Filed 10/2/12 P. v. Banks CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RONALD D. BANKS, Defendant and Appellant.	B239886 (Los Angeles County Super. Ct. No. BA389718)

APPEAL from a judgment of the Superior Court of Los Angeles County, William N. Sterling, Judge. Affirmed.

James C. Huber, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Ronald D. Banks appeals from the judgment entered following a jury trial which resulted in his conviction of possession of cocaine base for the purpose of sale (Health & Saf. Code, § 11351.5) [1] and his admissions that he had suffered four convictions for the possession of certain unlawful substances for the purpose of sale within the meaning of Health and Safety Code section 11379.2, subdivision (a), and served two prison terms within the meaning of Penal Code section 667.5, subdivision (b). The trial court sentenced Banks to eight years in local custody. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. The prosecution's case.

Los Angeles Police Officer Dennis Jarrott was assigned to the Southwest Division Narcotics Enforcement Detail. Since working in the Narcotics Department for the previous two years, Jarrott has "been involved in well over 500 narcotic arrests related to possession for sales. [He is] also a court-qualified expert . . . for . . . possession for sales of narcotics." Jarrott has been involved in numerous cases involving "cocaine base," which is also referred to as "crack cocaine" or "rock cocaine." According to Jarrott, to make crack cocaine, powdered cocaine is mixed with other ingredients, then heated until it forms a "rock" or "disk." Small pieces, usually a gram or one-half gram, are broken off the rock or disk and sold for varying amounts. The dealer usually weighs the piece of cocaine on a small scale, then wraps it in a baggie or clear plastic. In order to hide it from police, the seller will put the cocaine in a pocket, in their mouth, in their socks or "up their rear."

Dealers of cocaine are very often also users. Sometimes, in order to determine whether an individual is a dealer as well as a user, the officer will look for things "such as the scales, baggies, . . . currency, . . . how much [money the individual has and in what] denominations" and how much cocaine the individual has in his or her possession. In

[1] Banks was tried with a codefendant, Markiss Robinson, who was also charged with possession for sale of cocaine base in violation of Health and Safety Code section 11351.5. The jury found Robinson not guilty.

addition, if a police officer sees a lot of activity around a particular residence, the officer might obtain a search warrant and search the house or apartment and the individual living there for large amounts of narcotics.

In October 2011, Jarrott had been watching a duplex at 2920 South Normandie Avenue in Los Angeles County. He had noticed that, both during the day and at night, there had been "heavy pedestrian traffic that was consistent with narcotics sales" to the second story of the building.

On the afternoon of October 6, 2011, Jarrott and eight or nine other officers wearing Los Angeles Police Department raid jackets, "serv[ed] a search warrant at 2920 South Normandie Avenue." After announcing that they were police officers there to serve a warrant, the officers forced open the front door and "made entry." Jarrott had his gun drawn and was carrying it at a "low ready" angle.

Three or four people were inside the apartment, one of whom was Banks. While other officers detained other individuals, Jarrott and one other officer detained Banks, who was alone in the back bedroom, sitting on a chair next to a table. On the table, Jarrott "immediately observed [six] off-white rock-like substance[s] that resembled rock cocaine[,]" baggies, a razor, $4 in U.S. currency, and a cell phone. The rock-like substances were individually wrapped in plastic. Jarrott took the items and "booked [them] into evidence."

When Jarrott searched other rooms in the house, he found in a closet a "cookie shape form of [an] off-white rock-like substance that resembled rock cocaine" and, right next to it, a digital scale with white residue on the top. Next to the scale was a box of baggies. The "cookie" was in the shape of a circle, but with pieces broken off.[2] In the

[2] It was stipulated that the rock-like items, after being booked into evidence and following a proper chain of custody, "were tested by criminalist Marie Chance, who being qualified to perform such narcotics testing conducted an instrumental analysis on [the] items by FTIR around December 15, 2011" and determined that they contained the presence of cocaine in the form of cocaine base. Of the two items tested, one weighed 1.29 grams and the second weighed 16.19 grams.

"east bedroom," Jarrott discovered $516 in cash. Jarrott booked all four items into evidence.

As he searched through the apartment, in addition to the rock-like objects, the scale, the currency, the phone, the baggies and the razor, Jarrott found mail, including a statement from the Department of Water and Power, addressed to Ronald Banks.

