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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 FIVE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CHRISTIAN ALVAREZ,<br><br>Defendant and Appellant. | B275735<br><br>(Los Angeles County Super. Ct. No. NA102726) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura Laesecke, Judge. Affirmed.

Eduardo Paredes for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, David A. Wildman, Deputy Attorney General, for Plaintiff and Respondent.

The trial court denied a motion brought by defendant and appellant Christian de Jesus Alvarez (defendant) to suppress a firearm recovered from defendant's waistband as the result of a police stop on a public street. An officer discovered the weapon when he grabbed onto defendant as he was attempting to flee. We consider whether the officer's conduct violated constitutional prohibitions on unreasonable searches and seizures.

## I. BACKGROUND

We recount the relevant facts based on the evidence presented at the hearing on defendant's motion to suppress. Gang enforcement officer Victor Sosa (Sosa) was the sole witness.

On the evening of September 11, 2015, Los Angeles Police Department officers in the Harbor Division responded "a few times" to police radio broadcasts of gang members gathered in front of an apartment complex. Each time the officers drove by the complex in their marked vehicles, individuals among the group ran into the apartments.

At approximately 11:35 p.m. that night, another police radio broadcast reported a "gang group" at the same location. Because of the prior incidents, Sosa and five other officers decided to approach the site on foot. The officers responded as a group because the location was a West Side Wilmas gang "hangout" and the West Side Wilmas were "known to have guns on them."

As Sosa and the other officers approached the location, approximately eight people were standing in front of the apartment complex. When the officers were roughly five feet from the group, the officers directed everyone to "turn around" and "let [the officers] see [their] hands." One man in the group

immediately fled into an apartment. Defendant did not show his hands in response to the officers' commands; instead, defendant attempted to run past Sosa into the same apartment as the other man just did.

Sosa saw defendant "was running with his right hand on his waistband," as though "he was holding something, some type of object . . . ." In addition, defendant was "kind of ducking down" with a "hunched over" posture. Sosa believed defendant was probably armed based on Sosa's training and experience that a person "running with his hand in his waistband . . . probably ha[s] some type of object, which is generally a handgun or some type of weapon that they don't want . . . to fall . . . ." Sosa also believed defendant was probably armed because of other circumstances: the fact that the site was known as a "gang location," the prior calls that night about possibly armed gang members congregating in the same spot, and the way defendant ran after officers told everyone to stop.

Sosa ordered defendant to stop running, which he did not do.[1] Defendant had run a couple steps, and was "within maybe a [foot] or two away" from Sosa, when Sosa reached toward defendant's waistband. Sosa's hand landed partly on defendant's hand and partly on what Sosa "immediately recognized . . . to be a butt of a handgun." Sosa ordered defendant to his knees, informed the other officers defendant had a gun, and took defendant into custody. Officers retrieved a loaded nine millimeter handgun from defendant's waistband, beneath his

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[1] Sosa did not initially remember ordering defendant to stop. He corrected himself after re-reading the police report he wrote on the date of the incident.

shirt. After they recovered the gun, officers conducted a full search of defendant's person.

The Los Angeles District Attorney later charged defendant with carrying a concealed firearm, in violation of Penal Code section 25400, subdivision (a)(2)[2] (count one) and carrying a loaded, unregistered firearm in violation of section 25850, subdivision (a) (count two). The District Attorney further alleged, as to count one, that defendant knew and reasonably should have known he was carrying a stolen firearm and, as to both counts, that defendant was out on bail within the meaning of section 12022.1 when he committed the charged offenses.

Defense counsel moved to suppress the firearm under section 1538.5 on the ground it was the fruit of an illegal seizure and search. After Sosa testified at the suppression hearing, defense counsel argued Sosa's credibility was suspect because of the "discrepancy" in his testimony about telling defendant to stop running. Defense counsel urged the court to accept Sosa's initial testimony—i.e., that he did not tell defendant to stop—in which case, counsel argued, there was no evidence defendant attempted to run and therefore no probable cause for Sosa to search him. The prosecution responded that Sosa reached for defendant only after defendant disobeyed the officers' order to show his hands and defendant's body position showed he intended to flee.

