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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

NICKY HERNANDEZ,

Defendant and Appellant.

B251257

(Los Angeles County
Super. Ct. No. BA413283)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Anne H. Egerton, Judge. Affirmed.

California Appellate Project, Jonathan B. Steiner and Richard B. Lennon, under
appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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Defendant and appellant, Nicky Hernandez, appeals from the judgment entered following his plea of no contest to the serious felony (Pen. Code, § 290, subd. (c))¹ of unlawfully possessing a firearm (§ 29800, subd. (a)(1)), after having been convicted of the felonies of robbery (§ 211) and second degree burglary (§ 459), his acknowledgement that any term imposed for the offense would be served in state prison (§ 1170, subd. (h)(3)) and his admission he previously had been convicted of robbery (§ 211) within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). Pursuant to the plea agreement, the trial court sentenced Hernandez to two years eight months in state prison. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

*1. Facts.*²

Los Angeles Police Officer Hector Chairez is an experienced narcotics officer who has been employed by the police department for over 15 years. At 7:40 a.m. on July 17, 2013, the officer was in uniform and on patrol with his partner, Officer Julio Martinez, in a marked car in the vicinity of Bonsallo Avenue and 65th Street, an area known for prostitution, narcotics use and gang activity.

Chairez was driving south on Bonsallo. When he then made a left-hand turn onto 65th Street, he noticed Hernandez, who was sitting in the passenger seat of a parked white Honda Accord. Another man was in the driver's seat and a woman was sitting in the back seat of the Accord. Hernandez and the officer made eye contact and Hernandez appeared to become nervous. He began to move his hands, which were below the dashboard. Based on his experience, Chairez believed Hernandez's movements were consistent with those of someone who was attempting to conceal something. Chairez suspected Hernandez might be involved in narcotics activity and, because the woman in the back seat was provocatively dressed, that she might be involved in prostitution.

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

² The facts have been taken from the transcript of the preliminary hearing held on July 19, 2013.

Chairez pulled his patrol car up so that it was parallel to the Accord, got out, approached the driver's side of the Accord and, as Martinez moved to the passenger side of the vehicle, asked its occupants "what they were doing." Hernandez, who was "handling a sock in his hand," responded that he was not doing anything and that the sock was " 'just a dirty sock.' " ³

Chairez asked each of the occupants of the Accord for personal information, including whether any of them were on probation or parole, then stepped back to the patrol car to check the information on the computer. ⁴ As he was doing so, Martinez continued to stand by the passenger side of the Accord. During that time, Hernandez continuously moved his hands. In particular, it appeared to Martinez that Hernandez was reaching for his waistband. For the officer's safety, Martinez asked Hernandez to "put his hands . . . on his lap or just somewhere where [the officer] could see them." Hernandez, however, failed to do so and Martinez again asked Hernandez to keep his hands within the officer's view. After Martinez had asked Hernandez several times and he continued to refuse to stop moving his hands, Martinez opened the door and asked Hernandez to step out of the Accord. Hernandez "very slowly" put out one foot, then the other. He then began to "lunge forward[] toward[] the outside of the vehicle . . . with his hand toward[] his waistband." Martinez took a hold of Hernandez's shoulder and arm "to prevent him from grabbing his waistband," then called out to Chairez for assistance.

Chairez had seen the door on the passenger side of the Accord open and Hernandez place his feet outside the car, then begin to lean forward. After he saw Martinez grab hold of Hernandez's right shoulder, Chairez ran around the car to assist Martinez. As Chairez approached the car's open door, he "observed in plain sight . . . on the floorboard in front of the front seat a . . . clear plastic baggie [which contained] a

³ Chairez was suspicious of the sock because it had been his experience that one method drug users employed to "get high" was to put a substance such as paint or paint thinner on a sock then "sniff the sock or . . . put it in a bag and . . . put it close to [their] mouth and . . . nose and . . . inhale . . . the fumes."

⁴ Hernandez initially told the officer his name was Luis Nunez.

white crystal-like substance resembling methamphetamine, and on the lever to the right of the seat . . . a clear glass pipe with a sphere on one end . . . [with] residue inside of it.”