Nicholas Gallego is a Los Angeles police officer assigned to the Southwest Narcotics Enforcement Detail. He was present for the serving of the search warrant at Banks's South Normandie Avenue apartment. Gallego was the "point officer," or the first officer to enter the apartment. After a time, Gallego moved to a location "outside of the bedroom[s], alongside the rear door." There, he was given a cell phone by Officer Jarrott. When the phone, a flip-phone taken from the table Banks had been sitting next to, began to ring, Gallego answered it. The person on the other end asked for "Ron" and when Gallego said that he was "Ron," a male voice stated, "I got a bing bing. I'll be there in ten minutes." Approximately 10 minutes later, Robinson showed up at the back door to the apartment.

Los Angeles Police Officer David Acee also participated in the search of Banks's apartment on October 6, 2011. Acee was in full uniform and "helping to secure the scene." He was the officer who, when there was a knock on the back door, answered it to find Robinson standing outside. Just inside the apartment, by the door, Acee handcuffed Robinson. He and another officer, Detective Reyes, then searched Robinson. The officers found no weapons or narcotics. Reyes did, however, remove a cell phone from one of Robinson's pockets and give it to Acee. Officer Acee then gave the phone to Officer Gallego. Gallego then had custody of both Banks's and Robinson's phones.

In the meantime, Robinson was taken into the bathroom where a number of officers, including Jarrott, intended to strip search him. Although the officers were able to look through his clothing, "[when they] got to the point where he took his pants down

and [they] asked him to bend over," he would not cooperate. His evasive actions prevented completion of the search.[3]

Los Angeles Police Officer Armando Mendoza assisted with the October 6, 2011 search of 2920 South Normandie. Mendoza was assigned to the Narcotics Enforcement Detail, worked in plain clothes and had been part of the "entry team." Once inside the apartment, Mendoza and other officers attempted to locate individuals there to detain them. The officers "then . . . conducted a search of the location."

After the unsuccessful strip search, Robinson was detained and seated in a chair. Mendoza was "assigned to keep an eye on [him]." While Mendoza was watching him, he saw Robinson lift "his hips off the chair and retrieve[] something from his rear buttocks area." Mendoza then saw "something falling off the back of the chair area onto the floor." Mendoza retrieved the object and determined that "it was a white plastic that contained five individually packaged clear off-white solids resembling crack cocaine." After telling him that he had retrieved it from under Robinson's seat, Mendoza gave the container to Officer Jarrott.[4]

Officer Gallego, who was standing nearby, still had custody of both Banks's and Robinson's cell phones. When Banks's flip phone rang again, Gallego answered it. The call was from a female who asked if Banks had a "ten." Third and fourth calls were both from males asking for 20's.

Robinson's phone also rang and Gallego answered it. The first caller, a male, asked to speak with "Snipe." When Gallego said that he was Snipe, the voice asked if he could get a 20. The second caller did not believe that Gallego was Robinson and hung up.

---

[3] Robinson apparently "squatted down and said[,] 'I ain't got shit. Search me at the station.' "

[4] The substance, which was determined to be cocaine base, weighed ".45 grams" and was considered to be a "usable amount."

With regard to the use of rock cocaine, Officer Jarrott testified that an average user would probably smoke approximately a half of a gram. The individual could smoke it in as little as an hour, or make it last all day. A "heavy" crack cocaine user could use anywhere from one to seven grams in a day. In October 2011, a gram of crack cocaine would likely sell for between $20 and $30. In general, buyers approached sellers and simply asked for a "10 or 20."

Jarrott's opinion was that Banks was selling cocaine. Jarrott came to this conclusion "from the amount of surveillance [he had] conducted on [the] location; seeing the heavy pedestrian traffic [there]" and, during the execution of the search warrant, the recovery of the large amount of narcotics, the baggies on the table used to package the rock cocaine, "the amount of currency Mr. Banks . . . had that was in small denominations [and] in no particular order; [and] the phone calls that came in asking for $20 [and] $10 . . . ." In addition, the fact that "Mr. Banks's phone apparently . . . had received a call from Mr. Robinson's phone impact[ed his] opinion." Jarrott explained: "The fact that Officer Gallego, he received that phone call ten minutes prior, asking for a bing bing. [¶] Approximately ten minutes [later], Mr. Robinson came to the back door. He was then detained. Officer Gallego then called back the last number that [had been] called from Mr. Banks's phone. . . . And Mr. Robinson's phone rang, which made [Jarrott] further believe that he was coming there to either get rock cocaine or . . . deliver some rock cocaine." Jarrott believed that Banks wasn't just a heavy user "[b]ecause of the amount [of cocaine] he had[,] . . . the tools he had, such as the scale, . . . [and] the baggies he had on the table. . . ." Jarrott admitted, however, that he did not see Banks touching the drugs on the table or personally wrapping the drugs. He did not have any baggies in his hand.

b. *Defense evidence.*

Ronald Banks testified that he arrived at the apartment at 2920 South Normandie at approximately 4:00 p.m. on October 6, 2011.[5] He did not live at the apartment. He was there to visit a friend. Banks lived at 58th and 55th Avenues.

