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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ELMER T. SHERMAN,

Defendant and Appellant.

B230576

(Los Angeles County
Super. Ct. No. LA063812)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Joseph A. Brandolino, Judge. Affirmed.

Lyn A. Woodward, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Elmer Sherman pled no contest, following the denial of his motion to quash, to two counts of possession of ammunition in violation of Penal Code section 12316, subdivision (b), one count of possession of a controlled substance in violation of Health and Safety Code section 11377, subdivision (a), one count of unauthorized possession of a hypodermic needle or syringe in violation of Business and Professions Code section 4140, one count of possessing a weapon on school grounds in violation of Penal Code section 626.10, three counts of possession of a firearm by a felon in violation of Penal Code section 12021, subdivision (a)(1) and three counts of short barreled shotgun or rifle activity in violation of Penal Code section 12021, subdivision (a)(1). He admitted that he had served four prior prison terms within the meaning of Penal Code section 667.5, subdivision (b) and suffered four prior felony convictions within the meaning of Penal Code sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d) (the "Three Strikes" law). Pursuant to the plea agreement, the trial court sentenced appellant to 4 years in state prison.

Appellant appeals, contending that the trial court erred in denying his motion to quash. We affirm the judgment of conviction.

Facts¹

On December 4, 2009, Los Angeles County Sheriff's Deputy Thomas Lynch went to Pierce College in response to a radio call. While there, he encountered appellant, who had a cut on his hand. Appellant told Deputy Lynch that he had cut himself with a knife. Deputy Lynch asked appellant if he had a knife, and appellant said that he did. The deputy searched appellant and found a three-inch folding knife.

Deputy Lynch arrested appellant for having a weapon on a college campus. The deputy then searched appellant again incident to arrest and found a crystal rock-like substance which resembled and was later determined to be methamphetamine. The deputy also found burglary tools, a syringe and three rounds of .45 caliber ammunition.

¹ These facts are taken from the preliminary hearing and appellant's motion to quash.

On December 24, 2009, Los Angeles County Sheriff deputies searched appellant's residence pursuant to a search warrant. The officers seized several hundred rounds of ammunition and three "homemade firearms" from appellant's bedroom.

Discussion

The search warrant in this case found probable cause to search appellant's residence for narcotics and firearms. Appellant contends that the affidavit in support of the search warrant application was devoid of facts which provide probable cause and was largely filled with unsupported conclusions. He contends that the trial court erred in denying his motion to quash the search warrant and suppress evidence.

Probable cause to issue a search warrant exists when "the information on which the warrant is based is such that a reasonable person would believe that what is being sought will be found in the location to be searched." (*People v. Stanley* (1999) 72 Cal.App.4th 1547, 1554.) When deciding whether an affidavit is supported by probable cause, the magistrate must make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates* (1983) 462 U.S. 213, 238.)

An affidavit based on mere suspicion or belief, stating a conclusion with no supporting facts, is wholly insufficient. (*Illinois v. Gates, supra*, 462 U.S. at p. 239.) However, "[t]he opinions of an experienced officer may legitimately be considered by the magistrate in making the probable cause determination." (*People v. Deutsch* (1996) 44 Cal.App.4th 1224, 1232.)

"The question facing a reviewing court asked to determine whether probable cause supported the issuance of the warrant is whether the magistrate had a substantial basis for concluding a fair probability existed that a search warrant would uncover wrongdoing." (*People v. Kraft* (2000) 23 Cal.4th 978, 1040.) The burden is on the defendant to establish the invalidity of a search warrant. (*People v. Garcia* (2003) 111 Cal.App.4th 715, 720.)

a. Narcotics

The affidavit states: "LAPD narcotics officers have witnessed hand to hand transactions take place at the front door of the residence, consistent with actions related to narcotics activity. The observations were made numerous times, with the most recent observation having been made on December 17, 2009." This statement alone is sufficient to establish probable cause to believe that narcotics would be found at the residence. (*People v. Garcia, supra*, 111 Cal.App.4th at p. 721 ["A sufficient nexus is established for the search of a residence when a target sells controlled substances from the residence."]; see *People v. Deutsch, supra*, 44 Cal.App.4th at p. 1232 ["opinions of an experienced officer may legitimately be considered by the magistrate in making the probable cause determination"].)

