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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT LEONARD WISHMAN,

Defendant and Appellant.

H036984

(Santa Clara County

Super. Ct. No. C1083783)

After the trial court denied his Penal Code section 1538.5 motion to suppress evidence, Robert Wishman (appellant) pleaded no contest to one misdemeanor count of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a), count two), one count of possession of controlled substance paraphernalia (Health & Saf. Code, § 11364, count three), and one count of using or being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a), count four). In addition, appellant admitted that he had two prior convictions for violating Health and Safety Code section 11550.

The court suspended imposition of sentence and placed appellant on formal probation for two years on the condition that he serve 312 days in county jail; the court awarded him credit for time served.

Appellant filed a timely notice of appeal.

On appeal, appellant challenges the denial of his suppression motion. For reasons that follow, we affirm the judgment.

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. (*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].)

Evidence Adduced at the Hearing on the Suppression Motion

Officer Hans Jorgensen testified that he was on duty on February 5, 2010, in a marked patrol car in the area of Blossom Hill Road and Eagles Lane. Around 2 p.m., he saw appellant step off the sidewalk of Blossom Hill Road into westbound lanes of traffic; appellant got into the street. Cars had to slow down to avoid hitting him. Officer Jorgensen saw that appellant was wearing a jacket. Appellant looked at the patrol car and stepped back on to the sidewalk. Officer Jorgensen made a U-turn and drove toward appellant. Officer Jorgensen saw that appellant had taken off his jacket and was walking in a westbound direction. Officer Jorgensen stopped the patrol car and he and Officer Krauss got out. Officer Jorgensen saw appellant putting his jacket back on; he had one arm in the jacket. According to Officer Jorgensen, he wanted to talk to appellant because appellant was "jaywalking."

Officer Krauss told appellant to put down the jacket; appellant continued to walk away. When appellant did not respond Officer Krauss grabbed the jacket. Officer

Jorgensen testified that Officer Krauss did so because they "didn't know if he had any weapons or if he was reaching in it to grab some type of deadly weapon." The jacket was leather and Officer Jorgensen could not see "whether or not it secreted a weapon." After the officers took the jacket from appellant, appellant told the officers that he had an open bottle of liquor inside the jacket. Officer Jorgensen conducted a pat search of appellant. Officer Jorgensen said that he was concerned for officer safety because appellant was wearing a sweatshirt "that covered his waistband and pockets." "Based on [appellant's] elusive behavior" Officer Jorgensen was concerned that appellant posed a danger to the officers. Officer Jorgensen explained this "elusive behavior" as appellant taking off his jacket and failing to respond to the officers' initial commands to put down his jacket.

During the pat search, Officer Jorgensen saw in plain view a clear glass pipe, short straw and a clear plastic bag containing a white substance in appellant's "left breast pocket." Officer Jorgensen believed the substance to be methamphetamine. In appellant's right front pocket Officer Jorgensen discovered an object; initially, he felt it and based on its shape and rigidity concluded that it was a knife. Accordingly, he removed it from the pocket. Officer Jorgensen placed appellant in handcuffs.

On cross examination, Officer Jorgensen confirmed that Blossom Hill Road runs east-west and has three lanes on each side of a median strip. The lanes are approximately 10 to 12 feet wide, but lane number three, which is the one closest to the curb is approximately 22 feet wide because cars can park there. Officer Jorgensen confirmed that Defense Exhibit A, described as an enlarged aerial photograph of Blossom Hill Road between Judith Street and Eagles Lane, fairly and accurately showed the location where he saw appellant.¹ Although he was unsure of the name of the road that intersected Blossom Hill Road between Judith Street and Eagles Lane, Officer Jorgensen confirmed

¹ Defense counsel informed this court that she intended to lodge Defense Exhibit A with this court. However, it appears that Defense Exhibit A was damaged and counsel was able to lodge only a photograph of the exhibit with the court.

there was such an intervening intersection and that intersection was controlled by a stop sign. Upon viewing the exhibit, Officer Jorgensen was able to confirm that the intervening intersection was Goldfield Road.