Police officers arrived at approximately 5:00 p.m. Banks was coming out of the restroom, which is in the hallway between the living room and the back bedroom, when he heard a loud crash, "like glass breaking." A young woman who lived at the apartment came running down the hall from the bedroom toward the living room and went to the door to see what had happened. She looked down the stairway, then called out to the four or five people who were in the apartment, " '[It's] the police.' " Banks, who heard "stomping" as the officers were coming up the stairway, knew the police "had guns out" so he simply "stood where he was[, in the hallway between the bathroom and the living room,] and raised [his] hands up in the air." When the officers entered, they first pointed their weapons at the people in the living room. Officer Jarrott then came down the hallway, spotted Banks and told him to "get down on the floor." Banks followed Jarrott's instructions and was then placed in handcuffs. He was escorted to the living room and placed in a "couch-like" seat where he sat for between 15 and 20 minutes. He was then placed under arrest and transported to the police station. At no time while the police were in the apartment was Banks in the back bedroom sitting in a chair next to a table.

Banks indicated that the cell phone which had been sitting on the table in the bedroom did not belong to him. It belonged to the young lady who stayed at the apartment. Banks did not know why anyone would call the phone and ask to speak to "Ron."

After the prosecutor showed to Banks the Department of Water and Power bill addressed to him at 2920 South Normandie Avenue, Banks nevertheless insisted that he

---

[5] Banks admitted having prior convictions which involved moral turpitude. The convictions occurred in 1997 and 2001.

did not live there. He had stayed at the apartment for awhile in 2006 and he believed the bill must have been from that period of time.

When it was pointed out to Banks that he was in a house where there was close to 20 grams of rock cocaine, Banks acknowledged that that was what the officers had testified to. However, Banks knew that the closet where the officers said the cocaine was found had been locked with a dead bolt. Banks indicated that the "lady who stay[s at the apartment] ha[d] it locked" and he knew that simply from seeing the deadbolt on the door.

When he was shown a photograph of rock cocaine, Banks stated that he did not know what it was. Although he had seen rock cocaine before, he was not certain that that was what was depicted in the photograph. When he was shown a photograph of the scale, Banks stated that he recognized it as a scale, "but . . . did not have it in the closet."

Banks met Robinson "in October after this arrest and during this incarceration." They had been placed in the same holding tank at the jail. Banks had never seen Robinson before that day. Banks had been taken from the apartment before Robinson arrived and Robinson had not come to the apartment to buy from or sell to Banks crack cocaine.

2. *Procedural history.*

Following a preliminary hearing, a two-count information was filed on November 8, 2011. In count 1 it was alleged that, on or about October 6, 2011, Ronald Banks committed the crime of possession for sale of cocaine base in violation of Health and Safety Code section 11351.5. It was further alleged as to count 1 that, on December 12, 1979, and pursuant to Health and Safety Code section 11370.2, subdivision (a), Banks had been convicted of one count of Health and Safety Code section 11378.5, possession for sale of designated substances including phencyclidine and, between October 22, 1991 and October 31, 2001, Banks had been convicted of three counts of possession for sale of cocaine base in violation of Health and Safety Code section 11351.5. Finally, as to count 1, it was alleged that, pursuant to Penal Code section 667.5, subdivision (b), Banks suffered the following convictions for which he served prison

terms: On February 10, 2009, he was convicted of the attempted possession of a designated controlled substance in violation of Penal Code section 664 and Health and Safety Code section 11350, and on April 10, 2008, he suffered a conviction for possession of a designated controlled substance in violation of Health and Safety Code section 11350.[6]

During the prosecution's case, the prosecutor informed Banks that he had a right, if he wished, "to have this jury hear the evidence [regarding his prior] convictions. [He] could also have a court trial on th[em]. At that trial, [he] would have a right to confront and cross-examine all witnesses against [him] and the right to use the subpoena power of the court at no cost to [him] and the right to present a defense and testify as a part of that defense." The trial court then added that Banks had "the right against self-incrimination" or the right to remain silent. When asked if he was willing to "give up all of those rights[,]" Banks responded, "Yes, sir."

