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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FRANK ANTHONY JIMENEZ, Defendant and Appellant.	H042568 (Santa Cruz County Super. Ct. No. F26415)

Following the trial court's denial of his motion to suppress evidence under Penal Code section 1538.5[1] during the preliminary hearing, defendant Frank Anthony Jimenez pleaded guilty to a count of misdemeanor possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)). On appeal, defendant argues the court erred when it denied his motion to suppress. He also urges us to consider the issue on the merits, even though he did not renew the motion to suppress before the trial court. We find defendant's failure to renew the motion to the trial court forfeited his claim of error. We also find Proposition 47's designation of his offense as a misdemeanor after he had already entered his initial plea does not cure this defect. In any event, we find that if we considered the merits of defendant's arguments, his motion to suppress was properly denied. We affirm the judgment.

[1] Unspecified statutory references are to the Penal Code.

BACKGROUND

On March 14, 2014, defendant was charged by complaint with a count of felony possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)).

On July 14, 2014, the trial court simultaneously conducted a preliminary hearing and heard a motion to suppress evidence (§ 1538.5). Following the hearing, the motion to suppress was denied. Subsequently the trial court reduced the charge of violating Health and Safety Code section 11377, subdivision (a) from a felony to a misdemeanor. Thereafter, defendant pleaded guilty to the misdemeanor count of possession of a controlled substance. On August 6, 2014, the trial court suspended imposition of sentence for 24 months and placed defendant on probation.

On October 1, 2014, defendant appealed the judgment in case No. H041497. The trial court granted defendant a certificate of probable cause. Defendant filed an opening brief claiming his motion to suppress was erroneously denied. In response, the People filed a respondent's brief arguing defendant had forfeited appellate review of his motion to suppress, because he did not renew his motion to suppress in the trial court after the preliminary hearing or in a section 995 motion, citing to *People v. Lilienthal* (1978) 22 Cal.3d 891, 896 (*Lilienthal*) and *People v. Hawkins* (2012) 211 Cal.App.4th 194.

On February 23, 2015, defendant filed a request and order to calendar the case in the trial court, noting he would like to discuss withdrawing or vacating his plea. On February 26, 2015, defendant voluntarily dismissed his appeal in case No. H041497. Below, the trial court considered and granted defendant's request to withdraw his plea, which the People did not oppose. Afterwards, the trial court determined it could not hear a renewed motion to suppress. In the interim, voters had passed Proposition 47, which reduced defendant's crime to a misdemeanor for all purposes. The trial court concluded neither a renewed motion to suppress nor a section 995 motion are available for misdemeanors and declined to hold a hearing on the renewed motion to suppress.

Subsequently, on May 27, 2015, defendant pleaded nolo contendere again to the misdemeanor charge of possession of a controlled substance in violation of Health and Safety Code section 11377, subdivision (a). The trial court again suspended imposition of sentence for 24 months, nunc pro tunc to August 6, 2014, the date defendant was initially sentenced. Defendant appealed.

DISCUSSION

Defendant raises two arguments on appeal. First, he argues that he sufficiently preserved his arguments pertaining to the denial of the motion to suppress on appeal, even though he did not have a hearing on his renewed motion to suppress. Second, he argues the court erred when it denied his motion to suppress during the preliminary hearing. We first address defendant's argument that his arguments pertaining to the motion to suppress are properly preserved on appeal.

1. *Forfeiture of Argument*

Section 1538.5, subdivision (f)(1) permits a defendant to make a motion to suppress evidence obtained by a search at a preliminary hearing. Defendants may obtain appellate review of the denial of the suppression motion even if he later pleads guilty. (§ 1538.5, subd. (m).) In order to obtain direct appellate review, a defendant who moves to suppress evidence at a preliminary hearing must raise the issue of the validity of the search in superior court by either renewing the motion in the trial court or challenging the legality of the search in a motion to dismiss under section 995. (*Lilienthal*, *supra*, 22 Cal.3d at pp. 896-897; *People v. Hawkins*, *supra*, 211 Cal.App.4th at pp. 199-200.) "The unification of the municipal and superior courts has not abrogated the need for a renewal of a motion to suppress evidence following certification of a case to the superior court." (*People v. Garrido* (2005) 127 Cal.App.4th 359, 364.)

