Filed 8/4/15 P. v. Ascenio CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>FRANK ASCENCIO,<br><br>Defendant and Appellant. | B255779<br><br>(Los Angeles County<br>Super. Ct. No. KA103325) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Jr., Judge. Affirmed.

Edward H. Schulman, 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, Assistant Attorney General, Victoria B. Wilson and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Frank Ascencio appeals from the judgment entered following his pleas of no contest to count 1 – possession of a controlled substance (methamphetamine), and count 2 – possession of a firearm by a felon, and following his convictions by jury on count 3 – lewd or lascivious act upon a child under 14 years old, count 4 – possession of child pornography, count 5 – child molesting, and count 6 – invasion of privacy, following the denial of his Penal Code section 1538.5 suppression motion. (Health & Saf. Code, § 11377, subd. (a); Pen. Code, §§ 29800, subd. (a)(1), 288, subd. (a), 311.11, subd. (a), 647.6, subd. (a)(1), 647, subd. (j)(3)(A).)[1] The court sentenced appellant to prison on the above counts for a total of seven years four months.

***FACTUAL SUMMARY***

A detailed recitation of the facts pertaining to the present offenses is unnecessary to resolve this appeal. It is sufficient to note the record reflects on or between January 1, 2012 and October 31, 2012, appellant committed child molesting of C. Doe (count 5); on or between January 1, 2013 and October 1, 2013, appellant committed invasion of privacy (count 6); and on or between March 1, 2013 and April 30, 2013, appellant committed a lewd or lascivious act upon a child under 14 years old, i.e., Jessica Doe (count 3). Moreover, on or about October 1, 2013, appellant possessed methamphetamine, possessed a firearm while he was a felon, and possessed child pornography (counts 1, 2 & 4, respectively).

On October 1, 2013, deputies searched a garage at 1710 Delhaven in West Covina. Appellant lived in the garage. Deputies recovered two computer thumb drives from the garage. After reviewing the two thumb drives, deputies obtained a search warrant, searched the garage pursuant to the warrant, and obtained additional thumb drives leading to evidence introduced at trial.

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[1] The information alleged counts 1 through 6. Some counts were renumbered for purposes of jury trial, but the court sentenced on counts 1 through 6. We refer to the counts as counts 1 through 6.

## *ISSUE*

Appellant claims the trial court erroneously denied his Penal Code section 1538.5 suppression motion.

## *DISCUSSION*

*The Trial Court Properly Denied Appellant's Suppression Motion.*

1. *Pertinent Facts*.

On October 25, 2012, in another case (superior court case No. KA099846), appellant, inter alia, pled no contest to possession of methamphetamine (Health & Saf. Code, 11377, subd. (a)) and possession of a smoking device (Health & Saf. Code, § 11364.1, subd. (a)(1)) with the understanding he would receive Proposition 36 probation. The court, honoring the bargain, placed appellant on formal probation for one year. The reporter's transcript of the proceeding reflects a condition of probation was, "You're to submit your person and property to search and seizure at any time of the day or night by any law enforcement officer . . . with or without a warrant or probable cause."[2]

In the present case (superior court case No. KA103325), appellant filed a pretrial Penal Code section 1538.5 motion seeking suppression, inter alia, of the fruits of the search of two thumb drives seized from his room, i.e., a residential garage, pursuant to a probation search. The written motion argued the search exceeded the scope of a probation search. The People's filed opposition argued, inter alia, the search was justified by the search condition in case No. KA099846.

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[2] Appellant notes the minute order for the October 25, 2012 proceeding in case No. KA099846 reflects the condition was, in pertinent part, "[S]ubmit to searches and seizures of your person and property at any time during the day or night by any peace officer . . . with or without a warrant, probable cause, *or reasonable cause*." (Italics added.) That is, inter alia, the minute order includes, but the reporter's transcript omits, the phrase "or reasonable cause." Our resolution of appellant's claim makes the difference inconsequential.

