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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. TERRINO LAMON BRYANT, Defendant and Appellant.	B266072 Los Angeles County Super. Ct. No. BA419881 **Public—Redacts material from sealed record**

APPEAL from a judgment of the Superior Court of Los Angeles County, Monica Bachner, Gail R. Feuer, and Michael Garcia, Judges. Reversed and remanded with directions.

Laurie Wilmore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General and Theresa A. Patterson, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

On New Year's Eve in 2013, police arrived at a single-family home in South Los Angeles to conduct a probation search of Devonte Holman, who was not charged in this case. While one officer knocked on the door, another officer peered through the blinds covering a side window, where he saw a man hand two guns to defendant Terrino Bryant, who disappeared with them into a nearby laundry room. Police ordered the occupants out of the house and confirmed Holman was not there. After they searched the house and discovered two handguns in the dryer, they arrested defendant for possession of the weapons. Defendant's motion to suppress the evidence was denied, and he was ultimately convicted of two counts of possession of a handgun by a felon.

Because the prosecution failed to establish Holman was subject to residential search terms, or that officers had a reasonable belief Holman was home, the motion to suppress should have been granted. Accordingly, we reverse the judgment with directions.

At defendant's request, we have also independently reviewed the transcripts from his sealed *Pitchess* hearing.[1] We conclude the record is insufficient to permit meaningful review. Accordingly, if the People elect to retry defendant, we direct the court to conduct another *Pitchess* hearing in accordance with the views expressed in the sealed portion of this opinion.

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1 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

FACTUAL AND PROCEDURAL BACKGROUND[2]

Around 9:30 p.m. on New Year's Eve, December 31, 2013, nine officers arrived at a single-family, four bedroom home in South Los Angeles to conduct a probation compliance check on probationer Devonte Holman.

Officers learned Holman's address by asking a third party to search for it in a probation database. Officer Julio Garcia was "aware" that Holman had "search probationary terms." Indeed, "everyone knew there was a Devonte Holman search conditions probationary person at that particular location." Officer Felipe Rocha was also aware that Holman had "search and seizure conditions."

Garcia believed Holman would be home when they arrived. He had no particular reason for this belief. "It was just his residence. So I was assuming he would have been home. I really don't have anything specific to say." In fact, Holman was not home.

As other officers knocked on the front door, Garcia monitored the back door to catch anyone who might run out. He stood on the driveway, which was adjacent to a bedroom window. Blinds were drawn over the window, but by leaning over about three feet from the driveway and putting his face two or three inches from the glass, Garcia was able to see inside. He explained, "I just had a need to see, so I just looked."

Garcia peered through the blinds for about a minute, watching a woman watch television. After he heard officers at the front door announce their presence, Garcia saw a black male

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[2] We have limited our discussion to those facts raised at the suppression hearing.

enter the bedroom and remove two firearms from a gym bag in the closet. Defendant entered the room, and the other man handed him the guns. Then, Garcia saw both men walk into the nearby laundry room.

Officers ordered all the occupants to leave the house and stand in the driveway while they conducted a protective sweep. After confirming Holman was not present, they searched the house. Rocha searched the dryer by prying the door open with a knife, and found the revolvers inside.

By first amended information filed March 5, 2014, defendant was charged with two counts of possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1); counts 3 and 4).[3] The information also alleged that defendant had two prior convictions—a 1993 conviction for robbery (§ 211) and a 2008 conviction for possession of a firearm by a felon (former § 12021, subd. (a)(1)).[4] The People alleged both convictions as prison priors (§ 667.5, subd. (b)) and alleged the robbery conviction as a strike prior (§ 667, subd. (b)–(i); § 1170.12, subd. (a)–(d)). Defendant pled not guilty and denied the allegations.

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[3] All undesignated statutory references are to the Penal Code.

