Filed 4/15/11 P. v. Kewell CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY E. KEWELL, Defendant and Appellant.	A127906 (Napa County Super. Ct. No. CR147922)

Defendant Timothy E. Kewell appeals from a judgment entered on his guilty plea to possession of a controlled substance. (Bus. & Prof. Code, § 4060). He contends that the trial court erred in denying his motion to suppress evidence seized during a patdown search. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

At approximately 8:20 p.m. on September 9, 2009, City of Napa police officers Nick Dalessi and John Corrigan were traveling westbound on Central Avenue in an unmarked patrol vehicle. It was dark outside. Dalessi observed defendant riding a bicycle eastbound on Central Avenue without a bike light. The officers made a traffic stop and informed defendant that he was stopped for riding a bike without a bike light. While speaking to defendant, Dalessi smelled the odor of an alcoholic beverage coming from him. Defendant admitted that he drank alcohol earlier that evening.

As Dalessi talked to defendant about his bike light, defendant straddled the frame of his bicycle with both of his feet on the ground. Dalessi could not see defendant's waistline or pockets because he was wearing a long blue shirt that covered his waistline.

Dalessi asked defendant if he was carrying any drugs, firearms or weapons. Defendant replied that he was not. Dalessi then asked for permission to search him. Defendant paused, looked at Corrigan, then looked back at Dalessi and refused to consent to a search. Corrigan told Dalessi that he had previously arrested defendant for a firearm violation.

Dalessi informed defendant that he would patsearch him for weapons. During the patsearch, Dalessi felt an oval-shaped object inside defendant's left front pants pocket, which he knew from his training and experience to be consistent with a pill. He asked defendant what kind of pill he had in his pocket and defendant said it was Vicodin and that he had a prescription for it. Dalessi reached into defendant's pocket and removed a clear cigarette cellophane wrapper that contained three white oval-shaped pills. Dalessi then offered to take defendant to his residence so that he could provide proof of the prescription. Defendant said he did not know where the prescription was and did not know if he would be able to find it at his residence.

Defendant moved to suppress the evidence, alleging that he was illegally patsearched. The trial court denied the motion, finding that there was probable cause to search defendant.

II. DISCUSSION

A. Standard of Review

The principles governing appellate review of a trial court's denial of a motion to suppress evidence are well established. "We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]" (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

B. The Legality of the Patdown Search

The leading United States Supreme Court case on the legality of patdown searches is *Terry v. Ohio* (1967) 392 U.S. 1 (*Terry*). A *Terry* search is limited to "an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the

assault of the police officer." (*Id.* at p. 29.) "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." (*Id.* at p. 27.) In justifying a patsearch, an officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (*Id.* at p. 21.) An officer may not rely on an "inchoate and unparticularized suspicion or 'hunch' " to justify a patsearch. (*Id.* at p. 27.) The *Terry* court noted that although each of a series of acts may appear "innocent in itself," taken together they may "[warrant] further investigation." (*Id.* at p. 22; see also *People v. Souza* (1994) 9 Cal.4th 224, 233 [" 'The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct' "].) Courts should consider the " ' "totality of the circumstances—the whole picture" ' " and examine each case on the facts to establish whether a challenged detention was objectively reasonable. (*People v. Ramirez* (1996) 41 Cal.App.4th 1608, 1614.)

Defendant does not challenge his detention, but contends that he was unlawfully patsearched because Officer Dalessi could not have reasonably believed that he was armed and dangerous at the time he was stopped. The totality of the circumstances refutes this contention.

Here, several factors justified the patsearch. Defendant hesitated before refusing to give his consent to search, he was wearing a long shirt that covered his waistline, and Dalessi had just learned that defendant had a previous arrest for a firearm violation. In addition, it was dark and Dalessi feared that defendant might flee given his position on the bicycle.

Relying on *In re H.H.* (2009) 174 Cal.App.4th 653 (*H.H.*), defendant argues that a traffic stop for a missing bicycle light does not justify a patsearch. He also asserts that his refusal to consent to search cannot provide reasonable suspicion for a patsearch.

