

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

| |
|---|
| California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115. |
|---|

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

SHVONTE ABDUAL BOGARD,

Defendant and Appellant.

B284954

(Los Angeles County
Super. Ct. No. NA106177)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jesse I. Rodriguez, Judge. Affirmed.

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, Michael C. Keller and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Shvonte Abdual Bogard challenges a judgment of conviction entered following a guilty plea, contending the trial court erred in denying his motion to suppress evidence. We reject his challenge and affirm the judgment.

RELEVANT PROCEDURAL BACKGROUND

On April 8, 2017, appellant was arrested when Long Beach Police Department (LBPD) officers conducted a traffic stop of a vehicle in which appellant was a passenger, and discovered that he was carrying a pipe commonly used for smoking methamphetamine. After appellant was transported to jail, an officer found that appellant possessed methamphetamine.

On May 9, 2017, an information was filed, charging appellant with possession of a controlled substance or paraphernalia in a custodial facility (Pen. Code, § 4573.6, subd. (a)).¹ Accompanying the charge were allegations that he had suffered a prior conviction constituting a “strike,” for purposes of the “Three Strikes” law (§§ 667, subds. (b) - (j), 1170.12, subds. (a) - (d), and three other prior convictions (§ 667.5, subd. (b)). Appellant pleaded not guilty.

Appellant asserted a motion to suppress evidence (§ 1538.5), which was denied. Following that ruling, appellant entered a plea of nolo contendere to the charge against him and admitted the special allegations. The trial

¹ All further statutory citations are to the Penal Code.

court struck the prior convictions and sentenced appellant to a term of two years in prison.

DISCUSSION

Appellant contends the trial court incorrectly declined to suppress the evidence discovered during and after the traffic stop. The crux of his contention is that because the initial item of evidence was found while he was unlawfully detained and subjected to an unlawful patdown, all the evidence was subject to suppression. As explained below, we discern no error in the trial court's ruling.

A. *Governing Principles*

Under section 1538.5, subdivision (a), a defendant may move to suppress evidence gathered in violation of the state or federal Constitution. The California Constitution bars the exclusion of evidence obtained as a result of an unreasonable search or seizure unless this remedy is required by the federal Constitution. (Cal. Const., art. I, § 28, subd. (d); *People v. Camacho* (2000) 23 Cal.4th 824, 830.) “The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures by police officers and other government officials. [Citation.] This constitutional proscription is enforced by an exclusionary rule, generally prohibiting admission at trial of evidence obtained in violation of the Fourth Amendment. [Citations.]” (*In re Tyrell J.* (1994) 8 Cal.4th 68, 75,

overruled on another ground in *In re Jaime P.* (2006) 40 Cal.4th 128, 139.)

When reviewing a ruling on an unsuccessful motion to exclude evidence, we defer to the trial court's express and implied factual findings, upholding them if they are supported by substantial evidence, but we then independently review the court's determination that the search did not violate the Fourth Amendment. (*People v. Lomax* (2010) 49 Cal.4th 530, 563 (*Lomax*).) In evaluating the legality of the search, we examine "the correctness or incorrectness of the trial court's ruling, not the reasons for its ruling [Citations.]" (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 27.)

Here, the key issues concern whether appellant was lawfully detained and subjected to a patdown during the investigation of a traffic violation. Generally, a police officer may detain a person in order to investigate possible criminal behavior, and may also conduct a patdown when the officer "has reason to believe that he is dealing with an armed and dangerous individual[.]" (*Terry v. Ohio* (1968) 392 U.S. 1, 27.) The officer's conduct is assessed under an objective standard. (*Id.* at p. 21.) "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (*Ibid.*) In the case of a patdown, the "sole justification . . . is the protection of the police officer and others nearby, and [the patdown] must therefore be confined

in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.” (*Id.* at p. 29.)