At the end of the hearing, defense counsel argued that appellant was not jaywalking because jaywalking occurs only when a pedestrian crosses a roadway between two adjacent intersections that are controlled by traffic control signal devices. Since Goldfield Road was controlled by a stop sign, appellant could not be jaywalking as he was not crossing between two adjacent intersections controlled by signal devices.² Thus, because the officers stopped appellant on a misunderstanding of the law, there was "no articulable, reasonable suspicion to justify his detention."

The People argued that the uncontroverted evidence established that the officers saw appellant "unsafely go in the middle of the street causing . . . cars to slow down." So even if there was not a technical jaywalking violation, "there was cause to detain under the officer safekeeping rule in protecting persons under . . . Ray."

By written order, the court denied the motion to suppress. The court made the following findings: "The police officers in this case observed defendant crossing Blossom Hill Road in a manner that caused autos to brake in order to avoid hitting him. Officer Krauss attempted to converse with him but defendant walked away. When the two officers caught up with him he was instructed to drop his jacket[,] which was half on and half off. He ignored them. They then searched his jacket and his pockets and found contraband and a folding knife[,] which was modified with tape[,] which allowed a holder to open it simply by flicking it with his or her wrist. [¶] Assuming that his actions on and in Blossom Hill Road did not violate any statute or local ordinance, the police

² Vehicle Code section 21955 provides that "[b]etween adjacent intersections controlled by traffic control signal devices or by police officers, pedestrians shall not cross the roadway at any place except in a crosswalk." In *Quinn v. Rosenfield* (1940) 15 Cal.2d 486, 490-491, the California Supreme Court rejected the contention that a stop sign is a traffic control signal device.

were acting lawfully in their attempt to talk to him: His actions caused auto traffic to brake. There is no reason to characterize any of the activity of the police as unlawful. The two officers were attempting to determine what made him engage in such dangerous (to himself) activity and to determine his sobriety. When they eventually were able to catch up to defendant the police did a quick pat search for weapons. They found a switchblade knife and contraband. Since the police acted lawfully there is no reason to suppress any fruits of the protective search. [¶] Defendant's motion to suppress all or some of that evidence is DENIED."

Discussion

Appellant argues that the prosecution did not establish cause to detain him because the officer's mistaken belief that he was jaywalking cannot serve as reasonable justification for detaining him, nor can the community caretaking doctrine be invoked on these facts.

"The touchstone of the Fourth Amendment is reasonableness. [Citation.] Whether an officer's conduct was reasonable is evaluated on a case-by-case basis in light of the totality of the circumstances. [Citation.]" (*In re Raymond C.* (2008) 45 Cal.4th 303, 307.) Thus, "[t]he Fourth Amendment prohibits 'unreasonable searches and seizures' by the Government" (*U.S. v. Arvizu* (2002) 534 U.S. 266, 273.)

"A warrantless search is presumed to be unreasonable, and the prosecution bears the burden of demonstrating a legal justification for the search. [Citation.] '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.]' [Citations.]" (*People v. Redd* (2010) 48 Cal.4th 691, 719.) As we shall explain, we conclude the prosecution established that the search and seizure in this case was reasonable.

Police contacts may be placed "into three broad categories ranging from the least to the most intrusive: consensual encounters that result in no restraint of liberty whatsoever; detentions, which are seizures of an individual that are strictly limited in duration, scope, and purpose; and formal arrests of comparable restraints on an individual's liberty. [Citations.]" (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.) This case concerns the latter two categories.

The court below denied appellant's motion to suppress not based on any finding that Officer Jorgensen acted reasonably in believing appellant violated the law; rather, as noted, the court denied the motion because "[t]he two officers were attempting to determine what made [appellant] engage in such dangerous (to himself) activity and to determine his sobriety." The court's order implies that it was persuaded by the People's argument that the officers had cause to detain appellant under their community caretaking function.

