SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO
APPELLATE DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

v.

CHARLES JOSEPH COX

Defendant/Appellant.

Case No: ACRAS 800100
(Trial Court: MWV 707249/ MWV 707263)

PER CURIAM
OPINION

Appeal from an order denying appellant's motion to suppress evidence (Pen. Code § 1538.5, subd. (j)), San Bernardino Superior Court, Rancho Cucamonga District, Raymond L. Haight, Judge. Affirmed in part, reversed in part, and remanded for further proceedings.

Allison K. Aranda for defendant and appellant.

Michael A. Ramos, District Attorney, Jack C. Liu, Deputy District Attorney, for plaintiff and respondent.

THE COURT:

PROCEDURAL BACKGROUND

On November 13, 2007, appellant Charles Joseph Cox was cited for a violation of Penal Code section 626.6 – person not a student, officer or employee, interference with peaceful conduct of campus, failure to leave or reentering campus. Appellant pled not guilty at arraignment on November 27, 2007. On January 4, 2008, respondent, the People, filed an amended complaint charging Cox with a violation of Penal Code section 632(a) – eavesdropping on or recording confidential communications. On January 11, 2008, a second amended complaint was filed alleging multiple counts of Penal Code section 632(a).

On February 26, 2008, appellant brought a motion to suppress pursuant to Penal Code section 1538.5. On March 7, 2008, the court denied the motion. This appeal followed pursuant to Penal Code section 1538.5, subdivision (j).

FACTS

The Chaffey Community College Division Police Department has time, place, and manner restrictions for demonstrations on campus. They are found in the administrative manual and guide, section 5.6, free-speech, time place and manner. The Chaffey College governing board prepares the document.[1] The rules were approved by the governing board at a meeting

[1] RT 75:2

on July 26, 2007.[2] Normally a group has to give the school five business days notice before the day of an event.[3]

On November 13, 2007, the appellant Charles Cox was part of a group on the Chaffey College campus protesting against abortion.[4] The group did not provide the requisite five days notice.[5] Chaffey Community College Division Police Department Chief David Ramirez and one vice president made the decision that if the group was already there, and if they acted peacefully, did what they were told to do in terms of staying in the designated area, they would be permitted to remain.[6]

As soon as the group came on campus, in the quad area, Ramirez had Officer Hunsiker go out and talk to the group.[7] Ramirez had designated the west half of the quad for the group to demonstrate.[8] Ramirez told Officer Hunsiker to tell the group that they were free to demonstrate on campus as long as they remained on the west side of the quad; he did so, Ramirez did not know how the group responded.[9]

At about 11:20 a.m., Chaffey College Police Officer Thanh Tran made contact with Cox. Cox was not a student of Chaffey College.[10] Ramirez had dispatched Tran to contact Cox, because Ramirez had seen that Cox was in

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[2] RT 76:19
[3] RT 77:5
[4] RT 18:23
[5] RT 77:2
[6] RT 77:13
[7] RT 90:6
[8] RT 78:1
[9] RT 90:12, 91:7
[10] RT 18:18-28

the southeast section of the quad.[11] Tran believed that Cox and his group had to stay in a location east of the cafeteria, right outside of the south entrance to the cafeteria.[12] The college had given Cox and his group a table and designated the area immediately surrounding the table totaling about 15 feet.[13]

Tran made contact with Cox who was outside the area designated for his group, and requested him to go back to the designated area.[14] According to Tran, Cox became very irate, defiant, and challenging. Cox said Tran had no permission, and no right to ask him to go back to that one area.[15] Tran asked Cox again to go back to the one area.[16] Cox again refused to listen and was defiant and challenging. Cox again said Tran had no permission to ask them what to do. Cox said he wanted to speak to Tran's supervisor.[17]

The conversation was in two parts: the first part was on the east side of the quad when Tran asked Cox to move. Then, after Cox moved to the north side of the quad, Tran approached Cox and asked him a second time to move back to the south end. Cox then asked to talk to Chief Ramirez.[18] Tran directed Cox to the campus police office, and Cox went there without

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[11] RT 77:27 - 78:4
[12] RT 29:17
[13] RT 30:6
[14] RT 20:2
[15] RT 20:5
[16] RT 20:15
[17] RT 20:28
[18] RT 34:2

