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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LISA FINLEY,

Defendant and Appellant.

B276787

(Los Angeles County
Super. Ct. No. NA104261)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Jesse I. Rodriguez, Judge. Affirmed.

Susan Morrow Maxwell, 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, Victoria B.
Wilson and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and
Respondent.

After her motion to suppress evidence pursuant to Penal Code section 1538.5¹ was denied, Lisa Finley (defendant) entered a plea of nolo contendere to resisting an executive officer in violation of section 69. The trial court sentenced defendant to 333 days of time served in county jail and three years of formal probation. On appeal, defendant contends the trial court erred by denying her motion to suppress evidence, contending the observations made by the detectives that she exhibited symptoms of drug use were made while she was subjected to an unlawful detention. We affirm the judgment of conviction.

BACKGROUND

The facts are taken from the evidence presented at the preliminary hearing on June 8, 2016, consisting of the testimony of Long Beach Police Department homicide Detectives Peter Lackovic (Lackovic) and Oscar Valenzuela (Valenzuela).

1. Testimony of Lackovic

On February 25, 2016, at approximately 1:10 p.m., Detectives Lackovic and Valenzuela were driving in the area of 67th Street and Gardenia Avenue in Long Beach, Los Angeles County, when Detective Lackovic saw defendant sitting on the front porch of a residence located at 6572 Gardenia Avenue, having a conversation with somebody inside the residence. The detectives were in that area investigating the death of an infant found in an alley and recognized defendant as a “person[] of interest.”² The front door of the

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

² Two days earlier, detective Lackovic had spoken with individuals at the crime scene who provided a description of defendant as a person “that [] could have been involved” with the death of the infant.

residence had a five-foot square landing in front of it, with one or two steps leading to a walkway; the front yard was open, with no fence surrounding it. Detective Lackovic parked his vehicle and walked toward defendant. He was dressed in a business suit except he was not wearing his suit jacket.

Standing approximately five feet from defendant in the front yard of the residence, Detective Lackovic asked defendant her name, to which she responded he didn't need to know her name. He then called his partner Detective Valenzuela for backup; he arrived within 30 seconds to a minute.

Prior to Detective Valenzuela's arrival, defendant asked Detective Lackovic who he was and for his identification. He responded "I'm Detective Lackovic, Long Beach Police Department," and showed her his lanyard around his neck, which stated "Police" in big bold letters across the top with his picture underneath and the title "Police Officer." He proceeded to question defendant, asking her her name several times, where she lived, and if she knew anything about the homicide in the alley. Defendant was unable to stay focused on the conversation and did not answer any of his questions directly.

Within minutes of his interaction with defendant, Detective Lackovic formed the opinion that defendant was under the influence of a controlled substance, specifically methamphetamine.³ He based his determination on the following observations: "She wasn't able to have a normal conversation, like you and I are. She seemed very rigid in her movement. The way she would talk seemed very—very choppy and forced. She couldn't stay focused

³ Detective Lackovic has been a police officer for 24 years. He received training at the police academy in identifying people under the influence of a controlled substance, and the characteristics individuals may then display. He had also worked in specialized units throughout his career and had been in contact with people under the influence, sometimes on a daily basis, and had arrested people for being under the influence.

on the conversation we were having. [¶] She got up, she would walk around. At one point she asked me to do something—she asked me to back away from her. I backed away from her but then she comes right towards me. She was doing things that kind of were contradictory to what she wanted.”

When Detective Valenzuela arrived at the location, a male individual, who was riding his bicycle on Gardenia Avenue, later identified as Andre Lyons (Lyons), told defendant not to talk to the detectives. Defendant told Detective Lackovic to back up because she was bipolar; so he backed away from her.

Defendant moved away from the front porch and walked in a small circle with Lyons. She then grabbed a suitcase by the front porch and started to walk with Lyons to an alley, located north of the residence. Lyons continued to yell at the detectives, insisting they back away from defendant; he held a can of soda as if he was going to throw it at them. Defendant was also yelling and screaming. Once defendant got to the alley, Detective Lackovic told her “You’re not free to go. You’re under arrest.” Defendant kept walking.

