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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Arapahoe County District Court; The Honorable Andrew Baum; and Case Number 2016CR1151	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant Kelvin Dalexi Arteaga	
Megan A. Ring, Colorado State Public Defender JOSEPH PAUL HOUGH 1300 Broadway, Suite 300 Denver, Colorado 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #34384	Case Number: 2018CA1018

DEFENDANT'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 1,608 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the Defendant-Appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

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STATEMENT OF THE ISSUE PRESENTED

Whether the trial court reversibly erred by failing to grant the defendant's motion to suppress evidence and statements.

STATEMENT OF THE CASE

Kelvin Arteaga (the defendant) was charged with and convicted of distribution, and possession with intent to distribute, a controlled substance, and was sentenced to five years in prison—though that was later reduced to three years of supervised probation.(CF,p15-16;R.Tr.(4/16/18),p16-17;(8/20/18),p6)

SUMMARY OF THE ARGUMENT

Even if the officers had reasonable suspicion to detain all the vehicle's occupants (including the defendant), because they had no probable cause to believe that the defendant, in particular, had committed any crime (at the time he was arrested), the trial court reversibly erred in failing to grant the defendant's motion to suppress evidence and the incriminating statements he made to police.

ARGUMENT

Standard of Review, Preservation & Applicable Facts

The denial of a motion to suppress presents a mixed question of law and fact, meaning, appellate courts will defer to the trial court's findings of fact if supported by the record but review a trial court's conclusions of law de novo.

People v. Adkins, 113 P.3d 788, 790 (Colo. 2005). Furthermore, where the error is one of constitutional dimension, as in this case, reversal is required unless the court is convinced that it was harmless beyond a reasonable doubt. *Bartley v. People*, 817 P.2d 1029, 1034 (Colo. 1991).

The constitutional harmless error test is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *People v. Welsh*, 58 P.3d 1065, 1072 (Colo. App. 2002) (citing *Bernal v. People*, 44 P.3d 184 (Colo. 2002)). Put another way, if the record shows that the defendant could have been prejudiced, the error cannot be considered harmless beyond a reasonable doubt. *People v. Perry*, 68 P.3d 472, 476 (Colo. App. 2002).

Here, preserving the error for review, defense counsel filed a pretrial motion to suppress evidence and statements due to Arteaga's unlawful arrest.(CF,p50-57) Specifically, the defense contended that at the time Arteaga was arrested, officers had no probable cause to believe he had committed any crime and therefore, all evidence and incriminating statements derived thereafter should be suppressed as fruits of the illegality.(CF,p50-52)

At a subsequent hearing on the motion, Investigator Eric Waters testified that he and a confidential informant (CI) arraigned a controlled drug buy from a

man known as "Santos"—who was not Arteaga.(R.Tr.(8/15/17),p22-25) Just prior to the deal, Waters and another officer (Sexton) performed a "strip search" of the CI (to ensure that he did not already possess any drugs) and provided him with "photocopied money."(R.Tr.(8/15/17),p27-28,54-55)

The CI then phoned Santos who informed the CI that he would soon meet him at the appointed parking lot and would be in a red vehicle.(R.Tr.(8/15/17),p28) Minutes later, and as Waters, Sexton (and numerous other officers) surveilled the scene, Waters observed the CI approach and enter a red Honda.(R.Tr.(8/15/17),p28-29,58) Because the CI was wearing an "electronic monitoring device" (a wire), officers heard what they believed to be a drug transaction in progress.(R.Tr.(8/15/17),p29-30)

After the CI gave the "bust signal," six to eight officers (with their guns drawn) descended on both sides of the Honda, ordered and removed everyone from the vehicle (including Arteaga, who was sitting in the backseat), and placed all occupants in handcuffs before conducting a "pat-down for weapons" and then positioning each person at the four corners of the car.(R.Tr.(8/15/17),p30-32) Waters then approached the empty vehicle and observed "money outside the front passenger side" and "drugs visible in the backseat."(R.Tr.(8/15/17),p32)

Shortly thereafter, the CI was "debrief[ed]" in the "SWAT van" and indicated that after entering the vehicle, he provided Santos (who was in the front passenger seat) with money in exchange for a bindle of heroine.(R.Tr.(8/15/17),p33,61) A female then provided the CI with an additional bindle and Arteaga (the defendant) gave him two more.(R.Tr.(8/15/17),p33-34)

Once the vehicle was thoroughly searched, and more drugs were found, all four occupants of the Honda (not including the CI) were transported to the police station.(."(R.Tr.(8/15/17),p35-37) After reading Arteaga his *Miranda* rights at the station, the defendant agreed to speak with officers and fully confessed to providing heroin to the CI.(R.Tr.(8/15/17),p37-39,48-53)

At the conclusion of Waters's testimony, defense counsel argued that based on the evidence presented at the hearing, there was simply no probable cause to believe that prior to his arrest, Arteaga (in particular) had committed any crime.(R.Tr.(8/15/17),p68-69) Indeed, only after Arteaga had been unlawfully arrested did officers then received probable cause (from the CI's "debrief") to believe that the defendant participated in the drug deal.(R.Tr.(8/15/17),p69)