[4] The Deadly Weapons Recodification Act of 2010 repealed and recodified former sections 12000 to 12809 without substantive change. (§§ 16000, 16005, 16010.) Effective January 1, 2012, former section 12021, subdivision (a) was recodified without substantive change at section 29800, subdivision (a). (Stats. 2010, ch. 711 (S.B. 1080), § 4 [repealed]; stats. 2010, ch. 711 (S.B.1080), § 6 [reenacted].)

On January 30, 2014,[5] defendant filed a motion for pretrial discovery of any law enforcement records indicating that the arresting officers had previously made untrue statements. The trial court conducted an in camera review of the potentially relevant records,

[REDACTED]

On February 10, 2014, defendant filed a motion to suppress evidence under section 1538.5, arguing that the search of his home and the seizure of evidence was unreasonable and violated his rights under the Fourth Amendment. (U.S. Const., 4th Amend.) He moved to suppress the items found in the house and the officer's observations through the bedroom window. The motion was brief, but did raise a specific challenge to the search team's basis for conducting a probation search, citing *People v. Harvey* (1958) 156 Cal.App.2d 516 and *People v. Madden* (1970) 2 Cal.3d 1017, among other authorities. A hearing was held on May 2, 2014. After further argument on May 21, 2014, the court denied the motion by written decision.

After a trial at which he did not testify, a jury convicted defendant of both counts. Defendant waived jury trial on the allegations and admitted the prior convictions.

The court denied defendant's motion to strike the prior convictions, and sentenced him to seven years and four months in state prison. The court selected count 3 as the base term and sentenced defendant to six years—the middle term of two years, doubled for the strike prior, plus two years for the prison priors.

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[5] The original information in this case was filed on January 29, 2014. All motions were filed after defendant was held to answer.

The court imposed 16 months for count 4—one-third the midterm of two years, doubled for the strike prior—to run consecutive.

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant contends the court erred in denying his motion to suppress because the prosecution failed to establish that Holman was subject to residential search terms; officers did not have a reasonable belief Holman was home; and peering in the bedroom window was an unconstitutional search.[6] Defendant also asks us to conduct an independent *Pitchess* review.

1. The evidence obtained from the warrantless search should have been suppressed because the search was unreasonable.

"The Fourth Amendment provides in relevant part that the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.' The Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.' " (*Florida v. Jardines* (2013) 133 S.Ct. 1409, 1414.) Because the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . [, it] is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home

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[6] The parties stipulated that defendant had standing to challenge the search.

without a warrant are presumptively unreasonable." (*Payton v. New York* (1980) 445 U.S. 573, 585–586, internal quotation marks omitted.)

"When a defendant raises a challenge to the legality of a warrantless search or seizure, the People are obligated to produce proof sufficient to show, by a preponderance of the evidence, that the search fell within one of the recognized exceptions to the warrant requirement. [Citations.] A probation search is one of those exceptions. [Citations.] This is because a 'probationer . . . consents to the waiver of his Fourth Amendment rights in exchange for the opportunity to avoid service of a state prison term,' except insofar as a search might be 'undertaken for harassment or . . . for arbitrary or capricious reasons.' [Citations.]

"Because the terms of probation define the allowable scope of the search [citation], a searching officer must have 'advance knowledge of the search condition' before conducting a search. [Citations.] Without such advance knowledge, the search cannot be justified as a proper probation search, for the officer does not act pursuant to the search condition. [Citations.] As the Supreme Court has held, 'a search founded on neither reasonable suspicion of criminal activity nor advance knowledge of a probation search condition can aptly be characterized as arbitrary.' [Citations.]

"Section 1538.5 affords criminal defendants a procedure by which they may seek suppression of illegally seized evidence. (§ 1538.5, subd. (a)(1), (d), (f)(1), (i), (m).) Our high court has said that section 1538.5 'provides a comprehensive and exclusive procedure for the final determination of search and seizure issues

prior to trial.' [Citation.] . . . The Evidence Code, including hearsay rules, applies to section 1538.5 motions. [Citations.]

