Appendix B

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

APPELLATE DIVISION

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, vs. MURAT AKSU, Defendant/Appellant.	)	Case No.: 2010021861 OPINION AND JUDGMENT

On June 18, 2010, Defendant and Appellant, Murat Aksu (hereinafter "Mr. Aksu"), was stopped by a law enforcement officer in front of the Hall of Justice at the Ventura County Government Center on suspicion of engaging in terrorist activity. During the ensuing investigation, law enforcement officers determined that Mr. Aksu was using a concealed camera to secretly photograph women in the area in front of the entrance to the Hall of Justice. Criminal proceedings ensued and, ultimately, Mr. Aksu pleaded guilty to two counts of violating Penal Code section 647, subdivision (j)(2), a misdemeanor.

Mr. Aksu has filed two separate appeals wherein he alleges that four separate errors were made during his prosecution. In the first appeal, he argues three things:

(1) a pre-plea motion to suppress evidence was wrongfully denied, (2) that the court improperly accepted his guilty plea, and (3) the court committed error when it ordered Mr. Aksu to register as a sex offender pursuant to Penal Code section 290. In his second appeal, which has been consolidated with the first appeal, Mr. Aksu argues (4) that his motion to withdraw his guilty plea was wrongfully denied.

After a review of the record and legal authorities, each of the rulings and actions of the trial court is affirmed.

FACTS AND PROCEDURAL BACKGROUND

On the morning of June 18, 2010, Stephen Egnatchik of the Ventura County Sheriff's Office attended a department briefing where he learned from other officers that women who worked at the Ventura Government Center had complained about being followed by someone who was later identified as Mr. Aksu. The women reported that as Mr. Aksu got close to them, he appeared to manipulate something on his briefcase. When the women and Mr. Aksu got close to the entrance of the government center, Mr. Aksu would turn away and not follow them into the building.

Shortly after the briefing, Officer Egnatchik observed Mr. Aksu in the area in front of the Hall of Justice. Officer Egnatchik testified that as he started walking toward Mr. Aksu, Mr. Aksu saw him, then simultaneously changed his direction away from where he had been walking and placed his cell phone to his ear. Based upon what he had learned from the briefing sessions, his personal observations, and his training in

terrorist activities, Officer Egnatchik concluded that Mr. Aksu was engaged in "some kind of pre-planning for either some sort of terrorist activity or attack on the Government Center."

Upon initial contact, Officer Egnatchik asked Mr. Aksu what he was doing at the Government Center. Mr. Aksu said he was there to see two women who worked at the center. Notwithstanding that answer, Officer Egnatchik testified that he told Mr. Aksu that "I would like to search him and his briefcase for any sort of contraband for the terrorist related activity that I suspected." Per Officer Egnatchik, Mr. Aksu consented to the search, and when pornographic images and a small, wireless, HD video camera were discovered, Mr. Aksu demonstrated how he used the camera to film "attractive women." When asked if he ever "records" up women's dresses or any other parts of women, Mr. Aksu responded that he had recently accidentally filmed up the dress of a woman.

After this initial encounter between Officer Egnatchik and Mr. Aksu, other law enforcement officers became involved. Thereafter, there was a search of Mr. Aksu's vehicle, an interview at a sheriff's office facility, a review of the photos on Mr. Aksu's camera, and the issuance of a search warrant to search for related materials at Mr. Aksu's home.

Mr. Aksu was arrested, charges were filed, and a motion to suppress was filed and heard over a three-day period in June 2011. Mr. Aksu denied giving consent to Officer Egnatchik or others to search his person or property, and to the extent he may have unwittingly given consent, it was only because he was

overwhelmed by their presence and their demands. Notwithstanding Mr. Aksu's testimony, the court denied the motion to suppress.

Upon receiving the court's ruling on the motion to suppress, on June 16, 2011, Mr. Aksu pleaded guilty to two counts of violating Penal Code section § 647 subdivision (f)(2). At his sentencing hearing on October 3, 2011, the court imposed a lifetime Penal Code section 290 registration term. On October 11, 2011, Mr. Aksu filed his first appeal, asserting error in the motion to suppress, that the court improperly took his guilty plea, and that the court abused its discretion in ordering registration terms.

While the first appeal was pending, on April 2, 2012, Mr. Aksu filed a motion to withdraw his guilty plea. That motion was heard over the course of three days and denied on March 28, 2014. That ruling then became the subject of the second appeal, filed April 24, 2014, which by court order was consolidated with the first appeal.

