S218993

(3)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE Plaintiff and Respondent, v. SHAUNTREL RAY BROWN, Petitioner and Defendant.	No.: S No.: D064641 (Super. Ct. No. SCS264898)

PETITION FOR REVIEW

Of the April 22, 2014 Decision From the Court of Appeal, Fourth District Division One, Affirming the Trial Court's Denial of Appellant's Motion to Suppress

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

The People Plaintiff and Respondent v. SHAUNTREL RAY BROWN , Defendant and Appellant.	)	No.: S No.: D064641 (Super. Ct. No. SCS264898) **PETITION FOR REVIEW**

TO THE HONORABLE CHIEF JUSTICE CANTIL-SAKAUYE AND THE HONORABLE JUSTICES OF THE CALIFORNIA SUPREME COURT

Petitioner, Shauntrel Ray Brown, by and through his attorney, the Public Defender of the County of San Diego, respectfully petitions this honorable court to grant review of the Court of Appeal's April 22, 2014 Published Decision Affirming the Superior Court's denial of Mr. Brown's Motion to Suppress. In the alternative Petitioner requests de-publication. A typewritten copy of the opinion is appended as Appendix A.

INTRODUCTION

In this case a deputy responded to a fight between at least four pedestrians in an alley. Although he arrived in with three minutes, the deputy saw only a lone driver leaving the alley. After driving through the alley and seeing nothing to confirm a fight, he found the same car that passed him parked on the street. The deputy parked behind the car, activated his overhead lights, and investigated the driver. In upholding the stop in this case, the Fourth District Court of Appeal disagreed with or ignored three separate lines of cases. The court disagreed with twenty nine year precedent that holds a red light directed towards a stopped vehicle constitutes a detention. (*People v. Bailey* (1985) 176 Cal.App.3d 402.) *Bailey* has been the rule not only in California, but in jurisdictions throughout the United States.[1] By finding that the driver here failed to demonstrate submission to the show of police authority, the Court below not only disagreed with *Bailey,* it also

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1 (See *State v. Burgess* (1995) 163 Vt. 259, 261, 657 A.2d 202; *Hammons v. State* (1997) 327 Ark. 520, 528, 940 S.W.2d 424; *Lawson v. State* (Md. Ct. Spec. App. 1998) 120 Md.App. 610, 617-18, 707 A.2d 947, 951; *State v. Donahue* (1999) 251 Conn. 636, 643, 742 A.2d 775; *Wallace v. Com.* (2000) 32 Va.App. 497, [528 S.E.2d 739]; *State v. Gonzalez* (Tenn.Crim.App.2000) 52 S.W.3d 90, 97; *People v. Cash* (Ill. App. Ct. 2009) 396 Ill.App.3d 931, 946-47 [922 N.E.2d 1103, 1114]; *State v. Willoughby* (2009) 147 Idaho 482, 489 [211 P.3d 91, 98]; *People v. Laake* (2004) 348 Ill.App.3d 346, 284 Ill.Dec. 203, 809 N.E.2d 769, 772.) The decision is also at odds with jurisdictions that have held that a red light indicates a detention, but amber lights or emergency lights used as a hazard warning might not depending upon the circumstances. (See *State v. Baldonado* (1992), 115 N.M. 106, p110, 847 P.2d 751]; *U.S. v. Dockter* (8th Cir. 1995) 58 F.3d 1284, 1287; *State v. Morris* (2003) 276 Kan. 11, 24 [72 P.3d 570, 579]; *Commonwealth of Pennsylvania v. Krisko* (2005) 884 A.2d 296, 300–01; *State v. Williams* (Tenn. 2006) 185 S.W.3d 311, 318; *Smith v. State* (Fla. Dist. Ct. App. 2012) 87 So.3d 84, 88.)

ignored a recent case from the United States Supreme Court, which held that a suspect submits to a show of police authority by simply staying put. (*Brendlin v. California* (2007) 551 U.S. 249.) Lastly, the Court below disagreed with a 10 year old case, *People v. Jordan* (2004) 121 Cal.App.4th 544, which holds that a civilian 911 operator cannot impute knowledge to an officer in the field under the collective knowledge doctrine. (*Id.* at p. 560, fn. 8.) Petitioner respectfully submits these three cases should not be countermanded but rather should dictate the result in this case.

WHY REVIEW SHOULD BE GRANTED

Review should be granted first because there is now a split of authority and it is now necessary to secure uniformity of decision. (Subdivision (b)(1) of Rule of Court 8.500.) The lower court expressly disagrees with *People v. Bailey, supra,* 176 Cal.App.3d 402, which has established for 29 years that a red light directed at a parked car is a detention because no reasonable person would feel free to leave. (*Id.* at p. 406.) The court's holding is also at odds with *Brendlin v. California, supra,* 551 U.S. 249, which held citizens show submission to police authority by simply remaining where they are when the police signal them to stop. The Court of Appeal fails to acknowledge the holding in *People v. Jordan, supra,* 121 Cal.App.4th 544, by imputing facts known only by the dispatch operator to the deputy in the field.

