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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON SPENCER,

Defendant and Appellant.

B255745

(Los Angeles County  
Super. Ct. No. BA404363)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edmund Willcox Clarke, Jr., Judge. Affirmed.

Jonathan P. Milberg, under appointment by the Court of Appeal for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Brandon Spencer was convicted, following a jury trial, of four counts of attempted murder in violation of Penal Code sections 664 and 187.<sup>1</sup> The jury found true the allegations that the attempted murders were willful, deliberate and premeditated, and were committed for the benefit of a criminal street gang within the meaning of section 186.22. The jury also found true the allegations that appellant personally discharged a handgun in the commission of the attempted murders, and inflicted great bodily injury with the handgun within the meaning of sections 12022.53, subdivisions (b) through (d). The trial court sentenced appellant to a term of 40 years to life for the attempted murder of Geno Hall (Hall), consisting of a 15-year-to-life term for the attempted murder conviction plus a 25-year-to-life term for the firearm use enhancement. The court sentenced appellant to concurrent terms of 40 years to life for the remaining three attempted murder convictions.

Appellant appeals from the judgment of conviction, contending the warrantless search of his cell phone incident to his arrest violated his Fourth Amendment rights and requires reversal of the judgment. We affirm the judgment of conviction.

### Facts<sup>2</sup>

On October 31, 2012, a student association at the University of Southern California (USC) held a Halloween party in USC's Tutor Campus Center Building. At about 11:38 p.m., appellant, who was a member of the Black P Stones (BPS) Bloods gang and was wearing his gang's colors, approached Hall outside the entrance to the party area. Appellant asked Hall where he was from, and Hall replied, "Rolling 40s." Appellant and Hall were wearing their respective gangs' colors. BPS and the Rolling 40s were longtime bitter rivals. Appellant fired six shots at Hall and the group of people

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<sup>1</sup> All further undesignated code section references are to the Penal Code.

<sup>2</sup> This brief summary of the crimes in this matter is taken from the Reporter's Transcript of the trial, as is Officer Garcia's account of his initial search of appellant's cell phone. Officer Rand's testimony is taken from the hearing on appellant's motion to suppress.

around Hall, wounding Hall, Hall's friend Davonte Smith, Thomas Richie, and Mysson Downs, who had previously known appellant.

Appellant fled after the shooting, but was arrested in a nearby parking lot by Los Angeles Police Department (LAPD) officers. LAPD Officer Garcia seized appellant's cell phone from his pants pocket and searched it, at least briefly.

Several hours after appellant's arrest, after receiving information from the arresting officers that there were photographs on appellant's cell phone, LAPD Officer Robert Rand viewed images and video on appellant's cell phone. These images included a photograph of a revolver similar to the one used in the shooting, a photograph of appellant firing a gun at an indoor shooting range, a photograph of BPS graffiti, and a video of appellant and other gang members driving around asking people where they were from.

Officer Rand used these photographs and videos, along with other information, to obtain search warrants for appellant's and Hall's cell phone and Twitter accounts. Some of the photos and videos were shown at trial. Evidence from appellant's and Hall's Twitter accounts was also introduced at trial and showed that they had been engaged in an argumentative and threatening exchange of messages prior to the Halloween party.

### Discussion

Appellant made a motion to suppress the evidence obtained during Officer Rand's warrantless search of his cell phone. The trial court denied the motion, finding dispositive the holding of the California Supreme Court in *People v. Diaz* (2011) 51 Cal.4th 84 (*Diaz*). In that case, the California Supreme Court held that the contents of a cell phone could properly be searched incident to arrest. (*Id.* at p. 93.)

In June 2014, while this case was pending on appeal, the United States Supreme Court held that police may not search data or images contained in cell phones without a warrant in the absence of an emergency necessitating immediate action. (*Riley v. United States* (2014) \_\_\_ U.S. \_\_\_, 134 S.Ct. 2473 (*Riley*).)