"The community caretaking exception to the warrant requirement" recognizes that, "in addition to their investigative tasks, police officers regularly perform ' "community caretaking functions"—helping stranded motorists, returning lost children to anxious parents, assisting and protecting citizens in need.' " (*People v. Madrid* (2008) 168 Cal.App.4th 1050, 1056 (*Madrid*), quoting *People v. Ray* (1999) 21 Cal.4th 464, 467 (*Ray*).)³

³ In *Ray*, the police received a report in the afternoon that the door to a residence had been open all day " 'and it's all a shambles inside.' " (*Ray, supra*, 21 Cal.4th at p. 468.) The reporting party did not believe that anyone was inside the residence. (*Ibid.*) When the officers arrived, they found the front door open about two feet. (*Ibid.*) Looking through the opening, the officers could see that the inside of the residence had been "ransacked." They knocked and announced their presence, but there was no response. The officers decided to enter the residence to see if there was anyone inside who needed assistance and to determine if a burglary had been committed or was in progress. (*Ibid.*) After entering the residence, they saw a large quantity of cocaine inside the residence and thereafter obtained a search warrant for the residence based on these observations. (*Id.* at pp. 468-469.) The trial court granted the defendant's suppression motion. (*Id.* at p. 469.)

"The appropriate standard under the community caretaking exception is one of reasonableness: Given the known facts, would a prudent and reasonable officer have perceived a need to act in the proper discharge of his or her community caretaking functions?" (*Madrid, supra*, 168 Cal.App.4th at p. 1056, quoting *Ray, supra*, at pp. 476–477.) Officers are entitled to draw reasonable inferences in light of their experience, but they must be able to point to specific and articulable facts from which they concluded their actions were necessary. (*Id.* at p. 1056.) Reasonableness depends on a balancing between the public interest and an individual's right to be free from arbitrary interference from law enforcement officers. (*Id.* at p. 1058.) "In engaging in this weighing process, courts must act as vigilant gatekeepers to ensure that the community caretaking exception does not consume the warrant requirement." (*Ibid.*)

In *Madrid*, the court set forth a nonexclusive list of four factors relevant to whether an officer has acted reasonably: (1) the nature and level of distress exhibited by the individual; (2) the location of the individual; (3) whether the individual was alone and/or had access to assistance independent of the officer; and (4) to what extent the

The Court of Appeal reversed, and the California Supreme Court granted review. (*Id.* at pp. 469-470.)

In *Ray*, a three-justice plurality lead opinion concluded that the officers' entry was justified by the community caretaking exception, while the three-justice concurring opinion reasoned that the officers' entry was justified by exigent circumstances. (*Ray, supra*, 21 Cal.4th at pp. 478 (Brown, J., lead opinion), 480-482 (George, C. J., concurring).) The plurality opinion began by distinguishing between the exigent circumstances exception to the warrant requirement and the community caretaking exception. (*Id.* at p. 470.) "When the police act pursuant to the exigent circumstances exception, they are searching for evidence or perpetrators of a crime. Accordingly, in addition to showing the existence of an emergency leaving no time for a warrant, they must also possess probable cause that the premises to be searched contains such evidence or suspects. [Citations.] In contrast, the community caretaker exception is only invoked when the police are not engaged in crime-solving activities." (*Id.* at p. 471.) "[T]he defining characteristic of community caretaking functions is that they are totally unrelated to the criminal investigation duties of the police." [Citation.] Upon entering a dwelling, officers view the occupant as a potential victim, not as a potential suspect." (*Ibid.*)

individual presented a danger to him or herself and others, if not assisted. The first factor, the nature and level of the distress, is entitled to the greatest weight, though it is not necessarily dispositive. (*Madrid, supra*, at p. 1059.) A particular level of distress may be more or less serious depending on the remaining three factors. (*Ibid.*)⁴

The officers' actions in this case fail the reasonableness test. There was no evidence that appellant appeared to be in distress other than his attempt to cross Blossom Hill Road. Once appellant noticed the officers driving on the other side of the street he returned to the curb and resumed walking on the sidewalk in his original direction of travel. The only facts that Officer Jorgensen articulated as grounds for detaining appellant were that he attempted to cross the road outside a crosswalk. There was no evidence presented that appellant appeared to be staggering or walking with an unsteady gait or stopping to steady himself. Appellant was walking in daylight on a sidewalk located on a busy street as evidenced by the fact that Officer Jorgensen saw "vehicles" slow to avoid striking appellant. Officer Jorgensen did not testify to any facts that suggested that appellant was unable to care for himself or could not have sought assistance from someone other than the officers. Once appellant was back on the

