Filed 9/28/12 In re Daniel P. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re DANIEL P., a Person Coming Under the Juvenile Court Law.	B239232 (Los Angeles County Super. Ct. No. JJ15803)
THE PEOPLE, Plaintiff and Respondent, v. DANIEL P., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Donna Quigley Groman, Judge. Affirmed in part and reversed in part.

Holly Jackson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Chung L. Mar and Seth P. McCutcheon, Deputy Attorneys General, for Plaintiff and Respondent.

Minor Daniel P. appeals from the order of wardship entered following a finding that he transported cocaine in violation of Health & Safety Code section 11352, subdivision (a) (undesignated statutory references are to the Health & Safety Code); possessed marijuana in violation of section 11357, subdivision (b); and provided false information to a police officer, in violation of Penal Code section 148.9, subdivision (a). Minor contends that the juvenile court erred by denying his suppression motion and that insufficient evidence supports the court's finding that he transported cocaine. We agree with respect to the sufficiency of evidence and reverse the juvenile court's finding regarding that offense, but otherwise affirm.

BACKGROUND

About 6:40 p.m. on January 16, 2012, Los Angeles Police Department Officer Robert Martinez and his partner responded in their marked police patrol car to a radio call of a man with a gun in the area of 103rd Street and Compton Boulevard. The neighborhood is an area of high crime and high gang activity. Martinez saw a man fitting the description of the suspect. Minor was walking right alongside the man. When Martinez's patrol car was about five or six yards away, the man and minor both looked at the patrol car and both "ducked" inside a liquor store. The man reached into his jacket and pulled out a large sandwich bag, then "tucked it under" some chips on a rack just inside the door. Minor and the man walked farther into the store together. Martinez and his partner entered the store and detained minor and the man. Martinez's partner recovered "a large sandwich bag full of marijuana" from beneath some chips. Martinez's partner asked minor if he had anything that would cut, stick, or poke the officer, and minor responded that he had a baggie of marijuana in each of his socks. During a pat search for officer safety, Martinez's partner recovered two baggies of marijuana from minor's socks, what Martinez referred to as "a baggy of cocaine" from minor's front trouser pocket, and $188 in cash. A fingerprint comparison performed after minor was booked revealed that minor had given the officers a false surname.

The parties stipulated that a criminalist who had examined the contents of the seized baggies would be deemed to have been called and to have testified that "he found [the] contents were as follows: item No. 1, a bindle containing an off-white powder net weight .31-gram; item No. 2 knotted sandwich bag containing green plant material examined and found to have a net weight of 23.64 grams which contained marijuana; item No. 3, plastic bindle containing green plant material examine[d] and weighed [and] found to have a weight of 1.32 grams which contained marijuana; and item No. 5 which is plastic zip baggy containing green plant material net weight of .34 grams that also contained marijuana."

The juvenile court sustained a Welfare and Institutions Code section 602 petition alleging transportation of cocaine in violation of Health and Safety Code section 11352, subdivision (a); possession of marijuana in violation of Health and Safety Code section 11357, subdivision (b); and providing false information to a police officer, in violation of Penal Code section 148.9, subdivision (a). (The court reduced the marijuana charge from a felony to an infraction.) It declared minor to be a ward of the court, calculated his maximum confinement term to be five years six months, and ordered him suitably placed.

DISCUSSION

1. Denial of suppression motion

Minor filed a motion to suppress the physical evidence and his statements on the theory that the officers improperly detained him. The juvenile court heard the motion in conjunction with the adjudication hearing. Martinez was the sole witness. In addition to his observations set forth above, Martinez testified that he detained minor because he was walking side-by-side with the man who matched the description of a suspect seen with a gun, both minor and the man looked at the police car and "simultaneously ducked into the liquor store and headed the same direction together giving the impression that obviously they were in some type of collusion with each other," and the man removed the bag from his jacket and hid it when they walked into the store, causing Martinez to believe that "[o]bviously something was afoot."

