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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**THE PEOPLE,**  
**Plaintiff and Respondent,**  
**v.**  
**SCOTT JOHN LOWE,**  
**Defendant and Appellant.**

**A106684**  
**(Solano County**  
**Super. Ct. No. VCR165452)**

Defendant Scott John Lowe pled guilty to transportation of methamphetamine (Health & Saf. Code, § 11379) and admitted one prior drug-related conviction (Health & Saf. Code, § 11370.2, subd. (a)). His sole contention on appeal is that the trial court erred in denying his motion to suppress evidence. (Pen. Code, § 1538.5, subd. (m).) He contends the police lacked reasonable cause to detain, pat search and remove a plastic baggie from his sweatshirt pocket during the pat search. We reverse.

**BACKGROUND**

Defendant's motion to suppress was heard and denied at his preliminary hearing. After defendant was held to answer, he renewed the motion to suppress based on the transcript of testimony given at the preliminary hearing. (Pen. Code, § 1538.5, subd. (i).) We summarize the evidence presented at that hearing in the light most favorable to respondent and to the trial court's ruling. (*Guidi v. Superior Court* (1973) 10 Cal.3d 1, 10, fn.7.)

On January 20, 2003, at about 12:51 p.m., Vallejo Police Officer Hendershot was driving in an unmarked police vehicle in the area of Couch and Valle Vista Streets in Vallejo. Officer Hendershot saw a man (later identified as Beasley) carrying tools toward what appeared to be an “abandoned or stripped-out [Mazda] vehicle” in an empty lot at 329 Couch Street. There was a garage located about 500 feet from the vehicle, and Beasley appeared to be about 450 feet from the garage and 50 feet from the vehicle, which had no license plate and was missing its hood.

Officer Hendershot continued driving to a car wash located on Valle Vista to wash his car, intending to return to the lot to see if Beasley remained near the Mazda. When Officer Hendershot returned, he saw Beasley standing at the Mazda, “doing something in the engine compartment.” The officer drove up, got out of his vehicle and asked Beasley what he was doing. Beasley responded that he was “taking something off the car.” Beasley told the officer that the Mazda belonged to “a friend of his cousin Dave,” but could not give cousin Dave’s last name.

Officer Hendershot believed Beasley was “stripping the abandoned car” based on information he possessed that approximately seven abandoned or stolen vehicles had been recovered within a two-block radius of that location in 2001 and 2002, and because a California Highway Patrol Officer (Dixon) had told Officer Hendershot that Dixon believed there was a “chop shop” operating out of the main building on that property, Acme Storage. Officer Hendershot suspected that Beasley was part of that “chop shop” operation.

While this investigation was in progress, defendant walked out of the aforementioned garage area “attached to 329 Couch Street,” entered a green Corvette, and began to drive out of the lot. When a marked police cover vehicle arrived, driven by Sergeant Rogers, defendant made eye contact with one of the police officers, stopped the Corvette “dead in its tracks,” and drove back to the parking spot he had just vacated. Defendant then exited the Corvette, looked toward Officer Hendershot’s location, and began walking back toward the open garage door. When defendant looked over, Officer Hendershot directed defendant to come over to the officer’s location. Officer Hendershot

believed defendant was involved in stripping the vehicle Beasley had been working on because the officer had seen Beasley walking from the direction of the same garage that defendant was heading toward. When Officer Hendershot asked defendant to come over, defendant hesitated, started walking in the officer's direction, looked toward the railroad tracks situated 30 feet in the opposite direction, and resumed walking toward Officer Hendershot. Believing that defendant was considering running away down the railroad tracks, Officer Hendershot warned defendant, "Don't even think about running."

