Filed 11/13/15 P. v. Briggs CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Appellant, v. DALE CURTIS BRIGGS Defendant and Respondent.	H041433 (Santa Clara County Super. Ct. No. C1371249)

In this appeal by the People we are asked to decide if the record at a preliminary hearing established that defendant Dale Curtis Briggs was lawfully detained based on a reasonable suspicion that he was in violation of Vehicle Code section 21201[1]—safety requirements for bicycles. We conclude that defendant was not lawfully detained and that the trial court did not err in granting defendant's suppression motion and in later refusing to reinstate the complaint.

Background

On December 17, 2013, the Santa Clara County District Attorney filed a felony complaint in which defendant was charged with one count of possession of a controlled substance (Health and Saf. Code, § 11377, subd. (a)) and one count of being under the influence of a controlled substance (Health and Saf. Code, § 11550, subd. (a)).

The case was set for both a motion to suppress evidence pursuant to Penal Code section 1538.5 and a preliminary hearing on May 16, 2014.

[1] All further statutory references are to the Vehicle Code unless otherwise indicated.

Preliminary Hearing Testimony

The testimony adduced by San Jose Police Officer Thomas Walias established the following. On September 1, 2013, at approximately 10:30 p.m., the officer was on patrol in a marked police vehicle. The officer was driving eastbound on San Antonio Street in San Jose when he saw a bicyclist, later identified as defendant, riding his bicycle eastbound on San Antonio Street in the bicycle lane. At the time the officer first saw defendant, defendant was two car lengths in front of the officer's patrol vehicle or approximately 30 feet away and offset to the right of the officer's vehicle. The officer said that he was not able to see defendant at all until he got within two car lengths of defendant; it was dark at the time. Officer Walias conceded that there is a buffer zone of two feet between the bicycle lane on San Antonio Street and the vehicle lane.

After defendant turned right onto southbound Packing Place, the officer initiated an enforcement stop for a Vehicle Code violation. When asked why he stopped defendant the officer said that he suspected that defendant's bicycle was not equipped with a red rear reflector visible up to 500 feet away. When asked if the officer was referring to a particular section, the officer responded that he was referring to section 21201.

Once defendant stopped and the officer approached him, the officer noticed that defendant exhibited objective signs of being under the influence of a controlled substance, specifically methamphetamine. The officer asked defendant if he had anything illegal on his person. When defendant said no, the officer asked and received permission to search defendant's pockets. The officer located a black coin purse inside defendant's left pant pocket, which contained "two small individual [b]aggies of a white crystalline substance." The officer tested the substance using the "NIC" narcotic field testing kit, which gave a result of presumptive positive for methamphetamine. The officer arrested defendant.

For purposes of the preliminary hearing, the parties stipulated that the white crystalline substance found by the officer was tested by a forensic criminalist at the Santa Clara County Crime Laboratory and that it tested positive for methamphetamine.

Motion to Suppress

At the end of the preliminary hearing, defense counsel submitted a supplemental motion to suppress the evidence found by Officer Walias. The prosecutor asked to respond to the motion in writing. The court set the matter for a hearing to be held on May 30, 2014.

In her opposition to the motion to suppress, the prosecutor argued that Officer Walias had reasonable suspicion to stop defendant based on section 21201, subdivision (d)(2). The prosecutor pointed out that section 21201, subdivision (d)(2) requires that "A bicycle operated during darkness . . . shall be equipped with . . . the following: [¶] . . . [¶] A red reflector on the rear that shall be visible from a distance of 500 feet to the rear when directly in front of lawful upper beams of headlamps on a motor vehicle." The prosecutor argued that since Officer Walias could not see the red reflector at all using his regular headlights from a distance of 30 feet, it was reasonable for the officer to infer that the red rear reflector would not be visible with high beams from an even greater distance—more than 15 times the distance from which the officer first saw defendant.