At the March 5, 2014 hearing on the suppression motion, the court took judicial notice of appellant's search and seizure probation condition in case No. KA099846. The preliminary hearing testimony of Los Angeles County Sheriff's Detective Shawn O'Donnell was incorporated by reference into the suppression hearing evidence. O'Donnell testified at the preliminary hearing as follows. On October 1, 2013, O'Donnell was at the Delhaven address. O'Donnell and other deputies were conducting surveillance there and intending to conduct a probation violation compliance search on appellant. Appellant was on probation for "narcotics." Appellant left the residence in a vehicle and deputies detained him perhaps a mile from the residence.

O'Donnell told appellant that deputies were going to conduct a probation compliance search of his residence. The court asked O'Donnell to describe a probation search. O'Donnell later testified, "we're there to determine if he's in compliance with his probation terms and conditions" and this was done by searching, inter alia, appellant's living quarters and "[t]hings where people could hide things."

After O'Donnell told appellant that deputies were going to conduct a probation compliance search of his residence, appellant told O'Donnell that appellant's belongings were in the garage and appellant had been staying there. Deputies took appellant back to his residence so a probation compliance search could be conducted, and O'Donnell asked if appellant had anything illegal in the garage. Appellant replied he had methamphetamine and a handgun or revolver inside his computer desk drawer.

O'Donnell went and "checked in" those locations. He found a loaded .22-caliber revolver and a container inside of which was a white crystalline substance resembling methamphetamine. He also recovered two thumb drives that were next to the computer. (The two thumb drives are identified various ways in the record. We refer to them hereafter as the two thumb drives.) O'Donnell did not review the two thumb drives; another detective did. O'Donnell did not have the ability to look at the two thumb drives at the scene. Appellant was a member of the "Old Town Kriminals" gang.

The court asked O'Donnell if there was any reason deputies chose to confiscate the two thumb drives as part of a probation compliance search, and O'Donnell replied, "Just to see if there's any photos or any other type of illegal activity that Mr. Ascencio was involved [in]." Based on other investigations and arrests in which O'Donnell had been involved, it had been O'Donnell's experience thumb drives might contain evidence of criminal activity.[3]

After argument during the suppression motion, the court concluded as follows. Law enforcement confiscated the two thumb drives because, in the experience of law enforcement, the two thumb drives could contain information of further illegal conduct separate from the previously discovered contraband. Based on the probation condition, appellant to some extent agreed to surrender his Fourth Amendment rights; therefore, he could no longer contest the search and seizure of the two thumb drives. The court denied the suppression motion.

2. *Analysis.*

Appellant claims the trial court erroneously denied his suppression motion. He argues "the warrantless seizure of [the two thumb drives] from his home pursuant to a probationary 'search' condition, as well as the warrantless examination of same off-site, exceeded its constitutional scope in light of the offenses for which he had been placed on

[3] At the hearing on the suppression motion, the parties stipulated the preliminary hearing transcript could be incorporated into the suppression hearing evidence. In that context, appellant's counsel subsequently commented, "I think the only thing that's relevant is [O'Donnell's] testimony at the [preliminary hearing]." The court stated, "Very good then." As respondent observes, the comment of appellant's counsel indicates he wanted incorporation limited to O'Donnell's testimony. At the preliminary hearing, Los Angeles County Sheriff's Detective Dan Morgan testified, in pertinent part, to the effect Los Angeles County Sheriff's Deputy Morales was present when the guns, drugs, and two thumb drives were seized, and Morales told Morgan that Morales looked at the thumb drives for gang-related evidence but saw photographs of young girls. In light of our conclusion below that any warrantless search of the two thumb drives was justified by appellant's search condition, we need not decide whether, as respondent suggests, the above limiting comment of appellant's counsel precludes consideration of Morgan's testimony. Even if Morgan's above testimony was admitted into evidence at the suppression hearing, the testimony does not affect our analysis.

probation and in the absence of a 'reasonable suspicion' that the seized items had potential evidentiary value either in enforcing compliance with his probationary status or in uncovering current criminal wrongdoing. Accordingly, that seizure and search were conducted in an unreasonable manner and all 'fruits of that poisonous' seizure should have been suppressed." We reject appellant's claim.

