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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MAMBEREH KHACHIAN,

Defendant and Appellant.

B234650

(Los Angeles County
Super. Ct. No. PA069913)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Dalila Corral Lyons, Judge. Reversed.

Richard L. Fitzer, 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, Assistant Attorney General, Susan Sullivan Pithey and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

After the trial court denied his motion to suppress, Mambereh Khachian pleaded no contest to one count of possession of a controlled substance. On appeal, he argues that the trial court erred in denying his motion to suppress evidence of the heroin because its seizure was the product of an unlawful arrest and an involuntary consent to search. We hold that the officers had a reasonable suspicion justifying Khachian's detention but that under the circumstances, their handcuffing him turned the detention into a de facto arrest for which they lacked probable cause, thereby rendering the subsequent search unlawful. The judgment is reversed.

FACTS AND PROCEEDINGS BELOW

An information charged Khachian with one count of possession of a controlled substance (heroin). Khachian moved under Penal Code section 1538.5 to suppress evidence of the heroin obtained by the police following his arrest for walking in the middle of a residential street. (See Veh. Code, § 21956.)¹

At the hearing on the motion, the prosecution called Los Angeles Police Department (LAPD) Officer Anthony Potts as its sole witness. Officer Potts testified as follows.

At approximately 10:25 p.m. Officer Potts and his partner, Officer Rivera, were on patrol in a residential neighborhood that had recently experienced a string of burglaries. The officers observed Khachian walking in the middle of the street clad in a dark jacket, dark pants and a dark hat. Khachian was talking on a cellular phone, had one hand in his pocket and was looking at the houses on both sides of the street as he walked by. Khachian's behavior and the darkness of the area made the officers suspicious and they decided to "conduct an investigation" of Khachian.

The officers stopped their patrol car but did not activate the siren or flashing lights. After getting out of the car the officers "command[ed]" Khachian to approach and speak with them. Khachian acknowledged the officers but ignored their commands.

¹ As we discuss below, the People concede that walking in the middle of a residential street is not a crime.

After one or two orders to put down the cellular phone and take his hand out of his pocket, Khachian obeyed. As soon as he complied with their order the officers handcuffed him. They explained to Khachian that he was being “detained” for being a pedestrian in the middle of the street.

After conducting a pat-down search and finding nothing to indicate criminal conduct, Officer Rivera asked Khachian if he could search him further. Khachian responded, “Yes, officers, you may.” During that second search Rivera recovered a package of cigarettes from Khachian’s jacket pocket. Without asking Khachian’s permission, Rivera searched the cigarette package and found a bundle containing a black tar-like substance. (Khachian earlier stipulated for purposes of the preliminary hearing that the substance was heroin.)

It is undisputed that the officers never drew their guns or batons.

The trial court denied Khachian’s suppression motion. Khachian then pleaded no contest to one count of possession of a controlled substance. The court suspended imposition of sentence and placed Khachian on three years’ probation under Proposition 36. Khachian filed a timely appeal from the denial of his suppression motion under Penal Code section 1538.5, subdivision (m).

DISCUSSION

I. THE STANDARD OF REVIEW

The standard for reviewing the denial of a suppression motion is well settled. We defer to the trial court on all its factual findings if they are supported by substantial evidence.² Once the facts are determined, we decide de novo whether the search or seizure was reasonable under established constitutional principles. (*People v. Ayala* (2000) 24 Cal.4th 243, 279.)

² Thus we accept Officer Potts’s testimony that there were no street lights in the area over contrary testimony from the defense investigator.

II. THE OFFICERS WERE JUSTIFIED IN DETAINING KHACHIAN FOR INVESTIGATION

Under *Terry v. Ohio* (1968) 392 U.S. 1, 21, 30, an officer may stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion, supported by specific and articulable facts, that “criminal activity may be afoot” and that the person to be stopped is engaged in that activity, even if the officer lacks probable cause to arrest.

People concede on appeal that Khachian violated no law by walking in the middle of a residential street (Veh. Code, § 21956, subd. (a); *People v. Cox* (2008) 168 Cal.App.4th 702) and that Khachian’s doing so was not a lawful basis for detaining him. Based on that concession Khachian argues that the evidence seized from his person had to be suppressed because, even if the officers acted in good faith, there is no good faith exception to the reasonable suspicion requirement. (*In re Tony C.* (1978) 21 Cal.3d 888, 893; cf. *People v. Carmona* (2011) 195 Cal.App.4th 1385, 1394, [because the traffic stop was illegal, the evidence obtained as a result of the traffic stop must be excluded].) We agree with the rule but that is not the end of the analysis.

The officers’ mistake as to the grounds for the detention does not require the suppression of the evidence. “The *Terry* standard being one of objective reasonableness, we are not limited to what the stopping officer says or to evidence of his subjective rationale; rather, we look to the record as a whole to determine what facts were known to the officer and then consider whether a reasonable officer in those circumstances would have been suspicious.” (*U.S. v. McKie* (D.C. Cir. 1991) 951 F.2d 399, 402.) In this case, the officers were wrong in believing Khachian was violating the law by walking down the middle of the street but they nevertheless had objectively reasonable grounds for stopping and questioning him. The officers observed Khachian at 10:25 p.m. in an unlit residential area that had recently experienced several burglaries. He was dressed in dark clothing, talking on a cellular phone and acted as though he was “casing” the neighborhood. Thus, the information the officers possessed rendered the *initial* stop

constitutionally permissible. The deterrence function of the exclusionary rule would not be advanced by suppression when an officer has correctly ascertained the facts but picked the wrong legal theory.

III. THE EVIDENCE MUST BE SUPPRESSED BECAUSE IT WAS THE PRODUCT OF AN UNREASONABLE SEIZURE.

It is undisputed that Officer Potts handcuffed Khachian immediately after he obeyed Potts's instruction to put the cellular phone down and take his hand out of his pocket. It is also undisputed that after handcuffing Khachian the officers conducted a pat-down search and found nothing suspicious but nonetheless asked him "if [they] could search him further" to which Khachian responded "Yes, officers, you may." During that search Officer Rivera removed a pack of cigarettes from Khachian's jacket and opened it. Inside the pack Rivera found a white bindle containing a tar-like substance resembling heroin. In his testimony, Potts did not explain the reason for handcuffing Khachian other than that he was being "detained" for "investigation" for "being a pedestrian in the middle of the street[.]" As previously noted, the People concede that Khachian was not breaking the law by walking in the middle of the street.

Even assuming that it was constitutionally permissible for the officers to briefly handcuff Khachian while they conducted a pat-down search, it has been clear at least since *Davis v. Mississippi* (1969) 394 U.S. 721 that investigatory seizures without probable cause violate the Fourth Amendment. (See also *Brown v. Illinois* (1975) 422 U.S. 590, *Dunaway v. New York* (1979) 442 U.S. 200; *People v. McGaughran* (1979) 25 Cal.3d 577, 586 [“an investigatory detention exceed[s] constitutional bounds when extended beyond what is reasonably necessary under the circumstances which made its initiation permissible”].) Therefore, after conducting a pat-down search of Khachian, and finding no weapons or contraband, the officers were obligated to let him go on his way if he chose to. Keeping him by the side of the road in handcuffs while they conducted a further search constituted a seizure without probable cause. Therefore, the

evidence discovered must be suppressed. (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 783-784, 791; *In re Antonio B.* (2008) 166 Cal.App.4th 435, 442.)

DISPOSITION

The judgment is reversed.

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ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON,