

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Yuba)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL THOMAS ANDERSON,

Defendant and Appellant.

C052270

(Super. Ct. No.
CRF05708)

Pursuant to a plea agreement, defendant Michael Thomas Anderson pled no contest to possession of ephedrine or pseudoephedrine with the intent to manufacture methamphetamine (Health & Saf. Code, § 11383, subd. (c)(1)) and admitted a prior conviction within the meaning of Health and Safety Code section 11370.2, subdivision (c). The trial court sentenced defendant to nine years in prison, imposed various fines and fees including a restitution fine of \$1,800, and suspended an additional restitution fine of \$1,800 pending successful completion of parole.

On appeal, defendant contends the trial court should have granted his suppression motion, and the imposition of the \$1,800 restitution and parole revocation fines violated the plea agreement. We reject the contentions and affirm.

BACKGROUND

The facts are taken from the suppression hearing. On October 12, 2005, around 10:00 p.m., Yuba County Sheriff's Deputy Jason Nakamura, while on patrol with other officers as part of a stolen vehicle task force, responded to a call about a grey Chevrolet Suburban on Olivehurst Avenue. Nakamura found a gray Suburban in a parking lot in front of some duplexes.

Deputy Nakamura did not use the emergency lights as his patrol car approached the Suburban. He and the other officers left the patrol car and walked toward the Suburban. Looking inside the vehicle with his flashlight, Nakamura found defendant "in there, and he was just wet, just drenched wet. Looked like sweat and kind of curled up, and he was shaking." This concerned Nakamura because the night was cool and chilly, so the deputy knocked on the window in order to determine whether defendant needed help.

Deputy Nakamura's efforts were unsuccessful, so another deputy opened one of the Suburban's doors and yelled at the still-sleeping defendant. Once defendant woke up, Nakamura asked him if he was all right. Defendant said he was fine, and the deputy asked if he would step outside and talk "for a moment." Defendant said "[y]eah, sure" and left the Suburban, exiting on the side opposite from Nakamura.

Once defendant left the Suburban, Deputy Nakamura immediately went around the vehicle to question him. As the deputy talked to defendant, he "noticed [defendant] was looking all around and still kind of shaking, playing with his hands,

smacking his lips, that sort of behavior." This led the deputy to suspect that defendant was under the influence of a stimulant.

Deputy Nakamura asked defendant when he had last used a controlled substance and if he was currently under the influence of anything. Defendant replied that he did not think so, and he had last used drugs about a week earlier. Nakamura asked defendant if he could evaluate him to make sure he was not under the influence of anything, and defendant said "sure, yeah." Nakamura checked his pulse and "tested his Rhomberg, internal clock," both of which were elevated. Defendant's pupils constricted and then dilated when light was shined on them.

The evaluation led Deputy Nakamura to conclude that defendant was under the influence of a controlled substance, so he arrested him. A warrant check was made during the encounter, which turned up an outstanding arrest warrant for defendant. The Suburban was searched after defendant's arrest, and evidence was seized from the vehicle. The entire encounter took less than five minutes.

During the encounter with defendant, Deputy Nakamura held his gun at his side, and thought he kept it behind his left leg, as was his practice. The deputy, who was the only witness at the suppression hearing, stated there were a total of three or four deputies surrounding the Suburban. Nakamura first testified that he believed the other deputies had their weapons out during the encounter. He subsequently testified that he did not know whether the other deputies' guns were drawn.

The trial court denied the suppression motion, finding Deputy Nakamura had held his gun behind his leg during the encounter and concluding defendant was subjected to a consensual encounter rather than a detention.

DISCUSSION

I. The Suppression Motion

Defendant contends the trial court should have granted the suppression motion because the sheriff's deputies had detained defendant since the start of the encounter. We conclude defendant was not detained and therefore his arrest and subsequent search were legal.