Appellant contends that this statement is a bare conclusion wholly missing factual support. He contends that the conclusion is flawed because there is only one date given, and there are "no time, details, or names of the officers conducting the implied surveillance" and no details about the "numerous" transactions.

The affidavit describes the officers involved as LAPD narcotics officers and describes what they observed as hand-to-hand transactions. The one date given was four days before the application for the search warrant was made. Thus, the observations were made by trained observers experienced in narcotics activity and were direct observations of transactions which, in the opinion of these trained experts, involved sales of narcotics. Based on these observations, Detective Roberts concluded that "narcotics are being dealt from the residence directly."

Appellant relies on *Bailey v. Superior Court* (1992) 11 Cal.App.4th 1107 to show the inadequacy of the above statement. This reliance is misplaced. *Bailey* involved reports from one anonymous informer and one unidentified informer. Both claimed only to have seen heavy foot traffic in and out of the suspect apartment. They did not observe any actual criminal activity. That is not the case here. There is nothing in *Bailey* to suggest that direct observation of what is virtually certain to be criminal activity by a

police officer is not sufficient to provide probable cause.² (See *Bailey, supra*, 11 Cal.App.4th at p. 1114 [noting that police "officers could have conducted surveillance to confirm the suspected activities"].)

The affidavit contained further supporting facts. Appellant was found in possession of almost two grams of methamphetamine when he was arrested. Appellant's brother, who shared the residence, had prior convictions for narcotics sales and appellant's girlfriend, who also shared the residence, had prior narcotics-related convictions. The residence had surveillance cameras in trees at the front and rear of the property, and such cameras are commonly used by criminals to detect law enforcement presence. There is no question that these facts together with the LAPD observations establish probable cause.

Probable cause to search appellant's residence for narcotics exists even without considering the statements in the affidavit that appellant was a high-ranking member of the Canoga Park Alabama gang. Accordingly, we do not consider appellant's claim that the affidavit is lacking facts to support the conclusion that appellant is a gang member.

b. Firearms

According to a statement in the affidavit, the Sheriff's report for appellant's arrest was Attachment A to the search warrant application. However, the Sheriff's report is nowhere to be found. It is not part of the clerk's transcript, superior court file or the motion to amend filed with this Court. As respondent points out, that report might have contained additional information regarding appellant's gang affiliation. It might also

² To the extent that appellant is suggesting that observing hand-to-hand transactions is similar to observing heavy traffic, we do not agree. We understand the statement that the officers observed hand-to-hand transactions consistent with narcotics activity to be a shorthand way of stating that the officers saw money being exchanged for a substance that resembled narcotics. This is effectively direct observation of criminal activity, since non-criminal explanations for such activity are highly unlikely.

have included more details about the ammunition and appellant's connections with firearms. It is appellant's burden to furnish an adequate record on appeal. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) The Court of Appeal may affirm the judgment on the basis of lack of an adequate record on appeal. When appropriate, the Court may order a record correction on its own motion.

Here, we need not order the record corrected. It seems highly likely that the missing Sheriff's report would only strengthen the case for a search warrant. Even assuming for the sake of argument that the Sheriff's report actually supported appellant's contentions, any error in the ruling on the search warrant would be harmless. There was probable cause to search for narcotics. Thus, the entire search warrant was not invalid. (See, e.g., *People v. Joubert* (1983) 140 Cal.App.3d 946, 951-953 [overbroad warrant can be upheld as to valid portions].) Since the officers could properly search the residence for narcotics, they could seize any contraband found during the search, assuming the contraband was in plain view or discoverable in an area which could reasonably be searched for narcotics. (*People v. Gallegos* (2002) 96 Cal.App.4th 612, 622-623.) Given appellant's prior convictions, he could not lawfully possess such items. Thus, police would be justified in seizing the ammunition and firearms as contraband even under a search warrant limited to narcotics.

Disposition

The judgment is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.