" 'Section 1538.5, by its terms, authorizes a motion to suppress if "[t]he search or seizure without a warrant was *unreasonable*." ' (*People v. Williams* (1999) 20 Cal.4th 119, 129.) This requires that the 'defendant[] must do more than merely assert that the search or seizure was without a warrant. The search or seizure must also be unreasonable; that is, it must not fall within any exception to the warrant requirement.' (*Ibid*.) A three-step allocation of the burden of producing evidence governs, with the ultimate burden of persuasion always remaining on the People. '[W]hen defendants move to suppress evidence, they must set forth the factual and legal bases for the motion, but they satisfy that obligation, at least in the first instance, by making a prima facie showing that the police acted without a warrant. The prosecution then has the burden of proving some justification for the warrantless search or seizure, after which, defendants can respond by pointing out any inadequacies in that justification.' (*Id*. at p. 136.) The prosecution retains the ultimate burden of 'proving that the warrantless search or seizure was reasonable under the circumstances.' (*Id*. at p. 130.)" (*People v. Romeo* (2015) 240 Cal.App.4th 931, 939–941 (*Romeo*).)

1.1. Standard of Review

The question of whether the officers "knew" that Holman lived at the target house, was on probation, and was subject to search conditions is a question of historical fact, and we defer to the court's factual findings if they are supported by substantial evidence (*Romeo*, *supra*, 240 Cal.App.4th at pp. 941–942, 948–949). Accepting the court's factual findings does not end the

analysis, however. The additional question of whether, "under the Fourth Amendment, [the officers'] basis for executing a warrantless search was *reasonable* in light of the total mix of information known to [them], requires 'critical consideration, in a factual context, of legal principles and their underlying values' [citation], thus presenting a mixed question of law and fact, reviewable de novo . . . . [Citations.]" (*Romeo*, *supra*, at p. 949.)

1.2. The People did not prove that the search condition extended to Holman's residence.

Defendant contends the prosecution failed to prove that Holman's probation term was broad enough to allow police to search Holman's residence.[7]

As discussed, a criminal defendant, in order to obtain probation, may specifically agree to allow the police to search him without a warrant, and thereby waive his Fourth Amendment rights. (*People v. Bravo* (1987) 43 Cal.3d 600, 607.) Because any subsequent search is premised on a defendant's advance consent, however, the scope of the search is limited "to the terms articulated in the search clause." (*People v. Woods* (1999)

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[7] The People contend defendant forfeited this issue by failing to raise it at the suppression hearing. We disagree. "[B]y unambiguously asserting a *Harvey-Madden* objection in its written motion to suppress, the defense gave plenty of notice that it intended to challenge the evidentiary foundation for the warrantless search in this case, and in response to that objection, the prosecutor might have proved up the operative terms of probation in any number of ways." (*Romeo*, *supra*, 240 Cal.App.4th at p. 952.) Indeed, the defense repeatedly objected to testimony on this and other foundational issues, cross-examined the officers about it, and raised the issue at argument. Finally, the court ruled that police conducted a valid probation search. The issue is therefore cognizable on appeal.

21 Cal.4th 668, 681.) Put another way, "a probationer's expectation of privacy, and hence the reasonableness of a warrantless search, may vary depending on the scope of advance consent." (*Romeo*, *supra*, 240 Cal.App.4th at p. 950.)[8]

To determine "the scope of consent, we must use an objective test, evaluating the terms of the operative search clause in objective terms, without regard to either the subjective understanding the probationer might have [citation] or the searching officer's subjective intent in conducting the search [citation]." (*Romeo*, *supra*, 240 Cal.App.4th at p. 950.)

