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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. BRANDON WHITE, Defendant and Appellant.	2d Crim. No. B292950 (Super. Ct. No. MA071128) (Los Angeles County)

Sheriff's deputies went to appellant Brandon White's home and conducted a nighttime search without the benefit of a warrant or other legal cause. They were investigating a report that someone in appellant's home might be linked to the unwitnessed theft of a motorcycle. While searching the home, they forced open a locked closet door. A firearm was found. Appellant's motion to suppress was denied and he plead no contest to possession of a firearm by a felon. (Pen. Code,

§§ 1538.5, 29800, subd. (a)(1).)[1] We conclude the search was unlawful.

No evidence supports the trial court's finding that deputies conducted a valid "protective sweep." A protective sweep requires "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." (*Maryland v. Buie* (1990) 494 U.S. 325, 334 [108 L.Ed.2d 276] (*Buie*).) Deputies did not testify to facts showing that any person, dangerous or not, was believed to be in appellant's home. Instead, they entered the home out of an unparticularized concern for officer safety. This is not a legal basis for a protective sweep. We reverse the order denying the motion to suppress and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

On April 27, 2017, Los Angeles County sheriff's deputies investigated a vehicle theft in Littlerock. The victim provided a photo of a motorcycle and told deputies that earlier that month, she saw a man rummaging in her garage at midnight; he left when she and her husband confronted him. The motorcycle later disappeared from her garage. At some point after the theft, the victim saw the same man peering through the fence in front of her home. She followed him until he entered a nearby house. The victim did not witness the theft of the motorcycle and could not have known whether it was at that house.

At 8:30 p.m., deputies went to the house where the victim last saw the suspicious man. They did not have a search warrant. The deputies entered the fenced property through an

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

open gate and knocked on the front door. No one answered. They heard men talking in a garage attached to the house. They knocked on the garage, but no one answered.

Two deputies walked 20 to 50 feet around the garage to the backyard, which was illuminated by light coming from an open door. Looking through the doorway, they saw what appeared to be the stolen motorcycle. They entered the garage to detain three men, who were so startled by the deputies' sudden appearance that they began screaming. Appellant came in and asked, "What's going on in my garage?" He was detained without incident, along with a woman who entered the garage from the house.

Additional deputies arrived. They asked appellant if anyone was in the house. Appellant said his girlfriend was in his room at the back of the house. He called to her and she came out of the house without incident. At that point, a deputy testified, "we conducted a protective sweep of the house to make sure nobody else was in there laying in wait or anything bad to happen and so we continued our investigation."

Deputies came upon a bedroom closet large enough to hold a person. They heard a "scratching, moving sound" in the closet, which was locked from the outside with a deadbolt. It had no doorknob; a key had to be inserted into the deadbolt to retract the lock and swing the door open. A deputy broke the latch. Inside he found a zippered black bag containing a semi-automatic firearm. The closet contained nothing that might have made a scratching, moving sound.

Deputies subsequently obtained appellant's criminal record which revealed a prior felony conviction. They obtained a search

warrant, searched the bedroom closet and uncovered a revolver and a box of ammunition for a semi-automatic weapon.

Appellant was charged with possession of a firearm by a felon (counts one and three) and unlawful possession of ammunition (count two). (§§ 29800, subd. (a)(1), 30305, subd. (a)(1).) He was further alleged to have a prior felony conviction. (§ 667.5, subd. (b).) In a negotiated plea, appellant pled no contest to count one. The court sentenced him to two years in prison, struck the prior offense and dismissed the remaining counts.

The Motion To Suppress

Appellant moved to suppress evidence seized from his home. (§ 1538.5.) He argued that deputies unlawfully entered his home and searched his bedroom closet. The prosecutor asserted that the closet was included in the area authorized by a protective sweep conducted to determine if anyone was hiding and remove possible threats.

The court determined the sweep was valid because (1) a deputy testified that he heard a noise coming from a locked closet; (2) it appeared that the closet door opened from both sides; and (3) "[t]he dispositive inquiry is this officer is standing in front of a locked door, hearing something coming from the other side of the door," which "could have opened and somebody could have jumped out." It concluded, "I find that the officers acted reasonably and in good faith in this search of the closet and I am denying the 1538.5."

DISCUSSION

Appellant challenged the warrantless search of his home. (§ 1538.5, subd. (a)(1)(A).) The burden shifted to the People to show the search fell within a recognized exception to the general

proscription against warrantless searches of the home. (*Vale v. Louisiana* (1970) 399 U.S. 30, 34 [26 L.Ed.2d 409]; *People v. Camacho* (2000) 23 Cal.4th 824, 830.) The search is reviewable, despite appellant's no contest plea. (§ 1538.5, subd. (m); *People v. West* (1970) 3 Cal.3d 595, 601.)

We defer to the trial court's factual findings if supported by substantial evidence but exercise our independent judgment to determine whether a search or seizure is reasonable under the Fourth Amendment. (*People v. Ovieda* (2019) 7 Cal.5th 1034, 1041 (*Ovieda*); *People v. Glaser* (1995) 11 Cal.4th 354, 362.) Federal constitutional standards govern the suppression of evidence derived from police searches and seizures. (Cal. Const., art. I, § 24; *Ovieda* at p. 1041.)

"'[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' [Citation.] And a principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest." (*Welsh v. Wisconsin* (1984) 466 U.S. 740, 748 [80 L.Ed.2d 732].) A warrantless entry is "presumptively unreasonable." (*Payton v. New York* (1980) 445 U.S. 573, 586 [63 L.Ed.2d 639].)

