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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re RICARDO P., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO P.,

Defendant and Appellant.

G047293

(Super. Ct. No. DL038943)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jacki C. Brown, Judge. Affirmed.

Wayne C. Tobin, 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, Melissa Mandel and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

The Orange County District Attorney filed a Welfare and Institutions Code section 602 petition, against minor Ricardo P., alleging possession of a firearm by a minor (Pen. Code, § 12101, subd. (a)(1))¹ and street terrorism (§ 186.22, subd. (a)). The petition also alleged Ricardo possessed the firearm for the benefit of a criminal street gang (§ 186.22, subd. (b)). We refer to this as the “firearm petition.” A subsequent petition was filed alleging Ricardo committed vandalism (§ 594) for the benefit of a street gang (§ 186.22, subd. (d)). We refer to this as the “vandalism petition.”

Ricardo filed a suppression motion under Welfare and Institutions Code section 700.1, which was denied. One month later, Ricardo admitted all of the allegations of both petitions. Under both petitions, the juvenile court declared Ricardo to be a ward of the court. Ricardo was placed on probation with various terms and conditions including completion of 20 days of Caltrans work, a \$100 restitution fine, search terms, and gang association terms.

On appeal Ricardo contends he was initially arrested for vandalism without probable cause. As a result, he contends, his subsequent statements and the seizure of a firearm from his home must be suppressed.

We affirm. We agree that Ricardo was initially arrested without probable cause. The evidence need not be suppressed, however, because Ricardo’s acknowledgment that he was on probation (which was true) subject to search and seizure

¹ All statutory references are to the Penal Code unless otherwise stated.

terms (which was not true, but upon which the officer could reasonably rely) attenuated the taint from the unlawful arrest.

FACTS

In May of 2011, Garden Grove Police Detective Peter Vi was on patrol with his partner in territory claimed by the Loco Mexican Style gang. Detective Vi observed three individuals walking away from a parked car and recognized one of them as Jorge Lopez, a registered gang member.² Detective Vi knew that Jorge Lopez was on probation and that a condition of his probation was that he not associate with other gang members or probationers. Detective Vi stopped the three individuals, conducted a pat down of all three, and directed them to sit on the street curb.

Detective Vi asked the two individuals with Jorge Lopez for their names in order to determine whether Jorge Lopez was violating his probation. Ricardo was one of the individuals, and Detective Vi recalled that Ricardo was the subject of an investigation involving vandalism that occurred approximately three months earlier. Detective Vi contacted Officer Vincente Vaicaro, who was leading the vandalism investigation. Detective Vi held Ricardo so Officer Vaicaro could speak to him about the suspected vandalism.

Officer Vaicaro had previously reviewed a case reported by Officer Lux about a gang graffiti incident. Officer Lux had told Officer Vaicaro that while he was on patrol an anonymous citizen stopped him and pointed to some graffiti in the area. The graffiti written in the area included the letters "L.M.S.X" and the number "3," which is an

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Persons who have been convicted in a criminal court, or who have had petitions sustained in juvenile court, of gang related crimes must register with the chief of police in their city of residence within 10 days of release from custody or within 10 days of arrival in a city or county to reside there. (§ 186.30.)

acronym for the Loco Mexican Styles gang. Officer Lux had also told Officer Vaicaro that the anonymous citizen identified Ricardo as the perpetrator of the graffiti. The anonymous citizen stated that he grew up with Ricardo, went to school with him, and that Ricardo also went by the moniker “Little Stalks.” Officer Vaicaro was aware that Ricardo’s older brother was a known gang member who went by the moniker “Stalks,” and opined that it made sense that Ricardo’s moniker would be “Little Stalks.”

When Officer Vaicaro arrived at the scene 15 to 20 minutes after Detective Vi first made contact with the group, Officer Vaicaro led Ricardo away from the other two individuals, handcuffed him, placed him in the back of the police car, and placed him under arrest for vandalism. Vaicaro told Ricardo he wanted to talk to him about a vandalism incident. Officer Vaicaro asked him whether he was on probation and subject to search and seizure terms. Ricardo stated that he was still subject to search and seizure terms (which was, in fact, not true — he was under probation, but without search and seizure terms). Officer Vaicaro could not recall whether that exchange occurred just before or after placing Ricardo under arrest.

Officer Vaicaro then asked Ricardo where his gun was. Ricardo admitted he had a gun in the garage of his residence, which was one house away from where they were standing, and consented to Officer Vaicaro retrieving it. A firearm was recovered from Ricardo’s garage. At the police station, Ricardo waived his *Miranda* rights and admitted to committing the vandalism. (*Miranda v. Arizona* (1966) 384 U.S. 436.)

In September of 2011 the district attorney filed the firearm petition. Approximately four months later, the district attorney filed the vandalism petition.

