a violation of the law. (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 384.) Pulido conducted standard field sobriety tests ultimately leading to Espinoza's arrest.

Having concluded the initial contact between Espinoza and Pulido was consensual in nature, and Pulido thereafter had a reasonable suspicion Espinoza had violated the law and subsequently effected a lawful detention, we conclude there was no unlawful detention or seizure; the trial court correctly denied the motion to suppress. (*People v. Werner, supra*, 207 Cal.App.4th at p. 1203.)

We need not address Espinoza's *Harvey-Madden* issue in light of our conclusion the initial contact was consensual.

DISPOSITION

The judgment is affirmed.