Detective Lackovic radioed dispatch and requested “units to assist because of what’s going on.” Defendant and Lyons continued down the alley approximately 30 or 40 feet, and then turned right and headed southbound down another alley. Detective Lackovic continued to ask defendant to “stop,” but she kept walking. At that point, Detective Lackovic had a brief conversation with Detective Valenzuela, stating: “Hey, I’m going to go after Lyons and you go after [defendant].”

While running towards Lyons, Detective Lackovic looked over his shoulder and saw that Detective Valenzuela and defendant were up against a wooden fence. Detective Lackovic decided to assist his partner, rather than

“go after” Lyons, and headed toward defendant. While trying to grab hold of defendant’s arm, he looked up and realized Lyons had thrown the soda can which he had been holding. The can landed near Detective Lackovic’s feet, causing some of the soda to spray on him. He also felt pain in his wrist, as defendant dug her fingernails into his skin. He then heard Detective Valenzuela yell, “Hey, she’s going to bite you. She’s going to bite you.” Detective Lackovic immediately let go of defendant. At that point, Detective Lackovic heard sirens, and the units he had requested arrived.

As a uniform police officer approached, Detective Lackovic grabbed defendant’s right arm, and she started kicking him. Defendant kicked Detective Lackovic approximately five or six times in his leg and shin area until he was able to lean his body across her thigh. He then rolled defendant on to her stomach and, with the help of the uniformed police officer, handcuffed her.

II. Testimony of Valenzuela

When Detective Valenzuela arrived at the location, he saw defendant sitting on the front porch of the residence, having a conversation with Detective Lackovic.⁴ He approached defendant and showed his identification. As soon as he made contact with defendant, he realized something was “off.” He looked over at Detective Lackovic and told him, “Hey 11550,” which is the

⁴ Detective Valenzuela has been a police officer for 18 years. He was trained in identifying individuals under the influence of controlled substances. Prior to being assigned to the homicide unit, he spent approximately four-and-a-half to five years in the drug investigation section, and also worked in a directed enforcement team, where he was primarily tasked with conducting narcotic-related investigations. He had received over 100 hours of narcotic-related instructions, which included training on identification of the objective symptoms displayed by individuals who are under the influence of a controlled substance. He also had arrested individuals for being under the influence.

Health and Safety Code section for being under the influence. He had observed that she “appeared to be a little paranoid . . . and agitated. Her movements appeared to be—they weren’t fluid like a normal person. They appeared to be a little—a little rigid . . . her speech was kind of, ah, fast.” Based on his observations, Detective Valenzuela formed the opinion that defendant “potentially could have been under the influence of a controlled substance,” specifically a central nervous stimulant.

Detective Valenzuela then saw defendant leave the porch and walk in a circle. Next, she left heading toward an alley. When she approached the alley, Detective Valenzuela (as had Detective Lackovic) told her she was under arrest. She responded that she wasn’t going to go to jail. He then had a brief conversation with Detective Lackovic; they then decided they were going to arrest defendant.

As Detective Valenzuela tried to grab defendant’s right hand, she kept turning and began screaming and yelling. He was unable to handcuff defendant because she was resisting him. Detective Lackovic then approached. Defendant fell to the ground. Detective Valenzuela tried to grab defendant’s right hand while she was on the ground, but she dug her nails into his wrist, so he let go. He also observed defendant dig her nails into Detective Lackovic’s wrist. Defendant then moved her mouth closer to Detective Lackovic’s wrist. Detective Valenzuela yelled several times, “She’s going to bite you.” Detective Lackovic eventually took defendant into custody.

On May 31, 2016, defendant filed a notice of motion to suppress evidence pursuant to section 1538.5,⁵ arguing the detectives’ observations

⁵ Pursuant to section 1538.5, a defendant may move to suppress as evidence “any tangible or intangible thing obtained as a result of a search or

about her demeanor and behavior were in violation of the Fourth Amendment because they were made while she had been unlawfully detained. The prosecution opposed the motion, arguing the detectives' observations were made during a consensual encounter, thereby precluding any claim of protection under the Fourth Amendment.

