Filed 9/15/11 In re R.C. CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re R.C., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. R.C., Defendant and Appellant.	A130996 (Alameda County Super. Ct. No. SJ10-015659-01)

After defendant's motion to suppress evidence (Welf. & Inst. Code, § 700.1) was denied, he entered an admission to one count of disturbing the peace (Pen. Code, § 415). In this appeal he renews his claim that he was unlawfully detained and searched. We find that defendant gave consent to the search before any unlawful detention occurred, and affirm the judgment.

STATEMENT OF FACTS

San Leandro Police Officer Timothy Chinn testified that on the night of August 22, 2010, he responded to the report of a "possible battery" at Washington Elementary School. When Officer Chinn arrived at the school, Sergeant Henderson was already on the scene and "talking to a group of juveniles" sitting on a bench. In a "different location" on the school property, two other officers had contacted another "group of juveniles."

Officer Chinn approached Sergeant Henderson "to cover him." He recognized defendant, who was "sitting on a park bench," from "prior contacts" with him a week

before. The officer asked defendant to "stand up and come over toward" him. The battery investigation was ongoing, and Officer Chinn "wanted to talk to" defendant. Defendant "walked over" to Officer Chinn, whereupon the officer asked if he had "anything illegal or any contraband on his person." Defendant "said 'no' " Officer Chinn then asked defendant, "Do you mind if I check?" Again defendant replied "No." During the search of defendant and his backpack that followed, Officer Chinn found a large black permanent marking pen, smaller marking pens, three bottles of fabric paint, and a notebook. The officers thereafter determined that no battery had been committed.

DISCUSSION

Defendant argues that the prosecution "presented no evidence of the validity of *Sergeant Henderson's* initial detention" of him. Therefore, despite the subsequent consent to search given by defendant, he claims that the "search cannot stand." He asks us to remand the case to the trial court with directions to grant the motion to suppress and afford him an opportunity to "withdraw his admission if he so desires."

"The standard of appellate review of a trial court's ruling on a motion to suppress evidence is well established. We defer to the trial court's factual findings, express or implied, if supported by substantial evidence, with all presumptions favoring the trial court's exercise of its power to judge the credibility of the witnesses, resolve conflicts in the testimony, weigh the evidence and draw factual inferences. [Citations.] However, in determining whether on the facts so found the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. McHugh* (2004) 119 Cal.App.4th 202, 209.) "Further, we examine the legal issues surrounding the potential suppression of evidence derived from a police search and seizure by applying federal constitutional standards." (*People v. Superior Court* (*Walker*) (2006) 143 Cal.App.4th 1183, 1195.) "Pursuant to article I, section 28, of the California Constitution, a trial court may exclude evidence under Penal Code section 1538.5 only if exclusion is mandated by the federal Constitution." (*People v. Banks* (1993) 6 Cal.4th 926, 934.) We defer to the trial court's findings of fact, but measure those facts against

federal constitutional standards of reasonableness. (*People v. Miller* (2004) 124 Cal.App.4th 216, 221.)

Our first inquiry in the present case is whether a detention of defendant occurred before consent to search was obtained. "A seizure occurs when the police, by the application of physical force or show of authority, seek to restrain the person's liberty [citations]; the police conduct communicates to a reasonable innocent person that the person is not free to decline the officer's request or otherwise terminate the encounter [citation]; and the person actually submits to that authority [citation] for reasons not 'independent' of the official show of authority [citation]. Admittedly, the application of this test to particular circumstances is sometimes more an art than a science. [Citation.] As the high court has emphasized, 'for the most part *per se* rules are inappropriate in the Fourth Amendment context. The proper inquiry necessitates a consideration of "all the circumstances surrounding the encounter." ' [Citations.]" (*People v. Brendlin* (2006) 38 Cal.4th 1107, 1118.) " ' "[A] person has been 'seized' within the meaning of the Fourth Amendment" . . . "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he [or she] was not free to leave." ' [Citation.] The high court later made clear that this test 'states a necessary, but not a sufficient, condition for seizure.' [Citation.] In order for there to be a seizure under the Fourth Amendment there must also be an arrest, by the application of physical force or by submission to the assertion of authority." (*People v. Hoyos* (2007) 41 Cal.4th 872, 893, italics omitted.)

