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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JENNY MINHAE HONG, Defendant and Appellant.	B269010 (Los Angeles County Super. Ct. No. VA137580)

APPEAL from a judgment of the Superior Court of Los Angeles County, Patrick T. Meyers, Judge. Affirmed.

William L. Heyman, 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, Assistant Attorney General, Steven E. Mercer and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

Jenny Minhae Hong appeals from the judgment following her conviction on one count of leaving the scene of an accident resulting in injury to a person other than herself. (Veh. Code, § 20001, subd. (a).)[1] She contends that her trial counsel rendered ineffective assistance by failing to file a timely motion to suppress evidence. (Pen. Code, § 1538.5.) We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence at Trial

Around 3:30 p.m. on December 24, 2013, Andy Chin was riding his bicycle on Artesia Boulevard near Caliente Avenue in the City of Cerritos. A car struck his rear bicycle wheel and his bicycle frame, causing him to fall. He thought the car was a white Toyota or Lexus SUV.

Michael Cardenas was sitting in his truck in the driveway of a nearby house, facing the street. He saw a woman in a white truck hit a bicycle, look in her mirror, and quickly drive away. He honked his horn to alert the driver to stop. He saw the bicyclist hit his shoulder on the ground and remain on the ground in pain.

Ki'Jon Washington was in his home near the intersection of Artesia Boulevard and Caliente Avenue when he heard tires screeching in the street. He looked out the window and saw a minivan driving full speed down the street. He walked outside and saw a bicycle and a man

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[1] Further unspecified statutory references are to the Vehicle Code.

lying on the ground. The minivan was gone. Washington's cousin called the police.

An ambulance arrived and took Chin to the hospital. Chin suffered from a concussion and a fractured collar bone.

Los Angeles County Deputy Sheriff Ramiro Arguello responded to the accident and spoke to Cardenas and Washington, who said they heard a loud bang and saw a white van or SUV driving away. Cardenas thought the driver of the vehicle was Asian, approximately 40 years old with brown hair.

Paul Kim, Chin's son-in-law, learned about the accident around 4:30 p.m. on the day it occurred. He decided to look for the vehicle involved in the accident. He retrieved Chin's bicycle from the sheriff's substation. The bicycle was silver with blue and greenish/yellowish trim. The rear wheel was bent.

Kim drove around the neighborhood and stopped when he saw a white SUV parked in the driveway of a house a few blocks from the accident. He walked up the driveway to see the front of the car, which was facing the garage. Kim saw damage on the front bumper that he thought was consistent with the accident: paint in a similar color to the bicycle and tire marks around the same height as the bicycle tire. He used his cell phone to take pictures of the car, and he took the pictures to the front counter at the sheriff's substation, gave them the police report number and asked them to give the pictures to Deputy Arguello. The pictures were submitted into evidence at trial.

Deputy Arguello ran the license plate number from the car seen in Kim's pictures and determined that the car belonged to appellant. On

the evening of December 26, Deputy Arguello went to appellant's home to interview her and examined the car, which was on her driveway. Based on the condition of her car, Deputy Arguello believed that appellant was involved in the accident. The bicycle and the SUV were taken into custody as evidence.

Ellen Andrews, a Los Angeles County Sheriff's Department senior criminalist, examined the SUV and found damage to the lower front bumper, including blue and yellow paint transfer on the car and dark marks consistent with tire tread. When Andrews examined the bicycle, she saw missing blue paint as well as white paint transfer on the bicycle.

Another senior criminalist, Stephan Schliebe, examined blue and yellow paint transfers from the front bumper of the SUV and a white paint sample from the bicycle. He concluded that the blue and yellow paint on the SUV could have come from the bicycle and the white paint on the bicycle could have come from the SUV. He believed that the paint transfers likely occurred because the two collided.

Defense Evidence

Appellant presented no evidence on her behalf.

Procedural Background

Appellant was charged by information with one count of leaving the scene of an accident resulting in injury to a person other than herself. (§ 20001, subd. (a).) On November 17, 2015, the first day of trial (in the morning before jury selection began at 1:30 p.m.), appellant

filed a motion to suppress the evidence related to Kim's photographs of her car and Deputy Arguello's investigation. She argued that Kim's conduct in examining her vehicle and taking photographs, and Deputy Arguello's conduct in going onto her property to examine and impound her vehicle, constituted illegal searches and seizures in violation of the Fourth Amendment. The trial court denied the motion as untimely.

The jury found appellant guilty. The trial court suspended imposition of sentence and placed appellant on formal probation for three years under the condition that she serve 270 days in county jail. Appellant timely appealed.

DISCUSSION

Section 1538.5, subdivision (i), specifies the time within which a motion to suppress evidence must be made. In relevant part, it provides: "If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, . . . the defendant shall have the right to renew [a motion made at the preliminary hearing] or make the motion at a special hearing relating to the validity of the search or seizure *which shall be heard prior to trial and at least 10 court days after notice to the people, unless the people are willing to waive a portion of this time*." (Italics added.) Here, defendant's trial counsel did not file a motion to suppress until the first day of trial, without prior notice to the prosecution. As appellant concedes, the trial court was correct that the motion was untimely.

