

**IN THE APPELLATE DIVISION OF THE SUPERIOR COURT  
OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CRUZ**

THE PEOPLE OF THE	)	Appellate Case No.
STATE OF CALIFORNIA	)	AP00XXXX
	)	
PLAINTIFF/RESPONDENT,	)	Trial Court Case No.
	)	XXXX
v.	)	
	)	
DEFENDANT/APPELLANT.	)	
	)	
DEFENDANT/APPELLANT.	)	
_____	)	

**APPELLANT’S OPENING BRIEF**

Appeal from the Superior Court of the State of California,  
County of Santa Cruz, Watsonville Branch,  
Hon. J. Justice, Judge.

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*United States v. Gonzalez-Rivera* (9th Cir. 1994) 22 F.3d 1441, 1446-47.

### STATUTES

California Penal Code §1538.5

## **I. STATEMENT OF THE CASE**

This action is an appeal from an order denying the appellant's motion to suppress evidence pursuant to California Penal Code §1538.5. The appellant sought to suppress evidence obtained as a result of his arrest on December 18, 2006. The court made an oral ruling denying the motion on the record at a hearing held March 23, 2007, in the Watsonville branch of the Santa Cruz Superior Court. Review of a Penal Code §1538.5 ruling in a misdemeanor case is by direct appeal to the appellate division of the superior court; no final judgment is necessary. Cal. Pen. Code §1538.5(j).

## **II. STATEMENT OF FACTS AND PROCEEDINGS**

Around 11:35 P.M. on December 18, 2006, Watsonville Police Officer Francisco Ibarra was patrolling the east side of Watsonville, in the area of Martinelli Street and East Lake Avenue. [Reporter's Transcript (RT) 2, 3] While driving eastbound on East Lake Avenue, Officer Ibarra noticed a tan vehicle stopped on Martinelli Street and a woman standing next to the vehicle in the middle of the road. [RT 4-5] The rear of the vehicle was pointing out into the street and the front of the vehicle pointed at an angle toward the sidewalk; the closest point on the car to the sidewalk was approximately 25 inches from the curb, in excess of the legal parking limit of 18 inches. [RT 5-6] The officer later testified that he could not remember whether the vehicle's headlights were on or off. [RT 20]

The officer drove his patrol car up to the woman and asked her if she was okay. [RT 6] The woman assured Officer Ibarra that she was okay. [RT 6] While talking to the woman, the officer noticed Defendant/Appellant sitting in the driver's seat of the stopped white car. [RT 6] While still seated in his patrol vehicle, and looking around the woman, the officer noticed that Defendant/Appellant eyes were "somewhat

red.” [RT 6:19] The officer later testified that “Defendant/Appellant was somewhat—how could I say, was trying to hide himself I guess, trying to—not trying to look at me, trying to avoid me.” [RT 6:22-24] The officer noticed that Defendant/Appellant “had somewhat like a blank type of—I guess apparent stare.” [RT 6:24-25] The officer conversed with Defendant/Appellant, who explained to the officer that he had been offering the woman a ride. [RT 21] The officer understood Defendant/Appellant’s speech as they conversed and did not note any slurring. [RT 21] The officer did not state that he observed any odor of alcohol coming from Defendant/Appellant’s vehicle. [RT 2-7, 20-22] Apparently satisfied, the officer drove away and left Defendant/Appellant sitting in his car. [RT 7, 22]

The officer drove 1.5 blocks, turned onto a side street, then made a U-turn to face Martinelli Street again. [RT 7] The officer then saw Defendant/Appellant driving down Martinelli Street. [RT 7] The officer estimated by pacing the vehicle that Defendant/Appellant was driving approximately 22 mph in a 25 mph zone—three miles per hour under the speed limit. [RT 7, 10] Mr. Defendant/Appellant’s vehicle was not impeding the flow of traffic by traveling at that speed. [RT 22-23] The officer observed that Defendant/Appellant’s driver’s side window was open. [RT 10] The officer also observed Defendant/Appellant’s vehicle traveling nearer to the center line of the street than to the right side; however, the officer did not observe any weaving or see the vehicle cross any lane lines. [RT 10, 24] The officer followed Defendant/Appellant’s vehicle for seven to eight blocks, then activated his red emergency lights to stop the vehicle. [RT 12]

