Filed 12/28/09 P. v. Abberton CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. COLIN JAMES ABBERTON, Defendant and Appellant.	A123171 (San Mateo County Super. Ct. No. SC066163)

I. INTRODUCTION

After being detained and then arrested in East Palo Alto for possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1))[1] while on probation with a search condition, appellant pled no contest to that charge and was placed on further probation. He appeals, claiming the trial court incorrectly denied his Penal Code section 1538.5 motion to suppress evidence, claiming that he was unlawfully detained when the arresting officers learned he was on probation with a search condition. We disagree with this contention and hence affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

During the mid-afternoon of April 11, 2008,[2] appellant and his girlfriend, Ashley Serpa-Flack, were seated in a parked U-Haul truck at the end of a cul-de-sac in East Palo Alto; appellant was in the passenger seat and his girlfriend in the driver's seat. Ms.

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

[2] All subsequent dates noted are in 2008.

Sherpa-Flack, a student at the University of California, Santa Cruz, had driven to this location so that a friend of appellant's, someone named Raul, could visit some family who lived there.

While these two individuals were parked there, a patrol car driven by East Palo Alto Police Officer Marshbanks and also containing his partner, Officer Norris, came into the cul de sac. Marshbanks parked the patrol car "on the other side of the street facing southbound from the U-Haul van" and, according to both officers, did not block the latter vehicle.[3] The two officers exited the patrol car and approached the two people in the U-Haul. Officer Norris began the encounter, according to the testimony of Ms. Serpa-Flack, by simply asking them some general questions; she described this encounter thusly: "He asked what we were doing, if we knew the area, if we knew what was going on in East Palo Alto and essentially spoke to us the entire time we were stopped and the entire time we were questioned."

Appellant responded to this question by stating that he was on his way to a birthday party for his mother.

At this point, and within less than a minute of the two officers initial approach to the U-Haul vehicle, Officer Marshbanks asked to see the two persons' driver's licenses.[4] Immediately upon reviewing them, he asked if either was on probation or parole. (RT 10.) Appellant responded that he was on probation with a search condition. Officer Marshbanks then asked appellant whether "he had anything illegal in the vehicle?" Appellant responded by stating that there was a firearm on a black sweatshirt between their two seats.

At that point, the two officers drew their weapons, arrested appellant, and retrieved a .22 caliber handgun from the floorboard of the truck.

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[3] According to the testimony of Ms. Serpa-Flack, after the arrival and parking of the police car, she did not feel she was "able to move" the U-Haul, because "it would have been difficult to maneuver out."

[4] According to the testimony of Ms. Serpa-Flack, the time between the officers' approach to her and appellant and when they asked to see their drivers' licenses was "[a]bout three to five minutes."

Shortly thereafter, a third officer, Officer Norden, arrived to provide cover and assistance for the other two officers. Initially, his vehicle blocked the U-Haul truck from leaving; shortly afterwards, it was moved to allow Ms. Serpa-Flack to leave in the U-Haul.

On May 9, a four-count information was filed against appellant. In addition to the charge noted above, it also charged him with carrying a concealed weapon, carrying a loaded firearm with a prior conviction for carrying a concealed weapon in public, and possession by a felon. (Respectively, §§ 12025, subd. (a)(3), 12031, subd. (a)(2)(A), and 12316, subd. (b)(1).) The information also alleged that appellant was ineligible for probation based on his commission of three prior felonies. (§ 1203, subd. (e)(4); Health & Saf. Code, §§ 11351, 11359 & 11378.)

On September 15, the trial court denied appellant's section 1538.5 motion—the issue to be discussed below. At that point, appellant revised his plea to plead no contest to the section 12021, subdivision (a)(1), charge and the remaining three counts were dismissed by the prosecution. The trial court suspended imposition of a prison sentence, and placed appellant on three years probation with a condition of 10 months in jail.

Appellant filed a timely notice of appeal on November 7.

III. DISCUSSION

A. *The Relevant Search & Seizure Law*

At the hearing on the motion to suppress, appellant's counsel stipulated that his probation status provided for a warrantless search. Nevertheless, he contends that he disclosed that fact to Officers Norris and Marshbanks during an unlawful detention by them. We thus turn to discuss, first, the law on this subject and, second, the relevant factual findings of the magistrate.

The Fourth Amendment of the federal Constitution requires state and federal courts to exclude evidence obtained from unreasonable government searches and seizures. (*People v. Williams* (1999) 20 Cal.4th 119, 125.) State and federal constitutional claims regarding the admissibility of evidence obtained by an allegedly improper search and seizure are reviewed under the same standard. (*In re Tyrell J.*

(1994) 8 Cal.4th 68, 76, overruled on another ground in *In re Jaime P*. (2006) 40 Cal.4th 128; *People v. Camacho* (2000) 23 Cal.4th 824, 829-830.) A warrantless search is presumed to be illegal. (*Mincey v. Arizona* (1978) 437 U.S. 385, 390.) The prosecution always has the burden of justifying a warrantless search or seizure by proving that it fell within a recognized exception to the warrant requirement. (*People v. Williams*, at p. 130; *In re Tyrell J*., at p. 76.)

