Filed 2/23/12 P. v. Lowe CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. TOMMY LOWE, Defendant and Appellant.	B232549 (Los Angeles County Super. Ct. No. BA378538)

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

Tommy Lowe, in pro. per.; and Donna L. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

An information filed December 20, 2010 alleged that Lowe committed one count of selling, transporting, and/or offering to sell a controlled substance (cocaine), in violation of Health and Safety Code section 11352, subdivision (a) (count 1), and one count of possession for sale of cocaine base, in violation of Health and Safety Code section 11351.5 (count 2). The information further alleged that Lowe had served seven separate prison terms under Penal Code section 667.5, subdivision (b), and had suffered six prior convictions pursuant to Health and Safety Code section 11370.2, subdivision (a). Lowe pleaded not guilty.

On December 28, 2010, Lowe filed a motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 ("*Pitchess* motion"). The trial court granted the motion and conducted an in camera hearing, ordering discovery to be delivered to Lowe's counsel.

After trial, a jury found Lowe guilty on both counts, and Lowe waived the right to a jury trial on the prior convictions and then admitted the prior convictions as alleged in the information. The trial court sentenced Lowe to eight years in state prison on count 1, and imposed an eight-year concurrent sentence on count 2, staying the imposition of the sentence on count 2 under Penal Code section 654. The trial court struck the remaining allegations pursuant to Penal Code section 1385. Lowe filed a timely notice of appeal on April 13, 2011.

We appointed counsel to represent Lowe on appeal. After examining the record, counsel filed an opening brief raising no issues and asking this court to review the record, including the disposition of the *Pitchess* motion. On October 13, 2011, we directed counsel to send the record on appeal and a copy of the opening brief to Lowe, and notified Lowe that he had 30 days in which to personally submit any contentions or issues he wished us to consider.

Lowe filed a 13-page supplemental brief asking this court to consider issues related to the effectiveness of his counsel, the credibility of police witnesses, a juror who thought he recognized Lowe, and the *Pitchess* motion. We summarize the facts and then address his contentions in turn.

At trial, the prosecution presented evidence that on November 26, 2010, around 4:30 p.m., Los Angeles Police Department officers conducting a plain clothes operation in an area of downtown Los Angeles known for narcotics sales saw Lowe sitting on a milk crate by a shopping cart and speaking with Ira Johnson, who was standing in front of Lowe. Another man, Francisco Coronel, approached and spoke to Johnson. Johnson turned to Lowe and spoke to him, and Lowe took a plastic baggie out of the shopping cart containing off-white solids that looked like cocaine base, handing it to Johnson. Johnson grabbed the bag and turned to Coronel, who had money in his hand. Coronel gave Johnson the money, and Johnson dropped several of the pieces of cocaine base into Coronel's hand. Johnson put the money in his jacket pocket and gave the baggie back to Lowe, who placed the baggie back in the shopping cart.

As Coronel walked away, one of the officers gave his description to other officers nearby, who detained and searched Coronel, finding in his pocket six pieces of what appeared to be cocaine base wrapped in a white piece of paper.

A few minutes later, four or five people lined up in front of Johnson. Lowe again reached into the shopping cart, took the baggie out, and gave it to Johnson, who took money from each person in line, put the money in his pockets, and gave each some of the off-white substance in the baggie. An officer called a "chase unit" and told them to detain Lowe and Johnson. As the other officers approached, Johnson threw the baggie back toward a wrought iron fence. Lowe lifted up a blanket next to him and tossed something under it. The responding officers detained Lowe and Johnson, and recovered the baggie. The officers found a lip balm container under the blanket; inside was an off-white solid resembling cocaine base. The officers also recovered $325 in small bills from Johnson's pockets, and $95 in small bills from Lowe's right front jacket pocket.

Lab tests confirmed that the items recovered from Coronel, the items in the baggie recovered from Johnson, and the item in the lip balm container were all cocaine base. An expert testified that based on these facts, Lowe possessed the cocaine base for the purpose of sale.

The defense called one of the officers back to the witness stand and questioned him about his ability to observe Lowe and Johnson, and whether he had seen the line formed in front of Johnson.