During the hearing on the suppression motion the prosecutor argued that the objective facts showed that Officer Walias had reason to suspect that defendant was in violation of the bicycle equipment lighting requirements; that the officer need not have been certain that was the case; and that because the officer could not see defendant's rear bicycle reflector until he was 30 feet away from him, it was reasonable for the officer to infer that defendant's bicycle did not have a red rear reflector.

At the end of the hearing, the court stated that it had read both motion pleadings and the transcript of the preliminary hearing. The court said it was "not convinced that

there was a reasonable suspicion to stop based upon the evidence that was submitted;" accordingly, the court granted the motion to suppress and dismissed the case. Specifically, the court found that there was not "sufficient evidence submitted to sustain and hold the defendant for this particular charge."

Motion to Reinstate the Complaint

Subsequently, on June 16, 2014, pursuant to Penal Code section 871.5, the prosecutor filed a motion to compel the magistrate to reinstate the complaint. Again the prosecutor argued that Officer Walias's undisputed observations provided him reasonable cause to believe that defendant was in violation of the Vehicle Code. However, this time the prosecutor asserted that there was reasonable suspicion to believe that defendant was in violation of several sections that require visibility of bicycles operating during darkness. The prosecutor contended that even if Officer Walias was mistaken in his belief that defendant had violated section 21201, subdivision (d)(2), this would "not vitiate the officer's reasonable suspicion that *a* violation had occurred."[2]

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[2] The prosecutor cited *Devenpeck v. Alford* (2004) 543 U.S. 146 (*Devenpeck*) for this proposition. In *Devenpeck*, the United States Supreme Court held that the subjective intent for an arrest is irrelevant: Even if the stated basis for the arrest is flawed, the officer is excused if another basis, supported by probable cause, existed to arrest the suspect. (*Id*. at p. 153.) The Supreme Court based its holding on the "arbitrary consequences" (*id*. at p. 155) that would result from subjective inquiries. If two officers arrest a suspect on identical facts supporting probable cause, one arrest could be constitutional and the other unconstitutional if the latter officer failed to identify correctly "a general class of offense for which probable cause exists." (*Id*. at p. 154.) The prosecutor argued that this legal principle applicable to determine the existence of probable cause to make an arrest is equally applicable to reasonable suspicion sufficient to justify a detention. It cannot be that reasonable suspicion for a detention exists so long as the facts may arguably give rise to reasonable suspicion to detain based on *any* criminal statute on the books—even if the crime is buried deep in a dust-covered tomb and never charged or prosecuted. If it were so, officers could detain without a reasonable suspicion under virtually any set of facts and later search the legal archives for a statute that might arguably justify it. Such an approach would be inconsistent with the Fourth Amendment's fundamental requirement that detentions be constrained by the requirement of reasonableness.

At the hearing on the prosecutor's motion to reinstate the complaint, the prosecutor argued that the uncontroverted facts that were adduced at the preliminary hearing caused Officer Walias to believe that the "[V]ehicle [C]ode and that particular subsection was indeed violated." Again, the prosecutor argued that even if the officer was wrong about the particular section that was violated, "if there's another section or another law violation that gives rise to the stop of the detention, that's appropriate here." However, the prosecutor conceded that the other law violations were "not raised at all before now."

On July 18, 2014, after reviewing the transcript of the preliminary hearing, the court denied the prosecutor's motion to reinstate the complaint. The court explained that "the People simply didn't meet their burden in creating a record that is sufficient under the case law."

The People filed a timely notice of appeal.

Discussion

The People contend that the magistrate erred in granting the motion to suppress evidence. We note that the People may appeal from the order denying the motion to reinstate the complaint pursuant to Penal Code section 871.5. (Pen. Code, § 1238, subd. (a)(9).) Penal Code "section 871.5 is the exclusive method by which the People may obtain a review of a magistrate's order of dismissal." (*People v. Mimms* (1988) 204 Cal.App.3d 471, 481.)

