Filed 1/10/18 P. v. Diaz CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

ROBERT MANUEL DIAZ, SR.,

Defendant and Appellant.

2d Crim. No. B279891
(Super. Ct. No. 16F-04095)
(San Luis Obispo County)

Robert Manuel Diaz, Sr. appeals a judgment following conviction by plea of possession of a firearm by a felon with an admission that he served three prior prison terms. (Pen. Code, §§ 29800, subd. (a)(1), 667.5, subd. (b).)[1] We conclude that the trial court did not abuse its discretion by denying Diaz's motion to withdraw his plea, and affirm. (§ 1018; *People v. Patterson* (2017) 2 Cal.5th 885, 894 [statement of rule regarding plea withdrawal].)

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

FACTUAL AND PROCEDURAL HISTORY

On May 2, 2016, the San Luis Obispo County prosecutor charged Diaz with possession of a firearm by a felon (count 1); carrying a concealed firearm (count 2); offering to sell or transport methamphetamine (count 3); and possession of methamphetamine with a firearm (count 4). (§§ 29800, subd. (a)(1), 25400, subd. (a)(2); Health & Saf. Code, §§ 11379, subd. (a), 11370.1, subd. (a).) The four-count felony complaint also alleged that Diaz suffered two prior drug convictions and served four prior prison terms. (Health & Saf. Code, § 11370.2, subd. (c); § 667.5, subd. (b).)

On May 25, 2016, Diaz withdrew his not guilty plea, waived his constitutional right and right to a preliminary examination, and pleaded guilty to count 1, possession of a firearm by a felon. He also admitted that he served three prior prison terms. The parties stipulated that the police report provided a factual basis for the guilty plea.

Police Report

In the early afternoon of April 21, 2016, Pismo Beach Police Officer Brenden Neary responded to a call reporting that two tall, dark-skinned, bearded men wearing gray clothing were knocking on the doors of vacant rental properties in the 300 block of Park Avenue. Neary immediately saw Diaz standing on the corner of Park and Dolliver Avenues; he matched the physical description provided by the complaining party. Diaz looked around several times as he spoke on his cellular telephone. Neary stopped his patrol vehicle and spoke with Diaz, who held one hand inside his pants pocket. Diaz also held two cigarettes in his right hand.

Neary asked Diaz to sit on the curb and he complied. Diaz stated that he was knocking on doors to obtain assistance in

starting his vehicle. Diaz added that the man with him left to obtain jumper cables.

A second police officer soon arrived. Neary asked Diaz to place his hands on top of his head so that he could be searched for weapons. Diaz stated that he did not consent to a patdown for weapons. Neary replied that Diaz's consent was not necessary. Neary then asked if Diaz had any weapons. Diaz replied: "Yes I do. That's my issue though." He added that he had a ".380" in his pocket. Neary placed Diaz in handcuffs and searched his pockets. Diaz had a .380 caliber firearm, $120 currency, a used hypodermic syringe, and a baggie containing 4.4 grams of methamphetamine in his pants pockets. The detention was captured by Neary's vest video-camera. The recording was later uploaded to the 911 server and marked with this case number as evidence.

Neary arrested Diaz and discovered that the firearm had a bullet in the chamber ready to fire and that Diaz was a convicted felon and member of the North West criminal street gang.

Motion to Withdraw Plea

Approximately six months later, Diaz moved to withdraw his guilty plea, claiming that his former attorney did not advise him that he had a meritorious motion to suppress the evidence seized during his unlawful detention. The trial court denied the plea withdrawal motion.

Sentence, Conviction, and Appeal

On December 22, 2016, in accordance with the plea agreement, the trial court sentenced Diaz to five years in prison, consisting of a midterm of two years and three one-year terms for the prior prison term enhancements. The court also imposed a $1,500 restitution fine; a $1,500 parole revocation restitution fine

(suspended); a $40 court security assessment; and a $30 criminal conviction assessment. The court awarded Diaz 209 days presentence custody credit and then dismissed the remaining charged counts and allegations.

Diaz appeals and contends that the trial court erred by denying his motion to withdraw his plea. On April 5, 2017, we granted Diaz relief from default and permitted him to file a second notice of appeal and to request a certificate of probable cause from the trial court. The certificate was granted on April 12, 2017.

