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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. MARK ANTHONY PEREZ, Defendant and Appellant.	2d Crim. No. B282528 (Super. Ct. No. 2012037805) (Ventura County)

A jury found Mark Anthony Perez guilty of being a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1)) (count 1),[1] a felon in possession of ammunition (§ 30305, subd. (a)(1)) (count 2), and a felon in possession of ammunition (*ibid.*) (count 4).

The trial court suspended the imposition of sentence and placed Perez on 36 months' formal probation on various terms and conditions, including that he serve 365 days in the county jail. We conditionally reverse for a new *Pitchess* hearing.

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

(*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) In all other respects, we affirm.

FACTS

October 21, 2012

On October 21, 2012, Ventura County Sheriff's Deputy Russel Grant and three other deputies went to execute an arrest warrant at the home of John Roberts. Roberts is a convicted felon subject to probation search terms. Perez lived in the home with Roberts. Perez is also a convicted felon, but at the time was not on parole or probation.

Grant knocked on the door, but did not receive an immediate response. He could hear a shuffling sound coming from inside and noticed a curtain moving. He continued to knock. Four or five minutes later, Perez opened the door.

Grant asked Perez if Roberts was there. Perez said he was not. Grant told Perez that Roberts was subject to search terms and that he planned to search Roberts's bedroom. Perez let Grant and the other deputies inside. Once inside, the deputies saw Roberts peek out of one of the rooms. They arrested him.

Grant asked if anyone else was inside the house. Perez said no. Because Perez had lied about Roberts, Grant did not trust Perez. The deputies conducted a protective sweep of the house.

Perez was living in the master bedroom. Deputies found a 12-gauge shotgun in plain view in the master bathroom. Grant arrested Perez for being a felon in possession of a firearm.

Perez asked Grant to obtain his license from a drawer in the master bedroom. When Grant opened the drawer, he saw a live 12-gauge shotgun round.

At the sheriff's station, Perez said the shotgun and round belonged to Roberts. Perez admitted the master bedroom was his.

November 2, 2013

On November 2, 2013, Sheriff's Deputy Beau Rodriguez was in the sheriff's gang unit. He learned from dispatch that Martin Gaspar was at Perez's home. Gaspar was on parole for making terrorist threats. Gang and weapons allegations were included in the charges. Gaspar had an outstanding felony parole warrant. He was likely armed and dangerous.

Rodriguez's unit split into two teams. One team surrounded the house and the other would enter the residence. A member of the entry team saw Perez through a window. He ordered Perez to open the door. Once inside, the deputy immediately saw Gaspar who tried to flee, but was arrested. The deputies detained the residents of the house, including Perez, outside.

The deputies conducted a protective sweep. They saw rifle ammunition and alcohol bottles containing a green substance. Based on what they saw, they obtained a search warrant.

In a search pursuant to the warrant, deputies found live rifle ammunition, 12-gauge shotgun ammunition, more than a pound of marijuana, alcohol bottles, butane canisters and a Crockpot. Some of the items were components used to make "honey oil"; that is concentrated cannabis.

Perez admitted that the marijuana was his and that he cooks honey oil. But he claimed the marijuana and honey oil were only for his personal use. Perez said the ammunition had

been there for a long time. He did not think it was a problem because the police searched his house before and never arrested him for it.

Defense

Roberts admitted that the shotgun and ammunition were his. Roberts put the shotgun in the bathroom and the ammunition in the drawer. Roberts never saw Perez handle it.

DISCUSSION

I

Prior to trial, Perez made a motion pursuant to *Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531, seeking disclosure of information concerning three of the sheriff's deputies involved in his November 2, 2013, arrest. The trial court found Perez showed good cause to conduct an in-camera hearing. After the court reviewed the records in camera, the court found nothing to be disclosed and ordered the transcript of the hearing sealed.

