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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM JOSEPH LEWIS, Defendant and Appellant.	B237686 (Los Angeles County Super. Ct. No. YA081051)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eric C. Taylor, Judge. Affirmed as modified.

Kimberly Howland Meyer, 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, Victoria B. Wilson and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Upon the denial of his motion to suppress evidence (Pen. Code, § 1538.5), defendant William Joseph Lewis pleaded no contest to one count of possession of a controlled substance (Health and Saf. Code, § 11350, subd. (a)) and admitted three prior conviction allegations (*id.* at § 11370, subds. (a), (c)). The trial court entered judgment and, after suspending the imposition of sentence, placed defendant on probation pursuant to Proposition 36.

Defendant contends on appeal that his suppression motion should have been granted because he was unlawfully detained and searched in violation of the Fourth Amendment. We conclude the trial court properly denied the suppression motion. However, the sentence must be modified because the court miscalculated the conduct credits to which defendant was entitled and failed to impose a mandatory fine. As modified, the judgment is affirmed.

BACKGROUND

I. The Evidence

At the hearing on the suppression motion, Torrance Police Officer Tyrone Gribben testified as follows:

At about noon on May 9, 2011, Gribben was on patrol with his partner when he saw defendant standing near a motorcycle that was parked illegally on the sidewalk in front of a motel. Gribben was familiar with the area because he had made over 50 arrests at that location for narcotics, stolen vehicles, firearms, and "just about everything" else.

Gribben walked over to defendant and initiated a conversation about the motorcycle, which defendant admitted was his. Gribben made "small talk" and said he thought the motorcycle was "nice." He asked for defendant's identification, but did not display a weapon or tell defendant he could not leave. He might have told defendant the motorcycle was parked illegally. He asked a series of questions concerning defendant's residence, occupation, prior record, medications, and possession of anything illegal.

After a minute or two elapsed, Gribben's partner joined them. By that point in the encounter, which was recorded,[1] Gribben was concerned about his safety. His concerns were based on his knowledge of the location and the number of armed individuals he had arrested there for weapons offenses, defendant's baggy clothing that was obscuring his waistband, and defendant's unusually nervous demeanor which indicated he was "nervous about something [more] than just a simple parking violation." Alarmed by the manner in which defendant was fidgeting with his hands, looking away, and "continuously . . . sweating," Gribben announced he was going to check defendant's waistband, which was covered by a loose shirt: "Based on his demeanor, my past experiences in and around that area, specifically that hotel, and the fact that I was there investigating the motorcycle parked on the sidewalk, I detained Mr. Lewis and decided, based on all those things before, that I was going to conduct a pat-down search on him for weapons prior to going any further on my investigation."

At that point, defendant was detained and told to place his hands behind his head while Gribben patted his waistband and found no weapons. Gribben inquired whether he had anything illegal in his pockets. Defendant said he did not. Gribben asked, "You don't mind if I check?" Defendant responded, "No, I don't understand why you're checking," which Gribben understood to be a denial of consent. Gribben stated, "Hold on, hold on, stay right there, keep your hands right up there." After asking again if he had any weapons, Gribben instructed defendant to "keep your hands right here, spread your feet, and interlace your fingers behind your head because you're starting to make me worried, now."

As Gribben patted the outside of defendant's pants pockets, he felt a "fairly large bulge" in the left front pocket. He felt both a soft object and a larger hard object, which

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[1] At the suppression hearing, neither party introduced the audio recording of Gribben's encounter with defendant, which lasted four minutes.

he believed might be some type of folding knife or small gun.[2] Gribben asked defendant what he had in his pocket, and defendant mentioned a pack of cigarettes and a zip-up case for an earpiece. Gribben reached inside the pocket and removed "a pack of cigarettes, and . . . a hard black zip-up case about four inches by three inches in diameter."

After obtaining defendant's permission, Gribben opened the hard zip-up case and found a white substance that resembled rock cocaine: "I asked him if he minded if I looked in there, and he indicated that he did not mind, and I conducted a search of its contents." The hard case contained a "black plastic bindle" inside "a tight netting." The bindle, which could not be "seen easily," "obviously had some type of narcotic in it. I opened it up and [found] a white crystalized rock, which I recognized as rock cocaine." After defendant admitted the rock cocaine was his, Gribben asked why he had allowed him to search inside the case "considering he had already denied a search earlier, and he basically indicated that he just didn't think I would find it."

