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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO HERRERA ESPINOZA,

Defendant and Appellant.

G047016

(Super. Ct. No. 10CF1414)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard M. King and Walter P. Schwarm, Judges. Affirmed.

Tom Stanley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Alana R. Butler and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

Francisco Herrera Espinoza appeals from his conviction for transportation of methamphetamine and street terrorism. He contends the trial court erred by denying his motion to suppress evidence seized during a consensual search of his vehicle during a traffic stop because the detention was illegally prolonged. We find no error and affirm the judgment.

FACTS AND PROCEDURE

In the early evening on May 25, 2010, Santa Ana Police Officer Joseph Marty stopped a Chevrolet Avalanche driven by Espinoza because there was excessively loud music coming from the vehicle and Espinoza was not wearing his seat belt. During the encounter, Marty asked Espinoza for consent to search his person and the vehicle, which Espinoza gave. In the ensuing search, Marty's partner found methamphetamine worth approximately \$50 in the vehicle's center console.

An information charged Espinoza with transportation of methamphetamine (Health & Saf. Code, § 11379) (count 1); possession for sale of methamphetamine (Health & Saf. Code, § 11378) (count 2); and street terrorism (Pen. Code, § 186.22, subd. (a))¹ (count 3). Gang enhancements were alleged as to counts 1 and 2 (§ 186.22, subd. (b)). The trial court subsequently granted Espinoza's motion to set aside count 2 and the corresponding gang enhancement.

Espinoza filed a motion to suppress evidence obtained during the warrantless search. (§ 1538.5.) He asserted this was a routine traffic stop, he did not consent to a search of the car, and Marty's only justification for the search was his "instinct" or "sixth-sense" that contraband might be found. The prosecution's opposition asserted Espinoza was lawfully detained in a routine traffic stop and Espinoza thereafter gave free and voluntary consent to the search.

¹ All further statutory references are to the Penal Code.

Marty testified at the suppression hearing. He and his partner were in an unmarked vehicle; both were wearing modified uniforms which consisted of jeans and polo shirts. They were part of a “special problem unit” or “directed unit” aimed at crime suppression and were not looking for traffic violations at the time. When Marty pulled next to Espinoza’s car at a traffic light, he heard loud music coming from Espinoza’s car and saw Espinoza was not wearing his seatbelt, both of which were Vehicle Code violations. Marty turned his lights and siren on and pulled over Espinoza’s car.

Marty told Espinoza why he was being pulled over, and Espinoza apologized. Marty asked Espinoza if he had any weapons or narcotics on his person or in his vehicle, or if he had ever been arrested; Espinoza answered, “No.” Marty asked Espinoza if he would consent to a search of his person and vehicle. Espinoza responded, “Yes.” Marty’s gun was not drawn and his handcuffs were not out. He did not tell Espinoza he would be arrested or treated unfavorably if he did not consent, nor did he promise Espinoza any favorable treatment if he gave consent. Espinoza did not limit his consent to the search to any particular part of the car.

Marty had Espinoza get out of the car, patted him down, and found no contraband. Marty’s partner searched the car and found approximately seven grams of methamphetamine in the center console. Espinoza was very cooperative with the officers during the entire encounter.

Espinoza testified the car he was driving belonged to his mother. After discussing the reasons for the stop, Marty asked Espinoza if he could search Espinoza. Espinoza said, “Yeah.” Espinoza got out of the car and stood at the back of the car while Marty patted him down. When Marty asked for consent to search the car, Espinoza said, “Not really because it’s not my vehicle.” Marty said he had to search the car’s glove compartment (Espinoza assumed for registration and insurance information), so Espinoza said, “Okay. The glove compartment.” Espinoza testified the methamphetamine found in the car belonged to him.

The prosecutor argued there was consent for the car search and Espinoza's testimony that Marty indicated he only wanted to search the glove compartment lacked credibility. Defense counsel argued Espinoza had only consented to a search of his person and the glove compartment. The trial court found Marty's version of the events was more credible, Espinoza had consented to the search, and therefore the court denied the motion to suppress.

In a jury trial, Espinoza was found guilty on count 1 (transportation of methamphetamine) and count 3 (street terrorism). The trial court granted Espinoza's motion to reduce count 3 to a misdemeanor. The court sentenced him to formal probation and ordered him to serve 180 days in county jail.

DISCUSSION

Espinoza contends the trial court erred by denying his motion to suppress evidence found during the search of the car. He contends his detention was unduly prolonged and therefore his consent was invalid. The Attorney General contends Espinoza has forfeited the argument because it was not raised below. We agree.

“The standard of appellate review of a trial court's ruling on a motion to suppress 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. [Citations.]” (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

People v. Williams (1999) 20 Cal.4th 119 (*Williams*), explains the specificity with which a defendant must make a suppression motion: “[W]hen the basis of a motion to suppress is a warrantless search or seizure, the requisite specificity is generally satisfied, *in the first instance*, if defendants simply assert the absence of a warrant and make a prima facie showing to support that assertion. Of course, if defendants have a specific argument *other than the lack of a warrant* as to why a warrantless search or seizure was unreasonable, they must specify that argument as part of their motion to suppress and give the prosecution

an opportunity to offer evidence on the point. [Citation.]” (*Williams, supra*, 20 Cal.4th at p. 130.)

