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SEE DISSENTING OPINION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS IBARRA-ZARAGOZA, Defendant and Appellant.	A127456 (Sonoma County Super. Ct. No. SCR-564762)

Defendant Carlos Ibarra-Zaragoza appeals from a conviction following a plea of no contest to possessing methamphetamine for sale. He contends the police conducted an unreasonable search of his vehicle without a warrant and that the court erred in denying his motion to suppress the evidence obtained in that search. We agree and shall reverse the conviction.

BACKGROUND

On the evening of July 1, 2009, in a high crime area of Santa Rosa, Sonoma County Deputy Sheriff Michael Crean observed defendant's car fail to make complete stops at two consecutive stop signs. Crean initiated a traffic stop and watched the car come "to kind of a crawl, almost a really slow speed." Crean observed the driver look in the car's rearview mirror and saw "his body motion and arm kind of went towards the center console. [¶] . . . [¶] Maybe five to eight" inches. The car travelled approximately 100 to 150 yards before pulling over and stopping. Crean stated that the car could have pulled over safely at any point after he activated his red light and initiated the stop.

Crean asked defendant for his driver's license. When defendant said that he did not have one, Crean detained him for driving without a license. He then searched the car in preparation for having it towed, starting with the center console. He looked inside the console and saw an "access panel for maintenance" that had markings suggesting the panel had been forcibly pried open and used frequently. Crean opened the panel without difficulty and found a plastic bag of powder. Relying on his experience as a narcotics detective, Crean believed the powder was crystal methamphetamine. He then noticed that one headrest "looked like it was loose or slightly moved off of the two posts." He examined both headrests and found 11 additional packages of methamphetamine totaling 98.5 grams. Crean also found a notepad with possible pay-and-owe notes and a cellular phone. Defendant then admitted he sold drugs and had $500 in cash with him.

Defendant was charged with possessing methamphetamine for sale; transporting, furnishing and selling methamphetamine; and driving without a valid driver's license. At the preliminary hearing, defendant moved to suppress the evidence obtained in the search of his car. The court ruled that "the conduct of the deputy after the arrest when he conducted the search did not appear to be an inventory search, because he immediately went to the console area and took it apart, at which time he located a large quantity of methamphetamine. The facts testified to at the hearing presented as a search for contraband rather than an inventory search, even though, after the arrest, the officer was entitled to do an inventory search after the defendant was arrested." However, the court found the search was justified because Crean had probable cause to believe the car contained contraband. The court considered "the failure to stop promptly and the gestures provided, along with the fact that it occurred at night, the area in which it occurred, as adequate probable cause to search the vehicle for contraband." After defendant's renewed Penal Code section 1538.5[1] motion was also denied, he pleaded no contest to possessing methamphetamine for sale and admitted he possessed more than

[1] All further statutory references are to the Penal Code.

28.5 grams of methamphetamine. Defendant received a negotiated sentence of two years in prison with 291 days in presentence credits and filed a timely notice of appeal.

DISCUSSION

Defendant contends the court erred in denying his section 1538.5 motion to suppress because the vehicle search was not supported by probable cause. We agree.

The governing law is well settled. When a suppression motion is raised during the preliminary hearing, section 1538.5 "makes the findings of the magistrate 'binding' on the superior court." (*People v. Trujillo* (1990) 217 Cal. App. 3d 1219, 1223.) "[O]n further appellate review of a suppression motion, the appellate courts must give the magistrate's express and implicit factual determinations the same deference formerly given those by the superior court." (*Id.* at p. 1224.) "We review the court's resolution of the factual inquiry under the deferential substantial-evidence standard." (*People v. Saunders* (2006) 38 Cal.4th 1129, 1134.) However, in determining whether the search was reasonable on the magistrate's facts and "whether the applicable law applies to the facts and is a mixed question of law and fact that is subject to [our] independent review." (*Id.* at p. 1134; *People v. McDonald* (2006) 137 Cal.App.4th 521, 529.)

"[A] warrantless search of an automobile stopped by police officers who ha[ve] probable cause to believe the vehicle contain[s] contraband [i]s not unreasonable within the meaning of the Fourth Amendment." (*United States v. Ross* (1982) 456 U.S. 798, 799.) "Probable cause for a search exists where an officer is aware of facts that would lead a [person] of ordinary caution or prudence to believe, and conscientiously to entertain, a strong suspicion that the object of the search is in the particular place to be searched." (*People v. Dumas* (1973) 9 Cal.3d 871, 885, citing *People v. Superior Court* (1970) 3 Cal.3d 807, 815-816 (*Kiefer*).) We determine probable cause by examining the totality of the circumstances. (*Illinois v. Gates* (1983) 462 U.S. 213, 238.) In this case, the relevant circumstances—defendant's gesture toward the console, the time it took him to stop his car, and the late hour and location—fall short of the probable cause necessary to justify the search of a vehicle stopped for a traffic violation.