Defendant was arrested for a narcotics violation but was not cited for a Vehicle Code violation.

II. The Arguments and Ruling Below

The prosecution argued below that the detention, patsearch, and search inside the zip-up case were lawful for the following reasons: The initial encounter was consensual. As a result of defendant's unusually nervous behavior, the large shirt that was obscuring defendant's waistband, and the prior arrests that Gribben had made at the same location for weapons violations, Gribben became legitimately concerned that defendant might be armed and dangerous. Accordingly, it was lawful for Gribben to detain defendant and pat the outside of his clothing for weapons. Upon feeling a hard object in defendant's pocket that might be a weapon, Gribben lawfully removed the suspicious object to ensure his

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[2] At oral argument, defendant's counsel correctly pointed out that Gribben acknowledged the item was soft when he manipulated it. However, he went on to state, "It was soft on one end, and there was something else on there that was fairly large. It was hard."

safety. Gribben obtained defendant's voluntary consent before opening the hard zip-up case and examining its contents.[3]

Defendant argued, on the other hand, that because the detention was unlawful, the patsearch was also unlawful. In defendant's view, he was detained from the inception of the encounter and the detention became unlawful when it was unduly prolonged beyond the time reasonably necessary to cite him for a simple parking violation. In addition, he argued the search inside the zip-up case was not consensual.

After a lengthy hearing that consumed several court sessions, the trial court found the detention and searches leading to the discovery of the controlled substance were lawful. It therefore denied the suppression motion.

Although the record does not contain a written order setting forth the trial court's findings, we draw the following inferences from the reporter's transcript of the hearing. Upon consideration of Gribben's testimony and the arguments of both counsel, the trial court indicated that Gribben was a credible witness and that the detention and patsearch were lawful. The court then turned to the final question, whether defendant had consented to the search of the zip-up case. Although earlier the court had indicated the search of the zip-up case was not consensual, the court now expressed the opposite opinion. Moments before denying the suppression motion, the court stated that "from the words that you have read to me and the way that they were read to me they are — they are certainly a good argument that your client consented to search after the pouch was out of his pocket." Viewing the record as a whole, we infer the trial court ultimately found the search of the zip-up case was consensual.

Following the denial of the suppression motion and acceptance of defendant's no contest plea, the court entered judgment and, after suspending the imposition of sentence, placed him on probation for six months under Proposition 36. This timely appeal followed.

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[3] The prosecution's alternative theory—that the search was conducted incident to arrest—will not be discussed because it is not necessary to our determination of the appeal.

DISCUSSION

The Search of Defendant

I. Standard of Review

"'"An appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] 'The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review.' [Citations.] [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review." (*People v. Williams* (1988) 45 Cal.3d 1268, 1301.)' (*People v. Alvarez* (1996) 14 Cal.4th 155, 182 (*Alvarez*); see also *People v. Superior Court* (*Keithley*) (1975) 13 Cal.3d 406, 410 [the trial court's findings must be upheld if supported by substantial evidence].)

"'The Fourth Amendment, made applicable to the states through the Fourteenth Amendment's due process clause (*Mapp v. Ohio* (1961) 367 U.S. 643, [650]-660; *Wolf v. Colorado* (1949) 338 U.S. 25, 27-28, overruled on another point, *Mapp v. Ohio, supra,* 367 U.S. at pp. 654-655), guarantees "the people" "[t]he right . . . to be secure . . . against unreasonable searches and seizures . . . ." "[A] Fourth Amendment 'seizure' occurs when a vehicle is stopped at a checkpoint" by a law enforcement officer. (*Michigan Dept. of State Police v. Sitz* (1990) 496 U.S. 444, 450.) "The question thus becomes whether such [a] seizure[] [is] 'reasonable' under the Fourth Amendment." (*Ibid.*)' (*Alvarez, supra,* 14 Cal.4th at pp. 182-183; see also *Terry v. Ohio* (1968) 392 U.S. 1, 19 [for any type of detention, the overall standard to which the government must adhere is that of

reasonableness]; *People v. McGaughran* (1979) 25 Cal.3d 577, 584 ['the officer may temporarily detain the offender at the scene for the period of time necessary to discharge the duties that he incurs by virtue of the traffic stop'].)

