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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. OMAR AISPURO, Defendant and Appellant.	D052086 (Super. Ct. No. SCD200280)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Gill, Judge. Affirmed.

The prosecution charged Omar Aispuro with possession of ammunition by a person prohibited from possessing a firearm (Pen. Code, § 12316, subd. (b)(1)).[1] Aispuro filed a section 1538.5 motion to suppress the ammunition evidence found in a search of his person, arguing his detention was unlawful and all evidence found in a search following the unlawful detention should be suppressed. The trial court denied the

1 Statutory references are to the Penal Code.

motion, finding police reasonably detained Aispuro. A jury subsequently convicted Aispuro of illegal possession of ammunition. The court sentenced him to the middle term of two years in prison.

Aispuro appeals, contending (1) the court erred by denying his section 1538.5 motion, and (2) on appeal the People rely on a theory not previously raised at the suppression hearing. We conclude the court properly denied Aispuro's motion to suppress evidence. We further conclude the People raised all necessary theories at the suppression hearing to permit assertion of the theories on appeal, and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On July 14, 2006, Officer Hubert Scallon encountered a man (Francisco) who was visibly upset and in a distressed state, crying and swaying back and forth while walking on the sidewalk outside the Homestead Suites hotel. After a short conversation, Scallon determined Francisco's agitated condition was likely caused by the influence of narcotics. Francisco gave his name to Scallon, who processed it through the California Law Enforcement Telecommunications System (CLETS) to determine whether Francisco had a criminal background or was subject to a search waiver or arrest warrant.[2] Scallon learned Francisco had a criminal history and was subject to a Fourth Amendment waiver. Scallon placed Francisco in his patrol vehicle and took him to find his hotel room and

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[2] Individuals on parole or probation in the state of California are subject to a Fourth Amendment search and seizure waiver. (*People v. Reyes* (1998) 19 Cal.4th 743, 753-754.)

confirm his identification. A woman told Scallon that Francisco was with her and led the officer to room 126. She knocked on the door, announced the officer's presence and stated his request for Francisco's identification. Scallon heard the occupants lock the door and waited 30 seconds until an occupant opened it. Scallon saw Aispuro and three other occupants in the room, each of whom appeared startled with a frozen, "deer-in-the-headlights" look. At that moment he believed he had interrupted illegal activity and Aispuro was under the influence of narcotics. Scallon requested each of the occupants of the room to come to the door and present their identifications. At first Aispuro was unresponsive to Scallon's questions but later became aggressive.

Scallon submitted each name through CLETS to determine criminal histories and outstanding warrants. Meanwhile, Scallon asked each of the occupants to sit on the curb outside the room. As the four occupants sat on the curb, Scallon learned two additional people were in the bathroom of the room. He entered the room to perform a safety sweep and found two additional people in the bathroom. Scallon also seated those two occupants on the curb outside the room.

The CLETS inquiry disclosed Aispuro was subject to two outstanding arrest warrants. Scallon placed Aispuro in handcuffs and under arrest. Incident to the arrest, Scallon searched Aispuro and found eleven .9 millimeter bullets in the front left pocket of his pants.

Prior to trial, Aispuro filed a section 1538.5 motion to suppress several items of evidence, including the .9 millimeter bullets. The trial court heard the testimonies of

Scallon and officer Jeffrey Wuehler at the suppression hearing and denied Aispuro's 1538.5 motion.

DISCUSSION

Aispuro contends the court erred by denying his motion to suppress evidence. He asserts the evidence admitted against him should be suppressed because it was obtained as a result of an unlawful detention.

I

Standard of Review

The standards of review of the trial court's determination on a motion to suppress pursuant to section 1538.5 are not in dispute. Factual determinations are reviewed under the substantial evidence standard; the determination of the applicable rule of law is reviewed de novo. (*People v. Williams* (1988) 45 Cal.3d 1268, 1301.) For a defendant to prevail on appeal, it must appear that, after reviewing the evidence most favorably to the prosecution, on no reasonable hypothesis was there sufficient substantial evidence to support the trial court's decision. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Bard* (1968) 70 Cal.2d 3, 4-5.) Under de novo review, the appellate court independently reviews the legal issue of reasonableness of the challenged detention. (*People v. Alvarez* (1996) 14 Cal.4th 155, 182.)

II

Lawful Detention

Police officers may lawfully detain individuals briefly as long as the detention is reasonable and does not amount to an arrest. (*People v. Coulombe* (2000) 86 Cal.App.4th

52, 56.) Traditionally there have been different categories of police interactions with individuals, each of which evoked a separate analysis regarding the degree of restraint and extent to which a person was detained. (*People v. Verin* (1990) 220 Cal.App.3d 551, 557.) Unlike consensual encounters and arrest, lawful police detentions must be strictly limited in duration, scope and purpose. (*Id*. at p. 555.) A lawful detention must be reasonable, brief, and within the scope and purpose of lawful police duties.