Kiefer is instructive. There, the California Supreme Court critically examined problems endemic to vehicle searches for which probable cause is predicated on the officer's observation of "furtive gestures" or "furtive movements" by the vehicle's occupant. (*Kiefer, supra,* 3 Cal.3d at pp. 817-828.) "The difficulty," the court explained, "is that from the viewpoint of the *observer,* an innocent gesture can often be mistaken for a guilty movement. He must not only perceive the gesture accurately, he must also interpret in accordance with the actor's true intent. But if words are not infrequently ambiguous, gestures are even more so. Many are wholly nonspecific, and can be assigned a meaning only in their context. Yet the observer may view that context quite otherwise from the actor: not only is his vantage point different, he may even have approached the scene with a preconceived notion—consciously or subconsciously—of what gestures he expected to see and what he expected them to mean. The potential for misunderstanding in such a situation is obvious. [¶] It is because of this danger that the law requires more than a mere 'furtive gesture' to constitute probable cause to search or to arrest. The United States Supreme Court recently affirmed this rule in the case of *Sibron v. New York* (1968) 392 U.S. 40, 66-67: 'deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea,* and *when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime,* they are proper factors to be considered in the decision to make an arrest.' . . . That knowledge, of course, may be derived from the usual twin sources of information and observation; stating the rule for California, the court in *People v. Tyler* (1961) 193 Cal.App.2d 728, 732, declared: 'As it is the information known to the police officers or the suspicious circumstances which turn an ordinary gesture into a furtive one, it is equally clear in this state that in the absence of information or other suspicious circumstances, a furtive gesture alone is not sufficient.' " (*Id*. at p. 818.)

In this case, defendant's "furtive gesture"—a movement of five to eight inches toward the car's center console—was decidedly ambiguous. As observed in *Kiefer,* "the act of simply bending forward or downward in the front seat of an automobile has . . . many more innocent than culpable interpretations." (*Kiefer, supra,* 3 Cal.3d at p. 820, fn.

5.) Furthermore, the other circumstances the People cite as indicia of criminal activity add little to the probable cause equation. After Crean turned on his lights defendant slowed, continued for approximately half a block, turned the corner and came to a stop. This was hardly a driver who "continues to drive for a substantial distance and makes sharp turns or other unusual maneuvers" such as would suggest evasive action implying consciousness of guilt. (*Kiefer, supra,* at p. 825.) Even in conjunction with the location and time of the stop, these two ambiguous observations compose too slender a reed to support a reasonable suspicion that defendant had secreted contraband in his car. There is simply nothing in the facts of defendant's arrest that would lead us to conclude that the arresting deputy possessed specific knowledge relating defendant to evidence of the crime when he searched defendant's vehicle. (See *Sibron v. New York, supra,* 392 U.S. at pp. 66-67.) Accordingly, the court wrongly denied defendant's suppression motion on the ground that the search was supported by probable cause.

The People alternatively contend the search was justified as an inventory search within the meaning of *South Dakota v. Opperman* (1976) 428 U.S. 364. Not so. The magistrate found as a factual matter that Officer Crean pried open the console panel while searching for criminal evidence, not conducting an inventory search. That finding is supported by substantial evidence and we therefore defer to it.

The warrantless search of defendant's car was undertaken without probable cause and in the absence of any other applicable exception to the Fourth Amendment's warrant requirement. Because all of the evidence against defendant resulted from the unlawful search, his conviction must be reversed.

DISPOSITION

The judgment is reversed.

Siggins, J.

I concur:

Jenkins, J.

POLLAK, ACTING P. J.—Dissenting.

"Probable cause for a search exists where an officer is aware of facts that would lead a [person] of ordinary caution or prudence to believe, and conscientiously to entertain, a strong suspicion that the object of the search is in the particular place to be searched." (*People v. Dumas* (1973) 9 Cal.3d 871, 885, citing *People v. Superior Court (Kiefer)* (1970) 3 Cal.3d 807, 815-816.) "[A] warrantless search of an automobile stopped by police officers who ha[ve] probable cause to believe the vehicle contain[s] contraband [i]s not unreasonable within the meaning of the Fourth Amendment." (*United States v. Ross* (1982) 456 U.S. 798, 799.) Further, "police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." (*California v. Acevedo* (1991) 500 U.S. 565, 580; see also *United States v. Ross*, *supra*, at p. 825.)

The magistrate who heard the testimony in support of the motion to suppress and the trial court judge who again denied the motion to suppress both found credible the arresting officer's testimony that the defendant's observed movements within his car while failing to come to a stop over some 100 to 150 yards caused him to suspect that defendant was hiding contraband. Both judicial officers rejected the contention that the officer's search could be justified as an inventory search, but agreed that the "elongated stop" where there was no impediment preventing defendant from immediately pulling to the side of the road, coupled with the defendant's movements watching the police vehicle in his rear view mirror while leaning towards the console of the car—at night in a high crime area—provided a reasonable basis to believe defendant had placed contraband in the console.

There was more than a "furtive gesture," as in *Kiefer*, to support such a reasonable belief. According to the officer who stopped defendant:

"A: . . . [A]s soon as I turned on my light, the defendant — he came to kind of a crawl, almost a really slow speed. And we continued probably close to a hundred and fifty yards before he actually turned the corner on Sebastopol Road and came to a stop.

