Dated 6/5/14 P. v. Howard CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DEXTER HOWARD, Defendant and Appellant.	B246618 (Los Angeles County Super. Ct. No. MA056270)

APPEAL from a judgment of the Superior Court of Los Angeles County, David Walgren, Judge. Affirmed.

Dawn Schock, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Dexter Howard appeals from his conviction by jury verdict of one count of being a felon in possession of a gun.[1] (Pen. Code, § 29800, subd. (a)(1).) Our independent review of the record reveals no arguable issue that would aid defendant. We affirm the judgment of conviction.

FACTUAL AND PROCEDURAL SUMMARY

Dexter Howard was on parole from a prior prison term in May 2012. He and his girlfriend, Ella Reed, were staying in a home rented by her mother in the rural Lancaster area. Their bedroom and bathroom were separated from the downstairs kitchen, laundry room, and bedrooms by a door on the first floor. There was testimony that the first floor was off limits to defendant. As a condition of his parole, defendant had agreed to submit to warrantless parole compliance searches. Since he was a convicted felon, he was not allowed to possess a firearm. Defendant had given the address of the home to his parole agent, and a parole agent had visited the location at least twice to verify that defendant was living there.

On May 17, 2012, at 8:00 a.m., Los Angeles County sheriff's deputies and parole agents came to the house to conduct a parole compliance search regarding defendant. When officers knocked on the front door, Ms. Reed responded, opening an inner door, but not an outer security door. She told the officers she had to get dressed and closed the door. When Ms. Reed returned to the door she was detained. The officers heard defendant call out that he was coming downstairs; he was detained when he came to the first floor. The officers then conducted a security sweep of the residence to make sure no one else was inside so it would be safe to conduct a search. They called for everyone to come outside. Ms. Reed's mother, brother Michael Reed, and three children came out. Mr. Reed was a parolee, but was not in compliance because he had not reported to his parole officer. The occupants were detained in the driveway in front of the house.

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[1] Statutory references are to the Penal Code unless otherwise indicated.

Once the occupants had left the residence, the officers divided up to conduct the search. Defendant and Ms. Reed occupied an upstairs bedroom. No weapons, live or spent rounds were found in that bedroom. Deputy James Speed began by searching a laundry room. It was between the kitchen and a bathroom. The door was open. There was a washer and dryer and a shelf above them. He looked in the washer and dryer because they are commonly used to hide things. Deputy Speed recovered three spent and one live .22 rounds from inside the washing machine. He also found an unloaded Remington .22 caliber rifle under some clothes on a shelf above the washing machine and dryer. He described the weapon as unusual because it is a left-handed bolt action .22 Remington.

A BB gun resembling a revolver, four rounds of live ammunition and four rounds of spent ammunition, as well as a gun boot used to protect the butt of a rifle, were found in a downstairs bedroom containing mail addressed to Mr. Reed. The only firearms or replica firearms found were the left-handed bolt action .22 rifle and the BB gun. The rifle was in working condition.

The entire search lasted about two hours. As the result of a conversation between Deputy Julia Vezina and a child named Charlisa who was in the residence, Deputy Vezina recovered a cell phone in the upstairs bedroom, exhibit 13. The telephone was locked, but Ms. Reed unlocked it for the officer. Once she did so, Deputy Vezina saw several photographs and a video on the phone.

Deputy Speed did not recall whether he downloaded photos from the cell phone recovered by Deputy Vezina, or whether he removed the SIM card.[2] He looked at the photos on the station computer. He found photographs of defendant holding what appeared to be a .22 left-handed bolt action rifle as well as a pistol, using the cell phone to take his own picture looking into a mirror. Some of the photographs from the cell phone were admitted into evidence. Deputy Speed described the rifle in one of the

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[2] Subscriber Identity Module for a mobile phone, see *Gatton v. T-Mobile USA, Inc.* (2007) 152 Cal.App.4th 571, 577.

photos as having a “Monte Carlo cut” on the butt, which is the same as the rifle seized during the search, a very unusual feature. Another cell phone photo showed defendant with a left-handed bolt action rifle, like the rifle recovered from the laundry room. This feature also is extremely rare, according to Deputy Speed. One photo was taken in the upstairs bedroom used by defendant, exhibit 14. People’s exhibit 15 was another photo from the cell phone showing defendant holding the rifle with the bolt action visible.