"Further, any challenge to the admissibility of a search or seizure must be evaluated solely under the Fourth Amendment. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1171; *In re Lance W.* (1985) 37 Cal.3d 873, 879; see also *California v. Greenwood* (1987) 486 U.S. 35, 38.) '"An illegal search or seizure violates the federal constitutional rights only of those who have a legitimate expectation of privacy in the invaded [space] or the seized thing. (*United States v. Salvucci* (1980) 448 U.S. 83, 91-92.) The legitimate expectation of privacy must exist in the *particular area searched or thing seized* in order to bring a Fourth Amendment challenge." (*People v. Hernandez* (1988) 199 Cal.App.3d 1182, 1189, italics in original.)' (*People v. McPeters*, *supra*, 2 Cal.4th 1148, 1171.) The burden is on the defendant to establish that a legitimate expectation of privacy (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 104) was violated by government conduct." (*People v. Carter* (2005) 36 Cal.4th 1114, 1140-1141.)

II. The Detention Was Lawful

Defendant contends the detention became unlawful when it was prolonged beyond the time reasonably necessary to issue a parking citation. He relies on the general rule for routine traffic stops that once a driver provides proper identification and signs a citation containing a written promise to appear, the driver is free to go. (*People v. McGaughran*, *supra*, 25 Cal.3d at p. 583.)

The evidence reasonably showed, however, that defendant was not detained until midway through the four-minute encounter when his unusually nervous behavior caused Gribben, who could not see his waistband and had arrested others at the same location for weapons violations, to suspect he might be armed and dangerous. We disagree that the detention was unduly prolonged. As discussed below, the evidence, when viewed in the light most favorable to the trial court's ruling, reasonably supported the finding that

defendant was lawfully detained midway through the encounter as a result of Gribben's justifiable suspicion that he was carrying a concealed weapon.

III. The Patsearch Was Lawful

Defendant contends the patsearch was unlawful because the circumstances did not support a reasonable suspicion that he was carrying a weapon. We are not persuaded.

A. Patsearches Generally

"When an officer reasonably suspects that an individual whose suspicious behavior he or she is investigating is armed and dangerous to the officer or others, he or she may perform a patsearch for weapons. (*Terry v. Ohio*, *supra*, 392 U.S. at pp. 24, 30; *Giovanni B. v. Superior Court* (2007) 152 Cal.App.4th 312, 320; *People v. Dickey* (1994) 21 Cal.App.4th 952, 955-956; *People v. Garcia* (2006) 145 Cal.App.4th 782, 786.) The sole justification for the search is the protection of the officer and others nearby, and the search must therefore be confined in scope to an intrusion reasonably designed to discover weapons. (*Terry v. Ohio*, *supra*, at p. 29.) A patsearch is a 'serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.' (*Id.* at p. 17, fn. omitted.) On the other hand, law enforcement officers have a legitimate need to protect themselves even where they may lack probable cause for an arrest. (*Id.* at p. 24.) The officer has an immediate interest in taking steps to ensure that the person stopped 'is not armed with a weapon that could unexpectedly and fatally be used' against the officer. (*Id.* at p. 23.)

"Such a limited frisk for weapons is justified where the officer 'can point to specific and articulable facts which, considered in conjunction with rational inferences to be drawn therefrom, give rise to a reasonable suspicion that the suspect is armed and dangerous.' (*People v. Medina* [(2003)] 110 Cal.App.4th [171,] 176; see *Ybarra v. Illinois* (1979) 444 U.S. 85, 92-93; see *Terry v. Ohio*, *supra*, 392 U.S. at p. 21; *People v. Lindsey* (2007) 148 Cal.App.4th 1390, 1395-1396; *People v. Lopez* (2004) 119 Cal.App.4th 132, 135; *People v. Dickey*, *supra*, 21 Cal.App.4th at p. 956; *People v.*

Miranda (1993) 17 Cal.App.4th 917, 927 [minor traffic offenses do not reasonably suggest the presence of weapons, and an officer may not search a driver unless the objective circumstances furnish reasonable grounds to believe the driver is armed or dangerous and may gain immediate control of a weapon].)

