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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD CUNNINGHAM, Defendant and Appellant.	B272276 (Los Angeles County Super. Ct. No. TA138717)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael J. Shultz, Judge. Reversed and remanded with directions.

Richard L. Fitzer, 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, Paul M. Roadarmel, Jr. and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

In November 2015, Los Angeles County deputy sheriffs seized guns and ammunition during a warrantless search of a tent occupied by defendant Richard Cunningham. Defendant was charged with various firearms violations, and he moved to suppress evidence of the seized weapons. After the trial court denied the suppression motion, defendant entered a no-contest plea to two counts and was sentenced to four years in state prison.

As we now discuss, the trial court erred in concluding that defendant did not have an objectively reasonable expectation of privacy in his tent because it was erected without a permit on a public right-of-way. Accordingly, we remand the matter to the trial court with directions to permit the defendant to withdraw his no-contest plea, permit the People to reinstate the original charges, and conduct a further suppression hearing consistent with the views expressed in this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

On November 21, 2015, Los Angeles County deputy sheriffs seized two machine guns, a semiautomatic weapon, two revolvers, and ammunition during a warrantless search of a tent occupied by defendant. Defendant subsequently was charged by information with violating Penal Code[1] sections 29800, subdivision (a)(1) (felon in possession of a firearm) (counts 1–5), 33410 (possession of a silencer) (count 6), 32310, subdivision (a) (giving or receiving a large capacity magazine) (count 7), and 32625, subdivision (a) (possession or transportation of a machine

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

gun) (counts 8–9). The information also alleged that defendant had two prior "strike" convictions.[2]

Defendant filed a motion to suppress the evidence seized from his tent. (§ 1538.5.) A suppression hearing was held on April 5, April 18, and May 16, 2016. The evidence presented at the suppression hearing was as follows.

A. The Prosecution Case

1. Defendant's Arrest

(a) Deputy Stelter

Deputy Clayton Stelter testified that on the evening of November 21, 2015, he and deputies Steven Nemeth and Bao Dang went to investigate a reported illegal encampment. The encampment was located on a dirt lot surrounded by an eight foot chain-link fence immediately south of Lomita Avenue in Harbor City. A gate was closed and locked when the deputies arrived, but they were able to open the gate by pushing on it. Once the gate was opened, the three deputies entered the property.

From outside the gate, Deputy Stelter could see a makeshift encampment, including a tent with debris around it. As the deputies entered the lot, Deputy Nemeth activated a tripwire, which caused two pieces of metal to bang together. Defendant came out from his tent and said something like, "Hey, who's here?" The deputies identified themselves as deputy sheriffs, detained defendant at gunpoint, and patted him down for weapons. They then asked defendant to sit down on a box while Deputies Nemeth and Dang did a protective sweep. One of the deputies asked whether there was anything illegal in the

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[2] Both convictions, dated 1978 and 2005, were for assault with a deadly weapon (Pen. Code, § 245, subd. (a)).

camp that they should be worried about, and defendant replied, "No. Go ahead and check."

After walking to the front of the tent, Deputy Dang reported to Deputies Nemeth and Stelter that he had seen a machine gun inside. The deputies handcuffed defendant. Deputy Nemeth said to defendant, "You don't want some kid to come in here and find your gun and get hurt." Defendant then admitted he had additional firearms on the property.

(b) Deputy Nemeth

Deputy Steven Nemeth testified that when he and Deputy Stelter approached the dirt lot on November 21, 2015, they saw what appeared to be a tent and an illegal encampment. Upon entering the property, the deputies heard a metal clanking and saw defendant step out of his tent. Defendant said, "Hey, who is that?" The deputies identified themselves and asked defendant to approach them. Deputy Nemeth detained defendant pending a trespass investigation. The deputies believed defendant was trespassing "[b]ased on his own statements that he didn't live there, during questioning on the report, knowing it's not a common area for people to sleep. It's a dirt lot. It's not a residential neighborhood. It's gated, obviously. He didn't put the gate up himself[.]"

Deputy Nemeth asked whether defendant lived in the tent; he said he did. Deputy Nemeth then asked whether there was anything illegal in his tent or in the encampment. Defendant "said, no, there wasn't, and he had nothing to hide, 'Go ahead and search.' " Deputy Nemeth asked whether defendant owned the property on which he was staying; he said no. Defendant said he did not know who owned the property.