Prior to trial Ricardo filed a motion to suppress all evidence collected after Officer Vaicaro placed Ricardo under arrest. Following an evidentiary hearing, the juvenile court denied the motion. One month later, Ricardo entered an admission to the allegations set forth in both petitions. Under both petitions, the juvenile court declared Ricardo to be a ward of the court and placed him on probation. Ricardo timely appealed.

DISCUSSION

On appeal, Ricardo contends he was arrested without probable cause, and thus the court should have suppressed all evidence collected after his arrest, including his admission to having a gun in violation of his probation, the gun itself, as well as his confession regarding the tagging incident. We agree with Ricardo that he was arrested without probable cause. We hold, however, that Ricardo's subsequent statement that he was on probation with search and seizure terms was an intervening causal factor justifying the continued arrest and subsequent search of Ricardo's home, such that exclusion of the evidence is unwarranted.

Standard of Review

“When we review a trial court's ruling on a motion to suppress evidence under section 1538.5, we apply the substantial evidence test to the factual determination made by the court. We do not substitute our judgment for the credibility determinations of the trial court. Once the facts are established, however, we review such facts de novo to determine whether such facts justify the actions of the law enforcement officer.” (*People v. Oldham* (2000) 81 Cal.App.4th 1, 9.)

“[W]hen defendants move to suppress evidence, they must set forth the factual and legal bases for the motion, but they satisfy that obligation, at least in the first instance, by making a prima facie showing that the police acted without a warrant. The prosecution then has the burden of proving some justification for the warrantless search or seizure, after which, defendants can respond by pointing out any inadequacies in that justification.” (*People v. Williams* (1999) 20 Cal.4th 119, 136.) Ultimately, “The burden is on the People to justify the warrantless search as reasonable.” (*People v. Schmitz* (2012) 55 Cal.4th 909, 919.)

Ricardo Was Arrested Without Probable Cause

The police did not have a warrant for Ricardo's arrest in this case, and thus the burden was on the prosecution to justify admission of the evidence. The People contend there was no arrest in this case; merely a detention. They claim the anonymous tip Officer Lux received and communicated to Officer Vaicaro provided reasonable suspicion to detain Ricardo, and Ricardo's subsequent statement that he was on probation with search terms justified the subsequent arrest and seizure of evidence.

The problem with the People's position is that Officer Vaicaro specifically testified that he placed Ricardo under *arrest* for vandalism, and even told Ricardo he was under arrest, not merely detained. This occurred prior to any questioning about gun possession. The only ambiguity was Officer Vaicaro could not recall whether he placed Ricardo under arrest before asking about probation, or after. But there was no ambiguity in Officer Vaicaro's testimony that he placed Ricardo under arrest before asking him about gun possession. Thus we are at a loss to understand how the People can seriously contend this was a detention and not an arrest.

Since the evidence shows Officer Vaicaro arrested Ricardo, we consider whether Officer Vaicaro had probable cause to do so. "Probable cause exists when the facts known to the arresting officer would persuade someone of 'reasonable caution' that the person to be arrested has committed a crime." (*People v. Celis* (2004) 33 Cal.4th 667, 673.) The only evidence Officer Vaicaro had that Ricardo committed vandalism was the anonymous tip provided to Officer Lux.

There are well-recognized pitfalls associated with anonymous sources. "[I]nformation from anonymous sources is inherently unreliable. Neither the police nor the magistrate knows the motives of the unknown informant. Here the informer may have been motivated by concern for the welfare of a relative . . . [citation] or may have been perpetrating a hoax on the police or seeking revenge on a neighbor [citation]. In addition, the police and the magistrate cannot possibly know how the informant obtained

the information [citation]. Nor can they obtain additional information to check out the informer's credibility. Without knowing the identity of the source, the police cannot even determine whether he or she is a criminal, a drug addict, a 'stoolie' or an otherwise inherently unreliable individual. . . . [Citation.] We note that decisions of California courts and the United States Supreme Court appear to be unanimous in rejecting anonymous tips, standing alone, as the basis for a search warrant." (*People v. Kershaw* (1983) 147 Cal.App.3d 750, 756-757.)

An anonymous tip can generate probable cause when the tip is well corroborated. (E.g. *Illinois v. Gates* (1983) 462 U.S. 213 [anonymous letter predicted a detailed travel pattern on a particular date of an Illinois couple making a drug run to Florida; the date and travel pattern was corroborated by police surveillance, justifying a search warrant].) The same is true of a detention. (E.g. *Alabama v. White* (1990) 496 U.S. 325, 331-332 [police received an anonymous tip asserting that a woman was carrying cocaine and predicting that she would leave an apartment building at a specified time, get into a car matching a particular description, and drive to a named motel; police surveillance proved the predictive information to be accurate, justifying investigatory stop of vehicle, but this was a "close case"].)

