Filed 1/14/13 In re David V. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re DAVID V., a Person Coming Under the Juvenile Court Law.	B238628 (Los Angeles County Super. Ct. No. FJ49637)
THE PEOPLE, Plaintiff and Respondent, v. DAVID V., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Philip K. Mautino, Judge. Affirmed as modified.

Bruce G. Finebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Seth P. McCutcheon, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant David V. appeals from an order of wardship entered following findings he was a minor in possession of a concealable firearm for the benefit of a criminal street gang. He was ordered home on probation. Appellant contends the recovered handgun and his statements to police were the product of an unlawful detention, and the evidence was insufficient to support the gang enhancement findings.[1]

FACTUAL AND PROCEDURAL BACKGROUND

The Los Angeles County District Attorney filed a Welfare and Institutions Code section 602 petition alleging in count 1 that appellant, then 14 years old, had possessed a concealed firearm in violation of former Penal Code[2] section 12101, subdivision (a)(1).[3] The petition further alleged pursuant to section 186.22, subdivision (b)(1)(A) that appellant had possessed the weapon "for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members." In count 2, the petition alleged that appellant had carried a loaded firearm as "an active participant in a criminal street gang"

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[1] The court also calculated a maximum term of physical confinement as seven years six months. However, because appellant was placed home on probation, the court's calculation of that maximum term is of no legal effect. (See *In re Ali A.* (2006) 139 Cal.App.4th 569, 572-574 [when minor placed home on probation, juvenile court is not authorized to include maximum term of confinement in disposition order; maximum term of confinement contained in such an order is of no legal effect]; *In re Joseph G.* (1995) 32 Cal.App.4th 1735, 1744 ["[o]nly when a court orders a minor removed from the physical custody of his parent or guardian is the court required to specify the maximum term the minor can be held in physical confinement."].) Accordingly, we shall strike this portion of the disposition order. (See *In re Matthew A.* (2008) 165 Cal.App.4th 537, 541.)

[2] Statutory references are to the Penal Code, unless otherwise indicated.

[3] Effective January 1, 2012, former section 12101, subdivision (a)(1) ("A minor shall not possess a pistol, revolver, or other firearm capable of being concealed upon the person") was repealed and replaced with section 29610, without substantive change. (Stats. 2010, ch. 711, § 4; amending Stats. 2010, ch. 711, § 6.)

in violation of former section 12031, subdivisions (a)(1) and (a)(2)(C)).[4] Appellant filed a motion to suppress under Welfare and Institutions Code section 700.1.

At the hearing on the suppression motion, which was held concurrently with the jurisdiction hearing, Carlos Cruz, the arresting officer, testified he was part of the Gang Enforcement Detail of the Los Angeles Police Department. One of his primary duties was to suppress gang activity. According to Cruz, at 7:30 p.m. on November 10, 2011, he and his partner officer saw appellant and two other individuals leaving an alley at Vermont Avenue and James M. Wood Boulevard in Los Angeles. The area was a high crime area and the "stronghold" of the Francis Avenue clique of the Mara Salvatrucha (M.S. 13) gang. It was also the subject of a gang injunction which, among other things, prohibited M.S. 13 gang members from associating with one another in public.

From prior contacts, Officer Cruz identified one of appellant's companions as Dennis B., an active M.S. 13 gang member, who had been served with the injunction. Cruz did not recognize appellant and the third individual, although he believed they were members of the M.S. 13 gang based upon their baggy clothing, and presence in the area with a known gang member. Appellant also had the close-cropped hair of a gang member. Cruz noticed appellant was carrying a black backpack over his shoulders.

Cruz and his partner decided to stop Dennis B. to investigate whether he was associating with gang members in violation of the injunction. As the officers were stepping out of their car, Dennis B. and appellant immediately looked in Cruz's direction and sprinted rapidly northbound, splitting up with the third individual. The officers returned to the patrol car and drove around the block in an attempt to cut them off. In the meantime, appellant and Dennis B. ran through a restaurant, out onto Francis Avenue and

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4 Effective January 1, 2012, former Penal Code section 12031, subdivision (a) ("A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person . . . on any public street") was repealed and replaced with section 25850, subdivision (a), without substantive change. (Stats. 2010, ch. 711, § 4; amending Stats. 2010, ch. 711, § 6.)

continued down the block before the officers drove up and ordered them to stop. Appellant complied and was detained. Apparently, neither Dennis B. nor the third individual was detained.