"Q: How far behind him were you?

"A: I was right behind him. [¶] . . . [¶] . . .

"Q: Was there any activity or motion by the defendant, you could see during this crawl?

"A: Yes, there was.

"Q: What was that?

"A: I followed the suspect in his vehicle. He was looking back at me in his rearview mirrors. I saw his body motion and arm kind of went towards the center console.

"Q: Could you gesture, for the judge?

"A: (Complies.) He was just moving to the side instead of parking his car and safely pulling to the side shoulder. His body movement was moving to the center of the car (indicating).

"[Q]: Let the record reflect that the witness is moving his whole torso approximately eight inches —

"[A]: Maybe five to eight.

"[Q]: — to the right?

"[A]: Right.

"The Court: That was demonstrating that he was moving towards the console.

"[A]: Correct.

"Q: And how long did it take during this period when you were following him? Was it possible for him to have pulled the car over?

"A: Yes.

"Q: At any point, was it not possible?

"A: No.

"Q: How long a period are we talking about, in distance?

"A: *It was no less than maybe a hundred to a hundred and fifty yards*." [¶] . . . [¶] . . .

"Q: . . . Would you please tell the court what went into your analysis as to the probable cause for criminal conduct by the defendant? [¶] . . . [¶] . . .

"[A]: During the traffic stop, the suspect movements obviously raised my suspicion . . . . [U]pon contact with him at the window, both hands were on the steering wheel. I would have removed him and handcuffed him immediately if he had a license or didn't have a license, just based on elongated stop. His movements toward his area are consistent with somebody having a weapon, hiding a weapon, hiding contraband." (Italics added.)

Based on these facts, the magistrate who heard the testimony ruled as follows: "In this case the court interprets the failure to stop promptly and the gesture provided, along with the fact that it occurred at night, the area in which it occurred, as adequate probable cause to search the vehicle for contraband. The defendant could have pulled over promptly, and given that he drove for 150 yards while appearing to hide something gave probable cause to search."

Similarly, the trial judge who ruled on the Penal Code section 1538.5 motion concluded: ". . . there was probable cause. He didn't pull over, he went 100, 150 [yards] past where there was red lights on him and on and on. It is in the transcript. He made a furtive movement toward the center console of his car. The officer was attempting to pull the defendant over. The initial act of failing to pull the car over after immediately the lights were on shows a consciousness of guilt. The officer was only about a car length behind the defendant's vehicle and the officer could see the defendant look back at him in the rear view mirror. This is all in the transcript. The officer had his emergency lights activated. So there would be no question the defendant knew the officer was attempting to pull him over, yet the defendant continued to drive 100, 150 yards, that is a football field and a half as you and I know, before pulling over during which time he made his furtive movement. The officer testified it was a residential area, there was no reason why the defendant couldn't have pulled over immediately and it was while the defendant was driving slowly this 100, 150 yard stretch that the officer observed the defendant make his furtive movement toward the center of the vehicle. So . . . there is probable cause to suspect that the defendant was attempting to hide the contraband in the center console of the vehicle."

In my opinion, both lower court judges got it absolutely right. While this was no high speed chase, the unequivocal testimony was that after the patrol car activated its red lights defendant continued far more than "approximately half a block," as the majority opinion states, and far more than was necessary to safely pull to the side of the road. And during this time the officer observed defendant viewing him in his rearview mirror and moving to his right in the direction of the center console. "In determining probable cause

we must make a 'practical, common-sense decision whether . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.' " (*People v. Allen* (2000) 78 Cal.App.4th 445, 450, quoting *Illinois v. Gates* (1983) 462 U.S. 213, 238.) Under the totality of the circumstances here, I see no basis for rejecting the conclusion of the magistrate and the trial court that the officer had a reasonable basis to suspect that defendant had placed contraband in the car's center console while needlessly crawling to a stop over some 100 to 150 yards in a residential area.

Moreover, even if there were no probable cause, there is another potential basis for denying the motion to suppress. There is no question that defendant was properly stopped for traffic violations and then arrested prior to the search of the car for admittedly driving without a driver's license. The officer properly made arrangements to have the car towed and at some point an inventory of the vehicle's contents likely would have been made. (Veh. Code, §§ 14602.6, subd. (a)(1), 22651, subd. (h)(1); *People v. Shafrir* (2010) 183 Cal.App.4th 1238; *People v. Green* (1996) 46 Cal.App.4th 367.) At that point the contraband undoubtedly would have been discovered, so that if the inventory search was conducted pursuant to an established departmental routine, the motion to suppress should be denied under the doctrine of inevitable discovery. (*Nix v. Williams* (1984) 467 U.S. 431, 444; *People v. Robles* (2000) 23 Cal.4th 789, 800; *People v. Clark* (1993) 5 Cal.4th 950, 993, overruled on different grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Superior Court (Walker)* (2006) 143 Cal.App.4th 1183, 1214-1217.)

I would affirm the judgment.

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Pollak, Acting P. J.