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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DONTE T. HARP,

Defendant and Appellant.

B239337

(Los Angeles County
Super. Ct. No. BA382759)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Clifford L. Klein, Judge. Affirmed.

California Appellate Project, Jonathan B. Steiner and Ann Krausz for Defendant
and Appellant.

No appearance for Plaintiff and Respondent.

Donte T. Harp appeals from the judgment entered following a jury trial which resulted in his conviction of the sale of a controlled substance, to wit, cocaine base (Health & Saf. Code, § 11352, subd. (a)) and his admissions that he previously had been convicted of two narcotics-related offenses (Health & Saf. Code, §§ 11370.2, subd. (a), 11351.5) for one of which he served a prison term (Pen. Code, § 667.5, subd. (b)). The trial court sentenced Harp to six years in county jail (Pen. Code, § 1170, subd. (h)(1) & (2)). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts.

Jeanette Milazzo has been a special agent with the Federal Bureau of Investigation (F.B.I.) for approximately three years. Her background is in narcotics operations and she is “assigned to a squad that works primarily [with regard to] violations dealing with drugs, narcotics, and firearms.” She has worked on between 150 and 200 cases, all involving other law enforcement personnel and some involving the use of informants. Milazzo explained that an informant is “usually . . . a civilian who [is either recruited] or [has] come to [law enforcement agents] voluntarily to help [them] conduct undercover controlled narcotics purchases.”

At approximately 11:00 a.m. on April 12, 2011, Milazzo, eight other law enforcement officers and a confidential informant were working with Detective Craig Piantanida from the Los Angeles Police Department (L.A.P.D.), intending to make a controlled buy of narcotics. The group, or “task force,” had gone to a particular area near 4234 Montclair, a residence which had been “identified as a problem location for selling narcotics.” Milazzo and Piantanida asked the informant, a woman by the name of Stacy C., to attempt to purchase narcotics “from that specific location.”

Before Stacy C. went to the house, she was searched, told “where to go and what to do[,]” given instructions on what to do if she found herself in danger, provided with \$40 with which to purchase narcotics and provided “with recording equipment and a radio transmitter” so that she could keep in constant contact with the officers throughout

the narcotics transaction. After she had bought the narcotics, she would be picked up, the recording and transmitting devices would be deactivated, officers would “collect the narcotics evidence” and Stacy C. would be “debrief[ed]” on what had occurred.

Milazzo and other narcotics officers had been working with Stacy C. for “approximately a year” and she had proven to have been reliable. The information that she had given had been consistent with “the recording[s] that [the officers had] obtain[ed] after booking the electronic evidence.”

On this occasion, Milazzo watched Stacy C. walk down Adams Street, then turn onto South Montclair. By way of the radio transmitter, Milazzo could hear everything that was going on. At some point, Stacy C. approached a group of individuals and asked where she could purchase rock cocaine. Milazzo and Piantanida then listened as she walked away from the group and saw her, accompanied by a man, approach a gold colored Oldsmobile with handicapped plates. Stacy C. then purchased narcotics from the man sitting in the car.

After Stacy C. purchased the narcotics, Milazzo and Piantanida, who were in an unmarked car, followed the Oldsmobile until they reached a point where they could “pass it on to other law enforcement officers.” They then picked up Stacy C. at a predetermined location. As she was walking to the location, Stacy C. was using her cell phone to give to Piantanida descriptions of the individuals “she [had] encountered on that day[.]” After she had gotten into the officers’ vehicle, Stacy C. handed the recording equipment to Milazzo and the “narcotics evidence” and a business card to Detective Piantanida. Milazzo immediately disabled the recording equipment.

After the narcotics buy was complete, Milazzo had the opportunity to watch the video. Although one could not “actually make out most people within [the] video,” what it showed was consistent with what Stacy C. had told Milazzo had occurred.

No one was arrested on that day as a result of Stacy C.’s purchase of cocaine. According to Milazzo, Stacy C.’s action was “part of a large scale investigation . . . which culminated in a multi-arrest multi-agency takedown on May 19th. And if [they

had] done the arrest on that day, it could have possibly compromised the investigation and the informant's identity.”