" 'In a proceeding under Penal Code section 871.5 to reinstate a complaint, the superior court sits as a reviewing court and is bound by the magistrate's findings of fact if they are supported by substantial evidence. [Citation.]' [Citation.] The only ground for a motion for reinstatement of a complaint is that 'as a matter of law, the magistrate erroneously dismissed the action or a portion thereof.' (§ 871.5, subd. (b).) 'In determining whether to compel reinstatement of a complaint dismissed after the granting of a defendant's suppression motion by the magistrate at a preliminary hearing, the

superior court reviews the legal soundness of the magistrate's ruling on the suppression motion [citations] based on "the record of the proceedings before the magistrate" (§ 871.5, subd. (c)).' [Citation.]" (*People v. Nottoli* (2011) 199 Cal.App.4th 531, 544 (*Nottoli*).)

" 'On appeal from an order denying a motion to reinstate a criminal complaint under [Penal Code] section 871.5, we disregard the superior court's ruling and directly examine the magistrate's ruling to determine if the dismissal of the complaint was erroneous as a matter of law. To the extent the magistrate's decision rests upon factual findings, "[w]e, like the superior court, must draw every legitimate inference in favor of the magistrate's ruling and cannot substitute our judgment, on the credibility or weight of the evidence, for that of the magistrate." [Citation.]' [Citation.] 'We review the magistrate's legal conclusions de novo, but are bound by any factual findings the magistrate made if they are supported by substantial evidence.' [Citation.]" (*Nottoli*, *supra*, 199 Cal.App.4th at pp. 544-545.)

" '[I]t is the duty of the superior court, and ours as well, to measure those facts, as found by the magistrate, against the constitutional standard of reasonableness. The constitutional issue is solely a question of law and if the magistrate mistakenly concluded that a search was unconstitutional that conclusion is also erroneous "as a matter of law." ' [Citation.]" (*Nottoli*, *supra*, at p. 545.) "While we accept the magistrate's findings of fact that are supported by substantial evidence, it is this court's responsibility to measure the facts against the Fourth Amendment standards articulated by the U.S. Supreme Court. [Citations.]" (*Ibid*.)

Initially, we note that in seeking review and reinstatement of a complaint following the denial of a motion to reinstate, the People may not advance or raise new theories that could have been but were not argued at the suppression hearing. (*Nottoli*, *supra*, at p. 561.) " 'To allow a reopening of the question on the basis of new legal theories to support or contest the admissibility of the evidence would defeat the purpose

of Penal Code section 1538.5 and discourage parties from presenting all arguments relative to the question when the issue of the admissibility of evidence is initially raised. [Fn. omitted.] [Citations.]' [Citation.]" (*Ibid*.) This rule applies to the People's assertion that defendant's detention was justified pursuant to the officer's community caretaking function. At no time during the preliminary hearing or the subsequent suppression hearing did the prosecution argue that the detention was justified by the officer's community caretaking function. In fact, at the hearing on the prosecutor's motion to reinstate the complaint, the prosecutor stated "there has to be a law violation or another exception, *which we're not relying on here*, such as public safety or the care taking job of the police in order to justify a detention, but we're not relying on *People versus Ray*."[3] (First italics added.)

The People argue that defendant's detention was lawful based upon the reasonable suspicion defendant was in violation of the vehicle code equipment visibility requirements for bicycles operated during darkness. Specifically, the People assert that while the officer testified below that he conducted the enforcement stop because he believed that defendant was in violation of section 21201, subdivision (d)(2) in not having a rear reflector, the record supports the detention because there was reasonable suspicion to believe that defendant was in violation of other subsections of section 21201. The People point out that section 21201 requires that a bicycle have a white light illuminating in front and visible from a distance of 300 feet in front and from the sides of

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[3] In *People v. Ray* (1999) 21 Cal.4th 464, the California Supreme Court noted 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." (*Id*. at p. 467.) The Supreme Court distinguished the warrant exception for exigent circumstances from the one for community caretaking and concluded that the "emergency aid" doctrine was a subcategory of the latter. (*Id*. at p. 471.) The "emergency aid" component of the community caretaking exception "requires specific, articulable facts indicating the need for ' "swift action to prevent imminent danger to life or serious damage to property . . . ." [Citation.]' [Citation.]" (*Id*. at pp. 472-473.)