Here, however, there was very little corroboration. The only corroboration Officer Vaicaro mentioned was that the anonymous tipster stated Ricardo's moniker was "Little Stalks," and Officer Vaicaro knew Ricardo's brother to go by the moniker "Stalks." But this shows nothing more than the tipster knew Ricardo's nickname. There is nothing connecting Ricardo, or "Little Stalks," for that matter, to the vandalism. Simply knowing the accused's name does not corroborate the accusation itself. (*Cf. Florida v. J.L.* (2000) 529 U.S. 266, 272 ["An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the [anonymous] tipster has knowledge of concealed

criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.”].) Thus the weakly corroborated anonymous tip did not give rise to probable cause, and the arrest was unlawful.

Ricardo’s Admission that he Was on Probation Was an Intervening Factor Rendering the Seizure of Ricardo and his Firearm Reasonable

Having concluded Ricardo was arrested without probable cause, we next consider whether Ricardo’s statements to police and the gun located in his residence should have been suppressed. As a general rule, courts must exclude evidence obtained as a direct product of an unlawful arrest. (*Mapp v. Ohio* (1961) 367 U.S. 643, 655.) However, “exclusion may not be premised on the mere fact that a constitutional violation was a ‘but-for’ cause of obtaining evidence. Our cases show that but-for causality is only a necessary, not a sufficient, condition for suppression.” (*Hudson v. Michigan* (2006) 547 U.S. 586, 592.) “Rather, the more apt question in such a case is ‘whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.’” (*Wong Sun v. United States* (1963) 371 U.S. 471, 488.)

In concluding the evidence here need not be excluded, we are guided by *People v. Brendlin* (2008) 45 Cal.4th 262 (*Brendlin*). In *Brendlin* an officer performed an unlawful traffic stop. (*Id.* at p. 268.) The officer asked the passenger to identify himself. The passenger complied, and the officer returned to his vehicle where he discovered defendant had an outstanding arrest warrant. (*Id.* at pp. 265-266.) The officer then arrested the passenger and, in a search incident to arrest, found materials used for manufacturing methamphetamine in the back seat of the vehicle. (*Id.* at p. 266.) Defendant moved to suppress the evidence, which the trial court denied, and defendant

then pleaded guilty to the manufacture of methamphetamine. (*Id.* at p. 266.) On appeal the issue was “whether the existence of defendant’s outstanding arrest warrant — which was discovered *after* the unlawful traffic stop but *before* the search of his person or the vehicle — dissipated the taint of the illegal seizure and rendered suppression of the evidence seized unnecessary.” (*Id.* at p. 267.)

Brendlin applied a three factor test derived from *Brown v. Illinois* (1975) 422 U.S. 590, 603-604 (the *Brown* factors), to determine whether the taint had been attenuated: “the temporal proximity of the unlawful seizure to the subsequent search of the defendant’s person or vehicle, the presence of intervening circumstances, and the flagrancy of the official misconduct in effecting the unlawful seizure.” (*Brendlin, supra*, 45 Cal.4th at 269.)

The *Brendlin* court held the first *Brown* factor — temporal proximity — was largely irrelevant where the intervening factor is an arrest warrant, because discovery of the arrest warrant did not depend on the defendant’s conduct. By contrast, in cases where the intervening factor “was a volitional act by the defendant, such as resisting arrest or flight,” “the temporal proximity between the illegal police conduct and the defendant’s response has a logical connection in that the closer these two events are in time, the more likely the defendant’s response was influenced by the illegality or that the illegality was exploited.” (*Brendlin, supra*, 45 Cal.4th at p. 270.)

As to the second *Brown* factor — intervening circumstances — *Brendlin* held the warrant “supplied legal authorization to arrest defendant that was completely independent of the circumstances that led the officer to initiate the traffic stop.” “The challenged evidence was thus the fruit of the outstanding warrant, and was not obtained through exploitation of the unlawful traffic stop.” (*Brendlin, supra*, 45 Cal.4th at p. 271.)

As to the third factor, the *Brendlin* court found no evidence of police misconduct or bad faith, noting “a mere ‘mistake’ with respect to the enforcement of our

traffic laws does not establish that the traffic stop was pretextual or in bad faith.”

(*Brendlin, supra*, 45 Cal.4th at p. 271.)

Applying that analysis here, as to the first *Brown* factor, it appears there were only a few minutes between Officer Vaicaro placing Ricardo under arrest and his confession to owning a gun. Since that confession, in contrast to discovering an arrest warrant, involved conduct by Ricardo, the first *Brown* factor favors exclusion of the evidence.