Once defendant meets his specificity burden, the burden shifts to the prosecution to prove some justification for the warrantless search (*Williams, supra*, 20 Cal.4th at p. 136). But, “once the prosecution has offered a justification for a warrantless search or seizure, defendants must present any arguments as to why that justification is inadequate. [Citation.] Otherwise, defendants would not meet their burden under section 1538.5 of specifying why the search or seizure without a warrant was ‘unreasonable.’ This specificity requirement does not place the burden of proof on defendants. [Citation.] . . . [T]he burden of raising an issue is distinct from the burden of proof. The prosecution retains the burden of proving that the warrantless search or seizure was reasonable under the circumstances. [Citations.] But, if defendants detect a critical gap in the prosecution’s proof or a flaw in its legal analysis, they must object on that basis to admission of the evidence or risk forfeiting the issue on appeal.” (*Williams, supra*, 20 Cal.4th at p. 130.) “Defendants cannot . . . lay a trap for the prosecution by remaining completely silent until the appeal about issues the prosecution may have overlooked.” (*Id.* at p. 131.) “Defendants who do not give the prosecution sufficient notice of [the] inadequacies [in the prosecution’s proposed justification for a warrantless search or seizure] cannot raise the issue on appeal.” (*Id.* at p. 136.) “‘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.’” (*Ibid.*)

Espinoza’s suppression motion asserted the warrantless search of his car was unjustified because it took place during a routine traffic stop and he did not consent to the search. He did not raise the issue of prolonged detention in the trial court. The prosecution’s opposition asserted Espinoza was lawfully detained, and he gave free and voluntary consent to the search. At the hearing, no evidence was introduced regarding the duration of the traffic stop. Marty testified that after he stopped Espinoza’s car, told him the

reason for the stop, and asked him a couple questions, he asked Espinoza if he would consent to a search of his person and the car. Espinoza said yes, and the search took place. Espinoza's testimony was mostly consistent with Marty's with the exception that he denied giving consent to search the car. Espinoza claimed he only said the officers could look in the glove box, and only after Marty said they had to look in the glove box. In argument, the prosecutor and defense counsel argued only about the scope of Espinoza's consent.

Here, Espinoza had a specific argument other than the lack of a warrant to suppress the evidence, namely that his detention was illegally prolonged. He did not specify that argument as part of his motion to suppress or raise it at the suppression hearing. The issue of prolonged detention was separate and distinct from the issues he raised and required different factual findings by the trial court. Espinoza had an obligation to specify prolonged detention as a ground for suppression of the evidence and because he did not, he has forfeited the issue on appeal. (*Williams, supra*, 20 Cal.4th at p. 136.)

Even if Espinoza had preserved his claim for appeal, we would nonetheless reject it on the merits. An officer has the right to stop and detain a driver who has committed a traffic infraction. (*People v. Gallardo* (2005) 130 Cal.App.4th 234, 238 (*Gallardo*)). Espinoza concedes the legality of the traffic stop. Although a traffic stop cannot be prolonged beyond the time period necessary to address the violation, there is no hard and fast rule as to the amount of time that is reasonable—it depends on the circumstances of each case. (*Ibid.*)

“[I]nvestigative activities beyond the original purpose of a traffic stop . . . are permissible as long as they do not prolong the stop beyond the time it would otherwise take.” (*People v. Brown* (1998) 62 Cal.App.4th 493, 498 (*Brown*); *Gallardo, supra*, 130 Cal.App.4th at p. 238; see also *People v. McGaughran* (1979) 25 Cal.3d 577, 584 [warrant check permissible during traffic stop so long as it “can be completed within that same period” as necessary “to discharge the duties that he incurs by virtue of the traffic stop”]). “Questioning during the routine traffic stop on a subject unrelated to the purpose of

the stop is not itself a Fourth Amendment violation. Mere questioning is neither a search nor a seizure.” (*Brown, supra*, 62 Cal.App.4th at p. 499.) Furthermore, an officer may ask for consent to search, so long as the search does not unduly prolong the traffic stop. (*Gallardo, supra*, 130 Cal.App.4th at p. 239.)

Here, there is no evidence in the record that would support a conclusion the detention was unreasonably prolonged. After approaching the car and advising Espinoza of the traffic violations, Marty asked Espinoza a few questions (if he had weapons or narcotics, or had ever been arrested), and then asked Espinoza if he would consent to a search of his person and car. Espinoza’s consent appears to have come just a few minutes after the stop. Espinoza got out of the car; Marty patted him down. Marty’s partner searched the car and found the methamphetamine. While the record does not indicate the precise amount of time that elapsed during the stop, or what the officers were doing, if anything, with respect to the traffic violation, nothing indicates the duration of the detention was unduly prolonged. Therefore, the search did not violate the Fourth Amendment and the trial court did not err by denying the motion to suppress.

DISPOSITION

The judgment is affirmed.

O’LEARY, P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.