Stacy C. had been paid approximately \$14,000 for her work as a confidential informant. How much she was paid varied significantly with each assignment. If the information obtained by the informant led to an arrest or “some significant action that [could] be taken by law enforcement[,]” the informant would be paid more. However, an informant is not paid extra for testifying in court or if the information they provide leads to a conviction.

Detective Piantanida was assigned to “the Los Angeles Police Department Federal Bureau Violent Crime Task Force.” He was working on the investigation of the residence at 4234 Montclair with Agent Milazzo.

From 2004 to 2008, Piantanida had been involved in over a 1,000 arrests involving narcotics, including rock cocaine. From 2008 to 2011, he worked with informants who purchased narcotics. During that time, Piantanida, himself, purchased narcotics in an undercover capacity only twice. However, on approximately 15 occasions he had worked as an undercover seller during which he sold to users fake rock cocaine.

Piantanida and the police department tended to use undercover informants frequently when they were working with the F.B.I. Piantanida indicated that, most of the time if he were to attempt to purchase narcotics in an undercover capacity, individuals “would look at [him] . . . as law enforcement or, at least, someone that didn't necessarily fit into the specific area. [¶] So utilizing informants just enable[d] [law enforcement] to infiltrate the community . . . and find out who [was] selling narcotics [with a certain] comfort level”

On April 12, 2011, Piantanida, along with his task force and Special Agent Milazzo, was targeting 4234 Montclair. As Agent Milazzo had indicated, that specific address had been identified as a problem location; several controlled narcotic purchases had been made there. In addition, Piantanida and other officers had received “many complaints” regarding the sale of narcotics in the area surrounding the residence.

Piantanida had decided to use the services of Stacy C. Although she had been arrested a number of times, had a 2001 misdemeanor conviction for petty theft and a 2005 conviction for the sale of cocaine, the United States Attorney had reviewed her criminal history and determined that she would be “acceptable to use for [the] investigation.” It is common for informants to have criminal records, particularly if they had been involved in the drug trade.

Generally, prior to working with an informant, Piantanida and a special agent will “sit down with them, speak with them about their knowledge of criminal activity in general, . . . their knowledge of specific areas [and] depending [upon] what . . . [the officers intend to use] the informant for, their knowledge o[f] more specific things.” In addition, the officers “admonish informants that they cannot engage in criminal activity.”

Piantanida and Special Agent Milazzo followed Stacy C. as she walked toward the house on Montclair. They did not see Stacy C. approach the house, but a short time later, Piantanida saw her walking with “an unidentified male Black with a green shirt.” He then observed her approach the passenger’s side of a parked brown Oldsmobile with a handicapped license plate. The man in the green shirt approached the driver’s side of the car. After speaking with the individual in the car Stacy C., still accompanied by the man in the green shirt, walked eastbound on 28th Street, back toward where they had come from. After a time, Stacy C. left the man in the green shirt. In the meantime, the Oldsmobile had driven off westbound on 28th Street, toward Crenshaw Boulevard. Piantanida followed the Oldsmobile for a short time. There was one Black male in the car. Piantanida then directed another officer, who was in plain clothes and driving an unmarked vehicle, to follow the car until uniformed officers could move in and conduct a traffic stop in order to determine the identity of the driver.

Piantanida then contacted Stacy C., who informed him that she had purchased cocaine from the man in the car. Piantanida picked up Stacy C., who gave to Milazzo the recording equipment and to Piantanida “two off-white solids wrapped in a clear plastic bag” and a business card which she had obtained from the man in the Oldsmobile. Based

on his background, training and experience, Piantanida was of the opinion that each of the two off-white solids consisted of a usable amount of cocaine base.

After the uniformed officers made the traffic stop and obtained a license number and date of birth from the driver, Piantanida obtained a picture of the man which Stacy C. identified as the defendant and appellant, Donte Harp. The business card which Harp had given to Stacy C. indicated that his name was "Tay."