Apart from the express and implicit departures from settled law, the issues in this case are important in their own right: May police officers' hunches be saved by incorporating information the officer does not have? Does a defendant have the burden of showing submission to authority when the uncontradicted evidence is that he stayed exactly where he was after police activated their overhead lights?

STATEMENT OF THE CASE

Petitioner is the defendant in the criminal action entitled People v. Shauntrel Ray Brown, No. SCD248478. Upon the denial of his motion to suppress he entered a guilty plea to one count of driving with a measurable blood alcohol level of 0.08 percent or greater (Vehicle Code section 23152, subdivision (b)). Petitioner admitted that he had suffered three or more prior convictions for driving under the influence within the previous 10 years and that his blood alcohol at the time of this offense was 0.15 percent or greater (Veh. Code, §§ 23550, subd. (a); 23578.) The court sentenced Petitioner to two years in local custody pursuant to Penal Code section 1170, subdivision (h). The Court of Appeal affirmed the trial court's denial of the motion to suppress.

FACTS

On the evening of May 26, 2013, a 911 call was made to the San Diego County Sheriff's office reporting a fight in an alley in the City of Imperial Beach. The recording of the call was played for the court during the suppression motion. The caller provided his location to the dispatcher and reported a fight located two houses to the north in the alley involving at least four people. The caller could only see shadows from his vantage point and based his call on what he could hear. He heard someone claim they had a loaded gun. Sheriff's dispatch alerted Deputy Geasland as follows: "415 Fight, I.B., 1169 Georgia, south of Coronado, North of Fern in the alleyway, four subjects. Somebody may have said something about a loaded gun." The deputy, in a marked patrol car, arrived at the scene within three minutes of the call and saw a car facing him with its headlights on which started driving

towards him. He later testified "[h]e was coming from the exact address where the fight call came out." Seeing no one else, Deputy Geasland tried to yell at the driver as he passed him: "Hey! Did you see a fight? Anything about a fight?" The lone driver did not appear to acknowledge the deputy in any manner. Deputy Geasland thought the driver either failed to hear him because his window was up or simply ignored the questions while he slowly drove down the alley and out of sight.

Deputy Geasland, who had no information about a car, nor a physical description of the participants, drove through the reported location then turned around. Although he saw no fight, he did not consider confirming the call because he believed the caller was anonymous.

Deputy Geasland felt if there had been a fight and if a gun had been involved, then the driver of the car that passed him might have been involved, might have possessed a gun, or might have been injured. He drove around the area until he saw the same vehicle that passed him in the alley parked on Georgia Street with its brake lights on. Although Deputy Geasland did not observe the vehicle commit any moving violations, he put on his overhead lights and pulled in behind the vehicle to confirm his hunches. Petitioner remained parked as the deputy approached the driver's side of the vehicle. After obtaining Petitioner's license, Deputy Geasland observed red watery eyes, mumbled speech, and the odor of an alcoholic beverage. Petitioner seemed flustered, 'amped up,' and upon questioning, he admitted that there had been a lot of 'drama' in the alley. Deputy Geasland called for a traffic officer, Deputy Jackson, to complete the DUI evaluation.

Deputy Geasland was the only witness to testify at the suppression motion, but defense counsel read portions of Deputy Jackson's preliminary hearing testimony into the record as prior inconsistent statements. Deputy Geasland previously told Deputy Jackson he was about to enter the alley but then he saw Petitioner leaving it. Because Deputy Palencia had already driven through the alley, Deputy Geasland followed Petitioner's car and then pulled it over as it was driving north on Georgia Street. Deputy Geasland's recollection was also questioned because he did not write a report until after the motion to suppress was filed. The trial court, after reviewing the 911 call, the testimony of Deputy Geasland, and the preliminary hearing testimony from Deputy Jackson, concluded that Deputy Geasland was credible and accepted his testimony as true. The court denied the motion to suppress.

ARGUMENT

Deputy Geasland believed the call was based upon an anonymous tip. In contrast, the dispatch operator knew the call came in on a land line, confirmed the address with the caller, and could overhear some shouting. The dispatch operator learned that there was a woman involved, at least four African Americans, and a large American car was leaving the scene. Deputy Geasland had no information about a vehicle, and his only description of the participants was numerical, four subjects. Deputy Geasland made his decision on hunches. There might have been a fight, and if there was a fight, someone coming from that direction might have been involved.

The Court of Appeal refuses to base the totality of circumstances on what was known by the deputy when he decided to detain Petitioner, but dogmatically states the call was reliable as determined by the 911 operator

and the reliability of the call is tempered by public safety concerns. This is in contrast to current California law which states fact known, but not communicated, by a civilian 911 operator should not be imputed to an officer in the field.

The Court of Appeal held Petitioner did not demonstrate that he yielded to the show of authority and therefore there was no detention, but no reasonable person sitting in a parked car would feel free to leave if a police cruiser pulled in behind him and activated his emergency lights. Law abiding citizens signal submission to a detention by simply remaining parked and waiting for the officer to approach. This begs the question. What must a stopped person do to demonstrate a submission to the show of authority besides wait?

I.

DEPUTY GEASLAND DID NOT HAVE AN ARTICULABLE SUSPICION PETITIONER WAS INVOLVED IN CRIMINAL ACTIVITY.

