Filed 10/22/19 In re J.D. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

In re J.D., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B294484 (Super. Ct. No. VJ46346) (Los Angeles County)
THE PEOPLE, Plaintiff and Respondent, v. J.D., Defendant and Appellant.	

J.D. appeals orders of the juvenile court sustaining a Welfare and Institutions Code[1] section 602 petition with a finding that he possessed a controlled substance (Health & Saf. Code, § 11377), a misdemeanor. We conclude, among other things, that the juvenile court could reasonably find that 1) J.D. did not

[1] All statutory references are to the Welfare and Institutions Code unless otherwise stated.

timely file a motion to suppress evidence, and 2) there was no evidence to support a motion to suppress the evidence of J.D.'s possession of methamphetamine. We affirm.

FACTS

At midnight on August 4, 2018, Sheriff's Deputy Michael Lopez arrested J.D., 17 years old, for a "curfew violation." J.D. was present with three other males who had "open alcohol containers" on a sidewalk. In a search of J.D. "incident to arrest," Lopez recovered "a clear plastic baggie containing an off-white crystalline substance resembling methamphetamine."

Cassandra Carlos, a criminalist for the county lab, tested the substance and determined it contained methamphetamine.

The People filed a section 602 petition alleging J.D. unlawfully possessed that controlled substance.

At the evidentiary hearing on the petition, Lopez testified he arrested J.D. and booked the "white crystalline substance" under a specific "lab receipt number." Lopez prepared a report on the arrest. On that same day, he prepared three or four other reports. The report he initially provided to the district attorney's office did not "contain the correct narrative for the case involving [J.D.]." He had "mixed up the narrative pages of [his] report."

J.D.'s counsel told the juvenile court that she had only received the three-page corrected report "this morning." She asked for "a short recess" to "sort out which incident report we are using." The prosecutor advised the court that J.D.'s counsel now had "all the discovery" and "everything" the People "intend[ed] to use."

The juvenile court granted a recess. After the recess, the court asked whether J.D.'s counsel was ready to proceed. She responded, "Yes."

Lopez testified the substance he recovered from J.D. was correctly "booked" for his case. On cross-examination, he said he detained J.D. for an "open container investigation, arrested him for a curfew violation and searched him incident to arrest." J.D.'s counsel asked, "A curfew violation, is that an infraction? A ticket?" Lopez: "It is."

The juvenile court excused Lopez after the prosecutor and J.D.'s counsel said they had no further questions.

Carlos testified the test on the substance found on J.D. was methamphetamine. She was excused. The People rested. The defense thereafter did not present any evidence.

J.D.'s counsel moved the juvenile court to dismiss the case on the ground that Lopez was not a credible witness. After oral argument, the court denied that motion. J.D.'s counsel said, "Defense rests."

The juvenile court asked J.D.'s counsel, "[W]ould you like to make any additional argument . . . ?" She responded, "I know bringing it up now maybe is untimely, but the illegal search." She said J.D. should not have been arrested. "He should have been cited." "[The] open container or the curfew . . . – either one of them are tickets. . . . Minors are not to be detained."

The prosecutor objected. She said this claim "should have been brought up in a [section] 1538.5 motion . . . [a] search and seizure motion."

The juvenile court denied J.D.'s motion and said that "there is no evidence before me."

DISCUSSION

Untimely Suppression Motion

J.D. contends the juvenile court implicitly and erroneously refused to hear his motion to suppress the evidence of

methamphetamine as untimely. He claims the case must be remanded for a hearing on the suppression motion. We disagree.

Section 700.1 provides, in relevant part, "Any motion to suppress as evidence any tangible or intangible thing obtained as a result of an unlawful search or seizure *shall be heard prior to the attachment of jeopardy* and shall be heard at least five judicial days after receipt of notice by the people unless the people are willing to waive a portion of this time." (Italics added.) This section also provides, "If, *prior to the attachment of jeopardy*, opportunity for this motion did not exist or the person alleged to come within the provisions of the juvenile court law was not aware of the grounds for the motion, that person shall have the right to make this motion during the course of the proceeding under Section 701." (*Ibid.*, italics added.) Jeopardy attaches when the first witness is sworn. (*Richard M. v. Superior Court* (1971) 4 Cal.3d 370, 376.)