Tran following.[19] Cox voluntarily entered the police station[20] and initiated a conversation with Ramirez.[21]

Before Cox entered the police station, Ramirez had received information about complaints from students that they were being prevented from going back to class. Library staff had said that students were coming up to the counter saying that people with huge placards were blocking access to the cafeteria and the bookstore.[22] Ramirez got the information from the dispatcher office staff that they were receiving these types of calls.[23]

Ramirez had seen Tran making contact with Cox.[24] Ramirez then saw Cox walking toward the campus police office.[25] Next Ramirez saw Cox walking in and telling someone Cox was there to see Ramirez. Ramirez opened the door to the private area of the public safety office and invited Cox in. Ramirez asked Cox to have a seat so Ramirez and he could have a conversation.[26] The area was for staff and police officers only, not for public access.[27]

Cox began asking Ramirez if Ramirez was a person that had the authority to make the rules and regulations regarding free speech. Ramirez told Cox that Ramirez was the designated employee that made the decision

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[19] RT 21:9
[20] RT 103:9
[21] RT 103:12
[22] RT 93:4
[23] RT 96:11
[24] RT 73:20
[25] RT 78:9
[26] RT 78:13
[27] RT21:23

for the group to remain on campus and use the west side of the quad area.[28] Cox and his group were to remain on the west side of the quad.[29]

During the conversation, Tran returned to the police station. He went straight to the water container to get a cup of water behind Cox. Cox, Ramirez, and Tran were then in the same room alone.[30] Tran stood there listening to the conversation. He did not make any comments while Ramirez and Cox were speaking.[31]

When Ramirez told Cox that he did not have prior permission to be on campus, Cox said he did not need any permission; it is a public forum.[32] Ramirez told Cox it was not a public forum -- it was semi-public, and that there were time, place, and manner restrictions. Cox completely disagreed with Ramirez on the time, place, and manner restrictions.[33] Cox responded that Ramirez had no authority as to that, that Cox was going to get up and leave, and that he and his group were going to continue doing what they were doing or even spread throughout the quad.[34]

According to Tran, when Cox initially left Ramirez's office, he threw his arms up and said he was going to do what he wanted to do.[35] Cox then stood up and started walking towards the door. He entered into the public

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[28] RT 78:20
[29] RT 79:11
[30] RT 39:1; 40:12
[31] RT 41:3
[32] RT 79:3
[33] RT 79:6
[34] RT 79:19. Regarding this part of the encounter, we defer to the trial court's finding that the officers' versions of what transpired were more credible than that of Mr. Cox. RT 130:21.
[35] RT 24:13

area of the campus police office. Ramirez grabbed Cox's right hand and put him in a wrist lock. Tran assisted, and Cox was detained with handcuffs.[36]

According to Ramirez, Cox did not swing his arm at all when he tried to leave. He did not try to hit Ramirez.[37] During this conversation with Cox inside the station, Cox did not threaten Ramirez or make any sort of gestures or lunges towards Ramirez. Ramirez did not fear for his safety.[38]

Following Cox's statement saying "he was going to get up and leave" the office; and that his group "would continue doing" what they "were doing or even spread out throughout the quad,"[39] Ramirez decided to detain Cox because "his conduct and his presence [were] disruptive to the educational process."[40] According to Ramirez, the basis for the detention was that Cox "was in violation of Penal Code section 626.6, disruptive presence on school grounds, his conduct was . . . likely to continue conduct that would have interfered with activity [on the campus]."[41]

According to Tran, Cox was detained because Cox was "defiant, challenging and disobeyed school officials."[42] Cox "was not under arrest" at this time, because "he hadn't violated any law."[43] The following testimony was provided by Officer Tran (RT 49:6 - 25):

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[36] RT 79:24
[37] RT102:12
[38] RT98:13
[39] RT 79:18
[40] RT 102:19
[41] RT 80:3 The answer as given was interrupted by counsel before it could be completed.
[42] RT 53:21
[43] RT 59:4

Q Officer Tran, when you first approached Mr. Cox and his group, prior to Mr. Cox entering the police station, was Mr. Cox blocking any entrances to a building?

A No, ma'am.

Q Was he blocking any walkways?

A No, ma'am.

Q Was he interfering with students' ability to go to the cafeteria?