Denying the motion to suppress and subsequently allowing the evidence and Arteaga's incriminating statements to be admitted at trial, the court found that "[a]s far as probable cause goes, based on everything that Investigator Waters had at the

time … there was a reasonable articulable suspicion and so there was cause to detain everybody and figure out who Santos was, to find out from the CI who actually had handed over drugs in exchange for money. And then once [Waters] speaks to the CI, he gets confirmation that defendant is involved, and so at that point he does have probable cause to arrest Mr. Arteaga."(R.Tr.(8/15/17),p76-78)

Law & Analysis

The Fourth Amendment to the United States Constitution guarantees the right to be secure against unreasonable searches and seizures. U.S. Const. amends. IV, XIV; *see* Colo. Const. art. II, § 7. To effectuate these protections, "specific, articulable, and objective facts" or "reasonable suspicion" must exist before police may detain or initiate a "seizure of a particular individual." *People v. Schreyer*, 640 P.2d 1147, 1149 (Colo. 1982); *People v. Johnson*, 865 P.2d 836 (Colo. 1994) (A police officer, lacking probable cause to arrest, may stop a person whom the officer reasonably suspects is committing, has committed, or is about to commit a crime.). Furthermore, an officer has a "narrowly drawn authority" to "frisk" or "pat-down" an otherwise reasonably detained person "for the protection of the investigating police officer, where he has reason to believe that he is dealing with an armed and dangerous individual." *Terry v. Ohio*, 392 U.S. 1, 27 (1968); *see also People v. Ratcliff*, 778 P.2d 1371 (Colo. 1989) (when an officer has a reasonable suspicion to

believe that the detained person may be currently armed, he may conduct a protective pat-down search for weapons).

Concerning an officer's authority to arrest an individual, our Supreme Court has held that a "warrantless arrest must be supported by probable cause, i.e., a 'court must determine whether the facts available to a reasonable cautious officer at the moment of arrest would warrant his belief that an offense has been or is being committed' by the person to be arrested." *Schreyer*, *supra* at 1150 (quoting *People v. Navran*, 483 P.2d 228 (Colo. 1971)); *see also People v. McCoy*, 870 P.2d 1231, 1235 (Colo. 1994) ("[P]robable cause to arrest requires that at the time an arrest is made the police have probable cause to believe a crime has been or is being committed and probable cause to believe the person to be arrested has committed or is committing the crime."); *People v. Castaneda*, 249 P.3d 1119, 1122 (Colo. 2011) (same). Moreover, when a person is arrested without a warrant, the burden of proof is on the State to prove that the officers possessed sufficient probable cause to arrest, and if that "arrest is not supported by probable cause, then evidence obtained incident to that arrest must be suppressed." *People v. King*, 16 P.3d 807, 813-4 (Colo. 2001).

Here, even assuming that officers had reasonable suspicion to detain all of the vehicle's occupants, Arteaga nevertheless maintains that when six to eight

officers descend on a car, with their guns drawn, extract and place someone in handcuffs, and then conduct a "pat-down" search of his person (when there is no reason to believe that he is armed and dangerous), that individual is not merely being detained but clearly arrested—and that in turn requires a showing of probable cause to believe that he has committed a crime. *See People v. Holt*, 233 P.3d 1194, 1197 (Colo. 2010) (suspect in custody when officers entered his apartment with their weapons drawn, ordered no one to move, and then handcuffed him); *People v. Breidenbach*, 875 P.2d 879, 885-86 (Colo. 1994) ("[I]f the police officer uses physical restraint on the suspect or draws a gun it is more likely to be deemed custodial than if the questioning occurs without physical restraint or opportunity to restrain."). Here, however, prior to his arrest, there was no testimony or other evidence that Arteaga had actually participated in any illicit drug transaction. For all the police knew, Arteaga could have merely been an innocent passenger or bystander, who might even be unaware that any crime had been committed by anyone. Accordingly, the trial court clearly erred in failing to suppress the evidence ("money outside the front passenger side" and "drugs visible in the backseat") and the defendant's incriminating statements obtained as a direct result of Arteaga's unlawful arrest. As such, the defendant's convictions should be reversed and his case remanded for dismissal, unless the prosecution can otherwise

proceed. *See Wong Sun v. United States*, 371 U.S. 471, 481 (1963) (The "fruit of the poisonous tree" doctrine excludes evidence discovered as a result of a violation of a defendant's constitutional rights and "extends as well to the indirect as the direct products of such invasion."); *People v. Rodriquez*, 945 P.2d 1351, 1363 (Colo. 1997) ("Evidence obtained as a direct result of an illegal search or seizure is inadmissible.").

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CERTIFICATE OF SERVICE

I certify that, on January 31, 2019, a copy of this Opening Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on L. Andrew Cooper of the Attorney General's office through their AG Criminal Appeals account.