

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MAXIMO LABRO KEROL,

Defendant and Appellant.

H036767
(Monterey County
Super. Ct. No. SS092316)

In re MAXIMO LABRO KEROL,

on Habeas Corpus.

H037505

In the court below, defendant Maximo Labro Kerol unsuccessfully moved to suppress evidence. Thereafter, he pleaded no contest to possession of cocaine for sale. On appeal, he challenges the ruling on his suppression motion. He contends that his motion to suppress should have been granted because the arresting officer lacked reasonable suspicion to detain him and lacked probable cause to arrest him. In a separate petition for writ of habeas corpus, which we ordered to be considered with the appeal, defendant claims that he received ineffective assistance of counsel because his counsel failed to argue that the arresting officers exceeded the scope of his postarrest consent to search his hotel room by searching a closed container found in the room. We disagree with defendant's appellate contention and affirm the judgment. And we will deny the habeas corpus petition.

SCOPE OF REVIEW

“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.) On appeal, the record must be viewed in the light most favorable to the party prevailing below. (See *ibid.*) “[W]e uphold any factual finding, express or implied, that is supported by substantial evidence, but we independently assess, as a matter of law, whether the challenged search or seizure conforms to constitutional standards of reasonableness.” (*People v. Hughes* (2002) 27 Cal.4th 287, 327; *People v. Price* (1991) 1 Cal.4th 324, 409 [applying standard to arrest].)

BACKGROUND

Marina Police Officer Andreas Rosas was patrolling on foot in the area of Mortimer’s, an old time bar, at 11:20 p.m. because the area had recently experienced drug selling and prostitution activity and Mortimer’s was then the site of a large party. He walked past a liquor store and saw Brian Barnard approaching him from the direction of the Old Marina Inn. When Barnard saw Officer Rosas, he turned and ran back toward the hotel. Officer Rosas ran after Barnard and caught up with him at room No. 22 while Barnard was pounding on the door to that room. Rosas asked Barnard if the room was his, and Barnard replied that his “buddy” was staying there. Defendant then slightly opened the door to the room from the inside. Barnard tried to enter the room but defendant did not allow him access. Officer Rosas then pulled Barnard about five feet away from the door and conducted a pat search. At the same time, he told defendant to close the door. He explained: “Again, the concerns were that I didn’t know who [defendant] was. I didn’t know if, you know, he was somebody that could hurt me. I also didn’t know who was in the room. I didn’t know if there were other occupants that were in there that could come out and hurt us or pose a danger, a threat.” Defendant did

not close the door. Officer Rosas told defendant four or five more times to close the door. Defendant did not comply. Other officers then arrived to assist Officer Rosas. At some point, defendant bent down and picked up a white napkin that had been inside the threshold to defendant's room but would have been pushed outside the door had defendant closed the door. Officer Rosas grabbed the napkin from defendant's hand and felt a methamphetamine pipe inside the napkin. He simultaneously pulled defendant outside the room. Another officer asked whether defendant possessed any weapons, and defendant denied possessing weapons but admitted to possessing powder in his pocket. A third officer then searched defendant and found four bindles of cocaine. A fourth officer asked defendant for consent to search the room, and defendant consented. The officers then found numerous bindles of cocaine and a digital scale in a camera bag.

Among other reasons, the People justified the warrantless search on the basis that the officers had probable cause to arrest defendant for obstructing a peace officer: "Officer Rosas was dealing with an unfolding situation--somebody running from them. Tried to contain that matter and search him. [Defendant] arguably did a low grade [Penal Code section] 148 by not closing the door. There's officer safety. It's within that zone. [¶] When Officer Rosas saw something on the ground there, somebody says he picked something up Officer Rosas thought maybe it was something that his detainee had dropped. So I think by all rights he had a right to grab that and find out what it was. Determine, one, that [defendant] hadn't closed the door; so he was potentially arrestable for [Penal Code section] 148. But to pick up something that appeared--in that case, it's not something he's bringing from inside the room. It's the only way it could have gotten there. I mean, it's reasonable to believe it could have gotten there by the detainee, Mr. Barnard, dropped it when he was at that door, banging on the door, since it was between the door and the jam[b]. [¶] Based on that, Officer Rosas said as soon as he picked it up he determined from the feel that it was a meth pipe, and at that point pulled [defendant] out feeling he had involvement in this case, and he arrested him for possession of a meth

pipe. Whether it was his or it was dropped, he was possessing at that point. ¶ The rest of it, there's consent to search the room."