Here, "there is nothing in the record to aid an objective evaluation of the scope of advance consent that was given. We do not know whether the authorized scope of search extended just to" Holman's person, or if it also extended to property under his control. (*Romeo*, *supra*, 240 Cal.App.4th at p. 950.) If it did extend to his property, "we do not know whether it extended specifically to [his residence]. Nor do we know whether a search was authorized for any particular kind of contraband." (*Id.* at p. 951.)

"The omission of any particulars concerning the authorized scope of the search is not a minor detail. Unlike parole searches—where a searching officer's knowledge of a person's parole status *alone* is enough to justify a search of the parolee's person or any property under his control, including his residence—the permissible scope of a probation search is circumscribed by the terms of the search clause, and the scope

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[8] Although the principles in *Romeo* are not new, we acknowledge that the court did not have the benefit of that opinion when it ruled on the suppression motion.

may vary." (*Romeo*, *supra*, at p. 951; see *People v. Woods*, *supra*, 21 Cal.4th at p. 681 [search is "limited in scope to the terms articulated in the search clause"].)

In this case, the People failed to present any evidence of the scope of Holman's search term. When the prosecutor asked Garcia if he was aware that Holman "was on what you call search probationary terms[,]" Garcia answered, "Yes." When the prosecutor asked if Garcia understood "there was a Devonte Holman search conditions probationary person at that particular location," Garcia answered, "Yes." Similarly, the prosecutor asked Rocha if he was "aware that [Holman] is subject to search and seizure conditions[.]" Rocha answered, "Yes, Sir." Then the prosecutor asked him, "Were you aware that Devonte Holman was on probation?" He answered, "Yes, Sir." Rocha also agreed that he went into and through the house "to conduct the probationary search[.]" This was the entirety of the evidence presented on this topic at the suppression hearing.

"[M]ere knowledge that someone is on probation and subject to search, without more, may be insufficient where there is a challenge to the search." (*Romeo*, *supra*, 240 Cal.App.4th at pp. 951–952.) In this case, "the limited evidentiary presentation the prosecutor chose to make leaves us with no objective grounds upon which to rely in evaluating whether the permitted scope of search was exceeded." (*Id.* at p. 952.) We must conclude, therefore, that the People did not meet their burden.

1.3. Officers knew Holman was not at home when they conducted the search.

As discussed, even when a defendant waives the warrant requirement, he does not waive the reasonableness requirement. (*People v. Constancio* (1974) 42 Cal.App.3d 533.) That is,

a probation search, like any other consent-based, warrantless search, must be conducted in a constitutionally reasonable manner. (*People v. Bravo*, *supra*, 43 Cal.3d at p. 608.) Thus, "an officer . . . conducting a probation or parole search may enter a dwelling if he or she has only a 'reasonable belief,' . . . the suspect lives there **and** is present at the time." (*People v. Downey* (2011) 198 Cal.App.4th 652, 662, emphasis added.) Without a reasonable belief that the probationer is home, officers may not conduct the search.

Here, officers had no particular reason to believe Holman would be present when they arrived to search his residence at 9:30 p.m. on New Year's Eve. Indeed, Garcia testified that he thought Holman would be home because "it was just his residence. So I was assuming he would have been home. I really don't have anything specific to say." Regardless of what they thought in advance, however, once they arrived, it quickly became clear that Holman was not there.

Officers arrived at the house to discover other people living in it. They ordered everyone[9] out of the house and conducted a protective sweep to ensure Holman was not present. *Only then* did they search the house. That is, before officers searched the dryer and discovered the firearms, they had *actual knowledge* that Holman wasn't home. Thus, under *Downey*, they no longer had a " 'reasonable belief' " that Holman was "present at the time." (*Downey*, *supra*, 198 Cal.App.4th at p. 662.)

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[9] According to later trial testimony, officers allowed a mentally handicapped individual to remain inside, playing video games.

Accordingly, the People did not prove by a preponderance of the evidence that the warrantless search was a reasonable probation search.