" 'Although there is no "bright-line" distinction between a consensual encounter and a detention . . . "the police can be said to have seized an individual 'only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' " ' [Citations.] ' "The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." ' [Citation.]" (*Ford v. Superior Court* (2001) 91 Cal.App.4th 112, 124.) We must make a realistic assessment of appellant's encounter with the police based upon the totality of the

specific facts presented to us. (*People v. Bouser* (1994) 26 Cal.App.4th 1280, 1287; *People v. Grant* (1990) 217 Cal.App.3d 1451, 1458.) "What constitutes a restraint on liberty such that a person would conclude that he is not free to leave varies with the particular police conduct at issue and the setting in which the conduct occurs." (*People v. Ross* (1990) 217 Cal.App.3d 879, 884.) "Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled." (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.)

We find based on the record before us that no detention or seizure of defendant occurred when Officer Chinn parked his vehicle, approached the group assembled on the bench, and asked to speak with defendant. (*People v. Turner* (1994) 8 Cal.4th 137, 179–180; *People v. Menifee* (1979) 100 Cal.App.3d 235, 238–239.) The established rule is " 'that a detention does not occur when a police officer merely approaches an individual on the street and asks a few questions. [Citation.] As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required on the part of the officer. Only when the officer, by means of physical force or show of authority, in some manner restrains the individual's liberty, does a seizure occur. [Citations.]' [Citation.]" (*People v. Colt* (2004) 118 Cal.App.4th 1404, 1411.) "An officer has every right to talk to anyone he encounters while regularly performing his duties . . . . Until the officer asserts some restraint on the contact's freedom to move, no detention occurs." (*People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1227; see also *People v. Dickey* (1994) 21 Cal.App.4th 952, 954–955.) "[T]here must also be an actual taking into custody, whether by the application of physical force or by submission to the assertion of authority. [Citation.] [The United States Supreme Court] has also cautioned against an undue focus on the fact that government action caused some restriction on an individual's freedom of movement: ' "a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement . . . , nor even whenever

there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement . . . , but only when there is a governmental termination of freedom of movement *through means intentionally applied*." ' [Citations.]" (*People v. Brendlin, supra,* 38 Cal.4th 1107, 1115–1116.)

Here, Officer Chinn observed defendant and the others in his group sitting on a park bench. Nothing in the record before us indicates that Sergeant Henderson had confined the freedom to leave of defendant or anyone else in the group. Officer Chinn testified that when he arrived Sergeant Henderson was merely "talking to" the group assembled on the bench. Officer Chinn wanted to "talk to" defendant about the battery report, and asked him to "come over" to do so. He used a "normal speaking" tone, and did not draw his firearm. He did not engage in any further display of physical force or show of authority to signify to defendant that he was compelled to stay. (*In re Manuel G., supra,* 16 Cal.4th 805, 821–822; *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1254.)

"Unlike a detention, a consensual encounter between a police officer and an individual does not implicate the Fourth Amendment. It is well established that law enforcement officers may approach someone on the street or in another public place and converse if the person is willing to do so." (*People v. Rivera* (2007) 41 Cal.4th 304, 309.) As we read the record, Officer Chinn did nothing more than approach defendant, then ask to speak to him and for consent to search. Defendant had the right to refuse to speak with Officer Chinn or deny the request for consent to search. A request to search, "by its nature, carries the implication that permission may be withheld." (*People v. Ledesma* (2006) 39 Cal.4th 641, 704.) The consent was not the product of an unlawful

detention, and no evidence was presented that the ensuing consent obtained from defendant was involuntary. (*People v. Rivera*, *supra*, at p. 311.)

Accordingly, the judgment is affirmed.

_____
Dondero, J.

We concur:

_____
Margulies, Acting P. J.

_____
Banke, J.