DISCUSSION

Diaz argues that the trial court abused its discretion by denying his withdrawal motion because his detention and patdown for weapons were unreasonable pursuant to the Fourth Amendment. He asserts that he received the ineffective assistance of counsel because his former attorney did not advise him that he had a viable motion to suppress evidence.

At any time before judgment, a trial court may permit a defendant to withdraw a guilty plea for "good cause shown." (§ 1018; *People v. Patterson*, *supra*, 2 Cal.5th 885, 894.) Mistake, ignorance, or any factor overcoming the exercise of free will is good cause to withdraw a guilty plea. (*Patterson*, at p. 894.) Section 1018 states that its provisions "shall be liberally construed . . . to promote justice." A defendant seeking to withdraw a guilty plea on the grounds of mistake or ignorance must present clear and convincing evidence to support his claim. (*Patterson*, at p. 894.) A court's decision regarding a defendant's withdrawal motion is reviewed for an abuse of discretion. (*Ibid.* [an abuse of discretion exists where the court's decision rests upon an error of law].)

To establish a claim for ineffective assistance of counsel, defendant must establish that counsel's performance was deficient and that defendant suffered prejudice thereby. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-692; *People v. Patterson*, *supra*, 2 Cal.5th 885, 900; *People v. Mickel* (2016) 2 Cal.5th 181, 198.) In demonstrating deficient performance, defendant bears the burden of showing that counsel's performance fell below an objective standard of reasonableness. (*Mickel*, at p. 198; *People v. Orloff* (2016) 2 Cal.App.5th 947, 955-956.) In demonstrating prejudice, defendant bears the burden of establishing a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. (*Patterson*, at p. 900.) "To establish that he was prejudiced by counsel's alleged errors, [appellant] must show, 'that a reasonable probability exists that, but for counsel's incompetence, he would not have pled guilty'" and would have insisted, instead, on proceeding to trial. (*Id.* at p. 901.)

We presume that counsel's actions fall within the broad range of reasonableness, and afford great deference to counsel's tactical decisions. (*People v. Mickel*, *supra*, 2 Cal.5th 181, 198.) For this reason, a reviewing court will reverse a conviction based upon the ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had no rational tactical purpose for an action or omission. (*Ibid.*; *People v. Orloff*, *supra*, 2 Cal.App.5th 947, 955.) Moreover, counsel's failure to make an unmeritorious motion does not constitute ineffective assistance of counsel. (*People v. Jennings* (2010) 50 Cal.4th 616, 667, fn. 19; *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836.)

The Fourth Amendment protects against unreasonable searches and seizures. (U.S. Const., 4th Amend.; *Navarette v.*

California (2014) _ U.S. _, _ [134 S.Ct. 1683, 1687]; *People v. Casares* (2016) 62 Cal.4th 808, 837; *People v. Suff* (2014) 58 Cal.4th 1013, 1053-1054.) A detention is reasonable pursuant to the Fourth Amendment when the detaining officer can point to specific articulable facts that, in light of the totality of circumstances, provide some objective manifestation that the person detained may be involved in criminal activity. (*Navarette*, at p. _ [p. 1687]; *People v. Zaragoza* (2016) 1 Cal.5th 21, 56.)

A reasonable suspicion of criminal activity requires less information than a finding of probable cause. (*Navarette v. California*, *supra*, _ U.S. _, _ [134 S.Ct. 1683, 1687]; *People v. Wells* (2006) 38 Cal.4th 1078, 1083.) "[T]he level of suspicion the standard requires is 'considerably less than proof of wrongdoing by a preponderance of the evidence,' and 'obviously less' than is necessary for probable cause." (*Navarette*, at p. _ [p. 1687].) Law enforcement may base a finding of reasonable suspicion on its observations, together with information from other sources, including an anonymous tip. (*Wells*, at p. 1083.) "The standard takes into account 'the totality of the circumstances—the whole picture.'" (*Navarette*, at p. _ [p. 1687].) This standard necessarily precludes a "divide-and-conquer" analysis. (*U.S. v. Arvizu* (2002) 534 U.S. 266, 274.)