Defendant argued that there was no justification for grabbing defendant and the tissue: "I don't think there's probable cause to have a napkin in your hand. I don't think it's a plan view doctrine. I don't think there's anything like that. So when they seize that and [defendant], I believe they're not only conducting illegal search, they're also illegal arrest on the part of the officers. ¶ The officer indicated he believed Mr. Barnard dropped the item, but there is no evidence that he saw anything drop or any of the other officers saw anything drop. So I don't think a napkin is any sort of a contraband or anything like that that would require an immediate seizure, and it was on the other side of the threshold at the time. ¶ . . . And I would argue that seizure was unreasonable here. The search of the napkin was unreasonable. The seizure of [defendant] was unreasonable. Certainly, anything deriving from that, I think, should be suppressed and excluded as illegal, illegal police conduct."

The trial court reasoned as follows: "Well, a napkin in your hands at dinner isn't about probable cause for anything, but given the circumstances here, it seems to me the officers were reasonable in suspecting that something untoward and, quite possible, illegal was taking place in their presence."

DISCUSSION

"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.) "Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant [citation]." (*Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 653.) But there are " "a few specifically established and well-delineated exceptions" ' ' to the warrant requirement. (*United States v. Ross* (1982) 456 U.S. 798,

825.) Two such exceptions--both of which the People relied upon below in seeking to justify the warrantless search of defendant--are searches incident to a lawful arrest (*Chimel v. California* (1969) 395 U.S. 752, 762-763) and searches pursuant to consent (*People v. Woods, supra*, 21 Cal.4th at p. 674).

“If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.” (*Atwater v. Lago Vista* (2001) 532 U.S. 318, 354.) Probable cause exists where the facts and circumstances within the knowledge of the arresting officer are sufficient to warrant a prudent person in believing that the suspect is committing an offense. (See *Michigan v. DeFillippo* (1979) 443 U.S. 31, 37; cf. *People v. Price, supra*, 1 Cal.4th at p. 410.)

Penal Code section 148, subdivision (a)(1), makes it a crime if a person “willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician . . . in the discharge or attempt to discharge any duty of his or her office or employment” “The legal elements of a violation of [Penal Code] section 148, subdivision (a) are as follows: (1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties.” (*People v. Simons* (1996) 42 Cal.App.4th 1100, 1108-1109, see *In re Manuel G.* (1997) 16 Cal.4th 805, 815.)

The premise of defendant’s argument is that the search of the napkin cannot be justified as a search incident to a lawful arrest for violating Penal Code section 148. We glean that, from there, defendant argues that there was no justification to detain him and seize the napkin. We glean that from there defendant argues that his arrest for possession of the pipe and cocaine was unlawful as the fruit of the unlawful detention and his consent to search the room was unlawful as the fruit of the unlawful detention and arrest.

As to the underlying premise, defendant reasons that the officers testified that he was being detained for possession of a pipe, not for obstructing a peace officer. According to defendant, “the fact that [defendant] may have been potentially arrestable, but was not ultimately arrested, for a violation of Penal Code section 148 cannot be retroactively applied to save the illegal seizure of the napkin under the Fourth Amendment.” Defendant’s analysis is erroneous.

As the United States Supreme Court has made clear, “ ‘the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer’s action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.’ ” (*Whren v. United States* (1996) 517 U.S. 806, 813.) “Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” (*Ibid.*)

Defendant’s fallback argument is that it was not objectively reasonable to suspect a violation of Penal Code section 148 because “Officer Rosas did not testify that [defendant] prevented any officer from closing his door if the officers perceived a safety concern.” We disagree.

