Filed 5/15/18 P. v. Keesling CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>GERALD KEESLING,<br><br>Defendant and Appellant. | B283624<br><br>(Los Angeles County Super. Ct. No. BA456671) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Renee F. Korn, Judge. Affirmed.

Roberta Simon, 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, Assistant Attorney General, Scott A. Taryle and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Gerald Keesling was charged with unlawful possession of ammunition. (Pen. Code, § 30305, subd. (a)(1).)[1] The information further alleged that defendant was prohibited from owning and possessing a firearm pursuant to the Penal Code and sections 8100 and 8103 of the Welfare and Institutions Code, having previously been convicted of a violation of Health and Safety Code section 11352.

On May 19, 2017, defendant filed a motion to suppress evidence (§ 1538.5), specifically two bullets seized by law enforcement, from defendant at the time of his arrest. After a hearing, the trial court denied his motion.

On July 6, 2017, in exchange for a promise of three years of formal felony probation and 365 days in jail with credit for time served, defendant pled no contest to the charge. The trial court suspended imposition of sentence and placed defendant on probation pursuant to the offer. He was awarded 156 days of custody credits.

Defendant appeals, challenging the denial of his motion to suppress.

We affirm.

## FACTUAL BACKGROUND

*Factual Background*

Defendant was stopped by two police officers after he was seen riding his bike on the wrong side of the road. The purpose of the stop was to give defendant a citation or warning. Defendant stepped off his bike and placed it on the ground. Los Angeles Police Department Officer Ivan McMillan told defendant why he was being detained. He asked for identification but defendant

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

did not have any. Officer McMillan then filled out a field identification card and checked for outstanding warrants over the air. Defendant had no outstanding warrants. The officers gave defendant a verbal warning for riding his bicycle on the wrong side of the road. The traffic stop lasted about 40 to 50 seconds.

Officer McMillan then asked defendant if he had any weapons or drugs on his person. It was standard procedure to ask anyone stopped in the skid row area that question. Defendant replied that he did not. Officer McMillan then asked defendant if he could search his person. Defendant gave the officers consent to search him. If defendant had denied consent to the search, it was "[m]ore than likely" that the officers would have let him go.

Officer Johnson had defendant put his hands behind his head and patted him down. Officer Johnson felt ammunition rounds when he searched defendant's front left pants pocket. He moved the objects in defendant's pocket and asked what they were. Defendant said that they were rifle rounds that he found in a trash can earlier that day. Officer Johnson removed two rifle rounds from defendant's pocket. Officer McMillan asked defendant if he had been convicted of a felony. Defendant had been convicted of 14 felonies and 23 misdemeanors.

*Procedural Background*

Defendant filed a motion to suppress evidence. After entertaining oral argument, the trial court denied defendant's motion, reasoning, in part: "But as far as the court finding that there was any constitutional violation under [section] 1538.5, the court believes that the defendant was riding on the wrong side of the road in a situation that made it dangerous and unlawful and in the area that we all know which is skid row and just a

dangerous area in and of itself. They have a right to stop him, to at least address the traffic violation, and they certainly can ask to search him. The officer said what would have happened if the defendant had declined, which he did not, and had the defendant [refused], then we'd be in a different situation entirely, and that would be a constitutional violation."

**DISCUSSION**

Defendant argues that the trial court erred when it denied his motion to suppress the evidence.

I. *The Law*

In reviewing the denial of a suppression motion pursuant to section 1538.5, the appellate court views the record in the light most favorable to the trial court's ruling, deferring to those express or implied findings of fact that are supported by substantial evidence, including the trial court's resolution of credibility issues, factual conflicts, and determination of the weight of the evidence. (*People v. Alvarez* (1996) 14 Cal.4th 155, 182; *People v. Leyba* (1981) 29 Cal.3d 591, 596–597.) Any conflicts in the evidence are resolved in favor of the trial court's ruling. (*People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1224.) The reviewing court then exercises its independent judgment to determine whether, on the facts found, the seizure of defendant was unreasonable within the meaning of the United States Constitution. (*People v. Glaser* (1995) 11 Cal.4th 354, 362; *People v. Williams* (1988) 45 Cal.3d 1268, 1301.)

II. *Analysis*

As the parties agree, defendant was detained during the traffic stop. Substantial evidence supports the trial court's determination that defendant gave his consent to be searched after the traffic stop was completed.

Officer McMillan testified that he asked for defendant's identification before the search. After asking for the identification, the officers completed a field identification card and checked for outstanding warrants. The officers then gave defendant a verbal warning. Only after all of this did Officer McMillan ask for consent to search defendant, as part of standard procedure.