Pursuant to the totality of the circumstances, Neary lawfully detained Diaz based upon a reasonable suspicion that he may have been involved in criminal activity. Neary responded to a police call that two men were knocking on the doors of vacant rental homes. Diaz's physical description matched that provided by the complaining party. Neary saw Diaz standing in the area, looking around as he spoke on the telephone, but keeping his hand in his pocket. Neary may have reasonably believed that

Diaz was involved in burglarizing homes or in engaging in lookout behavior. The temporary detention allowed Neary to resolve any ambiguity in Diaz's behavior and establish whether the behavior was lawful. (*People v. Souza* (1994) 9 Cal.4th 224, 233 [possibility of an innocent explanation does not preclude police officer from entertaining 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 . . . .'" (*Ibid.*)

Moreover, Neary reasonably suspected that Diaz may have been armed or carrying a weapon. (*People v. Parrott* (2017) 10 Cal.App.5th 485, 495 [statement of rule regarding patdown search].) Diaz had his hand in his pocket during the detention and, when asked if he was carrying a weapon, stated that he had a .380 firearm. Under the circumstances, the patdown search was supported by Neary's reasonable suspicion. (*Ibid.*)

In sum, a suppression motion would not have been successful. Counsel's failure to make an unmeritorious motion does not constitute ineffective assistance of counsel. (*People v. Jennings*, *supra*, 50 Cal.4th 616, 667, fn. 19.) The trial court did not abuse its discretion by denying Diaz's motion to withdraw his plea.

Justice Tangeman's concurring opinion cites cases involving isolated facts to support its argument. For example, after acknowledging that the call the police received described the suspects as "dark skinned," it cites *People v. Bower* (1979) 24 Cal.3d 638 to condemn the stop as "racially motivated." The suspect was stopped because he fit the description given to the police, not because of his race. The concurring opinion argues that there is no evidence this was a high crime area. This

observation has no relevance to the facts. To suggest there is nothing suspicious about knocking on doors in the neighborhood is to ignore reality. True, this could be innocent activity, but it could also point to would-be burglars trying to determine who is home and who is not.

It is also true, as the two concurring opinions posit, that there is nothing inherently wrong with a person keeping his hand in his pocket. But after being stopped by the officer, the suspect kept his hand in his pocket. Under the circumstances, it seems reasonable for the officer to have acted as he did. That the facts in *Parrott* involved a bulge in the defendant's pocket does not change our view. (*People v. Parrott*, *supra*, 10 Cal.App.5th 485.) *Parrott* teaches us that "a police officer has a strong need to practice caution and self-protection when on patrol." (*Id.* at p. 496.) This cautionary rule is not less applicable here.

But there is one thing upon which we all can agree. The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

PERREN, J., concurring:

I concur with Justice Gilbert's analysis concerning the detention of Diaz. I concur with Justice Tangeman's analysis relating to the search of Diaz. I agree with both my colleagues that the judgment be affirmed.

PERREN, J.

TANGEMAN, J., concurring:

I disagree with the conclusion that the detention and search of Robert Manuel Diaz, Sr. was lawful. But I agree that the judgment should be affirmed because Diaz did not establish good cause to withdraw his plea based on ineffective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668.) Facts outside this record that may have come to light if the officer testified could have justified counsel's decision not to file a motion to suppress. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

Officer Neary's Detention of Diaz

A law enforcement officer may "temporarily detain a suspect based . . . on a 'reasonable suspicion' that the suspect has committed or is about to commit a crime. [Citations.]" (*People v. Bennett* (1998) 17 Cal.4th 373, 386-387.) Reasonable suspicion is a less-demanding standard than probable cause, but still requires "specific, articulable facts that are 'reasonably "consistent with criminal activity."' [Citation.]" (*People v. Wells* (2006) 38 Cal.4th 1078, 1083 (*Wells*); see also *ibid.* [detention predicated on curiosity, rumor, or hunch is unlawful, even if the officer acts in good faith].) Whether reasonable suspicion for a detention exists requires an independent examination of the totality of the circumstances. (*People v. McCullough* (2013) 56 Cal.4th 589, 595-596; *People v. Souza* (1994) 9 Cal.4th 224, 231 (*Souza*).)

