Filed 1/30/13 P. v. Rasner 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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JUSTIN CHARLES RASNER,<br><br>Defendant and Appellant. | 2d Crim. No. B238448<br>(Super. Ct. No. 1312984)<br>(Santa Barbara County) |

Justin Charles Rasner appeals his conviction by plea to petty theft with priors (Pen Code, §§ 666/484)[1], possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)), and possession of 28.5 grams or less of marijuana (Health & Saf. Code, § 13357, subd. (b)). Appellant was sentenced to four years eight months state prison after he admitted a prior strike conviction (§§ 667, subds. (d)(1) - (e)(1); 1170.12, subds. (b)(1) & ((c)(1)) and two prison prior enhancements (§ 667.5, subd. (b)). Appellant contends, among other things, that the trial court erred in denying his motion to suppress evidence (§1538.5) and in not striking the prior strike conviction. We modify the judgment to reflect that appellant was awarded 615 days presentence custody credits and shall pay a $95 court security fee (§ 1465.8, subd. (a)(1)) and a

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

$120 criminal conviction assessment (Gov. Code, § 70373). The judgment, as modified, is affirmed.

*Facts & Procedural History*

On June 25, 2009, appellant and his girlfriend, Ashley Snyder, stole a can of Arizona brand ice tea and a bottle of Smirnoff vodka at Nielsen's Market in Solvang. The theft was videotaped on the store surveillance system. A store employee saw Snyder and appellant drive away in a newer SUV.

On July 9, 2009, just before midnight, Santa Barbara Sheriff Deputies Brian Scott and Glen Wolfgang responded to a domestic argument call at 396 Vester Sted, Solvang. As Deputy Wolfgang approached the address, a SUV pulled out, made a quick u-turn, and parked in the street. Appellant and Snyder were in the SUV.

Deputy Wolfgang parked behind the SUV; Deputy Scott parked on the other side of the street. The deputies approached the SUV and asked whether appellant and Snyder were involved in the reported domestic argument. Snyder confirmed that they argued and said that appellant was driving because she was too upset.

The deputies asked for identification. Snyder produced an identification but appellant had none. Deputy Wolfgang conducted a records check and determined that appellant did not have a valid driver's license. During the records check, Deputy Scott heard the rattle of liquor bottles inside the SUV. The deputies asked about the noise and saw the top of a liquor bottle, a duffle bag, and a chrome metal case in plain view. The metal case had a marijuana leaf embossed on the case. Appellant said the metal case was his and contained marijuana, and that he had a machete in the duffle bag.

Appellant and Snyder consented to a search of the SUV. The officers found two 1.5 liter Smirnoff vodka bottles under the passenger seat. Inside the metal container, were four prescription bottles containing 16.4 grams of marijuana, a

marijuana grinder and paraphernalia, and a rock-like substance that appellant said was "kief" (concentrated cannabis). Another bottle had a fluid ounce of morphine sulfate.

Appellant moved to suppress this evidence on the theory it was an unlawful detention. The trial court denied the motion on the ground that it was a consensual encounter. "[T]he officer approached, he said he utilized his customary response how are you doing, what is going on this evening, those kinds of typically consen[s]ual encounter kind of discussions. The vehicle was not blocked. . . . [I]n a consen[s]ual encounter the officer may ask for identification and that is not a detention. [¶] . . . As soon as the person says no I don't have any identification really at that point [it] changed from a consen[s]ual encounter to an investigation either to a 12500(a) of the Vehicle Code driving without a valid license, . . . or 12591(a) of the Vehicle Code driving without being in possession of your driver's license. . . So it was a reasonable detention . . . . [W]ithin one to three minutes they come back with the fact that he doesn't have a driver's license, at that particular point you have probable cause to arrest and probable cause to search the area of the vehicle subject to that arrest. Although they did not arrest for that particular point they did get . . . a consen[s]ual search from the defendant."

*Consensual Encounter*

On review, we defer to the trial court's factual findings which are supported by substantial evidence and determine whether, on the facts so found, the detention and search was reasonable under the Fourth Amendment. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) It is not a detention when a police officer approaches an individual on a street and asks a few questions, "[s]o long as a reasonable person would feel free 'to disregard the police and go about his business,' [citation]. [T[he encounter is consensual and no reasonable suspicion is required." (*Florida v. Bostick*, (1991) 501 U.S. 429, 434 [115 L.Ed.2d 389, 398]; *People v. Hughes* (2002) 27 Cal.4th 287, 328.)