When Deputy Geasland arrived in the alley he believed he was investigating a fight call from an anonymous informant. He immediately tried to verify the information by asking about the fight from the car passing him, but the driver continued without acknowledging his presence. He had no indication that the driver even heard his questions. The deputy then drove further down to alley to corroborate the fight, but did not see, smell or hear anything that would indicate a fight or a gun. He did not think he could contact the caller to even confirm he was in the right location. This case should not have been decided based upon what was known by the 911

Operator, but by what was known by Deputy Geasland at the time he made is detention.

Although circumstances short of probable cause to arrest may justify an officer's investigative detention, a detention may not be premised on mere curiosity, rumor, or hunch that the detainee is involved in criminal activity. (*Terry v. Ohio* (1968) 392 U.S. 1, 21–22.) Instead, an investigative detention must be justified by specific and articulable facts, measured by facts *known to the officer* at the time he or she detains the suspect (*People v. Bowers* (2004) 117 Cal.App.4th 1261, 1268–1271), that make it objectively reasonable for an officer in a like position, drawing on training and experience, to suspect (1) a crime has occurred or is occurring and (2) the detainee is involved in that activity. (*In re Tony C.* (1978) 21 Cal.3d 888, 893.) Fourth District Court of Appeal held all of this to be true in *Giovanni B. v. Superior Court* (2007) 152 Cal.App.4th 312, 320.

Deputy Geasland "knew" the call was anonymous, thus it was one of the facts he was to use in assessing the totality of the circumstances when he decided to detain Petitioner. In 1990, the United States Supreme Court considered the weight to be given an anonymous telephone tip when determining if there was a reasonable suspicion to detain a person suspected of possessing drugs. (See *Alabama v. White* (1990) 496 U.S. 325, 328.) The Court held the "totality of the circumstances" approach is the correct method of analysis, and that this approach requires the consideration of both the quantity and quality of all the information possessed by the police. (*White, supra,* 496 U.S. at pp. 328–332.) The court stated that the anonymous tip, standing alone, did not justify the *Terry* stop. (*White,* at p. 329.) However, the

Court upheld the detention because the caller was able to predict future behavior of the suspect, and when the police were able to corroborate that future behavior, it inferred the informant knew intimate details about the suspect, including his criminal activities. (*Id.* at p. 332.) Self-verifying detail is also considered to be more valuable if it relates to suspicious activities than innocent activities. See *Illinois v. Gates* (1983) 462 U.S. 213, 245.) An informant's "explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case." (*Gates, supra,* at 234.) A tip is less reliable without personal observation. (See *Spinelli v. United States* (1969) 393 U.S. 410.) In this case, Deputy Geasland not only thought the tip was anonymous, but the information did not appear to derive from firsthand observation because he was told "somebody may have said something about a loaded gun." That is a far cry from a caller reporting that he had seen or been threatened with a gun. There were also no future behaviors predicted by the caller.

The "totality of the circumstances" analysis includes a public safety factor; a greater threat to public safety requires a less reliable tip to justify a detention. Exigent circumstances, such as a report of someone carrying a bomb, might justify a stop and search "even without a showing of reliability." (See *Florida v. J.L.* (2000) 529 U.S. 266, 273; *People v. Wells* (2006) 38 Cal.4th 1078, 1083; *People v. Dolly* (2007) 40 Cal.4th 458, 463.) The Fourth District Court of Appeal reasoned the instant call was entitled to greater weight because it reported potential violent activity involving a firearm, and was thus similar to similar to the reports in *Dolly, supra,* 40 Cal.4th at page

464 and *Wells, supra*, 38 Cal.4th at p. 1083. (See T.O., p. 8) Not so. *Wells* distinguished its case from *Florida v. J.L., supra,* 529 U.S. 266 in that a report of a possibly intoxicated driver weaving all over the roadway posed "a far more grave and immediate risk to the public than a report of mere passive gun possession." (*Wells, supra,* 38 Cal.4th at p. 1087.)

In this case no one reported being threatened with a brandished firearm. In *Dolly* an unidentified 911 caller believed the perpetrator was about to shoot him. He reported an African-American male had "just pulled a gun" on him and mentioned a gang name. The caller described the perpetrator, a bandage on his arm, a description of his parked vehicle, and his exact location. When the police officers arrived within minutes, they easily identified the perpetrator and found a loaded .38-caliber revolver. (*Dolly, supra*, 40 Cal.4th at page 462.) In the instant case, the caller did not personally see or hear a gun and he was certainly not threatened. When Deputy Geasland arrived at the scene he saw no blood, no casings, no wounded and no fight. He saw nothing that indicated a danger to the public, there was no reason to enhance his perceived reliability of the tip.

II.

THE DISPATCH OPERATOR'S KNOWLEDGE SHOULD NOT BE IMPUTED TO THE DEPUTY.

The dispatch operator had details that she did not communicate to the deputy. Although the caller did not verbally identify himself, his address was known by virtue of the call coming from a landline and his confirmation of his address. The operator heard raised voices. The caller could not see anyone, but believed African Americans were involved in the disturbance

and they drove large American cars. The caller did not personally observe anything but shadows, and never saw a gun, but heard someone claim they possessed one.