When the trial court determines that a defendant's *Pitchess* motion shows good cause, the custodian of records is obligated to bring to the trial court all "'potentially relevant'" documents. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1229.) "The custodian should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion. A court reporter should be present to document the custodian's statements, as well as any questions the trial court may wish to ask the custodian regarding the completeness of the record." (*Mooc*, at p. 1229.) The trial court should then make a record of

what documents it examined before ruling on the motion. (*Ibid.*) The court can photocopy the documents and place them in a confidential file, or prepare a list of the documents it considered, or state for the record what documents it examined. (*Ibid.*) Without some record of the documents examined by the trial court, a party's ability to obtain appellate review would be nonexistent. (*Ibid.*)

Here county counsel and two sheriff's sergeants attended the *Pitchess* hearing. No one was identified as the custodian of records. There was no attempt to authenticate the records. The trial court stated it "reviewed all the files." But because the custodian of records did not testify, it is not clear to which documents "all the files" refers. If the custodian produces the entire personnel file, the custodian should say so on the record. If the custodian omits documents as not potentially relevant, the custodian should state, at least in general terms, what documents are omitted.

We must conditionally reverse and remand for the trial court to conduct a new *Pitchess* hearing following the procedure set forth by our Supreme Court in *People v. Mooc*, *supra*, 26 Cal.4th at pages 1228-1229.

II

Perez contends the trial court erred in denying his motion to suppress evidence obtained as a result of the protective sweep of his home on October 21, 2012.

Deputy Grant testified at the suppression hearing. He had been a sheriff's deputy for 13 years. On October 21, 2012, he served a domestic violence arrest warrant on Roberts at his home. Prior to serving the warrant, Grant did a background

check on the residents of the home, including Perez. Grant discovered that Perez had a prior conviction for selling narcotics.

When deputies arrived at the home, an aggressive pit bull was barking in the backyard. Grant knocked on the door but no one answered for four or five minutes. The curtains moved. The facts indicated to Grant that someone could be hiding weapons or contraband or planning an ambush.

When Perez finally answered the door, he lied about Roberts not being at home. When Perez told the deputies no one else was at home, they did not trust him because he had lied about Roberts. The deputies conducted a sweep. They saw a 12-gauge shotgun in plain view. After the deputies arrested Perez, Perez asked Grant to get his wallet from inside the nightstand in his room. When Grant opened the nightstand drawer, he saw a live shotgun round in plain view.

Officers making an in-home arrest may without a warrant or probable cause make a cursory search of areas where people might be hiding. (*Maryland v. Buie* (1990) 494 U.S. 325, 334-335.) The search must be supported by "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. (*Id.* at p. 334.)

Here deputies had reason to believe that one resident of the house was suspected of domestic violence and another resident had been convicted of selling narcotics. Firearms are one of the "'tools of the trade'" of narcotics sales. (*People v. Ledesma* (2003) 106 Cal.App.4th 857, 865.) The type of criminal conduct underlying the arrest or search is significant in determining whether a search is justified. (*Ibid.*) When deputies

knocked on the door of the residence, it took four to five minutes for Perez to answer. During that time, the window curtain moved. An experienced deputy testified he was concerned that the residents of the house could be using that time to set up an ambush. Perez lied to the deputies about Roberts being home.

The deputies had more than sufficient articulable facts to warrant a reasonably prudent officer in believing the area to be swept harbors a person posing a danger to them.

III

Perez contends the probation condition that prohibits him from associating with any person who is using or trafficking in any controlled substance, including marijuana, should be stricken. "The Legislature has placed in trial judges a broad discretion in the sentencing process, including the determination as to whether probation is appropriate and, if so, the conditions thereof. (Pen. Code, § 1203 et seq.) A condition of probation will not be held invalid unless it '"(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . ."' [Citation.] . . . Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*People v. Lent* (1975) 15 Cal.3d 481, 486, fn. omitted.)

Perez argues the jury did not convict him of a drug offense, personal use of marijuana is not in itself criminal, and the probation condition forbids conduct that is not reasonably related to future criminality.

But Perez was convicted of firearms offenses and has a prior conviction for narcotics sales. Firearms and narcotics sales are frequently related. (*People v. Ledesma*, *supra*, 106 Cal.App.4th at p. 865.) The condition forbids conduct that is reasonably related to future criminality.

Perez argues the condition violates his constitutional right to association. But a probation term may restrict freedom of association if it relates to reformation and rehabilitation. (*People v. Stapleton* (2017) 9 Cal.App.5th 989, 995.) The probation condition is reasonably related to future criminality; thus, it also relates to reformation and rehabilitation.