⁴ In *Madrid, supra*, 168 Cal.App.4th 1050, the court accepted the possibility that the community caretaking exception might justify stopping a vehicle, but found that "given the known facts, a reasonable officer would not have perceived a need to stop [Madrid's] vehicle to discharge his community caretaking functions." (*Id.* at pp. 1058, 1060.) An officer stopped Madrid's truck in a shopping center parking lot because Madrid's passenger was perspiring and had exhibited an unsteady gait. The officer thought the passenger might be under the influence of alcohol or drugs, have a medical problem, or be a victim of assault. After the officer approached the truck, he noticed that the passenger was " 'nodding off' " and had dilated pupils. (*Id.* at p. 1053.) The officer's inquiry about drugs led to admissions and the recovery of contraband. (*Id.* at pp. 1053–1054.) The appellate court noted that the passenger exhibited a low level of distress; neither Madrid nor the passenger indicated a need for help, nothing about the passenger's circumstances suggested he required additional aid, and Madrid was available to assist the passenger, if necessary. (*Id.* at p. 1060.) The court rejected a possible inference by the officer that the passenger may have been suffering from a drug overdose as "unreasonably speculative." (*Ibid.*)

sidewalk there was no indication that appellant was in need of any help from the officers; there was no testimony that appellant exhibited any erratic behavior.

Nevertheless, "[n]o rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." [Citation.]' [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 976; *People v. McDonald* (2006) 137 Cal.App.4th 521, 529 [we affirm the trial court's ruling if it is correct on any theory of law applicable to the case, even if for reasons different than those given by the trial court].)

Officer Jorgensen stopped appellant because he saw appellant walk into traffic causing vehicles to slow to avoid hitting him. Vehicle Code section 21954, subdivision (a) provides that "Every pedestrian upon a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway so near as to constitute an immediate hazard." By causing traffic to slow to avoid hitting him, appellant did not yield to traffic. If he had yielded to traffic there would have been no need for the vehicles to brake. Simply put, appellant broke a traffic law. Since appellant violated the Vehicle Code, Officer Jorgensen "had the legal right, indeed the duty" to detain him. (*People v. Superior Court (Brown)* (1980) 111 Cal.App.3d 948, 954 [officer has right and duty to detain where he witnesses a traffic violation].) "[W]hen circumstances are 'consistent with criminal activity,' they permit—even demand—an investigation . . ." [Citation.]" (*People v. Souza* (1994) 9 Cal.4th 224, 233.)

It is important to note that the reasonableness of a search or seizure is measured against federal constitutional standards. (*People v. Woods* (1999) 21 Cal.4th 668, 674; *People v. Lomax* (2010) 49 Cal.4th 530, 564, fn. 11 [the legality of a stop and the

admissibility of the evidence found as a result is assessed under federal constitutional standards].)

Under federal constitutional standards, even if Officer Jorgensen had subjectively but erroneously believed that appellant had committed a particular traffic violation by his action, when in fact, the action constituted a different violation, this would not vitiate the officer's reasonable suspicion that a violation had occurred--the justifiable basis for the stop. (*Devenpeck v. Alford* (2004) 543 U.S. 146, 153 [an officer's subjective reasoning for making an arrest need not be the criminal offense as to which the known facts provide probable cause].) For Fourth Amendment purposes, the officer's action is not invalidated by his subjectively mistaken state of mind as long as the circumstances, viewed objectively, justified the action. (*Ibid.*; *Whren v. United States* (1996) 517 U.S. 806, 812-813.) This legal principle, applicable to determine the existence of probable cause to make an arrest, which requires more than the reasonable suspicion sufficient to justify a stop, is equally applicable here. Simply put, Officer Jorgensen was justified in detaining appellant for the Vehicle Code violation.⁵