How much of that knowledge should be imputed to the responding deputy? If the dispatch operator received the call from a computer or cell phone and the participants were identified as Asian Americans riding motorcycles, would the detention of Petitioner, an African American, be lawful based upon the information known by Deputy Geasland?

The Fourth District Court of Appeal appears to impute the dispatch operator's assessment of the caller's reliability to Deputy Geasland: "Understandably Brown cites no authority for the proposition that an officer, acting on directions from a dispatcher, must personally assess the reliability of the person who made the original 911 report." (See Typewritten Opinion, (T.O.) p. 8.) Certainly an officer getting information second hand from a dispatcher is not required to determine whether the caller is reliable, but he could be given objective facts that would tell him if the call could be verified, such as the address of the caller, or even that the call came through 911 on a landline. An officer can give more weight to a tip when the caller could be held accountable for making a false report. (See *Navarette v. California* (2014) 134 S.Ct. 1683, 1690.)

The issue here is impute-ability. The reliability of the call is less important than the quantum of information that the deputy possessed to determine if he had the facts to support a detention. Petitioner cited *People v. Jordan* (2004) 121 Cal.App.4th 544 in his opening brief, which the Fourth District Court of appeal simply chose to ignore in their opinion. The Fifth

District Court of Appeal addressed a nearly identical situation of unreported information when they determined officers lacked a reasonable suspicion to detain an armed felon at a described location based upon a citizen's tip:

> In this case, we restrict our analysis to the information actually provided to the officers in the field because respondent has not addressed whether the information learned by the 911 operator but not relayed to the officers should be imputed to the officers. (See *U.S. v. Colon* (2d Cir.2001) 250 F.3d 130 [application of the collective or imputed knowledge doctrine and determination that record did not support a holding that information told to a 911 operator could be imputed to police officers].) Information obtained by the 911 operator that was not relayed to the officers included (1) more specific information about the suspect's appearance (bald, light-skinned, and in his *late* 30's), (2) the allegations that the suspect had "been threatening to shoot people," (3) more specific information about the type of gun, i.e., "small, like a .22, .25," and (4) the manner in which the informant reported the information, such as the tone of voice, rate of speech, and accent. (See *Jordan, supra,* 121 Cal.App.4th at p. 560.)

In *Jordan,* as in most collective knowledge cases, the police had a detailed description of a suspect, including the location of his concealed firearm. Dispatch reported the following "Subject is a black male in his 30's, black jacket, white shirt, tan pants and red boots. Possibly carrying a concealed hand gun in his right front coat pocket. R/P no contact." (*Jordan, supra* 121 Cal.App.4th at p., 550.) In the instant case, Deputy Geasland had no description of anyone and certainly no description of where a gun could be found. In *Jordan* a person matching that description was found at the location described by the caller.

In *Jordan* the police were unable to corroborate dangerous behavior. The suspect's behavior and appearance did not suggest that he presented an imminent danger to a specific individual, to the public in general, or to the officer. (See *Jordan, supra,* 121 Cal.App.4th at p. 563.) As in *Jordan*, Deputy Geasland was unable to make observations that suggested Petitioner presented an imminent danger to anyone, much less any indication that criminal activity may be afoot. Unlike *Jordan*, Deputy Geasland did not have any description of the individual who was suspected to be armed. There was no articulable suspicion of criminal activity, only a hunch.

III.

PETTITIONER WAS DETAINED WHEN THE DEPUTY ACTIVATED HIS OVERHEAD LIGHTS.

In 1985 the Sixth District Court of Appeal decided in *People v. Bailey, supra,* 176 Cal.App.3d 402 that, "[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. Any reasonable person in a similar situation would expect that if he drove off, the officer would respond by following with red light on and siren sounding in order to accomplish control of the individual." (*Id.* at p. 406.) The court logically based its conclusion on well-established United States Supreme Court precedent and common sense.

In 1968, in *Terry v. Ohio,* the U. S. Supreme Court stated a person is seized "when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." (*Terry v. Ohio* (1968) 392 U.S. 1, 19 n. 16.) Later, the Court clarified that a seizure occurs through a

show of authority, "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."(*United States v. Mendenhall* (1980) 446 U.S. 544, 554 (*Mendenhall*); *INS v. Delgado* (1984) 466 U.S. 210, 215.) The U.S. Supreme Court then added another layer to the *Mendenhall* show of authority standard by stating a seizure does not occur until the person submits to the show of authority *California v. Hodari D.* (1991) 499 U.S. 621, pp. 624, 628, 629.) (*Hodari*)

In *Hodari*, police officers wearing jackets which displayed the word "Police" approached a group of young males. (*Id.* at p. 622.) Upon seeing the approaching officers the group moved away. Police called out to the group that they were police officers and demanded the young men to stop. Notwithstanding the officer's clear showing of authority and their demands that the group stop, Hodari D. took flight. Police gave chase and just prior to being tackled by a police officer, Hodari jettisoned a package containing narcotics. (*Id.* at pp. 622-623.) The majority in *Hodari* noted: "We did not even consider the possibility that a seizure could have occurred during the course of the chase because, as we explained, that 'show of authority' did not produce his stop." (*Hodari*, *supra*, 499 U.S. at p. 628.)