After a series of tests, an arrest was made leading to a charge of driving under the influence of alcohol. Mr. Defendant/Appellant moved to suppress the evidence obtained after Officer Ibarra stopped his vehicle on

December 18, 2006. In its oral ruling denying the motion, the court agreed with Mr. Defendant/Appellant that the driving Officer Ibarra observed did not provide a reasonable basis for a stop. [RT 40-41] The court stated that, “if in fact the only things that the officer had seen or done was watching a guy drive down . . . a residential street . . . at 11:35 at night at 22 in a 25 with the window down and it’s freezing enough weather outside, [there] would have been no basis for a stop and I’d agree with you and I’d dump that count.” [RT 40-41] But the court continued, “[t]he advantage the officer had is he talked to and dealt with your client before he became a drinking driver. He was just a drinking “parker,” . . . and when your client pulled away from the street or the curb and drove onto the street, then there is PC for Officer Ibarra to further investigate.” [RT 41]

Mr. Defendant/Appellant filed a timely notice of appeal on April 11, 2007.

### **III. ARGUMENT**

#### **A. STANDARD OF REVIEW**

An appellate court reviews a motion to suppress evidence under several standards. The appellate court must uphold the trial court’s factual finding findings related to the detention, whether express or implied, if they are supported by substantial evidence. *People v. Loewen* (1983) 35 Cal.3d 117, 123. The trial court’s determination of whether, on the facts found, the detention was unreasonable within the meaning of the Constitution, is a question of law. *Id.* On that issue, the appellate court exercises its independent judgment. *Id.* It is the “ultimate responsibility of the appellate court to measure the facts, as found by the trier, against the constitutional standard of reasonableness.” *Id.*

**B. THE LOWER COURT ERRED IN DENYING MR. DEFENDANT/APPELLANT'S MOTION TO SUPPRESS EVIDENCE OF HIS DECEMBER 18 ARREST.**

**1. The Court's finding that Officer Ibarra Had Cause to Believe Mr. Defendant/Appellant Was Intoxicated at their First Contact Is Not Supported By Substantial Evidence.**

In making its comment regarding Mr. Defendant/Appellant being a "drinking 'parker'" before becoming a drinking driver whom Officer Ibarra could reasonably detain, [RT 41] the court impliedly found that Officer Ibarra reasonably believed that Mr. Defendant/Appellant was intoxicated during their first contact when the officer stopped to speak with the woman standing in the street. Officer Ibarra's testimony does not support the court's finding.

Officer Ibarra testified that he observed that Mr. Defendant/Appellant had red eyes during their first contact. He also describes Mr. Defendant/Appellant as trying to avoid looking at the officer, and having a "blank" look. Failure to look at an officer is hardly evidence of intoxication; it is not even a reasonable indicator of criminal activity generally. *See United States v. Gonzalez-Rivera* (9th Cir. 1994) 22 F.3d 1441, 1446-47. Similarly, a "blank" look is too vague a description to support any finding. It is unclear, first, what "blank" means, as it is a subjective description. A look Officer Ibarra deemed blank could be full of meaning to someone else. In addition, Officer Ibarra had no point of reference to determine whether that was the look that Mr. Defendant/Appellant *always* had on his face. The officer did not testify that drunk people often have blank looks in his experience; he merely cited the look as something he noticed when contacting Defendant/Appellant.

