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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ADRIAN NIGEL JOE,

Defendant and Appellant.

2d Crim. No. B251232
(Super. Ct. No. BA404692-01
(Los Angeles County))

Adrian Nigel Joe appeals a judgment following conviction of possession of ammunition, and possession of marijuana for sale. (Pen. Code, § 30305, subd. (a)(1);¹ Health & Saf. Code, § 11359.) We affirm.

FACTUAL AND PROCEDURAL HISTORY

At midday on November 8, 2012, Los Angeles Police Officer Paul Fedynich conducted surveillance of a clothing store located at 1509 West Martin Luther King Jr. Boulevard in Los Angeles, directly across the street from the police station. Fedynich saw Joe and Darren King leave the shop and enter a vehicle. Fedynich later conducted a traffic stop, found two firearms in the vehicle, and arrested Joe and King.

¹ All further statutory references are to the Penal Code unless stated otherwise.

Shortly thereafter, Fedynich and other police officers searched the clothing store pursuant to a search warrant. The officers discovered a solid brick of marijuana inside a Tupperware container, two digital scales, plastic baggies, and mail addressed to Joe. The marijuana weighed 386.6 grams.

Fedynich and other officers then executed a search warrant at Joe's residence located at 5215 South Gramercy Place in Los Angeles. The officers found a small quantity of marijuana, a box of ammunition, and documents bearing Joe's name and address. A health access card bearing Joe's name was found near the ammunition.

At trial, the parties stipulated that Joe was a convicted felon and could not legally possess ammunition within the meaning of section 30305.

Police Vehicle Recording

Following the arrest, police officers placed Joe and King in the back seat of a patrol vehicle, left them alone for a short time, and recorded their conversations. Joe stated: "They don't know nothing else about nothing. But last night that one little transaction. . . . A nigga ain't sell nothing to nobody, nigga, except for one nigga." Regarding the ammunition, Joe stated: "They got actual charge on me that could stick . . . cause it was in my house, in my room." Joe also stated that he would ask his girlfriend to "just take that case" because "she don't have a felony, she can have bullets." At trial, the prosecutor played the recording for the jury.

Recorded Jail Conversations

During Joe's confinement pending trial, jail officials monitored and recorded his telephone conversations. Joe stated that someone "told the police," because "they know what they was looking for," and that the charges against him were not "gonna stick." Joe also opined that criminal street gang members, "The Thirties," informed on him. At trial, the prosecutor played the recorded telephone calls for the jury.

Joe's Trial Testimony

Joe testified at trial and denied possessing the marijuana found in the clothing store or the ammunition found in the apartment. He stated that the clothing store belongs to his estranged wife and that his family members have keys to the apartment. Joe also denied that he resided at the apartment.

Conviction and Sentencing

The jury convicted Joe of possession of ammunition, and possession of marijuana for sale. (§ 30305, subd. (a)(1); Health & Saf. Code, § 11359.) The trial court sentenced him to two years confinement in county jail for each count, to be served concurrently. The court also imposed a \$280 restitution fine, a \$280 parole revocation restitution fine (stayed), a \$40 court operations fee, and a \$30 criminal conviction fee. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a); Gov. Code, § 70373.) The court awarded Joe 108 days of presentence custody credit.

Joe appeals and contends that the trial court erred by denying his motion for a trial continuance.

DISCUSSION

Joe argues that the trial court abused its discretion by denying his request for a continuance to obtain an expert witness to examine the patrol vehicle recording for tampering. He claims the error violates his federal and California constitutional rights to the effective assistance of counsel, to present a defense, and to due process of law. Joe asserts that the error is prejudicial pursuant to any standard of review because the recorded statements contradict his defense that he did not possess the marijuana or ammunition.

On March 20, 2013, the trial court held a hearing regarding motions as well as the preliminary examination. Joe objected to the patrol vehicle recording in part on grounds that the recording assertedly had been spliced and edited. The prosecutor responded that he had listened to the recording and he had "no reason to believe it has been altered in any way." The court deferred ruling on Joe's objection.