At the preliminary hearing on June 8, 2016, the trial court heard testimony from Detective Lackovic and Detective Venezuela regarding the motion to suppress. At the conclusion of testimony, defendant's counsel argued that once she refused to give her name and answer any of the detectives' questions, the encounter between the parties was no longer consensual and any subsequent observations made by the detectives were inadmissible. The trial court disagreed with defendant, ruling the encounter between the detectives and defendant was consensual, and the detectives had probable cause to arrest defendant for "[Health and Safety code section] 11550 or some derivative charge."⁶

On June 22, 2016, the district attorney filed an information charging defendant with two counts of resisting an executive officer in violation of section 69.

Prior to the pretrial hearing, defendant filed her second motion to suppress evidence pursuant to section 1538.5, again arguing that "any observations made by the [detectives] should be excluded as stemming from the unlawful detention." The prosecution opposed the motion.

seizure" on the grounds that "[t]he search or seizure without a warrant was unreasonable." (§ 1538.5, subd. (a)(1)(A).)

⁶ Health and Safety Code section 11550 provides in pertinent part: "A person shall not use, or be under the influence of any controlled substance."

On August 9, 2016, at the pretrial hearing, the trial court again denied the motion to suppress, this time ruling the initial encounter with defendant was not consensual, but because the detectives had the right to be at the location, which was open to the public, they also had the right to briefly question defendant and make observations about her condition.

Following the denial of her motion to suppress, defendant pled nolo contendere to count 1, resisting an executive officer in violation of section 69, in exchange for dismissal of count 2. She was sentenced to serve 333 days in county jail, and three years of formal probation.

Defendant filed a timely notice of appeal.⁷

CONTENTIONS

Defendant contends Detective Lackovic unlawfully detained her by continuing to question her based on her claim that she had told the Detectives that she did not want to talk, and that the detectives' observations made thereafter (their observations of her exhibiting symptoms of drug use) should be suppressed as a violation of her Fourth Amendment rights.⁸ The People disagree, contending there was no Fourth Amendment violation because the initial encounter between defendant and Detective Lackovic was consensual, rather than a detention, since "a reasonable person would believe that they could terminate the encounter."

⁷ The denial of a suppression motion may be challenged by an appeal from the judgment entered after defendant's guilty or no contest plea. A certificate of probable cause is not required. (§ 1538.5, subd. (m).)

⁸ Defendant also contends the observations made by Detective Valenzuela regarding her "exhibiting symptoms of possible drug use" should be suppressed "as fruit of the poisonous tree." Given our resolution of this case, the observations made by Detective Valenzuela of defendant are not "fruit of the poisonous tree."

DISCUSSION

I. Standard of Review

“The standard of appellate review of a trial court’s ruling on a motion to suppress is well established. We defer to the trial court’s factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]” (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

II. The Trial Court Did Not Err in Denying Defendant’s Motion To Suppress Evidence Under Section 1538.5

“The Fourth Amendment to the United States Constitution prohibits seizures of persons, including brief investigative stops, when they are ‘unreasonable.’”⁹ (*People v. Souza* (1994) 9 Cal.4th 224, 229.) “For purposes of Fourth Amendment analysis, there are basically three different categories or levels of police “contacts” or “interactions” with individuals, ranging from the least to the most intrusive. *First*, there are . . . “consensual encounters” [citation], which are those police-individual interactions which result in no restraint of an individual’s liberty whatsoever—i.e., no “seizure,” however minimal—and which may properly be initiated by police officers even if they lack any “objective justification.” [Citation.] *Second*, there are what are commonly termed “detentions,” seizures of an individual which are strictly limited in duration, scope and purpose, and which may be undertaken by the