The trial court denied defendant's suppression motion. The court found Sosa reached for defendant in an attempt to stop him from running and did not detain defendant until he placed his hands on him. At that point, Sosa felt the gun, which gave him probable cause to conduct a search.

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[2] Statutory references that follow are to the Penal Code.

Defendant pled guilty to the concealed firearm charge and admitted he committed the offense while he was out on bail. The trial court sentenced him to three years and four months in county jail. As permitted by the terms of his guilty plea, defendant appeals the denial of his motion to suppress.

## II. DISCUSSION

Defendant contends the trial court should have excluded the firearm (as well as a subsequent statement he made to the police and other fruits arising from the incident) because Sosa detained and searched defendant without a warrant and before Sosa had any basis to suspect illegal activity. More specifically, defendant argues that when the officers told defendant's group to put their hands up, the officers effectively detained defendant without justification. Defendant further argues there was no reasonable basis for Sosa to reach for defendant's waistband because there was no evidence Sosa was afraid for his safety, defendant did not attempt to run away, and Sosa had no basis to believe defendant was carrying a gun.

As we will explain in greater detail, defendant's argument is unsupported by the evidence or applicable authority. Sosa's testimony at defendant's suppression hearing establishes he was justified in reaching out to stop defendant from fleeing past him, which resulted in Sosa placing his hand on the suspicious area of defendant's waistband. Defendant was not seized until Sosa made contact with him, and the seizure was reasonable under the circumstances.

The Fourth Amendment to the United States Constitution prohibits the government from subjecting its citizens to "unreasonable searches and seizures . . . ." (U.S. Const., 4th

Amend.; see also Cal. Const., art. I, § 13 ["The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated"].) A defendant may move "to suppress as evidence any tangible or intangible thing" on the ground that "[t]he search or seizure without a warrant was unreasonable." (§ 1538.5, subd. (a)(1)(A).) ""The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment.'" [Citations.]" (*People v. Suff* (2014) 58 Cal.4th 1013, 1053.)

"'[R]easonableness is always the touchstone of Fourth Amendment analysis,' [citation], and reasonableness is generally assessed by carefully weighing 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' [Citation.]" (*County of Los Angeles v. Mendez* (2017) 581 U.S. ___ [137 S.Ct. 1539, 1546].)

Because the interaction between defendant and Sosa was limited to a "brief encounter . . . on a public street," the *Terry v. Ohio* (1968) 392 U.S. 1 (*Terry*) reasonable suspicion standard applies. (*Illinois v. Wardlow* (2000) 528 U.S. 119, 123 (*Wardlow*).) Terry held "the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." (*United States v. Sokolow* (1989) 490 U.S. 1, 7 [citing *Terry*, *supra*, 392 U.S. at p. 30].) If, upon detaining a person based on reasonable

suspicion, the officer "is justified in believing that the individual . . . he is investigating at close range is armed and presently dangerous to the officer or to others" (*Terry*, *supra*, at p. 24), the officer may conduct a search "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby" (*id.* at p. 26).

Here, we must first determine "at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when [Sosa] 'seized' [defendant] and whether and when he conducted a 'search.'" (*Terry*, *supra*, 392 U.S. at p. 16.) An officer "seizes" someone when, "by means of physical force or show of authority," the officer "in some way restrain[s] the [person's] liberty . . . ." (*Id.* at p. 19, fn. 16.) A brief investigatory detention, upon less than probable cause, does not violate the Fourth Amendment if the officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (*Id.* at p. 21, fn. omitted.)

Defendant contends Sosa and the other officers violated his Fourth Amendment rights as soon as they ordered him (together with the rest of defendant's group) to show their hands. Defendant's contention runs counter to controlling authority. In *California v. Hodari D.* (1991) 499 U.S. 621 (*Hodari D.*), the United States Supreme Court considered whether the defendant in that case was seized by a police officer when the officer pursued him as he attempted to flee. The high court held that in order for a constitutional seizure to occur, there must be physical force "*or*, where that is absent, *submission* to the assertion of authority." (*Id.* at p. 626; see also *Brendlin v. California* (2007) 551 U.S. 249, 254 [show of authority without physical force or

submission is "at most an attempted seizure"]; *People v. Brown* (2015) 61 Cal.4th 968, 974.) The *Hodari D.* court concluded that even if the officer's pursuit was a "'show of authority' calling upon [the defendant] to halt," it was not a seizure because the defendant did not yield. (*Hodari D.*, *supra*, at pp. 625-626, 628.)