"'[T]he officer need not be absolutely certain that the individual is armed; the crux of the issue is whether a reasonably prudent person in the totality of the circumstances would be warranted in the belief that his or her safety was in danger.' (*People v. Avila* (1997) 58 Cal.App.4th 1069, 1074; see *Terry v. Ohio*, *supra*, 392 U.S. at p. 27.) Reasonable suspicion must be based on 'commonsense judgments and inferences about human behavior.' (*Illinois v. Wardlow* [(2000)] 528 U.S. [119,] 125.) The determination of reasonableness is 'inherently case-specific.' (*People v. Durazo* [(2004)] 124 Cal.App.4th [728,] 735.) An inchoate and unparticularized suspicion or hunch is not sufficient, nor is the fact the officer acted in good faith. (*Terry v. Ohio*, *supra*, at pp. 22, 27.) Where specific and articulable facts are absent, the patsearch cannot be upheld. (*People v. Dickey*, *supra*, 21 Cal.App.4th at p. 956.) Whether a search is reasonable must be determined based upon the circumstances known to the officer when the search was conducted. (*In re Jaime P.* (2006) 40 Cal.4th 128, 133.)" (*In re H.M.* (2008) 167 Cal.App.4th 136, 143-144.)

B. The Finding That the Patsearch Was Justified Is Supported by Substantial Evidence

In this case, the trial court found the patsearch was justified because (1) the officer had made over 50 arrests at that same location for narcotics, stolen vehicles, firearms, and "just about everything" else; (2) defendant's voice and mannerisms—he was fidgeting with his hands, looking away, and sweating continuously—caused him to seem unusually nervous for a person who had committed a simple parking violation; and (3) the officer could not see defendant's waistband, which was covered by a large shirt.

A defendant's unusually nervous behavior is a legitimate factor in assessing the reasonableness of a patsearch for weapons. In *In re H.M.*, *supra*, 167 Cal.App.4th 136,

for example, the court stated: "We conclude the trial court correctly held the detective had a reasonable suspicion H.M. was armed. H.M. was not stopped solely because he committed a minor traffic violation. H.M. was also stopped because of his unusual, suspicious behavior. Magallon observed H.M. dashing through heavy traffic, causing motorists to honk and swerve. H.M.'s facial expression and his repeated glances behind as he ran suggested he was frightened and fleeing from a dangerous situation. The fact he was sweating profusely and appeared confused and nervous reinforced this impression. Nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. (*Illinois v. Wardlow*, *supra*, 528 U.S. at p. 124.) Viewed objectively, through the lens of common sense and experience, H.M.'s odd behavior strongly suggested criminal activity was afoot. Indeed, we can conceive of few hypotheses explaining H.M.'s conduct, other than that he was either a perpetrator or a victim fleeing a crime scene." (*In re H.M.*, *supra*, 167 Cal.App.4th at p. 144.)

Similarly, defendant in this case was not detained simply because of a parking violation, but because he was nervously fidgeting, sweating continuously, and looking away, and the location was one in which Gribben had made several arrests for firearms offenses. The fact that defendant was standing next to a motorcycle that was parked illegally on the sidewalk in a high crime area was a legitimate factor in assessing the reasonableness of the patsearch.

"To be sure, the mere fact a person is located in a high-crime area when stopped by police does not, by itself, give rise to a reasonable suspicion that the individual is armed. (*Illinois v. Wardlow*, *supra*, 528 U.S. at p. 124 ['An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime']; *People v. Perrusquia* (2007) 150 Cal.App.4th 228, 233; *People v. Medina*, *supra*, 110 Cal.App.4th at p. 177.) Nonetheless, the character of the locale where the stop occurs is a factor to be considered in a Fourth Amendment analysis. '[O]fficers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. Accordingly, . . . the fact that the stop

occurred in a "high crime area"' is one of the 'relevant contextual considerations in a *Terry* analysis.' (*Illinois v. Wardlow*, *supra*, at p. 124; see also *People v. Souza* [(1994)] 9 Cal.4th [224,] 240 ['An area's reputation for criminal activity is an appropriate consideration in assessing whether an investigative detention is reasonable under the Fourth Amendment']; *People v. Medina*, *supra*, 110 Cal.App.4th at p. 177.)" (*In re H.M.*, *supra*, 167 Cal.App.4th at p. 145.)