Perez argues that the condition is overbroad because it lacks a knowledge requirement. But it is implied that a violation of a probation condition must be willful and that conditions barring the possession of contraband should be construed to require knowledge of its presence and its restricted nature. (*People v. Hall* (2017) 2 Cal.5th 494, 501.)

Perez argues that all prescription drugs are controlled substances. But the condition will be interpreted reasonably. Associating with people who have legitimate prescriptions for the drugs they possess is not barred by the probation condition. But personal possession or use of marijuana violates federal law even when recommended by a physician. (21 U.S.C. §§ 844(a), 812(c)(c)(10); *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 492, fn. 5 [marijuana cannot be dispensed under a prescription].) Associating with persons using or trafficking in marijuana would be a violation of probation.

Perez points out that his attorney asked for a stay in his jail sentence because Perez's girlfriend was beginning

chemotherapy. The trial court stayed the jail sentence for three weeks. Perez argues that "it is not unreasonable to assume" that she would use marijuana to cope with adverse effects of her treatment.

Perez is simply speculating about his girlfriend's need to use marijuana while he is on probation. Both Perez's girlfriend and his attorney spoke at the sentencing hearing. Neither mentioned marijuana for chemotherapy side effects. The sentencing hearing occurred over one year ago. Even assuming she needed marijuana then, there is nothing in the record to suggest she might still need it. The record shows no need to amend the conditions of probation.

DISPOSITION

The judgment is conditionally reversed. The cause is remanded to the trial court with directions to hold a new *Pitchess* hearing in which any witnesses who testify are placed under oath. If the trial court finds there are discoverable records, they shall be produced and the court shall conduct such further proceedings as are necessary and appropriate. If the court finds there are no discoverable records, or that there is discoverable information but appellant cannot establish that he was prejudiced by the denial of discovery, the judgment shall be reinstated as of that date. (See *People v. Wycoff* (2008) 164 Cal.App.4th 410, 416.)

NOT TO BE PUBLISHED.

GILBERT, P. J.

I concur:

YEGAN, J.

TANGEMAN, J., Concurring and Dissenting:

I concur in all of the majority opinion except Part III, to which I dissent; I would modify the probation condition to strike the words "including marijuana." The condition that prohibits mere association with persons who use marijuana is unrelated to the crime of which Perez was convicted, forbids conduct that is not criminal, and requires conduct that has no relationship to his future criminality. (*People v. Lent* (1975) 15 Cal.3d 481, 486.)

Perez was convicted of being a felon in possession of a firearm and ammunition. He was not convicted of a drug offense. It is true that Perez has a 2006 conviction for sale of methamphetamine. That drug was and remains illegal, but in this state marijuana is not. And the probation condition here does far more than prohibit marijuana use; it prohibits Perez from merely associating with anyone who uses it, something completely unrelated to his current or even his former conviction. *People v. Ledesma* (2003) 106 Cal.App.4th 857, does not stand for the principle that people who are convicted of firearms offenses are likely to be involved in narcotics activities. It involved the constitutionality of a protective sweep for weapons undertaken as part of a probation search of a house reasonably believed to be the site of ongoing narcotics activities with multiple people inside. (*Id.* at p. 865.)

The prohibited association is not criminal. Even the use of marijuana is not criminal in this state. And "California courts long ago recognized that state courts do not enforce the federal criminal statutes." (*People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1445 (*Tilehkooh*) [reversing order revoking

probation based on legal use of medical marijuana].) Whether federal law prohibits marijuana use is irrelevant here.

Finally, the condition requires conduct that has no relationship to Perez's future criminality. If "a condition of probation restricting the lawful use of medical marijuana cannot be deemed to serve a reformative or rehabilitative purpose" where there is no evidence the probationer diverted marijuana to nonmedical purposes (*People v. Moret* (2009) 180 Cal.App.4th 839, 861 (dis. opn. of Kline, J.); see *Tilehkooh*, *supra*, 113 Cal.App.4th at pp. 1443-1445), then surely a prohibition on mere association with persons engaged in legal uses of marijuana serves no legitimate reformative or rehabilitative purpose here.

TANGEMAN, J.

F. Dino Inumerable, Judge

Superior Court County of Ventura

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