DISCUSSION

Lowe's first contention is that his trial counsel was ineffective. We reverse on appeal for ineffective assistance of counsel only if counsel's representation fell below an objective standard of reasonableness given prevailing professional standards, and it is reasonably likely that the deficient representation prejudiced Lowe. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 697–698]; *People v. Cain* (1995) 10 Cal.4th 1, 28.) Further, Lowe must overcome the presumptions that counsel was effective, and that the actions Lowe challenges might be considered sound trial strategy. (*In re Jones* (1996) 13 Cal.4th 552, 561.)

Lowe claims his counsel's performance at trial was deficient because he failed to question witnesses about the following: what Lowe was wearing on the day of his arrest; differences in the testimony of two officers; whether one of the officers moved during his observation of the cocaine sale and whether another had a clear view of the scene; whether Lowe could have gotten up and walked away when one of the officer's attention was focused on Johnson; how Lowe arrived at the scene; and inconsistencies between the testimony and the police reports. We have reviewed the reporter's transcript as to each claim of error above, and conclude that trial counsel's performance at trial was not deficient in any of those respects.

Lowe also contends that his trial counsel was ineffective because when Lowe failed to accept a plea bargain offered by the prosecution, counsel "act[ed] like he really didn't care about what I did." Further, Lowe states that his lawyer did not discuss his case with him and seemed to have his mind made up, did not ask Lowe what happened the day he was arrested, never met Lowe, never came to the county jail to visit Lowe, never asked where Lowe lived or whether he had a job or was receiving general relief, never asked about his income, never asked whether Lowe had any witnesses to present in court. These actions by counsel are not reflected in the trial record, which necessarily

also sheds no light on counsel's reasons for any of those actions, if true. Under these circumstances, a claim of ineffective assistance is more appropriately decided in a habeas corpus proceeding, where relevant facts could be developed. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267; *People v. Avena* (1996) 13 Cal.4th 394, 419.)

Lowe argues counsel did not advise him that he was charged with two counts until opening statements. Again, the record does not support this allegation, and the reporter's transcript shows a discussion of a plea offer by the prosecution (at a hearing at which Lowe was present with counsel) referring to the two counts, before voir dire began. Lowe contends counsel should have called Coronel as a witness or put Lowe on the witness stand, but those are tactical decisions by counsel which we do not second-guess. (*People v. Lucas* (1995) 12 Cal.4th 415, 442.) Lowe's argument that his counsel did not ask the officers about the money that was found on Lowe's person is belied by the reporter's transcript, which shows that counsel cross-examined the officers on that issue.

Lowe's second argument is that in general the testifying officers committed perjury. We do not address that argument on appeal, as the credibility of witnesses and the resolution of any inconsistencies in testimony were the exclusive province of the trier of fact. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Lowe's final argument is that one of the jurors, the only black man on the jury, knew him and this was grounds for a mistrial. The reporter's transcript reflects, however, that outside the presence of the jury, a juror told the trial court that Lowe "looks really familiar" and he may have seen Lowe near the flower market downtown. The juror had not seen Lowe engage in any illegal activity. The juror explained that he had no relationship with Lowe and could be impartial. The trial court allowed the juror to return to the jury; Lowe's counsel did not object because there was no evidence that the juror ever spoke to Lowe. This was not grounds for a mistrial.

We have reviewed the transcript of the in camera hearing on the *Pitchess* motion, at which the trial court, after reviewing and describing the documents, found that two complaints against one police officer, and one against another, could conceivably be relevant, and ordered their disclosure. Based on that review, we conclude that the trial

court properly exercised its discretion in determining which material was appropriate for disclosure. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1232.) The record discloses no basis on which to argue that additional items should have been disclosed. Further, we discern no ineffective assistance of counsel in trial counsel's failure to submit evidence of police misconduct at trial.

We have conducted a review of the entire record, and are satisfied that Lowe's appellate counsel has fully complied with his responsibilities and that no arguable issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 109–110; *People v. Wende* (1979) 25 Cal.3d 436, 441.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.