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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RONALD GADSDEN, Defendant and Appellant.	D075939 (Super. Ct. No. SCD275729)

APPEAL from a judgment of the Superior Court of San Diego County, Louis R. Hanoian, Amalia L. Meza, and Albert T. Harutunian III, Judges. Affirmed as modified.

Justin Behravesh, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Michael Cosgrove, Deputy Attorneys General, for Plaintiff and Appellant.

A deputy sheriff patrolling Poway Road at 3:00 a.m. detained defendant Ronald Gadsden after seeing him exit the passenger side of a parked vehicle.

A loaded firearm was recovered in the subsequent search of the car. Gadsden was charged with possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1))[1] and possession of ammunition by a felon (§ 30305, subd. (a)(1)). He moved to suppress the evidence, arguing that his initial detention was unlawful because the officer lacked reasonable suspicion. The trial court disagreed and denied his motion. After a jury convicted him as charged, Gadsden unsuccessfully moved to strike his prior strike under *People v. Romero* (1996) 13 Cal.4th 497 (*Romero*) and was sentenced to a four-year prison term.

On appeal, Gadsden challenges the denial of his motion to suppress. Although the analysis is close, we ultimately conclude the deputy had a reasonable basis to conduct a detention based on the totality of the circumstances—including Gadsden's behavior just after seeing the patrol car, the time of night, and the deputy's knowledge of recent crimes in the area. Next, Gadsden challenges the denial of his *Romero* motion, contending he fell outside the spirit of the Three Strikes Law. We reject that claim as well, finding no abuse of discretion given Gadsden's criminal history. Finally, we agree with Gadsden that the abstract of judgment must be corrected to reflect that he received four-year terms on each count based on the prior strike, and not based on any enhancements. As so modified, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 3:00 a.m. on a night in February, San Diego County Sheriff's Deputy David Smith was patrolling near Adah Lane in Poway. It was an area he had patrolled in the past, consisting of several automotive repair shops and other businesses, all of which were closed at that hour. Although he was aware that burglaries had recently taken place in the

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

vicinity, no calls had been made regarding such activity on that particular night.

Deputy Smith was driving a marked patrol vehicle eastbound on Poway Road, a major road with two lanes going in each direction. He pulled into the left turn pocket to travel northbound when a flash of light on his right suddenly caught his eye. Smith looked over; about 50 feet away on Adah Lane, he saw Gadsden exit the passenger side of a silver Ford Taurus while another male remained sitting in the driver's seat.

Gadsden walked to the front of the car, turned to his left, and had almost reached the corner of the vehicle on the driver's side when he spotted the patrol car. He abruptly changed course, turning around and walking quickly back to the passenger side while reaching toward the waistband area of his jacket. As Gadsden made his way back to the passenger door, Smith drove head-on towards the vehicle to initiate a stop, activating his overhead lights as he hit the intersection of Poway Road and Adah Lane. With his eyes focused on Gadsden, Smith saw him open the passenger door, bend down toward the floorboard, and start to dig around.

Unable to see what Gadsden was doing, Deputy Smith commanded him to show his hands. He had to repeat the command a few times and started to pull out his firearm when Gadsden complied, placing both hands on the Taurus. Smith conducted a patdown search of Gadsden but did not find anything. The driver, who was also the registered owner of the vehicle, consented to a search of his vehicle, which resulted in the discovery of a loaded handgun under the passenger seat where Gadsden had been rummaging.

The San Diego County District Attorney charged Gadsden with possession of a firearm by a person previously convicted of a felony (§ 29800,

subd. (a)(1), count 1) and possession of ammunition by someone previously convicted of a felony (§ 30305, subd. (a)(1), count 2). At the preliminary hearing, Gadsden moved to suppress the evidence (§ 1538.5), arguing his detention was based not on reasonable suspicion but rather on the mere sight of "two black males, in Poway, late at night." The trial court disagreed and found that given the area's crime level, the time of night, and Gadsden's furtive motions, there were enough articulable facts to give rise to reasonable suspicion. Contending that the denial of his motion to suppress was error, Gadsden filed a motion to dismiss the information under section 995. That motion was likewise denied, and a jury ultimately convicted Gadsden on both counts.