Here, defendant made his motion to suppress at the preliminary hearing. After it was denied, he neither renewed the motion with the superior court nor sought a review of

the denial with a section 995 motion. Accordingly, under the reasoning set forth in *Lilienthal*, he has forfeited appellate review of the denial of his suppression motion.

Defendant, however, argues the passage of Proposition 47 and his subsequent actions, including abandoning the appeal and withdrawing his plea so he could renew his motion to suppress, carves out an exception for the *Lilienthal* rule. Defendant voluntarily abandoned his first appeal and went back to the trial court in February 2015 so he could withdraw his plea and renew his motion to suppress. By that time, Proposition 47 had been enacted by the voters. Proposition 47 amended Health and Safety Code section 11377. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108 (*Lynall*).) A violation of Health and Safety Code section 11377 is now a misdemeanor unless the defendant has one or more prior convictions for an offense specified in Penal Code section 667, subdivision (e)(2)(C)(iv). It does not appear that defendant has a disqualifying conviction, so his violation of Health and Safety Code section 11377 must be considered a misdemeanor. Therefore, after defendant withdrew his plea, the trial court declined to hold a hearing on the renewed motion to suppress after concluding that a renewed suppression motion under section 1538.5, subdivision (i) was not contemplated in misdemeanor cases.

Defendant argues that Proposition 47's designation of his offense as a misdemeanor for all purposes renders a renewed motion to suppress unnecessary. He claims that section 1538.5, subdivision (j) does not contemplate a second motion to suppress in misdemeanor cases, and section 995 motions are similarly unavailable for misdemeanors. Therefore, he argues *Lilienthal*'s requirement for renewal of the motion in order to preserve a direct appeal is inapplicable.

In misdemeanor cases, section 1538.5, subdivision (j) entitles defendants to appellate review by the appellate division of the superior court of an order denying a motion to suppress. Defendant claims that review of the motion to suppress by the appellate department of the superior court, however, is not appropriate in this case.

In *Lynall*, *supra*, 233 Cal.App.4th 1102, this court held that appellate jurisdiction over judgments in cases where a defendant was charged with a felony in an information lies with the Court of Appeal, even if Proposition 47 subsequently reduced the charged felony offense to a misdemeanor. (*Id.* at p. 1105.)

Assuming without deciding that defendant's assertion that the appeal over the denial of the motion to suppress lies with this court and not the appellate division of the superior court is valid, we conclude *Lilienthal* applies and bars us from reviewing the motion to suppress. Despite the unique procedural circumstances of defendant's case, Proposition 47's designation of defendant's offense as a misdemeanor does not alter the fact that defendant failed to renew his motion to suppress or bring a section 995 motion when he had the opportunity to do so. The passage of Proposition 47 does not somehow cure this initial deficiency.[2]

Defendant frames this issue as one where he has adequately exhausted his remedies. As addressed in *Lilienthal*, however, the reason for enforcing a requirement that a defendant must renew his motion to suppress in the superior court is that "it would be wholly inappropriate to reverse a superior court's judgment for error it did not commit and that was never called to its attention." (*Lilienthal*, *supra*, 22 Cal.3d at p. 896.) Consideration of defendant's motion to suppress in this particular situation would be doing exactly what *Lilienthal* warned against. We would be reviewing the magistrate's

[2] We note that defendant does not challenge the trial court's decision not to hold a hearing on the renewed motion to suppress. We also note there may be cases where a defendant was charged with a felony offense before Proposition 47 was passed and made a motion to suppress during the preliminary hearing. Subsequently, Proposition 47 was passed and the defendant's offense was reduced to a misdemeanor for all purposes. We do not express an opinion on whether those defendants should be allowed to make a renewed motion to suppress under section 1538.5, subdivision (i). We also do not express an opinion on how the *Lilienthal* rule should be applied in those particular cases.

findings during the preliminary hearing, not the findings of the superior court. And any error we may find would not have been made by the superior court judge.

Nonetheless, defendant argues the principles of due process require us to review his motion to suppress on appeal. He claims that if we fail to review his motion to suppress, he will be deprived of all opportunity to seek review of the lawfulness of the search. We disagree. We are not depriving defendant of his opportunity to seek review of the motion to suppress if we decline to review it. Rather, defendant himself *forfeited* appellate review of the motion to suppress in this court when he failed to renew the motion or file a section 995 motion challenging the information below before he entered his plea.[3]

In any event, even if we were to address defendant's arguments pertaining to the motion to suppress on the merits, we would find that they fail.