The record here does not reveal that Officer Neary had reasonable suspicion to detain Diaz because he did not articulate specific facts reasonably consistent with criminal activity. When Officer Neary detained Diaz, he knew that Diaz matched a physical description received in a phone call from a neighbor; had been knocking on doors of vacant rental properties

in the middle of the day; and had been looking around, talking on a cell phone, while standing on the sidewalk. Diaz was alone, had one hand in his pocket, and made no furtive movements. He complied with all of Officer Neary's directives, and said that he had been searching for jumper cables.

Considered together, these facts do not give rise to the reasonable suspicion required for a lawful detention. First, "[a] person's racial status is not an 'unusual' circumstance[,] and the presence of an individual of one race in an area inhabited primarily by members of another race is not a sufficient basis to suggest that crime is afoot." (*People v. Bower* (1979) 24 Cal.3d 638, 644 (*Bower*).) Second, law enforcement officers do not have "carte blanche to pat down anyone wearing baggy clothing" when the wearing of that clothing is unaccompanied by "other suspicious circumstances." (*People v. Collier* (2008) 166 Cal.App.4th 1374, 1377, fn. 1 [smell of marijuana].) Third, Officer Neary received no report of an actual crime, and there is nothing inherently suspect about a person knocking on doors during the middle of the day. (Cf. *Wells*, *supra*, 38 Cal.4th at p. 1083 [report of an actual crime may give rise to reasonable suspicion for a detention].) Finally, Officer Neary did not witness Diaz do anything unusual or suspicious after he arrived. (*Terry v. Ohio* (1968) 392 U.S. 1, 22 (*Terry*) ["There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone"]; *In re Tony C.* (1978) 21 Cal.3d 888, 898 (*Tony C.*) ["Much more is needed to reasonably suspect that a person merely standing on a street corner in broad daylight is acting as a 'lookout' for a partner in crime"].)

Moreover, none of the factors commonly invoked to justify the legality of a detention was present here. Nothing in

the record indicates this was a high-crime area. (See *Souza*, *supra*, 9 Cal.4th at p. 240 ["An area's reputation for criminal activity is an appropriate consideration in assessing whether an investigative detention is reasonable"].) The detention occurred in the middle of the day. (See *id*. at p. 241 ["The time of night is another pertinent factor in assessing the validity of a detention"].) Diaz did not flee from Officer Neary when he approached. (See *id*. at p. 235 ["flight from police is a proper consideration . . . in determining whether in a particular case the police have sufficient cause to detain"].) He made no furtive movements. (See *Illinois v. Wardlow* (2000) 528 U.S. 119, 124 ["nervous, evasive behavior is a pertinent factor in determining reasonable suspicion"].) And he complied with all of Officer Neary's instructions. (See *People v. Mendoza* (2011) 52 Cal.4th 1056, 1082 [defendant's hostile manner can help to provide reasonable suspicion for detention].)

Indeed, the facts here are less supportive of reasonable suspicion than cases in which our Supreme Court determined that detentions were unreasonable. For example, in *People v. McGaughran* (1979) 25 Cal.3d 577, 588-591 (*McGaughran*), the defendants' detentions were not justified even though they were not local residents who appeared to be lost in an area known for narcotics trafficking and made furtive movements when a police officer activated his overhead lights. In *Tony C.*, *supra*, 21 Cal.3d at pages 897-898, the Supreme Court found unreasonable the detention of a minor who, rather than attending school, was walking on a sidewalk during the noon hour in a neighborhood where several burglaries had recently occurred. And in *People v. Moore* (1968) 69 Cal.2d 674, 683, overruled on another ground by *People v. Thomas* (1977) 19

Cal.3d 630, 641, footnote 8, the Supreme Court deemed unreasonable a detention where the defendant was talking on the phone in a high-crime area and turned his back to police officers when they approached.