Harp was not arrested on April 12, 2011. He was taken into custody at his home, over a month later on May 19, 2011.

Stacy C. indicated that she worked for the L.A.P.D. and the F.B.I. as an informant. She had become an informant through Detective Piantanida. When she began in February 2010, she was simply told that she needed to "find people that sell drugs." Between February 2010 and May 2011, Stacy C. participated in approximately 20 drug transactions. She believed she was paid between \$15,000 and \$20,000 for her work. On April 12, 2011, Stacy C. was working for both the L.A.P.D and the F.B.I.

Stacy C. is familiar with "street talk" regarding the buying and selling of cocaine. She had sold drugs and "was from the streets." She has a 2005 conviction for the sale of cocaine and a 2001 misdemeanor conviction for petty theft.

It was Stacy C.'s belief that the area surrounding 4234 Montclair was a "drug area" or "[t]he hood." When one is looking for someone from whom to purchase cocaine, that person would likely approach a group and ask, " 'Who got work?' " or " 'Where's that?' " or " 'You got it?' "

On April 11, 2011, Stacy C. approached a group of men standing in front of 4234 Montclair and asked if any of them knew someone named " 'Hustle.' " She asked because he was someone she had known from the area. When no one knew Hustle, Stacy C. asked, " 'Who got it?' " or " 'Do you got some work[?]' " One of the men indicated that he knew where to go, so he and Stacy C. walked south on Montclair, then west on Norton. There the man saw a friend, who he referred to as "Tay-dog." The man Stacy C. was walking with approached Tay-dog, who was sitting in a beige car. After the

two men had a conversation, Stacy C. walked up to the passenger side of the car, asked Tay-dog if he had it and threw the \$40 on the seat. Tay-dog then handed cocaine packaged in plastic to Stacy C. When she asked him how she could get in touch with him, Tay-dog handed to Stacy C. a business card. Stacy C. took the card, then walked away.

At trial, Stacy C. identified “Tay-dog” as the defendant, Harp.

L.A.P.D. Officer Brian Thayer was working as part of the task force with Special Agent Milazzo and Detective Piantanida on April 12, 2011. At trial, he recognized Harp and knew him as either “Tay” or “Tay-Dog.”

After the informant, Stacy C., had purchased cocaine from Tay-dog, Detective Piantanida handed to Officer Thayer several items to book into evidence. Piantanida gave to Thayer two off-white rock-like substances which resembled rock cocaine and a business card with a phone number and “ ‘Tay’s Income Tax Service’ ” printed on it. Thayer weighed the two rocks and, together, they amounted to 1.42 grams.¹

2. Procedural history.

On February 3, 2012, an amended information was filed in which it was charged that, on or about April 12, 2011, the crime of the “sale/transportation/offer to sell [a] controlled substance,” in violation of Health and Safety Code section 11352, subdivision (a), a felony, “was committed by Donte Taiwan Harp, who did unlawfully transport, import . . . sell, furnish [or] administer . . . a controlled substance, to wit, cocaine base.” It was further alleged pursuant to Health and Safety Code section 11370.2, subdivision (a) that the defendant, Donte Taiwan Harp, previously had been convicted of two counts

¹ The off-white rocks were analyzed by Jane Villegas, a criminalist for the L.A.P.D., assigned to the Scientific Investigation Division, Narcotics Analysis Unit. She analyzed the rocks, which according to Villegas weighed 0.29 grams, on April 22, 2011 and again on February 8, 2012. She performed a “color screening test,” a “microcrystal test” and an “instrumental analysis” test on each rock and formed the opinion that each one contained cocaine in the form of cocaine base.

of possession of cocaine base for sale in violation of Health and Safety Code section 11351.5, for one of which he served a prison term (Pen. Code, § 667.5, subd. (b)).

At proceedings held on February 3, 2012, the trial court informed Harp that, although he faced a term of 12 years for the crimes and other allegations made in the information, the People were offering him three years in state prison. Harp rejected the offer, indicating that he wanted to be placed on probation. After Harp made his wishes known, the trial court responded, “The district attorney’s not going to do that. I have too limited knowledge of this case, but when I see someone with this record that you have, I normally do not give probation.” The trial court reminded Harp that if he took the three-year offer, he would actually serve a year and a half in local custody under Penal Code section 1170. Harp still insisted on a jury trial.