2. *The Motion to Suppress*

a. **The Preliminary Hearing**

On February 22, 2014, Santa Cruz Sheriff's Deputy Daniel Robbins was approaching the intersection of Buena Vista Drive and Ranport Road in a marked patrol vehicle at approximately 3:00 a.m. He was patrolling the area to investigate residences that were known to be areas of high crime. There was no lighting at the intersection. When he stopped, he saw a black Escalade pass in front of his patrol car. Robbins noticed the license plate light was not clearly illuminated, and the lights were so dim that they were illuminating only the border of the license plate and the license plate was not legible from 10 feet away. Robbins knew this was a violation of Vehicle Code section 24601, which provides that a license plate must be illuminated so it is clearly legible from a distance of 50 feet to the rear of the car. Robbins initiated a traffic stop.

[3] Additionally, defendant does not argue that his trial counsel rendered ineffective assistance for failing to renew the motion before the trial court.

Robbins asserted the license plate was not legible until he was about 20 feet away from defendant's car. The vehicle pulled over in front of 29 Rancho Road.

Deputy Robbins identified defendant as the driver of the black Escalade. Robbins also noticed that when he approached defendant's car, he saw a black Jaguar parked nearby with two occupants inside. When the occupants inside the Jaguar saw Robbins, they pretended to be sleeping. Robbins was familiar with 29 Rancho Road and knew the house to be affiliated with drug use. Stolen cars had been recovered from the area. Nearby, there was another house where another drug user lived. Robbins did not have any particular reason to believe defendant knew anyone at the house at 29 Rancho Road. He asked defendant if he knew anyone at the house, and defendant responded he did not.

Deputy Robbins asked defendant where he was going. Defendant responded he was heading home to Green Valley Road. Robbins thought this was odd, because Buena Vista Road was a "really, really long way" to get home to Green Valley Road. Robbins confronted defendant about his answer, and defendant responded that he had pulled over to call a friend on his phone.

While Deputy Robbins was speaking to defendant, he noticed defendant exhibited several signs and symptoms consistent with being under the influence of a controlled substance. Robbins observed defendant's skin condition was poor and he was unable to stop moving. Robbins did not know whether defendant had a nervous condition that caused him to fidget, or if he had a medical condition that could lead to the condition of his skin. Robbins also believed defendant was being deceptive with his answers. Defendant indicated to Robbins that he had previously been arrested for the use of controlled substances, which was later confirmed by police dispatch.

After making these observations, Deputy Robbins asked defendant to step out of the car so he could conduct an examination to determine if he was under the influence. After defendant got out of the vehicle, Robbins felt it was necessary to conduct a pat search. From his training and experience, Robbins knew that people who are under the

influence of controlled substances are less susceptible to pain, can have increased strength, and may act out rashly. The area was poorly lit and had a high crime rate. At that point, Deputy Luis Melgoza had arrived on the scene, but Robbins believed the officers may be outnumbered. Robbins was unsure if defendant had come to meet the two individuals that were in the parked black Jaguar nearby. Deputy Melgoza went to speak with the two individuals in the Jaguar while Robbins dealt with defendant.

Deputy Robbins conducted a pat search of defendant. During the search, he felt an item, consistent with the shape of a bullet, inside of defendant's left pants pocket. Robbins asked defendant if he could take the item out. Defendant initially did not answer the question directly, stating he wanted to go home. He then began to place both of his hands into his pockets. Robbins ordered defendant not to put his hands in his pockets. Defendant then forcefully shoved his hands inside his pockets.

Based on defendant's behavior, Deputy Robbins became concerned. The item he had felt in defendant's pocket was consistent with a bullet, and he had not yet finished conducting a pat search. Therefore, he believed that defendant may be in possession of a small weapon. Robbins then grabbed defendant's right hand. Deputy Melgoza, who had finished speaking to the two individuals parked nearby, grabbed defendant's left hand. Defendant continued to disobey Robbins' request that he take his hands out of his pockets. Robbins then balled his hand up in a fist and pressed it into defendant's back, pretending his fist was a taser. Robbins told defendant if he did not cooperate he was going to tase him. At that point, defendant took his hands out of his pockets. Deputy Melgoza saw that defendant was holding a small clear container in his hand, which he dropped to the ground. Robbins and Melgoza handcuffed him.