In *People v. Bravo* (1987) 43 Cal.3d 600, one of the probation conditions of the defendant was "'submit his person and property to search or seizure at any time of the day or night by any law enforcement officer with or without a warrant.'" (*Id.* at p. 602.) Police suspected the defendant was engaged in narcotics activity (*id.* at pp. 602-603, 611) and searched his home based on the probation condition (*id.* at p. 603). On appeal, the defendant claimed the search violated the Fourth Amendment because it was not based on "reasonable cause." (*Ibid.*) "Reasonable cause" is the same as "reasonable suspicion." (Cf. *In re Randy G.* (2001) 26 Cal.4th 556, 567.)

*Bravo* reasoned, the "*search* condition must . . . be interpreted on the basis of what a reasonable person would understand from the language of the condition itself." (*Bravo, supra,* 43 Cal.3d at p. 607, italics added.) *Bravo* stated, "We think the wording of appellant's probation *search* condition authorized the instant *search*." (*Ibid.,* italics added.)

*Bravo* then stated, "The condition is worded almost identically to the condition at issue in *People v. Mason* [1971] 5 Cal.3d 759. As in this case, the defendant in *Mason* agreed as a condition of his probation to "'submit his person, place of residence, vehicle, to *search* and seizure at any time of the day or night, with or without a search warrant, . . .'" [Citation.] We observed in *Mason* that 'a probationer who has been granted the privilege of probation on condition that he submit *at any time* to a *warrantless search* may have *no reasonable expectation of traditional Fourth Amendment protection.*' [Citation.]" (*Bravo, supra,* 43 Cal.3d at p. 607, italics added.)

*Bravo* also stated, "We read the consent in *Mason* as a *complete waiver of that probationer's Fourth Amendment rights, save only his right to object to harassment or searches conducted in an unreasonable manner.* [Citation.] We see no reason to

interpret the condition imposed on this appellant more narrowly." (*Bravo, supra,* 43 Cal.3d at p. 607, italics added.) A trial court can insert into a search condition language expressly requiring reasonable cause, but absent such language a reasonable-cause requirement will not be implied. (*Id.* at p. 607, fn. 6.)

*Bravo* later observed, "Were we to conclude that a probationer's waiver of Fourth Amendment rights were either impermissible or limited to searches conducted only upon a reasonable-suspicion standard, the opportunity to choose probation might well be denied to many felons by judges whose willingness to offer the defendant probation in lieu of prison is predicated upon knowledge that the defendant will be subject to search at any time for a proper probation or law enforcement purpose. We see no basis for denying a defendant the right to waive his Fourth Amendment rights in order to accept the benefits of probation. The reasonable-suspicion standard . . . has no application to *searches* conducted pursuant to a consensual probation order." (*Bravo, supra,* 43 Cal.3d at p. 609.)

*Bravo* also stated, "We find no reason to conclude that a defendant who in order to obtain probation specifically agreed to submit to *search* 'with or without a warrant at any time' has waived only the right to demand a warrant. Rather, . . . *the defendant has voluntarily waived 'whatever claim of privacy he might otherwise have had*.' [Citation.]" (*Bravo, supra,* 43 Cal.3d at p. 610, italics added.)

*Bravo* continued, "Our interpretation of the scope of appellant's consent in agreeing to the *search* condition of his probation is *consistent with the dual purpose of such a provision 'to deter further offenses by the probationer and to ascertain whether he is complying with the terms of his probation'* [citation]. As we recognized in *Mason*: ' "With knowledge he may be subject to a *search* by law enforcement officers at any time, [the probationer] will be less inclined to have narcotics or dangerous drugs in his possession. The purpose of an unexpected, unprovoked *search* of defendant is to *ascertain* whether he is complying with the terms of probation; to determine not only whether he disobeys the law, but also whether he obeys the law. *Information obtained under such circumstances would afford a valuable measure of the effectiveness of the*

*supervision given the defendant and his amenability to rehabilitation*." [Citation.]'" (*Bravo, supra,* 43 Cal.3d at p. 610, italics added.)