The People justified the warrantless entry into appellant's home as a protective sweep. The court accepted this rationale. We conclude that deputies offered no valid reason to enter the home for a protective sweep. The prosecution did not carry its burden of producing evidence to justify the sweep. (*People v. Williams* (1999) 20 Cal.4th 119, 134, 136-137 [prosecutor must prove a justification for a warrantless search or seizure and cannot merely respond to defendant's argument].)

"The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." (*Buie*, *supra*, 494 U.S. at p. 337.) It "is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." (*Id.* at p. 327.)

The sole justification for entering appellant's home was a deputy's testimony that "we conducted a protective sweep . . . to make sure nobody else was in there laying in wait . . . ." *Buie* does not authorize a sweep unsupported by "a *reasonable suspicion* that the area to be swept harbors a dangerous person." (*People v. Celis* (2004) 33 Cal.4th 667, 678 (*Celis*).) "The officers cited concerns that unknown persons might be in the house . . . . While these concerns are obviously important, the People elicited no testimony to show the officers reasonably believed they were actually in play." (*Ovieda*, *supra*, 7 Cal.5th at p. 1043.)

No evidence supports the warrantless entry into appellant's home. Deputies detained three men in the garage. Appellant and a woman entered the garage to investigate the commotion. More deputies arrived and asked if anyone else was in the house. Appellant named his girlfriend; he called to her and she came outside. Everyone was detained without incident. Deputies did not testify that anyone was armed, or to a belief a dangerous person or anyone was in the house.

No sweep is permissible if "the evidence showed nothing more than a generalized concern for officer safety . . . ." (*People v.*

Werner (2012) 207 Cal.App.4th 1195, 1209.) "'[T]he mere abstract theoretical "possibility" that someone dangerous might be inside a residence does not constitute "articulable facts"' justifying a sweep." (*People v. Ledesma* (2003) 106 Cal.App.4th 857, 866.)

Case law illustrates the point.

In *Celis*, officers surveilled the defendant's home and noted the periodic presence of others. But the day they detained him in his backyard, "they had no knowledge of the presence of anyone in defendant's house . . . thus, when they entered the house to conduct a protective sweep, they did so without 'any information as to whether anyone was inside the house.'" (*Celis*, *supra*, 33 Cal.4th at p. 679.) The Supreme Court concluded that police lacked articulable facts that, under *Buie*, "would warrant a reasonably prudent officer to entertain a reasonable suspicion that the area to be swept harbors a person posing a danger to officer safety." (*Id.* at pp. 679-680.)

In *People v. Ormonde* (2006) 143 Cal.App.4th 282, police investigating a domestic violence report detained the defendant outside the apartment; a detective walked through the open front door because he was uncertain if someone might emerge with a weapon and knew that domestic violence incidents often pose a danger to responding officers. (*Id.* at pp. 287, 294.) The court invalidated the protective sweep because the officers failed to articulate any reason to believe a dangerous person was inside. (*Id.* at p. 295.)

In *People v. Werner*, *supra*, 207 Cal.App.4th 1195, deputies went to a home to investigate an accusation made against the defendant. He was detained outside and said no one was inside. Nevertheless, they entered for "'officer safety reasons'" and found incriminating evidence in plain view. (*Id.* at pp. 1201-1202.) The

officers' general concern for their safety did not allow them to enter the home for a protective sweep. (*Id.* at pp. 1208-1210.)

Here, as in *Celis*, *Werner*, *Ledesma*, and *Ormonde*, the deputy testified at appellant's suppression hearing that unknown persons might be in the house but failed to offer specific and articulable facts justifying entry. "[O]fficers pointed to no such facts. If they existed, the prosecution failed to elicit them." (*Ovieda*, *supra*, 7 Cal.5th at p. 1043.) Because a protective sweep "is decidedly not 'automatic'" (*Buie*, *supra*, 494 U.S. at p. 336), officers did not have carte blanche to enter a home without a reasonable suspicion that a dangerous person was inside.

Officers had no report of shots fired or possible victims in the house. (*Ovieda*, *supra*, 7 Cal.5th at p. 1043.) They knew only that a man *might be* at appellant's house who *might be* linked to the unwitnessed theft of a motorcycle earlier in the month. A theft investigation is not an exigent circumstance necessitating immediate warrantless entry into the home.

The prosecutor focused on a noise within appellant's locked bedroom closet to justify deputies' actions. This was irrelevant. The People had to prove a legally sufficient reason for deputies to enter the house without a warrant. The prosecutor did not carry that burden. There was no exigency and no testimony showing that deputies had a reasonable suspicion, based on articulable facts, that a dangerous person was in the home. On the contrary, everyone in the house came out and cooperated with the deputies. There was no factual predicate for a protective sweep.[2]

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[2] In light of our conclusion, we do not reach appellant's argument that the protective sweep was illegal because it was incident to a detention. Nor do we reach his claim that trial counsel was ineffective by failing to argue that officers illegally

DISPOSITION

The judgment is reversed. The matter is remanded with directions that the trial court permit appellant to withdraw his no contest plea and enter an order granting appellant's suppression motion.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

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invaded the curtilage of appellant's home by walking 20 to 50 feet around his house to the backyard to look into his garage, where they saw the motorcycle. We deny appellant's application for writ of habeas corpus in a separate order.

Frank M. Tavelman, Judge

Superior Court County of Los Angeles

Michael C. Sampson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael C. Keller and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.