A No, ma'am.

Q Was he interfering [with] the students' ability to go into the book store?

A No, ma'am.

Q Was he interfering with their ability to go to class?

A No, ma'am.

Q Was he preventing any business of the school from going on?

A No, ma'am.

As the detention of Cox began, he was searched for officer safety.[44] Tran conducted a pat-down search, and pulled Cox's wallet out from Cox's back pocket.[45] Tran asked Cox if "he had any guns, weapons, [a] knife [or] needles in his pockets."[46] Cox revealed that he had a recorder[47] in his front pocket.[48] The recorder was turned on. Cox had recorded Ramirez's conversation and the conversations between other individuals on campus

[44] RT 53:24
[45] RT 57:21
[46] RT 23:22
[47] RT 23:24, 57:25
[48] RT22:23, 72:8

and even phone calls with entities outside of Chaffey College.[49] After Tran took the recorder out of Cox's pocket, Tran gave it to Ramirez.

Ramirez booked the recorder in evidence because Ramirez had been recording conversations without consent or permission.[50] Ramirez is the person that makes the decision whether to arrest.[51] Ramirez did not arrest Cox for violation of Penal Code section 632 because Ramirez was "a nice guy," even though he thought Cox was breaking the law. At that point, Ramirez did not issue Cox a citation.[52]

Cox was given a non-student disruptive presence advisory form and was asked to stay off campus for seven days, and Cox said that he would.[53] Cox said he came with the group in a van, and he did not have transportation off-campus. Ramirez ordered his staff to escort Cox to the local McDonald's.[54] Later that day, at about 2:00 p.m., Cox returned to the campus. He was disruptive, yelling, and screaming outside the quad. Cox was arrested by Tran for "trespassing" "[p]ursuant to Penal Code section 626.6(a)."[55]

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[49] RT 80:13
[50] RT 80:23
[51] RT 59:1
[52] RT 106:5
[53] RT 24:23
[54] RT 81:8
[55] RT 25:17

RULING IN THE TRIAL COURT

The court found that once the appellant was contacted by the school officials in the police station office, he indicated he was going to continue to engage in activity in violation of the school policy. At that point, the officers were justified to detain the appellant. The court further found that the officers were justified in doing a pat-down search to verify that appellant had no weapons. An object was found in appellant's pocket that sufficiently appeared to be a weapon and that officers were justified in removing it. Once it was removed, it was regarded as potential evidence.

DISCUSSION

Appellant contends that the trial court erred in finding that the officers were justified in detaining Cox, they did not have probable cause to search Cox, and they did not have a reasonable suspicion to pat down Cox for weapons. Appellant further contends that the officers did not have probable cause to arrest Cox outside of the search appellant claims was unlawful. On appeal, appellant also contends that the court erred in excluding the audio recording Cox made using his digital recorder.

Penal Code section 1538.5 authorizes suppression of any evidence obtained in violation of the Fourth Amendment, not only tangible objects but also "intangible evidence," such as testimony. (*Kirby v. Superior Court* (1970) 8 Cal.App.3d 591, 595 [observations made by police officer].)

In ruling on a suppression motion, the trial court finds historical facts, selects the applicable rule of law, and applies the law to the facts to determine whether the moving party's Fourth Amendment rights were violated. (*People v. Alvarez* (1996) 14 Cal.4th 155, 182.) The prosecution has the burden of establishing that a search without a warrant was reasonable. (*People v.* Zamudio (2008) 43 Cal.4th 327, 341.) Matters such as witness credibility, weight of the evidence, and resolution of evidentiary conflicts are exclusively within the province of the trial court. (*People v. Zamudio*, 43 Cal.4th at 346, note 7; *People v. Leyba* (1981) 29 Cal.3d 591, 596; *People v. Lawler* (1973) 9 Cal.3d 156, 160.)

On appeal from a ruling on a suppression motion, we defer to all trial court factual findings that are supported by substantial evidence. We then exercise independent judgment to determine whether, on the facts found, the search and/or seizure was reasonable under the Fourth Amendment. (*People v. Williams* (1988) 45 Cal.3d 1268, 1301; *People v. Leyba* (1981) 29 Cal.3d 591, 596.) If the actions that the police observe do not amount to "objective manifestations" of any criminal activity, then police have no valid reason for initiating a detention. (*United States v. Lopez-Soto* (9th Cir. 2000) 205 F.3rd 1101, 1106.)