After Deputy Dang saw the machine gun, the deputies arrested defendant for weapons possession. Deputy Nemeth read defendant his *Miranda*[3] rights, and defendant said he wished to speak without an attorney present. Deputy Nemeth asked whether defendant had any additional weapons. Initially, defendant said he did not. Deputy Nemeth responded that he would hate for a child to enter the encampment and find a weapon and possibly harm himself; at that point, defendant admitted he did have more weapons and told Nemeth where they were. He said his guns were located in two black bags, one inside the tent, and the other just outside the tent. Deputy Dang searched the bags. Defendant never asked the deputies to stop searching or withdrew his consent to the search.

Deputy Nemeth said that about a week earlier, he had received a tip from defendant's ex-girlfriend that defendant had guns. During a traffic stop, the ex-girlfriend said that "[m]y ex-boyfriend . . . who is a piece of shit . . . has guns." Deputy Nemeth had not received any calls from the business owners about the illegal encampment, and he did not know whether defendant had permission to live on the property.

(c) Deputy Dang

Deputy Bao Dang testified that after defendant was detained, the deputy walked toward the tent's opening to make sure no one else was inside. The right side of the tent was open; the other three sides were closed. Deputy Dang looked inside the tent from about a foot from its opening. He observed what appeared to be the barrel of a gun sticking out of a black bag. He

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

entered the tent and seized the weapon, a machine gun. He then exited the tent and told his partners what he had recovered. Deputy Nemeth said there were other weapons in the tent; Deputy Dang did not recall whether Deputy Nemeth said defendant had given consent to search. Deputy Dang then reentered the tent and recovered another black bag that contained three more firearms—a .22-semiautomatic pistol and two .22-caliber revolvers—and ammunition. His partners then told him there might be another gun outside the tent, and he located an additional machine gun outside the tent, in a container or bag of some sort.

2. Ownership of the Dirt Lot

Dale Williams, a City of Los Angeles Bureau of Engineering employee, testified that the dirt lot where defendant's tent was located was an unpaved portion of Doble Avenue. Williams explained that the dirt lot was privately owned, but had been designated a public right-of-way—i.e, "an area that's been dedicated for use by the public, such as a public street, public alley, or public walkway." According to Williams, a paved street and an unimproved public right-of-way are "the same, except one is paved and one is not."

Williams testified that nearly all of the streets in the City of Los Angeles are constructed over property that is privately owned, but over which the city has an easement for a public right-of-way. The owner of the underlying fee cannot prevent a member of the public from entering a public right-of-way, even if the area has been fenced off or gated off.

Williams testified that if someone wanted to construct a tent on a public right-of-way, he or she would have to get a permit from the Bureau of Engineering Public Works

Department. "[A]nything that's constructed in the public right-of-way requires a permit . . . . [¶] If it's anything that's not a standard street improvement, it would require . . . what we call a revocable permit, which allows [construction of] something that is nonstandard." If someone were to build something on a public right-of-way without a permit, he could be asked to remove it or be cited for a code violation.

B. The Defense Case

Defendant testified on his own behalf. He said that at the time of his arrest, the tent was his home. The tent was next to a fence, behind which was a pallet manufacturing yard. The barbed wire on top of the fence had been installed by the surrounding businesses, and defendant had put an additional piece of barbed wire atop the gate.

Defendant testified that he did not own the dirt lot and had not asked anyone for permission to be on it. However, defendant had a relationship with the business owners of the surrounding properties, and he "was under the belief it was okay . . . from the people there" for him to be on the lot.

Defendant said that his tent had four sides, and the inside of the tent was not visible from the outside. To exit the tent, defendant lifted up a flap; once he exited, the flap fell back down. Defendant did not give the deputies permission to search his tent, and none of the bags inside defendant's tent was open. Nonetheless, one of the deputies went immediately into defendant's tent and came out with a machine gun. The deputy then went back into the tent and found a second bag containing three firearms.