The second *Brown* factor favors admission of the evidence. Officer Vaicaro arrested Ricardo for vandalism. The question regarding Ricardo’s gun was not directly related to vandalism, but instead was prompted by Ricardo’s representation that he was under probation with search and seizure terms. Even though Ricardo was not, in fact, under search and seizure terms, Officer Vaicaro was entitled to rely on Ricardo’s erroneous representation that he was on search and seizure terms. (*In re Jeremy G.* (1998) 65 Cal.App.4th 553, 556.) Ricardo then admitted he owned a gun and consented to a search of his home, likely because he thought he was under search and seizure terms. Thus the search of Ricardo’s residence and seizure of his gun was related to Ricardo’s probation status, not the arrest for vandalism. As in *Brendlin*, Officer Vaicaro’s discovery of Ricardo’s probation status “supplied legal authorization . . . that was completely independent of the circumstances that led” Officer Vaicaro to arrest Ricardo for vandalism. (*Brendlin, supra*, 45 Cal.4th at p. 271.) The only sense in which the discovery of Ricardo’s probation status is connected to the unlawful arrest is that, arguably, the discovery would not have occurred but for the arrest. But the same was true in *Brendlin* — the officer would not have discovered the arrest warrant but for the unlawful traffic stop — and the court held that was insufficient to sway the second *Brown* factor towards exclusion of the evidence. (*Brendlin*, at p. 268.)

Finally, the third *Brown* factor — flagrancy and purposefulness of the police misconduct — favors admission of the evidence. The *Brendlin* court regarded the third factor as “the most important because ‘it is directly tied to the purpose of the exclusionary rule — deterring police misconduct.’” (*Brendlin, supra*, 45 Cal.4th at p. 271.) There is nothing in the record to suggest Officer Vaicaro knowingly arrested Ricardo without probable cause. The rules regarding anonymous tips, though sound, may not be intuitive to officers in the field, particularly the amount of corroboration needed to justify an arrest. Nothing in the record suggests the arrest was a setup to ask Ricardo about his probation status. Indeed, there is no reason why Officer Vaicaro needed to arrest Ricardo to ask about his probation status, and since Ricardo believed he was under search and seizure terms, Ricardo’s answers would likely have been the same even if he had not been arrested. Accordingly, the third *Brown* factor strongly favors admission of the evidence.

This case is a closer call than was the case in *Brendlin*, given that the temporal proximity factor favors exclusion. Nonetheless, weighing all three *Brown* factors, we conclude Officer Vaicaro’s discovery of Ricardo’s ostensible probation status was an intervening circumstance that broke the chain of causation between the illegal arrest and subsequent evidence collected by Officer Vaicaro.

Ricardo contends *Brendlin* is distinguishable. According to Ricardo, “If the attenuation doctrine did not apply in *Brendlin*, an officer in the field would have to disregard the warrant and disobey a judicial officer’s direct order upon realizing that the initial traffic stop was invalid. The officer could face possible contempt sanctions and professional discipline for releasing someone that could be wanted for a serious offense. . . . In any event, when the intervening circumstance is an existing arrest warrant, a neutral judicial officer has already decided that the greater intrusion of an arrest is justified.” Ricardo raises genuine points of distinction between this case and *Brendlin*, but they are not the basis upon which *Brendlin* was decided. *Brendlin* was

decided based on the analysis of the three *Brown* factors we discuss above, and that analysis compels us to conclude the evidence here was admissible.

Ricardo also contends that admitting the evidence here would undercut our high court's holding in *People v. Sanders* (2003) 31 Cal.4th 318. In *Sanders* the court held "that an otherwise unlawful search of the residence of an adult parolee may not be justified by the circumstance that the suspect was subject to a search condition of which the law enforcement officers were unaware when the search was conducted." (*Id.* at p. 335.) In other words, an unlawful search may not be justified by discovering *after* the search that the suspect is subject to search terms. Our high court later explained its reasoning: "This is so, we reasoned, because 'whether a search is reasonable must be determined based upon the circumstances *known to the officer when the search is conducted.*' [Citation.] *Sanders* explained that the 'primary purpose of the exclusionary rule [is] to deter police misconduct' [Citation], and that to admit evidence seized during a search that the officer had no reason to believe was lawful, merely because a search condition had been imposed, 'would legitimize unlawful police conduct [citation].'" (*In re Jaime P.* (2006) 40 Cal.4th 128, 133.) Here, however, when Officer Vaicaro questioned Ricardo about gun possession, Officer Vaicaro already knew about Ricardo's ostensible probation status, and thus the ill identified by *Sanders* is not present here.³

³ Ricardo also contends that even if probable cause supported his initial arrest, the arresting officer was acting on information from another officer who did not testify, and thus the People did not establish probable cause at the suppression hearing as required by *People v. Madden* (1970) 2 Cal.3d 1017 and *People v. Harvey* (1958) 156 Cal.App.2d 516 (the *Harvey/Madden* rule). Since we agree with Ricardo that he was initially arrested without probable cause, however, the *Harvey/Madden* issue is moot.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.