Recent Case Report

People v. Garry

(2007) __ Cal.App.4th __ [2007 WL 3342586]

ISSUE

Did a de facto detention result when an officer spotlighted and approached a suspected drug dealer on a street corner?

FACTS

At about 11:30 P.M., a uniformed Vallejo police officer in a marked car was on patrol in a "high-crime, high-drug" area when he spotted Garry just standing on a street corner. The officer stopped about 35 feet from Garry and shined his white spotlight on him. As he did so, he noticed that Garry "looked nervous." The officer then got out of his car and walked toward Garry in a manner that the officer described as "briskly."

As the officer was approaching, Garry's nervousness increased to apparent "shock." As the officer testified, Garry "started, like, walking backwards" and then spontaneously said, "I live right there," as he pointed to a house. The officer responded, "Okay, I just want to confirm that," at which point he asked, "Are you on probation or parole?" Garry said he was on parole.

The court's explanation of what happened next was unclear, possibly because the record was unclear. In any event, the officer decided to detain Garry (probably to conduct a parole search), but Garry "started to pull away violently." The officer was able to restrain him and, during a search incident to Garry's arrest for resisting, the officer found 13 pieces of rock cocaine in his jacket pocket.

Garry filed a motion to suppress the cocaine, but the court denied it on grounds that the officer had not detained Garry until after he learned he was on parole. Said the court, "[The officer] didn't yell anything at Mr. Garry. He didn't yell 'Stay where you are. You're under arrest,' or anything like that. He simply approached him . . . "

A jury subsequently convicted Garry of possessing cocaine base for sale.

DISCUSSION

Garry contended that the manner in which the officer approached him rendered the initial encounter a detention. And because the officer lacked grounds to detain him, the detention was illegal, and the cocaine should have been suppressed. The court agreed.

The United States Supreme Court has ruled that a suspect is detained "when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement."[1] Because the officer could have legally detained Garry when he learned that he was on parole, the issue was whether he detained him before then.

In determining whether an officer's "show of authority" transformed an encounter into a detention, the courts examine the surrounding circumstances (especially the officer's words and actions), then ask whether they would have caused a reasonable innocent person in the suspect's position to believe that he was not free to leave or otherwise terminate the encounter.[2]

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[1] *Brendlin* v. *California* (2007) __ U.S. __ [2007 WL 1730143].

[2] See *United States* v. *Drayton* (2002) 536 U.S. 194, 202 ["The reasonable person test is objective and presupposes an *innocent* person."]; *Florida* v. *Bostick* (1991) 501 U.S. 429, 438 ["[T]he 'reasonable person' test presupposes an *innocent* person."].

As noted, the judge at the suppression hearing ruled that the officer did not initially detain Garry. But the Court of Appeal disagreed, ruling that the manner in which the officer approached him was so "aggressive and intimidating" as to render the encounter a de facto detention. Said the court, "[A]ny reasonable person who found himself in defendant's circumstances, suddenly illuminated by a police spotlight with a uniformed, armed officer rushing directly at him asking about his legal status, would believe themselves [sic] to be under compulsion of a direct command by the officer."

Consequently, the court ruled that the cocaine should have been suppressed.

COMMENT

In *Florida* v. *Bostick*, the United States Supreme Court said, "Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions."[3] Although the officer in *Garry* approached an individual and asked a single question, the court ruled that the Supreme Court's rulings on this issue did not apply because there were four additional circumstances: (1) the officer shined a spotlight on Garry, (2) the officer was armed and in uniform, (3) the officer walked toward him hurriedly, and (4) the officer asked if he was on probation or parole. As we will explain, none of these circumstances—whether singly or in combination—justified the court's decision.

THE SPOTLIGHT: The courts in California and virtually everywhere else consistently rule that an officer's act of illuminating a suspect with a white spotlight before speaking with him is relatively unimportant.[4] As the court observed in *People* v. *Perez*, "While the use of high beams and spotlights might cause a reasonable person to feel himself the object of official scrutiny, such directed scrutiny does not amount to a detention."[5]

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[3] (1991) 501 U.S. 429, 434. ALSO SEE *Florida* v. *Royer* (1983) 460 U.S. 491, 497 ["law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions."].

