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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHEUA CORTEZ,

Defendant and Appellant.

A128708

(San Francisco City & County
Super. Ct. No. 208988)

Defendant Josheua Cortez appeals from a judgment entered after he pleaded guilty to possession of a firearm by a felon. He claims the trial court erred in denying his motion to suppress evidence seized during a detention. We reverse.

I. BACKGROUND

Defendant was charged in an amended information, filed in February 2010, with possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)) and possession of a loaded firearm by a convicted person (Pen. Code, § 12031, subs. (a)(1), (a)(2)(A)).

Defendant was stopped sometime after 10:30 in the evening by two San Francisco police officers when they noticed him carrying a bottle of beer in public. Carrying an unsealed or open container of alcohol in public is a violation of section 25620, subdivision (a) of the Business and Professions Code. Additionally, it was a high crime area known for public intoxication, open container violations, robberies, and shootings. The arresting officer could not tell whether the bottle was open or not when he approached defendant and explained he detained defendant for the purpose of determining whether the beer bottle was sealed. One of the officers took the bottle from

defendant's hand to inspect it, while the second officer asked defendant if he had any weapons. Defendant answered he did not. When the officer again asked defendant if he had any weapons, defendant said he had a gun in his bag. The officers then searched the bag and found a firearm.

Defendant moved to suppress the evidence, arguing he was detained without reasonable suspicion. The trial court denied the motion. He thereafter pleaded guilty to one count of possession of firearm by a felon (Pen. Code, § 12021, subd. (a)(1)) and one count of possession of a loaded firearm (Pen. Code, § 12031, subd. (a)(1).) Defendant was given a suspended sentence and placed on three years' probation.

II. DISCUSSION

Defendant contends his motion to suppress the firearm should have been granted because the officers lacked reasonable suspicion to detain him.

“A detention is constitutionally reasonable if the circumstances known or apparent to the detaining officer 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. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so; the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience [citation], to suspect the same criminal activity and same involvement by the person in question.’ ” (*People v. Daugherty* (1996) 50 Cal.App.4th 275, 285.) “ ‘Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like “articulable reasons” and “founded suspicion” are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.’ ” (*People v. Souza* (1994) 9 Cal.4th 224, 230, quoting *United States v. Cortez* (1981) 449 U.S. 411, 417–418.)

Detentions may not be based on a mere hunch, nor may they be justified by the good faith of the officer. (*Terry v. Ohio* (1968) 392 U.S. 1, 22.) We review de novo the denial of a motion to suppress for lack of reasonable suspicion to detain. (*People v. Williams* (1988) 45 Cal.3d 1268, 1301, disapproved on other grounds in *People v. Guinuan* (1998) 18 Cal.4th 558, 569.)

The circumstances known to the officers here did not reasonably justify defendant's detention. The time of night, crime rate in the area, and apparent possession of alcohol may contribute to a reasonable suspicion of criminal activity, but they are not dispositive. Nothing in defendant's appearance or behavior, or the outward appearance of the bottle raised a reasonable suspicion defendant was carrying an open container. (See *People v. Durazo* (2004) 124 Cal.App.4th 728, 735–736 [reasonable suspicion lacking where officer had a “ ‘gut feeling’ ” defendants were involved in criminal activity but could not articulate any facts to support the hunch other than objectively innocuous behavior].)

People v. Brewer (1991) 235 Cal.App.3d 909, on which the People rely, does not compel a contrary conclusion. In *Brewer*, an Oakland police officer observed the defendant “standing in front of a liquor store and apparently drinking from a container enveloped in a brown paper bag.” (*Id.* at p. 911.) After the defendant observed the officer, he set down the bag and began walking away. (*Ibid.*) Pursuant to an Oakland Municipal Ordinance prohibiting consumption and possession of an open container of alcohol on a public street or sidewalk, the officer detained the defendant. (*Id.* at pp. 911–912.) A search of the bag revealed an open and partially consumed can of beer. (*Id.* at p. 912.) The court held the officer was entitled to use the ordinance as the basis for initiating the detention. (*Id.* at p. 914.)

Here, in contrast, there is no evidence the bottle was covered with a bag or was open, nor was defendant observed drinking from it. Further, defendant was walking at a normal pace and never made any attempt to avoid contact with the uniformed officers. (See *Illinois v. Wardlow* (2000) 528 U.S. 119, 124 [flight upon appearance of officers,

combined with presence in an area known for narcotics trafficking, provides reasonable suspicion].)

In sum, while the late hour, the nature of the area, and defendant's possession of what appeared to be a full bottle of alcohol are certainly relevant to whether the detention was justified, without more those factors do not support a reasonable suspicion defendant was involved in criminal activity. The trial court erred in denying the motion to suppress.

III. DISPOSITION

The judgment is reversed, the plea is vacated, and the matter is remanded for further proceedings.

Margulies, J.

We concur:

Marchiano, P.J.

Dondero, J.