Temporary investigative detentions are often called "Terry stops," after *Terry v. Ohio* (1968) 392 U.S. 1, 22. *Terry* created a limited exception to the general rule that all seizures of the person must be justified by probable cause to arrest for a crime. (*Florida v. Royer* (1983) 460 U.S. 491, 498.) The standard for a Terry stop has been called "reasonable suspicion" to contrast it with probable cause. (*Alabama v. White* (1990) 496 U.S. 325, 330; *U.S. v. Sokolow* (1989) 490 U.S. 1, 7.) Reasonable suspicion can be established with less information and less reliable information than that required to show probable cause. (*Alabama v. White*, 496 U.S. at 330; *People v. Souza* (1994) 9 Cal.4th 224, 230; *People v. Johnson* (1991) 231 Cal.App.3d 1, 11.)

First Claimed "Detention"

Appellant contends that there was an unlawful detention when appellant was escorted into the "nonpublic" area of the police station. Respondent contends that it was appellant's own choice to walk into the campus police station and speak to a higher ranking officer, and there was no unlawful detention.

Consensual encounters do not trigger Fourth Amendment scrutiny. (*Florida v. Bostick* (1991) 501 U.S. 429, 434.) Unlike detentions, they require no articulable suspicion that the person has committed or is about to commit a crime. (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784.) As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is

required on the part of the officer. A seizure occurs only when an officer, by means of physical force or show of authority, terminates or restrains a person's freedom of movement, i.e., a person's liberty, "through means intentionally applied." (Citation omitted, *Brendlin v. California* (2007) 551 U.S. 249, __, 127 S.Ct. 2400, 2405; *People v. Zamudio*, 43 Cal.4th at 341; see also, *Florida v. Bostick*, 501 U.S. at p. 434; *Wilson*, 34 Cal.3d at 789-790.)

In order to determine whether a particular encounter constitutes a seizure, the court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to terminate the encounter. (*Florida v. Bostick*, 501 U.S. at 439.) This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation. (*Michigan v. Chesternut* (1988) 486 U.S. 567, 573.) Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or a tone of voice indicating that compliance with the officer's request might be compelled. (*United States v. Mendenhall* (1980) 446 U.S. 544, 554; *In re James D.* (1987) 43 Cal.3d 903, 913, fn. 4.)

The officer's uncommunicated state of mind and the individual citizen's subjective belief are irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred. (*In re Christopher B.* (1990) 219 Cal.App.3d 455, 460.) The standard is an objective one based on the circumstances surrounding the encounter. (*California v. Hodari D.* (1991) 499 U.S. 621, 628.) The dispositive question is whether, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. (*Brendlin v. California* (2007) 551 U.S. 249, __, 127 S.Ct. 2400, 2405.)

There is no question that appellant voluntarily entered the police station. There is additionally no question that appellant requested to speak to a higher ranking officer, and therefore appellant voluntarily and consensually entered the police station to talk with Ramirez. Appellant's voluntary consent continued into the private area of the police station so that he could have the conversation he sought with Ramirez. The trial court found no credible evidence that there was any basis for a reasonable person to believe that appellant was not free to leave. The trial court found not credible the testimony of the appellant to the contrary.

Applying the principles previously enunciated, this court finds that there was no unlawful detention up to the time of the handcuffing because the defendant was free to leave. There was no seizure, no detention, and therefore no unlawful detention. See, e.g., *Ford v. Superior Court* (2001) 91

Cal.App.4th 112, 125 ("The Fourth Amendment does not prevent a person from agreeing to accompany officers to the police station and remain there for interrogation. [Citations.]" No seizure of Ford where he spent hours with the police, including an interrogation, being "unfailingly cooperative" before confessing to murder.).

Detention When Handcuffed

Appellant claims that at the time he was handcuffed, the police officers had no reasonable suspicion to detain him -- that he had done nothing wrong. For this analysis, we conclude that appellant was "seized" within the meaning of the Fourth Amendment as he started to leave the police office, was stopped by Chief Ramirez, and handcuffed by Officer Tran. See generally, *Terry v. Ohio* (1968) 392 U.S. 1, 17 (when a police officer restrains a person's freedom to walk away, the person has been "seized"). Whether the police officers had a reasonable suspicion of criminal activity that warranted this forced detention is the focus of our analysis.