At sentencing, Gadsden filed a motion under section 1385 and *Romero*, *supra*, 13 Cal.4th 497 to dismiss his strike prior. Denying the motions, the court sentenced Gadsden to a two-year middle-term on count 1, doubled for the strike. The court similarly imposed a doubled two-year middle term on count 2 but stayed that sentence pursuant to section 654.

DISCUSSION

Gadsden challenges the denials of his pretrial suppression motion and posttrial *Romero* motion. Although the suppression issue presents a far closer call, we ultimately reject both claims. Gadsden also points to an error in his abstract of judgment, which we agree must be corrected to reflect the sentence as pronounced.

A. *Motion to Suppress*

Gadsden asserts that Deputy Smith lacked reasonable suspicion for the initial detention. He does not challenge the propriety of the subsequent *search* to which the Taurus driver consented. When reviewing a suppression ruling, "we defer to the superior court's express and implied factual findings

if they are supported by substantial evidence" but "exercise our independent judgment in determining the legality of a search on the facts so found." (*People v. Woods* (1999) 21 Cal.4th 668, 673–674; see *People v. Simon* (2016) 1 Cal.5th 98, 120.) As we explain, taken in their totality, the facts support a finding of reasonable suspicion.

1. *Effecting the Detention*

At the outset, we must determine *when* Deputy Smith detained Gadsden to evaluate if he had grounds for reasonable suspicion in that moment: "A detention may not be justified after the fact on a basis not relied on by the officer." (*People v. Bower* (1979) 24 Cal.3d 638, 647 (*Bower*).) Although it was undisputed that Deputy Smith detained Gadsden, the trial court did not make a specific factual finding as to when the detention occurred.

A detention has taken place " 'when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.' " (*People v. Brown* (2015) 61 Cal.4th 968, 974 (*Brown*); quoting *Terry v. Ohio* (1968) 392 U.S. 1, 19, fn. 16.) Furthermore, when an individual submits to a show of authority with passive acquiescence, "a seizure occurs if 'in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave, [Citation].' " (*Brendlin v. California* (2007) 551 U.S. 249, 255; quoting *United States v. Mendenhall* (1980) 446 U.S. 544, 554, fn. 1 (conc. opn. of Powell, J.).) Resolution of this question presents "a mixed question of law and fact qualifying for independent review." (*People v. Zamudio* (2008) 43 Cal.4th 327, 342.)

Although our Supreme Court has recognized that activating sirens or lights can be a show of authority (*Brown*, *supra*, 61 Cal.4th at p. 978), the activation of lights does not per se constitute a detention (*id.* at p. 980). Here,

however, we readily conclude that the detention occurred when Smith activated his overhead lights as he drove toward Gadsden. When law enforcement drives a patrol vehicle toward someone with lights flashing, a reasonable person would not feel free to walk away. (See *Brendlin v. California*, *supra*, 551 U.S. at p. 255; *People v. Kidd* (2019) 36 Cal.App.5th 12, 21 (*Kidd*) [defendant "was detained when the officer made a U-turn to pull in behind him and trained spotlights on his car"].)

2. *The Reasonableness of the Detention*

At the time Deputy Smith activated his lights and initiated the detention, he had already observed Gadsden react in two ways. When Gadsden caught sight of Smith's patrol vehicle, he changed direction, walking hurriedly *back* from the headlight region of the Taurus to the passenger-side door. As he did so, Gadsden began reaching into the waistband area of his jacket.[2] These events happened at 3:00 a.m. in an area where all nearby businesses where closed and recent burglaries had been reported. Our task is to determine whether these facts amount to reasonable suspicion for the deputy to detain Gadsden.