Banks admitted his prior convictions and prison terms. He admitted that, in 1979, he had suffered a conviction for Health and Safety Code section 11378.5, possession for sale of a designated substance, including phencyclidine, and in 1991, 1997, and 2001, he had suffered convictions for Health and Safety Code section 11351.5, possession for sale of cocaine base. In addition, Banks admitted that pursuant to Penal Code section 667.5, subdivision (b), in 2001 he had been convicted of and served a prison term for the attempted possession of a designated controlled substance in violation of Penal Code section 664 and Health and Safety Code section 11350; and in 2008, he had suffered a conviction for possession of a designated controlled substance in violation of Health and Safety Code section 11350. The trial court "accept[ed] [Banks's] waivers and admissions" and found that they had been "knowingly[,] . . . intelligently [and] voluntarily made."

---

[6] Count 2 and the related allegations pertain to Markiss Robinson, who is not a party to this appeal.

After the People had rested and moved their exhibits into evidence, Banks's counsel made a motion for acquittal pursuant to Penal Code section 1118.1. The trial court denied the motion.

Banks testified on his own behalf. Before he did so, his counsel argued that his prior convictions for Health and Safety Code sections 11351.5 and 11378.5, possession for sale, were too remote to be used to impeach him in the present case. She argued that the most recent of those convictions occurred in 2001, which was well over 10 years ago. Although Banks did have prior convictions from 2008 and 2009, they were not for possession for sale, but for mere attempted possession and possession of controlled substances.

After hearing the prosecutor argue that the convictions should be allowed, the trial court noted that the 2008 and 2009 convictions did not involve moral turpitude. The court then indicated that it did not think that 10 years was so long ago, particularly if one, like Banks, had been born in 1957. The court did, however, determine that it would only allow the prosecutor to refer to a sanitized version of Banks's priors. For example, the prosecutor could ask, " 'Isn't it true that you have prior felony convictions involving moral turpitude?' " The trial court's ruling was that Banks's 1997 and 2001 priors were not too remote, but that the prosecutor could only refer to them "with [a] sanitized question . . . ."

During direct examination, Banks's counsel asked, "Mr. Banks, isn't it true that you have prior felony convictions involving moral turpitude?" Banks responded, "Yes, ma'am." Counsel then asked, "And isn't it true [that] those prior felony convictions involving moral turpitude occurred in 1997 and 2001?" Banks again responded, "Yes ma'am." The trial court then instructed the jury that it could only "consider those prior felony convictions insofar as they affect[ed] the witness's credibility or believability and for nothing else."

After being instructed by the court and hearing the parties argue, the jury began its deliberations on January 18, 2012. On January 19, the jurors requested a read back of Officer Mendoza's testimony. After hearing the testimony read back, the jurors resumed

their deliberations. That same day, the jury foreperson indicated that the jury had reached verdicts on both counts.

With regard to Banks, who was charged in count 1, the jury found him "guilty of the crime of possession for sale of cocaine base, in violation of Health and Safety Code section 11351.5, a felony . . . ."

Banks was sentenced on January 25, 2012. Before the court imposed sentence, Banks's counsel argued that, although he had several prior convictions, the most recent for possession for sale were more than 10 years old. Counsel asserted that the fact that his most recent convictions were for an attempt to posses and simple possession of cocaine base should be considered mitigating factors. Counsel asked that the court strike the Health and Safety Code section 11370.2, subdivision (a) priors and impose the mid-term of four years on the current offense, plus one year each for the section 667.5, subdivision (b) priors, for a total sentence of six years.

The trial court indicated that "if [it] were talking about street sales where there [had been] . . . a couple of rocks or something, then it would be different. But [the court thought] the quantity here was significantly more. He's not a major drug dealer, but he's not a street dealer either. How much was it? Was it 15 grams?" Accordingly, the trial court sentenced Banks to the "high term of five years, plus three years for [one of] the Health and Safety Code section 11370.2 priors," for a total of eight years in local custody.

The court awarded Banks presentence custody credit for 112 days actually served and 112 days good time/work time, for a total of 224 days. Banks was then ordered to pay a $240 restitution fine (Pen. Code, § 1202.4, subd. (b)), a $30 criminal conviction assessment (Gov. Code, § 70373), a $40 court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)) and a $50 laboratory analysis fee (Health & Saf. Code, § 11372.5). All remaining priors and allegations were stricken pursuant to Penal Code section 1385 "because the court determine[d] eight years [was] sufficient punishment and the . . . last sales related case was in 2001."

Banks filed a notice of appeal on March 13, 2012.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed July 11, 2012, the clerk of this court advised Banks to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. On August 1, 2012, Banks submitted a letter brief in which he asserted his trial counsel had been ineffective.

"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. Carter* (2003) 30 Cal.4th 1166, 1211; see *Strickland v. Washington* (1984) 466 U.S. 668, 694.) If the defendant makes an insufficient showing with regard to either component, the claim must fail. (*People v. Holt* (1997) 15 Cal.4th 619, 703.)