Deputy Speed took the rifle seized during the search, went to a mirror at work, and held the rifle in the same manner depicted in the cell phone photos of defendant in order to determine whether the rifle in the cell photo had a right- or left-handed bolt action. (Exhibit 16.) Based on a comparison with the photo depicting defendant, Deputy Speed concluded that defendant was holding the unusual left-handed bolt action rifle in the photographs. In order to determine the date the photos on the cell phone were taken, Deputy Speed pulled the photos up and checked the properties on each, which gave a date and time the photo was created. (People’s exhibit 17, shows computer screen with properties and photo in People’s 14; People’s exhibit 18 shows properties and People’s 15) The created date for the photos was Wednesday, April 25, 2012.

The defense was that defendant did not have access to the laundry room where the rifle and ammunition were seized. His mother, Debbie Jackson, testified that he brought his laundry to her home once a week.

Michael Reed testified that the rifle recovered from the laundry room was his. He found the rifle, ammunition and the gun boot in a shed on the property. He put the rifle in the bedroom where he was staying, on April 20 or 21. Mr. Reed never told defendant he had the rifle, nor did he show it to him. When the police arrived to perform the parole compliance search, Mr. Reed looked out the window and saw a deputy. He ran to the back room, took the rifle and shells and put them in the laundry room. He attempted to hide the rifle by putting it on the shelf and covering it with clothing. He threw the ammunition inside the washing machine. Mr. Reed said he was not allowed in the laundry room, but went there anyway to hide the rifle so it would not be found in his

bedroom. The laundry room door was kept locked, but he knew where his mother kept the key by her bedroom. The BB gun found in the room he used also belonged to him.

Mr. Reed testified in support of the defense theory that the cell phone photographs showed defendant holding a replica pellet rifle rather than the real rifle found in the laundry room. According to Mr. Reed, the photographs found on the cell phone depicted defendant holding a third weapon, a pellet gun that looked very much like the real rifle found in the laundry room. Defendant also was holding a BB gun. Mr. Reed did not know how defendant got possession of the two weapons. He was positive that the weapon defendant was holding in the photos was not the rifle recovered from the laundry room during the parole search. He testified that the "rifle pellet gun" was sold before the deputies recovered the rifle. It was not found in the search of the house.

Defendant and Mr. Reed were arrested and each was charged with being a felon in possession of a firearm (§ 29800, subd. (a)(1)) and of ammunition (§ 30305, subd. (a)(1)). It was alleged that defendant had three prior felony convictions, one of which qualified as a strike under sections 1170.12, subdivisions (a) through (d) and 667, subdivision (b) through (i). Mr. Reed accepted a plea bargain and pled no contest. The defense was provided funds to retain a firearms expert, but no expert testified at trial for defendant. Defendant's motion to dismiss under section 1118.1 was denied. After the trial court ruled that he could be impeached with three prior convictions, defendant chose not to testify. The parties stipulated that defendant previously had been convicted of a felony.

During deliberations the jury requested readbacks of testimony by Deputy Speed and Mr. Reed. It also requested clarification of the instruction on constructive possession of a firearm by a felon. As a result of that request, the trial court allowed counsel to reargue that issue. Defendant was found guilty of being a felon in possession of a firearm, but not guilty of the charge of being in possession of ammunition.

The trial court denied defendant's motion to dismiss the strike prior under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. He was sentenced to the upper term of three years, doubled because of the strike, plus one year for each of the three prison

priors, for a total of nine years. He received 277 days of presentence custody credit and 277 days of conduct credit. He was ordered to pay restitution of $2,160, and a parole restitution fine in the same amount, which was stayed. He also was ordered to pay a court security fee of $40, a criminal conviction assessment of $30, and a crime prevention fine of $10.

Defendant filed a timely appeal. His appointed counsel found no arguable issues to raise and asked us to independently review the record on appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441–442 (*Wende*). We advised defendant that he had 30 days within which to submit any arguments he wished this court to consider. In response, he filed a supplemental brief, in which he raises a number of contentions regarding the proceedings below. We denied his request on appeal to relieve appointed counsel. We have reviewed his brief and the record on appeal in accordance with *Wende* and *People v. Kelly* (2006) 40 Cal.4th 106, 119–120.