[4] See *People* v. *Franklin* (1987) 192 Cal.App.3d 935, 940 "[T]he spotlighting of appellant alone fairly can be said not to represent a sufficient show of authority so that appellant did not feel free to leave."]; *People* v. *Rico* (1979) 97 Cal.App.3d 124, 130; *People* v. *Brueckner* (1990) 223 Cal.App.3d 1500, 1505 ["The fact he shined his spotlight on the vehicle as he parked in the unlit area would not, by itself, lead a reasonable person to conclude he or she was not free to leave."]; *State* v. *Baker* (Idaho 2004) 107 P.3d 1214, 1216 ["While this Court has not addressed the issue, courts in other jurisdictions have found the use of a spotlight alone does not constitute a show of authority such that a reasonable person would not feel free to leave."]; *State* v. *Stuart* (Ct.App. 1990) 811 P.2d 335, 338 ["[I]t was not unreasonable for [the officer] to take the relatively unintrusive investigatory step of shining a spotlight on the vehicle. Such conduct constituted neither an unlawful search of the vehicle nor seizure of Stuart."]; *State v. Clayton* (Mont 2002) 45 P.3d 30, 35 ["[The officers] only pulled in behind [the defendant] and shined the spotlight to determine how many people were in the vehicle. The officers did not have their sirens or emergency lights on and the encounter took place on a public street."]; *State v. Calhoun* (Or.App. 1990) 792 P.2d 1223, 1225 ["T]he fact that the headlights and spotlight were on did not transform the encounter into a stop" and that the officer did not park in such a way that prevented the defendant from driving away."]; *Stewart v. State* (Tex.Crim 1980) 603 S.W.2d 861, 862 [officers exercised no authority when they approached a van that was parked at the end of a street and shined their spotlights into the van.].

[5] (1989) 211 Cal.App.3d 1492, 1496.

Nevertheless, the court in *Garry* complained that the officer "bathed defendant in light." *Bathed?* A little melodramatic, but with virtually no facts to support its decision the court was forced to hype the few that it could ferret out. Still, regardless of whether the officer had bathed, showered, washed, or shampooed Garry with light, it was not a significant circumstance.

ARMED AND UNIFORMED: The next circumstance relied upon by the court was that the officer was in uniform and was armed. That the court even mentioned this circumstance demonstrates the complete lack of factual support for its decision. Whether an officer was uniformed or armed means nothing because *every* officer is armed, and virtually all of them who patrol the streets are in uniform. Thus, when this issue was raised before the United States Supreme Court, the Court responded, "That most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon."[6]

WALKING "BRISKLY": The officer testified that he walked "briskly" toward Garry. He also said that Garry was standing "probably about 35 feet away," and that it took him two and one half to three seconds to reach him after he had stepped out of his patrol car. Although these were, of course, estimates, the court held them up as precise mathematical calculations. And after running the numbers it announced that the officer did not actually walk "briskly" toward Garry. In reality, said the court, he was "rushing directly" at him. Later, apparently dissatisfied with such a meager embellishment, the court reverted to hype and said, *"[The officer] all but ran directly at him."*

If the court had wanted to actually explore this issue, it might have looked at *People v. Kemonte H.*[7] in which the court ruled that officers did *not* detain the defendant merely because they "pulled the [patrol] car over, stopped the car approximately 15 to 20 feet away from Kemonte and walked toward him at a 'semi-quick' pace." Said the court, "A reasonable person of Kemonte's age would not have felt restrained by two police officers approaching him on a public street. [A] reasonable person could only conclude that the officers wanted to talk to him."