Harp made a motion to bifurcate his trial on the substantive offense from that on his prior convictions. The trial court granted the motion.

After the trial court instructed the jury on various concepts, including the standard of “beyond a reasonable doubt,” counsel gave their opening statements and each of the prosecution’s witnesses testified.

When the People rested their case, Harp’s counsel made a motion for acquittal pursuant to Penal Code section 1118.1. The People responded, “Your Honor, the evidence shows that [Stacy C.] purchased two rocks of cocaine from the defendant, and Detective Piantanida testified that they were in this full amount.” The trial court responded, “If the jury believes the informant, then it would be sufficient to sustain the conviction on appeal, so the 1118[.1] is denied.”

The trial court addressed defense counsel and stated, “You indicated informally that [Harp] is not going to testify[,] [b]ut of course we have to have that waiver on the record.” The trial court then addressed Harp, stating, “Mr. Harp, you do have the right to testify. You heard me talk about that in front of the jury. You also have a right not to testify. It is my understanding you’ve made the decision you wish to assert your 5th Amendment right not to testify?” Harp responded, “Yes, Sir.” When the trial court then

asked Harp if he had discussed this decision with his counsel, Harp again replied, “Yes, Sir.”

With regard to Harp’s prior convictions and prison term, the trial court again addressed Harp, stating, “Mr. Harp, I’ll take the jury waiver. This means nothing if you’re not convicted, but if you are convicted, then we have the issue of [your prior drug convictions] and the prior prison term. [¶] . . . [¶] Do you give up your right to a jury trial and agree that I as the judge can decide the issue of the truth of the prior convictions” “[t]hat are alleged in this case?” Harp responded, “Yes, Sir.” The trial court then inquired, “And you talked to your lawyer about it, and she has answered all your questions?” Harp stated, “Yes, Sir.”

On the afternoon of February 9, 2012, the trial court received notice from the jury’s foreperson that the jury had reached a verdict. The court clerk then read the verdict, which indicated that the jury had found “the defendant Donte Tyrone Harp guilty of the crime of [the] sale of a controlled substance, to wit, cocaine base, in violation of Health [and] Safety Code section 11352[, subdivision] (a), a felony, as charged in count 1 of the information.”

After the trial court released the jury, Harp’s counsel indicated that she believed Mr. Harp was simply going to admit his priors. The matter was then continued for a week, until February 17, 2012, for probation and sentencing proceedings. The trial court requested from both sides “a brief sentencing memorandum as to what [counsel] believe[d] the appropriate sentence [should] be.”

On February 17, 2012, Harp’s counsel indicated that Harp was prepared to admit his prior convictions and prison term. The trial court informed Harp that “[he had] the right to a trial on the prior convictions. . . . [He had the] right to confront and cross-examine any witnesses, a right to subpoena [his] own witnesses[,] to put on [a] defense, and a right against self-incrimination. [He did] not have to admit these priors. The effect of the priors [would be] as follows: the 11370.2[, subdivision] (a), Health [and] Safety

Code priors . . . could add three consecutive years to [his] sentence [and] the [Penal Code section] 667.5[, subdivision] (b) prior could add an additional year to [his] sentence.”

After Harp indicated that he understood the consequences of admitting his priors, the trial court advised him that, in doing so, he was giving up his right to confront and cross-examine witnesses, his right to subpoena witnesses and present evidence on his own behalf and his right against self-incrimination. When the trial court determined that “there ha[d] been no threats or promises [made] as to what [would] happen when [he] admit[ted] these prior convictions” and that they were being freely and voluntarily made, it asked Harp if he admitted or denied “the allegation under Health [and] Safety Code section 11370.2[, subdivision] (a) [that he had been] convicted of Health [and] Safety Code section 11351.[1] on January 2nd, 2007.” Harp answered, “Yes Sir. Admit.” The court then asked, “And as to the same charge, January 30, 2006, . . . do you admit or deny that prior conviction?” Harp stated, “Admit.” Finally, the court asked Harp if, for the conviction he had suffered on January 2, 2007, he had served a prison term pursuant to Penal Code section 667.5, subdivision (b). Harp answered, “Yes, Sir.” The court then found the priors to be true and that Harp had “understood them [and] voluntarily, knowingly, and intelligently waived his rights.”