On May 7, 2013, the prosecutor informed the trial court that she was providing Joe with a transcript of the patrol vehicle recording. On May 29, 2013, Joe submitted a request for appointment of an expert to examine the recording.

On May 31, 2013, Joe filed a motion to continue the trial, asserting that he had not received the transcripts of the jail and patrol vehicle recordings and that he was seeking the appointment of an expert witness to examine the vehicle recording. On June 3, 2013, Joe filed a written motion seeking discovery of the patrol vehicle recording transcript, among other things.

On June 19, 2013, the trial court held a hearing regarding the continuance request. Joe stated that his expert witness required four weeks to examine the recording. He explained that he did not request appointment of the expert earlier because he believed the matter might settle. The court denied the motion and stated that Joe did not establish a good cause showing why he did not seek appointment of the expert earlier. Over Joe's objection, the court then set the matter for trial to be held on June 26, 2013. On June 26, 2013, Joe again requested a continuance to permit his expert witness to examine the recording. The court also denied this second request.

On June 28, 2013, during jury selection, Joe requested that the trial court listen to the jail recordings and patrol vehicle recording and compare them to the transcripts. On July 1, 2013, the court stated that it had listened to the recordings, compared them to the transcripts, and found the transcripts to be substantially accurate. Joe raised various evidentiary objections to the recordings which the court overruled. Trial then proceeded; Joe did not present expert testimony regarding the vehicle recording.

The trial court may grant a continuance only upon a showing of good cause. (§ 1050, subd. (e); *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1181.) On review, we decide whether the trial court abused its discretion by denying the requested continuance. (*Ibid.*) Our review involves an analysis of the particular circumstances and the reasons presented to the court for a continuance. (*Ibid.*) Not

every denial of a request for more time arguably denies due process of law, even if the party seeking the continuance thereby fails to offer evidence. (*People v. Beames* (2007) 40 Cal.4th 907, 921.) Although "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality," "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process." (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589.)

"Good cause" requires a showing that counsel has prepared for trial with due diligence. (*People v. Doolin* (2009) 45 Cal.4th 390, 450 [no abuse of discretion to deny seven-week continuance to allow defendant to retest DNA evidence].)

The party challenging a ruling regarding a continuance request bears the burden of establishing an abuse of discretion. (*People v. Hajek and Vo, supra*, 58 Cal.4th 1144, 1181.) An order denying a continuance is seldom successfully attacked. (*Ibid.*) Pursuant to California law, an abuse of discretion is established only if the court's decision is arbitrary or unreasonable. (*Id.* at pp. 1180-1181.)

Here Joe has not met his burden of establishing an abuse of discretion. When Joe filed a motion to suppress evidence on February 19, 2013, he included a declaration stating that the patrol vehicle recording had been tampered with and spliced. He possessed the *recording* (but not necessarily the transcript thereof) prior to the March 20, 2013, preliminary examination. He did not request the appointment of an expert witness until May 31, 2013, more than three months later, because he had hoped that the matter would settle. Even without a continuance, Joe had from June 19, 2013, until presentation of the defense case on July 3, 2013, for examination and analysis of the recording. Joe did not establish the due diligence requisite to a showing of good cause. (*People v. Doolin, supra*, 45 Cal.4th 390, 450.)

Moreover, pursuant to any standard of review, denial of the continuance is harmless. During the recorded jail conversations, Joe admitted that the police officers came to his apartment and his store and found contraband. He also claimed

that he knew who had informed on him – a drug customer to whom he recently had sold drugs. Joe stated that he hoped a woman friend would claim possession of the ammunition because she was not a convicted felon. There is no prejudice from denial of the continuance.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Norman J. Shapiro, Judge
Superior Court County of Los Angeles

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