DISCUSSION

I. MOTION TO SUPPRESS EVIDENCE

A. STANDARD OF REVIEW

The standard of review on a motion to suppress ruling, particularly when there is a claim of consent for the search is:

"Our guiding principles are well settled. Inasmuch as the search herein was conducted without a warrant, the burden was on the People to establish justification under a recognized exception to the warrant

requirement. (*People v. Rios* (1976) 16 Cal.3d 351, 355-356 [128 Cal.Rptr. 5, 546 P.2d 293].) The People relied on consent, which constitutes such an exception. (*People v. Michael* (1955) 45 Cal.2d 751, 753 [290 P.2d 852].) In that event, however, the People had the additional burden of proving that the defendant's manifestation of consent was the product of his free will and not a mere submission to an express or implied assertion of authority. (*People v. Johnson* (1968) 68 Cal.2d 629, 632 [68 Cal.Rptr. 441, 440 P.2d 921].) The voluntariness of the consent is in every case 'a question of fact to be determined in the light of all the circumstances.' (*People v. Michael*, *supra*, 45 Cal.2d at p. 753; accord, *People v. Reyes* (1974) 12 Cal.3d 486, 501 [116 Cal.Rptr. 217, 526 P.2d 225].)" (*People v. James* (1977) 19 Cal.3d 99.)

"Our role in reviewing the resolution of this issue is limited. The question of the voluntariness of the consent is to be determined in the first instance by the trier of fact; and in that stage of the process, 'The power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor proper exercise of that power, and the trial court's findings—whether express or implied—must be upheld if supported by substantial evidence.' (*People v. Superior Court (Keithley)* (1975) 13 Cal.3d 406, 410 (118 Cal.Rptr. 617, 530 P.2d 585]; accord, *People v. Ruster* (1976) 16 Cal.3d 690, 701 [129 Cal.Rptr. 153, 548 P.2d 353].)" (*Ibid.*)

At footnote 4 of *James*, *supra*, the court noted, "The People may discharge the foregoing burdens by a

preponderance of the evidence. (*United States v. Matlock* (1874) 415 U.S. 164.)"

In determining whether the trial court's express or implied findings are supported by substantial evidence, the reviewing court does not reweigh the evidence or reconsider the credibility of witnesses. Instead, on review, the court determines whether there is some evidence, no matter how slight, of reasonable, solid, credible value that supports the express or implied findings of the trial court. (*People v. Johnson* (1980) 26 Cal 3d. 557, 577-578 [162 Cal.Rptr. 431].)

B. ANALYSIS

The most reasonable interpretation of the record from the motion to suppress hearing is that the court found the initial contact between Officer Egnatchik and Mr. Aksu to be a consensual encounter that quickly transitioned into a temporary detention. Consensual encounters are not seizures and do not require any level of "cause." Temporary detentions are seizures and require reasonable suspicion of criminal activity.

"The Supreme Court recently summarized the governing principles: "The Fourth Amendment permits brief investigative stops ... when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.' *United States v. Cortez*, 449 U.S. 411, 417-418 [66 L. Ed. 2d 621, 101 S. Ct. 690] (1981); see also *Terry v. Ohio*, 392 U.S. 1, 21-22 [20 L. Ed. 2d 889, 88 S. Ct. 1868] (1968). The 'reasonable suspicion' necessary to justify such a stop 'is dependent upon both the content of information possessed by police and its

degree of reliability[,]'·*Alabama v. White*, 496 U.S. 325, 330 [110 L. Ed. 2d 301, 110 S. Ct. 2412] (1990) ... tak[ing] into account 'the totality of the circumstances .... *Cortez*, *supra*, at 417 .... Although a mere "'hunch'" does not create reasonable suspicion, *Terry*, *supra*, at 27 ... , the level of suspicion the standard requires is 'considerably less than proof of wrongdoing by a preponderance of the evidence,' and 'obviously less' than is necessary for probable cause, *United States v. Sokolow*, 490 U.S. 1, 7 [104 L. Ed. 2d 1, 109 S. Ct. 1581] (1989)." (*Navarette v. California* (2014) 572 U.S.__ [188 L. Ed. 2d 680, 134 S. Ct. 1683, 1687] (*Navarette*); accord, *Souza*, *supra*, 9 Cal.4th at pp. 229-231.) '[W]here a reasonable suspicion of criminal activity exists, "the public rightfully expects a police officer to inquire into such circumstances 'in the proper exercise of the officer's duties.'"' (*People v. Wells* (2006) 38 Cal.4th 1078, 1083 [45 Cal. Rptr. 3d 8, 136 P.3d 810] (*Wells*), quoting *In re Tony C.* (1978) 21 Cal.3d 888, 894 [148 Cal.Rptr. 366, 582 P.2d 957].)" (*People v. Brown* (2015) 61 Cal. 4th 968, 981.)