Officer Cruz searched the backpack appellant had been wearing, and retrieved a loaded nine-millimeter firearm, fully cocked and operable, with one bullet in the chamber. The officer noted appellant was wearing an El Salvador belt buckle, which was affiliated with the founding members of M.S. 13.

At the police station, appellant was advised of his right to remain silent, to the presence of an attorney, and, if indigent, to appointed counsel (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]), which he waived. Appellant told officers the third individual with him was Largo, an M.S. 13 member, who had given appellant the gun "to hold." Appellant also admitted he was a "future" for M.S. 13 or an aspiring gang member.

Officer Cruz, who had several years of experience investigating the M.S. 13 gang, testified as a gang expert. He described the history, territory and identifying symbols of the M.S. 13 gang and the 200-member Francis Avenue clique, and their primary activities, which included vandalism, robbery, extortion, aggravated assault, criminal threat, possession of a concealed firearm, shooting and murder. Cruz testified to prior crimes committed by two different M.S. 13 members.

Officer Cruz opined appellant was an active member of M.S. 13 because of his haircut, attire, including the El Salvador belt buckle, association with two known gang members, presence in gang-controlled territory, and admission of his gang affiliation. Cruz further opined that carrying a loaded gun at the behest of another M.S. 13 gang member benefitted the gang, because the younger gang member would be expected to use the weapon to protect the gang, and to commit crimes and to intimidate the community on behalf of the gang.

Dennis B. testified for the defense that he was at the Ventura Division of the Juvenile Justice Correctional Facility on November 10, 2011. Dennis B. had been at the facility since March 20, 2011 and was not to be released before April 5, 2019. He was never outside the facility on the night that appellant was arrested.

After hearing the evidence and argument of counsel, the court denied appellant's motion to suppress, found the allegations had been proved beyond a reasonable doubt and sustained the petition.

DISCUSSION

I. *The Detention Was Justified by Reasonable Suspicion*

Appellant's sole challenge is to the propriety of the detention, arguing the police lacked reasonable suspicion to detain him.[5] Specifically, he contends neither his mere presence in a high crime area at night, nor his attempt to avoid having contact with police was sufficient to justify a detention, nor was Officer Cruz's identification of Dennis B. credible. Appellant does not separately contest the lawfulness of the arrest or the search.

A. *The Law Governing Detentions*

Police contacts with individuals fall into "three broad categories ranging from the least to the most intrusive: consensual encounters that result in no restraint of liberty whatsoever; detentions, which are seizures of an individual that are strictly limited in

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[5] In reviewing the ruling on a motion to suppress, the appellate court defers to the trial court's factual findings, express or implied, when supported by substantial evidence. (*People v. Hoyos* (2007) 41 Cal.4th 872, 891; *People v. Ayala* (2000) 23 Cal.4th 225, 255; *People v. James* (1977) 19 Cal.3d 99, 107.) The power to judge credibility, weigh evidence and draw factual inferences is vested in the trial court. (*James*, at p. 107.) However, in determining whether, on the facts found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. (*Hoyos*, at p. 891; *People v. Zamudio* (2008) 43 Cal.4th 327, 342; *People v. Ramos* (2004) 34 Cal.4th 494, 505.) Whether relevant evidence obtained by assertedly unlawful means must be excluded is determine exclusively by deciding whether its suppression is mandated by the federal Constitution. (Cal. Const., art. I, § 28, subd. (f)(2) [formerly subd. (d)]; *People v. Lenart* (2004) 32 Cal.4th 1107, 1118.)

duration, scope, and purpose; and formal arrests or comparable restraints on an individual's liberty." (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.)

