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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. WILLIE JAMES GEORGE, Defendant and Appellant.	H027709 (Santa Clara County Super. Ct. No. CC311259)

In the court below, defendant Willie James George unsuccessfully moved to suppress evidence. He thereafter pleaded guilty to attempting to use a counterfeit access card, second degree burglary, possession of a forged driver's license, and forgery of access-card-account information. On appeal, he contends that the trial court erred by denying his suppression motion. He principally argues that the evidence implicating him was the product of an unlawful detention or involuntary consent. We affirm the judgment.

SCOPE OF REVIEW

" ' "An appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. [Citation.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] 'The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review.' [Citations.] [¶] The court's

resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review." ' [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 255.)

BACKGROUND

Defendant initially moved to suppress before the magistrate at the preliminary hearing. He thereafter renewed the motion in the trial court and based the motion on the preliminary-hearing transcript, which outlines the following.

Santa Clara Police Officer Robert Solito saw a car on El Camino Real with only one functioning brake light. He activated his patrol-car lights and observed the car's driver converse with the front seat passenger while their heads and shoulders moved. He saw a back-seat passenger move as well and thought that the occupants had passed something among themselves. The car did not pull over immediately, so Officer Solito activated his siren and radioed for assistance. After the car stopped, Officer Solito contacted the driver, Gregory Jones, and obtained Jones's driver's license and automobile registration. Back-up officers then arrived. Officer Solito transmitted Jones's information to the dispatcher and, after six or seven minutes, learned that Jones was on parole and subject to a search condition. He then elected to perform a parole search to discover what the three were doing in the car just before the stop. He asked Jones for permission to search the car and his person, and Jones consented. Officer Solito then directed Jones, defendant, and the back-seat passenger to exit the car and stand in separate places. He searched Jones and found no weapons or contraband. He searched the car's interior and found a receipt from Kragen's for a transaction that occurred a few minutes earlier. He searched the car's trunk and found merchandise matching the Kragen's receipt and merchandise from Macy's. By this time, one of the back-up officers

had arrested the back-seat passenger for being under the influence of drugs and defendant had identified himself to another officer by means of his driver's license. Officer Solito approached defendant and asked for permission to search his person. According to Officer Solito, defendant was "cooperative," gave "permission," gave "consent," and offered that he possessed no drugs. Another officer performed a pat-down search on defendant, but Officer Solito was dissatisfied with it. Officer Solito then asked defendant whether he possessed anything, including a wallet. Defendant replied negatively. Officer Solito then pat-searched defendant and, meeting some resistance to the search, retrieved a wallet. Defendant exclaimed, "it's not mine." The wallet contained credit cards and a driver's license under the name Johnathan Newberry. Jones's picture was on the license. The officers then found on defendant another driver's license and credit card under the name Christopher Wallace. Defendant's picture was on the license. The licenses were counterfeit. The credit-card accounts belonged to individuals. After the officers arrested Jones and defendant, defendant explained that Jones had persuaded him to take the wallet while they were being stopped by Officer Solito because of Jones's parolee status; and he admitted buying some of the Kragen merchandise, for which Jones paid with one of the credit cards.

UNLAWFUL DETENTION

Defendant concedes that the initial detention for the traffic infraction was justified. He contends, however, that the detention was unreasonably prolonged beyond the time required to investigate the infraction. In particular, he urges that "police may not detain *him* for further criminal investigation pending parole search of Jones and the vehicle without independent reasonable suspicion that he is engaged in criminal activity." He cites *People v. McGaughran* (1979) 25 Cal.3d 577, for the proposition that a detention based on a traffic infraction may last only as long as it is reasonably necessary under the particular circumstances for the officer to perform duties related to the stop. And he

implicitly argues that the parole search was not related to the stop. From this, he concludes that his consent to the searches was a product of the unlawful detention.

Though we would venture that a parole search is necessarily related to a traffic stop if police officers make a valid traffic stop and, during the course of the investigation, learn that they are entitled to perform a parole search, we need not analyze this issue.

"Passengers are not seized within the meaning of the Fourth Amendment simply because they occupy a seat in a vehicle which a police officer stops for a violation of the Vehicle Code." (*People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1369 (*Cartwright*).) We recognized this principle in *People v. Fisher* (1995) 38 Cal.App.4th 338, wherein we held that a passenger is not detained when officers stop a vehicle because a passenger's privacy rights are not implicated in a traffic stop. We stated: "[I]n constitutional terms a passenger is not 'lawfully stopped' [citation], seized, or detained [citation] merely because the vehicle in which he or she is riding is stopped for a traffic violation." (*Id*. at p. 344.)