Defendant does not recall any of the deputies asking if he had anything illegal inside the tent or in the surrounding

encampment. He does not believe he ever alerted any of the deputies that there were more firearms inside his tent. He does recall one of the deputies saying he would hate for children or other people to find additional weapons and harm themselves. At that point, defendant thought about what the deputy said. It "wasn't a good idea to leave what was there on that lot since I was gonna go to jail, and I didn't want a child to find any – or . . . somebody that shouldn't at all, you know, have any access to anything like that, fall into their possession." Defendant therefore directed the deputy to a bag outside the tent that contained an additional weapon.

Jeff Costa, a street service supervisor for the City of Los Angeles, testified for the defense that the dirt lot on which defendant had erected his tent was an unpaved portion of Doble Avenue, which Costa referred to as a "paper street." He explained that the dirt lot was owned by the adjoining landowners, over which the city had an easement. Costa did not know on which portion of the dirt lot defendant's tent was situated.

Defendant attempted to call as a witness Scott Hayworth, an owner of one of the adjoining businesses. Defense counsel made an offer of proof that Hayworth would testify "that he's one of the business owners on Doble; that he knows Mr. Cunningham; Mr. Cunningham comes and goes; and that he has no complaints with him being there when he is there; and that he never heard other business owners complain; that Mr. Cunningham has his phone number and has often alerted him when there's been other people in the area or people that were suspicious." The court ruled that the testimony was irrelevant and excluded it.

C. Ruling

At the conclusion of testimony, defense counsel argued that defendant had a reasonable expectation of privacy in his tent. Counsel noted that there was no evidence that defendant had ever been asked to leave his encampment or had ever been cited for a code violation. Further, "[i]f there's a permit violation, nobody testified as to what that permit violation is. Even the engineer couldn't say what [code] [defendant] was violating. . . ."

The People urged that defendant lacked a reasonable expectation of privacy in his tent because it was erected on a public right-of-way, and defendant had not obtained a permit.

The trial court noted that there was a subjective and objective aspect to defendant's expectation of privacy. The court found that defendant had clearly demonstrated a *subjective* expectation of privacy, noting that defendant "set up a tripwire in order to warn him of intruders. [¶] There was a fence around there. He contributed to the fence. The fence was essentially closed, and the police essentially had to break through the fence in order to get in." Accordingly, the only significant issue is whether defendant had an *objectively reasonable* expectation of privacy—"that is, whether this is the type of right that society wants to protect."

The trial court determined that defendant did not have an objectively reasonable expectation of privacy, making the following findings:

"I do not think that society is recognizing the expectation of privacy of somebody who's camped on a public easement, which is not appropriate, and it . . . is against the law to build structures without a permit. It is against the law to camp. . . . [¶] He didn't have permission to be there. None of the business owners could

have given him permission, and they didn't. The city or municipality shouldn't, can't and wouldn't have given him permission to be there.

"I believe [defendant] knew he didn't have permission to be there. Whether there was a specific code that he was violating or whether they cited a specific code, I don't think it's necessary for purposes of determining whether or not he had a legitimate expectation of privacy in this property and this structure . . . . [¶] For that reason, and for that reason alone, the motion is denied.

"Now, with that said, I think the issue of whether he gave consent is a red herring. Dang testified he didn't even hear it. So, even if the defendant gave consent, it doesn't matter because Dang did what he did without knowing that there was consent. [¶] . . . [¶]

". . . [I]f the court is mistaken [about defendant's reasonable expectation of privacy], [the deputy sheriffs] had no business going in there. They had no business. They didn't even have probable cause. [¶] The tip was from his angry girlfriend that he had guns, not even that the guns were illegal, not even that he was a person who was precluded from possessing guns. [¶] There's really nothing wrong with possessing a firearm. So, they had no probable cause. They broke in.

"And then even if they obtained consent, the consent was obtained at gunpoint, which would have . . . [vitiated] any consent. [¶] But the bottom line is, he doesn't have and didn't have a legitimate expectation of privacy, so the motion [to suppress] is denied."

D. No Contest Plea and Appeal

On May 16, 2016, defendant entered a no-contest plea to counts 1 and 8 and admitted a prior strike. Defendant was sentenced to four years in state prison.

Defendant timely appealed from the judgment of conviction.

CONTENTIONS

Defendant contends the trial court erred in denying his suppression motion because he had a reasonable expectation of privacy in his tent. The People disagree, urging that as a matter of law, an individual cannot have an objectively reasonable expectation of privacy in a tent erected without a permit on a public right-of-way.