J.D. contends because of the People's delay in producing the correct arrest report, his counsel's motion to suppress evidence was timely.

The People respond that the motion came too late. They note it was first raised at the end of counsel's closing argument, after the witnesses had testified, and both were excused, and after "both sides had rested, and jeopardy had attached." We agree.

When J.D.'s counsel first raised the suppression issue in her closing argument, she knew there was a problem with her delay in raising it so late in the proceedings. She said, "I know bringing it up now maybe is *untimely* . . . ." (Italics added.)

In *People v. Burke* (1974) 38 Cal.App.3d 708, the Court of Appeal affirmed a trial court's refusal to consider a suppression

motion because it was untimely. There, before jeopardy had attached, defense counsel made the suppression motion at the beginning of trial. He told the court that he had "no opportunity to make the motion earlier because of delay in discovering the relevant facts." (*Id.* at p. 713.) The trial court said he "had been representing the defendant for two months" and he had "ample time . . . to make the motion before trial." (*Ibid.*) In affirming, the Court of Appeal said there is "a strong legislative preference for litigating prior to trial the legality of searches and seizures" and "[n]o persuasive justification for the delay was presented." (*Ibid.*) Here J.D.'s counsel was not new to this case. She had represented him in three prior hearings. Moreover, unlike the counsel in *Burke*, she did not raise the issue before the September 21, 2018, evidentiary hearing or before jeopardy had attached.

In *People v. Martinez* (1975) 14 Cal.3d 533, 535, our Supreme Court affirmed a trial court's denial of a "mid-trial motion to suppress evidence." The defendant claimed his counsel's failure to make the motion before trial was excused because he "was unaware of the grounds for suppression" until a police witness testified at trial. (*Id*. at p. 537.) In affirming, the court said, "He could have learned the grounds for a pretrial suppression motion *by simply interviewing his client*." (*Ibid*., italics added.) Similarly, in *People v. Frazier* (2005) 128 Cal.App.4th 807, 829, the court rejected a claim that a late suppression motion should be excused by counsel's late discovery of facts and stated, among other things, that "[t]he facts of the two searches . . . *must have been within the knowledge of defendant*." (Italics added.)

Here J.D.'s counsel did not claim she had been prevented from interviewing J.D. about the facts of his arrest. She had appeared with him at *four hearings* – an August 29th hearing, a September 18th hearing, a September 20th hearing, and the September 21st evidentiary hearing. J.D. notes the People produced a late police report on the day of the evidentiary hearing. But the prosecutor confirmed that J.D. had received all the discovery at 9:00 a.m. that morning. The juvenile court granted J.D.'s counsel a recess. After the recess, at approximately 3:10 p.m., J.D.'s counsel confirmed she was "ready" to proceed. J.D. has not shown that the court did not carefully evaluate the impact of the delayed discovery in determining procedural fairness for J.D. Moreover, Lopez testified about the reason why he arrested J.D.

J.D. notes that in *People v. Guzman* (1975) 47 Cal.App.3d 380 (overruled on other grounds in *People v. McDonald* (1984) 37 Cal.3d 351, 362, fn. 8), the court held it was error to deny a suppression motion made during trial as untimely because the defendant did not have the opportunity to raise that motion earlier. But, as the People note, that case is distinguishable. There the defense raised the suppression motion during trial when the prosecutor was attempting to introduce the challenged evidence.

Here, by contrast, J.D.'s counsel did not make the motion during trial at the time the evidence was presented. She could have made the motion when Lopez testified at the beginning of the hearing that he arrested J.D. for a "curfew violation." She could have questioned Lopez about how he had determined J.D. violated curfew and under what ordinance during cross-examination. But she did not raise those issues at that time.

