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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. SEBASTIAN RUBEN BERNARD, Defendant and Appellant.	B270975 Los Angeles County Super. Ct. No. NA103583

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark C. Kim, Judge. Reversed and remanded with directions.

Gloria C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, and David W. Williams, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Sebastian Bernard appeals from a no contest plea entered after the trial court denied his motion to suppress. Defendant contends that police did not have reasonable suspicion to detain him because the observed facts—that defendant was talking to someone who was holding a can of beer—did not support an objectively reasonable belief that defendant was engaged in criminal activity; the evidence seized after the unlawful detention should therefore have been suppressed as the direct product of the detention. We agree, and reverse and remand with directions.

BACKGROUND

Defendant was charged by criminal complaint with one count of possession of a baton (Pen. Code, § 22210).[1] He moved to suppress evidence and statements obtained after a warrantless search (§ 1538.5), contending his detention, warrantless search, and arrest were unreasonable because officers lacked reasonable and articulable suspicion that he had been or was about to be engaged in criminal activity.

On March 2, 2016, the court considered the suppression motion concurrently with the preliminary hearing. Long Beach Police Department Officer Kevin Matter was the sole witness. He testified as follows.

1. Testimony Presented

On February 14, 2016 at around 5:00 p.m., Officers Matter and Sturgeon of the Long Beach Police Department were on

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1 All undesignated statutory references are to the Penal Code.

patrol in a marked police car. Matter had been a police officer for four months. As they drove west down a residential street, Matter saw two men standing on the sidewalk; the two men were on the south side of the street talking to each other.[2] Matter was in the passenger seat and had to look through the driver's window to see the interaction 25 feet away. One of the men, later identified as defendant, was facing away from the street; Matter could not see his hands. The other man was holding a can later identified as Tecate beer; the record does not disclose whether the can was open or closed. Though Matter could see the other man holding the can, he did not see either man drink from it.

Sturgeon stopped the patrol car and ordered both men over to the front of the car; Matter intended to investigate "an open alcoholic beverage container in public." He did not watch defendant turn around or cross the street, and did not attempt to determine whether defendant was holding a can of beer. Nevertheless, Matter believed "they both may be drinking. They both appeared to be engaged in conversation, and as they approached our vehicle, neither of them had anything in their hands."[3] Matter explained that though he had seen people drinking alone in public, and though he had seen groups in which only some people were drinking, it was also "extremely common for people to be drinking in public in pairs when they are together and engaged in close conversation, as it appeared that the two

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[2] The record does not identify the other man, and he is not a party to this appeal.

[3] The other man apparently put the can on the ground before crossing the street to the police cruiser; no other alcohol was ever recovered.

were. When both subjects were approaching our car, neither of them had anything in their hands, and I believe that it may have been possible for either one or both, if [defendant] did have a beverage in his hand, to have ditched it."

Matter testified that by the time Sturgeon summoned them to the patrol car, neither man was free to leave. Defendant obeyed Matter's instructions throughout the encounter. He did not attempt to flee. Matter explained that had they failed to obey, he would have detained them anyway, and that he planned to search defendant regardless of whether defendant ultimately had a can of beer. Further, such a search was not required by police department policy; it was a discretionary choice.

Matter asked defendant for permission to search him. Defendant replied, "Yeah, that's fine." Defendant admitted that he had a "pipe thing" and a knife in his back right pocket and gave Matter permission to remove them. Matter recovered a black folding knife and a black pipe that was "expandable, collapsible, and was weighted and heavy. [Matter] later recognized that item as a baton." Matter then ran a wants and warrants search for defendant; defendant had none. He arrested defendant for possession of the baton. Defendant waived his *Miranda*[4] rights and explained that "he had the baton because he was a small guy and needed it for protection."

Defense counsel argued that defendant had indisputably been detained and that the detention was unlawful. He was detained solely based on his proximity to another man whom officers believed was committing an offense. Matter's proffered basis for entertaining a suspicion of criminal activity—that

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[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

people sometimes drink in pairs and sometimes do not—was not objectively reasonable. Accordingly, all observations, statements, and evidence uncovered as a result of the unlawful detention should be suppressed.

The prosecutor did not present additional argument or cite to any legal authority. Instead, when defense counsel finished, the court turned to the prosecutor and said, "Obviously, I have to ask what your position is on the case. [¶] I assume it is that you're arguing that there was a reasonable suspicion that the defendant was sharing this Tecate or had his own Tecate and, under *Terry*, there was a reasonable detention at that point, that under the circumstances, if there, in fact, was not a separate can that the defendant had, that he still had a reasonable suspicion that they were sharing that can." The court went on, "After that, your argument, I assume, is that the defendant voluntarily agreed to a search." The court speculated on further arguments the prosecutor might make concerning the search, and concluded by asking, "Was there something else you wanted to add?" There was not.[5] The court denied the motion and held defendant to answer on the complaint.

2. The Plea

Defendant was charged by information dated March 16, 2016 with one count of possession of a baton (§ 22210; count 1). Later that day, he entered a negotiated plea of no contest. The court suspended imposition of sentence and placed defendant on three years of formal probation. Among other probation

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[5] Defense counsel objected to the court's remarks, noting that the court "just articulated the entire prosecution argument for the prosecution for which they could then agree with the court."

conditions, defendant was ordered to serve 180 days in county jail, waive all protections under the newly-enacted Electronic Communications Privacy Act (§§ 1546–1546.4) and submit all "electronic information" to warrantless search, and pay the cost of probation services.[6]

Defendant filed a timely notice of appeal challenging the denial of the motion to suppress (§ 1538.5, subd. (m)).

CONTENTIONS

Defendant argues that the court erred by denying his motion to suppress because talking to someone who was holding a can of beer, without more, did not support a reasonable suspicion that defendant was engaged in criminal activity. Because the detention was improper, he argues, the resulting search was invalid. The People concede defendant was detained, but argue the detention was reasonable because defendant was talking with a friend, he was standing in a position that suggested he was holding a drink, and people usually drink in pairs.

We agree with defendant that Officer Matter did not have reasonable suspicion of defendant's involvement in criminal activity at the time he was detained. Accordingly, because the

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[6] We cannot determine from the record before us whether the parties negotiated all of these particular probation terms, and if so, whether the court imposed the negotiated terms. We note, however, that the probation department recommended 90 days in county jail and did not suggest an electronic-search condition.

court's contrary finding was not based upon substantial evidence, we reverse the judgment and remand the matter with directions.[7]

DISCUSSION

1. Standard of Review

"On review of a motion to suppress, we defer to the trial court's factual findings, where supported by substantial evidence, but must independently assess, as a question of law, whether under the facts as found the challenged search and seizure conforms to the constitutional standards of reasonableness." (*People v. Franklin* (1987) 192 Cal.App.3d 935, 939.) "[W]here, as is the case here, there is no controversy concerning the underlying facts, our task is simplified: The only issue is whether that rule of law, as applied to the undisputed historical facts, was or was not violated. This is an issue for our independent review. (See *People v. Thompson* (2006) 38 Cal.4th 811, 818.)" (*People v. Walker* (2012) 210 Cal.App.4th 1372, 1380.)

2. Reasonable Suspicion

The Attorney General concedes, as did the prosecution below, that the police detained defendant when they ordered him

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[7] Defendant also challenges the constitutionality of the probation condition requiring him to waive all protections provided in the Electronic Communications Privacy Act (§§ 1546–1546.4) and to submit all "electronic information" to warrantless search (§ 1546, subd. (h)). In light of our conclusion that the detention was unreasonable, we do not address this argument. (See *People v. Brown* (2003) 31 Cal.4th 518, 534 ["It is well established that we do not reach constitutional questions unless absolutely required to do so to dispose of the matter before us." (Internal quotation marks omitted)].)

to come to the front of the police car. The question before us, therefore, is whether the detention was reasonable.

To "justify an investigative stop or detention" under the Fourth Amendment, "the circumstances known or apparent to the [detaining] 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. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so; the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience [citation], to suspect the same criminal activity and same involvement by the person in question." (*In re Tony C.* (1978) 21 Cal.3d 888, 893, emphasis added.)

" 'Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.' " (*People v. Souza* (1994) 9 Cal.4th 224, 230, quoting *United States v. Cortez* (1981) 449 U.S. 411, 417–418.) Detentions may not be based on a mere hunch and may not be justified by an officer's good faith. (*Terry v. Ohio* (1968) 392 U.S. 1, 22.)

3. The police lacked a particularized, objective basis to believe defendant was engaged in criminal activity.

Here, the only suspected criminal activity was the drinking of alcohol from an open container in a public place. The record demonstrates that Officer Matter, in his investigation of this possible violation, detained defendant based on the following:

- Matter observed defendant talking to a third party;
- Matter could not see defendant's hands; and
- The third party was holding a can of Tecate beer.

The issue before us is not whether these facts justified consensual questioning or further investigation; the question is whether they justified a detention. (See *Florida v. Royer* (1983) 460 U.S. 491, 497–498 [officers may approach someone on the street and ask if he will answer questions, but may not detain anyone, even briefly, without reasonable grounds].) The court below concluded they did—that is, that the facts raised a reasonable suspicion that defendant was engaged in criminal activity. We address these circumstances singly and collectively.