Deputy Melgoza informed Deputy Robbins that defendant had dropped something on the ground while he was being placed into the patrol car. The item was made out of either glass or plastic and was about the size of a bullet. Robbins described it as having a "bullet-type" head and was consistent with the item Robbins had felt in defendant's

pocket. It was filled with a white crystal-like powdery substance. Later, the substance tested positive as methamphetamine.

b. **The Trial Court's Ruling**

First, the trial court determined that there was no reason to discount Deputy Robbin's testimony about defendant's dim license plate. The court therefore concluded the initial traffic stop was justified.

Next, the court turned to whether Deputy Robbins properly conducted a pat search after the traffic stop. The court noted several factors that were present: (1) defendant was in a known high-crime area, (2) the stop occurred at approximately 3:00 a.m., (3) there were two other individuals in a parked car near where defendant had stopped, and Deputy Robbins was unsure if defendant was meeting these other individuals or knew them, and (4) Deputy Robbins opined that defendant exhibited signs of being under the influence of a controlled substance. Considered altogether, the court believed that Deputy Robbins had reasonable suspicion to conduct the pat search.

c. **Standard of Review**

"Defendant's challenge to the trial court's ruling denying his motion to suppress presents a mixed question of law and fact that is subject to a two-tier standard of review. '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.' " (*People v. Sardinas* (2009) 170 Cal.App.4th 488, 493.) "In determining whether substantial evidence supports the trial court's findings, '[i]f there is conflicting testimony, we must accept . . . the version of events most favorable to the People, to the extent the record supports them.' " (*People v. Boulter* (2011) 199 Cal.App.4th 761, 767.)

d. **The Initial Traffic Stop**

First, we find the trial court did not err when it concluded Deputy Robbins' initial traffic stop was justified.

Vehicle Code section 24601 provides: "Either the taillamp or a separate lamp shall be constructed and placed as to illuminate with a white light the rear license plate during darkness and render it clearly legible from a distance of 50 feet to the rear. When the rear license plate is illuminated by a lamp other than a required taillamp, the two lamps shall be turned on or off only by the same control switch at all times."

During the preliminary hearing, Deputy Robbins testified he stopped defendant because his car's license plate was not properly illuminated in violation of Vehicle Code section 24601. Robbins stated he was stopped at an unlit intersection when defendant drove past him at approximately 30 to 40 miles per hour. The back of defendant's car was approximately 10 feet away from Robbins, and Robbins noticed the rear license plate was not clearly illuminated. Robbins also found the license plate lights were so dim that he was unable to read the numbers on the plate until he was about 20 feet away from defendant's car and the lights from his patrol car illuminated the plate.

Defendant argues that Deputy Robbin's initial stop was not justified, because defendant's alleged violation of Vehicle Code section 24601 was merely a pretext to stop defendant. Defendant claims from the "totality of the circumstances," including the fact that Robbins did not ultimately cite defendant for his violation of the Vehicle Code, it can be deduced that Robbins was merely conducting a roving search for drugs in the area.

This argument has no merit. "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." (*Whren v. United States* (1996) 517 U.S. 806, 810.) Therefore, if there is valid reason for the traffic stop, an officer's subjective intent is irrelevant. (*Id.* at pp. 811-813.)

Defendant argues there was insufficient evidence that he violated Vehicle Code section 24601 based on Deputy Robbins's testimony. Defendant claims that "Deputy Robbins only stated he could not 'read' the license plate until he was 20 feet away." He also claims that Robbins did not have a sufficient opportunity to view the dimly lit taillight, because by the time Robbins turned onto the road and was directly behind defendant's car, defendant was already relatively far away. Furthermore, Robbins failed to conduct an investigation to determine whether the license plate was in fact illegible from a distance of 50 feet. We find defendant's characterization of the facts undermines his own argument. As defendant himself points out, Robbins stated the license plate was *not* legible until he was 20 feet away from defendant. It seems reasonable and logical to infer that if the license plate was not legible and properly illuminated until a distance of 20 feet, it would be even less legible and less illuminated at the greater distance of 50 feet.

Hence, substantial evidence supports the trial court's determination that Deputy Robbins stopped defendant for violating the Vehicle Code. Accordingly, based on the Vehicle Code violation, the stop was proper even if Robbins had a separate subjective intent when he initiated the traffic stop.

e. **Ordering Defendant Out of His Car**

Next, defendant argues Deputy Robbins did not have a reasonable suspicion that defendant was under the influence of a controlled substance. Therefore, Robbins could not have ordered defendant to step out of his car.

