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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. CLINT BEVERFORD, Defendant and Appellant.	2d Crim. No. B290034 (Super. Ct. No. 2016038227) (Ventura County)

Clint Beverford appeals a judgment following his conviction for possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1))[1] (count 1); carrying a loaded firearm in a vehicle (§ 25850, subd. (a)) (count 2); possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) (count 3); possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) (count 4); and possession of drug paraphernalia (Health & Saf. Code, § 11364, subd. (a)) (count 5). Beverford admitted the

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

special allegations as to counts 1 and 2 that he had served a prior prison term. (§ 667.5, subd. (b).)

We conclude, among other things, that the trial court did not err: 1) by denying Beverford's motion to suppress evidence (§ 1538.5); and 2) by not instructing the jury on the defense of momentary possession for counts 1 and 2. We affirm.

FACTS

On the morning of October 22, 2016, Police Officer Brandon Mascorro was driving his black and white police car near the beach. A man waived his hand at Mascorro to call his attention. Mascorro pulled over to talk with him. The man told Mascorro that two people in a parked Chrysler 300 automobile "appeared to be smoking some type of narcotic." This vehicle was "less than a quarter of a mile" away.

Mascorro promptly drove to that area and saw the parked vehicle described by the witness. Beverford was in the driver's seat. As Mascorro approached, Elizabeth Contreras "was exiting" the passenger seat of the Chrysler and going towards the trunk of that car.

Mascorro got out of the patrol car, walked to the Chrysler, and told Beverford that he was investigating a report that Beverford and Contreras "were possibly smoking narcotics in the vehicle." Beverford said that "they just arrived and there was no reason for anybody to believe that." Mascorro asked if Beverford or Contreras was on probation or parole. Contreras said she was on probation. Mascorro "conducted a records check" and confirmed that Contreras was on probation for theft offenses and she had "search terms." Mascorro decided to conduct a probation search of the vehicle.

Mascorro called for the assistance of another officer. He felt it was not safe to search the vehicle by himself. There were two suspects, one in the car, the other outside. He felt that "there's a strong likelihood that [they] can have either weapons [or] they choose to attack you . . . ."

After the second officer arrived, Mascorro asked Beverford to "step out of the vehicle" and he "conducted a pat-down search of his person."

Prior to conducting the probation search, Mascorro asked Beverford, who was standing several feet from the vehicle, if there were any drugs or weapons in the car. Beverford initially said "no." Mascorro said he wanted him "to be honest" and he "didn't want to be surprised by anything in the vehicle." Beverford responded that there was a knife and drugs inside the car and a shotgun in the trunk. At the time he made these statements, he was not under arrest and he had not been handcuffed.

Mascorro searched the interior of the car and found a knife, narcotics, "a clear plastic baggie [containing] a white crystal like substance," and a "pipe used for methamphetamine." After completing the search of the interior, he searched the trunk and found a shotgun.

After his arrest, Beverford filed a motion to suppress (§ 1538.5) the evidence of the narcotics and meth pipes seized in that car and the shotgun and shotgun shells. He claimed the search and seizure violated his "rights pursuant to the Fourth and Fourteenth Amendments to the United States Constitution" and his rights under the California Constitution.

At the hearing, Mascorro testified about the information from the witness, the probation search of the car, the items seized

from the interior of the car, and the shotgun found in the trunk. The trial court denied the motion. It said, "[I]t's clear from the evidence presented that this was a citizen's informal contact with law enforcement. Law enforcement has an open duty and an obligation to look into such situations. And they did which resulted in a casual and consensual encounter with the defendant and his passenger who happened to be on probation with search terms. [¶] . . . [¶] The defendant himself made admissions about what was in the car."

At trial, Mascorro testified that in the search of the interior of the Chrysler 300 automobile, the items he seized included OxyContin, methamphetamine, methamphetamine pipes, heroin, and drug paraphernalia. After searching the interior of the car, he turned his "attention" to the trunk. He found a shotgun in the trunk. It was loaded. He confirmed that the shotgun belonged to Beverford. Beverford said the "majority of the controlled substances belonged to [him]."

Beverford and the People stipulated that "on October 22, 2016, the defendant was prohibited from owning or possessing a firearm, ammunition, or reloaded ammunition because the defendant had been previously convicted of Penal Code Section 25850, sub c, sub 6, carrying a loaded firearm, a felony, in case 2014030432."

In the defense case, Beverford testified that on October 22, 2016, he went to his mother's storage unit to "pick up the shotgun." He was going to transfer ownership of the gun to Dennis McCurry. He did this because he "was court ordered to do that in [his] prior gun charge." He went to the storage unit at 8:00 in the morning. McCurry was not at home. Beverford decided to stop at the beach and wait for McCurry to let him

know where he wanted to meet. Beverford testified he was at the beach for approximately two minutes before Mascorro arrived. He was asked, "[H]ow long were you in the car with the gun on that morning?" He answered, "[p]robably about 15 minutes."

Beverford's counsel requested the trial court to instruct the jury on the defense of momentary possession of the firearm. She claimed Beverford's testimony that he had the gun for 15 minutes was substantial evidence to support the instruction. The court declined to give the instruction.