In *H.H.*, similar to the facts here, a police officer observed a minor riding a bicycle without proper lighting equipment. (*H.H.*, *supra*, 174 Cal.App.4th at p. 656.) The officer

stopped the minor and became concerned that the minor might be armed when he volunteered that he was not on probation. (*Id.* at p. 655.) The minor refused to consent to a search. (*Ibid.*) The officer nevertheless patsearched the minor and found a loaded revolver in his jacket. (*Id.* at pp. 656-657.) Division Five of this district considered the issue of whether a minor's refusal to consent to a search, without more, created a reasonable suspicion to conduct a patsearch. The court held that it did not. It reasoned that the minor's refusal to consent did not necessarily indicate that the minor " 'had something illegal to hide' " and declined to view a defendant's exercise of his Fourth Amendment rights as comparable to unprovoked flight. (*Id.* at p. 660.) The court concluded that "there simply were no specific and articulable facts at the suppression hearing that the minor was armed and dangerous." (*Ibid.*)

Defendant's reliance on *H.H.* is misplaced because here there were specific facts regarding Dalessi's encounter with defendant that justified the patdown search. Unlike the officer in *H.H.*, Dalessi's motivation to patsearch defendant did not hinge solely on his refusal to consent to a search. Rather, Dalessi testified to a litany of reasons that led to his decision to patsearch defendant. These included the odor of alcohol on defendant's breath; defendant's long shirt and covered waistline (see *People v. Collier* (2008) 166 Cal.App.4th 1374, 1377, fn. 1 [wearing baggy clothing, coupled with other suspicious circumstances, may furnish the requisite facts to support a patsearch]); his straddling of his bicycle which Dalessi opined could signal the defendant's intention to flee; the fact that it was dark; defendant's hesitation of several seconds before answering whether he consented to a search; and defendant's previous arrest for a firearm violation. While defendant's assertion of his right of refusal, or the manner of that assertion is not a proper factor to consider in determining whether a patsearch is warranted (*H.H., supra,* 174 Cal.App.4th at pp. 659-660,) even removing this factor from the equation, the remaining facts, taken together, provided a reasonable suspicion that defendant was armed.

Defendant asserts that the fact that it was dark did not justify the search since Dalessi and Corrigan could have illuminated the scene or asked defendant to dismount his bicycle. The possibility that the officers could have taken alternate or additional steps

to ensure their safety is not determinative. "The judiciary should not lightly second-guess a police officer's decision to perform a patdown search for officer safety. The lives and safety of police officers weigh heavily in the balance of competing Fourth Amendment considerations." (*People v. Dickey* (1994) 21 Cal.App.4th 952, 957.)

Defendant also argues that Corrigan's previous weapons-related contact with him was stale, having occurred seven or eight years prior to the search. It is noteworthy, however, that the date of Corrigan's previous contact with defendant was not disclosed to Dalessi before he decided to conduct the patsearch. Again, it is easy to retrospectively criticize law enforcement's decisions, particularly when additional information later comes to light. The United States Supreme Court has recognized that "[a] creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. . . . The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." (*United States v. Sharpe* (1984) 470 U.S. 675, 686-687.) Here, Dalessi's reliance on the information of defendant's past weapons arrest was reasonable considering the totality of the circumstances.

C. The Scope of the Search

Defendant contends that even if he was legally patsearched, Dalessi exceeded the bounds of that search when he removed the pills from defendant's pants pocket because the small oval-shaped objects were not "immediately apparent contraband."