PROBATION OR PAROLE? The court also scolded the officer for "immediately and pointedly" questioning Garry about his probation and parole status. Would the court have preferred it if the officer had started out by engaging Garry in a discussion about the weather? In any event, as most courts understand, a mere investigative question such as this is not a circumstance that tends to indicate a suspect was being detained. For example, the United States Supreme Court has said, "We have held repeatedly that mere police questioning does not constitute a seizure."[8] And in another case, it said that a seizure does not result merely because officers ask "potentially incriminating questions."[9] Thus, the California Court of Appeal observed in *People* v. *Bennett*:

> By now, it is generally understood that there is nothing in the Constitution which prevents a police officer from addressing questions to anyone on the streets. Police officers enjoy the liberty possessed by every citizen to address questions to other persons.[10]

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[6] *United States* v. *Drayton* (2002) 536 U.S. 194, 204.
[7] (1990) 223 Cal.App.3d 1507.
[8] *Muehler* v. *Mena* (2005) 544 U.S. 93, 101. ALSO SEE *Florida* v. *Royer* (1983) 460 U.S. 491, 497.
[9] *Florida* v. *Bostick* (1991) 501 U.S. 429, 439.
[10] (1998) 68 Cal.App.4th 396, 402 [quoting from *United States* v. *Mendenhall* (1980) 446 U.S. 544, 553]. ALSO SEE *People* v. *Castaneda* (1995) 35 Cal.App.4th 1222, 1227 ["Castaneda was not

A SUPERFICIAL LOOK AT THE OTHER CIRCUMSTANCES: The court went through the motions of noting some of the circumstances that indicated that Garry had not been detained. It devoted a short paragraph to this effort, a paragraph in which it listed—but did not bother discussing—a single one of them. There were, however, some significant circumstances:

NO COMMANDS: The officer did not order Garry to halt or issue any other commands to him.[11]

NO RED LIGHT: The officer did not engage Garry by means of activating a red light or siren.[12]

NOT BLOCKED IN: The officer did not park his car in a manner that blocked Garry's movement.[13] In fact, as noted, the officer estimated that he parked 35 feet away.

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detained simply because an officer approached him and began talking to him."]; *People v. Manuel G.*, (1997) 16 Cal.4th 805 ["Approaching the minor in a public place and asking him questions were not actions in themselves constituting coercive police conduct that would lead a reasonable person to believe that he or she was not free to leave. . . . Nothing in the record suggests that before that point [the deputy] had, by words, gestures, or other coercive conduct, restrained the minor in any manner."]; *People* v. *Hughes* (2002) 27 Cal.4th 287, 328; *People v. Kemonte H.* (1990) 223 Cal.App.3d 1507, 1512 ["Officers may investigate activities taking place on a public street by making a reasonable inquiry of the participants without it being a detention."]; *People* v. *King* (1977) 72 Cal.App.3d 346, 349 ["[S]o long as his conduct does not constitute a 'detention' a police officer may talk to anyone in a public place, something that any person would lawfully be permitted to do, or try to do."]; *People* v. *Rosales* (1989) 211 Cal.App.3d 325, 330; *People* v. *Bouser* (1994) 26 Cal.App.4th 1280, 1284; *People* v. *Lopez* (1989) 212 Cal.App.3d 289, 291; *Wilson* v. *Superior Court* (1983) 34 Cal.3d 777, 790; *People* v. *Profit* (1986) 183 Cal.App.3d 849, 877; *People* v. *Epperson* (1986) 187 Cal.App.3d 115, 120; *People* v. *Derello* (1989) 211 Cal.App.3d 414, 426-7 ["[T]his was at most a consensual encounter where the officers were doing exactly what they were lawfully entitled to do, which is to approach and talk if the subject is willing."]; *U.S.* v. *Ayon-Meza* (9th Cir. 1999) 177 F.3d 1130, 1133 ["[W]e must recognize that there is an element of psychological inducement when a representative of the police initiates a conversation. But it is not the kind of psychological pressure that leads, without more, to an involuntary stop."].

[11] See *United States* v. *Mendenhall* (1980) 446 U.S. 544, 554 ["use of language or tone of voice indicating that compliance with the officer's request might be compelled" is relevant]; *People* v. *Verin* (1990) 220 Cal.App.3d 551, 556 ["[W]hen an officer 'commands' a citizen to stop, this constitutes a detention because the citizen is no longer free to leave."]. COMPARE *People* v. *Brown* (1990) 216 Cal.App.3d 1442, 1448 ["Stop"]; *People* v. *Rodriguez* (1993) 21 Cal.App.4th 232, 238 ["Stay there."]; *People* v. *Foranyic* (1998) 64 Cal.App.4th 186 ["Get off your bicycle, lay it down, and step away from it."]; *People* v. *Roth* (1990) 219 Cal.App.3d 211 ["Come over here. I want to talk to you."].