The Attorney General speculates that Officer Neary may have suspected that Diaz was burglarizing homes or engaging in "lookout behavior" at the time of the detention. But the officer did not so testify and conducting a search based on those suspicions would be unreasonable: The phone call that prompted Officer Neary to detain Diaz did not report a burglary, and nothing the officer observed suggests Diaz was connected to one. (*Tony C.*, *supra*, 21 Cal.3d at pp. 897-898 [unreasonable to suspect that minors walking on sidewalk during the early afternoon were "ipso facto bent on committing crimes" despite reports of previous burglaries in the area].) That stands in stark contrast to other detentions based on officers' reasonable suspicions of burglaries, which were upheld based on the presence of additional circumstances not present here. (See, e.g., *People v. Leyba* (1981) 29 Cal.3d 591, 600 [detention reasonable because a police officer saw cars blinking lights at each other in a school parking lot late at night, and there were multiple prior burglaries at the school]; *People v. Johnson* (1987) 189 Cal.App.3d 1315, 1317-1318, 1320 [detention legal because the defendants were seen in the area of a house near where two men "were [seen] climbing a fence into the backyard"].) And while a defendant's "lookout behavior" may sometimes justify a detention in a high-crime area (see, e.g., *People v. Mims* (1992) 9 Cal.App.4th 1244, 1250-1251; *People v. Superior Court* (*Bowden*) (1976) 65 Cal.App.3d 511, 518, 522; *People v. Rosenfeld* (1971) 16

Cal.App.3d 619, 623), there was no evidence that this was a high-crime area.

This case is unlike *Terry*, on which the Attorney General relies. In *Terry*, a police officer saw the defendant walk past a store window, look inside, turn around and walk back to his accomplice, and confer with him. (*Terry*, *supra*, 392 U.S. at p. 6.) The accomplice then did the same thing. (*Ibid*.) Each man repeated this series of actions five or six times before following a third man down the street. (*Ibid*.) The officer suspected that the men were casing the store to commit an armed robbery. (*Ibid*.) He confronted them and asked their names. (*Id*. at pp. 6-7.) When they "mumbled something," the officer grabbed Terry. (*Id*. at p. 7.) The U.S. Supreme Court upheld the detention under these circumstances: "It would have been poor police work indeed for an officer of 30 years' experience *in the detection of thievery from stores in this same neighborhood* to have failed to investigate this behavior further." (*Id*. at p. 23, emphasis added.)

Unlike the situation in *Terry*, nothing in the record indicates that Officer Neary reasonably suspected Diaz was about to commit a crime. Officer Neary saw Diaz engage in no potentially criminal behavior; he saw him standing on a street corner, talking on the phone. And Officer Neary confronted Diaz not in an area known for recent criminal activity but in a neighborhood of vacation rental homes.

The majority relies on *Souza*, *supra*, 9 Cal.4th 224 (maj. opn., *ante*, at pp. 6-7), but in that case the detaining officer saw "two people who appeared to be talking to the occupants of a car parked in total darkness in . . . a 'high crime area'" at 3:00 a.m. (*Souza*, at p. 242.) When the officer shined his spotlight toward the group, the occupants of the car and the

defendant fled. (*Ibid*.) Here, there was no evasive behavior in a high-crime area in the middle of the night.

I acknowledge that factors consistent with innocent activity may collectively amount to reasonable suspicion. (*Souza*, *supra*, 9 Cal.4th at p. 233.) But those factors must collectively suggest that criminal activity is underway. (*Ibid*.) That suggestion is absent here. Officer Neary's detention was predicated on no more than a hunch. (*Wells*, *supra*, 38 Cal.4th at p. 1083.)

Officer Neary's Frisk of Diaz

Even if Officer Neary's detention of Diaz were reasonable, the record before us does not justify the officer's subsequent search for weapons.

A law enforcement officer's frisk of an individual "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." (*Terry*, *supra*, 392 U.S. at p. 17.) Thus, an officer may frisk an individual for weapons only if the officer "has reason to believe" the individual is "armed and dangerous." (*Id*. at p. 27.) "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that [their] safety or that of others was in danger." (*Ibid*.) An officer's "inchoate and unparticularized suspicion or 'hunch'" that an individual is dangerous will not justify a frisk (*ibid*.); instead, the officer must "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion" (*id*. at p. 21). Determining whether an officer has reasonable suspicion that an individual is armed and dangerous requires an

independent review of the totality of the circumstances. (*People v. Woods* (1999) 21 Cal.4th 668, 673-674; *Souza*, *supra*, 9 Cal.4th at pp. 230-231.)