Instead, counsel raised the suppression issue after it was too late to question any witnesses. She raised it in closing argument after Lopez and the other witness had been excused, after all the evidence had been introduced, and after both sides had rested. She introduced the issue by stating that "bringing it up now *maybe is untimely*." (Italics added.) The juvenile court could reasonably find the motion was untimely.

J.D.'s Unlawful Arrest Claim

But even assuming arguendo that J.D. had shown the motion was timely, the result would not change. The parties have assumed the juvenile court implicitly denied the suppression motion on the single ground that it was untimely. But the court also could reasonably infer there was no evidence and no merit to J.D.'s claim that his arrest was unlawful.

J.D.'s counsel argued minors, such as J.D., may not be detained for curfew violations, and therefore items seized as incidents of such arrests (the methamphetamine) are inadmissible as a violation of the Fourth Amendment. In rejecting this claim, the juvenile court mentioned, among other things, that 1) "[t]here was no suppression motion," and 2) "*there is no evidence before me*." (Italics added.)

The juvenile court was correct. J.D.'s counsel did not request the court to recall Lopez to testify and did not make an offer of proof of any proposed additional facts. She did not request an evidentiary hearing. She merely presented legal arguments based on the evidence already admitted.

But the legal points counsel raised were not correct and did not support a suppression order. Counsel's claim that police are prohibited from arresting or detaining minors for curfew violations is not correct. A police officer may arrest and

temporarily detain a minor for a curfew violation. (*In re Ian C.* (2001) 87 Cal.App.4th 856, 859-860; *id.* at p. 860 ["We are not alone in upholding the detention and search of a curfew violator"]; see also *In re R.W.* (2018) 24 Cal.App.5th 145, 150; *In re Charles C.* (1999) 76 Cal.App.4th 420, 426-427.) A search incident to such an arrest or detention for a minor's curfew violation is authorized. (*Ian C.*, at p. 860; *Charles C.*, at p. 427.)

J.D.'s counsel argued the arrest was unconstitutional because curfew violations are minor offenses for which the police issue tickets or citations. But " '[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.' " (*People v. McKay* (2002) 27 Cal.4th 601, 607.) "[T]here is nothing inherently unconstitutional about effecting a custodial arrest for a fine-only offense." (*Ibid.*; see also *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 323; *In re Ian C.*, *supra*, 87 Cal.App.4th at p. 860.)

J.D. contends Lopez may have "likely" erred "in failing to rule out the exceptions to" the possible curfew ordinances of Los Angeles or Whittier that may have applied. But this issue was not raised in the juvenile court. In closing argument, J.D.'s trial counsel made no reference to any curfew ordinance Lopez allegedly violated. His counsel had the opportunity to question Lopez about the requirements involving specific curfew ordinances on cross-examination, but counsel did not do so. A defendant on appeal may not claim evidence should have been suppressed on specific grounds when he or she did not raise those grounds in the trial court. (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1192-1193; see also *People v. Saunders* (1993)

5 Cal.4th 580, 590; *People v. Borland* (1996) 50 Cal.App.4th 124, 128; *People v. Hulings* (1962) 211 Cal.App.2d 218, 220.)

In addition, J.D.'s trial counsel did not make an offer of proof to support the factual basis for J.D.'s current claims on appeal. (*People v. Eid* (1994) 31 Cal.App.4th 114, 126 ["Failure to make an adequate offer of proof precludes consideration of the alleged error on appeal"].) J.D.'s current argument is also based on speculation about whether Lopez may have "likely" erred and about which ordinances might have applied. But speculation about matters not found in the record and not raised below will not support a reversal. (*People v. Zepeda*, *supra*, 87 Cal.App.4th at pp. 1192-1193; *People v. Hulings*, *supra*, 211 Cal.App.2d at p. 220.)

DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Kevin L. Brown, Judge

Superior Court County of Los Angeles

Mary Bernstein, 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, Assistant Attorney General, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.