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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. BRIAN C. POWELL, Defendant and Appellant.	B229791 (Los Angeles County Super. Ct. No. GA080002)

APPEAL from judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed in part, reversed in part and remanded.

Sheila Tuller Keiter, under appointment of the Court of Appeal, for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Peggy Z. Huang, Deputy Attorneys General for Plaintiff and Respondent.

Appellant Brian Powell appeals his conviction by plea bargain of receiving stolen property and unlawful firearm activity. He challenges the trial court's

denial of his motion to suppress evidence and his sentencing on both counts. We find no reversible error in the denial of the motion to suppress evidence and affirm the judgment. We find sentencing error. We affirm the judgment in part, reverse it in part and remand for resentencing.

FACTUAL AND PROCEDURAL SUMMARY

On May 10, 2010, at about 1 a.m., Los Angeles deputy sheriffs conducted a traffic stop on a vehicle in which Christopher Wiggins was a passenger. The stop occurred on Flagstone Street, which is adjacent to Andre Street in the city of Duarte. Wiggins informed the deputies he was on parole and stated that his address was 403 Andre Street (the house). The deputies unsuccessfully attempted to verify with Wiggins' parole officer whether Wiggins lived at the house. The deputies asked Wiggins if there was anything illegal in the house, and Wiggins replied that he had only stayed there a few times and was not aware of anything.

When the deputies arrived at the house, they encountered defendant Brian Powell, his brother, and his girlfriend, Rachel Trejo. Powell, his brother, and his grandmother lived in the house. The deputies informed them they would be performing a parole compliance check of Wiggins' bedroom. The deputies detained Powell, his brother and Trejo and sat them on the driveway. While Powell was seated on the driveway, one of the deputies asked him if there was anything illegal in the residence. Powell responded that he had a gun in his room and indicated it might be stolen. He was then handcuffed and placed in a patrol vehicle. Deputy Morales asked him to sign an entry waiver (a written form consenting to a search of the property), and Powell hesitated. Deputy Morales told Powell, "If you [*sic*] find anything illegal, your grandmother will be arrested for it." Approximately 10 minutes later, Powell signed the consent waiver. The record suggests that Powell's grandmother remained inside the house and both parties' briefs indicate she was inside. Powell then escorted the deputies to his room to retrieve the gun. The deputies found a loaded .45 caliber firearm on top

of a box underneath a desk in Powell's room. The officers then arrested Powell. The officers did not find anything belonging to Wiggins, and did not charge him. A check revealed the gun was reported stolen by a Los Angeles Police Department officer.

On November 8, 2010, the Los Angeles County District Attorney charged appellant by information with receiving stolen property (Pen. Code, § 496)[1] and unlawful firearm activity (§ 12021, subd. (e))[2]. The information alleged Powell had a prior "strike" conviction within the meaning of the Three Strikes law (§§ 1170.12, subds. (a)-(d); 667 subds. (b)-(i)). Appellant moved to suppress evidence pursuant to section 1538.5. The motion was denied. Appellant pled not guilty to both counts and denied the special allegations. He moved to set aside the information pursuant to section 995 on the grounds that his section 1538.5 motion should have been granted. The trial court denied the motion. Afterwards, appellant withdrew his plea of not guilty and pled no contest pursuant to a plea bargain. The court granted appellant's *Romero*[3] motion and struck the prior conviction allegation.

The court sentenced Powell to eight months imprisonment consisting of one-third the middle term for each count, each count to run concurrently, but consecutive to a four-year sentence for an unrelated Pomona case (KA 091608), which served as the base term. Appellant filed a timely appeal.

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[1] All statutory references are to the Penal Code.

[2] This section has been recodified without substantive change as Penal Code section 29820 (Stats. 2010, ch. 711).

[3] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

DISCUSSION

I

Appellant moved to suppress the firearm found in the search because it was obtained in violation of the Fourth Amendment, since the search was not justified by a parole search, exigent circumstances, or consent.