DISCUSSION

I.

Legal Principles

A defendant may move to suppress evidence on the ground that "[t]he search or seizure without a warrant was unreasonable." (§ 1538.5, subd. (a)(1)(A).) A warrantless search is presumed to be unreasonable, and the prosecution bears the burden of demonstrating a legal justification for the search. (*People v. Redd* (2010) 48 Cal.4th 691, 719.)

The threshold issue before us is whether the challenged actions by the officers—i.e., the warrantless search of defendant's tent—" ' " 'has infringed an interest of the defendant which the Fourth Amendment was designed to protect.' [Citations.] . . ." [Citations.]' (*People v. Shepherd* (1994) 23 Cal.App.4th 825, 828.) ' "An illegal search or seizure violates the federal constitutional rights only of those who have a legitimate expectation of privacy in the invaded place or seized thing. [Citation.] The legitimate

expectation of privacy must exist in the particular area searched or thing seized in order to bring a Fourth Amendment challenge." [Citation.]' (*People v. McPeters* (1992) 2 Cal.4th 1148, 1171, italics omitted; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 971; *People v. Roybal* (1998) 19 Cal.4th 481, 507.)

" 'A defendant has the burden at trial of establishing a legitimate expectation of privacy in the place searched or the thing seized.' (*People v. Jenkins*, *supra*, 22 Cal.4th 900, 972.) 'A person seeking to invoke the protection of the Fourth Amendment must demonstrate both that he harbored a *subjective* expectation of privacy and that the expectation was *objectively reasonable*. [Citation.] An objectively reasonable expectation of privacy is "one society is willing to recognize as reasonable." [Citation.] Stated differently, it is an expectation that has " ' "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." ' " [Citation.]' (*People v. Hughston* (2008) 168 Cal.App.4th 1062, 1068 (*Hughston*); see also *Smith v. Maryland* (1979) 442 U.S. 735, 740; *U.S. v. Dodds* (10th Cir. 1991) 946 F.2d 726, 728 (*Dodds*).)

" ' "A 'reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. [Citation.]" [Citation.]' (*Rains v. Belshé* (1995) 32 Cal.App.4th 157, 173.) 'There is no set formula for determining whether a person has a reasonable expectation of privacy in the place searched, but the totality of the circumstances are considered.' " (*People v. Nishi* (2012) 207 Cal.App.4th 954, 960–961, italics added (*Nishi*).)

" ' "The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial

court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." ' (*People v. Redd* (2010) 48 Cal.4th 691, 719.)" (*People v. Cervantes* (2017) 11 Cal.App.5th 860, 867.)

II.

An Individual's Reasonable Expectation of Privacy in a Tent or Temporary Dwelling

In *U.S. v. Sandoval* (9th Cir. 2000) 200 F.3d 659 (*Sandoval*), the court considered a defendant's reasonable expectation of privacy in a tent located on public land. In that case, federal agents discovered a medicine bottle bearing defendant's name during a warrantless search of defendant's makeshift tent on Bureau of Land Management (BLM) land. Through the medicine bottle, the agents were able to connect defendant to marijuana growing nearby. (*Id.* at p. 660.) As a result, defendant was indicted on drug and conspiracy charges. (*Ibid.*) Defendant moved to suppress evidence discovered during the warrantless search; the district court denied the motion.

The Ninth Circuit reversed. It concluded that defendant had a subjective expectation of privacy, and that defendant's expectation of privacy was objectively reasonable. The court explained that in prior decisions, it had held that a person can have an objectively reasonable expectation of privacy in a tent located on private property or on a public campground. In the case before the court, the tent was located on BLM land, not on a public campground, and it was unclear whether the defendant had permission to be there. However, the court said, "we do not believe the reasonableness of Sandoval's expectation of privacy

turns on whether he had permission to camp on public land. Such a distinction would mean that a camper who overstayed his permit in a public campground would lose his Fourth Amendment rights, while his neighbor, whose permit had not expired, would retain those rights." (*Sandoval*, *supra*, 200 F.3d at pp. 660–661, fn. omitted.)