Before the court imposed sentence, defense counsel indicated that she had “neglected to inform the court [that] Mr. Harp is gainfully employed. He works . . . [for] Flat Iron Construction, working on railways, and they contract out with the [Los Angeles] Zoo. So he goes to various locations to work on those rail lines. He works about eight hours a day. He had to obviously c[o]me to every single court date when he was out of custody, and he would ask for [the] time off in order to make those court dates. [¶] He . . . also [has] two children, a nine-year old and an 11-year-year old. They . . . live with him part-time, and he . . . financially support[s] them.”

After indicating that the maximum term which it could impose was 12 years, the trial court sentenced Harp to the low term of three years for his violation of Health and Safety Code section 11352, subdivision (a). The court selected the low term based on the

“small amount of narcotics involved in this case.” With regard to his admission of a Health and Safety Code section 11370.2, subdivision (a) prior, the trial court imposed an additional, consecutive term of three years. In total, Harp was sentenced to six years, the time to be served in county jail pursuant to Penal Code section 1170, subdivision (h)(1) and (2). The court explained that it had imposed a six-year term because Harp “just has too long a record. And it’s not just drug sales. But I noticed prior convictions involving weapons and violence. And that’s of great concern to the court, a number of those. And of course he has been to state prison before.”

Harp was awarded presentence custody credit for 14 days actually served and 14 days of conduct credit.² He was ordered to pay a \$240 restitution fine (Pen. Code, § 1202.4, subd. (b)), a \$10 fine pursuant to Penal Code section 1465.7, a \$40 court security fee (Pen. Code, § 1465.8, subd. (a)(1)), a \$30 criminal conviction assessment (Gov. Code, § 70373), a \$180 laboratory fee and penalty assessment (Health & Saf. Code, § 11372.5, subd. (a)) and a \$10 DNA penalty assessment.

Harp filed a timely notice of appeal and request for the appointment of counsel on February 17, 2012.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

² In an order filed June 6, 2012, the trial court corrected the number of presentence custody credits awarded to 15 days actually served and 15 days of conduct credit, for a total of 30 days. In addition, the court indicated that Harp’s one-year term pursuant to Penal Code section 667.5, subdivision (b) and second three-year term pursuant to Health and Safety Code section 11370.2, subdivision (a) were intended to have been stricken at the time of sentencing due to “the non-violent nature of the current offense and [to make] the sentence . . . proportionate to other narcotics sales case[s].” (See Pen. Code, § 1385.) The sentencing minute order and the abstract of judgment were ordered to be amended in accordance with these corrections.

By notice filed August 20, 2012, the clerk of this court advised Harp to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. Harp submitted a letter in which he claimed his counsel had been ineffective. He stated, “She told me I was guilty, [that] the evidence point[ed] to me. She also told me if I took it to trial I wouldn’t get no more th[a]n four years low term.”

“In assessing claims of ineffective assistance of trial counsel, we consider whether counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.]” (*People v. Carter* (2003) 30 Cal.4th 1166, 1211; see *Strickland v. Washington* (1984) 466 U.S. 668, 694.) Here, nothing in the record indicates counsel’s representation fell below an objective standard of reasonableness. Counsel made appropriate motions and arguments. Moreover, the trial court informed Harp that although he faced a term of 12 years, the People were offering him three years in state prison, which meant that he would actually serve only a year and a half in local custody. It is difficult to believe that, under these circumstances, his counsel would urge him to go to trial because, if he did so, he would not receive more than four years in prison. Harp’s assertion is neither reasonable nor supported by the record.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel’s responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.