There cannot be a legitimate dispute that as Officer Egnatchik approached Mr. Aksu on the morning of June 18, 20l0, he had ample reasonable suspicion to engage Mr. Aksu in a temporary detention. Officer Egnatchik had just left a briefing where he had learned that several women had made complaints about Mr. Aksu. As he came upon Mr. Aksu in front of the government center, Officer Egnatchik observed Mr. Aksu's furtive behavior and was concerned that the brief case and cell phone might be part of terrorist

activity separate and apart from the complaints of the women.

Upon that basis, the search that immediately ensued would be justified either by obtaining voluntary consent from Mr. Aksu or by virtue of Officer Egnatchik's right to perform a *Terry* pat-down search for the safety of himself and others—albeit with the possible exception of reaching into Mr. Aksu's pockets.

However, it is not necessary to examine the propriety of the Terry pat-down search of Mr. Aksu's pocket. Rather, if consent was given for the search, either as part of a consensual encounter or as part of a valid temporary detention, then a *Terry* pat-down analysis as an alternate way to justify the search is unnecessary. Therefore, the real issue is whether or not consent was given for the search; and if so, was it free and voluntary rather than a mere submission to a claim of lawful authority or the result of coercion or duress. (*People v. James* (1977) 19 Cal. 3d 99; see also, *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983); *Schneckloth v. Bustamante*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).)

The trial court found that based upon the totality of the circumstances Mr. Aksu did in fact give consent for the search of his person and property and that the consent was free and voluntary. The trial court cited on the record the distinction between consensual encounters and temporary detentions, the length of the detention, the lack of restraints or drawn weapons, and the number of officers present. The court also discussed Mr. Aksu's level of sophistication, his cooperative behavior, and the reasons for the

cooperative behavior. Perhaps most importantly, the court cited Mr. Aksu' s lack of credibility and the court's sense that Mr. Aksu was attempting to "deflect the court from what really was going on."

The court's findings of free and voluntary consent are supported by substantial evidence. Accordingly, the trial court properly denied the suppression motion.

II. TAKING OF GUILTY PLEA

A. STANDARD OF REVIEW

The standard of review to determine if a plea is valid is whether the record affirmatively shows the plea to be voluntary and intelligent in the totality of the circumstances. (*People v. Mosby* (2004) 33 Cal.4th 353; see also, *Mills v. Municipal Court* (1973) 10 Cal.3d 288 [110 28 Cal.Rptr. 329, 515 P.2d 273]; *In Re Ronald* (1977) 19 Cal.3d 315 [137 Cal.Rptr. 781, 562 P .2d 684].)

B. ANALYSIS

On June 16, 2016, Mr. Aksu appeared in court with counsel and pleaded guilty to two counts of violating Penal Code section 647, subdivision (j)(2). In exchange, the remaining five counts were dismissed.

Prior to entering into this plea, Mr. Aksu executed a "Waiver of Constitutional Rights-General Misdemeanor" form. The plea form advised Mr. Aksu of his constitutional rights, and he acknowledged on the form that he knowingly and intelligently waived those rights. Mr. Aksu also acknowledged on the form that he had been advised of and understood the charges filed against him. Significantly, the form references with respect to the Penal Code section 290 registration that

the "DA will recommend 290; Defense will oppose; 290 discretionary not mandatory."

The minutes of June 16, 2011, reflects that Mr. Aksu was advised of the charges and his rights and that "[a]fter inquiry the court found that the defendant understood the nature of the charges, the consequences of conviction and his rights, and that he expressly, voluntarily, intelligently and understandingly waived his rights."

The transcript from the hearing reflects that the court confirmed that Mr. Aksu had read and signed the plea form. The court confirmed that Mr. Aksu had discussed with his attorney the factual basis of the charges. The court invited Mr. Aksu to ask his lawyer any questions prior to entering into his plea. Finally, the court confirmed as part Mr. Aksu's sentence that the court had the discretion to make a lifetime Penal Code section 290 registration order. Mr. Aksu indicated at the hearing that he understood all of those things.

As of the June 16, 2011, Mr. Aksu's case had been pending for 363 days. He had been represented by as many as four lawyers during the course of the case. He had just participated in an extended motion to suppress hearing. As pointed out in his appellate brief, Mr. Aksu is well-educated and at the time of the plea was employed as a civil electronics engineer for the federal government.

In light of the foregoing, it stretches credulity to believe that Mr. Aksu's plea was not voluntary and

intelligently entered into. He may now wish he had not entered into the plea, but that is a different matter.

