Filed 12/26/12 P. v. Maye CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOHN MAYE, Defendant and Appellant.	B236209 (Los Angeles County Super. Ct. No. BA 377508)

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

Joy A. Maulitz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

John Derek Maye appeals from the judgment entered following a jury trial that resulted in his conviction of sale of a controlled substance and his admission that he had suffered prior drug-related convictions.[1] The trial court sentenced him to prison to nine years, consisting of the three-year low term, plus six years, or three years for each of two prior drug-related convictions.

On appeal, appellant contends the trial court committed reversible error failing to hold an in camera hearing and, instead, summarily denying his discovery motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). He contends his defense counsel was ineffective by failing to cross-examine the key prosecution witness regarding the disparity between his preliminary hearing and his trial testimony. He further contends the trial court abused its discretion in erroneously admitting prejudicial evidence of two prior crimes, which violated his guarantee to due process and a fair trial. He also contends the prosecutor committed misconduct by questioning appellant concerning his post-*Miranda*[2] silence in his prior cases in violation of *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*), and, alternatively, the trial court abused its discretion under Evidence Code section 352 in admitting evidence of his post-*Miranda* silence. Lastly, appellant contends the cumulative effect of these errors necessitates reversal of the judgment.

We conclude appellant's contentions are not meritorious and affirm the judgment.

BACKGROUND

We review the evidence, both direct and circumstantial, in light of the entire record and must indulge in favor of the judgment all presumptions as well as every logical inference that the jury could have drawn from the evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1156; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

---

[1] At sentencing, the trial court struck all the alleged prior drug-related convictions, except two of those admitted by appellant, and the prior prison allegations.

[2] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

On October 27, 2010, about 5:00 p.m., Los Angeles Police Department (LAPD) Officers George Mejia and Paul Valencia conducted a narcotics enforcement surveillance near San Julian and Sixth Streets in Los Angeles. Through binoculars, Mejia observed Major Lee, an African-American male whom he recognized from prior contacts, approach appellant, who was sitting on a chair on the sidewalk of San Julian, about 140 feet away from the officers. After Lee and appellant conversed, Lee removed currency from the cup in his hand and gave it to appellant, who put the currency in a black plastic bag near his feet. From the same bag, appellant removed a white object, which was the size of a Tic Tac and resembled cocaine base, and placed the object on the cardboard box next to him. Lee picked up the object, placed it in his jacket pocket, and walked away.

A total of $23, consisting of a $5 bill and eighteen $1 bills, was found in appellant's pants pocket after he was detained. Another $23 in currency and an object resembling rock cocaine were recovered from the black plastic bag near appellant's feet. During the search of Lee, who also was detained, the police recovered from Lee's jacket pocket a glass cocaine pipe with an object resembling rock cocaine in its tip. The two objects each weighed 0.05 grams and contained cocaine in the form of rock cocaine.

Evidence was presented establishing appellant had suffered prior convictions for possessing rock cocaine for sale in 2004 and 2008.

At trial, appellant not only admitted he had suffered these two convictions, he further admitted he had been convicted of selling cocaine arising from a 2006 incident. He denied, however, that he sold cocaine as alleged in the current charge. Rather, he was a drug addict, and the cocaine in his bag was for personal use. He testified that he was homeless and sold cigarettes and lighters for money. He explained this incident as involving the sale of cigarettes, which were on a cardboard box "in plain sight." A man with a cup in hand walked up to buy a cigarette. Appellant reached into the bag to make change for a dollar but the man decided to buy five cigarettes for the dollar. Appellant and the man were arrested.

DISCUSSION

1. Denial of Pitchess *Motion Without In Camera Hearing Not Error*

Appellant contends the trial court erred by summarily denying his *Pitchess* motion and the appropriate remedy is to remand for an in camera hearing. No error transpired.

a. Procedural Background

The arrest report prepared by Meija indicated he observed Lee, who was holding a white paper cup in his right hand, stop next to appellant, who was sitting on a chair on the sidewalk with a black bag and cardboard box next to him. After the two conversed, Lee removed some green paper currency from the cup and handed it to appellant. Appellant placed that currency inside the black bag and appeared to remove an unknown "off white solid resembling cocaine base" from the black bag and placed it on top of the cardboard box. Lee picked up the object, placed it inside his jacket pocket, and walked southbound.

When Lee was detained, the police "recovered an off white [item] resembling cocaine base inside a 3" glass pipe from his left jacket pocket." Currency in the amount of $23 was recovered by appellant's right front pants pocket while another $23 in currency along with "an off white solid resembling cocaine base" were recovered from the black bag next to appellant.