We acknowledge a split of authority on this issue. (See *People v. Bell* (1996) 43 Cal.App.4th 754.) But *Cartwright* analyzed both *Fisher* and *Bell* under the standard expressed by the United States Supreme Court in *Maryland v. Wilson* (1997) 519 U.S. 408, 410 (holding that the rule of *Pennsylvania v. Mimms* (1977) 434 U.S. 106, "that a police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle, extends to passengers as well"), and agreed with *Fisher*. (*Cartwright, supra*, 72 Cal.App.4th at p. 1369; see also *People v. Gonzalez* (1992) 7 Cal.App.4th 381; *People v. Castellon* (1999) 76 Cal.App.4th 1369, 1374.) We will follow *Fisher* and *Cartwright.*

Since defendant was not detained by the traffic stop and direction to exit the vehicle, his claim of unlawful detention fails.

INVOLUNTARY CONSENT

Apart from challenging his consent as being a product of an unlawful detention, defendant claims that the People did not prove the scope of his consent because "[t]he testimony here was contradictory." There is no merit to this claim.

Since the search of defendant was conducted without a warrant, the prosecution bears the burden of showing by a preponderance of the evidence that defendant's consent to search was voluntary. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 222; *People v. James* (1977) 19 Cal.3d 99, 106, fn. 4 (*James*).) In every case, whether consent to search is voluntary is a factual question to be decided in light of all the circumstances. (*Ohio v. Robinette* (1996) 519 U.S. 33, 40; *James*, *supra*, at p. 106.) The trial court's findings on that question, whether express or implied, must be upheld if supported by substantial evidence. (*James*, *supra*, at p. 107.)

Similarly, it is the prosecution's burden to prove that a warrantless search was within the scope of the consent given. (*People v. Harwood* (1977) 74 Cal.App.3d 460, 466.) " 'The authority to search pursuant to a consent must be limited to the scope of the consent.' " (*Ibid*.) "Limitations may exist due to the specifications of the warrant [citation] or by constitutional mandate [citation], or, in the case of consensual search, by the mutual understanding and reasonable expectations of the parties." (*Id*. at pp. 466-467.)

"The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness--what would the typical reasonable person have understood by the exchange between the officer and the suspect? [Citations.]" (*Florida v. Jimeno* (1991) 500 U.S. 248, 251 (*Jimeno*); *People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1408.) "A suspect may of course delimit as he [or she] chooses the scope of the search to which he [or she] consents. But if his [or her] consent would reasonably be understood to extend to a particular container, the Fourth

Amendment provides no grounds for requiring a more explicit authorization." (*Jimeno, supra*, at p. 252.)

Defendant is less than clear, but he seems to imply that he limited his consent to a pat-search for weapons. But, again, he grounds his claim on contradictions in the evidence. And he fails to point to any affirmative evidence suggesting that he gave a limited consent. He overlooks that Officer Solito testified that he was cooperative, gave permission, and gave consent. From this, the trial court was entitled to accept that defendant did not limit his consent.

Though it is true that defendant tried to move around while being searched in an apparent attempt to prevent the search, he did so after he consented. "Efforts to mislead the police . . . do not necessarily vitiate consent freely given." (*People v. Ibarra* (1980) 114 Cal.App.3d 60, 65; *James*, *supra*, 19 Cal.3d at p. 108.) "It is true that a voluntary consent to search may be withdrawn at any time before the search is completed. [Citation.] Actions inconsistent with consent may act as a withdrawal if those actions are positive in nature. [Citation.]" (*People v. Gurtenstein* (1977) 69 Cal.App.3d 441, 451; see also *People v. Botos* (1972) 27 Cal.App.3d 774, 779.) Here, the trial court was entitled to conclude that defendant's physical resistance amounted to less than a positive withdrawal of consent.

