SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

APPELLATE DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. , Defendant and Appellant.	Case No: (Trial Court:) **PER CURIAM OPINION**

Appeal from a judgment of the Superior Court of Riverside County, Thomas Glasser, Judge (retired judge of the San Bernardino Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.), and Tamara Wagner, Temporary Judge (pursuant to Cal. Const., art. VI, § 21). Reversed and remanded.

Bartell, Hensel & Gressley, Donald J. Bartell, Lara J. Gressley and Michael W. Donaldson for Defendant and Appellant.

Michael A. Hestrin, District Attorney, and Alysia Chandler, Deputy District Attorney, for Plaintiff and Respondent.

THE COURT

Defendant was stopped on suspicion of driving under the influence (DUI). The officer who pulled him over began an investigation, but put the investigation on hold for somewhere in the neighborhood of fifty minutes while waiting for another officer to arrive to complete it. Because the prosecution has failed to show that this delay was reasonable under the circumstances, we find

a violation of the Fourth Amendment's prohibition on unreasonably prolonged detentions. We reverse the judgment.

FACTS

Defendant was charged with DUI (Veh. Code, §§ 23152, subds. (a), (b), 23578) and filed a motion to suppress (Pen. Code, § 1538.5). At the hearing on the motion, Riverside County Sheriff's Deputy Timothy Provost testified that on November 11, 2016, at about 5:20 p.m., he and his partner were on the 215 freeway transporting two arrestees from Perris to jail in Murrieta when he saw a truck driving without any lights on, even though it was getting dark at the time and most other vehicles had their headlights on. Deputy Provost then saw the truck weave back and forth within its lane, at one point crossing over the line, make several lane changes without signaling, and come close to hitting another vehicle. He radioed to have California Highway Patrol (CHP) respond to conduct a traffic stop because CHP "handles anything on the freeway for the most part, so see if they had someone in the area." Five or six miles after they first got behind the truck, it exited the freeway and the deputies followed "in hopes that a City of Menifee unit could be in position to conduct a stop." No such unit was available, so Deputy Provost and his partner "made a decision that it was in the best interest for everybody to conduct the stop despite having two arrestees in the back seat," and stopped the truck. Deputy Provost again radioed dispatch to send a CHP officer to conduct the investigation, but due to "some radio problems and just miscommunication or something . . . it seemed like we waited about 20, 20 minutes or so, and they didn't have anybody available." In the meantime Deputy Provost contacted the driver of the truck, defendant, and noticed that "his speech was slow, a little bit slurred. He seemed a little bit off" and not "normal . . . like he was possible on some type of medication or just he was speaking kind of slow . . . ." Defendant denied drinking and said that he was tired, and Deputy Provost, who had

received some training on DUIs "in the basic academy" including how to recognize objective symptoms and was familiar with such symptoms, did not smell any alcohol. About 20 minutes after the initial stop Riverside County Sheriff's Deputy Grimm responded to the scene and Deputy Provost and his partner left to take their two arrestees to jail.

Deputy Christopher Grimm testified that he heard Deputy Provost's initial radio call at about 5:20, but didn't respond at first. Later, when Deputy Provost again asked for assistance after initiating the traffic stop, Deputy Grimm responded, arrived at the scene between 6:00 and 6:15 — though he wrote 6:16 in his report and thought that time was "probably correct" — and conducted the investigation that resulted in defendant's arrest for DUI and subsequent blood draw.

Defendant argued in part that the initial detention was unreasonably delayed while Deputy Provost waited for Deputy Grimm to arrive to conduct the investigation, pointing to the lack of evidence that "it was an impossible thing to do to get somebody else there." The trial court[1] denied the motion to suppress, finding in part that while the delay was closer to 54 or 56 minutes rather than the 20 minutes Deputy Provost said, that delay was justified by "the fact that Provost had two arrestees in his vehicle. I don't think that he was able to conduct a DUI investigation and arrest another person. He had to wait for someone else to respond, and I think that is justification for that delay . . . ." In any event, the trial court noted that "if there was a Fourth Amendment violation in some respect that I'm overlooking or addressing incorrectly, I don't think the exclusionary rule should be used in this case. I would think a good faith exception should apply." Defendant thereafter entered a guilty plea, was placed on summary probation, and filed a timely notice of appeal. (Pen. Code, §§ 1466, subd. (b)(1), 1538.5, subd. (m).)

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[1] Judge Glasser heard and denied the motion to suppress. Commissioner Wagner took defendant's guilty plea and placed him on probation.