In contrast to a pedestrian fleeing from the police, the U.S. Supreme Court held that a person may show submission to authority by simply remaining at the scene: "a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away. Here, Brendlin had no effective way to signal submission while the car was still moving on the roadway, but once it came to a stop he could, and apparently did, *submit by staying inside*." (*Brendlin v. California*,

supra, 551 U.S. 249, 261-62.)

The Fourth District Court of Appeal apparently found *Brendlin* irrelevant to this case, choosing instead to agree with the dissent in *Bailey* which noted there was no evidence Mr. Bailey yielded to the show of authority as he was already stopped without any reference to police action. (*Bailey*, *supra*, 176 Cal.App.3d at pp. 407–408, (dis. opn. of Agliano, J.).) The lower court also chose to expand the reasoning of the Sixth District Court of Appeal in *People v. Perez* (1989) 211 Cal.App.3d 1492, 1495-1496 (*Perez*) in which the court observed: "Unlike *Bailey,* the officer here did not activate the vehicle's emergency lights; rather, he turned on the high beams and spotlights only. These differences are substantial because the conduct of the officer here did not manifest police authority to the degree leading a reasonable person to conclude he was not free to leave. While the use of high beams and spotlights might cause a reasonable person to feel himself the object of official scrutiny, such scrutiny does not amount to a detention." (*Id.* at p. 1496.) The Fourth District Court of Appeal then concluded there was no material difference between a police car activating red lights or using high beams and spotlights on a stopped car. "In both cases there is an apparent showing of police presence and police interest in the occupants of the stopped vehicle. In both instances there is a clear likelihood that police will give chase if the person drives off." (T.O., p. 11.)

The lower court therefore appears to have rejected binding authority from the United States Supreme Court while expanding the holdings of persuasive authority in order to abolish a long established rule that clearly informs citizens as to when they are detained. The opinion fails to define

what steps are required to demonstrate a submission to authority. Instead, the court appears to categorize the deputy's encounter with the driver as an unavoidable consensual encounter. If the driver moves, he violates a failure to yield statute. If the driver remains he is not detained, yet. When would the driver be detained? Would it be after the deputy poses questions about his activities? Would it be after the deputy asks for a license? Would it be after the deputy asks and obtains permission to search the car? None of those requests constitute a detention as long a person feels free to break the encounter. (See *United States v. Drayton* (2002) 536 U.S. 194.) So exactly when would the driver feel free to break the encounter?

Petitioner maintains that he submitted to the show of authority by simply remaining at the scene. He was detained when the overhead lights were activated and he remained where he was. The detention was not justified by anything Deputy Geasland knew at the time he activated his overhead lights. Well established case law supports Petitioner's position. By contrast, the lower court's ruling disagrees with the many cases from multiple jurisdictions that have relied on *Bailey* and its progeny as well as *Brendlin* and *Perez*.

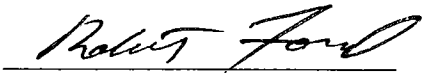
CONCLUSION

Based on the foregoing, petitioner request review be granted. These are issues with conflicting case law, and the *Bailey* case has been relied upon nationally for twenty nine years. The court below also ignores a rule of law set forth by the United States Supreme Court in *Brendlin*. The ruling that a peace officer's activation of his overhead lights does not result in the detention of a stopped vehicle gives the public no recourse to avoid what has now been deemed for all purposes a consensual encounter.

Dated: June 2, 2014

Respectfully submitted,

RANDY MIZE
Primary Public Defender

By: 
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CERTIFICATE OF WORD COUNT

I, ROBERT FORD, hereby certify that based on the software in the word processor program, the word count for this document is **4,561** words.

Dated: June 2, 2014

Respectfully submitted,

RANDY MIZE
Primary Public Defender

By: /s/ Robert Ford
ROBERT FORD
Deputy Public Defender

Attorneys for Petitioner
SHAUNTREL RAY BROWN

CERTIFICATE OF SERVICE

Rule 1.21(c)

CASE NAME: *People v. Brown*
Ct. Appeal 4th DCA, Div. 1 No.: D064641
Super. Ct No.: SCS264898

I, Vanessa Thompson, declare as follows:

I am employed in the County of San Diego, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 450 "B" Street, Suite 900, San Diego, California 92101-4009, in said County and State.

On June 2, 2014, I served the foregoing document:

PETITION FOR REVIEW

on the parties stated below, by the following means of service:

☒ **BY INTEROFFICE MAIL**: Pursuant to Rule 1.21(b), on the above-mentioned date I personally deposited in the United States Mail true and correct copies thereof, each in a separate envelope, postage thereon fully prepaid, addressed to the following **[See Service List]**. .

☒ **BY PERSONAL SERVICE**: On the date of execution of this document, I personally served true and correct copies of the above-mentioned document(s) on each of the following **[See Service List]**.

☐ **BY FAX**: From fax number (619) 338-4847, I caused each such document to be transmitted by fax machine, to the parties and numbers indicated above, under California Rules of Court, Rule 2.306. The fax machine that I used complied with Rule 2.301 and no error was reported by the machine.