In *In re Manuel G*. (1997) 16 Cal.4th 805, our Supreme Court discussed the differences between consensual encounters and detentions thusly: "Consensual encounters do not trigger Fourth Amendment scrutiny. [Citation.] Unlike detentions, they require no articulable suspicion that the person has committed or is about to commit a crime. [Citation.] [¶] The United States Supreme Court has made it clear that a detention does not occur when a police officer merely approaches an individual on the street and asks a few questions. [Citation.] As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required on the part of the officer. Only when the officer, by means of physical force or show of authority, in some manner restrains the individual's liberty, does a seizure occur. [Citations.] '[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.' [Citation.] This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation. [Citation.] Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled." (*Id.* at p. 821.)

The test for the existence of a show of coercive authority is an objective one, and does not take into account the perceptions of the particular person involved. (*In re Manuel G., supra,* 16 Cal.4th at p. 821; *California v. Hodari D*. (1991) 499 U.S. 621,

628.) As one court has noted, "[i]t is not the nature of the question or request made by the authorities, but rather the manner or mode in which it is put to the citizen that guides us in deciding whether compliance was voluntary or not." (*People v. Franklin* (1987) 192 Cal.App.3d 935, 941.)

"Where a motion to suppress is submitted to the superior court on the preliminary hearing transcript, the appellate court disregards the findings of the superior court and reviews the determination of the magistrate who ruled on the motion to suppress, drawing all presumptions in favor of the factual determinations of the magistrate, upholding the magistrate's express or implied findings if they are supported by substantial evidence, and measuring the facts as found by the trier against the constitutional standard of reasonableness." (*People v. Thompson* (1990) 221 Cal.App.3d 923, 940.)

We apply a mixed standard of review. "Whether a seizure occurred within the meaning of the Fourth Amendment is a mixed question of law and fact qualifying for independent review. [Citations.] Accordingly, 'we review the trial court's findings of historical fact under the deferential substantial evidence standard, but decide the ultimate constitutional question independently. [Citations.]' [Citation.] We must accept factual inferences in favor of the trial court's ruling. [Citation.] If there is conflicting testimony, we must accept the trial court's resolution of disputed facts and inferences, its evaluations of credibility, and the version of events most favorable to the People, to the extent the record supports them. [Citations.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 342.)

B. *The Magistrate was Correct in Holding there was no Unlawful Detainer Here*

Bearing in mind the standard of review issue just discussed, we will next recite the key elements of the trial court's findings after it heard the testimony it did on September 15. It stated, in the most relevant part: "It frankly was the testimony here of Officer Norris that ultimately has swayed me to [the] result that I'm going to deliver here because it's pretty clear as evidenced by Miss Serpa-Flack's testimony, as well that the initial approach here was to essentially discuss, 'Hey, do you know what you're doing here. Do you know the area. Do you understand what goes on here?' Was not one in which this court believes a reasonable person would believe at that point that they're being detained,

rather Officer Norris is engaging in a conversation with someone there. As it relates to the location and the parking of the vehicles; I am going to accept factually Officer Norris' representation of the positioning of the vehicles. It makes logical sense when Officer Norden then arrived as a cover vehicle then that vehicle would need to be moved before Miss Serpa-Flack could be in a position to move the U-haul truck. And I can certainly understand in the factual setting that was involved here seeing her boyfriend being arrested that she may have been focusing more on that and not on the fact that there was a cover-unit which arrived that essentially boxed her in. It's not particularly helpful one way or another as to Officer Marshbanks' description or former Officer Marshbanks' description where he parked because 'across the street' could have been anything including the positions and locations which were shown in the People's diagram here. The timing thereafter from the discussion held by Officer Norris almost immediately thereafter followed up by the request of Mr. Marshbanks for identification asking the question whether or not anybody was on probation or parole. Again, logically the court falls in line here the timing I think was very brief from the totality of the evidence presented here in terms of that timing. And so in weighing and considering all of the evidence presented here and using an objective standard, I do not find that the initial contact between the officers and Miss Serpa-Flack and Mr. Abberton constituted a detention. And I don't find that the detention occurred until such time that the officers were informed that there was a firearm in the vehicle. From the moment that the officers become aware that Mr. Abberton was on probation there is certainly justification for the search without any particular suspicion as in the case of People versus Sanders, S-A-N-D-E-R-S, at 3l Cal. Fourth, 318. Decision of 2002 or 2003. There is certainly no evidence that the search was done on the basis of being arbitrarily capricious for the purposes of harassment. So again, the evidence—the totality of the evidence taken with the testimony of each of these witnesses the motion to suppress is going to be respectfully denied."