DISCUSSION

Motion to Suppress

Beverford contends the trial court erred in denying his motion to suppress evidence. He claims: 1) "the search of the vehicle's trunk far exceeded the permissible scope of Ms. Contreras's probation search terms"; and 2) consequently, the firearm and Beverford's admission about possession of the firearm should have been excluded as evidence. We disagree.

On review of a ruling on a motion to suppress, " ' "[w]e 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." ' " (*People v. Cervantes* (2017) 11 Cal.App.5th 860, 867 (*Cervantes*).)

"[A] warrantless search of a car is valid if based on probable cause." (*Ornelas v. United States* (1996) 517 U.S. 690, 693.) Probable cause is present where the evidence is "sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." (*Id*. at p. 696.) In *Maryland v. Dyson* (1999) 527 U.S. 465, the Supreme Court

upheld the validity of a warrantless search of the trunk of the defendant's car. It said, " 'If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more.' " (*Id.* at p. 467.)

"[W]arrantless and suspicionless" parole or probation searches are reasonable if the parolee's or probationer's "status is known to the officer and the search is not arbitrary, capricious, or harassing." (*People v. Schmitz* (2012) 55 Cal.4th 909, 916 (*Schmitz*); *Cervantes*, *supra*, 11 Cal.App.5th at pp. 870-871.)

The scope of such searches of a car based solely on the defendant's parole or probation status extends to areas where the parolee or probationer "could have stowed personal belongings or discarded items when aware of police activity." (*Schmitz*, *supra*, 55 Cal.4th at p. 926; *Cervantes, supra*, 11 Cal.App.5th at p. 871.) Consequently, "a vehicle search based on a passenger's parole status may extend beyond the parolee's person and the seat he or she occupies." (*Schmitz*, at p. 926.) Whether the trunk of a vehicle may be searched as part of a probation search of a passenger on probation depends on the "reasonableness" of "all the attendant circumstances." (*Cervantes*, at p. 870, fn. 10.)

Here, a witness told Mascorro that two people in a Chrysler 300 automobile "appeared to be smoking some type of narcotic." Mascorro promptly spotted that parked vehicle with Beverford in the driver's seat and Contreras in the passenger seat. Mascorro believed an investigation was necessary, but he did not attempt a search at that time. Instead, he first confirmed Contreras was on probation with "search terms."

Beverford claims Mascorro had no lawful grounds to conduct a probation search of the trunk. In the *Schmitz* and

Cervantes cases, the courts did not decide whether a search of a trunk is proper based *solely* on a car passenger's probation status. But here, Mascorro had more information than just Contreras's probation status. He had information showing his decision to search the trunk was not arbitrary. (*Schmitz*, *supra*, 55 Cal.4th at p. 916.) The witness's statement that Beverford and Contreras were smoking a narcotic in the car gave him reason to believe there were drugs in that vehicle. (*People v. Dey* (2000) 84 Cal.App.4th 1318, 1322.) Beverford notes Contreras was in the passenger seat. But as Mascorro approached the car, he saw her "exiting" the passenger seat and "moving towards the trunk of the vehicle." That suspicious conduct, coupled with the information he had received about narcotics, reasonably drew his attention to the trunk. That is an area where drugs or weapons can be hidden. Mascorro found drugs during the search of the interior of the vehicle. Based on "all the attendant circumstances," he had reason to decide to search the trunk as part of a probation search. (*Cervantes*, *supra*, 11 Cal.App.5th at p. 870, fn. 10.)

Moreover, independent from the issue involving the scope of a probation search, Mascorro also had information which gave him probable cause to search the trunk. The witness saw Beverford smoking a narcotic in the car, and before the search Beverford told Mascorro that there were drugs and a knife in the car and a shotgun in the trunk. A warrantless search of the trunk is authorized where the police have probable cause to believe drugs are in the car. (*Maryland v. Dyson*, *supra*, 527 U.S. 465, 467; *People v. Hunter* (2005) 133 Cal.App.4th 371, 380 [" '[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle,' " including the

trunk].) Here in a search of the interior of the car, police found narcotics and a meth pipe. That provided additional probable cause to search the trunk. (*People v. Dey*, *supra*, 84 Cal.App.4th at p. 1322 [police could reasonably believe that "even if defendant makes only personal use of the marijuana found in his day planner, he might stash additional quantities for future use in other parts of the vehicle, including the trunk. Such a suspicion is sufficient for a search of the trunk"].)

Beverford claims his statements to police were inadmissible. At the hearing on the suppression motion, Beverford claimed his statements could not be considered because Mascorro did not advise him of his "Miranda rights." But those advisements are required for "custodial interrogations." (*Miranda v. Arizona* (1966) 384 U.S. 436, 444.) When Beverford made his statements, he was not in custody, not under arrest, and not in handcuffs. Mascorro testified that he never told Beverford "he was not free to leave." (*People v. Lopez* (1985) 163 Cal.App.3d 602, 608.) The police did not draw their weapons. *Miranda* did not apply. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 440.)