the bicycle (Veh. Code, § 21201, subd. (d)(1)), a white or yellow reflector on each pedal, shoe, or ankle visible from the front and rear of the bicycle from a distance of 200 feet (Veh. Code, § 21201, subd. (d)(3)), and a lamp or lamp combination, emitting a white light, attached to the operator and visible from a distance of 300 feet in front and from the sides of the bicycle. (Veh. Code, § 21201, subd. (e).)

In essence, the People ask this court to assume that because the officer could not determine that the moving object he saw in front of him was a bicycle until he was just 30 feet away, the officer would have had a reasonable suspicion that the defendant was violating other subsections of section 21201, in particular those outlined *ante.*

To justify an investigative stop or detention, an officer must have specific and articulable facts causing him to entertain a reasonably objective suspicion that some activity relating to crime has occurred or is about to occur and the person to be detained is involved in that activity. (*People v. Aldridge* (1984) 35 Cal.3d 473, 478.)

Assuming for the sake of argument that the People's alternate justifications to support the detention have not been forfeited because they were never argued during the preliminary hearing or at the subsequent suppression hearing, there is simply insufficient evidence in the record to support detention on these bases. The Vehicle Code violations deal with two different types of light and one additional type of reflector. Officer Walias never testified to any of these things and this court cannot presume that the officer was unable to observe the various lights and reflectors when he was never asked about them explicitly.

To prove defendant violated the law required evidence that Officer Walias could not see a white light illuminating in front and visible from a distance of 300 feet in front and from the sides of the bicycle and could not see a white or yellow reflector on each pedal, shoe, or ankle visible from the front and rear of the bicycle from a distance of 200 feet. When Officer Walias saw defendant on the bicycle he was 30 feet behind him, not in front or to the side of the bicycle to see a white light and whether he could see a

white or yellow reflector on each pedal was never explored by the prosecution. Officer Walias did testify that he could see a moving object in the distance before he got close enough to identify the object as a bicyclist. Conceivably, that moving object could have been a reflector on the pedal of defendant's bicycle. We will never know because the prosecutor failed to elicit any testimony on the subject.[4]

Finally, turning to the stated basis for the detention—a suspicion that defendant did not have a rear red reflector—we note for the record that photographs taken of defendant's bicycle by Office Walias show that there was a "piece of red equipment on the back of the bicycle" that was "red" and "oval" and made of "plastic" and that there was "some light emitting from it."

As noted, the bicycle was required to have a red rear reflector that was visible from a distance of 500 feet to the rear *when directly in front of lawful upper beams of headlamps on a motor vehicle*. In the absence of any testimony that if the bicycle had had a rear red reflector, Officer Walias would have been able to see it when he was not directly behind the bicycle, but was offset at least two feet to the side of the bicycle, there was insufficient evidence to support the officer's suspicion that the bicycle did not have a red rear reflector. Furthermore, although the officer testified that he had his headlamps on, the prosecutor never clarified whether they were on upper beams or were dipped. Simply put, the prosecutor presented no evidence indicating how a rear reflector would look from Officer Walias's position behind, but offset to the side of the bicycle. In sum, the leap the People asked the court below and asks this court to make is far too speculative—speculation is not a substitute for evidence. It is possible Officer Walias knew how red reflectors work when a car is not directly behind a bicyclist, but the prosecutor did not elicit such testimony. Without such testimony there was insufficient

[4] The photographs of defendant's bicycle, which were admitted into evidence, appear to show something on one of the pedals of defendant's bicycle.

evidence that Officer Walias had a *reasonable* suspicion that defendant's bicycle did not have a rear reflector.

The magistrate's ruling dismissing the complaint was not erroneous.

Disposition

The order denying the People's motion under Penal Code section 871.5 to reinstate the complaint is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

WALSH, J.*