*Hodari D.* is directly applicable here. Like the officer in that case, Sosa made a show of force when he directed defendant to show his hands. Like Hodari, defendant did not comply with the officer's command. Thus, there was no seizure at that point. It was only when Sosa placed his hands on defendant that a seizure occurred. (See *Hodari D.*, *supra*, 499 U.S. at p. 629 [pursuing officer did not seize the defendant until he tackled him]; *United States v. Smith* (9th Cir. 2011) 633 F.3d 889, 891-892 [officer did not seize the defendant when he ordered him to stand in front of his patrol car but only when the officer caught him after the defendant disregarded his order and fled] (*Smith*).) As we explain, that seizure was reasonable.

In considering the legality of a *Terry* stop, a reviewing court considers the "'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing" based on the officer's "own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' [Citations.]" (*United States v. Arvizu* (2002) 534 U.S. 266, 273.) Presence in a high-crime area is not enough, by itself, to justify a suspicion of criminal activity, but it is a relevant consideration "in determining whether the circumstances are sufficiently suspicious to warrant further investigation." (*Wardlow*, *supra*, 528 U.S. at p. 124.)

On the night in question, defendant was not merely present in a high-crime area. He was in a specific area known to be a hangout for West Side Wilmas gang members, who were known to carry guns. Multiple police radio calls had reported gang activity in that same location earlier that night, and every time officers responded to those calls, individuals congregating at the location fled. It was late at night, defendant was in a group of approximately eight people, and a recent radio call had again reported gang activity. Then, once defendant disregarded the officers' command to make his hands visible and instead attempted to run off while appearing to hold onto an object in his waistband, Sosa seized defendant by "grab[bing]" him at the waist. That was reasonable, and recovery of the gun that Sosa felt when he stopped defendant was therefore lawful. (*Sibron v. New York* (1968) 392 U.S. 40, 48-49, 67 [reasonable for officer to grab defendant and pat him down for weapons after defendant tried to flee from what appeared to be an attempted burglary]; *Pennsylvania v. Mimms* (1977) 434 U.S. 106, 112 ["little question the officer was justified" in frisking defendant for weapons once officer saw bulge in defendant's jacket]; *People v. Lindsey* (2007) 148 Cal.App.4th 1390, 1400-1401 [reasonable for officer to pat down defendant during investigatory stop after officer noticed defendant holding heavy object at his waist]; see also *Wardlow*, *supra*, 528 U.S. at pp. 122, 124-125 [high crime location combined with defendant's "unprovoked flight upon noticing the police" gave rise to suspicion of criminal activity justifying stop and patdown; *People v. Superior Court* (1971) 15 Cal.App.3d 806, 809, 813 [reasonable for officer to reach into defendant's pocket, which contained a loaded gun, without first conducting patdown, where

officer did so "almost [as] a reflexive motion" after the defendant made a "sudden gesture toward the pocket"].)

Defendant argues, however, it was unreasonable for Sosa to grab him because the evidence did not show he in fact ran away. The trial court at least implicitly found to the contrary in relying on authority concerning unprovoked flight (the *Smith* case) to deny defendant's suppression motion, and that finding is supported by Sosa's testimony. (See *People v. Tully* (2012) 54 Cal.4th 952, 979 ["'As the finder of fact . . . [,] the superior court is vested with the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences in deciding whether a search is constitutionally unreasonable'"].) Even if defendant managed to run just two steps, that was enough to show he was attempting to flee.[3]

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[3] Defendant's opening brief cites to *Miranda v. Arizona* (1966) 384 U.S. 436, appearing to contend at one point that any search or seizure was unlawful because it was not preceded by a *Miranda* advisement. To the extent the brief makes such an argument, we reject it as meritless.

## DISPOSITION

The judgment is affirmed.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, J.*

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