The Fourth Amendment protects against unreasonable searches and seizures, including brief investigatory stops. (See *People v. Souza* (1994) 9 Cal.4th 224, 229 (*Souza*).) Though these short detentions need not be justified by probable cause, they must be based on reasonable suspicion. (*Brown*, *supra*, 61 Cal.4th at p. 980.) Reasonable suspicion, in turn, requires something more than "mere curiosity, rumor, or hunch." (*In re Tony C.* (1978) 21 Cal.3d 888, 893 (*Tony C.*).) The officer must be able to point to

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[2] The precise sequence of events is at times difficult to discern from the record, but Smith testified that he turned on his lights *because* he believed that Gadsden "was going to run when he ran back to the vehicle," indicating that Gadsden's movement back toward the passenger side of the car factored into the concerns on which Smith based his detention.

"specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*Souza*, at p. 231; see *Tony C.*, at p. 893 ["in order to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity"].) The standard is objective in nature, "based on the facts and circumstances known to the officer but without regard to the officer's subjective state of mind." (*People v. Flores* (2019) 38 Cal.App.5th 617, 626 (*Flores*); *Kidd*, *supra*, 36 Cal.App.5th at p. 22.)

Often the observed circumstances are reconcilable with either criminal or lawful activity. But "[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." (*Tony C.*, *supra*, 21 Cal.3d at p. 894; compare *Kidd*, *supra*, 36 Cal.App.5th at p. 22 [where there were a *host* of lawful explanations for a car to be parked with its fog lights on, that fact alone did not give rise to reasonable suspicion].)

In denying Gadsden's motion to suppress, the trial court correctly noted that reasonable suspicion "cannot be based solely on factors unrelated to the defendant, such as criminal activity in the area." (*People v. Casares* (2016) 62 Cal.4th 808, 838.) For example, our Supreme Court has cautioned that the "high crime" justification is susceptible to abuse, warning "of the 'dangers' of using an officer's experience as to prior arrests to conclude that a location's

crime rate is high." (*Bower*, *supra*, 24 Cal.3d at pp. 645–646; see also *People v. Walker* (2012) 210 Cal.App.4th 1372, 1391 ["the fact the detainee happens to find himself or herself in a high-crime neighborhood is, of itself, insufficient to support a reasonable suspicion for a peace officer to stop that person"].) Likewise, "the 'nighttime factor' is not 'activity' by a citizen and . . . 'should be appraised with caution.' " (*Bower*, at p. 645; quoting *People v. Superior Court of Yolo County* (*Kiefer*) (1970) 3 Cal.3d 807, 825.) Accordingly, Deputy Smith's knowledge of recent car burglaries in Poway, combined with the early morning hour, would not by themselves be enough to justify detaining Gadsden. Both these factors "fail to reasonably 'distinguish the [suspected individual] from any other citizen . . . at that time and place.' " (*Bower*, at p. 644.)

Beyond external circumstances, an officer must have "a particularized and objective basis for suspecting the particular person stopped of criminal activity." (*Souza*, *supra*, 9 Cal.4th at p. 230; quoting *United States v. Cortez* (1981) 449 U.S. 411, 417–418.) During the suppression hearing, the trial court noted that Gadsden made several furtive motions in "hightailing it" back to the car and "ducking" towards the floorboard. Because the "ducking" motion occurred *after* Deputy Smith activated his overhead lights and initiated the stop, we limit our focus to Gadsden's movements before the detention occurred.

Our record reflects that once Gadsden saw Deputy Smith, he changed direction. Whereas Gadsden was initially walking toward the front left corner of the car, he reversed course and walked quickly back toward the front passenger door after spotting the patrol vehicle. To the extent Gadsden's retreat is akin to flight from an officer, it may be a key consideration in establishing reasonable suspicion. (See *Souza*, *supra*, 9

Cal.4th at p. 235.) While a defendant's flight alone does not always establish reasonable suspicion, "[t]ime, locality, lighting conditions, and an area's reputation for criminal activity all give meaning to a particular act of flight." (*Id.* at p. 239.) Here, Gadsden's retreat occurred in the middle of the night in an area occupied by closed auto parts stores that had recently been burglarized. These circumstances provide context to Gadsden's brisk retreat.