Hernandez continued to attempt to lean forward and Martinez told Chairez to “get [Hernandez’s] arm” because he kept “reaching for his waistband.” Chairez grabbed Hernandez’s left arm while Martinez took hold of Hernandez’s right arm and the two officers were able to pull Hernandez’s arms behind his back and handcuff him. After Chairez patted down Hernandez around his waistband, Hernandez fell forward onto the grassy area between the curb and the sidewalk. He then began to “gyrate” his body and shake his legs “as if he [were] having a seizure.” At the same time, he moved his body toward the car and “down underneath the [Accord].” Chairez grabbed Hernandez’s belt and shoulder and Martinez took hold of Hernandez’s feet as the officers attempted to move him back onto the grassy area. While the officers were moving Hernandez, Martinez told Chairez, “ ‘Hey, I know what he was grabbing at. Be careful. It’s pointed at you.’ ” The officers stopped moving Hernandez and Martinez recovered from Hernandez’s left pant leg a .22-caliber “blue steel semiautomatic handgun with wood grips.” The gun was not loaded.

After Martinez took possession of the handgun, Chairez requested backup units and an ambulance as he was unsure whether Hernandez was having a “medical seizure.” Chairez then recovered the baggie from the floorboard of the car. It was later determined the baggie contained 0.21 grams of methamphetamine.

Evidence of Hernandez’s “rap sheet” showed that on February 16, 2007, Hernandez had been convicted of robbery in violation of section 211 and that on January 3, 2011, he suffered a conviction for burglary.

2. Procedural history.

At the end of the preliminary hearing, after the People rested, defense counsel made a motion to suppress evidence of the gun and methamphetamine pursuant to section 1538.5. Counsel for Hernandez argued that, when Chairez parked the patrol car next to the driver's side of the Accord and Martinez got out and walked around to the passenger side of the vehicle, none of the occupants felt free to leave. Accordingly, a "detention began at that point." When Chairez then asked the occupants of the Accord for their names and whether they were on probation or parole, a detention was clearly in progress. With regard to the fact they were in a high-crime area, defense counsel asserted, "First, [the officers] said it's possibly a prostitution investigation, [then they said] it's possibly a drug thing. But really they're talking about a hunch. They see nothing to suggest prostitution or drugs, and . . . there wouldn't be a Fourth Amendment if you could just say everybody who lives in a high-crime area is subject to search and seizure." As to the fact Hernandez appeared nervous, counsel indicated there was nothing unusual about that, considering police officers were standing on both sides of the car. Counsel continued, "I imagine the other people [looked nervous] too. But the nervousness alone was [not enough]." "[P]robable cause or reasonable suspicion requires an articulable suspicion of a specific crime that's underfoot based on articulable evidence that [the officers] observed. [¶] Seeing three young people in a car is not significant enough, particularly in this day and age [Seeing a woman in a low-cut blouse is not enough] to suggest it's a prostitution case. And certainly seeing somebody appear to be nervous . . . does not make it a drug case."

After the prosecutor made a number of arguments with regard to why the detention was lawful, the trial court found "that at the point where the officers approach[ed] the vehicle and ask[ed] the occupants, including [Hernandez], for their identifications or their names, . . . no reasonable person would believe that they were free to leave. . . . [¶] However, the court [found] that [the officers had a] reasonable suspicion . . . to briefly detain the occupants of the vehicle . . . based on their experience concerning the high-crime nature of the area, including prostitution and narcotics,

considering [Hernandez's] nervousness, and also that he appeared to possibly be concealing an item below the dash. As Officer Chairez approached him, he saw [Hernandez] with a sock in his hand. Based on his training and experience, [the officer] had reason to believe that [Hernandez] might be sniffing paint or another substance to get high . . . and that provided additional facts to prolong the detention. [¶] . . . [¶] The court [found] that . . . Officer Martinez was justified in asking [Hernandez] to exit the vehicle because of his refusal to obey the order[] to keep his hands where the officer could see them and [was] continually reaching into his waistband. . . . When the [car] door was open[ed], Officer Chairez . . . saw in plain view . . . a baggie containing what appeared to be methamphetamine. At that point, the officers had probable cause to arrest Mr. Hernandez and search him incident to that arrest. . . . [In addition] the officers were justified in [placing Hernandez in handcuffs] at that point for their own safety and for his and were justified in patting him down given his continued behavior of reaching for his waistband. . . . The gun was [then] lawfully seized.” After making its remarks, the trial court denied Hernandez’s motion to suppress evidence.

