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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOHN JAMES SPARKS, Defendant and Appellant.	B240763 (Los Angeles County Super. Ct. No. NA090975)

APPEAL from the judgment of the Superior Court of Los Angeles County. Charles D. Sheldon and James D. Otto, Judges. Affirmed.

John J. Uribe, 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, Assistant Attorney General, Paul M. Roadarmel, Jr., and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant and appellant John James Sparks of one count of vehicular burglary and one count of possession of burglar's tools. The sole issue on appeal is defendant's contention his trial counsel was ineffective within the meaning of the Sixth Amendment for failing to file a motion to suppress evidence. We conclude defendant has failed to establish a claim of ineffective assistance of counsel, and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Eric Swenston operates a shop in an industrial area of Long Beach, where he builds race cars and performs general automotive repair. On the evening of December 30, 2011, he closed his shop and headed to his Ford Bronco parked outside. Mr. Swenston always locks his car when he parks it outside his shop, and he had locked it that day. As he walked toward the car, he noticed the hood was up and someone was under the hood, leaning on the left side of the car.

When Mr. Swenston got to within about 15 feet of his car, the individual looked up, saw Mr. Swenston approaching, and started running in the opposite direction. Mr. Swenston immediately started to chase after him but he slipped and fell, and the man was able to put some distance between them. After a couple of minutes of chasing him, Mr. Swenston saw the man turn left on San Francisco Street, at which point he lost sight of him. Mr. Swenston called 911 and described the suspect as a white male with long, light-colored hair, 5 feet 10 inches tall, approximately 40 to 50 years old, and wearing a dark green, Army-style jacket. By the time Mr. Swenston walked back to his car, a responding officer from the Long Beach Police Department (LBPD) had already arrived.

The officer and Mr. Swenston saw the driver-side window vent on his Bronco was broken, through which someone could reach in and open the door. The cables to his battery were also nearly cut all the way through. Within some 10 minutes, the officer received a radio call from another officer that a suspect was being detained. Mr. Swenston was taken to view the suspect, given an admonishment, and asked whether the individual appeared familiar to him. Mr. Swenston identified defendant, stating he looked like the man he saw tampering with his car under the hood. At the time of the

identification, Mr. Swenston noticed defendant was no longer wearing a jacket, and had on only a short-sleeved T-shirt even though it was a cold night.

Leonel Valdez, a patrol officer with the LBPD, was the officer who first spotted defendant. Officer Valdez, who was on patrol without a partner, received a radio broadcast about an auto burglary, the suspect description given by Mr. Swenston, and the fact the suspect had been last seen fleeing the scene in a southwesterly direction. Within a few minutes, Officer Valdez saw defendant on a bike path at a location southwest of the reported scene of the burglary. Defendant largely fit the description given of the suspect, as he was a white male with "long blondish" hair.

Officer Valdez pulled his patrol car over and asked defendant if he would speak with him. Defendant cooperated, and agreed to jump over the fence that separated the bike path from where Officer Valdez was standing. Officer Valdez noticed defendant was not wearing a dark green jacket as had been reported, and that he was younger than the age given for the suspect, but, in his experience, discrepancies by witnesses and victims in estimating age were "common." He performed a "patdown" search, and recovered a socket wrench and pair of pliers from defendant's rear pants pocket. Officer Valdez took possession of the tools because he believed they could be used as weapons. Several other officers arrived on the scene, including Officer Demarco and Officer Jonathan Calvert. Officer Valdez did not attempt to interview defendant, but left him with the other officers to search for other evidence, including for a discarded jacket matching the description given by Mr. Swenston.

When Officer Calvert arrived on the scene, he noticed the other officers already had a suspect being detained. Defendant was leaning or sitting on the push bar attached to the front of one of the patrol cars. He was not handcuffed. Officer Calvert walked over to speak with defendant. He told defendant he was investigating an auto burglary. Defendant initially denied having anything to do with it, but then told Officer Calvert his truck had broken down, he saw the Bronco, and broke into it to steal the battery. He had cut the battery cables when the owner of the car came towards him and he ran off. Officer Calvert asked him how he was able to cut the battery cables, and defendant

pointed to Officer Valdez and said "those tools." Shortly thereafter, defendant was placed under arrest.

Defendant was charged by information with one count of burglary of a vehicle (Pen. Code, § 459)[1], and one count of possession of burglary tools (§ 466). It was also specially alleged defendant had suffered three prior felony convictions, and had served a prior prison term (§§ 667.5, 1203, subd. (e)(4)). Defendant pled not guilty and denied all allegations.

Before the start of trial, the court held a hearing pursuant to Evidence Code section 402 (402 hearing) concerning the circumstances surrounding the statements made by defendant to Officer Calvert. Defendant contended the statements were not admissible because defendant had not been read his rights pursuant to *Miranda*.[2]

Officer Calvert testified at the hearing that he responded to Officer Valdez's call that he had a burglary suspect detained. When he arrived, defendant was sitting on the front push bar of a patrol car. Defendant asked Officer Calvert if he could sit in the back of a patrol car because his leg was hurting. Defendant was not handcuffed and was allowed to sit in the back of the car, with the door open. Officer Calvert spoke with defendant briefly, no more than a few minutes. He admitted defendant was not free to leave and that he did not read defendant his *Miranda* rights before speaking with him. Officer Calvert testified defendant admitted he had broken into the Bronco because his truck was not working. After hearing argument from counsel, the trial court ruled defendant's statements to Officer Calvert were admissible.