*Bravo* observed, "To condition warrantless probation searches upon reasonable cause would make the probation order superfluous and vitiate its purpose." (*Bravo, supra,* 43 Cal.3d at p. 610.)

*Bravo* stated, "We do not suggest that *searches* of probationers may be conducted for reasons unrelated to the rehabilitative and reformative purposes of probation or other legitimate law enforcement purposes. A waiver of Fourth Amendment rights as a condition of probation does not permit *searches* undertaken for harassment or searches for arbitrary or capricious reasons. We hold only that a search condition of probation that permits a *search* without a warrant also permits a *search* without 'reasonable cause,' as the former includes the latter. [Citation.]" (*Bravo, supra,* 43 Cal.3d at pp. 610-611, italics added.)

In *Bravo,* police suspected the defendant of criminal activity even though the quantum of suspicion might not have risen to the level of reasonable cause. (*Bravo, supra,* 43 Cal.3d at pp. 603, 611.) In *People v. Medina* (2007) 158 Cal.App.4th 1571 (*Medina*), police, who had no suspicion of criminal activity (*id.* at p. 1574) conducted a search of the defendant's room "[b]ased solely on the search condition of defendant's probation." (*Ibid.*) *Medina,* relying on the consent/waiver rationale of *Bravo* (*Medina,* at pp. 1576-1577) concluded, "a suspicionless search pursuant to a probation search condition is not prohibited by the Fourth Amendment." (*Medina,* at p. 1580.)

Appellant concedes *Bravo* "concluded that a search condition of probation that permits a search of a probationer's home without a warrant also permits a *search* of the home *without reasonable cause*." (Italics added.) However, appellant, distinguishing between searches and *seizures,* maintains *Bravo* did not "address[] the subject of whether an otherwise lawful exercise of police authority to *search* a probationer's person and effects without warrant or probable cause pursuant to a probationary search condition can lawfully escalate into the *seizure*" (italics added) of any property in plain view absent a

reasonable suspicion the *seized* items had potential evidentiary value in enforcing compliance with probationary status or uncovering current criminal wrongdoing.

We believe a corollary of *Bravo's* conclusion that a *search* pursuant to a search condition need not be supported by reasonable cause is the proposition that a *seizure* pursuant to such a condition need not be supported by reasonable cause. However, even if that proposition is not implicit, *Bravo's* reasoning, as shown below, compels the conclusion a seizure based on a probation search and seizure condition need not be supported by reasonable cause.

The probation condition at issue in *Bravo*, like the probation condition in this case, required not merely submission to a "search" but submission to a "seizure." Although a search condition can be viewed as referring to both search and seizure, a probation condition authorizing search and seizure can also be viewed as containing a "search" condition and a "seizure" condition. The reasoning of *Bravo* applies to such a probation "seizure condition."

"Under the Fourth Amendment, a seizure of property occurs when 'there is some meaningful interference with an individual's possessory interests in that property.' " (*People v. Bennett* (1998) 17 Cal.4th 373, 385.) Like *Bravo's* "search condition" (using that phrase narrowly hereafter to refer to the probation condition's search authorization, as distinct from the condition's seizure authorization, i.e., the "seizure condition"), the "seizure condition" in this case must be interpreted on the basis of what a reasonable person would understand from the language of the condition itself. A probationer who has been granted the privilege of probation on condition the probationer submit at any time to a warrantless seizure has completely waived the probationer's Fourth Amendment rights, save only his right to object to harassment or seizures conducted in an unreasonable manner.

If we concluded a probationer's waiver of Fourth Amendment rights was either impermissible or limited to seizures conducted only upon a reasonable-suspicion standard, judges might deny defendants the opportunity to choose probation. The reasonable-suspicion standard has no application to seizures conducted pursuant to a

consensual probation order. There is no reason to conclude a defendant who, to obtain probation, specifically agrees to submit to seizure with or without a warrant at any time has waived only the right to demand a warrant. Rather, the defendant has voluntarily waived whatever claim of a right to freedom from meaningful interference with the defendant's property that the defendant might otherwise have had.