The court distinguished the present case from its prior decision in *Zimmerman v. Bishop Estate* (9th Cir. 1994) 25 F.3d 784, 787–788, where the court held a squatter in a residential home did not have an objectively reasonable expectation of privacy. "First, camping on public land, even without permission, is far different from squatting in a private residence. A private residence is easily identifiable and clearly off-limits, whereas public land is often unmarked and may appear to be open to camping. Thus, we think it much more likely that society would recognize an expectation of privacy for the camper on public land than for the squatter in a private residence. [¶] Second, the facts of *Zimmerman* contrast starkly with the facts presented here. In *Zimmerman*, the appellants were asked on several occasions over the course of eight months to vacate the premises, and there was 'no dispute of material fact regarding the ownership of the property or whether the [owners] acquiesced in the presence of the [appellants].' [Citation.] By contrast, though Sandoval did not obtain permission to camp on BLM land, he was never instructed to vacate or risk eviction, and the record does not establish any applicable rules, regulations or practices concerning recreational or other use of BLM land. Indeed, whether Sandoval was legally permitted to be on the land was a matter in dispute." (*Sandoval*, *supra*, 200 F.3d at p. 661.) Accordingly, because defendant's subjective expectation of

privacy was objectively reasonable, the district court erred in denying defendant's motion to suppress. (*Ibid*.)

In *People v. Hughston* (2008) 168 Cal.App.4th 1062 (*Hughston*), the Court of Appeal relied on *Sandoval* to conclude that defendant had a reasonable expectation of privacy in a tent set up in a camping area of a public fairground during a three-day music festival. There, officers arrested defendant after observing him engage in what appeared to be a narcotics sale. They located his tent, which contained a make-shift kitchen, sleeping bags, chairs, and defendant's vehicle. (*Hughston*, at pp. 1066.) A search of defendant's tent revealed an enormous cache of narcotics. Defendant was charged with four narcotics offenses, to which he pled guilty after the trial court denied his motion to suppress. (*Id*. at pp. 1065–1067.)

On appeal, defendant contended that the trial court erred in denying the motion to suppress because he had a reasonable expectation of privacy in the tent that enclosed his vehicle. (*Hughston*, *supra*, 168 Cal.App.4th at p. 1068.) The Court of Appeal agreed. It noted that while no California court had ruled on whether a person has a reasonable expectation of privacy in a camping tent, other courts had extended Fourth Amendment protections to tents. (*Hughston*, at p. 1069.) Further, the court said, "the ultimate issue is not whether [defendant] had 'a property right' in the location searched by the police, but whether he had 'a legitimate expectation of privacy' in that location." (*Id*. at p. 1070.) In the present case, the defendant did: "*Sandoval* is directly on point. Although it was 'unclear' whether the defendant had permission to camp on the BLM land, the court held the reasonableness of the defendant's expectation of privacy did not turn on that issue. [Citation.] . . . . [¶] [Here,]

[t]he tent structure was erected on land specifically set aside for camping during the music festival. . . . Considering the totality of the circumstances [citation], we reject [the People's] argument that more evidence of [defendant's] right to camp at the site was required to justify an objectively reasonable expectation of privacy in the tarp structure. As the Colorado Supreme Court reasoned in *People v. Schafer* [(Colo. 1997)] 946 P.2d [938], 944: 'Whether pitched on vacant open land or in a crowded campground, a tent screens the inhabitant therein from public view. Though it cannot be secured by a deadbolt and can be entered by those who respect not others, the thin walls of a tent nonetheless are notice of its occupant's claim to privacy unless consent to enter be asked and given. One should be free to depart the campsite for the day's adventure without fear of this expectation of privacy being violated. Whether of short or longer term duration, one's occupation of a tent is entitled to equivalent protection from unreasonable government intrusion as that afforded to homes or hotel rooms. [Citations.]' " (*Hughston*, *supra*, 168 Cal.App.4th at pp. 1070–1071.) The *Hughston* court thus concluded that defendant had an objectively reasonable expectation of privacy in his tent, and that the officers' entry violated the Fourth Amendment unless an exception to the warrant requirement applied. (*Hughston*, at p. 1071.)

The Court of Appeal reached a contrary result in *People v. Thomas* (1995) 38 Cal.App.4th 1331 (*Thomas*), determining that defendant lacked a reasonable expectation of privacy in his temporary shelter, a cardboard box on a public sidewalk. During a warrantless search of the box, police officers discovered stolen property. Defendant was arrested and charged with receipt of stolen property. Defendant moved to suppress the evidence

taken from the box; the trial court denied the motion. (*Id*. at pp. 1332–1334.)

