Filed 12/28/17 In re M.W. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re M.W, a Person Coming Under the Juvenile Court Law.	B280574 (Los Angeles County Super. Ct. No. TJ22527)
THE PEOPLE, Plaintiff and Respondent, v. M.W., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Catherine J. Pratt, Judge. Affirmed.

Laini Millar Melnick, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Charles S. Lee and Jonathan M. Krauss, Deputy Attorney Generals, for Plaintiff and Respondent.

The juvenile court denied minor M.W.'s motion to suppress a handgun and sustained a Welfare and Institutions Code section 602 petition charging him with possession of a firearm by a minor in violation of Penal Code[1] section 29610. M.W. challenges the denial of the motion to suppress and contends the juvenile court erred in permitting the police officer to testify based on his background, training, and experience that he reasonably suspected minor was armed, thereby justifying the investigative stop and detention. We affirm.

FACTUAL BACKGROUND

On December 31, 2016, Los Angeles Police Department Officer Otoniel Ceballos, a five-year veteran of the department assigned to the Southeast gang detail, was on gang enforcement patrol with his partner in the vicinity of 129th and San Pedro Streets, Athens Park Bloods' territory.[2]

Shortly after 10:00 p.m., the officers were northbound on San Pedro Street, south of 129th Street. They were driving

---

[1] Statutory citations are to the Penal Code unless otherwise indicated.

[2] There was no testimony concerning the specifics of the officer's background, training and experience as a police officer or as a member of the gang detail, nor was there any testimony concerning how long he worked on the gang detail.

under 35 miles per hour, looking for pedestrians. Six or seven young-looking individuals were walking toward them (i.e., southbound) on the sidewalk on the officers' side of the street. The officers slowed and then stopped as the group approached. The officers' focus was initially on the entire group, as the individuals appeared young.

M.W., in the middle of the group, looked in the officers' direction, appeared startled, and slowed his pace until he was in the rear. The officers stepped out of their vehicle when the group was ten to fifteen yards away.

As the officers exited the patrol vehicle, everyone in the group except M.W. continued south on San Pedro and walked into the intersection at 129th Street. M.W., clutching his waistband with his right hand, did not follow the group and instead turned east and walked rapidly on the north side of 129th Street.

Based on M.W.'s holding his waistband, Officer Ceballos and his partner believed minor was armed. Officer Ceballos yelled at M.W. to stop when M.W. was about five to seven feet from the group. M.W. did not stop or look in the officer's direction, but continued to walk away.

Officer Ceballos ran directly toward M.W., and when Officer Ceballos was about five feet from him once again told the minor to stop. M.W. kept walking, but looked over his shoulder and told Officer Ceballos he was going home.

Officer Ceballos grabbed minor's arms and put them behind his back to detain him, still believing M.W. was armed or concealing contraband. Minor and Officer Ceballos "engaged" for a brief period of time. Officer Ceballos's partner approached to assist with handcuffing M.W. As he did so, a firearm fell out of

the front of M.W.'s waistband and hit the ground. The firearm was a nine-millimeter semiautomatic handgun, loaded with nine rounds in the magazine and one in the chamber.

PROCEDURAL BACKGROUND

On January 4, 2017, the minor was charged in a Welfare and Institutions Code section 602 petition with possession of a firearm by a minor in violation of section 29610. At the time this petition was filed, M.W. was on informal juvenile probation after admitting the same allegation in a previous Welfare and Institutions Code section 602 petition.[3] M.W. filed a motion to suppress the handgun, pursuant to Welfare and Institutions Code section 700.1, arguing the warrantless search was "presumptively illegal."

The parties stipulated Officer Ceballos' testimony would be considered first for the motion to suppress and, if the motion was denied, then for adjudication purposes.

---

[3] The previous petition charged defendant with possession of a firearm by a minor in violation of section 29610 (count 1), and carrying a loaded, unregistered handgun in violation of section 25850, subdivision (a) (count 2). Defendant admitted those allegations and was placed on informal probation. (Welf. and Inst. Code, § 790, subd. (a).) The conditions of probation included that M.W. "must not have, possess, or act like [he] possess a gun or knife . . . . [M.W.] also cannot have or possess anything [he] know[s] looks like a gun." Another condition of probation included that M.W. "must permit a law enforcement officer to search [his] person, house or property at anytime of the day or night with or without a warrant."