Deputy Wolfgang approached the parked SUV and asked if appellant and Snyder were involved in the reported domestic argument. The fact that the deputy asked for identification did not convert the consensual encounter into a detention. (*I.N.S. v. Delgado* (1984) 466 U.S. 210, 216 [80 L.Ed.2d 247, 255]; *Florida v. Bostick, supra*, 501 U.S. at pp. 434-435 [115 L.Ed.2d at p. 398].) In *People v. Terrell* (1999) 69 Cal.App.4th 1246, officers approached defendant in a park and asked to see his identification. The officers ran a warrants check and arrested defendant on an outstanding warrant. (*Id*., at p. 1251.) The Court of Appeal held that it was not an unlawful detention and the officers were free to approach defendant and ask for identification. (*Id*., at p. 1254.)

The cases cited by appellant are easily distinguished. In *People v. Bailey* (1985) 176 Cal.App.3d 402, the officer pulled up behind defendant's car, turned on his front and rear emergency lights, blocked defendant from leaving, smelled marijuana, and asked for consent to search. (*Id*., at p. 404.) In *People v. Garry* (2007) 156 Cal.App.4th 1100, the officer turned the patrol car spotlight on the defendant pedestrian, got out of the car, and briskly walked up to defendant while questioning defendant about his probation and parole status. (*Id*., at p. 1112.)

Unlike *Bailey* and *Garry*, Deputies Wofgang and Scott did not make a traffic stop, turn on their emergency lights or spotlights, draw weapons, run towards appellant, order appellant out of the SUV, question appellant about his parole or probation status, or block appellant's freedom of movement. The deputies inquired about the domestic argument call, asked for identification, and discovered appellant was driving without a driver's license, at which time appellant and Snyder consented to a search of the SUV.

The trial court correctly denied the motion to suppress. Consensual encounters do not require an articulable suspicion that the person has committed or is about to commit a crime. (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.)

*Romero Motion*

Appellant claims that the trial court abused its discretion in not striking his 2003 conviction for grand theft of a firearm. (§ 1385.) The trial court agreed that the current offenses involved a small amount of drugs and money but denied the *Romero* motion based on appellant's long criminal history and failed attempts at parole and probation. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 530-531.)

We review for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) The question is " 'whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he has not previously been convicted or one or more serious and/or violent felonies.' [Citation.]" (*Id*., at p. 377, quoting *People v. Williams* (1998) 17 Cal.4th 148, 161.)

The probation report states that appellant has a long criminal history dating back to 2000 when he was convicted of burglary and granted probation. Appellant violated probation twice and was convicted of possession of a controlled substance and grand theft of a firearm (the prior strike) in 2003. Appellant was sentenced to 16 months state prison, violated parole, and was sentenced to two years state prison in 2004 for receiving stolen property and forgery. In 2007 appellant was paroled and then convicted of driving without a license and failure to provide. Appellant was granted probation and violated probation in 2008 and 2010.

Appellant argues that he had had a difficult childhood and suffers from alcoholism, but drug or alcohol addiction is not a mitigating factor where it has been long term problem and defendant is unwilling to pursue treatment.[2] (*People v.*

[2] The probation report states that appellant (age 29) first consumed alcohol at age 15 and by age 17 was consuming "a half of a 'fifth' of hard liquor several times a week up to daily, when he could obtain it." Appellant was sober in 2009 but relapsed two

*Martinez* (1999) 71 Cal.App.4th 1502, 1511.) Given appellant's unrelenting record of recidivism and substance abuse, "there is simply nothing mitigating about an [11-year-old] prior." (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.) Once a career criminal commits the requisite number of strikes, the "circumstances must be 'extraordinary'" before he or she can be deemed to fall outside the spirit of the Three Strikes law. (*People v. Carmony*, *supra*, 33 Cal.4th at p. 376.)

Appellant asserts that the trial misconstrued its discretion when it said it would be an "abuse of discretion" to strike the prior conviction.[3] The court indicated that it would like to impose an eight year prison sentence, suspend the sentence, and place appellant on probation with close monitoring. "If it was up to the court, . . . it would do that, but the court is not free to exercise its discretion[. T]he legislature and the People of the State of California and the [en]acting of the Three Strikes Law . . . have indicated that there are certain things that have to come into play before the court can dismiss the charge under People versus Romero and it just isn't in this case."

The trial court was aware of its sentencing discretion and reasonably concluded that appellant should be sentenced as a second strike offender. (See e.g., *People v. Williams*, *supra*, 17 Cal.4th at pp. 163-164.) Appellant is the kind of

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months before his arrest, "consuming a full 'fifth' of whiskey daily. During that time, he would drink alcohol so heavily that he would 'black out' and not remember a couple of days at a time." Appellant first used marijuana at age 15 and, by age 16 was using daily. Appellant first used methamphetamine at age 19, and for a nine month period between the ages 19 and 20, was consuming a gram a day. Appellant also used cocaine and LSD and told the probation officer he has never experimented with or recreationally used prescription medication.