In conducting the investigation of a traffic violation, officers are held to specific objective standards. (*People v. Miranda* (1993) 17 Cal.App.4th 917, 926-927.) “[A] police officer can legally stop a motorist *only* if the facts and circumstances known to the officer support at least a reasonable suspicion that the driver has violated the Vehicle Code or some other law. [Citations.] ¶ . . . ¶ [A]n officer may order the driver out of the car [citation], ask for and examine the motorist’s driver’s license and the car registration, discuss the violation and listen to any explanation, write a citation, and obtain the driver’s promise to appear. [Citation.] ¶ . . . ¶ If the driver is unable to produce a driver’s license, registration, or satisfactory proof of identity, then the officer may, depending on the circumstances, reasonably expand the scope of the stop, making it incrementally more intrusive. [Citations.]” (*Ibid.*) Generally, violation of a minor traffic law, absent other circumstances raising a reasonable inference that a weapon is present, does not support a patdown. (See *People v. Superior Court* (1972) 7 Cal.3d 186, 208.)

B. *Underlying Proceedings*

Appellant’s section 1538.5 motion sought to suppress 1.91 grams of methamphetamine found in his possession

during booking, contending the discovery of that evidence resulted from an unlawful search and seizure.

1. Prosecution Evidence

At the hearing on the motion, the prosecution called as witnesses LBPD Officers Eric Thai and Justin San Juan. Officer Thai testified that on April 8, 2017, at approximately 6:53 p.m., he received a dispatch call directing him to a location on Main Avenue in Long Beach, in an area known for a high level of narcotics use. The call referred to a white van with green stripes, driven by a white female driver who was 35 to 45 years old. According to the call, whenever the van was present, there was considerable pedestrian traffic. Thai testified that the “narrative” of the call indicated possible drug-related activity.

At the designated address, Officer Thai observed a parked van matching the call’s description. Because the van had dark windows, he could not see inside it. After leaving his vehicle, he saw a person on a bicycle approach the van, place the bicycle against a pole, and enter the van, which drove away. By the time Thai returned to his vehicle, the van had disappeared.

In an effort to relocate the van, Officer Thai drove south through the area, and saw a white van approaching him. Thai saw that its female driver appeared to be distracted and allowed the van to drift into the southbound lane, so that it was travelling directly toward Thai. After maneuvering around the van, Thai made a U-turn and

conducted a traffic stop in order to investigate the traffic violation.

Officer Thai approached the driver's side of the van and talked to the driver, who matched the description provided in the dispatch call. Appellant was in the front passenger seat. When Thai asked the driver for her driver's license and registration, she identified herself as Tasha Atkinson, but said that she was not carrying her license. She also stated that she was on probation.

As Thai talked to Atkinson, LBPD Officers Justin San Juan and his partner appeared at the scene. Upon their arrival, Thai asked Atkinson to leave the van. According to Thai, he did so out of a concern for officer safety, in view of Atkinson's inability to provide identification. Appellant was also asked to leave the van. Because the van's passenger door was inoperable, appellant emerged through the van's driver side door. While Thai talked to the driver, San Juan contacted appellant. Thai testified that he asked San Juan to pay attention to appellant, but he could not recall when he told San Juan what he had observed prior to San Juan's arrival.

Officer San Juan testified that at approximately 6:53 p.m., he and his partner received a call relating to pedestrian traffic and a suspicious white van with green stripes, driven by a white female from 35 to 45 years old. He and his partner participated in the investigation of the call. San Juan could not recall when Officer Thai communicated what he had observed before San Juan's

arrival. San Juan was unable to see how many people were in the van because it had tinted windows.

When Officer San Juan appeared at the scene of the traffic stop, Thai asked appellant to leave the van. According to San Juan, appellant wore a large bulky sweater that covered his waistband, although a pants pocket was partially visible below the sweater. Because weapons are often hidden in the waistband area, San Juan conducted a patdown search of appellant, approximately 10 to 15 seconds after appellant left the van. San Juan stated that he engaged in what he described as “a standing modified position search,” which involved touching only outer clothing. Inside appellant’s front right pants pocket, San Juan felt a cylindrical object with a bulbous end which he recognized as being “used for ingesting or smoking methamphetamine.” After retrieving the item, San Juan asked whether appellant had anything else. Appellant replied that he had two containers of marijuana.

2. Defense Evidence

Appellant testified that on April 8, 2017, in the early evening, he was a passenger in Atkinson’s vehicle. As Atkinson drove along a narrow street, she found it necessary to move across the center of the street to avoid parked cars. According to appellant, when Officer Thai stopped the vehicle, Atkinson fully complied with his directions. Thai first asked them whether they were on probation. When Atkinson replied, “Yes,” and appellant replied, “No,” Thai

questioned her regarding her license and registration. Thai then ordered Atkinson to leave the vehicle and appellant to remain inside with his hands on the dashboard.