Investigatory detentions violate the Fourth Amendment unless the detaining officer 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; see generally *Terry v. Ohio* (1968) 392 U.S. 1; see, *U.S. v Cortez* (1981) 449 U.S. 411, 417-418 ("[t]he detaining

officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.").

Police officers who lack probable cause to arrest, but who can point to articulable facts justifying a reasonable suspicion that a particular person has committed, is committing, or is about to commit a crime may detain that person briefly to investigate the circumstances that provoked the suspicion. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 439, citing *United States v. Brigoni-Ponce* (1975) 422 U.S. 873, 881; *People v. Clair* (1992) 2 Cal.4th 629, 675.)

In order for a detention to be lawful, the officer must have specific articulable facts causing the officer to suspect that 1) some activity relating to crime has taken place or is occurring, and 2) the person the officer intends to stop or detain is involved in that activity. It must also be objectively reasonable for the officer to entertain such a suspicion. (*People v. Aldridge* (1984) 35 Cal.3d 473, 478.) The test is whether a reasonable police officer in a like position, based on his or her training and experience, would suspect the same criminal activity and the same involvement by the person in question. (*In re Tony C.* (1978) 21 Cal.3d 888, 893.)

The respondent cites *United States v. Mendenhall* (1980) 446 U.S. 544 for the proposition that circumstances amounting to a reasonable suspicion, but falling short of probable cause to arrest, justify a police officer detaining a person who may be involved in criminal activity, whether past, present, or

future. Furthermore, respondent argues that there was a reasonable suspicion to detain the appellant since he made statements that would violate Penal Code section 626.6.

Appellant argues that Penal Code section 626.6[56] requires a suspect 1) be properly advised to stay away, and 2) have actually engaged in some behavior that substantially interferes with the school's ability to do business. Section 626.4 provides the procedure for the institution to withdraw consent previously given for a group or individual to be on campus.[57]

According to section 626.6, the campus police would have been justified to direct appellant to leave the campus if they concluded that appellant was interfering with the peaceful conduct of the activities of the campus or had entered the campus for that purpose. A failure to comply with such directive would constitute a misdemeanor. Pursuant to the statute, the

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[56] [Penal Code section 626.6] "(a) If a person who is not a student, officer or employee of a college or university and who is not required by his or her employment to be on the campus . . . , enters a campus . . . , and it reasonably appears to . . . an officer or employee designated . . . to maintain order on the campus . . . , that the person is committing any act likely to interfere with the peaceful conduct of the activities of the campus . . . , or has entered the campus . . . for the purpose of committing any such act, the [officer] . . . may direct the person to leave the campus . . . . If that person fails to do so or if the person willfully and knowingly reenters upon the campus . . . within seven days after being directed to leave, he or she is guilty of a misdemeanor . . . . (b) The provisions of this section shall not be utilized to impinge upon the lawful exercise of constitutionally protected rights of freedom of speech or assembly."

[57] [Penal Code section 626.4] "(a) The . . . officer or employee designated . . . to maintain order on such campus . . . may notify a person that consent to remain on the campus . . . has been withdrawn whenever there is reasonable cause to believe that such person has willfully disrupted the orderly operation of such campus. . . . (d) Any person who has been notified . . . that consent to remain on the campus . . . has been withdrawn pursuant to subdivision (a), who has not had such consent reinstated, and who willfully and knowingly enters or remains upon such campus . . . during the period for which consent has been withdrawn is guilty of a misdemeanor. . . ."

directive to leave the campus must precede the failure to comply before a crime is committed.

Recognizing that appellant and his group had been granted permission to be on campus (regardless of the five-day notice requirement), section 626.4 would have allowed the college to withdraw such consent if there had been reasonable cause to believe that appellant had willfully disrupted the orderly operation of the campus. If such consent had been withdrawn and appellant had failed to leave the campus under such circumstances, then a misdemeanor would have occurred. Pursuant to the statute, the notice to leave must precede a failure to do so before a crime is committed.