The Court of Appeal affirmed. It noted that defendant's sidewalk residence violated section 41.18 of the Los Angeles Municipal Code, which provided that " '[n]o person shall sit, lie or sleep in or upon any street, sidewalk or other public way.' " (*Thomas*, *supra*, 36 Cal.App.4th at pp. 1333–1334, fn. 1.) Moreover, defendant was aware that he was violating the Municipal Code because his shelter and those of other homeless people residing in the same area had been removed by street maintenance crews several months earlier. (*Thomas*, at pp. 1333–1334.) The Court of Appeal concluded that defendant therefore lacked a reasonable expectation of privacy in his "box illegally placed on a public sidewalk" (*id*. at p. 1334): "Where, as here, an individual 'resides' in a temporary shelter on public property without a permit or permission and in violation of a law which expressly prohibits what he is doing, he does *not* have an objectively reasonable expectation of privacy. [Citations.] In short, a person who occupies a temporary shelter on public property without permission and in violation of an ordinance prohibiting sidewalk blockages is a trespasser subject to immediate ejectment and, therefore, a person without a reasonable expectation that his shelter will remain undisturbed. [Citations.] [¶] It is undisputed that Thomas's box was on the public sidewalk without the permission of the city, in violation of section 41.18 of the Municipal Code. For this reason, Thomas was subject to immediate ejectment (which, as he conceded, had occurred in the past) and the trial court's finding that Thomas had no objectively reasonable expectation of privacy was clearly correct." (*Id*. at pp. 1334–1335, fn. omitted.)

The Court of Appeal similarly concluded in *Nishi*, *supra*, 207 Cal.App.4th 954, in which defendant was camping in a tent in a wildlife preserve. During a search of defendant's campsite, sheriff deputies found ammunition under a tarp outside defendant's tent. (*Id.* at p. 959.) Defendant moved to suppress evidence discovered during the warrantless search of his campsite, and the trial court denied the motion.

The Court of Appeal affirmed. Although the court recognized that an individual can have a reasonable expectation of privacy in a tent, it found that principle did not apply to the case before it because defendant's tent was in an area where camping was prohibited without a permit, and defendant had been cited by officers for illegal camping and had been evicted from other campsites in the preserve on at least four or five recent occasions. (*Nishi*, *supra*, 207 Cal.App.4th at p. 961.) Thus, "both the illegality, and defendant's awareness that he was illicitly occupying the premises without consent or permission, are undisputed." (*Ibid.*)

Further, "in contrast to *Sandoval* and *Hughston*, not only was defendant clearly camped in a prohibited location, the shotgun shells were seized from *outside* his tent, in a pile of debris under a loose tarp. While a tent located in a public campground may be considered a private area where people sleep and keep valuables, functionally somewhat comparable to a house, apartment, or hotel room, the remainder of defendant's unauthorized, undeveloped campsite was a dispersed, ill-defined site, exposed and open to public view." (*Nishi*, *supra*, 207 Cal.App.4th at p. 962.)

III.
The Trial Court Erred in Concluding That the City's Easement Precluded Defendant's Reasonable Expectation of Privacy

The trial court concluded that defendant did not have a reasonable expectation of privacy in his tent because it was located on a public right-of-way and defendant had not obtained a permit to be there. For the reasons that follow, this was error.

The People urged in the trial court that defendant's expectation of privacy was not objectively reasonable because his encampment violated the law. Below, the People did not identify the statute or ordinance they believed governed; on appeal, they rely on the Los Angeles Municipal Code, section 62.08, subdivision III.B (section 62.08), which requires a permit for "*all structures*" placed in improved or unimproved public rights-of-way. According to the People, because tents are "structures," and because the lot where defendant placed his tent was a public right-of-way, defendant's tent necessarily was subject to section 62.08.