Especially under the standard of review noted above, we find this ruling to be correct. Both at the hearing on the motion to suppress and in his briefs to us, appellant's

basic argument is that an unlawful detention occurred when the police car driven by Officer Marshbanks and containing him and Officer Norris pulled up near the U-Haul van in the cul de sac, because that car effectively blocked the U-Haul van from departing. But, first of all, that contention rests entirely on the testimony of appellant's girlfriend, Ms. Serpa-Flack, and she was somewhat ambivalent on the subject of whether the initial placement of the police car totally blocked her from moving the van. Her first answer regarding that subject was as follows, under examination by appellant's counsel:

" Q. Did you feel at that time [when the police car first arrived] that you were able to move your car?

"A. No."

Under cross-examination by the deputy district attorney, the following testimony was added:

"Q. You weren't able to pull out when they originally approached?

"A. No.

"Q. Was there—there was no way to reverse the vehicle?

"A. It would have been difficult to maneuver out."

Then, under re-direct examination by appellant's counsel, she testified:

"Q. And once the police car arrived were you capable of leaving?

"A. No."

Officer Norris and Marshbanks' testimony was, however, quite to the contrary. Officer Marshbanks testified that their patrol car was parked "on the other side of the street facing southbound from the U-haul van." Officer Norris then elaborated, in response to a specific question from the deputy district attorney as follows:

"She wasn't being blocked in the front or back. At that time when we first approached she had nobody parked in front of her and there was nobody behind her." Norris did not change or alter this testimony on cross-examination.

The only other difference between the testimony of the two officers and that of Ms. Serpa-Flack related to the amount of time that elapsed after the officers arrived at the window of the U-Haul van and when they asked to see her and appellant's driver's

licenses. As noted, Officer Norris testified it was only 10 to 20 seconds while Ms. Serpa-Flack testified it was "[a]bout three to five minutes." But this difference is not at all material: the point is that it was a relatively very short period of time that the officers questioned the two persons "trying to get a feel for if we knew the area, if we were familiar with it" (per Ms. Serpa-Flack's description) before they asked for their driver's licenses. As our Supreme Court made clear in *In re Manuel G., supra,* 16 Cal.4th at page 821: "[A] detention does not occur when a police officer merely approaches an individual on the street and asks a few questions." (See also, to the same effect, *Florida v. Bostick* (1991) 501 U.S. 429, 434.) Even crediting the testimony of Ms. Serpa-Flack 100 percent, no more than that occurred here.

The testimony of Officers Norris and Marshbanks regarding both that issue and the "van-blocking" issue was clearly credited by the trial court. That being the case, "we necessarily defer to those factual findings where 'supported by substantial evidence.'" (*People v. Samples* (1996) 48 Cal.App.4th 1197, 1203, citing *People v. Glaser* (1995) 11 Cal.4th 354, 362; see also *People v. Garry* (2007) 156 Cal.App.4th 1100, 1106 (*Garry*).) There most certainly was such "substantial evidence" here, specifically the testimony of the two officers, especially Officer Norris.

Defendant argues that we should find that he was unlawfully detained based on our decision in *Garry, supra,* 156 Cal.App.4th 1100, because the two officers conduct was so intimidating as to constitute an unlawful detention. In *Garry*, an officer patrolling late at night in a high-crime, high-drug area where street sales often occurred and police had been assaulted, observed Garry standing on a corner. (*Id*. at p. 1104.) The officer turned the patrol car's spotlight directly on Garry, exited his car, and walked "briskly" towards him, covering about 35 feet in two and a half to three seconds, while asking Garry to confirm his parole status and disregarding his assertion that he was merely standing outside his home. (*Ibid*.) After learning that Garry was on parole, the officer decided to detain him and, after Garry resisted detention, the officer arrested him and searched him, finding certain illegal substances. (*Ibid*.) We concluded that an unlawful detention had occurred because the officer's actions, "taken as a whole, would be very

intimidating to any reasonable person" and that "only one conclusion is possible from this undisputed evidence: that [the officer's] actions constituted a show of authority so intimidating as to communicate to any reasonable person that he or she was " ' "not free to decline [his] requests or otherwise terminate the encounter." ' " (*Id*. at pp. 1111-1112.)

The differences between these facts and the present circumstances are obvious. Neither Marshbanks nor Norris shined a spotlight on appellant, rushed towards him, demanded to know his legal status, or otherwise took actions which suggested any effort to freeze appellant in his movements; to the contrary, their approach was not in the slightest intimidating, thus rendering *Garry* quite inapposite.

IV. DISPOSITION

The judgment is affirmed.

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Haerle, J.

We concur:

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Kline, P.J.

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Richman, J.