Defendant's argument, which focuses on whether Deputy Robbins had a reasonable suspicion that defendant was under the influence of drugs based solely on his evasive behavior and poor skin condition, ignores established precedent. Our Supreme Court has determined that "[o]nce a vehicle has been detained in a valid traffic stop, police officers may order the driver *and passengers* out of the car pending completion of the stop without violating the Fourth Amendment." (*People v. Lomax* (2010) 49 Cal.4th

530, 564.) Here, substantial evidence supports the court's finding that defendant was detained at a valid traffic stop. Therefore, Deputy Robbins was authorized to order defendant to step out of his car, regardless of what suspicions he may have had about defendant's drug use.

Defendant argues that Deputy Robbins was required to possess a reasonable suspicion about defendant's drug use, apart from the alleged traffic violation, before he could validly order defendant out of his car. He claims this is because an investigatory stop related to potential drug use would extend the time required to issue a dim light citation.

In part, defendant relies on *Rodriguez v. United States* (2015) __ U.S. __ [135 S.Ct. 1609] (*Rodriguez*). In *Rodriguez*, an officer observed a car violating Nebraska law by driving on highway shoulders. (*Id.* at p. __ [*id*. at p. 1612].) The officer initiated a traffic stop and wrote a warning ticket for the driver. After the officer finished explaining the warning to the driver, the officer asked for permission to walk his drug-sniffing dog around the driver's car. (*Id.* at p. __ [*id*. at p. 1613].) The officer also asked the driver to turn off the ignition, exit the vehicle, and stand in front of the patrol car while a second officer arrived. The officer walked his dog around the car, and the dog alerted the officer of the presence of drugs. (*Ibid.*) The traffic stop was extended by approximately seven to eight minutes so the dog could sniff the car. (*Ibid.*) The United States Supreme Court concluded the extension of the traffic stop was not justified, noting the difference between the safety interests implicated in a traffic stop and the government's interest in detecting crimes such as drug trafficking. (*Id.* at p. __ [*id*. at p. 1616].) An officer "may conduct certain unrelated checks during an otherwise lawful traffic stop. . . . [but] he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." (*Id.* at p. __ [*id*. at p. 1615].)

Rodriguez does not aid defendant. As noted, Deputy Robbins had reasonable suspicion that defendant had violated the Vehicle Code when he ordered defendant to

step outside his car. At that point, merely ordering defendant to step outside of his car did not exceed the scope of the traffic stop, or unduly prolong the traffic stop.

We do, however, agree with defendant that absent a reasonable suspicion of criminal activity such as drug possession or drug use, Deputy Robbins was *not* entitled to extend the scope of the traffic stop or prolong defendant's detention beyond that of permissible delays caused by officer safety measures. (*Rodriguez*, *supra*, __ U.S. at p. __ [135 S.Ct. at p. 1616].) Nonetheless, "[i]f the police develop reasonable suspicion of some other criminal activity during a traffic stop of lawful duration, they may expand the scope of the detention to investigate that activity." (*People v. Espino* (2016) 247 Cal.App.4th 746, 756.) Therefore, we next examine whether the subsequent pat search was reasonably justified based on the circumstances of the case.

f. **The Pat Search**

After Deputy Robbins ordered defendant to step outside of his car, he conducted a pat search. Defendant argues the pat search was not justified based on the totality of the circumstances.

The Constitution permits "a reasonable search for weapons for the protection of the police officer, where he [or she] has reason to believe that he [or she] is dealing with an armed and dangerous individual." (*Terry v. Ohio* (1968) 392 U.S. 1, 27.) A pat search is justified if "a reasonably prudent [officer] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger." (*Ibid.*) "[T]he police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the search. (*Id.* at p. 21.)

Defendant claims *People v. Medina* (2003) 110 Cal.App.4th 171 (*Medina*) is directly on point. In *Medina*, officers stopped the defendant's car at around midnight in a high-crime area. (*Id.* at pp. 174-175.) Officers admitted there was nothing specific about the defendant that would indicate he may be armed, but they decided to search him.

On appeal, the court concluded that the combination of the time and location of defendant's stop was insufficient to justify the search. (*Id.* at pp. 177-178.)