The juvenile court found "reasonable suspicion to detain the minor as he was accompanying the individual who appeared to match the description of a person with a gun. They both exhibited suspicious behavior and minor was not just in the general area of the suspect. He was walking side by side and his actions seem[ed] to mirror the person who was suspected to be in possession of a gun. [¶] The search that was conducted was for purposes of officer safety which is reasonable given the radio call that there was a man with a gun as well as the suspicious behavior of the persons. The minor admitted to having marijuana on his person."

Minor contends the trial court erred by denying his suppression motion.

A detention is reasonable under the Fourth Amendment to the United States Constitution when the detaining officer can point to specific articulable facts that, in the totality of the circumstances, would cause a reasonable officer to suspect that the person detained may be involved in criminal activity. (*People v. Souza* (1994) 9 Cal.4th 224, 231.) "[T]he 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." (*In re Tony C.* (1978) 21 Cal.3d 888, 893.) The reasonable suspicion standard is less demanding than the probable cause standard, with respect to both the quantity and the reliability of information. (*Souza*, at pp. 230–231.) The possibility of an innocent explanation does not negate an otherwise sufficient reasonable suspicion of criminal conduct. (*Id.* at p. 233.) Although mere presence in a high crime area is insufficient to warrant detention of one who otherwise appears to be innocent, an area's reputation for criminal activity is an appropriate consideration in assessing the existence of a reasonable suspicion. (*Id.* at pp. 240–241.)

In ruling upon a motion to suppress, the trial or juvenile court judges the credibility of the witnesses, resolves any conflicts in the testimony, weighs the evidence, and draws factual inferences. We will uphold the lower court's findings, express or implied, on such matters if they are supported by substantial evidence, but we independently review

whether the search or seizure was reasonable under the Fourth Amendment. (*People v. Alvarez* (1996) 14 Cal.4th 155, 182; *People v. Glaser* (1995) 11 Cal.4th 354, 362; *People v. Leyba* (1981) 29 Cal.3d 591, 596–597.)

Martinez's testimony demonstrated that minor was accompanying the man who matched the description of a suspect with a gun, for whom the officers were searching. The area was one known for high levels of crime and gang activity. Minor and the man both looked at the marked police car Martinez was driving and both simultaneously entered the liquor store and walked together through the store after the man removed the bag from his jacket and hid it amid bags of chips. The officers retrieved the bag, which appeared to contain marijuana. This was sufficient to support a reasonable suspicion that minor and the man might be involved in criminal activity, and thus sufficient to warrant a brief detention and pat search. Before minor was actually pat-searched, he admitted possessing hidden baggies of marijuana, which provided probable cause for the officer to search for contraband. Accordingly, the juvenile court did not err by denying minor's suppression motion.

2. Sufficiency of evidence of violation of section 11352, subdivision (a)

At our request, the parties submitted letter briefs regarding the sufficiency of evidence to support the juvenile court's finding that minor transported cocaine in violation of section 11352, subdivision (a), specifically, the evidence that the "off-white powder" in the baggie was cocaine. Minor contends the evidence is insufficient, while the Attorney General contends that Martinez's testimony referring to the contents of the baggie as cocaine, coupled with minor's consciousness of guilt, supported the juvenile court's finding.

To resolve this issue, we review the whole record in the light most favorable to the juvenile court's order to decide whether substantial evidence supports the court's finding, so that a reasonable fact finder could find the allegation true beyond a reasonable doubt. (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) Substantial evidence is "'"evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could

find the defendant guilty beyond a reasonable doubt."'" (*People v. Tully* (2012) 54 Cal.4th 952, 1006.) We also presume in support of the juvenile court's finding the existence of every fact the trier could reasonably deduce from the evidence and make all reasonable inferences that support the finding. (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1089.)

Although Martinez referred to the white powder as cocaine, the prosecutor never introduced evidence that the white power in the baggie actually was cocaine. The parties' stipulation regarding what the criminalist's testimony would have been specifically stated that each container of "green plant material" "contained marijuana," but simply referred to the powder as "an off-white powder net weight .31-gram," without stating its nature or chemical composition. Martinez did not testify that he performed field testing on the contents of the baggie that established that the powder was cocaine.