“No decision has interpreted the statute to apply only to physical acts, and the statutory language does not suggest such a limitation.” (*People v. Quiroga* (1993) 16 Cal.App.4th 961, 968.) “[Penal Code] section 148 penalizes even passive delay or obstruction of an arrest, such as refusal to cooperate.” (*People v. Curtis* (1969) 70 Cal.2d 347, 356, fn. 6, disapproved on another ground in *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222.) In the case of *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, this court concluded that “a reasonable inference could be drawn that appellant willfully delayed the officers’ performance of duties by refusing the officers’ repeated requests that he step away from the patrol car. . . .” (*Id.* at p. 1330.)

Here, police officers were pursuing a criminal suspect and detained him outside defendant’s opened door. Defendant refused officer requests to close the door.

“Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.” (*Terry v. Ohio* (1968) 392 U.S. 1, 23.) Given the facts and circumstances, Officer Rosas was certainly justified, in executing his crime prevention and detection duties, in ordering defendant to close his door to “neutralize the threat of physical harm.” (*Id.* at p. 24.)

“[P]robable cause does not require as strong evidence as is needed to convict.” (*Skelton v. Superior Court* (1969) 1 Cal.3d 144, 150.) The Fourth Amendment accepts the risk that “persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent.” (*Illinois v. Wardlow* (2000) 528 U.S. 119, 126.)

Defendant relies on *People v. Wetzel* (1974) 11 Cal.3d 104, 109-110. He claims that the case stands for the proposition that “the mere act of passively standing in a doorway does not constitute a violation of Penal Code section 148 even if the police have a lawful right to enter.” Defendant is mistaken.

In *Wetzel*, officers responding to an early morning burglary alarm near the defendant’s home were told by a citizen that one of the suspects may have gone into the defendant’s apartment. Officers woke the defendant by knocking at the apartment’s partially opened door, advised her of the situation, and requested permission to enter. The defendant told the officers to “ ‘[g]et the hell out of here’ ” (*People v. Wetzel, supra*, 11 Cal.3d at p. 107) if they did not have a search warrant. An officer explained to the defendant that they did not need a search warrant to enter but the defendant refused to consent. During the conversation, the defendant got out of the bed and stood at the doorway. Although she was threatened with arrest for obstructing an officer, the defendant refused to get out of the way and was arrested. The officers entered the apartment but did not find anything. However, during a postarrest search of the defendant, the officers discovered some Seconal pills. The defendant pleaded guilty to possession of drugs after her motion to suppress was denied.

On appeal, the Supreme Court held that the officers had the legal right to enter the defendant's apartment because they were in "hot pursuit" of a burglary suspect. (*People v. Wetzel, supra*, 11 Cal.3d at p. 108.) Nevertheless, it reversed the judgment. In so doing, it held that the officers did not have probable cause to arrest the defendant for violating Penal Code section 148 because all the defendant did was passively assert her constitutional rights. (*People v. Wetzel, supra*, at p. 110.)

Here, defendant did not simply stand on his constitutional rights and refuse consent to enter. He refused Officer Rosas's repeated commands to close the door. Although one court has noted that Penal Code section 148 does not criminalize "a person's failure to respond with alacrity to police orders" (*People v. Quiroga, supra*, 16 Cal.App.4th at p. 966), that is not what happened in this case. Here, defendant's repeated refusal to close his door forced the officers to cease interrogating Barnard and attend to their safety, which was threatened by defendant's presence and defendant's open door. This conduct amounted to far more than the lack of consent by inaction exhibited by the defendant in *Wetzel*. At the very least, the conduct constituted probable cause to believe that defendant was obstructing a peace officer.

We conclude that, because the police could lawfully arrest defendant for a violation of Penal Code section 148, the search of the napkin was justified as a search incident to a lawful arrest. It follows that the subsequent search of defendant was lawful as incident to an arrest and the subsequent search of defendant's room was lawful as a product of consent. The trial court therefore did not err in denying defendant's suppression motion.

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.