When reviewing the trial court's ruling on a motion to suppress evidence, we "defer to the trial court's factual findings" whether express or implied, where supported by substantial evidence. (*People v. Celis* (2004) 33 Cal.4th 667, 679 (*Celis*).) Based on these facts, we independently determine whether the search was reasonable. (*Ibid.*)

Appellant first argues the parole search for Wiggins was invalid, so that any information obtained as a result of the search should have been suppressed. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." (U.S. Const., Amend. IV.) "A search conducted without a warrant is unreasonable per se under the Fourth Amendment unless it falls within one of the 'specifically established and well-delineated exceptions.'" (*People v. Woods* (1999) 21 Cal.4th 668, 674 (*Woods*), quoting *Katz v. United States* (1967) 389 U.S. 347, 357.) Jurisprudence regarding parole searches and probation searches is effectively identical. (*People v. Sanders* (2003) 31 Cal.4th 318, 330.) "[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. [Citation.]" (*Woods*, *supra*, 21 Cal.4th at p. 675.)

Law enforcement officials may search a residence reasonably believed to be that of the probationer. (*People v. Downey* (2011) 198 Cal.App.4th 652, 658.) "[W]hether police officers reasonably believe an address to be a probationer's residence is one of fact, and we are bound by the finding of the trial court, be it express or implied, if substantial evidence supports it." (*Id.* at p. 658, citing *People v. Palmquist* (1981) 123 Cal.App.3d 1, 11–12, disapproved on another

point in *People v. Williams* (1999) 20 Cal.4th 119, 135.) Officers "may only search those portions of the residence they reasonably believe the probationer has complete or joint control over . . . That is, unless the circumstances are such as to otherwise justify a warrantless search of a room or area under the sole control of a nonprobationer (e.g., exigent circumstances), officers wishing to search such a room or area must obtain a search warrant to do so." (*Woods, supra*, 21 Cal.4th at p. 682.)

Here the magistrate found the officers reasonably believed Wiggins lived at the house because Wiggins said he lived there and the traffic stop occurred on an adjacent street. At that point, the officers could search those portions of the house they reasonably believed were under Wiggins' complete or joint control. The record does not indicate the officers believed Wiggins had control over the room occupied by Powell. Therefore, they could search common areas of the house but they needed other justification to search Powell's room, where the gun was found.

Appellant argues that even if the parole search was valid, his detention was unconstitutional, so that any evidence obtained during the detention should have been suppressed. The detention was valid because it was incident to a valid search and necessary for officer safety. "An officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.'" (*Muehler v. Mena* (2005) 544 U.S. 93, 98, quoting *Michigan v. Summers* (1981) 452 U.S. 692, 705.) Detention helps to ensure officer safety, facilitates the completion of the search, and prevents flight if contraband is found. (*Ibid.*) In this case, the officers detained appellant as necessary for officer safety while conducting a parole compliance check.

But appellant argues that even if the detention was legal, the officers lacked a legal basis to search his bedroom. We agree that this parole search as to Wiggins, by itself may not have justified the search of appellant's bedroom. But appellant's statement about a possible stolen firearm was enough to justify the

immediate and warrantless search of his bedroom. "Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." (*Welsh v. Wisconsin* (1984) 466 U.S. 740, 750.) Exigent circumstances exist when there is risk of danger to the police or to other persons inside or outside the dwelling. (*Celis*, *supra*, 33 Cal.4th at pp. 676–677.) "An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'" (*Brigham City, Utah v. Stuart* (2006) 547 U.S. 398, 404, quoted in *People v. Ormonde* (2006) 143 Cal.App.4th 282, 292.) Here, the officers were already justified in entering the house based on the parole search. When appellant told them there was a gun in his room that might be stolen, the officers knew there was at least one person (the grandmother) inside the house, and there may have been others. This established exigent circumstances to support the warrantless search and seizure of the firearm.