Although "the nature of a substance, like any other fact in a criminal case, may be proved by circumstantial evidence" (*People v. Sonleitner* (1986) 183 Cal.App.3d 364, 369 (*Sonleitner*)), here there was no circumstantial evidence establishing that the powder in the baggie was cocaine. Martinez did not testify that he was able to recognize cocaine by sight, odor, taste, or any other characteristic or that he recognized the powder in the baggie as cocaine because it possessed any such specific characteristic. In this regard, we note that the Legislature implicitly recognized that the physical characteristics of cocaine are insufficient to distinguish real cocaine from fake cocaine by enacting section 11355, which penalizes the sale of substances falsely represented to be cocaine. Nor were there any circumstances tending to show that the baggie contained cocaine, such as an observation of minor consuming the powder in a manner consistent with it being cocaine, minor's possession of paraphernalia used to consume cocaine, statements by minor tending to show that the substance was cocaine, or a purchase from minor—immediately prior to his detention—of a substance that was tested and found to be cocaine.

Minor's case does not present even a small percentage of the circumstantial evidence held to constitute substantial evidence in *Sonleitner*, *supra*, 183 Cal.App.3d 364.

There, an undercover officer arranged to purchase five ounces of cocaine from Sonleitner's codefendant, Smith, but wanted to purchase a sample first. Smith left, went to a residence associated with Sonleitner, returned to the undercover officer's hotel room, and presented the officer with a bindle that he said was "'a sample from the package.'" Subsequent chemical analysis upon the contents of the bindle established that it contained cocaine. The undercover officer agreed to proceed with the five-ounce purchase. Smith left and went to a different house, located on Cedar Street, then returned to the hotel room with a baggie that contained about two and one-half ounces of a substance that was subsequently analyzed and found to contain cocaine. Smith said his source would only permit him to deliver half of the total quantity purchased, but upon payment, he would go back and get the other half. Smith was arrested and other officers went to the house on Cedar Street. A woman sitting outside yelled, "'The sheriffs are coming.'" Several officers looked through windows of the house and saw Sonleitner running across the living room carrying a two-ounce plastic bottle labeled Inositol. Sergeant Wachsmuth pursued Sonleitner into the bathroom and saw him pour the contents of the bottle into the toilet and flush it. (*Id.* at pp. 366–368.) Thus, no analysis could be performed on the material that was flushed. At trial, the sergeant described the substance Sonleitner poured into the toilet as "a white crystalline powder resembling cocaine." (*Id.* at p. 368.) The sergeant further testified that he "had seen cocaine thousands of times. Cocaine is white and crystalline. Inositol is off-white or dull white and is not crystalline. Inositol is an inert ingredient commonly used for cutting cocaine." (*Ibid.*)

The *Sonleitner* court concluded that substantial circumstantial evidence supported a finding that the substance that had been flushed down the toilet was cocaine: "Here codefendant Smith went to meet his connection at the Cedar Street house and returned to the hotel and delivered a plastic baggie subsequently analyzed to contain approximately two and a half ounces of cocaine, stating that he was delivering half of the agreed-upon five ounces and would be going back for the other half. The bottle which appellant emptied into the toilet at the Cedar Street residence contained two ounces and no other