Nothing in the record suggests the officers knew of M.W.'s probation status at the time they detained him. (*In re Jaime P.* (2006) 40 Cal.4th 128.)

In addition to the evidence summarized above, the following exchange occurred during Officer Ceballos's testimony:

"[The Prosecutor]: Based on your background, training and experience, was this action of clutching his waistband significant to you?

"[Officer Ceballos]: Yes.

"[The Prosecutor]: Why?

"[M.W.'s counsel]: Objection; lack of foundation.

"The Court: Overruled. [¶] You may answer.

"[Officer Ceballos]: People who carry firearms usually don't do it with a holster. They will just put it in the pants. So when they walk away or run, they'll grab it to secure it in their pants so it doesn't fall out."

The juvenile court denied the motion to suppress, concluding the officers had a reasonable suspicion to detain defendant based on "the totality of the circumstances." The juvenile court credited Officer Ceballos's gang experience in evaluating his testimony and found it significant the individuals in the group appeared young and were in an area known for gang activity and it was after 10:00 on New Year's Eve. The juvenile court noted the minor's "grabbing the waistband to be a very troubling [act] because there are innocent occasions for that and there are very violent bases for that. I don't know how it is possible for people who weren't actually there and didn't actually see how it went down to determine in any given circumstance whether this appeared to be innocent or not innocent."

Moving to adjudication and based on Officer Ceballos's testimony, the juvenile court sustained the allegations of the petition. The offense was determined to be a felony and M.W.

was declared a ward of the court. M.W. filed a timely notice of appeal.

DISCUSSION

I. Waistband Testimony

Officer Ceballos detained minor based on M.W.'s holding onto his waistband, which suggested to the officer the minor was armed. The prosecutor asked whether the significance of the minor's gesture was based on the officer's "background, training and experience." The experienced officer, currently assigned to gang enforcement, testified it was.

Minor argues the officer testified without laying the proper foundation for his expertise or, alternatively, the testimony should have been excluded because the officer's background, training and experience were preliminary facts the prosecution failed to prove (Evid. Code, § 403, subd. (a).)[4]

Minor did not make an Evidence Code section 403 objection or seek a preliminary fact hearing. (Evid. Code, §§ 400-402.) Nor was the officer testifying as an expert who was required to lay a foundation for his opinions. (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1319.) Rather, we conclude Officer Ceballos, a five-year police veteran assigned to gang enforcement, was "aware of facts that would lead a man of ordinary caution or

---

[4] Evidence Code section 403, subdivision (a) provides in part, "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: [¶] (1) The relevance of the proffered evidence depends on the existence of the preliminary fact."

prudence to believe, and conscientiously to entertain, a strong suspicion" that the minor was carrying a firearm. (*Wimberly v. Superior Court* (1976) 16 Cal.3d 557, 564 (*Wimberly*).)

In *Wimberly,* our Supreme Court held more than 40 years ago, "It is not necessary . . . that the officer qualify as an expert to be able to form the reasonable belief necessary to justify his actions." (*Wimberly, supra,* 16 Cal.3d at p. 565.) There, the arresting officer recognized the seeds he saw in plain view inside a car were marijuana, justifying a search of the car's interior. As in this case, the officer based this conclusion on his training and experience. Admittedly, the *Wimberly* record included more specifics than are present in this case. For example, the arresting officer in *Wimberly* "testified at the suppression hearing that his experience and training in observing and detecting marijuana included 'quite a few arrests for marijuana' as well as various law enforcement training classes." (*Ibid.*) Based on this evidence, the trial court "expressly stated [the officer] would not be accepted as an expert at identifying marijuana, [but] the court differentiated between expert identification and probable cause and found [the officer] had enough experience to formulate a reasonable suspicion." (*Ibid.*) This conclusion prompted the Supreme Court to note, "We have often stated that probable cause for a search exists where an officer is aware of facts that would lead a man of ordinary caution or prudence to believe, and conscientiously to entertain, a strong suspicion that the object of the search is in the particular place to be searched. (*Id.* at p. 564.)