[3] The written plea agreement acknowledges that it is a mandatory state prison sentence case. The probation report states that appellant was statutorily ineligible for probation, that appellant's prior convictions were numerous or of increasing seriousness, that appellant has served a prior prison term, and that appellant's prior performance on probation and parole was unsatisfactory.

revolving-door career criminal for whom the Three Strikes law was devised. (*People v. Gaston* (1999) 74 Cal.App.4th 310, 320.,)

*Enhanced Presentence Conduct Credits*

Appellant was awarded 574 days presentence custody credit, consisting of 383 actual days and 191 days conduct credit. The Attorney General agrees that appellant was in custody 411 days, not 383, and should receive 615 days custody credit (411 days actual custody plus 204 conduct credit).

For the 63 days actual custody preceding the sentencing hearing (October 1, 2011 to December 2, 2011), appellant was awarded 31 days conduct credit based on former section 4019 which provides that appellant is entitled to conduct credits at the rate of two days for every four days of actual time served. (Stats. 2010, ch. 426, § 2; see *People v. Brown* (2012) 54 Cal.4th 314, 318 & fn. 3.) Appellant claims that he is entitled to 31 days additional conduct credit based on the 2011 amendment of section 4019 (AB 109) which provides that certain defendants may earn one-for-one conduct credits for crimes committed after October 1, 2011. (Stats 2011, ch. 15, § 482 (AB 109), operative October 1, 2011.)

*AB 109*

Effective October 1, 2011, section 4019 was amended to provide one-for-one conduct credits for crimes committed on or after October 1, 2011. (Stats 2011, c. 15 (AB 109) § 482.) Section 4019, subdivision (h) states in pertinent part: "The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to county jail . . . for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (Fn. omitted.)

Appellant argues, under equal protection principles, that he is entitled to 31 additional days conduct credit (enhanced one-for-one conduct credits) even though he committed the offenses in 2009, more than two years before the operative date of

AB 109. A similar argument was rejected by our Supreme Court with respect to a superseded version of section 4019 which provides for one-for-one presentence conduct credits from January 25, 2010 to September 20, 2011. (Stats 2009-2010, 3d Ex.Sess.(S.B.18) c. 28, § 50; *People v. Brown, supra,* 54 Cal.4th 314, 328-330; *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9.) The court concluded that the equal protection clauses of the federal and state Constitutions (U.S. Const., 14th Amend; Cal. Const., art. 1, § 7, subd. (a)) do not require that the superseded version of section 4019 for enhanced conduct credits be applied retroactively.

The same equal protection principle applies to AB 109 which is prospective in application. (See *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1553; *People v. Garcia* (2012) 209 Cal.App.4th 530, 541.) Appellant committed the crime in 2009, before AB 109's October 1, 2011 operative date. " '[T]he 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.' [Citation.]" (*People v. Floyd* (2003) 31 Cal.4th 179, 191.) Under the doctrine of stare decisis, *People v. Brown, supra,* and *People v. Lara, supra,* are dispositive. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

*Mandatory Fees and Assessments*

The abstract of judgment states that appellant was ordered to pay a $40 court security fee (§ 1465.8, subd. (a)(1)) and a $90 criminal conviction assessment (Gov. Code, § 70373). The Attorney General argues that the trial court erroneously calculated the fee and assessment, a sentencing matter that can be corrected on appeal. (*People v. Roa* (2009) 171 Cal.App.4th 1175, 1181 (§ 1465.8, subd. (a)(1)]; *People v. Lopez* (2010) 188 Cal.App.4th 474, 480 [Gov. Code, §70373].)

Government Code section 70373, subdivision (a)(1) requires a $30 assessment for each felony conviction and a $35 assessment for each infraction, which totals $95 for the criminal conviction assessment. (See e.g., *People v. Lopez, supra*, 188 Cal.App.4th at p. 480.) Section 1465.8, subdivision (a)(1) requires a $40 court

security fee for each criminal conviction, which totals $120 in court security fees. (See *People v. Roa*, *supra*, 171 Cal.App.4th at p. 1181.)

*Conclusion*

The judgment is modified to reflect: (1) that appellant was awarded 615 days presentence custody credits (411 days actual custody plus 214 days conduct credit), and (2) ordered to pay a $120 court security fee (§1465.8, subd. (a)(1)) and a $95 criminal conviction assessment (Gov. Code, § 70373.) The superior court clerk is directed to prepare an amended abstract of judgment and forward it to the California Department of Corrections and Rehabilitation. The judgment, as modified, is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Edward H. Bullard, Judge

Superior Court County of Santa Barbara

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