From the facts elicited during the hearing on the motion, there was no factual basis for the campus police to have had any suspicion that a crime may have occurred or was about to occur. The campus police had not asked appellant to leave the campus; appellant and his group had not been notified that their permission to be on campus had been withdrawn.

The testimony by Officer Tran was uncontroverted that appellant and his group had not blocked any walkways, they had not interfered with the students' ability to enter buildings, the cafeteria, or the bookstore, and they had not prevented the school from conducting the school's business. No crime had occurred. Moreover, the campus police had not directed appellant (nor his group) to leave the campus prior to the detention and therefore it was

factually impossible for a violation (or suspected violation) of sections 626.4 and 626.6 to have occurred prior to the detention.

The Arrest

Appellant argues that there was no probable cause for his arrest because his arrest was based on his unlawful detention and the non-student disruptive presence advisory form directing appellant to stay off the campus for seven days. Respondent suggests that there was probable cause to arrest appellant based on his return to campus in violation of the non-student disruptive presence advisory form which constituted a violation of Penal Code section 626.6.

"Cause to arrest exists when the facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested is guilty of a crime. (*People v. Harris* (1975) 15 Cal.3d 384, 389]; see also, [Penal Code] section 836, subd. 3.)." (*People v. Price* (1991) 1 Cal.4th 324, 410.)

Appellant's alleged violation of the form by returning to campus provides probable cause to believe that appellant violated Penal Code section 626.6(a) (If the person directed to leave the campus "willfully and knowingly reenters upon the campus . . . within seven days after being directed to leave, he or she is guilty of a misdemeanor"). What was factually missing at the time of the earlier detention was clearly present when

appellant returned at 2:00 p.m. -- the non-student disruptive presence advisory form.

Implicit in appellant's claim is that the non-student disruptive presence advisory form was a product of the prior illegal detention. We disagree. The standard for determining whether evidence must be excluded under the "fruit of the poisonous tree" doctrine was set by the United States Supreme Court: "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" (*Wong Sun v. United States* (1963) 371 U.S. 471, 487-488.)

Under *Wong Sun*, evidence is not to be excluded merely because it would not have been obtained but for the illegal police activity. (*Restani v. Superior Court* (1970) 13 Cal.App.3d 189, 198.) The question is whether the evidence was obtained by the government's exploitation of the illegality or whether the illegality has become attenuated so as to dissipate the taint. (*Id.*; see also, *Krauss v. Superior Court* (1971) 5 Cal. 3d 418, 422.)

Evidence is not "fruit of the poisonous tree" if the connection between the illegal source and the evidence is so attenuated it would serve no legitimate purpose to suppress the evidence. *People v. Thierry* (1998) 64

Cal.App.4th 176, 180. The evidence can be attenuated by the defendant in an act of free will which can "purge the primary taint of the unlawful invasion." (*People v. Bilderbach* (1965) 62 Cal.2d 757, 768, quoting *Wong Sun*, 371 U.S. 471; *People v. Johnson* (1969) 70 Cal.2d 541, 546.)

If the defendant commits an intervening independent act which breaks the causal chain between the illegality and the evidence, the evidence is sufficiently attenuated and there is no exploitation of the illegality. (*People v. Sesslin* (1968) 68 Cal.2d 418, 428; *People v. Caratti* (1980) 103 Cal.App.3d 847, 852.) If the evidence is obtained followed by an independent voluntary act by the appellant which is distinguishable from the initial illegality, the taint is attenuated. (*People v. Eastmon* (1976) 61 Cal.App.3d 646, 653; see *Mann v. Superior Court* (1970) 3 Cal.3d 1, 8.) The voluntary commission of an offense subsequent to illegal police conduct is sufficient to dissipate the taint caused by the original police misconduct. (*People v. Prendez* (1971) 15 Cal.App.3d 486, 489; see *People v. Guillory* (1960) 178 Cal.App.2d 854, 856.)

We conclude that existence of the non-student disruptive presence advisory form is unrelated to the detention of appellant. Evidence that the form was given to appellant has no causal connection to the prior detention. The form could have been given to appellant at any time prior to the detention and discovery of the digital recorder, could have been given

subsequent to the detention, and could have been given at any time with or without the detention.