In his *Pitchess* motion,[3] appellant sought disclosure of information concerning Mejia relating to complaints of "acts of violation of constitutional rights, fabrication of evidence, perjury, dishonesty, writing of false police reports, false or misleading internal reports including but not limited to false overtime or medical reports, and any other evidence of misconduct amounting to moral turpitude."

In his supporting declaration, Michael R. Powell, appellant's appointed counsel, stated, on information and belief, that Mejia "fabricated a story" about observing "an off-white substance the size of a 'Tic-Tac[,'] from a five story building that was situated across the street, and he fabricated the sale of cigarettes to be that of a sale of narcotics." Rather,

---

[3] The motion also was made under *Brady v. Maryland* (1963) 373 U.S. 83. We need not, and therefore do not, address the trial court's ruling on this motion in this regard, because appellant does not raise any *Brady* violation.

appellant "at no time sold any contraband as described in the arrest report." He further stated "the only monetary transaction that took place . . . was for the purchase of cigarettes." Appellant "put the cigarettes on the box and Mr. Lee paid for the cigarettes." Appellant "at no time ever took an off white substance the size of a 'Tic-Tac' from anywhere near or on his person and place it on top of the cardboard box."

The People filed opposition.

At the hearing, counsel for the LAPD noted both that the defense had provided him with a copy of that portion of the preliminary examination in which the officer described the size of the item he observed to be the size of "a tictac" and that although this observation was not indicated on the original arrest report, "the arrest report . . . does state [the officer] observed what he believed to be drugs . . . exchanged between [appellant] and co-defendant [Lee]."[4] He argued that appellant's mere statement that he was selling cigarettes or his mere denial of the events as recounted by the police was insufficient to get around the police observations, which were "supported by the evidence that . . . was recovered." He added that although he did not have the property report, "[t]here is nothing that indicates that anything else was recovered." The trial court indicated it did not "believe the court was provided with a property report either." Appellant's attorney argued the court should not rule by "looking at the situation and making a factual determination of what really exists on that day." The court denied the *Pitchess* motion.

b. Applicable Legal Principles

Pitchess "established that a criminal defendant could 'compel discovery' of certain relevant information in the personnel files of police officers by making 'general allegations which establish some cause for discovery' of that information and by showing how it would support a defense to the charge against him." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1018-1019 (*Warrick*).) "If the trial court finds good cause for the discovery, it reviews the pertinent documents in chambers and discloses only that information falling within the statutorily defined standards of relevance." (*Id*. at p. 1019.)

---

[4] Lee is not a party to this appeal.

A determination of good cause generally begins with the declaration of defense counsel, which must "describe a factual scenario supporting the claimed officer misconduct. That factual scenario, depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report." (*Warrick*, *supra*, 35 Cal.4th at pp. 1024-1025.) The trial court then determines "whether defendant's averments, '[v]iewed in conjunction with the police reports' and any other documents, suffice to 'establish a plausible factual foundation' for the alleged officer misconduct and . . . 'articulate a valid theory as to how the information sought might be admissible' at trial." (*Id*. at p. 1025.)

The requisite "'plausible' factual foundation for the *Pitchess* discovery requested" necessitates "a plausible scenario of officer misconduct . . . that *might or could have occurred*. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges. A defendant must also show how the information sought could lead to or be evidence potentially admissible at trial. Such a showing 'put[s] the court on notice' that the specified officer misconduct 'will likely be an issue at trial.' [Citation.]" (*Warrick*, *supra*, 35 Cal.4th at p. 1026, italics added.)

"To determine whether the defendant has established good cause for in-chambers review of an officer's personnel records, the trial court looks to whether the defendant has established the materiality of the requested information to the pending litigation. The court does that through the following inquiry: Has the defense shown a logical connection between the charges and the proposed defense? Is the defense request for *Pitchess* discovery factually specific and tailored to support its claim of officer misconduct? Will the requested *Pitchess* discovery support the proposed defense, or is it likely to lead to information that would support the proposed defense? Under what theory would the requested information be admissible at trial? If defense counsel's affidavit in support of the *Pitchess* motion adequately responds to these questions, and states 'upon reasonable belief that the governmental agency identified has the records or information from the records' [citation], then the defendant has shown good cause for discovery and in-chambers review

of potentially relevant personnel records of the police officer accused of misconduct against the defendant." (*Warrick*, *supra*, 35 Cal.4th at pp. 1026-1027.)

c. No Good Cause for In Camera Review and *Pitchess* Discovery Shown

Here, appellant's version of events is not even remotely plausible. According to appellant, he indeed engaged in a sales transaction with Lee on the subject date, but the sale involved cigarettes, a legal commodity, not rock cocaine, an illegal substance. The record, however, does not reflect that any cigarettes were recovered from the persons of appellant or Lee or from appellant's black bag following the detention of the two men. Moreover, at the *Pitchess* hearing, appellant's attorney did not indicate, much less offer evidence, such as the property report, that any cigarette(s) had been found during these searches.