DISCUSSION

Defendant's argument on appeal is that the trial court erred in denying his motion to suppress because his initial detention was unconstitutionally prolonged while Deputy Provost waited for another officer to arrive to conduct the DUI investigation.

> In ruling on a motion to suppress, the trial court finds the historical facts, then determines whether the applicable rule of law has been violated. [Citation.] "We review the court's resolution of the factual inquiry under the deferential substantial-evidence standard. The ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review."

(*In re Raymond C.* (2008) 45 Cal.4th 303, 306.)

Under the Fourth Amendment, "traffic stops must be reasonable in duration and not prolonged beyond the time necessary to address the traffic violation." (*People v. Gallardo* (2005) 130 Cal.App.4th 234, 238.) In other words, the "traffic stop may '"last no longer than is necessary to effectuate"' the mission" of the stop, and "'[a]uthority for the seizure thus ends' when the mission is completed 'or reasonably should have been' completed." (*People v. Vera* (2018) 28 Cal.App.5th 1081, 1087.) "There is no hard-and-fast limit as to the amount of time that is reasonable; rather, it depends on the circumstances of each case." (*Gallardo*, at p. 238.) But once that limit is reached the detention immediately becomes illegal going forward; the constitution does not permit even a de minimis unjustified prolongation of the stop. (See *Rodriguez v. U.S.* (2015) __ U.S. __ [135 S.Ct. 1609]; *Vera*, at p. 1086.) As always, it is the prosecution's burden to prove that a warrantless search or seizure was constitutional. (*People v. Johnson* (2006) 38 Cal.4th 717, 723.)

"In assessing whether a detention is too long in duration to be justified as an investigative stop," it is "appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to

detain the defendant." (*U.S. v. Sharpe* (1985) 470 U.S. 675, 686.) "[T]he permissible duration of the stop is not to be measured by the reasonable duration of traffic stops in similar circumstances, but by the amount of time actually necessary to perform the stop expediently." (*Vera, supra*, 28 Cal.App.5th at p. 1087.)

Here, the mission of the stop was to investigate whether or not defendant was driving under the influence. (See *Arburn v. Dept. of Motor Vehicles* (2007) 151 Cal.App.4th 1480, 1485 ["[w]eaving within a lane is a widely recognized characteristic of an intoxicated driver"].) That investigation began promptly when Deputy Provost contacted defendant and asked him a couple of preliminary questions, but then came to an abrupt halt. Instead of continuing with the investigation, the deputies on the scene waited *the better part of an hour* for another officer to arrive to complete what the record indicates was a routine DUI investigation.[2] We are unconvinced that the fact that Deputy Provost was in the middle of transporting two arrestees to jail justified the delay in investigating defendant. The deputy was clearly able to safely contact defendant and begin the investigation, his partner was on the scene, he never articulated any specific security concerns, continuing the investigation while waiting for assistance would not have delayed his transportation duties any more than simply waiting, and additional vehicle resources to transport defendant to jail would not have been needed until such time as the investigation disclosed probable cause to arrest him for DUI. Likewise, the record established that Deputy Provost had received academy training on DUI investigations and was familiar with the symptomology of intoxication, and suggests no other reason why he or his partner could not have continued the

[2] The trial court found that Deputy Provost's estimate of 20 minutes was incorrect, and calculated the time involved by measuring from Deputy Provost's initial observation of defendant to the time Deputy Grimm wrote in his report that he arrived. This is probably an overestimate, as it doesn't take into account such things as the five or six miles Deputy Provost and his partner followed defendant on the freeway or the length of Deputy Provost's initial contact with defendant. To the extent supported by the evidence, however, we defer to the trial court's factual finding as to the length of the delay.

investigation in order to quickly confirm or dispel the suspicion that defendant was under the influence while waiting for additional help. The People cite *People v. Gorak* (1987) 196 Cal.App.3d 1032, 1038, for the idea that a delay caused by the need to summon another officer to the scene can be reasonable. In that case, however, the assisting officer "arrived very soon" (within ten minutes), and the original officer was alone, "thought that he might have a problem controlling" the defendant, and had "limited experience in the" sort of investigation in question, such that the Court of Appeal could find that "[t]he procedure employed by the law enforcement officers was one that would rapidly exonerate the innocent and discover the guilty." (*Id.* at pp. 1036, 1038.) The procedure employed here was not nearly so expeditious. Because of the lengthy hiatus in the investigation during which time defendant remained deprived of his full liberty, and because the record fails to indicate any reasonable basis for the delay, we conclude that the traffic stop here was ultimately unreasonably prolonged. As a result, any evidentiary fruits of the detention following Deputy Provost's initial contact with defendant — the latest point the prosecution met its burden to justify — were the product of an unconstitutional seizure.