Here, Banks asserts there were inconsistencies in the testimony which counsel failed to address. Although a review of the record indicates that there were several discrepancies in the various witnesses' testimony, they were not substantial. Moreover, they dealt primarily with the conduct of police officers with regard to Banks's codefendant, Robinson. There were very few inconsistencies in the prosecution's witnesses' testimony regarding Banks.

Banks indicates his counsel was remiss in waiting until immediately before trial to indicate that she wished to file a motion to suppress evidence. However, the record indicates that, just before trial was set to begin, Robinson's counsel informed the trial court that the "actual unsealed portion of the search warrant affidavit [had] just [been] given to [both defense counsel that day]." Neither counsel wanted to file a motion before having had the opportunity to "view the search warrant and the affidavit." The trial court responded: "You know, the defendants want to waive time, so you can do that. I'll consider putting it over so you can, but if they're not going to waive time, it's their cases.

If they don't want to waive time, they want to go to trial, then I'm not going to hear it. . . . [¶] . . . [¶] They have the option." Banks informed his counsel that he did not wish to waive time.

Although it appears that defense counsel could have obtained the necessary records sooner,[7] the fact that she did not caused Banks no prejudice. Counsel for both defendants acted when there was still sufficient time to bring a motion to suppress evidence. That Banks refused to waive time so that his counsel could do so is not counsel's fault.

Banks asserts his counsel failed to perform simple discovery when she did not determine that the bill from the Department of Water and Power addressed to Banks at the South Normandie Avenue address was dated sometime in 2006. The assertion is without merit. The bill was discovered by Officer Jarrott. Jarrott never testified as to the date on the bill. It was only Banks who stated that the bill must have been from sometime during 2006. In addition, although Banks asserts his counsel failed to determine the actual date of the bill, that may not have been the case. Counsel may have looked at the bill and determined that it was current. This is particularly so since, when Jarrott testified that he found the bill, counsel chose to ask no questions with regard to the date which appeared on it.

Moreover, apart from counsel's actions, it is apparent the jury did not believe Banks. "*At trial*, 'it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends.' [Citation.] *On appeal*, an appellate court deciding whether sufficient evidence supports a verdict must determine whether the record contains substantial evidence—which we repeatedly have described as evidence that is reasonable, credible, and of solid

---

[7] The trial court indicated that the unsealed portion of the record would have been on file in the clerk's office, so defense counsel could have "gone and gotten it [themselves]." In addition, the trial court indicated that on the transfer sheet from Judge Ricciardulli, it was indicated that " 'defense counsel made an untimely request to unseal search warrant affidavits . . . for impeachment purposes. Trial judge must conduct 402 and determine if affidavit should remain sealed.' "

value—from which a reasonable jury could find the accused guilty beyond a reasonable doubt. [Citation.] 'In evaluating the sufficiency of evidence, "the relevant question on appeal is not whether *we* are convinced beyond a reasonable doubt" [citation], but "whether ' "*any* rational trier of fact " ' could have been so persuaded." . . .' [Citation.]" (*People v. Hovarter* (2008) 44 Cal.4th 983, 996-997.) Here, it is clear the jury reasonably chose not to believe Banks when he testified that the bill was from 2006.

Banks argues that his counsel was also ineffective for failing to determine that the cell phone found on the table did not belong to him. Initially, as stated above with regard to the Department of Water and Power bill, there is nothing in the record to indicate that counsel did not, in fact, determine that the phone belonged to Banks. All of the evidence indicates that it did and that is what the jury reasonably chose to believe. (See *People v. Hovarter*, *supra*, 44 Cal.4th at pp. 996-997.)

Banks indicates that, due to his prior record, his counsel assumed he would take a plea and thus failed to prepare for trial. A reading of the record does not support this claim. Although the evidence against Banks was strong, counsel thoroughly cross-examined each witness, pointing out inconsistencies in their testimony when it was relevant. It cannot be said that counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms" and that, because of her deficient performance, Banks suffered any prejudice. (See *People v. Carter*, *supra*, 30 Cal.4th at p. 1211.)

Finally, Banks asserts his counsel should have made a motion for a mistrial when the judge got sick.[8] Banks states that "[h]aving the jury coming back and forth to court for no reason might have made them bias[ed] [against] the defendants." However, it is doubtful that the trial judge's illness caused the jurors to harbor any bias. Although the jury found Banks guilty of the charged offense, it found his codefendant, Markiss Robinson, not guilty.

---

[8] After jury selection, but before the giving of testimony by the witnesses, the trial judge became ill and trial was postponed for four days.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.