[MS-0494.009.096.002]

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

APPELLATE DEPARTMENT

FILED _____

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RAMIRO GALVAN, Defendant and Appellant.	SUPERIOR COURT NO. CR 46261 MUNICIPAL COURT NO. 283102 (San Diego Judicial District) O P I N I O N

Appeal from judgment of the Municipal Court, San Diego Judicial District, County of San Diego, State of California. The Honorable Earl K. Adams, Judge. Affirmed.

John W. Witt, City Attorney, by S. Patricia Rosenbaum, Deputy City Attorney, appearing for plaintiff and respondent.

Michael B. Harris, Esq., appearing for defendant and appellant.

This is an appeal after denial of a motion to suppress pursuant to Penal Code Section 1538.5, and a plea of guilty to Health and Safety Code Section 11550, and the imposition of a

mandatory 90-day sentence pursuant to Health and Safety Code Section 11550.

The defendant and appellant raises three contentions:

(1) That the facts that were available to the officer at the time of the stop, search, and seizure amounted to an illegal stop, search and seizure, and should have been suppressed pursuant to Penal Code Section 1538.5;

(2) That the court abused its discretion in resolving all inferences in favor of the police officer's testimony;

(3) That the mandatory 90-day jail term provided in Health and Safety Code Section 11550 is unconstitutional in that:

(a) it constitutes cruel and unusual punishment; and

(b) it violates constitutionally mandated separation of legislative and judicial powers; and

(c) it constitutes cruel and unusual punishment as it relates to appellant.

Facts were presented to the trial court that on October 7, 1978, at about 1:15 p.m. in the afternoon, Officer Barack and Officer Aceves were dressed in plainclothes, driving an unmarked police vehicle in the area of 14th and Market in the City of San Diego. They were members of the Crime Suppression Unit, with a primary responsibility of contacting and arresting persons under the influence of heroin and other drugs. Barack had been a police officer for nine years and had had nine years' experience in narcotics enforcement. Officer Barack observed two persons on

the porch and front yard of a two-story rooming house at 525 14th Street, San Diego. The property was surrounded by a three-foot cyclone fence with three or five signs stating "No Trespassing." Officer Barack knew this address as being a place where heroin users, abusers and dealers congregate for the purpose of buying, injecting or selling heroin. Officer Barack saw two people, an unknown male, later identified as appellant Galvan, and a female known as "CC" or "CeCe" on the porch. Officer Barack had arrested "CeCe" some months before for possession of narcotics, and possession for sale, and knew that she had been convicted of heroin use, but had had no contact with her since then. From his prior contact with "CeCe" he knew that she had been living with her father at a different address than 525 14th Street.

Officer Barack further testified that his purpose of inquiring of the appellant and the female known as "CeCe" was to see what they were doing at that location, because the apartment house owner had asked him to keep people other than tenants away from the house. He said the boarding house was known to him to be a high drug area and he had made 100 arrests there in the past six months. Upon questioning by the court, Officer Barack stated that only about five of those arrested were tenants at that address.

Officer Barack made contact with appellant and asked if he lived at that address, and whether he had seen the No Trespassing signs. Galvan, appellant, stated, "No." Barack asked appellant for identification and noticed that appellant's response in producing his driver's license was slow. Barack then observed that

appellant's eye pupils were abnormally small as they stood in a shaded area. Appellant's speech was slow and deliberate and a fresh injection mark was visible on his right inner arm fold as his shirt sleeves were rolled up. Barack then inspected the pupils of appellant's eyes at a closer distance and still found them to be abnormally small and unresponsive as he shaded his eyes with his hand. The officer determined that appellant was under the influence of a controlled substance and arrested him for a violation of Health and Safety Code Section 11550.

On cross-examination Barack testified as follows:

He had some present recollection of the specific events during the arrest, and had relied on fellow officer Aceves' police report to refresh his recollection and used that report from time to time in court to aid in his testimony. The police report was made out by Officer Aceves about one hour after the arrest. Officer Barack could not remember the boarding house owner's name. The first time he talked with the owner about keeping trespassers off the premises was several years prior to October 7, 1978, and the last contact he had with the owner was over a year prior to October 7, 1978. Barack further testified that appellant and "CeCe" were within speaking distance but could not recall if they were talking together. The officer could not recall if there was a third person on the porch during this incident, although frequently an older man in his 50's does sit there.

Barack further recalled that appellant's right hand was missing a few fingers and appeared crippled, but did not know if

there was a tattoo there. He also noted that the "track/injection marks" were fresh and appellant's sleeves were rolled up. The officer also testified that he could not identify by name persons living at the house. He knew four or five residents by sight by virtue of prior contacts, and believed there were seven to nine different people in seven to nine different living units at the address.