☐ **BY E-MAIL**: On the above-mentioned date, I caused a true copy of said document to be emailed to said parties' e-mail addresses as indicated on the attached Service List. (Rules of Court, Rule 2.251(c)(1))

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 6/2/2014

Vanessa Thompson
Declarant

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Mr. SHAUNTREL RAY BROWN
(*through counsel*)

APPENDIX "A"

CERTIFIED FOR PUBLICATION

~~NOT TO BE PUBLISHED IN OFFICIAL REPORTS~~

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. SHAUNTREL RAY BROWN, Defendant and Appellant.	D064641 (Super. Ct. No. SCS264898)

APPEAL from a judgment of the Superior Court of San Diego County, Ana L. Espana, Judge. Affirmed.

Henry C. Coker, Public Defender, Randy Mize, Chief Deputy, Emily Rose Weber and Robert L. Ford, Deputy Public Defenders, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

Shauntrel Ray Brown entered a guilty plea to one count of driving with a measurable blood alcohol level of 0.08 percent or greater (Veh. Code, § 23152,

subd. (b)). Brown admitted that he had suffered three or more prior convictions for driving under the influence within the previous 10 years and that his blood alcohol at the time of this offense was 0.15 percent or greater (Veh. Code, §§ 23550, subd. (a); 23578).

The court sentenced Brown to two years in local custody pursuant to Penal Code section 1170, subdivision (h).

Brown appeals contending the trial court erred in denying his motion pursuant to Penal Code section 1538.5 to suppress evidence on Fourth Amendment grounds. We will find the trial court properly decided the officer had reasonable suspicion to detain Brown and that the court correctly concluded that in any event, Brown was already stopped before the deputy attempted to contact him.

In our analysis of the issues presented in this case we conclude that when a vehicle is already stopped, without police action, merely activating emergency lights on a police vehicle, without more, does not constitute a seizure within the Fourth Amendment. Accordingly, we will disagree with the decision in *People v. Bailey* (1985) 176 Cal.App.3d 402 (*Bailey*), on which Brown relies.

STATEMENT OF FACTS

Since the only issues raised in this appeal relate to the denial of the motion to suppress evidence we will recite the facts from the transcript of that motion.

On the evening of May 26, 2013, a 911 call was made to the San Diego County Sheriff's office reporting that a fight was taking place in an alley in the City of Imperial Beach. The recording of the call was played for the court during the suppression motion.

The caller, who provided his location to the dispatcher, reported a fight involving a number of people in an adjacent alley. There was a reference in the call to the presence of a loaded gun possibly involved in the affray. The Sheriff's dispatcher alerted Deputy Geasland about the "fight call" and the location. The deputy, in a marked patrol car, arrived at the scene within three minutes of the call.

The deputy drove down the alley where the fight was reportedly taking place. He did not see any people in the alley, however, he encountered Brown who was driving his car out of the alley. The deputy called out to Brown as he drove by asking, "Hey. Hey. Did you see a fight?" Brown did not respond and continued out of the alley. The lack of response and discovering Brown in the "exact location" of the reported fight aroused the deputy's suspicion.

Deputy Geasland was able to turn his car around and went in the direction he had seen Brown take. When he got out of the alley, Geasland observed Brown's car parked along the side of the road with the brake lights on. Geasland testified that he was concerned because the call had mentioned a loaded firearm and was considering the possibility that Brown had been injured. Therefore, Geasland pulled his patrol car in behind Brown's parked car and turned on the patrol car's overhead emergency lights.

The deputy then approached the car and made contact with Brown. He immediately noticed that Brown appeared to be intoxicated. His eyes were watery and bloodshot. He was mumbling and appeared flustered and upset. Geasland could smell the odor of alcohol and asked Brown if he had been drinking and if he had been involved in a fight. Brown answered affirmatively to both questions.

Geasland subsequently called a traffic unit to conduct further investigation of the possibility that Brown had been driving under the influence.

Deputy Geasland was the only witness to testify at the suppression motion.

The trial court, after reviewing the 911 call and the testimony of Deputy Geasland, concluded that Geasland was credible and accepted his testimony as true. The court then denied the motion to suppress.

DISCUSSION

I

DID THE DEPUTY HAVE REASONABLE SUSPICION OF CRIMINAL ACTIVITY?

Brown contends that we must treat the 911 call as an anonymous tip and further argues that the call, plus the deputy's observations do not separately or collectively amount to reasonable suspicion as required by *Terry v. Ohio* (1968) 392 U.S. 1. We disagree with Brown's analysis. The call from an identified citizen reporting contemporaneous observations is entitled to more credence than an anonymous tip, absent some circumstance that may cause police to question the caller's reliability. The deputy's immediate arrival on the scene and the nature of the reported activity, in our view gave the deputy sufficient articulable facts to support reasonable suspicion that criminal activity was taking place. Hence, the actions that followed were lawful.

A. Legal Principles

1. Standard of Review

In ruling on a motion to suppress evidence on Fourth Amendment grounds, the trial court first determines the facts underlying the police action and then must apply the

law to those facts in order to resolve the dispute. (*People v. Lawler* (1973) 9 Cal.3d 156, 160.) On appeal we review the trial court's factual findings under the deferential substantial evidence standard of review. Once we determine the trial court's factual findings are supported in the record, we independently review the legal issues arising from those facts. (*People v. Leyba* (1981) 29 Cal.3d 591, 596-597; *People v. Williams* (1988) 45 Cal.3d 1268, 1301; *People v. Miranda* (1993) 17 Cal.App.4th 917, 922.)