This interpretation of the seizure condition is consistent with the dual purpose of such a provision. Moreover, information obtained under such circumstances would afford a valuable measure of the effectiveness of the supervision given the defendant and his amenability to rehabilitation. To condition warrantless probation seizures upon reasonable cause would make the probation order superfluous and vitiate its purpose. The trial court in case No. KA099846 did not insert, into the probation condition, language requiring reasonable cause; we cannot imply such language.

Appellant concedes the garage was his residence and the two thumb drives were inside it. There is no dispute the two thumb drives were appellant's property, O'Donnell and the deputies lawfully entered the garage pursuant to the search condition, and the two thumb drives were seized in reliance upon the seizure condition. Appellant cites no case holding reasonable suspicion is a condition precedent to a seizure of the property of a probationer pursuant to a seizure condition. The probation condition contained no language limiting its application, e.g., only to guns or narcotics. There is no evidence the seizure and/or subsequent search of the two thumb drives was conducted (1) for harassment or for arbitrary or capricious reasons, (2) in an unreasonable manner, or (3) for reasons unrelated to the rehabilitative and reformative purposes of probation or other legitimate law enforcement purposes.

We conclude a seizure condition of probation that permits a seizure without a warrant also permits a seizure without reasonable cause, as the former includes the latter. (Cf. *Bravo, supra,* 43 Cal.3d at pp. 602, 606-611; *Medina*, *supra,* 158 Cal.App.4th at pp. 1575-1577.) The two thumb drives were seized pursuant to the seizure condition, and said seizure without reasonable suspicion was lawful based solely on the seizure condition. The alleged subsequent warrantless examination, i.e., search, of the two

thumb drives without reasonable suspicion was lawful under the search condition.[4] The trial court properly denied appellant's Penal Code section 1538.5 suppression motion.

None of the cases cited by appellant, or his arguments, compel a contrary conclusion. This includes *United States v. Knights* (2001) 534 U.S. 112 [151 L.Ed.2d 497] (*Knights*). *Knights* concluded a warrantless *search* of a probationer's apartment based on a search condition and reasonable suspicion was reasonable within the meaning of the Fourth Amendment, but *Knights* did not hold the Fourth Amendment *required* reasonable suspicion. (*Medina, supra,* 158 Cal.App.4th at p. 1578.)

Moreover, *Knights* "expressly declined to reach the issue whether 'acceptance of [a probation] . . . search condition constituted consent in the [*Schneckloth v. Bustamonte* (1973) 412 U.S. 218 [36 L.Ed.2d 854] sense of a complete waiver of his Fourth Amendment rights.'" (*Medina, supra,* 158 Cal.App.4th at p. 1578.) However, in *Bravo,* our Supreme Court has concluded, "A probationer's consent is considered 'a complete waiver of that probationer's Fourth Amendment rights, save only his right to object to harassment or searches conducted in an unreasonable manner. [Citation.]' (*Bravo, supra,* 43 Cal.3d at p. 607.)" (*Medina,* at p. 1576.) Even if *Bravo's* holding pertained to "search conditions" (using that phrase narrowly), *Bravo's* reasoning applies to appellant's probation "seizure condition."

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[4] Appellant's argument of error is based in part on the erroneous premise that any seizure and/or subsequent search of the two thumb drives required reasonable suspicion. Accordingly, we need not reach the issue of the impact, if any, of the deputies' discovery of the drugs and gun, and/or the deputies' knowledge of appellant's gang affiliation, on the later seizure and/or subsequent search of the two thumb drives. Nor need we reach the issues of whether there was (1) substantial evidence any warrantless examination or search of the two thumb drives was off-site or (2) substantial evidence concerning the facts and circumstances of any such off-site search. Finally, even if the trial court had erred by denying appellant's suppression motion, counts 1 and 2 would have been unaffected.

## *DISPOSITION*

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KITCHING, Acting P. J.

We concur:

ALDRICH, J.

EGERTON, J.*

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