Generally, defendant is correct that an officer may not remove an object from a patsearched individual's person if its " 'incriminating character [is not] "immediately apparent." ' " (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 375.) This "plain feel" approach is an extension of the "plain view" doctrine set forth in *Arizona v. Hicks* (1986) 480 U.S. 321. (See *People v. Dibb* (1995) 37 Cal.App.4th 832, 836-837 ["The critical question is not whether [the officer] could identify the object as contraband based on only the 'plain feel' of the object, but whether the totality of the circumstances made it

immediately apparent to [the officer] when he first felt [the object] that the object was contraband"]; *In re Lennies H.* (2005) 126 Cal.App.4th 1232, 1238-1239 [motion to suppress car keys found in minor's pocket properly denied where circumstances included officer feeling car keys during patdown search after the minor previously denied knowledge of them].)

In *People v. Valdez* (1987) 196 Cal.App.3d 799 (*Valdez*), the court held that the police could not seize a film canister containing cocaine from the defendant's front pants pocket during a patdown search. The court reasoned that a film canister "is not a distinctive drug-carrying item equivalent to a heroin balloon, a paper bindle, or a marijuana-smelling brick-shaped package, which may be seized upon observation. [Citations.] Rather, the canister is akin to a common product like a pill bottle, a pack of cigarettes, or a plastic bag which may *not* be seized merely because it may also be commonly used to store narcotics." (*Id.* at pp. 806-807.) Here, as in *Valdez*, the illegality of the seized item was not immediately apparent. Dalessi, however, obtained probable cause to seize the pills from defendant's pocket when defendant volunteered that he was carrying Vicodin.

People v. Avila (1997) 58 Cal.App.4th 1069 (*Avila*) is dispositive. There, an officer was lawfully patsearching a suspect when he felt a large and bulky object in the suspect's pant leg. (*Id*. at p. 1075.) He asked the suspect what the object was, and the suspect volunteered that the object was "meth." (*Ibid*.) The *Avila* court held that the "defendant confessed to the crime. [Citations.] The Fourth Amendment was not designed to protect a defendant from his own candor." (*Ibid.*) Here, as well, defendant's statements that the pills were Vicodin provided probable cause for Dalessi to search his pocket.

Defendant further contends that Dalessi had no probable cause to reach into his pocket because defendant claimed he had a prescription for Vicodin. Although a written prescription is a valid defense to possession of a controlled substance, defendant has the burden of proving the defense; it does not grant him complete immunity from criminal prosecution. Defendant was charged with violating Health & Safety Code section 11350,

subdivision (a), which states: "[e]xcept as otherwise provided in this division, every person who possesses . . . any controlled substance . . . specified in subdivision (b) or (c) of Section 11055[1] . . . *unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state*, shall be punished by imprisonment in the state prison." (Health & Saf. Code, § 11350, subd. (a), italics added.) The statute has been interpreted as providing a defendant, with a written prescription for the controlled substance, an affirmative defense which he or she bears the burden of proving; it, however, does not grant complete immunity from criminal prosecution. (See *People v. Martinez* (1953) 117 Cal.App.2d 701, 708 [written prescription from a licensed physician is a defense to a charge of possession of a controlled substance]); (*People v. Cardenas* (1997) 53 Cal.App.4th 240, 245 [" ' "It is well established that where a statute first defines an offense in unconditional terms and then specifies an exception to its operation, the exception is an affirmative defense to be raised and proved by the defendant" ' "].)

Finally, this case is distinguishable from the medical marijuana cases cited by defendant. (See *People v. Strasburg* (2007) 148 Cal.App.4th 1052, 1059-1060 [medical marijuana prescription provides limited defense against prosecution but does not provide a shield against reasonable investigations and seizures]; *People v. Mower* (2002) 28 Cal.4th 457, 469 [Health & Saf. Code, § 11362.5, subd. (d) does not provide immunity from arrest].) Here, defendant was unable to produce his prescription for Vicodin and therefore could not have avoided arrest.

[1] Vicodin, also known as hydrocodone, is listed as a Schedule II controlled substance under Health & Safety Code section 11055, subdivision (b)(1)(J) .

III. DISPOSITION

The judgment is affirmed.

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RIVERA, J.

We concur:

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RUVOLO, P.J.

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REARDON, J.