Medina is distinguishable. Although a late night detention in a high crime area is, alone, insufficient to justify a search (*Medina, supra*, 110 Cal.App.4th at p. 177), there were additional relevant facts justifying the search in this particular case. Here the court identified the relevant factors as: (1) defendant was in a known high-crime area, (2) the stop occurred at approximately 3:00 a.m., (3) there were two other individuals in a parked car near where defendant had stopped, and Deputy Robbins was unsure if defendant was meeting these other individuals or knew them, and (4) Deputy Robbins opined that defendant exhibited signs of being under the influence of a controlled substance based on his fidgety behavior and his poor skin condition.

"Nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." (*In re H.M.* (2008) 167 Cal.App.4th 136, 144.) And a reasonable suspicion that defendant may be under the influence of controlled substances is relevant when determining whether a pat search was proper. (*People v. Collier* (2008) 166 Cal.App.4th 1374, 1378 [" '[I]n connection with a lawful traffic stop of an automobile, when the officer has a reasonable suspicion that illegal drugs are in the vehicle, the officer may, in the absence of factors allying his safety concerns, order the occupants out of the vehicle and pat them down briefly for weapons to ensure the officer's safety and the safety of others.' "].)

Defendant stresses that these other factors present are also individually harmless, much like his presence in a high crime area. For example, he argues that furtive gestures by themselves cannot by itself constitute reasonable suspicion of a crime, citing *People v. Superior Court* [*Kiefer*] (1970) 3 Cal.3d 807, 818. He also argues that there could be an innocent explanation for his poor skin condition. And the fact that he had previously been arrested for possession of narcotics cannot lead an officer to reasonably believe that he was presently under the influence of narcotics. Additionally, he insists that evasive

behavior by itself does not lend to a conclusion that defendant may be under the influence.

We find no merit in defendant's argument. To determine whether a pat search is justified, we must look to the *totality* of the circumstances. (*Terry v. Ohio*, *supra*, 392 U.S. at p. 27.) Therefore, even though some of the factors cited by the court are individually harmless, it is reasonable to conclude that the combination of all these factors together caused the officer to believe his safety was in danger, warranting a pat search. Additionally, "[t]he possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of his investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal—to 'enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges.' " (*In re Tony C.* (1978) 21 Cal.3d 888, 894, superseded by statute on other grounds as stated in *In re Christopher B.* (1990) 219 Cal.App.3d 455, 460, fn. 2.) Therefore, we do not find the trial court erred when it concluded the pat search was justified.

g. **Scope of the Pat Search**

Defendant argues that even if the pat search was justified, Deputy Robbins exceeded the scope of the search when he forced defendant to empty his pockets.

Under *Terry*, " '[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to the others,' the officer may conduct a patdown search 'to determine whether the person is in fact carrying a weapon.' [Citation.] 'The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . .' [Citation.] Rather, a protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be strictly 'limited to that which is necessary for the discovery of weapons

which might be used to harm the officer or others nearby.' [Citations.] If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 373.)

"The scope of intrusion permitted without a warrant or probable cause 'will vary to some extent with the particular facts and circumstances of each case,' and there is no 'litmus-paper test' for distinguishing an investigatory stop from a full arrest. [Citation.] Consequently, we must consider the totality of the circumstances [citation] to determine if the means used by the police . . . were justified by the need of a 'reasonably prudent' officer [citation] to protect himself and others involved in the search." (*People v. Glaser* (1995) 11 Cal.4th 354, 366.)

Defendant argues that Robbins only said he felt that defendant had an object that was similar to a bullet inside his pocket. Therefore, defendant claims Robbins was not justified in taking the item from him. Defendant, however, mischaracterizes the nature of the search.

According to Deputy Robbins, when he pat searched defendant he felt a bullet-shaped item in defendant's pocket. Robbins did not reach down and forcefully remove the object. He also did not order defendant to take the object out. Rather, Robbins asked defendant if he could remove the object. Defendant did not answer this request. Instead, he began placing his hands into his pockets. Robbins told defendant to take his hands out of his pockets, and defendant disobeyed the order, forcefully shoving his hands into his pockets. At that point, Robbins became concerned, because he was unsure if the bullet-shaped object was a weapon or if defendant had a small weapon somewhere else on his person. We find this concern to be reasonable. If defendant had a bullet in his possession, it is logical to conclude it is possible he was in possession of a weapon that uses bullets. Robbins and Melgoza therefore restrained defendant,

eventually handcuffing him. According to Deputy Melgoza, defendant himself pulled the container out with his hand from one of his pockets and dropped it onto the ground.