First, while Matter testified that he detained defendant to investigate an open container violation, there is no evidence that *anyone* possessed an open container of alcohol.[8] Matter did not

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[8] There is some question about what law Matter believed the men were violating. At the suppression hearing, Matter did not disclose what open container or public drinking law provided the basis for the detention. Since neither party addresses that issue, however, we will assume that when defendant was detained, there was an ordinance prohibiting the public drinking of alcohol from an open container.

see defendant holding a can of beer; he saw defendant *talking* to someone who was holding a single can of beer. Importantly, there is no evidence that the can was open. Nor is there evidence from which the presence of an open container could be reasonably inferred. Matter did not see the third party drink from the can. He did not see the person raise the can towards his face. He did not see the third party make any arm movements consistent with drinking.

Second, even assuming the beer-holder was holding an *open* can, there is no non-speculative evidence from which Matter could have inferred that defendant *also* possessed an open container. Matter could not see defendant's hands. There was no other beer or liquor in the pair's vicinity—open, closed, or empty. There is no evidence the men were standing near a liquor store. There is also no evidence that either man appeared underage[9] or that they were standing on a residential block known for public intoxication. The beer-holder was not surrounded by food, additional alcohol, or the sort of general merriment that might indicate that he was hosting a party at which he might serve—and defendant might opt to open or consume—an adult beverage. (Cf. *People v. Redrick* (1961) 55 Cal.2d 282, 285 ["proof of opportunity of access to a place where narcotics are found, without more, will not support a finding of unlawful possession"].)

The People nevertheless argue that when these circumstances are combined with Matter's experience that it is "extremely common for people to be drinking in public in pairs when they are together and engaged in close conversation," the

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[9] In fact, defendant was 34 years old.

detention becomes reasonable. While a police officer may draw on his own experience, however, that experience is not a substitute for particularized suspicion. (See *People v. Hernandez* (2008) 45 Cal.4th 295, 300–301 [officer's experience that temporary permits are often invalid does not authorize him to stop car without plates but with a temporary permit].) This is especially true given that Matter had only been a police officer for four months, and testified he was never trained at the police academy that people drink in pairs. Even if we assume either that adults regularly share single cans of beer or that the presence of one can necessarily implies the presence of another, the People's drinking-together theory still fails unless, in the first instance, at least one member of the pair is drinking—and as we have noted, no such evidence was presented.

Further, the People's theory rests on an undue number of speculative inferences. Matter apparently assumed that since the third party was holding a can of beer, he must have been holding an *open* can of beer. Then he speculated that because he could not see defendant's hands, defendant must have been holding *something*, and since, in his experience, people typically drink in pairs, defendant's conversation with the beer-holding man probably meant that defendant had his own can of beer or had joint possession of the third-party beer. Yet Matter made no effort to determine whether defendant *actually had* any beer. He did not conduct any additional investigation. He did not seek a consensual encounter. He did not walk across the street to ask questions. He did not even watch defendant turn around. He just detained the two men.

In considering "the totality of the circumstances" (*United States v. Cortez*, *supra*, 449 U.S. at p. 417), the facts presented

here were insufficient to "provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza*, *supra*, 9 Cal.4th at p. 231.) Nothing in defendant's appearance or behavior raised a reasonable suspicion that he was carrying or drinking from an open container of alcohol. He did not make furtive movements, attempt to flee, or resist the officers in any way. There was no evidence he was swaying or stumbling. In fact, Matter testified defendant was "standing still" while he was talking to the other man. In short, the officers' basis for stopping defendant was at best impermissibly "predicated on mere curiosity, rumor, or hunch ... ." (*In re Tony C.*, *supra*, 21 Cal.3d at p. 893; see *People v. Durazo* (2004) 124 Cal.App.4th 728, 735–736 [no reasonable suspicion where officer had a "gut feeling" defendants were involved in criminal activity but could not articulate any facts to support the hunch other than objectively innocuous behavior].)

Because the officers had no reasonable suspicion defendant was engaged in criminal activity, they had no right to detain him. (*People v. Bower* (1979) 24 Cal.3d 638, 644.) The officers' improper detention of defendant vitiated any subsequent consent to the search and interrogation concerning the baton. (*Florida v. Royer*, *supra*, 460 U.S. at p. 501 ["statements given during a period of illegal detention are inadmissible even though voluntarily given if they are the product of the illegal detention"]; *Miller v. United States* (1958) 357 U.S. 301, 313–314 [suppression required of contraband seized after search incident to unlawful arrest].) Since the baton and statements concerning the baton are fruits of a poisonous tree (*Wong Sun v. United States* (1963) 371 U.S. 471, 484–488), the court should have suppressed them.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with directions to grant defendant's motion to suppress and vacate his plea.

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LAVIN, J.

WE CONCUR:

ALDRICH, Acting P. J.

GOSWAMI, J.*

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