Officer Barack also confirmed that he did not notice any furtive gestures, or any suspicious activity concerning either appellant or "CeCe."

Appellant was sworn and testified as follows:

He had given a ride to a friend in his car, and the friend had asked that appellant stop at the apartment house so that he could see a tenant inside. Appellant chose to wait for the friend and was seated on the steps of the front porch of the boarding house reading a newspaper. A female known to him by the name of Cecilia was on the porch, as was a resident known to appellant as Toto. He was not talking with Cecilia when the police approached. The two men came up to the porch while appellant was seated on the steps reading the paper. One man talked to Cecilia, and the other man identified himself as Police Officer Barack and talked to appellant. Barack asked appellant what he was doing there and appellant said he was visiting a friend. Barack asked for identification. Appellant remained seated. He removed his wallet from his left rear pocket with his left hand. Then Barack told appellant to roll up his sleeves to allow the officer to inspect the inner arm soft skin

at the elbow joint. Appellant wore a long-sleeved shirt rolled up one or two rolls above the wrist, but below the elbow. Appellant rolled up his sleeve between one-fourth to one-third of the way between his wrist and elbow. The elbow inner skin was concealed and no marks could be seen. Appellant also displayed a tattoo with a figure with the letters "IRO", a nickname. When appellant displayed his right hand during the testimony, it was apparent he was missing some fingers, giving the hand an unusual appearance. The tattoo was above his wrist and below the elbow on his right forearm. Appellant testified he did as he was told and rolled up his left sleeve to display his arms to the elbow joints. Officer Barack ordered appellant to stand up and the officer inspected appellant's eyes with the shade from his hand. The officer then placed defendant under arrest.

Judge Adams denied appellant's motion to suppress after which the appellant entered a plea of guilty to violation of Health and Safety Code Section 11550. Judge Adams imposed sentence on February 7, 1979 as follows:

> Summary probation for two years on condition that the defendant serve the mandatory 90-day incarceration in the County Jail, credit for two days time already served, and the further condition that the defendant not repeat the offense.

Judge Adams stayed execution of the sentence for 90 days to allow the defendant to appeal his decision, and on February 9, 1979,

the defendant filed a Notice of Appeal, and this case represents the subject of said appeal.

I

WAS THE EVIDENCE OBTAINED AND RECEIVED BY THE COURT THE RESULT OF AN ILLEGAL STOP, SEARCH, AND SEIZURE WHICH SHOULD HAVE BEEN SUPPRESSED PURSUANT TO PENAL CODE SECTION 1538.5?

The appellant, along with another person, was sitting on the porch of a boarding house near 14th and Market at 1:15 p.m. Officer Barack testified that he knew some of the other parties with the defendant before any contact with the appellant was made. Officer Barack further testified that the boarding house was located in an area characterized as "a location of high narcotics transactions" (approximately 100 arrests in the past six months of which five were persons who resided at said boarding house). The appellant was sitting with "CeCe," a known user and seller of narcotics who did not reside at the house. Further, that there were "No Trespassing" signs posted on the fence around the house. Further, that the owner of the house had requested police officers to keep non-tenants off the premises, and further that though appellant was unknown to Officer Barack, Officer Barack did know four or five of the seven to nine residents of said house by sight.

An officer's observation from a place where he has a right to be is not a search; Lorenzana v. Superior Court, 9 Cal.3d 626 (1973). Hence, the officer's observations which gave him a right to make the initial contact were not the product of any detention and as stated in Lorenzana, these factors provided a reasonable

basis for the officer's belief that the contact with appellant was appropriate. Hence the number of persons arrested at the address who were residents, the activities of drug involvement, trespass, and the drug history of the person "CeCe" added to the officer's suspicion that the appellant in the case at bar did not belong there.

The public interest requires a police officer to investigate circumstances that are consistent with both criminal and innocent activity to resolve whether illegality in fact exists. In re Tony C., 21 Cal.3d 888, 894 (1978).

Therefore, Officer Barack could reasonably question appellant as to whether he lived on the premises to ascertain whether he was trespassing, whether "CeCe" was his guest if he responded he was a tenant.

The finding by the court is that the initial contact of the officer was a reasonable investigation of trespass, and during this initial contact at the front porch, the officer observed additional factors which suggested drug involvement; such as, the slow response of appellant in producing identification, the slow and deliberate speech, fresh injection marks, and abnormally small pupils considering the shaded area in which he stood. These observations occurred in plain view and were observed by the officer where the officer had a right to be, and the officer is entitled to evaluate objective, observable factors in light of his own experience.