After defendant reached Officer Hendershot's location, the officer pat searched defendant for weapons and felt a bulge in his stomach area. Defendant was wearing a thick sweatshirt with a "kangaroo pouch" in the front. Defendant appeared nervous and was breathing "heavily." Officer Hendershot was unable to rule out whether the bulge was a weapon until he removed it from defendant's clothing; he could not tell what the bulge was from the external pat alone, due to defendant's bulky clothing and stature. "[I]t felt like just a big lump," measuring about six inches by four inches. It did not feel like "metal or anything like that," however the officer "thought it was a fanny pack at first" and so reached into the kangaroo pouch of the sweatshirt and pulled it out. It turned out to be a plastic bag containing a large quantity (66.67 grams) of methamphetamine.<sup>1</sup>

In denying the motion to suppress at the preliminary hearing, the magistrate concluded that Officer Hendershot acted reasonably in investigating Beasley's activity at the abandoned car in the parking lot. The magistrate further determined that defendant's behavior in getting into the Corvette and beginning to drive off, then stopping and backing the Corvette into its previous location upon the arrival of the marked police cruiser, warranted Officer Hendershot's further investigation and contact with defendant. The magistrate found the pat search of defendant was reasonable to protect officer safety, and that Officer Hendershot acted reasonably in removing the object from defendant's

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<sup>1</sup> The parties stipulated for purposes of the preliminary hearing that the material seized consisted of 66.67 grams of methamphetamine that was possessed for the purpose of sales.

sweatshirt since the officer could not tell what the object was and, so, could not eliminate it as a potential threat to his safety.

#### DISCUSSION

Defendant contends Officer Hendershot lacked reasonable suspicion that he was involved in a vehicle stripping operation, thereby rendering defendant's initial detention unlawful. He further asserts that the circumstances surrounding the detention did not create a legal justification for the pat search, and that the officer acted unlawfully when he extracted the plastic bag from defendant's sweatshirt pocket during the pat search.

In reviewing the trial court's denial of a motion to suppress evidence, we must uphold the court's express and implied factual findings if they are supported by substantial evidence. However, we independently assess, as a matter of law, whether the challenged search or seizure conforms to constitutional standards of reasonableness. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

#### *The Detention*

Defendant acknowledges that Officer Hendershot may have had reason to detain Beasley based on Beasley's conduct in relation to the partially stripped vehicle, but argues the officer had no reasonable basis to suspect defendant was connected with Beasley's actions, or that the garage from which defendant exited was connected with vehicle stripping. Defendant argues the detention was unreasonable because Officer Hendershot never saw him in close proximity to the Mazda or saw him engaged in any action consistent with vehicle stripping. Defendant points out that when Officer Hendershot saw him, he was standing about 500 feet from the Mazda and almost 450 feet from where the officer first saw Beasley walking toward the Mazda. He notes that there was no evidence that Beasley had any connection with the garage from which defendant emerged and later returned. He further notes that although Officer Hendershot knew that seven abandoned or stolen cars had been recovered within a two-block radius of the garage, the officer had no information indicating a link between those vehicles and the particular garage from which defendant emerged.

“[I]n order to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity.” (*In re Tony C.* (1978) 21 Cal.3d 888, 893.) An objective standard applies: would a reasonable officer in a like position, drawing on training and experience, suspect that the person is involved in criminal activity that has occurred, is occurring, or is about to occur. (*People v. Conway* (1994) 25 Cal.App.4th 385, 388-389.) An investigative stop or detention is held unlawful if it is predicated on circumstances which, when viewed objectively, support a mere curiosity, rumor or hunch, even though the officer may be acting in good faith. (*Id.* at p. 389.)

Here, defendant’s recitation of the sequence of events fails to give due weight to the effect of his own conduct. Prior to the detention, the officer had observed defendant walk out of the garage attached to 329 Couch Street, enter the Corvette, begin to drive out of the lot, and then stop “dead in his tracks” and return to the just vacated parking spot when the marked police cruiser arrived at the scene. Officer Hendershot further observed defendant get out of the Corvette, look toward Officer Hendershot’s location, and begin walking back toward the open garage door. The abrupt change in defendant’s course of action upon arrival of the marked police vehicle, coupled with his look toward the location where Officer Hendershot was speaking with Beasley, and defendant’s withdrawal toward the garage could have led Officer Hendershot to reasonably conclude defendant was reacting to the arrival of the police to the scene, thereby providing the nexus between defendant’s conduct and the investigation of Beasley, still in progress. We conclude defendant’s unusual conduct in apparent response to the arrival of the police justified the officer’s decision to initiate further contact with him.