After the motion to suppress evidence had been denied, Hernandez’s counsel made a motion to dismiss the matter. The trial court responded, “It appear[s] to me from the evidence presented the following offenses have been committed and there is sufficient cause to believe the defendant guilty of them: count 1, a violation of Penal Code section 28900[, subdivision] (a)(1) [and] [¶] . . . [¶] . . . count 3, a violation of Health and Safety Code section 11377[, subdivision] (a).”⁵

In count 1 of the information filed August 2, 2013, Hernandez was charged with the serious felony (§ 290, subd. (c)) of unlawfully possessing a firearm (§ 29800, subd. (a)(1)), after having been convicted of the felonies of robbery (§ 211) and burglary (§ 459). It was further alleged that, were he to be convicted of the offense, he would be required to serve any time imposed in state prison (§ 1170, subd. (h)(3)). In addition, it was alleged that, prior to the commission of the offense alleged in count 1, Hernandez

⁵ The People chose not to proceed on count 2 and the trial court dismissed it.

had been convicted to the serious or violent felony (§§ 667, subd. (d), 1170.12, subd. (b)) of robbery (§ 211) and was thus subject to the sentencing provisions of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). Finally, it was alleged as to count 1 that Hernandez had suffered prior convictions for robbery (§ 211) and burglary (§ 459) for which he served terms in prison or county jail pursuant to section 667.5, subdivision (b). In count 3 of the information, it was alleged Hernandez had committed the felony of possessing a controlled substance, methamphetamine, in violation of Health and Safety Code section 11377, subdivision (a). It was further alleged as to that count that, if convicted of the offense, Hernandez would be required to register pursuant to Health and Safety Code section 11590.

At proceedings held on August 28, 2013, the trial court indicated a disposition had been reached in Hernandez's case.⁶ The prosecutor then stated Hernandez was going to enter a plea to count 1 and admit the strike prior, for a total sentence of 32 months in state prison. After reviewing the charges to which Hernandez would be pleading and the allegations he would be admitting, the prosecutor advised Hernandez of his right to a court or jury trial, his right to confront and cross-examine the witnesses against him, his right to use the subpoena power of the court, at no cost to him, to procure witnesses and his right to remain silent. Hernandez indicated he understood his rights and was giving up each of them. The prosecutor then explained the consequences entry of a plea would have on Hernandez's status if he were on probation or parole, the consequences of his plea if he were not a United States citizen and the fact that, when he was released from prison after serving his term, he would be on parole for a period of three years. Hernandez acknowledged the consequences of his plea, then pled no contest to possession of a firearm by a felon (§ 29800, subd. (a)(1)) and admitted previously having been convicted of robbery (§ 211) and second degree burglary (§ 459), that his robbery conviction amounted to a strike pursuant to the Three Strikes law (§§ 667, subds. (b)-(i),

⁶ At the same proceedings, it was indicated the same disposition had been reached for another defendant, Alfred Spruill.

1170.12, subds. (a)-(d)) and that pursuant to section 1170, subdivision (h)(3), he would be required to serve his sentence in this matter in state prison. The trial court determined Hernandez had knowingly, intelligently, freely and voluntarily waived his constitutional rights. The court then found a factual basis for Hernandez's plea and admissions based on the preliminary hearing transcript and police report and accepted Hernandez's pleas and admissions.

As to count 1, the trial court sentenced Hernandez to the low term of 16 months in state prison, then doubled the term to 32 months pursuant to the Three Strikes law, indicating the term was to run "concurrent with any other time." The court awarded Hernandez presentence custody credit for 53 days actually served and 53 days of good time/work time, for a total of 106 days, then dismissed any remaining counts and allegations. Hernandez was ordered to pay a \$280 restitution fine (§ 1202.4, subd. (b)), a stayed \$280 parole revocation restitution fine (§ 1202.45, subd. (a)), a \$40 court operations assessment (§ 1465.8, subd. (a)(1)), and a \$30 criminal conviction fee (Gov. Code, § 70373).

Hernandez filed a timely notice of appeal on August 29, 2013.

CONTENTIONS

After examination of the record, appointed appellate counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed December 9, 2013, the clerk of this court advised Hernandez to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. No response has been received to date.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

KLEIN, P. J

CROSKEY, J.