We do not agree that section 62.08 required defendant to obtain a permit to erect his tent on the lot. Section 62.08 governs "the approval process for the installation of above ground facilities (AGFs)," defined as "*all structures*, cabinets, electric meters, *and any other appurtenance installed for telecommunication or utility purposes*." (Los Angeles Municipal Code, § 62.08, subd. I, italics added.) Under well-established principles of statutory interpretation, " ' "[w]here general words follow specific words in a [statute] the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." ' "

(*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 754.) Thus, the "structures" to which section 62.08 refers appear to be those "installed for telecommunication or utility purposes." Because defendant's tent plainly was not being used for telecommunication or utility purposes—and, indeed, may not have been "installed" within the meaning of section 62.08—it was not governed by that section.

In any event, even *were* defendant's tent subject to section 62.08, the cases discussed above make clear that an individual's legal right to place on a tent on public property is not dispositive of his reasonable expectation of privacy in the tent. To the contrary, as we have said: "[T]he ultimate issue is not whether appellant had 'a property right' in the location searched by the police, but whether he had 'a legitimate expectation of privacy' in that location." (*Hughston*, *supra*, 168 Cal.App.4th at p. 1070.) Accordingly, while the legal status of property may be *a* factor relevant to an individual's reasonable expectation of privacy, it is not the *only* factor. Instead, the trial court should have considered " '*the totality of the circumstances*.' " (*Nishi*, *supra*, 207 Cal.App.4th at pp. 960–961, italics added.) It failed to do so.

Moreover, there was evidence before the trial court to support the conclusion that defendant did have a reasonable expectation of privacy in his tent. That evidence included the following:

First, although there was testimony that the lot had the same legal status as a paved street, it indisputably did not resemble one. The lot was unpaved, covered by dirt and grass, and surrounded on all sides by fencing. Nothing about the appearance of the lot suggested a public street, sidewalk or alley; to the contrary, the photographs introduced as exhibits suggest

that the lot resembled the private industrial property to which it was adjacent. Thus, a trier of fact could conclude that defendant was not reasonably on notice of the lot's public character.

Second, although defendant did not have the City's permission to camp on the lot, the cases discussed above support the conclusion that permission is not dispositive. As *Sandoval* notes, land is often unmarked, and its ownership and availability for camping may not be apparent. Thus, a defendant's privacy rights under the Fourth Amendment turn on the *reasonableness* of his belief that he was permitted to be where he was, not the accuracy of that belief. In the present case, there is no evidence of any posted signs that would have indicated to a member of the public that the lot was a public right-of-way. Further, defendant testified without contradiction that he had a relationship with the surrounding business owners and believed they permitted him to reside on the vacant lot. And, defendant testified that he had never been "instructed to vacate or risk eviction." (*Sandoval*, 200 F.3d at p. 661; *Hughston*, *supra*, 168 Cal.App.4th at pp. 1069–1070.) Accordingly, a trier of fact could conclude that defendant reasonably believed that he was permitted to camp on the lot.

Third, defendant testified that the tent was his home. He further testified that the tent had four sides and a top, that the heavy tarp of which the tent was constructed prevented someone on the outside of the tent from seeing inside, that he had put barbed wire and a lock on the gate that was the entry point to the dirt lot on which the tent was located, and that he had placed a tripwire immediately inside the gate to warn him of intruders. A trier of fact thus reasonably could conclude that defendant's tent both " 'screen[ed] [defendant] from public view' " and provided

" 'notice of its occupant's claim to privacy unless consent to enter be asked and given.' " (*Hughston*, *supra*, 168 Cal.App.4th at p. 1070.)

In light of this evidence, the conclusion that defendant lacked a reasonable expectation of privacy in his tent is not compelled as a matter of law. Accordingly, a remand is necessary to allow the trial court to make findings on the factors relevant to defendant's reasonable expectation of privacy.

IV.

This Matter Must Be Remanded to the Trial Court for a Further Suppression Hearing

Because a remand for further factfinding is necessary, for the guidance of the trial court we identify some of the factors that may be relevant to the question of defendant's reasonable expectation of privacy:[4]

(1) *Whether the tent was operating as defendant's temporary home.* Adopting the analysis of *Sandoval* and *Hughston*, we conclude that an individual can have a reasonable expectation of privacy in a tent that functions as a temporary home. (*Sandoval*, *supra*, 200 F.3d at pp. 660–661; *Hughston*, *supra*, 168 Cal.App.4th at p. 1069; see also *Nishi*, *supra*, 207 Cal.App.4th at p. 962 [tent may be functionally comparable to a house, apartment, or hotel room].) "In determining whether [defendant] had a reasonable expectation of privacy in his tent, we take notice that tents have long been utilized as temporary or

