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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN W. KING,

Defendant and Appellant.

B237538

(Los Angeles County  
Super. Ct. No. BA387942)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Dennis J. Landin, Judge. Affirmed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Respondent.

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Defendant Kevin W. King appeals from his conviction following a plea of guilty to possession of a controlled substance for sale in violation of Health and Safety Code section 11351.5. Following our independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441 (*Wende*), we affirm.

## FACTS

We glean the following facts from the Reporter's Transcript of the preliminary hearing on September 1, 2011. At about 5:20 p.m. on August 18, 2011, a police officer observed defendant and another man in what appeared to be a hand-to-hand narcotics transaction. Both men were detained. No drugs were found on the person or in the immediate area of the other man. But police recovered a small plastic bindle containing several pieces of an off-white solid substance and \$14 from defendant's left sock; no drug-use paraphernalia was found in defendant's possession. The bindle was later determined to contain .95 gross grams of cocaine base. Based on these facts, the testifying police officer concluded that defendant possessed the cocaine base for sale.

## PROCEDURAL BACKGROUND

At his arraignment on August 22, 2011, defendant signed a written waiver of his right to appointed counsel. Defendant continued to represent himself at the preliminary hearing on September 1, at which his Penal Code section 1538.5 motion to suppress all evidence found as a result of an illegal detention, as well as his motion to exclude the evidence for failure to show chain of custody were heard and denied.<sup>1</sup>

Although defendant testified at the preliminary hearing, he was not re-advised of his right to counsel as required by section 866.5 and *McCarthy v. Superior Court* (1958) 162 Cal.App.2d 755. Defendant denied possessing any cocaine base and maintained that the bindle of cocaine base had not been in defendant's possession. Defendant heard a woman in the crowd say that the officer took the bindle out of his own pocket. Defendant

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<sup>1</sup> All future undesignated statutory references are to the Penal Code.

was held to answer. By information filed on September 15, 2011, defendant was charged with possession of cocaine base for sale. (Health & Saf. Code, § 11351.5.) The information was later amended to add additional section 667.5, subdivision (b) prior conviction allegations.

On September 16, 2011, defendant's motion to dismiss for failure of the police to get identifying information of the woman in the crowd was denied. Two weeks later, his section 995 motion to dismiss on the grounds that he had not been advised of the right to counsel at the preliminary hearing as required by section 866.5 and *McCarthy, supra*, were denied, based upon the trial court's finding that section 866.5 was satisfied by the fact that defendant was told at the preliminary hearing: (1) "You've been told that the court considers [representing yourself] a bad idea . . . ."; and (2) "Can I caution you before you testify that anything you say in connection with this hearing as the potential to result in your incrimination, and that taking the stand should be done with great caution. It is often discouraged by attorneys." Defendant's motion to exclude evidence as a sanction for failure to hold a timely probable cause hearing (§ 825; *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 57; *Gerstein v. Pugh* (1975) 420 U.S. 103, 125) was also denied. At a pretrial conference on October 17, 2011, defendant reaffirmed his desire to continue representing himself and executed another formal waiver of his right to appointed counsel. The trial court declined to reconsider defendant's section 995/866.5 motion. On October 21, defendant's renewed section 1538.5 motion to suppress and section 995/866.5 motion to dismiss were once again denied.

On October 31, 2011, defendant pled guilty to possession of cocaine base for sale. He was sentenced to the four year midterm in county jail. Execution of sentence was suspended and defendant was placed on three years formal probation. He timely appealed.

We appointed counsel to represent the defendant on appeal. After examination of the record, appointed counsel filed an opening brief which contained an acknowledgment that she had been unable to find any arguable issues and requested that we independently review the record pursuant to *Wende, supra*, 25 Cal.3d 436. On July 3, 2012, we advised

defendant that he had 30 days within which to personally submit any contentions or issues which he wished us to consider.

On August 3, 2012, appellant filed a document captioned: “Response to Court Letter Dated 7.3.12.” Attached to the caption page was a form Petition for Writ of Habeas Corpus with the present appeal case number handwritten by appellant.<sup>2</sup> Defendant contends the trial court committed two errors warranting reversal: (1) denial of his motion to dismiss for failure to provide a timely probable cause determination and (2) denial of his section 995/866.5 motion. Neither contention has merit.

### *Probable Cause Hearing*

Generally, a person arrested without a warrant is entitled to a probable cause hearing within 48 hours of the warrantless arrest. (§ 825; *People v. Lewis* (2008) 43 Cal.4th 415, 444, citing *Gerstein v. Pugh* (1975) 420 U.S. 103, 126.) But section 825 is not applicable to a parolee placed on a parole hold, because he or she is deemed not to be separately detained prior to arraignment. (*People v. Gordon* (1978) 84 Cal.App.3d 913, 922-923.) Here, defendant was on parole and had an ongoing probation violation case when he was arrested without a warrant at about 6:00 p.m. on August 18, 2011. Under these circumstances, appellant did not have a right to a probable cause hearing within 48 hours of his warrantless arrest.

### *Penal Code section 866.5*

Even assuming for the sake of argument that it was error to not re-advise appellant of his right to counsel at the preliminary hearing, we find any such error was harmless. (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 530 [on direct appeal from the judgment, denial of right to counsel is subject to harmless error analysis, i.e. whether the defendant was deprived of a fair trial or otherwise suffered prejudice as a result of the error ].)

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<sup>2</sup> We do not treat this attachment as a separate writ of habeas corpus and make no ruling other than in the present appeal.

Here, defendant has not shown he suffered any prejudice resulting from the failure to give the section 866.5 advisement at the preliminary hearing. Defendant was advised of his constitutional rights and waived those rights at his arraignment and several times thereafter, including when he plead guilty. Under these circumstances, the fact that defendant was not given formal advisements at the preliminary hearing – although the subject was discussed at the hearing – did not deprive defendant of a fair trial.

We have examined the entire record and are satisfied that appointed counsel has fully complied with her responsibilities and that no arguable issues exist. (*Wende, supra*, 25 Cal.3d at p. 441.)

### **DISPOSITION**

The judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.