Given that Gribben had arrested other armed individuals near the same motel, he was justifiably concerned for his safety when defendant, who was wearing a large shirt that covered his waistband, exhibited unusually nervous behavior under the circumstances. We conclude the trial court correctly determined that the patsearch was justified by Gribben's objectively reasonable suspicion that defendant was armed.

Defendant argues the removal of the soft objects from his pocket was unlawful. However, Gribben testified that he felt both soft and hard objects in defendant's pocket, and that he thought the hard object might be a folding knife or small gun. The objects retrieved from defendant's pocket were shown to Gribben at the hearing, and the trial court, which had an opportunity to observe both objects, found his testimony was credible.

We defer, of course, to the trial court's fact and credibility determinations. "The primary reason for deferring to the trial court's factfinding ability is that the resolution of conflicting evidence will necessarily depend upon the relative credibility of the witnesses offering that evidence. The trier of fact is the sole judge of that credibility (*Estate of Teel* (1944) 25 Cal.2d 520, 526), because only the trier of fact has the opportunity to observe and hear the witnesses. By contrast, an appellate court has nothing but the cold written record of the words spoken, which 'cannot give the look or manner of the witnesses; their hesitations, their doubts, their variations of language, their precipitancy, their calmness or consideration. A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression.' (*Maslow v. Maslow* (1953) 117 Cal.App.2d 237, 243, overruled on another

ground in *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 287, fn. 3.)" (*People v. Jackson* (1992) 10 Cal.App.4th 13, 20-21.)

IV. The Finding That Defendant Consented to the Search of the Case Is Supported by Substantial Evidence

Defendant contends the "trial court found that because Lewis's response to the officer's request for permission to search the case was ambiguous, there was no clear consent to open the case." We disagree. As previously mentioned, based on our reading of the transcript, we infer the trial court found that defendant had consented to the search of the case.

We conclude the finding of consent was amply supported by Gribben's testimony. Gribben testified that after discovering the white substance inside the case, he asked why defendant had agreed to let him search the case. Gribben asked whether defendant "figured I wouldn't find it when you let me look in there?" Defendant answered yes. This testimony, which the court found credible, reasonably supports a finding that the search of the case was consensual.

Defendant's Sentence

The Attorney General contends defendant's sentence must be corrected because the trial court miscalculated the number of conduct credits and failed to impose a mandatory $30 fine pursuant to Government Code section 70373, subdivision (a)(1). Defendant does not dispute either contention. We conclude the Attorney General is correct and we will remedy the error. (*People v. Smith* (2001) 24 Cal.4th 849, 854 [unauthorized sentence may be corrected at any time whether or not objection was lodged in the trial court].)

The trial court gave defendant credit for three days of custody time and three days of conduct credit. This was error. At the time of defendant's offense, former Penal Code section 4019, subdivision (f) provided that "a term of six days will be deemed to have

been served for every four days spent in actual custody." Interpreting the same statutory language, the court in *People v. Smith* (1989) 211 Cal.App.3d 523, 527, observed: "Credits are given in increments of four days. No credit is awarded for anything less." As defendant served only three days in custody, he was entitled to no conduct credits.[4]

Government Code section 70373, subdivision (a)(1) provides that "an assessment shall be imposed on every conviction for a criminal offense," with exceptions not relevant here. The amount of the fine is $30 for each felony or misdemeanor conviction. The trial court did not impose the fine, thus resulting in an unauthorized sentence. (*People v. Rodriguez* (2000) 80 Cal.App.4th 372, 376.)

DISPOSITION

The judgment is modified to reflect that defendant is entitled to no presentence conduct credits and is required to pay a $30 fine pursuant to Government Code section 70373, subdivision (a)(1).

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.

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[4] The Attorney General also incorrectly calculated the conduct credits, concluding defendant was entitled to two days.