⁵ The circumstances of this case are in contrast to those in *People v. Reyes* (2011) 196 Cal.App.4th 856 (*Reyes*). In *Reyes*, this court held that an officer lacked any objectively reasonable suspicion that the defendant had violated any traffic law where the vehicle stop was premised on a mistake of law. There, an officer saw that the defendant's van had no front license plate, but then observed a Florida license plate affixed to the rear of the vehicle before making the stop. (*Id.* at p. 859.) The officer cited the absence of a front license plate as the only basis for the stop. While the Vehicle Code requires that two license plates be affixed to vehicles (other than motorcycles) registered in California (Veh. Code, § 5200, subd. (a)), it allows for vehicles registered in other jurisdictions to display the license plates issued by that jurisdiction (Veh. Code, § 5202). (*Reyes, supra*, at p. 860.) Florida issues only one license plate, and the Vehicle Code provides that where only a single plate is issued it should be affixed to the rear of the vehicle. (*Ibid.*) Accordingly, we concluded "[t]hat which the officer accurately observed, and which caused him to suspect a violation, was not a violation of any law," and we determined that "a pure mistake of law [such as] the officer apparently made here cannot provide objectively reasonable suspicion for a traffic stop." (*Id.* at pp. 860, 863.) In contrast, here, even though the officer was mistaken about the particular Vehicle Code section that appellant violated, the officer observed something that was a Vehicle Code violation.

The evidence establishes that when ordered to put down his jacket, appellant continued walking away from the officers. Although we concede such was not in the contemplation of Officer Jorgensen, at this point in time, appellant had committed a misdemeanor in that he "willfully . . . delay[ed] . . . [a] public officer . . . in the discharge or attempt to discharge [a] duty of his or her office or employment" (Pen. Code, § 148.) Thus, Officer Jorgensen had probable cause to arrest appellant. A suspect has no right to resist a lawful detention. (*People v. Superior Court (Bowden)* (1976) 65 Cal.App.3d 511, 523; *People v. Lloyd* (1989) 216 Cal.App.3d 1425, 1429 [as a defendant has no right to resist a lawful detention, reasonable cause to detain becomes probable cause to arrest when the suspect refuses to comply with the officer's demands to stop].)

Warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the federal Constitution. (*Virginia v. Moore* (2008) 553 U.S. 164, 176 [Moore arrested for misdemeanor of driving on a suspended license, which was not an arrestable offense under state law]; see *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 323 [Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine].)

Since Officer Jorgensen was justified in arresting appellant, a search incident to that arrest is justified also. "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." (*U.S. v. Robinson* (1973) 414 U.S. 218, 235 (*Robinson*).)

Having in the course of the lawful search come upon the methamphetamine and the drug paraphernalia, Officer Jorgensen was entitled to seize them as " 'fruits,

instrumentalities, or contraband' probative of criminal conduct. [Citations.]" (*Robinson, supra*, 414 U.S. at p. 236.)

Accordingly, we conclude that because the seizure of appellant and search of his person were constitutionally reasonable, the trial court did not err in denying his motion to suppress the evidence found.

Ineffective Assistance of Counsel

By way of a supplemental brief, appellant argues that his counsel was ineffective in failing to introduce favorable evidence on how far he walked from the curb, by failing to challenge the seizure of his jacket and by failing to challenge the pat search.

"In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. . . . If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.] [Citation.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 391.)

In addition, "*Strickland v. Washington* (1984) 466 U.S. 668, 697 . . . informs us that 'there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an

ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.' " (*In re Cox* (2003) 30 Cal.4th 974, 1019-1020.)

Initially, we note that it would have been pointless to elicit evidence on how far appellant walked from the curb because Officer Jorgensen testified that appellant stepped off the curb, actually got into the street and caused vehicles to slow to avoid striking him. Thus, the distance that appellant walked from the curb was irrelevant to a finding that appellant violated Vehicle Code section 21954. Trial counsel is not required to indulge in idle acts to appear competent. (*People v. Terrell* (1999) 69 Cal.App.4th 1246, 1252-1253.)

Appellant argues that he was prejudiced by counsel's failure to raise additional grounds for suppression because Officer Jorgensen's plain view of his contraband would not have occurred if he had been allowed to finish putting on his jacket. According to appellant, there would have been no case against him if defense counsel had challenged the pat search and seizure of his jacket.

Since we have concluded that the officers had a legal basis under the Fourth Amendment for initially detaining, then arresting appellant, and conducting a search incident to that arrest that was constitutionally reasonable, appellant cannot show that he was prejudiced by counsel's failure to raise additional grounds for suppression.

Disposition

The judgment is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.