The People argue that this is the wrong framework to analyze the validity of the seizure here because defendant was not merely subject to an investigatory detention for DUI, he was also constitutionally subject to a full custodial arrest for the traffic infractions Deputy Provost observed on the freeway even though no such arrest occurred.[3] (See generally *People v. McKay* (2002) 27 Cal.4th 601 [while California statutory law generally forbids full custodial arrests for traffic

[3] Defendant argues that we should decline to consider this argument because the People did not raise it below. However, "[t]o *affirm* a trial court's suppression ruling . . . reviewing courts may rely on a new theory that was not raised below '[w]hen . . . the record fully establishes another basis for affirming the trial court's ruling and there does not appear to be any further evidence that could have been introduced to defeat the theory.'" (*People v. Nottoli* (2011) 199 Cal.App.4th 531, 561, fn. 14 [emphasis added].) We will therefore address the argument on its merits.

infractions, the Fourth Amendment does not].) But the case law on prolonged traffic stops precludes this approach.

The United States Supreme Court explained in *Rodriguez* that even when a driver is subject to being cited for a traffic infraction, this process "is 'more analogous to a so-called "*Terry* stop" . . . than to a formal arrest,'" and so the length of the seizure must be tied to the time reasonably necessary to "address the traffic violation that warranted the stop, [citation] and attend to related safety concerns [citation]." (*Rodriguez*, *supra*, 135 S.Ct. at p. 1614; see *Vera*, *supra*, 28 Cal.App.5th at p. 1088 [focusing on the length of time required by the citation process].) Justice Thomas in dissent criticized the majority for blurring the distinction between "traffic stops justified by reasonable suspicion" and those "based on probable cause" by holding that even the latter "can last no longer than is in fact necessary to effectuate the mission of the stop" even though a full custodial arrest would have been constitutionally permissible. (*Rodriguez*, at pp. 1621–22 (dis. opn. of Thomas, J.); see *People v. Parnell* (1993) 16 Cal.App.4th 862, 875 [speaking of "probable cause to issue defendant a traffic citation"]; *People v. Powell* (1973) 33 Cal.App.3d 802, 806 [similar]; see also Veh. Code, §§ 40500, subd. (a) [in the nomenclature of California law a notice to appear is issued to a person "arrested for" a Vehicle Code violation by an "arresting officer"], 40504, subd. (a) ["the arrested person" must promise to appear in court by signing the notice to appear "in order to secure release"]; *People v. Hart* (1999) 74 Cal.App.4th 479, 492 [an arrest for a traffic infraction requires probable cause but "does not normally result in physical custody"].) By arguing that there is no issue of prolonged detention when probable cause of a traffic infraction exists, the People's argument reiterates the distinction that the three dissenting justices in *Rodriguez* would have preferred but that the majority impliedly rejected. Furthermore, the Court

of Appeal has rejected more or less the same argument when offered to support the claim that the defendant was lawfully under arrest when he consented to a search:

> [The People's] view would allow the police to search and arrest a motorist for any offense — even where officers know there is no evidence that any other offense has been committed — so long as there is probable cause to support a traffic violation (e.g., speeding). We disagree with this view. [¶] . . . [The] result [in *Rodriguez*] makes clear that police may not use probable cause for a traffic violation to justify an arrest for an unrelated offense where, under the facts known to police, they have no probable cause supporting the unrelated offense.

(*People v. Espino* (2016) 247 Cal.App.4th 746, 763–65.) With allowances for the different contexts, the same basic point applies here.

Finally, though the trial court thought that the good faith exception to the exclusionary rule should apply in any event, the constitutional violation here was readily ascertainable from the facts the officers were in a position to directly observe; the straightforward prolonged detention means that the error was not caused by any *reasonable*-but-mistaken belief, and so the police conduct here was "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable

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that such deterrence is worth the price paid by the justice system." (See *Herring v. United States* (2009) 555 U.S. 135, 137, 142, 144, 146.)

DISPOSITION

The judgment is reversed and the order denying defendant's motion to suppress is vacated. The matter is remanded to the trial court with directions to enter a new order granting the motion to suppress in accordance with the views expressed in this opinion, and for further proceedings not inconsistent with it.

Sunshine S. Sykes
Presiding Judge of the Appellate Division

Raquel A. Marquez
Judge of the Appellate Division

Dean Benjamini
Judge of the Appellate Division