Appellant contends that since his case was pending on appeal when *Riley* was decided, the decision in *Riley* must be applied retroactively to his case, resulting in a holding that the evidence should have been excluded. He acknowledges that we have previously held that data or images found during a warrantless search of a cell phone prior to the decision in *Riley* need not be suppressed because the police in good faith reasonably relied on the decision in *Diaz*. (*People v. Macabeo* (2014) 229 Cal.App.4th 486, review granted Nov. 25, 2014 (S221852).)

We reach the same conclusion in this case. In *Davis v. United States* (2011) \_\_ U.S.\_\_, 131 S.Ct. 2419 (*Davis*), the U.S. Supreme Court held that evidence seized from a car during a search incident to arrest is contrary to the rule in *Arizona v. Gant* (2009) 556 U.S. 332 (*Gant*) and was not subject to the exclusionary rule because the officers conducted the search in “objectively reasonable reliance on [the] binding appellate precedent” of *New York v. Belton* (1981) 453 U.S. 454 (*Belton*). After Davis’s arrest, *Gant* had restricted the holding of *Belton*. In such a circumstance, “suppression would do nothing to deter police misconduct . . . and . . . it would come at a high cost to both the truth and the public safety. . . .” (*Davis, supra*, 131 S.Ct. at p. 2423.)

The U.S. Supreme Court in *Davis* said the exclusion of evidence to deter is proper when the law enforcement action in question constitutes “‘deliberate,’ ‘reckless,’ or ‘grossly negligent’” police conduct. (*Davis, supra*, 131 S.Ct. at pp. 2437-2439.) Presumably this would include systematically negligent police conduct. (See *id.* at p. 2438.) The court concluded that “[t]he harsh sanction of exclusion ‘should not be applied to deter objectively reasonable law enforcement activity.’ [Citation.] Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.” (*Id.* at p. 2429.) The court further held that although *Gant* applied retroactively, “[i]t does not follow . . . that reliance on binding precedent is irrelevant in applying the good-faith exception to the exclusionary rule.” (*Id.* at p. 2432.) The court therefore “[held] that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply.” (*Id.* at p. 2434.)

Appellant contends that *Diaz, supra*, 51 Cal.4th 84 cannot be considered binding appellate precedent for purposes of the good-faith exception to the exclusionary rule because it was contrary to binding U.S. Supreme Court precedent and “clearly out of step with established federal constitutional law.”

In *Diaz*, five justices agreed that under existing U.S. Supreme Court decisions cell phones could be searched incident to arrest. (*Diaz, supra*, 51 Cal.4th at p. 102 (conc. opn. of Kennard, acting C.J.).) Justice Kennard, in a concurring opinion, acknowledged the possibility that the U.S. Supreme Court would change its position on this issue, but recognized the California Supreme Court was bound to follow those precedents until the U.S. Supreme Court made exceptions to those cases or overruled them.<sup>3</sup> (*Id.* at p. 103 (conc. opn. of Kennard, Acting C.J.).) Appellant is correct that two justices dissented in *Diaz* and argued that the majority opinion in *Diaz* was contrary to existing U.S. Supreme Court law. (*Id.* at pp.103-112 (dis. opn. of Werdegar, J.).) However, the U.S. Supreme Court denied certiorari in *Diaz*. (*Diaz v. California* (2011) 132 S.Ct. 94.) Thus, at the time of appellant’s arrest, *Diaz*, was clearly binding appellate precedent for purposes of the good-faith exception to the exclusionary rule.

Appellant contends there is no evidence that Officer Rand was aware of or relied on *Diaz*. He acknowledges that in our previous opinion in *Macabeo*, we relied on *Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 178 (*Conway*) to support a presumption that the officers knew and relied on *Diaz*. He argues that the discussion of a presumption in *Conway* is dicta. The court in *Conway* relies on federal law in its discussion of the presumption, and we find *Conway* persuasive on this issue.