We review "the trial court's denial of a motion to suppress . . . in the light most favorable to the trial court's ruling, deferring to those express or implied findings of fact supported by substantial evidence. [Citations.] We independently review the trial court's application of the law to the facts. [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 969.) When reviewing questions of law, such as the reasonableness of an officer's actions, we exercise our independent judgment. (*People v. Camacho* (2000) 23 Cal.4th 824, 830.)

"A seizure of the person within the meaning of the Fourth and Fourteenth Amendments occurs when, 'taking into account all of the circumstances surrounding the encounter, the police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."' [Citation.] This test is derived from Justice

Stewart's opinion in *United States v Mendenhall*, 446 US 544, 64 L Ed 2d 497, 100 S Ct 1870 (1980), see *California v Hodari D.*, 499 US 621, 627-628, 113 L Ed 2d 690, 111 S Ct 1547 (1991), which gave several '[e]xamples of circumstances that might indicate a seizure, even where the person did not attempt to leave,' including 'the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.' [Citation.]" (*Kaupp v. Texas* (2003) 538 U.S. 626, 629-630 [155 L.Ed.2d 814, 819-820].)

In contrast, a seizure "does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free 'to disregard the police and go about his business,' [citation], the encounter is consensual and no reasonable suspicion [of criminal activity] is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature. . . . 'Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.'" (*Florida v. Bostick* (1991) 501 U.S. 429, 434 [115 L.Ed.2d 389, 398].)

Defendant's claim that he was detained before he was arrested centers on two factors, the number of officers at the scene and the presence of drawn weapons. He argues that "because the police had drawn weapons when they first encountered [defendant]," he "was detained at that moment."

Since the deputies had no articulable suspicion of wrongdoing when they first encountered defendant, defendant concludes that his arrest and the subsequent search must be suppressed as the fruits of an illegal detention.

The trial court found that Deputy Nakamura did not point his gun at defendant and implicitly found that the other deputies also did not point their weapons at defendant.¹ These conclusions are supported by substantial evidence. Nakamura testified he held his gun at his side and probably behind his leg. Although the deputy initially testified that the other officers had their weapons out, in his later testimony, Nakamura stated he did not know whether their weapons were drawn. The deputy also noted his attention was solely focused on defendant rather than on the other deputies. Based on this evidence, the trial court could reasonably conclude that Nakamura did not know whether the other deputies had their guns out.

Deferring to the trial court's implied finding that none of the deputies present were pointing their guns at defendant, we conclude defendant was not detained before his arrest. Although several officers were present, all other relevant factors point

¹ The trial court's denial of the suppression motion was based on its finding that Deputy Nakamura did not point his weapon at defendant. Had the trial court concluded that the other deputies pointed their weapons at defendant, it presumably would have held that defendant was detained throughout the encounter. Since the trial court held that defendant was not detained before his arrest, it implicitly found the other officers did not point their weapons at him.

to a consensual encounter rather than a detention. No emergency lights were employed, and Deputy Nakamura initiated the conversation by expressing concern for defendant's welfare. Defendant was never ordered to do anything by Nakamura or any other law enforcement personnel. Instead, the deputy asked defendant if he would get out of the vehicle and if he would submit to a field test for drugs. Finally, the encounter was brief, taking no more than a few minutes. We conclude from the circumstances surrounding the encounter that a reasonable person in this situation would feel free to go about his or her business.

Since defendant does not contest the probable cause supporting his arrest or the deputies' authority to search the Suburban incident to a valid arrest, we affirm the trial court's denial of the suppression motion.

II. Fines and the Plea Agreement

Defendant contends that the imposition of restitution and parole revocation fines above the statutory minimum violated the plea agreement. Finding the plea agreement did not address these mandatory fines, we reject the contention.

Under the terms of the plea agreement, defendant would plead no contest to one count of possession of ephedrine or pseudoephedrine with the intent to manufacture methamphetamine and admit a prior conviction within the meaning of Health and Safety Code section 11370.2, subdivision (c) in exchange for dismissal of the other counts and allegations. The trial court advised defendant that as a consequence of pleading no contest

he would be subject to restitution and parole revocation fines, with each fine ranging between \$200 and \$10,000. Defendant acknowledged understanding the trial court's explanation. The court did not advise defendant of his right to withdraw the plea pursuant to Penal Code section 1192.5 if the court did not sentence him in accordance with the plea agreement. Defendant did not object to the fines at sentencing.