Officer Ceballos's testimony concerning the significance of M.W.'s clutching his waistband was based on his personal observations and lay opinion, including a police officer's

"background, training and experience" and assignment to the gang enforcement detail. This was sufficient. (*People v. Farnam* (2002) 28 Cal.4th 107, 153-154 [correctional officer's testimony that defendant stood "in a posture like he was going to start fighting" was not inadmissible lay opinion testimony because the opinion was based on the officer's personal observations, and the perceptions formed by the officer was "sufficiently within common experience, and certainly within the experience of a correctional sergeant like [the witness] who had 15 years of security experience at a prison hospital"]; *People v. Souza* (1994) 9 Cal.4th 224, 233 (*Souza*) ["when circumstances are consistent with criminal activity, they permit—even demand—an investigation. . . . . [Citation.] A different result is not warranted merely because circumstances known to an officer may also be consistent with lawful activity. [Citation.] As we said: The 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 [police] investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal," internal quotation marks omitted].)

The juvenile court's evidentiary ruling was not an abuse of discretion or a violation of minor's constitutional rights. (*People v. Clark* (2016) 63 Cal.4th 522, 597.)

II. Denial of Motion to Suppress

M.W. contends the officers lacked reasonable suspicion to detain him. He argues (1) the juvenile court's statement "that gunfire was common on New Year's Eve" was a personal opinion not supported by any evidence; (2) "it would have been physically

impossible for [Officer] Ceballos to have seen the minor grabbing at his waistband, in the dark and at a distance, when the minor was in the middle of a closely packed group;" and (3) the juvenile court "relinquished its responsibility as the trier of fact to determine the evidence" by accepting Officer Ceballos's interpretation of minor's hand gesture.

In analyzing minor's contentions, "we defer to [the trial court's] factual findings if supported by substantial evidence. We independently assess the legal question of whether the challenged search or seizure satisfies the Fourth Amendment." (*People v. Brown* (2015) 61 Cal.4th 968, 975.)

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by law enforcement personnel. (U.S. Const., 4th Amend; *People v. Rogers* (2009) 46 Cal.4th 1136, 1156.) Under the Fourth Amendment, "an officer may . . . conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." (*Illinois v. Wardlow* (2000) 528 U.S. 119, 123 (*Illinois*), citing *Terry v. Ohio* (1968) 392 U.S. 1, 30.)

"'A detention is reasonable under the Fourth Amendment when the detaining officer can point to 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.'" (*People v. Casares* (2016) 62 Cal.4th 808, 837-838 (*Casares*).) "[T]he likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." (*United States v. Arvizu* (2002) 534 U.S. 266, 273-274.) Nevertheless, a reasonable suspicion cannot be based

solely on factors unrelated to the defendant, "such as criminal activity in the area." (*Casares*, *supra*, 62 Cal.4th at p. 838, citing *Illinois*, *supra*, 528 U.S. at p. 124.)

Here, reasonable suspicion to detain M.W. was based on the officer's determination that minor probably was carrying a firearm. Minor was with a group of young-looking individuals, after 10:00 p.m., in a known gang area, clutching his waistband, and actively avoiding any close contact with the patrolling officers. These observations by a five-year police officer assigned to gang enforcement constituted "specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that [minor] may be involved in criminal activity." (*Souza, supra,* 9 Cal.4th at p. 231; see also *In re H.M.* (2008) 167 Cal.App.4th 136, 147-148 ["[The minor] was *not* stopped and frisked merely because he was in gang territory, or as a matter of routine procedure. To the contrary, . . . [the minor's] curious activities strongly suggested criminal activity was afoot, leading an experienced officer to conclude [the minor] might well be armed"].)

Moreover, the officer's testimony as to his observation of the waistband gesture was not inherently improbable, and minor presented no evidence casting doubt on it. The juvenile court, as the trier of fact, was bound to base its decision on the evidence presented.

The trial court's comment concerning New Year's Eve, although not supported by witness testimony, did not downgrade the totality of the circumstances or invalidate the officers' reasonable suspicion. Under the totality of the circumstances, including minor's failure to stop when directed to by Officer Ceballos, the investigative stop and detention were reasonable.

(*Souza, supra,* Cal.4th at p. 233 ["the possibility of an innocent explanation for a person's flight from a police officer does not mean that the flight is irrelevant in determining reasonable cause to detain"].)

DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

---

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.