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<sup>3</sup> “[T]he United States Supreme Court has cautioned that on issues of federal law all courts must follow its directly applicable precedents, even when there are reasons to anticipate that it might reconsider, or create an exception to, a rule of law that it has established. (*Rodriguez de Quijas v. Shearson/Am. Exp.* (1989) 490 U.S. 477, 484.) The high court has reserved to itself alone ‘the prerogative of overruling its own decisions.’ (*Ibid.*; see *Scheiding v. General Motors Corp.* (2000) 22 Cal.4th 471, 478.)” (*Diaz, supra*, 51 Cal.4th at p. 103 (conc. opn. of Kennard, J.).)

In his supplemental letter brief, appellant contends that even if reliance on *Diaz* could be presumed in some cases, it cannot be presumed in this case because the record shows that Officer Rand “knew he needed a warrant to search the cell phone since he obtained one to ‘cover’ himself following his initial warrantless search.” At the hearing on the motion to suppress, Officer Rand explained that he viewed videos and photographs on the cell phone, but then shut down the phone because he intended to get the entire context [*sic*] of the phone. “SID,” the Scientific Investigation arm of the police department required a warrant to do a “forensic download.” This download would give Officer Rand access to “call contents” and “text messaging.” Nothing in Officer Rand’s testimony suggests that he sought a warrant because he knew or believed that he was not authorized to view readily accessible material on the cell phone such as photos and videos. Thus, Officer Rand’s act of obtaining a search warrant does not rebut the presumption that he was aware of and relied on *Diaz*.

In the supplemental letter brief, appellant also argues that even if a search of his cell phone would have been permissible incident to his arrest, the search of his cell phone did not in fact take place until five hours after he was arrested and so cannot be considered incident to his arrest. Appellant relies on a recent decision of the Ninth Circuit Court of Appeals to support his argument. (*United States v. Camou* (9th Cir. 2014) 773 F.3d 932 (*Camou*).) In that case, the court held that the search of a cell phone which occurred an hour and twenty minutes after his arrest and after he was transported to a border patrol station was not incident to arrest. The Ninth Circuit relied on its understanding of *U.S. v. Chadwick* (1977) 433 U.S. 1 (*Chadwick*) to support its holding.<sup>4</sup>

Like *Riley*, *Camou* was decided after appellant’s arrest in this case and involves an issue that was decided in *Diaz*. As the majority in *Diaz* recognized, approximately 90 minutes elapsed in that case between *Diaz*’s arrest and the search of his cell phone, a time which was “substantially similar to the 90-minute delay the high court held to be too

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<sup>4</sup> We are not bound to follow decisions of the Ninth Circuit even on issues of federal constitutional law. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 352; *People v. Bradley* (1969) 1 Cal.3d 80, 86.)

remote in [*Chadwick*].” (*Diaz, supra*, 51 Cal.4th at p. 93, fn .5.) However, as the majority explained, “*Chadwick* explains that a delayed warrantless search ‘of the person,’ [Citation.] — which includes property ‘immediately associated with the person’ at the time of arrest [Citation], but excludes property that is only ‘within an arrestee’s immediate control’ [Citation] — is valid because of ‘reduced expectations of privacy caused by the arrest.’ [Citation.]” (*Diaz, supra*, 51 Cal.4th at p. 94.) *Chadwick* involved the search of a double-locked footlocker found in the trunk of a vehicle which was not immediately associated with the defendant. As the majority in *Diaz* also pointed out, “*Edwards* states that ‘once the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other.’ ([*U.S. v. Edwards* (1974) 415 U.S. 800, 807].)” (*Diaz, supra*, 51 Cal.4th at p. 95.)

Although the warrantless search of appellant’s cell phone was unlawful under the recent decision in *Riley, supra*, 134 S.Ct. 2473, the search falls within the good faith exception to the exclusionary rule. Reversal of the trial court’s denial of the motion to suppress is not required, nor is reversal of appellant’s conviction.

Disposition

The judgment is affirmed.

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GOODMAN, J.\*

We concur:

TURNER, P.J.

MOSK, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.