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[4] On remand, if the court believes it would be helpful, it may conduct a further evidentiary hearing. If it holds such a hearing, defendant should be permitted to introduce evidence that he had permission to be on the property, including through the testimony of Scott Hayworth.

longer term habitation." (*People v. Schafer*, *supra*, 946 P.2d at p. 942; see also *Alward v. State* (1996) 112 Nev. 141, 150, disapproved on another ground in *Roskey v. State* (2005) 121 Nev. 184, 190–191, fn. 10 [making temporary residence in a tent, rather than a hotel, did not diminish defendant's expectation of privacy: "Indeed, holding that temporary residence at a hotel ensures Fourth Amendment protections, while temporary residence in a tent does not, would limit the protections of the Fourth Amendment to those who could afford them."].) On remand, therefore, the trial court should consider whether the tent was functioning as defendant's home.

(2) *Whether the lot's appearance reasonably put defendant on notice that it was "clearly off limits."* As we have discussed, *Sandoval* held that one of the factors relevant to a defendant's reasonable expectation of privacy is whether the land is "easily identifiable and clearly off-limits," or is instead "unmarked." (*Sandoval*, *supra*, 200 F.3d at p. 661.) On remand, therefore, the trial court should consider whether the appearance of the lot on which defendant was camping reasonably put him on notice that it had been designated a public right-of-way, or, instead, whether defendant reasonably believed it was privately owned.

(3) *Whether defendant had been asked to vacate the property.* One of the factors on which *Sandoval* relied in finding that the defendant had a reasonable expectation of privacy was that although he did not have express permission to be on the property, "he was never instructed to vacate or risk eviction." (*Sandoval*, *supra*, 200 F.3d at p. 661.) In contrast, the *Thomas* and *Nishi* courts noted in concluding that the defendants did *not* have reasonable expectations of privacy that the defendants

previously had been evicted from similar locations. (*Thomas*, *supra*, 38 Cal.App.4th at pp. 1333–1334; *Nishi*, *supra*, 207 Cal.App.4th at p. 961.) On remand, therefore, the trial court should consider whether defendant had ever been directed to vacate the property.

(4) *Whether defendant reasonably believed he had permission to camp on the property.* The *Sandoval* court held that although the defendant did not obtain permission to camp on BLM land, the lack of express permission was not dispositive. (*Sandoval*, *supra*, 200 F.3d at p. 661.) Similarly, in *Hughston*, the court said defendant was not "required to prove [that] his occupancy of the searched site was legal by showing he had paid required camping fees and erected a structure of permissible size" in order establish his reasonable expectation of privacy; it was enough that "[t]he tent structure was erected on land specifically set aside for camping." (*Hughston*, *supra*, 168 Cal.App.4th at p. 1070.) In contrast, in *Nishi* the defendant had previously been cited for illegal camping. (*Nishi*, *supra*, 207 Cal.App.4th at p. 961.) On remand, therefore, the trial court should consider whether defendant reasonably believed he had express or implied permission to camp on the lot.

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If on remand the trial court concludes, after considering the factors outlined above, that defendant had a reasonable expectation of privacy in his tent, it must then consider whether the warrantless search of the tent was otherwise lawful. We note in this regard that there was conflicting testimony regarding (1) whether defendant's weapons were in plain view,[5] and

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[5] Officer Dang testified that one side of defendant's tent was open, and that from outside the tent he could see what appeared

(2) whether defendant consented to the search of his tent. The trial court may also wish to consider the extent to which defendant had a reasonable expectation of privacy in the duffle bag outside his tent.

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to be a gun barrel protruding from a duffle bag. Defendant testified, in contrast, that all four sides of the tent were covered by a tarp when the deputies arrived, and the inside of the tent was not visible from outside the tent. Defendant further testified that none of the duffle bags in his tent was open.

DISPOSITION

The judgment is reversed and the matter is remanded to the superior court with directions to vacate defendant's no-contest plea. If the People so request, the superior court shall reinstate the charges contained in the information, and the superior court shall conduct a further suppression hearing, as discussed more fully herein. We leave to the trial court's discretion the determination whether taking additional evidence is necessary to resolve the issues addressed herein.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

BACHNER, 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.