cocaine was found there. The evidence strongly indicates the substance destroyed by appellant was the other half of the cocaine partially delivered by codefendant Smith. [Citations.] The only reasonable inference from appellant's conduct in running across the living room and flushing the powder down the toilet at the sound of his companion's yell that '[t]he sheriffs are coming,' is that the substance was unlawful, since there would be no need to destroy a substance which was lawful to possess. [Citation.] [¶] Sergeant Wachsmuth had seen cocaine thousands of times in his 10 years' experience as a narcotics officer, and he testified that he could observe the white crystalline character of the substance, resembling cocaine, as appellant was pouring it from the bottle. He said, '[A]nyone that has been in the business, either from my end or the other end can tell the difference between a cutting agent and cocaine.' [Citation.] Appellant contends 'that whether or not a powder or substance is a narcotic cannot be determined by a mere inspection of its outward appearance.' However, this statement was made in a case where the authorities had *recovered* substantial quantities of the material but neglected to introduce any testimony at trial by any qualified expert. (*Cook v. United States* (9th Cir. 1966) 362 F.2d 548, 549 & fn. 1.) Here, on the other hand, the prosecution carefully set forth several types of circumstantial evidence to prove the character of the powder, and '[w]hen all these facts are considered, they "justify the inference of guilt" [citation] drawn by the jury.' [Citation.]" (*Sonleitner*, *supra*, 183 Cal.App.3d at pp. 369–370.)

In contrast to the testimony of Sergeant Wachsmuth in *Sonleitner* regarding his extensive experience in recognizing cocaine during his 10 years as a narcotics officer, Martinez testified he had received training in the police academy regarding "sales and possession and distribution of narcotics," had "made numerous narcotics and sales arrest[s]" in his six years as a police officer, and came in contact with people "almost daily for some type of narcotic for sale investigation." He further testified that he had been involved in "[w]ell over 50" investigations involving the sale of marijuana. He never testified regarding his experience and training with respect to cocaine in particular, never testified that he was a narcotics officer, and never testified that his training or

experience provided him with an ability to determine that a substance was actually cocaine, as opposed to methamphetamine, laundry detergent, drink mix, or numerous other substances that exist in powdery form.

The Attorney General principally relies upon *People v. Bailey* (1991) 1 Cal.App.4th 459, in which police officers observed Bailey "apparently dealing narcotics" in front of a liquor store. (*Id.* at p. 461.) As the officers closed in and ordered everyone outside the store to sit down, Bailey and another man walked away, discarding baggies of "an off-white, chunky substance" that the arresting officer (Mills) referred to as "'rock cocaine.'" (*Id.* at p. 461.) A criminalist testified that the baggies contained "'chunky material . . . contain[ing] cocaine,'" but "was not asked and did not indicate whether the cocaine in evidence was rock cocaine or cocaine base." (*Id.* at pp. 461–462.) Bailey was convicted of violating section 11351.5 by possessing cocaine base for sale. On appeal he contended that "there is no substantial evidence the cocaine he possessed was base cocaine." (*Id.* at p. 461.) The appellate court recited that Mills had testified to his training and knowledge regarding "rock cocaine," to his experience in arresting persons for possession of rock cocaine, that he observed Bailey "engaging in what appeared to be a rock cocaine transaction similar to those [Mills] had made arrests for in the past," that he retrieved two packages of "'rock cocaine,'" and that "'[r]ock cocaine is—it's cocaine base.'" (*Id.* at p. 462.)

Quoting *Berry v. Chrome Crankshaft Co.* (1958) 159 Cal.App.2d 549, 552, the majority opinion in *Bailey* rejected a subsidiary contention that Mills' testimony that rock cocaine is cocaine base could not be considered because Mills provided no basis for his opinion: "'It is settled law that incompetent testimony, such as hearsay or conclusion, if received without objection takes on the attributes of competent proof when considered upon the question of sufficiency of the evidence to support a finding. [Citations.] "Evidence technically incompetent admitted without objection must be given as much weight in the reviewing court in reviewing the sufficiency of the evidence as if it were competent. [Citations.]"'" (*Bailey, supra*, 1 Cal.App.4th at p. 463.) The court

concluded, "[N]othing in the present record suggests Officer Mills' testimony was not worthy of belief. . . . No member of this court is capable on this evidence of concluding that a substance testing positive for cocaine cannot be then identified by its form or other physical properties to be base cocaine or that Mills did not have any basis for his testimony supporting the conclusion that it was base cocaine. . . . [¶] . . . [¶] A trier of fact reasonably could rely on the testimony of a trained narcotics officer received without objection that the substance possessed was rock cocaine and that rock cocaine was base cocaine. Coupled with the criminalist's testimony that the substance tested positive for cocaine, we conclude the evidence is substantial and supports the verdict. Although the evidence might have been inadmissible on a proper showing of insufficient foundation or hearsay, etc., no such challenge was made. Appellant would have us make his objection for him, sustain it and then refuse to consider the evidence in reviewing the sufficiency of evidence. To do so would violate the rule of Evidence Code section 353, that a verdict or finding may not be set aside by reason of the erroneous admission of evidence unless there is an objection at trial." (*Id.* at pp. 464–465.)