Defendant secondarily argues that the consent "could not have been a voluntary consent based on the circumstances." He claims that the circumstances were "inherently coercive." Again, however, defendant relies on inferences from the record favorable to him and overlooks inferences in support of the trial court's ruling. The voluntariness of the consent is in every case "a question of fact to be determined in the light of all the circumstances" (*People v. Michael* (1955) 45 Cal.2d 751, 753), and the trial court's resolution of that question "must be upheld if supported by substantial evidence." (*People v. Superior Court* (*Keithley*) (1975) 13 Cal.3d 406, 410.) Taken together, the circumstances present in this case adequately support a finding of voluntariness. For

example, "the arresting officer neither held defendant at gunpoint, nor unduly detained or interrogated him; the officer did not claim the right to search without permission, nor act as if he intended to [search] regardless of defendant's answer." (*James, supra,* 19 Cal.3d at p. 113.) The fact that Officer Solito asked defendant for permission to search also suggests a lack of coercion. " 'The mere asking of permission to enter and make a search carries with it the implication that the person can withhold permission for such an entry or search.' " (*Id.* at p. 116.) And although Officer Solito did not advise defendant of his right to withhold consent, "a warning of the right to refuse permission to search is not a precondition to a valid consent." (*Id.* at p. 115, accord, *Ohio v. Robinette, supra,* 519 U.S. at pp. 39-40.) Failure to advise of a right to refuse consent is only one factor for the trial court's consideration. (*James, supra,* at p. 118.) Considering the totality of the circumstances present in this case, there is sufficient evidence to support a finding that defendant voluntarily consented to a search of his person.

In short, the trial court was entitled to conclude from Officer Solito's testimony that defendant's consent was voluntary.

To the extent that defendant contends that he was unlawfully detained after the parole search and before his consent (when Officer Solito began to question him), making his consent a product of an unlawful detention, we disagree.

Not every encounter between a law enforcement officer and a citizen constitutes a detention for Fourth Amendment purposes. (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784; *United States v. Mendenhall* (1980) 446 U.S. 544.) "[S]eizure does not occur simply because a police officer approaches an individual and asks a few questions." (*Florida v. Bostick* (1991) 501 U.S. 429, 434.) Rather, "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." (*United States v. Mendenhall, supra,* at p. 553; *Terry v. Ohio* (1968) 392 U.S. 1, 19, fn. 16.) "[T]o 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." (*Florida v. Bostick*, *supra*, at p. 439; accord, *People v. Valenzuela* (1994) 28 Cal.App.4th 817, 823.)

Here, there is no suggestion in the record that Officer Solito coerced defendant to submit to questioning "by means of physical force or a show of authority." (*United States v. Mendenhall*, *supra*, 446 U.S. at p. 553.) In that respect, the facts before us are strikingly similar to those in *People v. Galindo* (1991) 229 Cal.App.3d 1529. In *Galindo*, defendant was a passenger in a speeding car. A highway patrol officer pulled the car over and cited the driver for exceeding the speed limit. After issuing the citation, and while the driver was walking back to the vehicle, the officer asked him whether there were guns or drugs in the car. The driver answered in the negative. The driver and the defendant then consented in writing to a search of the car, which contained drugs. The defendant sought to suppress evidence of the drugs on the ground that the officer's conduct after issuing the citation constituted an unlawful detention. The court rejected the defendant's contention, observing that neither the defendant nor his passenger had "any objective reason to believe that they were not free to end the discussion and proceed on their way." (*Id.* at p. 1536; see also, *People v. Bouser* (1994) 26 Cal.App.4th 1280, 1287-1288; *People v. Lopez* (1989) 212 Cal.App.3d 289, 292.) "The events took place in public. [Citation.] [The officer] did not display a weapon [citation] nor use language or tone of voice indicating that compliance was compelled." (*People v. Galindo*, *supra*, at p. 1535.) The same is true here. In this case, then, as in *Galindo*, "there was no 'seizure' of defendant." (*Ibid.*)

Defendant finally argues that "There was no evidence suggesting that [he] consented to the search of his wallet." But this point is simply a variant of the scope-of-consent point. Again, the trial court was entitled to accept that defendant's consent was unlimited. Moreover, that defendant denied ownership of the wallet, negates that he

expected privacy as to the wallet's contents and accordingly supports a conclusion that he did not exclude the contents from the scope of his consent. (See *People v. Dees* (1990) 221 Cal.App.3d 588, 594-595.)

INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that his trial counsel was ineffective for failing to assert all possible grounds in the motion to suppress. In particular, he contends that counsel should not have conceded "that police were entitled to order [him] from the car and conduct a pat-down search" and should have challenged "as unlawful the detention prior to the pat-down search."

We have, however, addressed and rejected that defendant was detained at any time during the traffic-stop investigation. We therefore decline to address defendant's argument and the People's preliminary argument that defendant is precluded from arguing on appeal unraised search issues under the guise of ineffective assistance of counsel because he failed to obtain a certificate of probable cause to appeal following a guilty plea. (Pen. Code, § 1237.5.)

DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.