Appellant contends that his trial counsel was ineffective for not making a timely motion to suppress. Relying on a combination of testimony at the preliminary hearing and at trial, defendant contends that such a motion would have been successful, because the conduct of Kim and Deputy Arguello constituted illegal searches and seizures. As we explain, appellant is incorrect, and therefore cannot show prejudice from her attorney's failure to make a timely motion to suppress.

"The standard for showing ineffective assistance of counsel is well settled. 'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.]" (*People v. Gray* (2005) 37 Cal.4th 168, 206-207.) "Further, 'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.' [Citation.]" (*People v. Carrasco* (2014) 59 Cal.4th 924, 982.)

A. *Kim's Conduct*

"'The Fourth Amendment protects against unreasonable searches and seizures by Government officials and those private individuals acting as "instrument[s] or agent[s]" of the Government. [Citations.] It does not provide protection against searches by private individuals

acting in a private capacity. [Citation.] Thus, "'evidence secured by private searches, even if illegal, need not be excluded from a criminal trial.'" [Citations.]'" (*People v. Wilkinson* (2008) 163 Cal.App.4th 1554, 1565 (*Wilkinson*); see also *People v. Warren* (1990) 219 Cal.App.3d 619, 622 (*Warren*) ["It is well settled that the 'Fourth Amendment's prohibition against unreasonable search and seizure does not apply to searches by private citizens.' [Citations.]"].)

"'Determining whether the requisite agency relationship exists "necessarily turns on the degree of the Government's participation in the private party's activities, . . . a question that can only be resolved 'in light of all the circumstances.'" [Citation.] . . . The defendant bears the burden of proving that an agency relationship exists. [Citation.] [¶] 'In order to run afoul of the Fourth Amendment, therefore, the Government must do more than passively accept or acquiesce in a private party's search efforts. Rather, there must be some degree of Government participation in the private search. . . .'" (*Wilkinson*, *supra*, 163 Cal.App.4th at pp. 1565-1566.)

At the preliminary hearing, Kim testified that when he spoke with Deputy Arguello on the phone, the deputy told him the location of the accident and the description of the vehicle as a white SUV. Kim went to look for a vehicle matching the description and found a white SUV with "tire marks and paint damage consistent with hitting a bicycle." After taking pictures, he wrote a letter about it and submitted the letter and pictures to the sheriff's station. Kim testified that he was not told to conduct the search by anyone in law enforcement and did not tell anyone his plans; he did it on his own.

Relying on this preliminary hearing testimony, appellant argues that Kim was "'acting as an agent of the Government or with the participation or knowledge of [a] governmental official'" when he found appellant's car. (*United States v. Jacobsen* (1984) 466 U.S. 109, 113.) He is mistaken. The decision in *Wilkinson, supra,* is instructive. There, the boyfriend of the defendant's roommate told the police he suspected the defendant of secretly recording the roommate and her boyfriend. After the defendant refused to allow the police to search his room, the boyfriend became frustrated that the police did not do more. He asked an officer if he could search the defendant's room himself, and the officer replied that he could look anywhere in the apartment because he lived there, but he could not act as an agent of the police. The boyfriend entered the defendant's room and found compact discs of images the defendant had taken surreptitiously of the roommate and her boyfriend. The court concluded "there was insufficient government participation" in the boyfriend's search of the defendant's room to implicate the Fourth Amendment, reasoning that "the police did not affirmatively encourage, instigate, or initiate" the search of the room, the seizure of the discs, or the viewing of the discs.[2] (*Wilkinson*, *supra*, 163 Cal.App.4th at pp. 1568-1569; see also *United States v. Jarrett* (4th Cir. 2003) 338 F.3d 339, 347 discussed in *Wilkinson*, *supra*, 163 Cal.App.4th at p. 1567 [where FBI agents exchanged emails with a hacker who sent evidence

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[2] Although the court concluded the boyfriend's search was a private search, the court further concluded that the police "impermissibly exceeded the scope of the private search by directing [the boyfriend] to keep looking." (*Wilkinson, supra,* 163 Cal.App.4th at pp. 1572.)

of child pornography in computers he hacked and the agents told the hacker he was free to continue sending them more information, the court found no government agency, reasoning that the fact that the FBI "did not actively discourage [the hacker] from engaging in illicit hacking does not transform [him] into a Government agent."].)

In the present case, there is even less evidence of government agency than in *Wilkinson*, where the private actor specifically asked the police if he could conduct the search himself, and the officer knew about the search before it occurred. "'While a certain degree of governmental participation is necessary before a private citizen is transformed into an agent of the state, *de minimis* or incidental contacts between the citizen and law enforcement agents prior to or during the course of a search or seizure will not subject the search to fourth amendment scrutiny.' [Citation.] The relevant factors used in determining whether the governmental participation is significant, or *de minimis*, are '(1) the government's knowledge and acquiescence, and (2) the intent of the party performing the search.' [Citation.]" (*Warren*, *supra*, 219 Cal.App.3d at p. 622.) "'[M]ere knowledge and passive acquiescence'" do not suffice to establish the private citizen was acting as a government agent. (*Wilkinson*, *supra*, 163 Cal.App.4th at p. 1566.)