Appellant further testified that while Thai talked to Atkinson, Officer San Juan arrived. Thai returned to the vehicle and ordered appellant to leave it. When appellant asked why he was being detained, the officers said that “they would get to that.” San Juan requested appellant’s consent to be searched, which he denied. San Juan then said that he would pat appellant down and let him go. According to appellant, San Juan said, “I am patting you down for weapons. It is safety [sic] for me and my officers.” San Juan initially “tapped” appellant’s body lightly, then manipulated his fingers over appellant’s pockets in order to determine the shape of the objects inside them. Appellant stated that he “had a lot of things in [his] pockets,” including a wallet, cell phone, charger, rechargeable battery, keys, and two small cylinders.

Appellant asserted that he wore no “gigantic sweats.” At one point, he testified that he wore a snug gym sweatshirt that fell to “[his] waistline or a little bit above [his] waistline.” Later, he described the sweatshirt as “c[oming] two inches under [his] waist,” without covering his pockets.²

² For purposes of reference, the trial court received a photo of appellant’s clothing when booked.

3. *Ruling*

Following the presentation of evidence, the prosecutor identified four facts supporting Officer San Juan's patdown, namely, the "suspicious car" call describing the van as potentially involved in drug activity, the high level of narcotics activity in the area, Atkinson's unlawful driving, and appellant's baggy clothing. Defense counsel argued that appellant was not identified in the dispatch call, that the officers offered no facts showing that he was a danger, and that San Juan improperly manipulated appellant's pockets during the patdown.

In denying the motion to suppress, the trial court concluded that the officers acted lawfully in conducting the traffic stop and directing Atkinson and appellant to leave the van. The court further determined that under "the totality of the circumstances," the patdown was justified, stating: "[Officer San Juan had] a right to pat [appellant] down for weapons . . . [¶] . . . whether or not the sweater [was] covering the waist area or not because . . . weapons are not only placed on the waistband." In so concluding, the court noted that appellant's pants pockets were an obvious potential hiding place for weapons, as they contained numerous items. The court also ruled that San Juan was entitled to retrieve the pipe in appellant's pocket because he immediately recognized the object he felt as a methamphetamine pipe.

C. *Analysis*

On appeal, appellant does not challenge the trial court's rulings, insofar as the court concluded that the traffic stop was lawful, that the officers were entitled to ask appellant to leave the van, and that Officer San Juan's recognition of the object he felt permitted him to seize it. Appellant argues only that his detention after leaving the van and the ensuing patdown contravened the Fourth Amendment of the United States Constitution. As explained below, we reject his contentions.

1. *Detention*

We find dispositive guidance regarding the propriety of appellant's continued detention from *Arizona v. Johnson* (2009) 555 U.S. 323 (*Johnson*). There, while patrolling a neighborhood known for gang activity, police officers stopped a car after discovering that its registration had been suspended. (*Id.* at p. 327.) The officers had no reason to suspect anyone in the car of criminal activity. (*Ibid.*) While one officer asked the driver for a driver's license and car registration, another talked to a passenger, who was wearing what appeared to be a gang-related bandanna, had a radio scanner, and remarked that he had recently served time for burglary. (*Id.* at p. 328.) After asking the passenger to leave the car, the officer conducted a patdown, which disclosed a gun. (*Ibid.*)

In affirming the propriety of the patdown, the United States Supreme Court ruled that because the traffic stop

was lawful, the officers were entitled to detain the passenger, even though they had no reasonable ground to believe he was engaged in illegal activity. (*Johnson, supra*, 555 U.S. at p. 327.) The court stated: “A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. [Citation.] An officer’s inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop. [Citation.] [¶] In sum, . . . a traffic stop of a car communicates to a reasonable passenger that he or she is not free to terminate the encounter with the police and move about at will.” (*Id.* at p. 333.)

Here, Officer San Juan detained appellant while Officer Thai investigated Atkinson’s failure to provide a driver’s license. Under *Johnson*, appellant’s continued detention after leaving the van was lawful.