More telling than what Officer Ibarra testified that he did see, is what he didn't see. Officer Ibarra never testified that Mr. Defendant/Appellant appeared to be intoxicated when the officer first spoke with him while he was seated in his vehicle. The officer testified that he spoke with Mr. Defendant/Appellant and understood his words, indicating that those words were not slurred. The officer was close enough to Mr. Defendant/Appellant to observe that his eyes were red, even though it was dark outside, but the officer never testified that he smelled alcohol on Mr. Defendant/Appellant or in his vehicle.

The Age 21 and Over Officer's Statement, commonly known as a DS-367 form, is issued by the Department of Motor Vehicles for officers to use in making sworn DUI reports. The DS-367 lists four objective symptoms of intoxication for officers to check off to indicate their basis for probable cause to arrest a defendant for driving under the influence. These symptoms are (1) bloodshot or watery eyes, (2) the odor of an alcoholic beverage, (3) an unsteady gait, and (4) slurred speech. After having the opportunity to observe Mr. Defendant/Appellant, Officer Ibarra noticed only one of these objective symptoms, the bloodshot eyes. Unless we are to question the officer's perceptive ability, the fact that the officer had the opportunity to observe the Defendant and did not notice more than one objective symptom of intoxication should demonstrate that no other such symptoms were present. This evidence of a lack of objective symptoms, coupled with the highly subjective nature of the officer's other observations—a look on the face, or avoiding a look—provide weak support for the court's finding that Officer Ibarra observed that Mr. Defendant/Appellant was intoxicated while Mr. Defendant/Appellant was still stopped on the side of the road.

**2. The Facts as Testified by Officer Ibarra do Not Provide a Basis for Reasonable Articulate Suspicion of Criminal Activity, so the Detention Violated the Fourth Amendment.**

An officer may arrest a person without a warrant only if the circumstances support an objectively reasonable belief that the person is committing or has committed a public offense. *Gerstein v. Pugh* (1975) 420 U.S. 103, 111-12. Probable cause must be determined under the particular factual context of each case. *Illinois v. Gates* (1983) 462 U.S. 213. Probable cause must be found to be objectively reasonable and the underlying intent or motivation of the arresting officer is irrelevant. *Scott v. United States* (1978) 436 U.S. 128; *United States v. Robinson* (1973) 414 U.S. 218; *People v. Gonzalez* (1990) 216 Cal.App.3d 1185.

Persons may be “detained” on less than probable cause. Such detentions, however, must be justified. The Fourth Amendment to the United States Constitution prohibits detentions of persons by law enforcement if such detentions are unreasonable. *Terry v. Ohio* (1968) 392 U.S. 1, 19. A detention is reasonable under the Fourth Amendment if the officer, at the time of the detention "can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." *People v. Souza* (1994) 9 Cal.4th 224, 231. Mere rumor, curiosity, or hunch is insufficient, despite the officer’s good faith. *People v. Roth* (1990) 219 Cal.App.3d 211, 215.

Conduct that is not necessarily indicative of criminal activity may, in some circumstances, be relevant to the reasonable suspicion calculus. *United States v. Montero-Camargo* (9th Cir. 2000) 208 F.3d 1122, 1130. But, “innocuous conduct does not justify an investigatory stop unless there is other information or surrounding circumstances of which the police are

aware, which, when considered along with the otherwise innocuous conduct, tend to indicate criminal activity has occurred or is about to take place.” *Id.* at 1130-31 (emphasis added). Likewise, while an officer may assess the facts in light of his experience, *see United States v. Brignioni-Ponce* (1975) 422 U.S. 873, 885, experience does not give officers unbridled discretion in making a stop. *Montero-Camargo, supra*, 208 F.3d at 1131. An officer’s experience may provide context for a situation, but the inferences the officer draws must be objectively reasonable: “‘experience’ does not in itself serve as an independent factor in the reasonable suspicion analysis.” *Id.*