2. Reasonable Suspicion

Police may temporarily detain a person to investigate possible criminal activity where the officer can point to specific facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person to be detained may be involved in criminal activity. (*People v. Souza* (1994) 9 Cal.4th 224, 231.) A finding of reasonable suspicion of criminal activity requires less information than a finding of probable cause. (*Alabama v. White* (1990) 496 U.S. 325, 330.) Police may base a finding of reasonable suspicion on their own observations together with information from other sources.

In *Alabama v. White*, *supra*, 496 U.S. 325, the court held that an anonymous tip, together with partial corroboration of the tip by police, could provide sufficient information to justify an investigative detention. In evaluating police action courts can consider the reliability of the information police receive from others.[1] The evaluation of

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1 In *Illinois v. Gates* (1983) 462 U.S. 213, 230, the court upheld a finding of probable cause, based on an anonymous tip, without information about the tipster's source of knowledge, in light of the corroboration done by law enforcement.

the source of information depends on the nature of the source of the information and the detail which it provides. Anonymous tips present the problem of lack of knowledge and in some instances the source of the tipster's information. As a general proposition, information from an identified citizen, based on that person's own observations, is at least presumptively reliable, in the absence of any circumstance that may call the person's reliability into question. (*People v. Brueckner* (1990) 223 Cal.App.3d 1500, 1504-1505.)

In *People v. Dolly* (2007) 40 Cal.4th 458, 461 (*Dolly*), the court considered a case involving an anonymous tip about an assault with a deadly weapon which the caller had observed. In that case the caller gave a detailed account of what had been observed and particularly described the alleged assailant. (*Id.* at pp. 464-465.) The court considered the nature of the criminal activity described, which the court found to present an urgency for a police response. The court in *Dolly* distinguished its case from the circumstances of *Florida v. J.L.* (2000) 529 U.S. 261, 273 (*J.L.*), in which the United States Supreme Court found the anonymous tip was not sufficiently corroborated by police before restraining the suspect. In *J.L.* the tip described a teenaged suspect who was standing on a street corner. The tip alleged the minor had a gun under his shirt. Police accosted the minor and frisked him without any information beyond the tip itself.

The court's analysis in *Dolly, supra,* 40 Cal.4th 458, 463, included an evaluation of various forms of tips to police. The court reasoned that tips reporting observations of on-going dangerous activity with precise information have some enhanced credibility as opposed to a generic anonymous tip, citing *People v. Wells* (2006) 38 Cal.4th 1078, 1083 (*Wells*). In *Wells* the court found an anonymous tip describing dangerous, reckless

driving taking place could justify an investigative detention due to the exigent nature of the risk presented by the alleged conduct.

The court in *Dolly, supra,* 40 Cal.4th 458, continued with its analysis and concluded that calls placed through the 911 system were entitled to some weight because the caller faces a risk that police will be able to discover the caller's identity. Thus, such a call is entitled to greater consideration than the generic anonymous tip. (*Id.* at p. 467.)

B. Analysis

Brown argues that the "anonymous" call, together with the deputy's observations does not provide reasonable suspicion to justify a detention. We disagree.

First, as Brown acknowledges, "the 911 call concerning a fight was more reliable than a truly anonymous tip because the dispatcher knew the location of the call and could hear some signs of an argument over the phone." Indeed, not only did the caller provide his own precise location, it is clear, at least at the time of the motion to suppress that defense counsel knew the identity of the caller, because counsel identified the caller in the points and authorities filed in the reply papers. The call in this case was completely different from the anonymous calls in *J.L, supra,* 529 U.S. 261 and *Alabama v. White, supra,* 496 U.S. 325. Here an identified citizen called and reported potentially violent activity taking place outside his home. Activity the dispatcher could hear. The Sheriff was entitled to presume the caller to be reliable and the fact that sounds from the fight were audible on the recording added to the reliability of the report.

Brown argues that since the deputy did not personally hear the call the deputy could not personally assess the reliability of the informant, thus the deputy could not rely

on it. Understandably Brown cites no authority for the proposition that an officer, acting on directions from a dispatcher, must personally assess the reliability of the person who made the original 911 report.

In this case the deputy arrived within three minutes of the citizen's call. The record shows the call was entitled to greater weight than an anonymous tip and that it reported potential violent activity involving a firearm. Thus, similar to the reports in *Dolly, supra*, 40 Cal.4th at page 464 and *Wells, supra*, 38 Cal.4th at page 1083, the report in the instant case was entitled to be deemed reliable observations of a percipient witness. The deputy was entitled to act on the dispatcher's information.

When the deputy arrived he found Brown leaving the exact location of the reported fight. Brown did not respond to the deputy's questions when he passed him. As the record shows the deputy became suspicious and was concerned that since a firearm had been reported, Brown may have been injured or involved in the fight.