A. Grounds for Aispuro's Initial Detention

The parties agree Aispuro was initially detained before Scallon was aware he was subject to outstanding arrest warrants. Traditionally, police may make an initial detention of someone if they have an articulable reasonable suspicion the person committed or was about to commit a crime. (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784.) The issue is whether there was an articulable reasonable suspicion Aispuro was involved in criminal activity. (*People v. Souza* (1994) 9 Cal.4th 224, 230.)

We conclude reasonable grounds existed to detain Aispuro based on his personal actions and those of his companions. During Scallon's initial encounter with Aispuro, he gained articulable facts to suspect illegal activity took place at the hotel. After Scallon knocked on the door, announced his presence and stated his request for Francisco's identification, he heard the occupants lock the door. He waited for approximately 30 seconds for the occupants to open the door. When they did, each looked frozen in their positions and startled, as if Scallon had just interrupted illegal activity. Aispuro aggressively responded to questioning by Scallon, whose focus shifted to Aispuro's behavior. Aispuro's conduct so distinctly differed from innocent activity that a

reasonable officer under similar circumstances would be justified in suspecting Aispuro's actions were consistent with criminal activity. (*Restani v. Superior Court* (1970) 13 Cal.App.3d 189, 195.) Reasonable suspicion permits officers to make further inquiry.

B. The Scope and Purpose of Aispuro's Detention

Aispuro's continued detention was reasonable based on Scallon's investigation and a protective sweep of the hotel room. The " 'scope of the detention must be carefully tailored to its underlying justification.' " (*People v. Soun* (1995) 34 Cal.App.4th 1499, 1516, quoting *Florida v. Royer* (1983) 460 U.S. 491, 500.) It is reasonable to continue a legal detention of a suspect for the purpose, and during the time, of a reasonable inquiry concerning outstanding warrants or criminal history. (*People v. Harris* (1963) 212 Cal.App.2d 845, 848.) It must be " 'temporary and last no longer than is necessary to effectuate the purpose of the [detention].' [Quoting *Royer*, at p. 500.]" (*Soun*, at p. 1516.) The purpose of the detention for questioning is to enable law enforcement officers to determine whether to make an arrest, investigate further, or take no action. (*People v. McLean* (1970) 6 Cal.App.3d 300, 306.)

Scallon's detention of Aispuro was limited in scope. Scallon requested the identifications of the occupants to ascertain their criminal histories or outstanding warrants after he observed suspicious criminal behavior. He detained Aispuro and the occupants outside their room for mere minutes to conduct a CLETS inquiry on each. After a few minutes, the CLETS inquiry informed Scallon that Aispuro was subject to outstanding arrest warrants. Scallon's orderly and brief search of the occupants'

identifications to determine whether the individuals had a criminal past or a current warrant outstanding was within reasonable law enforcement action.

Additionally, the Fourth Amendment permits continued detention to perform a protective sweep if the officer reasonably believes accomplices are nearby. (*Maryland v. Buie* (1990) 494 U.S. 325, 329.) An officer is justified in a limited intrusion to investigate whether others are present who may present a danger to persons or property. (*Ibid.*) There is a legitimate state interest in the protection of officers and in ensuring persons are not armed or able to gain control or use of a fatal weapon against them. (*Id.* at pp. 332-334.) At trial, Scallon explained he learned from the first four occupants that there were two additional individuals in the hotel room. When he entered the room for a protective sweep, he found a gun case, an assault rifle, a .9 millimeter pistol, an open backpack containing a large bag of marijuana and a smaller bag of marijuana, and two additional people. Aispuro's continued detention during this search was reasonable to protect the officer's safety and to allow the officer to perform an orderly search of the premises. The intrusion was *de minimus*, reasonable, and brief. (*Buie,* at pp. 333-334.) We conclude Aispuro's detention prior to the police learning of his outstanding arrest warrants was reasonable and therefore lawful.

C. Evidence Obtained

Only evidence seized as a result of an illegal search is subject to suppression in response to a section 1538.5 motion. (*People v. Brendlin* (2008) 45 Cal.4th 262, 268-271.) We conclude Aispuro was lawfully detained, investigated for outstanding warrants, and lawfully arrested pursuant to an outstanding arrest warrant. A person lawfully

arrested may be searched incident to the arrest. (*People v. Hurst* (1967) 256 Cal.App.2d 89, 94.) After the CLETS inquiry confirmed the existence of outstanding arrest warrants for Aispuro, Scallon lawfully placed him under arrest and searched his pockets incident to the arrest. The .9 millimeter rounds found in his pockets were lawfully obtained in a search incident to arrest and therefore should not have been suppressed.