Here, while Kim likely wished to help law enforcement, there is no evidence that Deputy Arguello knew that Kim was going to look for the vehicle involved in the accident. Indeed, the evidence suggests that he did not know – Kim acted on his own. Further, even if the evidence suggested that Deputy Arguello suspected Kim might conduct a search (it does not), there is no evidence that he did anything more than

passively acquiesce in Kim's desire to find the vehicle by telling him the location of the accident and a description of the vehicle involved. He did not "affirmatively encourage, initiate or instigate the private action. [Citation.]" (*United States v. Smythe* (10th Cir. 1996) 84 F.3d 1240, 1243, cited in *Wilkinson*, *supra*, 163 Cal.App.4th at p. 1566.) In short, the evidence fails to show that Kim acted as a government agent, and a timely motion to suppress evidence on that ground would have been futile. Thus, appellant's trial counsel was not ineffective in failing to make a timely motion to suppress Kim's observations and photographs.

B. *Deputy Arguello's Conduct*

Appellant contends that given the location of her SUV, Deputy Arguello conducted an illegal search by "position[ing] himself between the garage door [of appellant's residence] and the front of the SUV to see the damage on the lower part of the SUV's front bumper." According to appellant, although the SUV was in plain view, its incriminating nature was not immediately apparent–the vehicle faced the garage, the damage was on the lower part of the bumper, and it was dark outside. Appellant misconstrues the scope of the plain view doctrine.

"'[I]t is not a Fourth Amendment search for a police officer to see an item that is exposed to public view, though the item is within the curtilage of a residence.' [Citation.]" (*People v. Strider* (2009) 177 Cal.App.4th 1393, 1406 (*Strider*).) "[T]he law is clear that not every technical trespass onto the curtilage amounts to a search. Just like any other visitor to a residence, a police officer is entitled to walk onto parts

of the curtilage that are not fenced off. 'Whether a driveway is protected from entry by police officers depends on the circumstances. The fact that a driveway is within the curtilage of a house is not determinative if its accessibility and visibility from a public highway rule out any reasonable expectation of privacy. [Citation.]' [Citation.]" (*People v. Zichwic* (2001) 94 Cal.App.4th 944, 953 (*Zichwic*), impliedly overruled on other grounds by *United States v. Jones* (2012) __ U.S. __, 132 S.Ct. 945 (*Jones*).[3]) Here, there is no evidence that appellant's driveway was fenced off or otherwise protected from public view, or that her SUV was blocked from public view in any manner. That Deputy Arguello may have needed to lean over to see the lower part of the bumper does not transform his conduct into an illegal search. (See *Zichwic*, *supra*, 94 Cal.App.4th at p. 954 ["It is also settled that it is not a search to view either the exterior of a vehicle or what is exposed to the public inside the vehicle, though it is a search for an officer to physically enter the vehicle. [Citations.]"]; *Jones*, *supra*, 132 S.Ct. at pp. 953-954 [because "[t]his Court has to date not deviated from the understanding that mere visual observation does not constitute a search," traditional police surveillance by "visual observation" would be "constitutionally permissible"]; *Strider*, *supra*, 177 Cal.App.4th at p. 1406 ["In line with the unremarkable proposition that an officer's observations with the

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[3] *Zichwic*'s holding that the government's installation of an electronic tracking device on the undercarriage of the defendant's truck was not a search was abrogated by the United States Supreme Court's holding in *Jones* that the placement of such a device constituted a search within the meaning of the Fourth Amendment. (See *Jones, supra*, 132 S.Ct. at pp. 948-952.) Nonetheless, the rest of the court's reasoning in *Zichwic* remains good law.

naked eye, from a vantage point open to the public, is ordinarily not regarded as a search within the meaning of the Fourth Amendment [citations], [the cases cited by the People] found no Fourth Amendment violation when officers entered the curtilage of various residences and made plain view observations. [Citations.]"].)[4]

Thus, a timely motion to suppress Deputy Arguello's observations would have been futile, and appellant cannot show prejudice from her trial counsel's failure to make such a timely motion.[5]

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[4] Further, as respondent points out, Deputy Arguello was entitled to impound appellant's car under section 22655.5, which provides in part that a "peace officer . . . may remove a motor vehicle from . . . private property . . . [¶] (a) When any vehicle is found upon a highway or public or private property and a peace officer has probable cause to believe that the vehicle was used as the means of committing a public offense. [¶] (b) When any vehicle is found upon a highway or public or private property and a peace officer has probable cause to believe that the vehicle is itself evidence which tends to show that a crime has been committed." (§ 22655.5, subds. (a), (b).)

[5] Based on this conclusion, we need not consider appellant's alternative contention that if counsel was not ineffective for failing to make a *timely* motion under section 1538.5, subdivision (i), the trial court erred in denying it as untimely, and that error was prejudicial because the motion was meritorious.

DISPOSITION

The judgment is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.