[12] *Berkemer* v. *McCarty* (1984) 468 U.S. 420, 436 ["Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so."]; *Brower* v. *County of Inyo* (1989) 489 U.S. 593, 597 ["flashing lights" constituted a "show of authority"]; *People* v. *Bailey* (1985) 176 Cal.App.3d 402, 405-6 ["A reasonable person to whom the red light from a vehicle is directed would be expected to recognize the signal to stop or otherwise be available to the officer."].

[13] See *United States* v. *Drayton* (2002) 536 U.S. 194, 200 [Court notes that officers did not block the suspect's path]; *People* v. *Wilkins* (1986) 186 Cal.App.3d 804, 809 [seizure resulted from the officer "stopped his marked patrol vehicle behind the parked station wagon in such a way that the exit of the parked station wagon was prevented."]; *U.S.* v. *Sanchez* (10th Cir. 1996) 89 F.3d 715, 718 [the officer "did not obstruct or block Mr.

NO TOUCHING: The officer did not touch Garry until after he had been detained.

NO DRAWN WEAPON: The officer did not draw his gun on Garry.

PUBLIC PLACE: The encounter occurred in a public place. In fact, it supposedly occurred right in front of Garry's house. In the view of most other courts (including the United States Supreme Court), this was a relevant circumstance.[14]

NO BACKUP: The officer was alone.[15]

INVESTIGATIVE QUESTIONING: The officer's single question—"Are you on probation or parole?"—was a legitimate investigative question, and did not constitute a coercive accusation.[16]

It is very rare these days to encounter a published opinion in California in which a court distorts and ignores the facts as was done in *Garry*. We can only hope that this decision is reviewed by the California Supreme Court.

Sanchez's vehicle"]; *U.S.* v. *Dockter* (8th Cir. 1995) 58 F.3d 1284, 1287 [the officer "did not block appellants' vehicle or in any manner preclude them from leaving"].

[14] See *INS* v. *Delgado* (1984) 466 U.S. 210, 218; *People* v. *Sanchez* (1987) 195 Cal.App.3d 42, 47 ["the incident occurred on a public street"]; *People* v. *Epperson* (1986) 187 Cal.App.3d 115, 120; *People* v. *Profit* (1986) 183 Cal.App.3d 849, 879.

[15] See *People v. Manuel G.* (1997) 16 Cal.4th 805, 821 [the "presence of several officers" is a factor]; *People* v. *Profit* (1986) 183 Cal.App.3d 849, 877 ["Here initially there were three defendants and only two officers. Only later did the third officer even the numbers. This does not constitute a show of force, but instead indicates a reasonable exercise of precaution for the officers' own safety."]. *People v. Manuel G.* (1997) 16 Cal.4th 805, 823 ["Even if [the officer] stated in his radio broadcast that he was making a pedestrian stop, that statement does not contradict [the officer's] testimony that the encounter remained consensual until the minor threatened him."]; *U.S.* v. *Crapser* (9th Cir. 2007) 472 F.3d 1141, 1146 ["Although there were four officers present, most of the time only two talked to Defendant, while two talked to Twilligear"]; *U.S.* v. *Washington* (9th Cir. 2004) 387 F.3d 1060, 1068 [suspect "was confronted by six officers" who were "around" him]; *U.S.* v. *Kim* (9th Cir. 1994) 25 F.3d 1426, 1431, fn.3 [suspect was questioned by a single officer with "back-up posted in the background."]; *U.S.* v. *Ledesma* (10th Cir. 2006) 447 F.3d 1307, 1314 [the "threatening presence of several officers" is relevant].

[16] See *People* v. *Daugherty* (1996) 50 Cal.App.4th 275, 285 ["[The officer] did not directly accuse Daugherty of transporting narcotics, which may have been sufficient to convert the encounter into a detention."]; *U.S.* v. *Kim* (3rd Cir. 1994) 27 F.3d 947, 953 ["[W]e do not believe this question was accusatorial. The tone of the question in no way implied that [the agent] accused or believed that Kim had drugs in his possession; it was merely an inquiry."].