Yet if that were all we had, it would be difficult to assess whether Deputy Smith had reasonable suspicion to detain Gadsden. Gadsden's about-face does not resemble the headlong flight that occurred in *Souza*, where the defendant "took off running." (*Souza*, *supra*, 9 Cal.4th at p. 228; see also *Flores*, *supra*, 38 Cal.App.5th at p. 632 [slowing down and walking toward officers after making eye contact could not be compared to a " 'headlong flight' "].) It seems more like the muted flight attempt in *Bower*, where the defendant tried to avoid police by "proceeding at a 'very quick walk, almost a run.' " (*Bower*, *supra*, 24 Cal.3d at p. 643.) Our Supreme Court ultimately concluded that such an evasive, brisk walk was not dispositive of criminal activity, since " 'there are many reasons other than guilt . . . why an [individual] may not wish himself or others present exposed to the immediate view of a stranger, even if the stranger is a police officer.' " (*Id.* at p. 648; quoting *Tompkins v. Superior Court* (1963) 59 Cal.2d 65, 68.) If the only particularized factor linked to Gadsden was his hurried walk back to his vehicle upon seeing the patrol car, we would find the indicia of reasonable suspicion thin. (See, e.g. *People v. Perrusquia* (2007) 150 Cal.App.4th 228, 234 [defendant's detention in a high-crime area with recent robberies was not justified even though defendant tried to avoid contact with police].)[3]

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[3] *Souza* clarifies that contextual factors give meaning to a particular act of flight. (9 Cal.4th at p. 239.) Courts in other jurisdictions have begun to explore how racial profiling is one such contextual factor. (See

But here we have something more. Not only did Gadsden walk quickly back to the vehicle, but he also reached towards his jacket pocket near his waistband as he did so. In viewing the totality of circumstances, we consider this particularized fact in addition to the time of night, the recent burglaries in the area, and Gadsden's evasive retreat upon seeing the patrol car. Although the issue is a close one, we conclude on this record that there were sufficient articulable facts to give rise to reasonable suspicion to detain Gadsden.[4]

B. Romero *Motion*

Turning to sentencing issues, Gadsden challenges the trial court's denial of his motion to strike the prior strike conviction. As we explain, no error occurred.

Commonwealth v. Warren (Mass. 2016) 58 N.E.3d 333, 342 [racial profiling data for Boston police "suggests a reason for flight totally unrelated to consciousness of guilt"]; *People v. Horton* (Ill.Ct.App. 2019) 142 N.E.3d 854 868 [from pattern or practice data of Chicago Police, "one can readily understand why a young black man having a conversation with friends in a front yard would quickly move inside when seeing a police car back up"].) If police data suggests that certain demographic groups are disproportionately targeted for stops, frisks, searches, observations, interrogations, and repeat encounters, "[s]uch an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity." (*Commonwealth v. Warren*, at p. 342.) Although Gadsden argued in his suppression motion that Deputy Smith detained the two men "because they were two black males, in Poway, late at night," he does not pursue this contextual relevance argument on appeal.

[4] Because we find Deputy Smith had reasonable suspicion to detain Gadsden, we need not reach the People's additional argument that even if the detention was unlawful, Gadsden cannot show it *caused* the subsequent firearm seizure.

1. *Additional Background*

In 2003, Gadsden was convicted of assault with a deadly weapon after he stabbed three people following a dispute at a cafe. At sentencing, he sought to strike this prior strike conviction under *Romero*, *supra*, 13 Cal.4th 497. Arguing the strike was remote in time, he filed a mitigation statement stating it had occurred more than 15 years ago and that he successfully completed probation for the offense in 2008. In his statement, Gadsden also framed the current conviction as nonserious and nonviolent and attached letters of support written by his friends and family. Their letters described how Gadsden supports his family financially and emotionally and has worked to turn his life around since the birth of his three daughters. They also mentioned his volunteer work in his community—mentoring and coaching at-risk youth at a martial arts gym.