2. *Patdown*

We turn to the propriety of the patdown. Under *Terry*, a police officer is authorized to conduct “a reasonable search for weapons for the protection of the . . . officer, where he has reason to believe that he is dealing with an armed and

dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” (*Terry, supra*, 392 U.S. at p. 27.)

That standard attends to the facts known to the officer, not the officer’s subjective motive for conducting the search. (*People v. Sanders* (2003) 31 Cal.4th 318, 334.) Under the standard, “the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer’s action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.” (*Scott v. U.S.* (1978) 436 U.S. 128, 138.) Thus, “[t]he validity of a search does not turn on ‘the actual motivations of individual officers.’” (*People v. Sanders, supra*, at p. 334, quoting *Whren v. United States* (1996) 517 U.S. 806, 813.)

An instructive application of these principles is found in *People v. Collier* (2008) 166 Cal.App.4th 1374. There, two police officers stopped a car because it lacked a license plate. (*Id.* at pp. 1376-1377.) Upon contacting the car’s driver and passenger, the officers notice a strong odor of marijuana inside the car. (*Ibid.*) As the passenger wore baggy clothing capable of concealing a weapon, the officers patted him down, and found a gun in his pocket, as well as a jar of PCP. (*Id.* at p. 1377.) The trial court denied the passenger’s

motion to suppress evidence, noting that the officers were aware of the marijuana odor and the passenger's attire. (*Ibid.*) Affirming, the appellate court placed special emphasis on the fact that "guns often accompany drugs." (*Id.* at pp. 1377, 1378, quoting *U.S. v. Sakyi* (4th Cir. 1998) 160 F.3d 164, 169.)

Here, Officer San Juan was aware of similar facts supporting a patdown search. According to San Juan, he participated in the investigation triggered by the dispatch call, which referred to a suspicious van, a female driver, and pedestrian traffic. Officer Thai stated that the call indicated possible drug-related activity. Upon arriving at the traffic stop, San Juan saw a van and driver matching the descriptions provided in the call. Although San Juan's attention was drawn to appellant's sweatshirt, he also saw a pants pocket below the sweatshirt. Because appellant's attire was capable of concealing a weapon, San Juan conducted a patdown.

Under the rationale in *Collier*, there was an adequate basis for the patdown. The dispatch call raised a reasonable suspicion that the van was engaged in drug sales, as it referred to increased pedestrian traffic in the van's area. (*People v. Kershaw* (1983) 147 Cal.App.3d 750, 759 [heavy foot traffic is a sign of narcotics activity].) Indeed, the call expressly referred to potential drug activity. Although San Juan's subjective concern regarding officer safety hinged on what he perceived as the bagginess of appellant's clothing -- which appellant disputed -- the trial court found that

appellant's pockets seen by San Juan were also obvious potential hiding places for weapons.

Appellant contends the dispatch call was insufficient to raise safety concerns related to drug activity. He argues that the trial court, in finding that the patdown was justified, referred to the "totality of the circumstances" without mentioning the call. He further argues that Officer San Juan did not refer to the call in describing his subjective motive for the patdown.

In reviewing the trial court's conclusion that the patdown was justified, we resolve all factual issues in support of the ruling, insofar the court did not make express findings, provided there is adequate evidence for such implied findings. (*Lomax, supra*, 49 Cal.4th at p. 563.) That is because we review the court's findings, whether express or implied, "under the deferential substantial-evidence standard." [Citation.] Accordingly, '[w]e view the evidence in a light most favorable to the order denying the motion to suppress' [citation] and '[a]ny conflicts in the evidence are resolved in favor of the superior court ruling.' [Citation.]" (*People v. Tully* (2012) 54 Cal.4th 952, 979.) Here, the record establishes that the dispatch call communicated facts raising a reasonable suspicion regarding the van's involvement in drug activity.

Furthermore, as explained above, under *Terry*, investigative stops and patdowns are governed by an objective standard of reasonable police conduct. (*Terry, supra*, 392 U.S. at p. 21.) For that reason, Officer San

Juan's specific subjective rationale for the patdown did not render it unlawful, as the facts that he knew justified it. (*Miller v. City of Simi Valley* (9th Cir. 2009) 324 Fed.Appx. 681, 682; see *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145.) In sum, the trial court did not err in denying appellant's section 1538.5 motion.

DISPOSITION

The judgment is affirmed.

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

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.