Both Officer Calvert and Officer Valdez testified during trial, as did Mr. Swenston. The jury found defendant guilty on both counts.

Defendant waived his right to a trial on the bifurcated priors and admitted his prior felony convictions. The court imposed the low term of 16 months on count 1, and a consecutive six-month term on count 2, the misdemeanor. The court awarded defendant

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1 All further undesignated section references are to the Penal Code.

2 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

234 days of presentence custody credits, and imposed various fines and fees. This appeal followed.

DISCUSSION

Defendant's sole contention is that his trial counsel rendered ineffective assistance in violation of the Sixth Amendment to the federal Constitution by failing to move to suppress evidence pursuant to section 1538.5, specifically (1) his pre-arrest statements to Office Calvert, (2) the tools recovered from him during the patdown search by Officer Valdez, and (3) the in-field identification made by Mr. Swenston. Defendant contends all such evidence was tainted by the wrongful initial detention or "*Terry* stop"[3] by Officer Valdez.

The burden is on defendant to establish ineffective assistance by a preponderance of the evidence. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.) There are two elements to an ineffective assistance claim. A defendant "must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Cudjo* (1993) 6 Cal.4th 585, 623, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-696.)

On direct appeal, as here, this burden can be stringent. When the record on appeal "'"sheds no light on why counsel acted or failed to act in the manner challenged[,] unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," *the claim on appeal must be rejected*.' [Citation.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 (*Mendoza Tello*), italics added; see also *People v. Jones* (2003) 29 Cal.4th 1229, 1254 [ineffective assistance claim properly resolved on direct appeal only where record affirmatively discloses no rational tactical purpose for counsel's actions].)

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3 *Terry v. Ohio* (1968) 392 U.S. 1 (*Terry*).

Our Supreme Court has cautioned that, if not for this standard, "appellate courts would become engaged 'in the perilous process of second-guessing.' [Citation.] Reversals would be ordered unnecessarily in cases where there were, in fact, good reasons for the aspect of counsel's representation under attack. Indeed, such reasons might lead a new defense counsel on retrial to do exactly what the original counsel did, making manifest the waste of judicial resources caused by reversal on an incomplete record." (*People v. Pope* (1979) 23 Cal.3d 412, 426, overruled in part on other grounds as stated in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.)

Defendant concedes the factual circumstances surrounding his initial detention and search by Officer Valdez were "never properly explored," but nonetheless argues the record of the 402 hearing is "sufficiently complete" to resolve the ineffective assistance claim on direct appeal. We are not persuaded. The issue in the 402 hearing was whether defendant should have been read his *Miranda* rights before Officer Calvert spoke with him, and whether his confession to the burglary was admissible in light of the fact that he was not read his rights before that statement was made. In contrast, defendant's ineffective assistance claim is based on trial counsel's failure to contest the initial warrantless detention by Officer Valdez. The facts concerning the basis for the initial detention and patdown search were not developed at the 402 hearing. Neither the transcript of that hearing nor the trial transcript provide this court with the information necessary to determine whether trial counsel performed competently in choosing not to bring a motion to suppress.

Moreover, the validity of a warrantless detention, or *Terry* stop, of the type involved here is necessarily fact-intensive, judged on a case-by-case basis using a totality of the circumstances approach. (See *People v. Souza* (1994) 9 Cal.4th 224, 229-231 (*Souza*), discussing *Terry* and its progeny.) There is no bright-line rule that a detention made in a certain fashion or under a certain set of facts is per se violative of an individual's Fourth Amendment rights. (*Michigan v. Chesternut* (1988) 486 U.S. 567, 572-573; see also *Souza*, *supra*, at pp. 237-238.)

Nevertheless, defendant suggests the existing factual record establishes that any competent lawyer would have determined the detention here was improper because he was simply walking down a bike path at night when he was detained by Officer Valdez, he did not match the reported age of the burglary suspect, and there were no facts indicating he was armed and dangerous to justify a patdown search. We disagree. "'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 . . . .*' [Citation.]" (*Souza*, *supra*, 9 Cal.4th at p. 233, italics added.) And, the fact that an officer is investigating a burglary, a crime in which the perpetrators are often armed with weapons or at least "tools of the trade" that can be used as weapons, has been held relevant to judging the validity of a patdown search for weapons. (See, e.g., *People v. Osborne* (2009) 175 Cal.App.4th 1052, 1060-1061; *People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1230.)

"An appellate court should not declare that a police officer acted unlawfully, suppress relevant evidence, set aside a jury verdict, and brand a defense attorney incompetent unless it can be truly confident all the relevant facts have been developed and the police and prosecution had a full opportunity to defend the admissibility of the evidence." (*Mendoza Tello*, *supra*, 15 Cal.4th at p. 267.) The present record is not adequate to establish any improper police tactics were used in detaining defendant without a warrant, or ineffective assistance of counsel for failing to challenge same.

DISPOSITION

The judgment of conviction is affirmed.

GRIMES, J.

We concur:

BIGELOW, P. J. RUBIN, J.