Appellant argues that since the officers had no specific knowledge that the grandmother was dangerous, there were no exigent circumstances. Appellant cites *People v. Chavez* (2008) 161 Cal.App.4th 1493 (*Chavez*) and *People v. Ngaue* (1992) 8 Cal.App.4th 896 (*Ngaue*) in support of his position. In *Chavez*, an officer observed a cocked revolver while looking over the fence at defendant's home where the officer believed defendant to be present. (*Chavez, supra*, 161 Cal.App.4th at p. 1503.) The court held the officer was justified in retrieving the firearm because he reasonably believed defendant and his son were in the home and he had reason to suspect defendant was violent. (*Ibid.*) The court did not hold that it was necessary for the officer to believe the defendant was dangerous before exigent circumstances were demonstrated; it held that knowledge of a gun and a dangerous defendant was sufficient to create an exigent circumstance, not that both were necessary.

In *Ngaue*, the court held exigent circumstances existed which justified officers reentering a house when they had knowledge of a gun inside and they did not know if anyone had access to the gun. (*Ngaue*, *supra*, 8 Cal.App.4th at p. 905.) In that case, the court stated officer safety justified reentry because it was "undisputed no sweep of the residence was made prior to [appellant's] arrest, and thus, there may have been others in the house who might have had immediate access to the gun." (*Ibid.*) Appellant argues that this case is different because only appellant's grandmother remained inside and the officers had no reason to believe anyone else was inside. However, as in *Ngaue*, the officers had not performed a sweep and did not know whether anyone else was inside. The officers' knowledge of the gun along with uncertainty regarding people in the house created an exigent circumstance in this case, as it did in *Ngaue*. (*Ibid.*)

Taking all this information together, the officers knew they were going to conduct a parole search of the residence, where a felon claimed to live, where there was likely a stolen weapon, and where at least one person was inside. Under these circumstances, we conclude exigent circumstances justified the officers' search.

II

Appellant argues the court erred in sentencing him on both counts in violation of the plea agreement. We agree and hold one of the counts must be stayed.

Respondent argues this issue is not cognizable because appellant did not obtain a certificate of probable cause. (§ 1237.5.) But appellant's argument is that he did not receive the benefit of his plea bargain, not that the agreement is invalid. A defendant need not obtain a certificate of probable cause after pleading no contest when '"he is not attempting to challenge the validity of his plea of guilty but is asserting only that errors occurred in the subsequent adversary hearings conducted by the trial court for the purpose of determining the degree of the crime

and the penalty to be imposed."' (*People v. Johnson* (2009) 47 Cal.4th 668, 677, quoting *People v. Ward* (1967) 66 Cal.2d 571, 574.)

"Although a plea agreement does not divest the court of its inherent sentencing discretion, 'a judge who has accepted a plea bargain is bound to impose a sentence within the limits of that bargain. [Citation.] "A plea agreement is, in essence, a contract between the defendant and the prosecutor to which the court consents to be bound." [Citation.] Should the court consider the plea bargain to be unacceptable, its remedy is to reject it, not to violate it, directly or indirectly. [Citation.] Once the court has accepted the terms of the negotiated plea, "[it] lacks jurisdiction to alter the terms of a plea bargain so that it becomes more favorable to a defendant unless, of course, the parties agree." [Citation.]' [Citations.]" (*People v. Segura* (2008) 44 Cal.4th 921, 931.) When a defendant enters a plea of no contest in exchange for a specified sentence, both parties, including the state, must abide by the terms of the agreement. (*Id.* at pp. 930–931.)

When presenting the plea bargain to appellant, the District Attorney explained, "[e]ach of these counts carries state prison sentence of low term 16 months, mid term of two years and a maximum or high term of three years. You could only be sentenced on one of the two counts. It arises out of the same incident . . . the court can give you one third the mid term of two years which is eight months and run that concurrent with the four years in your Pomona case." The court then corrected counsel, stating that the eight-month sentence would run consecutive to the four years in the Pomona case. The district attorney agreed with this correction. Appellant agreed to these terms and pled no contest to each count. The court stated that it was sentencing pursuant to the plea agreement, but it directed that each count run concurrently. Even though the terms were to run concurrent, they were both imposed. This amounted to punishment in excess of the plea bargain. We remand the case to the trial court to stay one of the counts.

DISPOSITION

The convictions for receiving stolen property and unlawful firearm activity are affirmed. The sentence is reversed and the case is remanded for resentencing consistent with the views expressed in this opinion.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.