We hold, therefore, that the trial court properly denied Mr. Aksu's motion to set aside his plea.

III. SENTENCING

A. STANDARD OF REVIEW

Although neither party has presented any authority for an appropriate standard of review, as a general principle sentencing matters are reviewed under an abuse of discretion standard. (Pen. Code, §§ 12, 13; *People v. Bolton* (1979) 23 Cal. 3d 208 [152 Cal.Rptr. 141].)

"Where, as here, a trial court has discretionary power to decide an issue, its decision will be reversed only if there has been a prejudicial abuse of discretion. '"To be entitled to relief on appeal ... it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice ...."' (6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 242, p. 4234, citations omitted.) However, 'discretion may not be exercised whimsically and, accordingly, reversal is appropriate "where no reasonable basis for the action is shown." [Citation.]' (*Marini v. Municipal Court* (1979) 99 Cal.App.3d 829, 835-837 [160 Cal.Rptr. 465]; see generally, 6 Witkin, Cal. Procedure, *supra*, § 244, pp. 4235-4236.)" (*Baggett v. Gates* (1982) 32 Cal. 3d 128 [185 Cal. Rptr. 232].)

B. ANALYSIS

The trial court exercised its discretion under Penal Code section 290.006 and imposed sex offender registration conditions upon Mr. Aksu.

As required by that code section, the court first found that Mr. Aksu's offense was committed for purposes of sexual compulsion or sexual gratification, and second, the court then stated the reasons for requiring lifetime registration.

On appeal, Mr. Aksu argues that the court abused its discretion both by considering improper information and because there was insufficient justification to impose a lifetime registration. We disagree.

The trial court succinctly articulated the reasons for its decision, and based upon those reasons, the court found that registration was necessary to protect the public from future similar offenses.

In reaching its findings, the court was entitled to give the weight it felt appropriate to the information it had before it. Clearly there was a reasonable basis for the court's ruling. The fact that a different judge may have drawn different inferences and made different orders is not an abuse of discretion.

In respect to Mr. Aksu's complaint that the court considered improper information in reaching its conclusions (and without addressing the merits of such a complaint), the People are correct that such an objection cannot be raised for the first time on appeal. (See *People v. Soto* (1997) 54 Cal.App4th l; also *People v. Scott* (1994) 9 Cal.4th 331.)

The additional objection that the court improperly considered the five dismissed charges in violation of *People v. Harvey* (1979) 25 Cal.3d 754 [159 Cal.Rptr. 696, 602 P.2d 396] is also not correct. The plea form executed by Mr. Aksu explicitly provides that "I agree that the court may consider all dismissed charges and related offenses ...."

Lastly, the arguments in respect to the sixth and eighth amendments are simply not well taken. (See *People v. Garcia* (2008) 161 Cal.App.4th 475; also, *People v. Hofsheier* (2006) 37 Cal.4th 1185; both overruled on unrelated grounds in *Johnson v. Department of Justice* (2015) 20 Cal.4th 871.)

IV. MOTION TO WITHDRAW GUILTY PLEA

A. STANDARD OF REVIEW

An order denying a motion to withdraw a guilty plea is reviewed under a clear abuse of discretion. (*People v. Breslin* (2012) 205 Cal.App. 4th 1409, 1416.)

B. ANALYSIS

On April 12, 2012, six months after his guilty plea, Mr. Aksu filed a motion to withdraw his guilty plea, pursuant to Penal Code section 1018. "Section 1018 provides, in part: 'On application of the defendant at any time before judgment ... , the court may, ... for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted .... This section shall be liberally construed to effect these objects and to promote justice.' The defendant has the burden to show, by clear and convincing evidence, that there is good cause for withdrawal of his or her guilty

plea. (*Ibid.*; *People v. Nance* (1991) 1 Cal.App.4th 1453, l457 [2 Cal. Rptr. 2d 670].) 'A plea may not be withdrawn simply because the defendant has changed his [or her] mind.' (*People v. Nance*, *supra*, 1 Cal.App.4th 1453, at p. 1456.) The decision to grant or deny a motion to withdraw a guilty plea is left to the sound discretion of the trial court. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254 [69 Cal. Rptr. 2d 784, 947 P.2d 1321]; *Nance*, at p. 1457.) A denial of the motion will not be disturbed on appeal absent a showing the court has abused its discretion." (*Nance*, at p. 1456; see *Fairbank*, at p. 1254 ["A decision to deny a motion to withdraw a guilty plea ... is final unless the defendant can show a clear abuse of [the trial court's] discretion."].) "Moreover, a reviewing court must adopt the trial court's factual findings if substantial evidence supports them." (*Fairbank*, at p. 1254.)