Opposing the motion, the People highlighted Gadsden's "prodigious and consistent criminal history." Since 1997, he had been convicted of 10 misdemeanors and three felonies (including the current case). Some of those convictions occurred while he was on probation.

After reviewing the materials before it, the trial court declined to strike the strike. Noting Gadsden's consistent criminal record and his poor performance on probation, the court concluded that Gadsden's conduct was not an aberration. He was not someone who suffered a strike and then turned things around, but instead someone who "continues to walk on the thin edge between lawful conduct and continuing violations and keeps stepping over that line."

2. *Denial of* Romero *Motion*

The Three Strikes Law was intended to restrict a court's discretion by establishing a constrained sentencing scheme for repeat offenders. (*People v.*

Carmony (2004) 33 Cal.4th 367, 375–376 (*Carmony*).) In line with this intent, a trial court must meet strict requirements before making an exception to this scheme. (*Id.* at p. 376.) To strike a defendant's prior strike conviction at sentencing, the court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part . . . ." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

A decision to decline to dismiss or strike a prior is reviewed for abuse of discretion. (*Carmony*, *supra*, 33 Cal.4th at p. 374.) Under this deferential standard, "a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.) Additionally, " 'where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance.' " (*Id.* at p. 378; quoting *People v. Myers* (1999) 69 Cal.App.4th 305, 310.) It takes "extraordinary" circumstances for a career criminal to " 'fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record.' " (*Carmony*, at p. 378.)

This case falls short of that high standard. On appeal, Gadsden maintains that his 2003 strike prior should have been dismissed because of its remoteness. He completed probation for the offense in 2008 and since then has had only one other felony conviction in 2009. However, as the trial court found, Gadsden's most recent conviction was not so remote, occurring just a year before his current offense. Even after his 2003 strike, Gadsden continued to accumulate convictions, including a felony in 2009 that could

have resulted in a state prison sentence. And although Gadsden's current convictions involve nonviolent felonies, this was not the first time Gadsden had been convicted of being a felon in possession of a firearm. Moreover, possession of a firearm and ammunition at least involves the potential for violence.

Despite these facts, Gadsden maintains he is outside the spirit of the Three Strikes scheme because of the support he provides to his family and community. He attempts to distinguish his case from *People v. Gaston* (1999) 74 Cal.App.4th 310, where the defendant also sought to strike a prior despite having an extensive criminal history and poor performance on probation. The appellate court in *Gaston* reversed the trial court's decision to strike the strike prior, finding that a 44-year-old homeless person who had "committed an unending series of felonies" and had "particularly grim" life prospects was not outside the spirit of the Three Strikes law. (*Id.* at p. 322.)

We are unpersuaded. Unlike in *Gaston*, the trial court here *declined* to strike the strike, and it is that court's broad discretion that we review. Although Gadsden is in a relatively better position than Gaston, his circumstances are not so extraordinary that they necessarily overcome the weight of his extensive criminal history. The trial court considered Gadsden's character references and community involvement and nonetheless declined to strike the strike prior. No abuse of discretion occurred.

C. *Abstract of Judgment*

Finally, Gadsden asks this court to order a correction of the abstract of judgment so that the doubling of each count does not appear as a two-year enhancement. Since the Three Strikes law is a penalty provision and not an enhancement, both he and the People agree that no enhancement should be listed and instead, the principal term should simply be listed as four years. (See *People v. Williams* (2014) 227 Cal.App.4th 733, 744; *Romero*, *supra*, 13 Cal.4th at p. 527.) We agree with the parties.

DISPOSITION

The trial court is directed to correct the abstract of judgment to reflect the imposition of a four-year principal term on count 1 and a stayed four-year term on count 2, with no listed enhancements. As so modified, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

DATO, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.