On appeal, defendant argues that his consent was invalid because it was the result of an unduly prolonged stop; in other words, no reasonable person in defendant's position would have felt that he could leave or deny the officers' request.

To justify a search on the basis of consent, the state must show that "the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 248.) A voluntariness determination is a question of fact to be resolved by considering all attendant circumstances. (*Id*. at pp. 248–249.) Thus, on appeal, a trial court's voluntariness determination will be upheld if there is substantial evidence to support it. (*People v. James* (1977) 19 Cal.3d 99, 107; *People v. Aguilar* (1996) 48 Cal.App.4th 632, 640.)

Ample evidence supports the trial court's determination that defendant's consent to be searched was voluntary. The interaction occurred out in the public. There is no evidence that either officer had his weapon drawn. After the traffic stop was completed and the officers had given defendant a verbal warning, Officer McMillan asked defendant if he could be searched. While Officer McMillan did not tell defendant that he was free to leave, he was not required to advise defendant that he could refuse to consent. (*Ohio v. Robinette* (1996) 519 U.S. 33, 36 [the "Fourth

Amendment [does not require] that a lawfully seized defendant [to] be advised [that] he is 'free to go' before his consent to search will be recognized as voluntary"]; *People v. Galindo* (1991) 229 Cal.App.3d 1529, 1535–1536.) Rather, Officer McMillan's request for permission to search carried with it the inference that consent could be withheld. (*People v. Bravo* (1987) 43 Cal.3d 600, 605 ["if a person of normal intelligence is asked to give consent for a search he will infer that he has a right to withhold that consent"].)

Defendant further argues that the search went beyond his consent because it violated the plain-touch rule under *Terry v. Ohio* (1968) 392 U.S. 1 (*Terry*) and *Minnesota v. Dickerson* (1993) 508 U.S. 366. But a consent search does not need to be justified like a *Terry* stop. (*United States v. Fuentes* (9th Cir. 1997) 105 F.3d 487, 489; *People v. Superior Court* (*Chapman*) (2012) 204 Cal.App.4th 1004, 1012 ["By consenting to a warrantless search, one waives the right [to be] protected by the Fourth Amendment"].) Rather, once a defendant consents to a search, the scope of consent is determined by the "objective reasonableness" standard: "[W]hat would the typical reasonable person have understood by the exchange between the officer and the suspect?" (*Florida v. Jimeno* (1991) 500 U.S. 248, 251–252 (*Jimeno*).) "Whether the search remained within the boundaries of the consent is a question of fact to be determined from the totality of [the] circumstances." (*People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1408.) Unless clearly erroneous, the trial court's ruling must be upheld on appeal. (*Ibid.*)

Here, Officer McMillan asked defendant "if [he] could search his person for any weapons or narcotics." Generally, when a police officer specifies the subject of a search, the scope of consent should be interpreted to include those areas where the officer might reasonably expect to find the items that are the subject of the search. (*Jimeno*, *supra*, 500 U.S. at p. 251; *People v. $48,715 United States Currency* (1997) 58 Cal.App.4th 1507, 1516.) A reasonable person would have understood that "any weapons or narcotics" could be found inside his pockets. Thus, a reasonable person would have interpreted the scope of his consent to encompass a pat-down search and search of his pockets.

Moreover, defendant's silence and cooperation during the search gave Officer Johnson an additional reason to believe that defendant's pockets were included within the scope of his consent. (*United States v. Gordon* (10th Cir. 1999) 173 F.3d 761, 766 ["We consistently and repeatedly have held a defendant's failure to limit the scope of a general authorization to search, and failure to object when the search exceeds what he later claims was a more limited consent, is an indication the search was within the scope of consent"].)

Finally, defendant contends that the search was improper because the incriminating nature of the bullets in defendant's pocket was not immediately apparent. (See, e.g., *In re Lennies H.* (2005) 126 Cal.App.4th 1232, 1237.) The People respond that Officer Johnson believed that the items he felt in defendant's pocket were ammunition, and Officer Johnson was justified in taking the bullets "because bullets are weapons." Regardless of whether bullets themselves are weapons, given defendant's consent to be searched, the scope of the search properly included

bullets. After all, the bullets could not be used without a weapon and the officers did not know if defendant had a weapon nearby. In light of the circumstances of the traffic stop, namely defendant dangerously riding on the wrong side of the road in an area that is known to be dangerous, the officers rightly removed what they believed to be bullets, even before they knew that defendant was not allowed to possess them.

**DISPOSITION**

The judgment is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