We note *People v. Brendlin, supra,* 45 Cal.4th 262 was decided after the appellate briefs in this matter were filed. Under *Brendlin,* it appears that, barring flagrant misconduct, police officers may now perform an arrest warrant search of a defendant even when the initial detention is unlawful so long as the officer learns of the arrest warrant prior to the search. We requested and received supplemental briefs discussing the applicability of *Brendlin* to this case, and have considered those supplemental briefs.

In *Brendlin* an officer stopped a vehicle without reasonable suspicion and unlawfully detained Brendlin, who was a passenger. (*People v. Brendlin, supra,* 45 Cal.4th at p. 268.) The officer learned of an outstanding arrest warrant for Brendlin after, and as a result of, the unlawful stop and detention. (*Id*. at p. 268.) The Court dismissed the argument that "but for" the unlawful detention, the evidence Brendlin sought to suppress would not have been discovered. Rather, the court held the existence of the outstanding arrest warrant purged the original taint of the illegal detention. (*Id*. at pp. 268-272.) The Court reasoned that the chain of causation proceeding from the unlawful vehicle stop and detention became so attenuated or interrupted by an intervening circumstance (a warrant search), it removed the taint imposed on the evidence by the original unlawful detention. (*Id*. at pp. 269-270.) Applied to Aispuro,

his detention, if unlawful, was attenuated by the discovery of a warrant for his arrest, and under *Brendlin* his section 1538.5 motion would be denied even were his detention unlawful. Aispuro provides an excellent analysis seeking to distinguish this case from *Brendlin.* However, we are not persuaded *Brendlin* would be inapplicable even were the detention here unlawful.

III

Theories on Appeal

The People may not on appeal raise new theories not raised at the suppression hearing. (*People v. Smith* (1983) 34 Cal.3d 251, 270-271.) Aispuro contends the People offered, to justify his detention, new theories "invented for the consumption of this Court." To permit the People to offer new theories in the case on appeal would be an unfair deprivation of Aispuro's opportunity to respond. (*Giordenello v. U.S.* (1958) 357 U.S. 480, 488.) However, the People's theories for the lawfulness of Aispuro's initial and continued detention were raised throughout the case.

In response to Aispuro's motion to suppress evidence, the People cited the following reasons for his *initial* detention: (1) suspicious and illegal activity of the hotel occupants, and (2) reasonable suspicion Aispuro was under the influence of narcotics.[3]

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[3] The People stated in their response to the motion to suppress evidence that Scallon became suspicious of the occupants' activity when he heard "the door being double locked from the inside [and] waited approximately thirty seconds until the door was opened . . . . Everyone in the room stood up when they realized Officer Scallon was at the door and they all appeared startled and confused." The People further state Scallon "observed [Aispuro] lying on the bed and behaving as though he was under the influence

At the suppression hearing, the People again asserted that Scallon perceived Aispuro was (1) involved in illegal activity, and (2) under the influence of narcotics.[4] On appeal, the People asserted the same theories for his detention. Scallon believed he had (1) interrupted illegal activity and (2) suspected Aispuro was under the influence of narcotics.

The People also presented the same theories for Aispuro's *continued* detention in opposition to the section 1538.5 motion, at the suppression hearing and on appeal. In response to the motion, the People asserted Aispuro's continued detention was reasonable so Scallon could conduct a CLETS inquiry into his identification. At the suppression hearing, the People asserted Scallon's actions were reasonable because he needed to (1) conduct a brief investigation into each occupant's identification, and (2) perform a protective sweep. On appeal, the People asserted Aispuro's continued detention was valid because Scallon (1) lawfully ran a computer inquiry to determine Aispuro's criminal history, and (2) performed a protective sweep of the hotel room. The People argued the same theories at the suppression hearing that they argue on appeal for Aispuro's initial and continued detention.

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of drugs," and that Scallon found a "cigarette package contain[ing] two baggies of methamphetamine . . . and a third baggie of residue" within Aispuro's reach.

4 Scallon testified he "heard a lock be[ing] secured on the door and there was an approximately 30-second delay and then the door opened." He testified the occupants looked "[s]tartled, confused, deer-in-the-headlights." Scallon had the impression he had interrupted something. He testified Aispuro appeared to be under the influence of narcotics.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

McCONNELL, P. J.

McINTYRE, J.