DISCUSSION

I

Defendant's first contention concerns the scope of the parole compliance search. It is undisputed that the search was conducted pursuant to a valid parole search condition.[3] Defendant cites evidence that the residence searched was divided into two sections (the first floor, and the second floor occupied by defendant), divided by a door

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[3] "Under California statutory law, every inmate eligible for release on parole 'is subject to search or seizure by a . . . parole officer or other peace officer at any time of the day or night, with or without a search warrant or with or without cause.' (Pen. Code, § 3067, subd. (b)(3).) Upon release, the parolee is notified that '[y]ou and your residence and any property under your control may be searched without a warrant at any time by any agent of the Department of Corrections [and Rehabilitation] or any law enforcement officer.' (Cal. Code Regs., tit. 15, § 2511, subd. (b)(4); see also Cal. Code Regs., tit. 15, § 2356 [requiring the department staff to notify the prisoner of the conditions of parole before release].)" (*People v. Schmitz* (2012) 55 Cal.4th 909, 916 (*Schmitz*).) This parole search condition is a recognized exception to the constitutional requirement of a warrant for police searches and seizures. (*Ibid.*)

on the first floor. He argues: "Officers conducting the search did not have personal knowledge if any parts of the house were off limits to appellant in terms of the areas that he was allowed to access. . . . Deputy Speed admitted that if he[']s doing a complete compliance check he would force the door open . . . which is an indication that he had no intentions of following the guideline of conducting a lawful parole compliance check[.] . . . Deputy Speed testified that he started making demands for anybody inside the house to come out . . . w[h]ich contradicted his own testimony . . . [that] there were no locked doors in this house."

Common or shared areas of a residence may be searched by officers aware of an applicable parole or probation search condition. (*Schmitz*, *supra*, 55 Cal.4th at p. 918.) But residents not subject to such conditions "retain valid privacy expectations in residential areas subject to their exclusive access or control, so long as there is no basis for officers to reasonably believe that the probationer has authority over those areas." (*People v. Robles* (2000) 23 Cal.4th 789, 798.[4]) The test is whether the officer reasonably believes the probationer has joint control or access over the portion of the residence searched. (*People v. Ermi* (2013) 216 Cal.App.4th 277, 280.)

Deputy Speed testified that when he conducted the search of the house there were no locked doors which would have indicated that defendant was barred from accessing the laundry room. Instead, all the interior doors were unlocked. The door to the laundry room was open. Mr. Reed corroborated this testimony. He said that he used a key kept near his mother's room to unlock the laundry door in order to hide the rifle and ammunition there. But he testified that he did not relock the door because the police were "right there". Since there were no locked doors in the interior of the house, it was reasonable for Deputy Speed to conclude that defendant had access to the laundry room, justifying the search of that area.

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[4] Courts do not distinguish between probation and parole search conditions in discussing the expectation of privacy of cohabitants. (*Schmitz, supra*, 55 Cal.4th at p. 918, citing *People v. Sanders* (2003) 31 Cal.4th 318, 330.)

II

Defendant also argues that the prosecution did not meet its burden of proving that Ella Reed consented to the search of her telephone since there was no consent form signed by her nor did she testify at trial.

Defendant lacks standing to urge suppression of the cell phone photographs. (*People v. Rios* (2011) 193 Cal.App.4th 584, 597 [only the person whose rights were violated by the search itself, not the person who was aggrieved only by the introduction of damaging evidence, may urge suppression of the product of a Fourth Amendment violation].)

III

Defendant complains that the officers conducting the search handled the rifle and ammunition without attempting to preserve any fingerprint evidence that might have exonerated him.

"Generally, due process does not require the police to collect particular items of evidence. [Citation.] 'The police cannot be expected to "gather up everything which might eventually prove useful to the defense."' [Citation.]" (*People v. Montes* (2014) 58 Cal.4th 809, 837 (*Montes*).) "'[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.' [Citation.] Because '[t]he presence or absence of bad faith by the police . . . must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed' [citation], defendant has failed to establish bad faith in this case." (*Id*. at p. 838.)

The failure of the officers to fingerprint the rifle and ammunition has not been demonstrated to have been in bad faith, and does not constitute a denial of due process.

IV

Defendant's next argument relates to the defense theory that the photographs from the cell phone showed him with a pellet rifle that resembled the real rifle found in the laundry room. Deputy Speed testified at trial that he had been a law enforcement officer for ten years, and had never seen a left-handed bolt action rifle such as that found in the

laundry room. He also said that the laundry room rifle had a very unusual "Monte Carlo cut" on the butt. He described his effort to replicate the photographs on the cell phone by taking photographs of himself holding the real rifle by aiming his cell phone at a mirror, just as defendant had done in the cell phone photos. Based on that experiment, Deputy Speed concluded the rifle held by defendant in the cell phone photos was the same rifle with the unusual bolt action and shape of the butt.