Citing *Bailey*, the Attorney General argues, in essence, that Martinez's reference to the contents of the baggie as cocaine constitutes substantial evidence that it was, in fact, cocaine because minor did not object to Martinez's testimony. We disagree. Crucial factual differences distinguish *Bailey* from minor's case. In *Bailey*, a chemist testified that the substance in the baggies was cocaine in a chunky form. Here, there was no evidence of any testing by anyone that established that the substance in the baggie was cocaine. In *Bailey*, the issue the appellate court found to be supported by the police officer's testimony was merely whether the cocaine was in the form of cocaine base. The police officer in *Bailey* provided testimony demonstrating at least some level of expertise with respect to "rock cocaine," whereas Martinez did not testify to experience or training specific to cocaine. Critically, the testimony by the police officer challenged on appeal in *Bailey* was not identification of an unknown substance in a baggie, but that rock

cocaine is the same thing as cocaine base. This proposition is in no sense comparable to an unsupported opinion regarding the chemical composition of powder in a baggie.

The precept set forth in *Bailey*—that "'incompetent testimony, such as hearsay or conclusion'" introduced at trial without objection must be treated as if it were competent when reviewing the sufficiency of the evidence—does not mean that such evidence constitutes substantial evidence, even if admitted without error due to a lack of objection. In this regard, it must be recalled that the requirement that a conviction or adjudication be supported by substantial evidence is a requirement of the Fifth and Sixth Amendments to the United States Constitution, applied to the states through the Fourteenth Amendment due process clause. (*United States v. Gaudin* (1995) 515 U.S. 506, 509–510 [115 S.Ct. 2310]; *People v. Kobrin* (1995) 11 Cal.4th 416, 423.) A sufficiency of evidence claim, unlike an issue of the admissibility of evidence, is never forfeited by the defendant's failure to raise the claim in the trial court. (*People v. Neal* (1993) 19 Cal.App.4th 1114, 1122.) Here, unlike *Bailey*, we have no criminalist's testimony regarding the composition of the powder in the baggie, and Martinez was not shown to be "a trained narcotics officer." (*Bailey*, *supra*, 1 Cal.App.4th at p. 465.) The failure in this case of the prosecution to meet its burden of proof beyond a reasonable doubt extends far beyond merely determining whether "a substance testing positive for cocaine cannot be then identified by its form or other physical properties to be base cocaine." (*Id.* at p. 464.)

The Attorney General also argues that a finding that the substance in the baggie was cocaine is supported by an inference of consciousness of guilt arising from minor's conduct of hiding the baggies of *marijuana* in his socks. We do not agree. Hiding the marijuana supported an inference of minor's consciousness of guilt of possession of *marijuana* and has no tendency to show that the substance in the baggie in his trouser pocket was any controlled substance, let alone the specific controlled substance of cocaine. Unlike the defendant in *Sonleitner*, *supra*, 183 Cal.App.3d 364, minor made no attempt to destroy the unidentified powdery contents of the baggie.

Accordingly, we conclude that insufficient evidence supported the juvenile court's finding that minor transported cocaine. The court's finding that minor violated section 11352, subdivision (a) cannot be supported by minor's transportation of marijuana because marijuana is not within the scope of section 11352, subdivision (a). Thus, the juvenile court's finding regarding count 1 must be reversed and may not be re-adjudicated.

DISPOSITION

The order under review is reversed as to count 1 due to insufficient evidence. The order is otherwise affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.