Based on this record, a reasonably prudent officer in Officer Neary's position would not be warranted in the belief that Diaz posed a danger to their safety or the safety of others. State and federal courts—including this one—have repeatedly declined to uphold *Terry* frisks on facts as innocuous as those presented here. (See, e.g., *Ybarra v. Illinois* (1979) 444 U.S. 85, 93 [defendant's bulky clothing provides insufficient justification for frisk absent additional facts indicating defendant may be armed or dangerous]; *King v. State of California* (2015) 242 Cal.App.4th 265, 283-287 [defendant's act of honking horn, argumentative demeanor, presence in a "dangerous neighborhood," and "loose clothing" did not create reasonable suspicion he was armed and dangerous]; *People v. Sandoval* (2008) 163 Cal.App.4th 205, 212 [frisk of defendant in front of house where narcotics thought to be located was not justified where officer did not have reason to believe defendant was armed]; *People v. Medina* (2003) 110 Cal.App.4th 171, 177 [frisk unconstitutional where based solely on procedure calling for search of anyone stopped in high-crime area at night]; *People v. Dickey* (1994) 21 Cal.App.4th 952, 956-957 [frisk of driver not justified even though he had no identification, refused officer's requests to search car, was nervous and sweating, and had baking powder in film canister].) And Diaz's admission that he "ha[d] a .380 in [his] pocket" does not factor into the reasonable suspicion equation: Officer Neary had already announced his intention to begin the search when Diaz said he was armed. (*People v. Medina*, at p. 176 [rejecting the Attorney General's claim that defendant's admission justified

search where officer had already set out to conduct search].) "Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse." (*Florida v. Bostick* (1991) 501 U.S. 429, 438.) The frisk was based on no more than Officer Neary's inchoate and unparticularized suspicion that Diaz was armed and dangerous, and thus violated the Fourth Amendment. (*Terry*, *supra*, 392 U.S. at p. 27.)

People v. Parrott (2017) 10 Cal.App.5th 485, on which the majority relies (maj. opn., *ante*, at p. 7), is inapposite. In *Parrott*, the defendant had "a heavy item bulging in [his] front pocket, which [he] touched several times during [his] encounter" with police. (*Parrott*, at p. 496.) Officer Neary noticed no such bulge in Diaz's clothing. In *Parrott*, the officers frisked the defendant "only after he physically resisted two attempts . . . to handcuff him." (*Ibid.*) At no point did Diaz resist Officer Neary.

I "recognize that '[t]he judiciary should not lightly second-guess a police officer's decision to perform a patdown search for officer safety.'" (*In re H.H.* (2009) 174 Cal.App.4th 653, 660.) But the record does not contain specific, articulable facts to support a suspicion that Diaz was armed and dangerous.

Ineffective Assistance of Counsel

I nevertheless agree that based on this record the judgment should be affirmed because Diaz did not establish good cause to withdraw his plea. (Pen. Code, § 1018.) To establish good cause, he had to show he received ineffective assistance of counsel. (*People v. Hunt* (1985) 174 Cal.App.3d 95, 104.) To show ineffective assistance, Diaz had to demonstrate not only "that his Fourth Amendment claim [was] meritorious and that there [was] a reasonable probability that the verdict would have been

different absent the excludable evidence," but also that counsel's performance was deficient. (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 375.) On this record, Diaz cannot demonstrate deficient performance.

Though the record reveals that counsel neither discussed a motion to suppress with Diaz nor filed one on his behalf, it does not reveal why he did not do so. Perhaps counsel knew of additional facts, outside the record on appeal, that "'may very well have justified [Officer Neary's] conduct and counsel's decision not to attack the validity of the [detention and] search.'" (*People v. Mendoza Tello*, *supra*, 15 Cal.4th at p. 267.) Because the sentencing court relied on the police report to decide the merits of a motion to suppress, "[n]o one asked . . . why [Officer Neary] wanted to conduct a patdown search." (*Ibid.*) And "[n]o one gave him the opportunity to point to any specific and articulable facts justifying his actions." (*Ibid.*) "Nor did the prosecution have the opportunity to offer some other possible reason not to suppress the evidence." (*Ibid.*)

Our Supreme Court has "repeatedly stressed 'that "[if] 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.' [Citations.]" (*People v. Mendoza Tello*, *supra*, 15 Cal.4th at p. 266.) "A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding. [Citations.]" (*Id.* at pp. 266-267.) On this record, no relief can be granted.

TANGEMAN, J.

Michael L. Duffy, Judge

Superior Court County of San Luis Obispo

Richard L. Fitzer, 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, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, Nima Razfar, Deputy Attorney General, for Plaintiff and Respondent.