A detention occurs within the meaning of the Fourth Amendment when the officer, by means of physical force or show of authority, in some manner temporarily restrains the individual's liberty. (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 341; *Wilson v. Superior Court* (1983) 34 Cal.3d 777, 789-790; *People v. Souza* (1994) 9 Cal.4th 224, 231 (*Souza*).) Although a police officer may approach an individual in a public place and ask questions if the person is willing to listen, the officer may detain the person only if the officer has a reasonable, articulable suspicion the detainee has been, currently is or is about to be engaged in criminal activity. (*Terry v. Ohio* (1968) 392 U.S. 1, 21 [88 S.Ct. 1868, 20 L.Ed.2d 889]; see *In re Tony C.* (1978) 21 Cal.3d 888, 893.) To satisfy this requirement, the police officer must "point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*Souza*, *supra*, 9 Cal.4th at p. 231; *United States v. Sokolow* (1989) 490 U.S. 1, 7 [109 S.Ct. 1581, 104 L.Ed.2d 1] ["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"].) In evaluating whether that standard has been satisfied, we examine the "totality of the circumstances" in each case to determine whether a "particularized and objective basis" supports the detention. (*United States v. Cortez* (1981) 449 U.S. 411, 417 [101 S.Ct. 690, 66 L.Ed.2d 621].) The inferences from conduct required to establish a reasonable suspicion ultimately rest on commonsense judgment about human behavior, rather than on scientific studies. (*Illinois v. Wardlow* (2000) 528 U.S. 119, 124 [120 S.Ct. 673, 145 L.Ed.2d 570] (*Wardlow*).)

B. *Appellant's Detention Was Lawful*

Appellant refutes each piece of evidence in arguing the detention was unlawful. However, as discussed, in evaluating the propriety of appellant's detention, we are not concerned with the various pieces of evidence each considered in isolation, but with the

totality of the circumstances confronting the officers after appellant and his companions emerged from the alley, and with the juxtaposition and cumulative effect of the various pieces of evidence. (See *People v. Souza, supra,* 9 Cal.4th at p. 242.)

From the totality of circumstances there is sufficient evidence the officers had a reasonable suspicion to detain appellant. When the officers first noticed appellant wearing gang attire and walking with a known gang member in a high-crime area, their contact of him at that point would have been casual and consensual, with no restraint on appellant's liberty. (*United States v. Drayton* (2002) 536 U.S. 194, 201-202 [122 S.Ct. 2105, 153 L.Ed.2d 242]; *In re Manuel G., supra,* 16 Cal.4th at p. 821.) Appellant was free to avoid the encounter and to "go on his way," which he did by running away. (*Florida v. Royer* (1983) 460 U.S. 491, 498 [103 S.Ct. 1319, 75 L.Ed.2d 229].) However, while a person may decline to speak to officers and go about his or her business, without providing grounds for a detention, "obvious attempts to evade officers can support a reasonable suspicion." (*United States v. Brignoni-Ponce* (1975) 422 U.S. 873, 884-885 [95 S.Ct. 2574, 45 L.Ed.2d 607].) "[F]light from police is a proper consideration – and indeed can be a key factor – in determining whether in a particular case the police have sufficient cause to detain." (*People v. Souza, supra,* 9 Cal.4th at p. 235; *Illinois v. Wardlow, supra*, 528 U.S. at p. 124.)

In *Wardlow,* officers were driving in a caravan of vehicles through an area known for heavy narcotics trafficking when they saw the defendant standing near a building holding an opaque bag. (*Illinois v. Wardlow, supra*, 528 U.S. at pp. 121-122.) Upon seeing the officers, the defendant fled. (*Ibid*.) The Supreme Court held the defendant's "unprovoked flight," triggered by his observation of the police caravan, justified the officers' decision to detain him. (*Id*. at pp. 124-125.)

Similarly, in *Souza,* the California Supreme Court concluded the manner in which a person avoids police contact can be considered by officers and courts in assessing the propriety of a detention. *(People v. Souza, supra,* 9 Cal.4th at p. 234.) There, an officer on night patrol in a high-crime area encountered the defendant speaking to the occupants of a parked car. (*Id*. at p. 240.) As the officer approached, the defendant fled, and the car's occupants ducked down. (*Ibid.*) In finding the officer had reasonable suspicion to detain the defendant, the court explained, "Any temporary detention includes factors that, considered together, may suggest either criminal or innocent behavior to trained police officers. No single fact -- for instance, flight from approaching police -- can be indicative in *all* detention cases of involvement in criminal conduct. Time, locality, lighting conditions, and an area's reputation for criminal activity all give meaning to a particular act of flight, and may or may not suggest to a trained officer that the fleeing person is involved in criminal activity." (*Id*. at p. 239.)