1.4. The search was not otherwise justified.

Nor did the officers' observations through the window justify the search.[10] Without more, an individual carrying a handgun in his own home has not committed a crime that provides probable cause to arrest—much less an exception to the warrant requirement. (See *District of Columbia v. Heller* (2008) 554 U.S. 570, 635–636 [Second Amendment includes the right to have operable handguns in the home for purposes of self-defense]; *McDonald v. City of Chicago* (2010) 561 U.S. 742 [Second Amendment applies to the states].) If the police thought they had enough evidence to justify a warrant, they could have kept the Holman family assembled on the street, called a magistrate, and gotten one. They chose not to.

2. If the People elect to retry defendant, the court must conduct another *Pitchess* hearing.

Defendant requested, and the People did not oppose, that we independently review the *Pitchess* records submitted in the trial court and the sealed transcripts of the court's in camera examination of those records, to determine whether additional

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[10] The court denied the defense motion to suppress the officers' observations through the bedroom window after concluding the search condition gave them a lawful right to stand in the curtilage. Having determined that the probationary search itself was unreasonable, we need not reach the issue of whether peering through the window was also unreasonable. (See *Florida v. Jardines*, *supra*, 133 S.Ct. 1409 [intrusion onto curtilage is a search for 4th Amendment purposes].)

information should have been provided.

[REDACTED]

(*People v. Mooc* (2001) 26 Cal.4th 1216, 1227–1229 [record must be sufficient to permit appellate review] (*Mooc*).)

"For approximately a quarter-century our trial courts have entertained what have become known as *Pitchess* motions, screening law enforcement personnel files in camera for evidence that may be relevant to a criminal defendant's defense." (*Mooc*, *supra*, 26 Cal.4th at p. 1225.) In order to balance the defendant's right to discovery of records pertinent to his defense with the peace officer's reasonable expectation that his personnel records will remain confidential, the Legislature has adopted a statutory scheme requiring a defendant to meet certain prerequisites before his request may be considered. (See §§ 832.5, 832.7, 832.8; Evid. Code, §§ 1043–1047 [statutory scheme governing *Pitchess* motions].)

Discovery of *Pitchess* material "is a two-step process. First, defendant must file a motion supported by declarations showing good cause for discovery and materiality to the pending case. [Citation.] This court has held that the good cause requirement embodies a 'relatively low threshold' for discovery and the supporting declaration may include allegations based on 'information and belief.' [Citation.]" (*People v. Samuels* (2005) 36 Cal.4th 96, 109.)

"Once the defense has established good cause, the court is required to conduct an in camera review of the records to determine what, if any, information should be disclosed to the

defense. (Evid. Code, § 1045, subd. (b).)" (*People v. Samuels*, *supra*, 36 Cal.4th at p. 109.) Subject to certain statutory exceptions and limitations, the trial court must then disclose to the defendant " 'such information [that] is relevant to the subject matter involved in the pending litigation.' [Citation.]" (*Mooc*, *supra*, 26 Cal.4th at p. 1226.)

A trial court's ruling whether material in law enforcement records is relevant is reviewed for an abuse of discretion. (*Mooc*, *supra*, at 26 Cal.4th at p. 1219; *People v. Collins* (2004) 115 Cal.App.4th 137, 151.)

Here, the defense requested all complaints "relating to acts of coercive conduct, violation of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, illegal search/seizure, false arrest, perjury, dishonesty, writing of false police reports, [and] planting of evidence." There is no dispute as to the court's determination that good cause was shown, as evidenced by the decision to grant defendant's order to produce records and review the records in camera.

[REDACTED]

[REDACTED]

Accordingly, if the People elect to retry defendant in this case, we direct the trial court to conduct a new *Pitchess* hearing

[REDACTED]

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to enter an order granting defendant's motion to suppress. If the People elect to retry defendant, the court is directed to conduct another *Pitchess* hearing

[REDACTED]

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

ALDRICH, Acting P. J.

STRATTON, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.