Defendant concedes these actions on his part could have lead Officer Hendershot to reasonably suspect defendant might be returning to the garage to warn other persons involved in a potential car stripping operation. Nevertheless, he argues such a concern would only have justified Officer Hendershot in asking defendant what he was doing, but

not in detaining him. We disagree. Having developed a basis to suspect defendant was intending to warn others in the garage of the police presence, the officer acted reasonably in redirecting defendant toward the officer's location, thereby interrupting defendant's progress toward the garage for the brief period until the officer could find out what defendant was doing. The officer's suspicions were then heightened by defendant's hesitation and his glance down the railroad tracks in the opposite direction. This additional conduct, coming in response to the officer's instruction to walk in the officer's direction, supports the officer's belief that defendant was deliberating whether to run from the scene and further confirmed the officer's reasonable suspicion that the defendant was involved in criminal activity.

#### *The Pat Search*

Defendant contends Officer Hendershot pat searched him without having reasonable grounds to believe he was armed and dangerous, and acted unlawfully by removing the plastic bag from defendant's sweatshirt pocket during the pat search. The People contend the pat search was justified for officer safety purposes and that removal of the item was justified because the officer believed it could be a fanny pack, which hampered his ability to rule out its potentially hazardous nature. Because we conclude that the officer was not entitled to conduct a pat search, we need not reach the question whether he properly removed the plastic bag.

In *Terry v. Ohio* (1968) 392 U.S. 1, 27, the United States Supreme Court held that a police officer has authority to conduct a reasonable search for weapons where the officer has reason to believe the suspect is armed and dangerous. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent person in the circumstances would be warranted in the belief that his safety or that of others was in danger." (*Ibid.*) " "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his [or her] investigation without fear of violence . . . ." [[C]itation] . . . [A] protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be strictly "limited to that which is necessary for the discovery of weapons which might be

used to harm the officer or others nearby.” ’ ’ ” (*People v. Limon* (1993) 17 Cal.App.4th 524, 534; quoting *Minnesota v. Dickerson* (1993) 508 U.S. 366, 373.) “A *Terry* frisk ‘is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.’ [Citation.] Accordingly, a frisk for weapons is not justified unless the officer can point to specific and articulable facts which, considered in conjunction with rational inferences to be drawn therefrom, give rise to a reasonable suspicion that the suspect is armed and dangerous.” (*People v. Medina* (2003) 110 Cal.App.4th 171, 176.)

In this case, the officer’s testimony fails to provide a reasonable basis for the challenged pat search. We quote, in its entirety, the justification for the pat search put forward by the Attorney General. “Before appellant arrived at Officer Hendershot’s location, Officer Hendershot saw appellant look in the opposite direction toward the train tracks. . . . Believing appellant was about to run, Officer Hendershot warned him not to do so. . . . Appellant wore a bulky sweatshirt, and was nervous and breathing heavily. . . . When appellant finally arrived, Officer Hendershot reasonably pat searched him and so came upon what turned out to be the large bag of contraband Officer Hendershot originally believed could be a fanny pack.” However, the officer articulated no basis for the pat search. Further, nothing about the crime under investigation, the location of the detention, or the behavior of the defendant provided any specific and articulable facts upon which such a search could be justified.

#### DISPOSITION

The judgment is reversed. On remand, the trial court shall enter an order granting appellant’s motion to suppress.

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SIMONS, J.

We concur.

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STEVENS, Acting P.J.

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GEMELLO, J.