⁹ The Fourth Amendment provides “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated” (U.S. Const., 4th Amend.) “This guarantee has been incorporated into the Fourteenth Amendment to the federal Constitution and is applicable to the states.” (*People v. Camacho* (2000) 23 Cal.4th 824, 829.)

police “if there is an articulable suspicion that a person has committed or is about to commit a crime.” [Citation.] *Third*, and finally, there are those seizures of an individual which exceed the permissible limits of a detention, seizures which include formal arrests and restraints on an individual’s liberty which are comparable to an arrest, and which are constitutionally permissible only if the police have probable cause to arrest the individual for a crime.” [Citation.]’ (Italics added.)” (*People v. Profit* (1986) 183 Cal.App.3d 849, 863 (*Profit*), quoting from *Wilson v. Superior Court* (1983) 34 Cal.3d 777, 789 (*Wilson*).)

“[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter.’ . . . Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer’s display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer’s request might be compelled.” (*In re Manuel G.* (1997) 16 Cal.4th 805, 821, citing *United States v. Mendenhall* (1980) 446 U.S. 544, 554.)

Here, Detective Lackovic testified that he approached defendant in order to question her about a homicide he was investigating because she had been identified as a “person of interest.” He immediately asked defendant her name, to which she responded he didn’t need to know her name; and in response to defendant’s question asking who he was, Detective Lackovic identified himself as a police officer.

The parties agree that a police officer has the right to approach an individual to ask a few questions. (*Wilson*, 34 Cal.3d at p. 790 “[I]t is evident that [the detective] did not detain [defendant], for federal constitutional purposes, merely by approaching him, identifying himself as a police officer, and asking if he might have a minute of his time”]; *People v. Lopez* (1989) 212 Cal.App.3d 289, 291 [“it is quite clear police do not need to have a reasonable suspicion in order to ask questions or request identification”].)

Defendant argues that her encounter with Detective Lackovic became unreasonable when he continued to question her after she made it clear to him that she did not want to talk. Although Detective Lackovic testified that defendant stated “I don’t want to talk to you,” he later clarified that she never actually stated those words; rather, because she was not answering his questions directly, he got the “impression” that defendant did not want to speak with him. “Mere questioning is neither a search nor a seizure.” (*People v. Brown* (1998) 62 Cal.App.4th 493, 499.) Thus, Detective Lackovic’s further questioning of defendant was not by itself a Fourth Amendment violation.

Nor was there anything in the record to suggest defendant had any objective reason to believe “she was not free to end the conversation . . . and proceed on her way.” (*U.S. v. Mendenhall*, *supra*, 446 U.S. at p. 555.) While questioning defendant, Detective Lackovic stood in a public area approximately five feet from her, he maintained a calm and polite tone of voice, and at no point did he draw his weapon or use any commands or orders. (*People v. Epperson* (1986) 187 Cal.App.3d 115, 120 [concluding there was no seizure of defendant when “[t]he conversation occurred in a public place . . . and there was no show of force or threats, express or implied”].) He never accused defendant of committing a crime, but asked her general

investigatory questions such as where she lived, and if she knew anything about the homicide in the alley. (*People v. Lopez, supra*, 212 Cal.App.3d at p. 293 [concluding particular questions asked did not turn defendant's encounter with police officers into nonconsensual detention when they "were brief, flip, and, most importantly, did not concern criminal activity"].)

Based on the totality of these circumstances, we conclude the brief encounter between Detective Lackovic and defendant was consensual and it was during this consensual encounter that both detectives formed the opinion that she was under the influence of a controlled substance and determined to arrest her. The detectives' observations of defendant exhibiting symptoms of drug use did not violate her Fourth Amendment rights. (*In re Manuel G., supra*, 16 Cal.4th at p. 821; *Profit, supra*, 183 Cal.App.3d at p. 867.) Accordingly, the trial court did not err in denying defendant's motion to suppress.

DISPOSITION

The judgment of conviction is affirmed.

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GOODMAN, J.*

We concur:

CHAVEZ, Acting P.J.

HOFFSTADT, J.

* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.