"To establish good cause to withdraw a guilty plea, the defendant must show by clear and convincing evidence that he or she was operating under mistake, ignorance, or any other factor overcoming the exercise of his or her free judgment, including inadvertence, fraud, or duress. (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1207-1208 [38 Cal. Rptr. 2d 592].) The defendant must also show prejudice in that he or she would not have accepted the plea bargain had it not been for the mistake. (*In re Moser* (1993) 6 Cal.4th 342, 352 [24 Cal. Rptr. 2d 723, 862 P.2d 723].)" (*People v. Breslin* (2012) 205 Cal.App. 4th 1409, 1416.)

Mr. Aksu's Penal Code section 1018 motion was heard over a period of three days. The court heard from four former attorneys of Mr. Aksu: a criminal law

specialist critical of Mr. Aksu's former attorneys, his psychologist, his girlfriend, and a witness who testified about various video images.

At the conclusion of the hearing, the court divided its ruling into two parts. The court first addressed the issue of whether the plea was made knowingly, intelligently, and voluntarily. Then the court addressed the issue of the competence of counsel.

In respect to the issue of the plea, the court found that Mr. Aksu's plea was entered knowingly, intelligently, and voluntarily. The trial court stated its reasons on the record. In addition, the court found an absence of fraud, duress, or undue influence. The court specifically considered and rejected the suggestion that Mr. Aksu only pleaded guilty because of bad advice or lack of preparation for trial by his attorneys. A review of the record abundantly supports this conclusion.

On the issue of competence of counsel, the court in detail addressed the two-part test of *Strickland v. Washington* (1984) 466 U.S. 668. Per *Strickland*, Mr. Aksu was required to show two things. First, that the advice he received from his attorneys fell below an objective standard of reasonableness. Second, that but for the errors of his attorneys, there was a reasonable probability that the results of the proceedings would have been different. (*Strickland*, at p. 693.)

As is the case in many criminal prosecutions, the dilemma presented to Mr. Aksu and his attorneys was whether to proceed to trial on all seven counts and face significant jail time or, in the alternative, to plead guilty to a reduced number of counts and focus their

available energy and resources on sentencing. Particular to this case, the real and significant issue was the Penal Code 290 registration.

The trial court received evidence about the advice Mr. Aksu received from his attorneys concerning the pros and cons of proceeding to trial. The court also heard and considered the testimony of the criminal law expert, Mr. Vogel, who was critical of Mr. Aksu's trial attorneys and opined that their advice was below the standard of reasonably competent attorneys.

After receiving and considering the evidence, the trial court in great detail discussed on the record how Mr. Aksu's attorneys evaluated the case and the likelihood of prevailing at trial. The court then cogently applied the evidence to the law, as set forth in the cases of *People v. Breslin*, *supra*, 205 Cal.App. 4th 1409, *In re Cudjo* (1999) 20 Cal.4th 673, and *In re Lucas* (2004) 33 Cal. 4th 682.

In its final analysis, the court acknowledged that the investigation conducted by Mr. Aksu's attorneys "was less than complete" in some respects; but overall, the court found that "it seems as though counsel were very well justified in being concerned that this case could not be defended successfully…" On that basis, the court concluded that Mr. Aksu did in fact have the benefit of competent counsel whose representation did not fall below an objective standard of reasonableness.

Lastly, during the hearing the trial court appropriately limited evidence of factual innocence and evidence on the issue of whether there would have been a reasonable probability of success but for the plea.

Evidence of factual innocence is not relevant in this type of proceeding (see *People v. Turner* (1985) 171 Cal.App.3d 116; also, *People v Kunes* (2014) 231 Cal.App.4th 1438) and evidence of reasonable probability of success became irrelevant and subject to a finding of harmless error in light of the finding that Mr. Aksu was not able to establish the first prong of the *Strickland* test.

Based upon the foregoing and a review of the record, the trial court's ruling was well-thought out and amply supported by substantial evidence. Mr. Aksu's appeal is denied.

DISPOSITION

The judgment of conviction and sentence is hereby AFFIRMED.

Dated: August 10, 2016

/s/ Rocky J Baio
ROCKY J. BAIO
Judge of the Superior Court

WE CONCUR:

/s/ Frederick H. Bysshe
FREDERICK H. BYSSHE
Judge of the Superior Court

/s/ Matthew P. Guasco
MATTHEW P. GUASCO
Judge of the Superior Court
Presiding Appellate Judge