**a. Mr. Defendant/Appellant’s Driving Was Not A Basis for Reasonable Suspicion of Driving Under the Influence.**

Officer Ibarra’s observations of Mr. Defendant/Appellant’s driving do not support a reasonable suspicion that Mr. Defendant/Appellant was driving under the influence or involved in any other criminal activity that would warrant a vehicle stop. Indeed, the superior court expressly stated that the officer’s observations of Mr. Defendant/Appellant driving below the speed limit with his window open on a cold night not exactly centered in his lane did not provide a basis for a legal detention. [RT 40-41] The officer did not state that Defendant/Appellant drove unsafely or irregularly, nor that he violated any traffic laws. The officer observed Mr. Defendant/Appellant driving slightly below the speed limit in a residential neighborhood; no law specifies that vehicles must travel exactly at the speed limit. The officer does not state that the Defendant was weaving or crossing any lane lines, only that he was driving within his lane closer to the center line than to the right side of the road. Such driving is not a valid basis for a traffic stop. *See United States v. Colin* (2002) 314 F.3d 439, 446; *United States v. Lyons* (10th Cir. 1993) 7 F.3d 973, 976.

**b. The Entire Encounter Did Not Provide a Basis for Reasonable Suspicion.**

The superior court based its denial of the suppression motion on an implied finding that Mr. Defendant/Appellant was reasonably observably intoxicated when he first spoke with Officer Ibarra. As discussed above, that finding was without support in the officer's testimony. The officer justified his own stop on the totality of the circumstances, i.e., his initial contact with Mr. Defendant/Appellant plus the driving he observed. [RT 12] But the entire encounter taken as a whole does not rise to the level of supporting a reasonable suspicion of driving under the influence.

In terms of the defendant's person, the officer testified that he observed red eyes and a "blank" look. As discussed above, the "blank" look is a subjective observation and does not point to intoxication. As for the red eyes, the fact that the officer was close enough to observe Mr. Defendant/Appellant's eyes on a dark street and still did not smell any alcohol or observe any other objective symptoms of intoxication is a strong indication that those objective symptoms were not present.

In terms of Mr. Defendant/Appellant's behavior, the officer observed Mr. Defendant/Appellant supposedly trying to avoid looking at the officer. As cited above, there is substantial authority stating that failure to look at an officer does not provide the basis for reasonable suspicion. The officer also cited as suspicious behavior the fact that Mr. Defendant/Appellant left his window rolled down after driving away from the spot where he had been talking to the woman and then the officer. The officer cited his experience with DUI arrests in interpreting the open window, stating that people explained to him that they were trying to sober up by opening the window. But to interpret the open window in this way, the officer had to ignore the simplest explanation: Mr. Defendant/Appellant

simply had not yet rolled up his window after speaking with the woman on the street. Finally, the officer pointed to Mr. Defendant/Appellant's driving three miles per hour below the speed limit in a residential neighborhood at night. The officer admitted that, had Defendant/Appellant been driving over the speed limit, he would have stopped him; [RT 22-23] nevertheless, the officer pointed to his "experience" with people speeding on that road as evidence that Mr. Defendant/Appellant's obeying the speed limit was somehow an indication that he was intoxicated. Overall, a reasonable officer would not have formed a suspicion of driving under the influence based on the facts presented by Officer Ibarra.

#### **IV. CONCLUSION**

The superior court erred in denying Mr. Defendant/Appellant's motion to suppress evidence obtained as a result of Defendant/Appellant's December 18, 2006 arrest. The circumstances of the contact between Officer Ibarra and Mr. Defendant/Appellant do not provide the basis for an objectively reasonable suspicion that Mr. Defendant/Appellant was driving under the influence. Officer Ibarra did not observe that Mr. Defendant/Appellant was intoxicated when they first spoke, and Mr. Defendant/Appellant's entirely legal, safe driving after that conversation provided no new indication that Defendant/Appellant might be driving under the influence. Mr. Defendant/Appellant respectfully requests that this court vacate the lower court's order and order all evidence obtained from his December 18, 2006 arrest to be suppressed.