While we have decided that service of the form on appellant and appellant's alleged violation of the form's directive was not causally related to the prior detention, we also observe that, as alleged, appellant's decision to later violate the directive of the form and Penal Code section 626.6 was the product of his own decision making. As such, any alleged taint from the prior detention was sufficiently attenuated by appellant's own conduct. See, *People v. Caratti* (1980) 103 Cal.App.3d 847, 851-852.

Exclusion of the Audio Recording

Appellant claims that the trial court erred in excluding the audio recording, and contends that the only reason the court excluded the recording was that the prosecution did not have an opportunity prior to the hearing to review the transcript for accuracy. The reasons stated on the record are correctly characterized by the respondent: 1) appellant had only a rough transcript that was not verified; and 2) a transcript is required for appellate purposes before an audio recording may be received in evidence.

If a proper foundation is laid, audio recordings of conversations may be admissible in the court's discretion. (*People v. Siripongs* (1988) 45 Cal.3d 548, 574.) The party offering an audio recording into evidence must provide a transcript of the recording to the court and opposing party. (Cal. Rules of Court, Rule 2.1040.) In order to authenticate a tape recording, the party

seeking to introduce it must establish that it is an accurate representation of what it purports to be. (Cal. Evid. Code §§ 250, 1401; *People v. Mayfield* (1997) 14 Cal.4th 668, 747.) The party seeking to admit the evidence must show that the recording was complete, accurate and intelligible. (*People v. Spencer* (1963) 60 Cal.2d 64, 77-78.)

California Rule of Court 2.1040 provides that "a party offering into evidence an electronic sound . . . recording must tender to the court and to opposing parties a typewritten transcript of the electronic recording" and that the transcript must be "marked for identification." The trial court correctly explained that a transcript is required so that there will be an adequate record.[58]

Appellant agreed with the trial court's suggested procedure of playing the tape for Officer Tran during a recess for purposes of refreshing recollection.[59] Appellant also offered the recording for purposes of establishing tone of voice,[60] to resolve discrepancies between the officers' recollection and appellant's recollection.[61] In any event, we find that the trial court did not abuse its discretion by requiring the parties to adhere to the requirements of Rule 2.1040, and in finding that appellant had failed to do so.

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[58] RT 59:14
[59] RT 60:3-6
[60] RT 60:8
[61] In light of our decision regarding whether the detention was lawful, the issue of admissibility of the recording to establish tone of voice is moot.

DISPOSITION

Discovery of the digital recorder and its seizure by the police were the result of an unlawful detention. Therefore, the decision of the trial court with respect to evidence obtained as a result of the pat-down search, namely the digital recorder and audio files contained therein, is reversed. With respect to all other matters raised by the motion, the trial court's decision to deny the motion to suppress is affirmed. This case is remanded to the trial court for further proceedings consistent with this decision.

Dated: FEB 0 4 2009

Janet M. Frangie, Assistant Presiding
Judge of the Appellate Division

Stanford E. Reichert
Judge of the Appellate Division

Gregory S. Tavill
Judge of the Appellate Division

Superior Court State of California
County of San Bernardino
Appellate Division
DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) vs. ACRAS 800100
COUNTY OF SAN BERNARDINO) Trial Court # MWV 707249/707263

The undersigned hereby declares: I am a citizen of the United States of America, over the age of eighteen years, a resident of the above-named State, and not a party to nor interested in the proceedings named in the title of the annexed document. I am a Deputy Appellate Clerk of said County. I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business. On the date of mailing shown below, I placed for collection and mailing following ordinary business practices, at the request and under the direction of the Superior Court in and for the State of California and County above-named, whose office is at the Courthouse, San Bernardino, California, a sealed envelope which contained a true copy of each annexed document, and which envelope was addressed to the addressee, as follows:

District Attorney
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Allison Aranda, Esq.
Life Legal Defense Foundation
P.O. Box 890685
Temecula, CA 92589

cc: Honorable Judge Raymond L. Haight, Rancho Cucamonga Courthouse

Legal Research Attorney, San Bernardino Civil Courthouse

Trial Court: Rancho Cucamonga, Criminal Division

Date and Place of Mailing: February 4, 2009, San Bernardino, California.

Document Mailed: **PER CURIAM OPINION**

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 4, 2009, at San Bernardino, California.

_____ Deputy Clerk