The circumstances of appellant's suspected gang membership, his presence at night in a gang controlled area, and his association with a known gang member gave meaning to his subsequent headlong flight through a restaurant upon seeing the officers. In this context, the officers reasonably suspected appellant was fleeing because of a consciousness of guilt rather than an innocent desire to avoid police contact. That the officers may have misidentified one of appellant's companions prior to the detention is inconsequential. Under the circumstances, it was objectively reasonable for Officer Cruz to believe that appellant and his companions were members of the M.S. 13 gang and were congregating in violation of the injunction, given their attire and presence in that particular area. Finally, even if these circumstances were consistent with innocent activity, that did not preclude the officers from entertaining a reasonable suspicion of criminal activity, particularly in light of Officer Cruz's experience with the M.S. 13 gang and its conduct in the territory it claimed. (See *People v. Souza, supra,* 9 Cal.4th at p. 242.)

II. *Sufficient Evidence Supported the Gang Enhancements*

Appellant challenges the evidentiary basis for both enhancement findings.[6] With respect to count 1, the juvenile court found appellant unlawfully possessed a concealed firearm, and committed the offense "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" under section 186.22, subdivision (b)(1)(A). With respect to count 2, the court found appellant had carried a loaded firearm in a public place, as "an active participant in a criminal street gang" pursuant to former section 12031, subd. (a)(2)(C). The "active participant in a criminal street gang" element of this former statute was defined by section 186.22, subdivision (a), as meaning "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers or assists in any felonious criminal conduct by members of that gang."

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6 The same standard governs our review of the sufficiency of evidence in juvenile cases as in adult criminal cases: "[W]e review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357, italics omitted; see *In re Matthew A.*, *supra*, 165 Cal.App.4th at p. 540.)

Typically, the elements required for these enhancements are established by expert testimony provided by law enforcement professionals who have experience in the area of gang culture and psychology. (See, e.g., *People v. Gardeley* (1996) 14 Cal.4th 605, 618 [expert testimony by police detective particularly appropriate in gang enhancement case to assist fact finder in understanding gang behavior]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 944-946 [reaffirming *Gardeley* and admissibility of officer's expert testimony in the area of gang culture and psychology].)

A. *There was Sufficient Evidence of Appellant's Participation in a Gang*

Appellant contends there was insufficient evidence he was an "active" participant in the M.S. 13 gang to support the gang enhancement finding on count 2, arguing he admitted to police he was only an aspiring gang member.

Section 182, subdivision (a) does not criminalize gang membership; it targets "active participation" in a gang's activities. (Cf. see *People v. Castenada* (2000) 23 Cal.4th 743, 747 ["we construe the statutory language 'actively participates in any criminal street gang' (Pen. Code, § 186.22, subd. (a)) as meaning involvement with a criminal street gang that is more than nominal or passive"].)

Regardless of what he told police concerning the nature of his gang membership, which the juvenile court was free to disbelieve, appellant overlooks the overwhelming evidence of his active participation in the M.S. gang when he was found carrying the firearm. Appellant was dressed in gang attire, while walking through a gang stronghold and in the company of at least one known gang member, which demonstrated, according to Officer Cruz, that appellant was actively participating in the gang. Additionally, appellant told police he was given the weapon to hold by another gang member, which Cruz testified, was a prelude to using the weapon when necessary on behalf of the gang, thereby elevating appellant's status within the gang as "a shooter" and as someone willing to "put in work" or commit crimes for the gang . The evidence is substantial that appellant's involvement with the gang was active, rather than nominal or passive as appellant maintains.

B. *There was Sufficient Evidence of Appellant's Intent to Assist Gang Members*

Appellant also contends that because he acted alone in unlawfully possessing the firearm, there was no evidence he committed the crime with the specific intent to willfully promote, further, or assist other gang members in any felonious criminal conduct within the meaning of section 186.22, subdivision (a) to prove the gang enhancement on count 1. Here, too, appellant overlooks the expert testimony and his own admission to the contrary.

DISPOSITION

The maximum confinement term set forth in the minute order of January 17, 2012, is ordered stricken. In all other respects, the order is affirmed.

WOODS, J.

We concur:

PERLUSS, P.J.

JACKSON, J.