Relying on *People v. Walker* (1991) 54 Cal.3d 1013 (*Walker*), defendant contends the trial court violated the plea agreement when it imposed a restitution fine of \$1,800. In that case, the defendant signed a change of plea form, initialing his understanding of the agreement. (*Id.* at p. 1019.) He agreed to be sentenced to prison for five years. The court orally explained that "the maximum penalties provided by law for this offense are either 3 years, 5 years, or 7 years in state prison and a fine of up to \$10,000," followed by a period of parole." (*Ibid.*) The court sentenced the defendant to a five-year prison term but also imposed a restitution fine of \$5,000, even though the plea agreement did not mention such a fine. (*Ibid.*) The defendant did not object to the fine at sentencing, but on appeal he argued that the restitution fine should be stricken because it was not a part of the plea bargain. (*Ibid.*)

The Supreme Court explained that there were two principles at work. The first was a defendant's right to be advised of the direct consequences of the plea, a "judicially declared rule of criminal procedure," which may be forfeited absent a timely objection and which requires a showing of prejudice by the

appellant. (*Walker, supra*, 54 Cal.3d at pp. 1020, 1022-1023.) The second was the principle that the parties must adhere to the terms of a plea bargain. (*Id.* at p. 1020.) Violation of the bargain raises a constitutional right to a remedy. (*Id.* at p. 1024.) This latter right cannot be forfeited by mere failure to object at sentencing, unless the trial court specifically informed the defendant pursuant to Penal Code section 1192.5 prior to making the plea that its approval is not binding; the court may withdraw its approval at the time of application for probation or pronouncement of judgment; and in such case, the defendant could withdraw the plea. (*Walker*, at pp. 1024-1025.) A violation of a plea bargain is not subject to a harmless error analysis. (*Id.* at p. 1026.) The remedy is to reduce the fine to the statutory minimum. (*Id.* at p. 1027.)

Defendant's claim is precluded by the recently decided case of *People v. Crandell* (April 30, 2007, S134883) 40 Cal.4th 1301 [2007 Cal. Lexis 4271] (*Crandell*). In *Crandell*, the trial court imposed a \$2,600 restitution fine that had not been mentioned by the prosecutor in the recitation of the plea agreement. (*Id.* at p. *1.) Relying on *Walker*, the defendant contended that the fine violated his plea bargain and should be reduced to the \$200 statutory minimum. (*Id.* at pp. *1-2.)

The Supreme Court rejected the defendant's argument, finding no error under *Walker*. (*Crandell, supra*, 40 Cal.4th at p. *2.) In *Crandall*, the record showed that "the trial court, before taking defendant's plea, accurately advised him he would 'have to pay a restitution fund fine of a minimum of \$200, a

maximum of \$10,000' and ascertained that the prosecution had not made 'any other promises' beyond that the defendant would be sentenced to 13 years in prison," effectively distinguishing the case from *Walker*. (*Crandell*, at p. *14.) The Supreme Court concluded that under "these circumstances, it is clear that when defendant entered his plea, he could not reasonably have understood his negotiated disposition to signify that no substantial restitution fine would be imposed." (*Id.* at p. *15.)

The factors present in *Crandell* are also present here. Defendant was advised that the fines were a consequence of his plea and he represented that no one had made any other promises to him than those recited in the terms of the plea agreement. Accordingly, we conclude defendant could not have reasonably understood that his plea precluded the imposition of a substantial restitution fine.

DISPOSITION

The judgment is affirmed.

RAYE, J.

I concur in the judgment and opinion except as to part I of the Discussion, as to which I concur in the result.

BLEASE, Acting P.J.

I concur:

CANTIL-SAKAUYE, J.