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Based on the foregoing reasons and quantities of evidence presented to the trial court, the denial of the motion to suppress was proper.

II

DID THE COURT ABUSE ITS DISCRETION IN RESOLVING ALL INFERENCE IN FAVOR OF THE POLICE OFFICER'S TESTIMONY?

The court as a trier of fact has empowered the judge with the effect and value of the evidence, the credibility of the witnesses and to resolve factual conflicts. People v. Hecker, 179 Cal.App.2d 823 (1960).

> "[T]he power of the reviewing court begins and ends with a determination of whether there exists in the record substantial evidence, contradicted or not, which will support the (findings) and if there is, the strength of the opposing evidence or inferences is immaterial, for evidence is not weighed on appeal. Likewise, we are bound to liberally construe the findings in support of the judgment indulging in all reasonable inferences, resolving every substantial conflict in the testimony and construing any uncertainties in their favor." Id., at 828 (Citations omitted.).

Evidence Code Section 411 states: "the direct evidence of one witness who is entitled to full credit is sufficient proof of any fact."

The court was reasonable in choosing to accept Officer Barack's testimony wherein Officer Barack testified regarding his observations of the appellant, the nature and duration of the

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contact, and his determination that appellant was under the influence of heroin at that time, and that Officer Barack's testimony was the more credible of the two witnesses.

The court's resolution of questions of fact should not be disturbed because the court was reasonable in choosing to accept Officer Barack's testimony.

Based on the foregoing reasons, the court did not abuse its discretion.

III

IS THE MANDATORY 90-DAY JAIL SENTENCE UNDER HEALTH AND SAFETY CODE SECTION 11550 UNCONSTITUTIONAL?

The California Supreme Court recently in People v. Tanner, 24 Cal.3d 514 (1979) held that the mandatory provisions of Penal Code Section 1203.06, prohibit the granting of probation if a firearm is carried or used in connection with certain crimes. One of the decisions that the Supreme Court relied upon in the Tanner case was Keeler v. Superior Court, 2 Cal.3d 619, 631 (1970), which stated:

> "[S]ubject to the constitutional prohibition against cruel and unusual punishment, the power to define crimes and fix penalties is vested exclusively in the legislative branch."

The 90-day sentencing provision of Health and Safety Code Section 11550 has been recently addressed by several appellate courts and those courts are in agreement that said sentencing provision does not constitute cruel and unusual punishment.

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The issue was considered in Smith v. Municipal Court, 78 Cal.App.3d 592, 600 (1978); Bosco v. Justice Court, 77 Cal.App.3d 179, 188 (1978); and in In re Orosco, 82 Cal.App.3d 924 (1978). Each court is in agreement that said 90-day sentencing provision of Health and Safety Code Section 11550 does not constitute cruel and unusual punishment. In In re Orosco, supra, the court stated:

> "A defendant who challenges a penalty as cruel or unusual bears the burden of establishing that the penalty '. . . is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' (Citations omitted.) Unless this standard is met and unconstitutionally appears, clearly, positively and unmistakably (citations omitted), the courts will not tamper with the legislative directive."

In the case at bar, appellant has not met the standard as set forth in In re Orosco, i.e., defendant has not established that the mandatory penalty as per Health and Safety Code Section 11550 is disproportionate to the crime nor as it is applied to the appellant.

Based on the foregoing reasons, the Court finds that the 90-day sentencing provision of Health and Safety Code Section 11550 is not unconstitutional on its face, nor is it unconstitutional in its application to appellant.

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CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed in its entirety.

Judgment affirmed.

Earl B. Gilliam, Jr.

I CONCUR:

John Smith P.J.

D I S S E N T

I dissent.

The police are not private security guards for apartment house owners. We are told that the owner of the apartment had asked the police to keep people other than tenants away from the house. That is the reason when the officer passed by and saw the female, known to him as "CeCe", and the appellant upon the apartment porch that he stopped to inquire. That is no basis for stopping to invade the privacy of private citizens. The officer had no way of knowing and did not know when he inquired of appellant whether he was a tenant or not. There was nothing inherently suspicious about what he saw or what was going on. The fact that this may have been a drug area, and that "CeCe" was known to him creates no justifiable suspicion even with the ambit of In re Tony C., 21 Cal.3d 888 to justify the

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invasion of privacy that took place. On this ground, without addressing myself to any other points raised, I would reverse.

Byron F. Lackey J.