Defendant argues the search of his pocket was invalid under *People v. Collins* (1970) 1 Cal.3d 658. In *Collins*, the court held that "in searching a legally detained individual reasonably suspected of being armed, a police officer must be limited to 'a careful exploration of the outer surfaces of [the] person's clothing' [citation] until and unless he discovers specific and articulable facts reasonably supporting his suspicion. Only then may an officer exceed the scope of a pat-down and reach into the suspect's clothing for the limited purpose of recovering the object thought to be a weapon." (*Id.* at p. 662.) Therefore, an officer "exceeds a pat-down without first discovering an object which feels reasonably like a knife, gun, or club" and is unable to "point to specific and articulable facts which reasonably support a suspicion that the particular suspect is armed with an atypical weapon which would feel like the object felt during the pat-down." (*Id.* at p. 663.)

Collins, however, is distinguishable. Here, Deputy Robbins did not exceed the scope of the pat search. According to his testimony, Robbins never physically reached into the interior of defendant's pockets. When Robbins felt the bullet-shaped lump, he asked defendant if he could remove the object. Deputy Melgoza testified that defendant *himself* dropped the object to the floor after he shoved his hands into his pockets.

The People argue that based on the circumstances, it is apparent that defendant abandoned the drugs; therefore, the search of the abandoned property was lawful. "It is . . . well established that property is abandoned when a defendant voluntarily discards it in the face of police observation, or imminent lawful detention or arrest, to avoid incrimination." (*People v. Daggs* (2005) 133 Cal.App.4th 361, 365.) Defendant argues there is no evidence he abandoned the drugs voluntarily. Rather, he claims the deputies exceeded the scope of the pat search when they wrenched his hands out of his pockets, causing the drugs to fall to the ground. Defendant's argument, however, contradicts the

testimony provided by Deputy Melgoza. During the preliminary hearing, Melgoza testified that when he grabbed defendant's hands he saw that defendant was holding a small clear container. Again, Melgoza testified that defendant himself dropped the container on the ground. Melgoza did not say that the drugs were dropped onto the ground when the officers grabbed defendant's hands from his pockets.

Additionally, the officers' act of restraining defendant's hands during the pat search was reasonable. Deputies Robbins and Melgoza grabbed defendant's hands when he attempted to shove his hands into his pockets after Robbins felt a bullet-shaped object inside his pocket. Defendant argues that a bullet is not a "weapon" in the traditional sense, and the search therefore exceeded the permissible scope of the search. However, the scope of intrusion of a pat search must be confined to "guns, knives, clubs, or *other hidden instruments for the assault of the police officer*." (*Terry*, *supra*, 392 U.S. at p. 29, italics added.) As we previously noted, the presence of a bullet in a person's pocket may reasonably cause an officer to be suspicious about whether that person may be in possession of a weapon that uses bullets—such as a gun.

Furthermore, defendant's refusal to comply with the officers' directions to take his hands out of his pockets reasonably justified their decision to seize his hands. Again, we must consider the totality of the circumstances in order to determine if the officers' means are justified. (*People v. Glaser*, *supra*, 11 Cal.4th at p. 366.) "In making Fourth Amendment reasonableness assessments, courts have regularly considered the safety risks confronting investigating officers." (*People v. Wilson* (1997) 59 Cal.App.4th 1053, 1060.) "Officer safety is a legitimate and important governmental interest to consider in Fourth Amendment analysis. [Citations.] The privacy protections of the Fourth Amendment must not be construed so as to compromise the safety of those who serve and protect the public." (*People v. Hart* (1999) 74 Cal.App.4th 479, 490.) Here, the officers' actions in seizing defendant's hands were reasonable under the circumstances,

as defendant was resisting the pat search and blatantly disobeying the officer's orders to keep his hands out of his pockets.

Thus, we do not believe the officers exceeded the scope of the pat search when they grabbed defendant's hands from his pockets and collected the container containing drugs that defendant dropped during the interaction. And as a result, we do not believe the magistrate erred when it denied the motion to suppress at the preliminary hearing.

DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Grover, J.