Defendant cites testimony by Deputy Speed that he was not holding himself out as a expert on firearms. He also cites Deputy Speed's testimony that it was possible that a pellet rifle with the unusual features of the rifle in the laundry room exists. He argues that his Sixth Amendment right was violated "by not having the proper experts appointed as mandated in (People v. Worthy, supra)[.]"

Although no citation is provided, we take the reference by defendant to be to *People v. Worthy* (1980) 109 Cal.App.3d 514, 520, which held that an indigent criminal defendant is constitutionally entitled to defense services including expert fees. (*Schaffer v. Superior Court* (2010) 185 Cal.App.4th 1235, 1245.)

The record demonstrates that the trial court ordered fees for a defense firearm expert, and then ordered additional fees at the end of the trial. The declaration of defense counsel in support of the request for additional fees stated that the trial court appointed the firearm expert, who then had to spend additional time assisting the defense because of late discovery provided by the prosecution. No explanation is provided as to why the defense firearm expert did not testify at trial.

On this record, we conclude that defendant was provided the services of a firearm expert to assist in the defense and that no constitutional violation occurred.

V

Defendant also claims the jury was misinstructed on the intent element of the crime of being a felon in possession of a firearm. He contends: "The court gave the incorrect instruction regarding [his] requisite intent although it is a general intent crime the bench notes to CALCRIM No. 2511 for possession of a firearm by a convicted felon state that the appropriate intent instruction is CALCRIM No. 251. The court has a sua

sponte duty to instruct on the union of act and specific intent or mental state[.] People v. Alvarez 1996 14 Cal4th 155 220 . . . . Therefore because of the knowledge requirement in element 2 of 2511 instruction the court must give CALCRIM No. 251 union of act and intent specific intent or mental state together with this instruction." Defendant points out that the court gave CALCRIM No. 250 instead of No. 251. He argues that we may consider this issue although no objection to the instruction was raised in the trial court because it affected his substantial rights because the jury was not told that it had to find that he acted with the specific knowledge that the rifle and ammunition were accessible to him.

As defendant states, the trial court gave CALCRIM No. 2511 on the elements of possession of a firearm by a felon. The instruction stated the prosecution had to prove that defendant possessed a firearm, knew he possessed the firearm, and previously had been convicted of a felony. The instruction also defined the concept of constructive possession. The court gave CALCRIM No. 250 on the union of act and intent: "The crimes charged in this case require proof of the union, or joint operation, of act and wrongful intent. [¶] For you to find a person guilty of the crimes in this case, that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act; however, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime."

Possession of a firearm is a general intent crime, proven by either actual or constructive intent so long as it is intentional. (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417, fn. 3.) The prosecution must prove a defendant knowingly exercised a right to control the firearm, either directly or through another person. (*Ibid.*) The bench note for CALCRIM No. 2511 on this offense states that "[t]he court has a **sua sponte** duty to instruct on the union of act and specific intent or mental state. [Citation.] Therefore, because of the knowledge requirement in element 2 of this instruction, the court **must give** CALCRIM No. 251, *Union of Act and Intent; Specific Intent or Mental State*, together with this instruction. Nevertheless, the knowledge requirement in element

2 does not require any 'specific intent.'" (Bench Notes to CALCRIM No. 2511 (2014 ed.) pp. 390–391.)

In light of the requirement that the prosecution prove that defendant knew he possessed a firearm, even though this is a general intent crime, CALCRIM No. 251 should have been given rather than CALCRIM No. 250, as the Bench Notes recommend. But the error was not prejudicial here. CALCRIM No. 2511 instructed the jury it had to find defendant knew that he was in possession of a gun. The photographs from the cell phone provided evidence of that knowledge. It is not reasonably probable that defendant would have obtained a more favorable result if the jury had been instructed with CALCRIM No. 251. (*Montes, supra*, 58 Cal.4th at p. 876; *People v. Larsen* (2012) 205 Cal.App.4th 810, 829–830 [incorrect, ambiguous, conflicting or wrongly omitted instructions not amounting to federal constitutional error are reviewed under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836-837].)

DISPOSITION

The judgment of conviction is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.