Beverford claims his statements about the shotgun should have been excluded under the "fruit of the poisonous tree" doctrine. (*Wong Sun v. United States* (1963) 371 U.S. 471, 484-488.) He cites *People v. Medina* (2003) 110 Cal.App.4th 171, 179 (*Medina*), and claims his statements to Mascorro were "obtained through exploitation" of an illegal search.

But *Medina* is distinguishable. There we held the police unlawfully detained the defendant, the search was unlawful, and his admissions were coerced. In *Medina*, the police officer's testimony showed he had no lawful grounds to detain the

defendant and the defendant made his incriminating admission while the police had his "hands secured behind his head." (*Id*. at pp. 178-179.)

Here, by contrast, there was no unlawful search or unreasonable police conduct. As the People correctly note, Beverford made his statements *before* the search of the trunk took place. The trial court findings show it reasonably decided his statements were consensual and did not constitute an involuntary or invalid confession. There was no evidence at the suppression hearing to support a finding that the police conduct was unreasonable, deceptive, or coercive. Two officers were present. Mascorro's questions were brief. There was no showing "that defendant's free will was overborne by state compulsion," (*People v. Storm* (2002) 28 Cal.4th 1007, 1036) or that Beverford was "subjected to the coercive, police-dominated atmosphere which was *Miranda's* concern." (*People v. Lopez*, *supra*, 163 Cal.App.3d at p. 609.) The trial court did not err by denying his suppression motion.

Not Instructing the Jury on the Defense of Momentary Possession

Beverford contends the trial court erred by declining to instruct the jury on "the defense of temporary possession" of the firearm. The trial court must instruct the jury on defenses that are supported by substantial evidence. (*People v. Wilson* (2005) 36 Cal.4th 309, 331.)

CALCRIM No. 2511 provides, in relevant part, "If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that: "1. (He/She) possessed the firearm

only for a momentary or transitory period; 2. (He/She) possessed the firearm in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it; AND 3. (He/She) did not intend to prevent law enforcement officials from seizing the firearm." (*People v. Hurtado* (1996) 47 Cal.App.4th 805, 810-811 (*Hurtado*).)

In *Hurtado*, the court held that the defendant was not entitled to this instruction because his "possession of the firearm cannot be characterized as momentary." (*Hurtado*, *supra*, 47 Cal.App.4th at p. 814.) It noted that the defendant "maintained control over the gun for at least two days" and "was free to use it in any way he saw fit." (*Ibid*.) His "conduct in continuing to maintain dominion and control over the weapon for days vitiated any initial entitlement to a temporary possession for disposal defense to the felon in possession of a firearm charge." (*Ibid*.)

In *People v. Booker* (1978) 77 Cal.App.3d 223 (*Booker*), the defendant, who was convicted of possession of a firearm by a felon, claimed the trial court erred by not instructing the jury with this defense. He contended he took his sister's gun to a pawn shop to raise money for a trip. He argued the instruction was required because he took the gun "for the purpose of disposal of such item." (*Id*. at p. 225.) The Court of Appeal disagreed and affirmed. It said, "[D]efendant's possession of the revolver cannot be characterized as momentary." (*Id*. at p. 225.) "He carried it through the city streets for four blocks, and was free to use it in any way he saw fit." (*Ibid*.) Consequently, he "intentionally exercised dominion and control over the revolver for his own purpose and for a significant period of time." (*Ibid*.)

Beverford contends he testified that he had the gun in his car for only 15 minutes before the police arrived. He claims that

is substantial evidence to support the momentary possession instruction.

The People respond that the trial court did not err because his testimony was self-contradictory, and consequently it did not constitute substantial evidence. We agree.

Substantial evidence means evidence "of credible and solid value." (*People v. Misa* (2006) 140 Cal.App.4th 837, 842.) There is no substantial evidence to support an instruction where the evidence relied on to support the defense theory is contradicted by the defendant's own statements. (*People v. Wilson*, *supra*, 36 Cal.4th at p. 331.) The duty to instruct on a defense is not triggered by " ' " 'any evidence . . . no matter how weak.' " ' " (*Ibid.*)

Here, the portion of Beverford's testimony about the 15-minute possession was contradicted by his own testimony. Beverford said he picked up the shotgun from the storage facility at 8:00 a.m. He was in his vehicle for two minutes before Mascorro arrived and the gun was in that vehicle. Mascorro arrived at approximately 9:30 a.m.

In addition, the trial court correctly noted that Beverford's possession of the gun was not transitory. It said the evidence showed he had the gun "in his possession the entire time that it was in that storage unit, which was at least a matter of months, certainly a matter of days, and would certainly pass the two-day threshold mentioned in *Hurtado*." Beverford testified that he put the gun in the storage unit in October 2015. He took it out of that unit on October 22, 2016. Under *Hurtado* and *Booker*, Beverford's possession of this weapon "cannot be characterized as momentary." (*Hurtado*, *supra*, 47 Cal.App.4th at p. 814; *Booker*, *supra*, 77 Cal.App.3d at p. 225.) There was no error.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

David R. Worley, Judge

Superior Court County of Ventura

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