Upon leaving the alley, after Brown had done so, the deputy discovered Brown's car parked along the side of the road with the brake lights on. This discovery heightened the deputy's suspicions as well as concerns for Brown's safety. As the phrase was used in *Terry v. Ohio, supra*, 392 U.S. at page 19, the officer had sufficient facts to support reasonable suspicion that "criminal activity may be afoot." We conclude the deputy had sufficient information to justify detaining Brown at the point he observed Brown's car parked outside the alley.

II

WHEN WAS BROWN DETAINED?

Brown asserts he was detained the moment the deputy turned on the overhead lights on the patrol car, even though Brown had previously stopped on his own. Brown relies primarily on the opinion of the Sixth District Court of Appeal in *Bailey, supra,* 176 Cal.App.3d 402. There a divided panel of the court concluded that: "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. Any reasonable person in a similar situation would expect that if he drove off, the officer would respond by following with red light on and siren sounding in order to accomplish control of the individual." (*Id.* at p. 406.)

The dissent in *Bailey* acknowledged that when a person yields to a display of emergency lights, that the person has been seized. The dissent noted, however, there was no evidence the defendant yielded to the show of authority as the defendant in that case was already stopped without any reference to police action. (*Bailey, supra,* 176 Cal.App.3d at pp. 407-408 (dis. opn. of Agliano, J.).)

Since the decision in *Bailey, supra,* 176 Cal.App.3d 402, the Sixth District has somewhat narrowed or distinguished its holding. In *People v. Perez* (1989) 211 Cal.App.3d 1492, 1495-1496 (*Perez*), the dissenting justice in *Bailey* was the author of the unanimous opinion for the court. There the court dealt with a case where the police did not turn on the red lights when approaching a stopped car. Instead, the police used their spotlight and high beams to illuminate the stopped vehicle. The court observed:

"Unlike *Bailey,* the officer here did not activate the vehicle's emergency lights; rather, he turned on the high beams and spotlights only. These differences are substantial because the conduct of the officer here did not manifest police authority to the degree leading a reasonable person to conclude he was not free to leave. While the use of high beams and spotlights might cause a reasonable person to feel himself the object of official scrutiny, such scrutiny does not amount to a detention." (*Id.* at p. 1496.)

The basic thrust of the analysis in *Bailey* is that red lights are a showing that police will chase you if you do not remain stopped. The analysis does not take into account, as did the dissent, that there needs to be some evidence that the person yielded to that show of authority. In the case of a stopped vehicle approached by police, we believe there must be something more than merely activating the red lights to accomplish a detention, because, as the majority in *Bailey, supra,* 176 Cal.App.3d 402 acknowledged, if you do not yield, *police may chase you.*

After *Bailey, supra,* 176 Cal.App.3d 402 and *Perez, supra,* 211 Cal.App.3d 1492 were decided, the U.S. Supreme Court decided *California v. Hodari D.* (1991) 499 U.S. 621 (*Hodari D.*). In that case, police officers wearing jackets which displayed the word "Police" approached a group of young males. (*Id.* at p. 622.) Upon seeing the approaching officers the group moved away. Police called out to the group that they were police officers and demanded the young men to stop. Notwithstanding the officer's clear showing of authority and their demands that the group stop, Hodari D. took flight. Police gave chase and just prior to being tackled by a police officer, Hodari jettisoned a package containing narcotics. (*Id.* at pp. 622-623.) Thus, the issue before the court was

when was the defendant seized. The state appellate court held, consistent with *Bailey* that the defendant was seized when the officers made their unequivocal demands that he stop. Since the state court found there was not reasonable suspicion to detain Hodari D. at the time of the demand, the state court concluded the narcotics were found as the result of an unlawful seizure. The high court reversed, concluding that a mere showing of authority is not enough to constitute a seizure. Rather, the court held that a seizure under the Fourth Amendment only occurs when a person is physically prevented from leaving, or when the person yields to a showing of police authority. (*Hodari D., supra,* at pp. 626-629.)

We disagree with the analysis of the majority in *Bailey, supra,* 176 Cal.App.3d 402 and agree with the dissenting opinion in that case. We recognize the court's efforts in *Perez, supra,* 211 Cal.App.3d 1492 to distinguish *Bailey*, but respectfully reject the notion that there is a material difference between the situation in which a police car pulls in behind a stopped car and activates red lights and one in which the same car uses high beams and spotlights. In both cases there is an apparent showing of police presence and police interest in the occupants of the stopped vehicle. In both instances there is a clear likelihood that police will give chase if the person drives off. However, as the court in *Hodari D., supra,* 499 U.S. 621 has made clear, it is still necessary to find that citizen yielded to that show of authority. As young Hodari discovered, police will give chase, but mere demands, or even pursuit are not seizures until the citizen accepts the command, either direct or implied, or when the police succeed in restraining that person.

Applying *Hodari D., supra*, 499 U.S. 621, to the case before us, the record supports the trial court's finding that Brown was not stopped by police nor was he detained by the deputy until after the deputy approached the car and immediately observed clear indications of intoxication. In any event, the deputy had reasonable suspicion of criminal activity as soon as he pulled his car to a stop behind Brown's car. The trial court correctly denied the motion to suppress.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

McINTYRE, J.

O'ROURKE, J.