At first blush there is some plausibility to appellant's version of events. Essentially, he posits that much of what the officer described was in fact true: Appellant and Lee were both present at the San Julian and Sixth Streets location and were observed by the officer. A sales transaction took place in which Lee gave appellant money and appellant placed an item on a cardboard box which Lee then took. Appellant's scenario is consistent with his theory that he was only selling cigarettes, that the officer fabricated the presence of cocaine base and omitted any reference to the cigarettes in his report. The deficiency in the explanation is that it entirely omits any mention of the cocaine that appellant concedes the officers found in his black bag. Although appellant later testified it was for his own personal use, his failure to even discuss the cocaine rock in his *Pitchess* request reasonably allowed the trial court to conclude that appellant had omitted a material fact in seeking *Pitchess* discovery, was in fact selling cocaine, and that no plausible explanation had been forthcoming.

2. No Ineffective Assistance of Counsel Demonstrated

Appellant contends his trial counsel was ineffective, because he did not impeach Mejia at trial with the latter's inconsistent preliminary hearing testimony. We disagree.

At the preliminary hearing, in describing his location and that of the participants in the sale transaction, Mejia drew a diagram that indicated he was south of appellant and Lee

and testified that Lee was on appellant's left side. At trial, Mejia testified when making his observations, he was north of Lee and appellant and that Lee was on appellant's right side.

Appellant contends by failing to cross-examine Mejia about his preliminary hearing testimony in this regard, defense counsel was ineffective, because these inconsistencies between that testimony and his trial testimony call into question Mejia's ability to observe the transaction, his memory of the event, and the truthfulness of what Mejia saw, which form "the very crux of the case." We are not persuaded.

"If a defendant fails to show prejudice, a reviewing court may reject the claim without determining the adequacy of counsel's performance. [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 170; see also *In re Alvernaz* (1992) 2 Cal.4th 924, 945.) In this instance, the minor discrepancies as to the exact location of appellant and Lee in relation to each other and to Mejia is inconsequential and fail to contradict Mejia's observations regarding the exchange of Lee's green currency for appellant's piece of rock cocaine. In view of the overwhelming evidence of appellant's guilt, the assigned inconsistencies between Mejia's preliminary hearing testimony and his trial testimony therefore did not prejudice appellant, i.e., make it reasonably probable that a result more favorable to him would have transpired had these inconsistencies been before the jury.

2. Admission of Evidence of Two Prior Offenses Not Abuse or Error

Appellant contends the trial court abused its discretion and erred in allowing the admission of evidence of his prior drug offenses, which was "highly prejudicial, . . . not relevant to any contested issue, and amounted to sheer 'propensity' evidence, barred by Evidence Code section 1101[, subdivision] (b)" (section 1101(b)) and in violation of his right to due process (U.S. Const., 14th Amend.). No abuse or error transpired.

Pretrial, the prosecutor moved to present evidence of appellant's prior sales of cocaine in 2004, in 2006, and in 2008 to prove appellant's intent, the absence of mistake, and his general scheme and/or plan. Appellant's attorney objected under section 1101(b). After the court tentatively ruled the evidence was admissible, he argued the details of the prior offenses should be excluded under Evidence Code section 352 to avoid an undue

consumption of time. The court responded that it would entertain a motion to limit the evidence if prejudice arose.

During trial, the prosecutor introduced evidence that appellant had engaged in the sale of cocaine and possession of cocaine for sale in 2004 and in the sale of cocaine in 2008. On July 29, 2004, about 4:00 p.m., while working undercover narcotics near Main and Fifth Streets in Los Angeles, LAPD Officer Romeo Rubalcava observed appellant and Louis Chambers engage in what appeared to be drug transactions with others. Rubalcava walked up to the two and handed Chambers a marked $10 bill. Chambers gave appellant the bill and said he wanted "three." Reaching into a clear plastic bindle, appellant gave Chambers three objects resembling rock cocaine. Chambers gave two to Rubalcava and kept the third for himself. During a search following appellant's arrest, the police found in his pocket four clear plastic bindles containing 20 rocks of cocaine each, or a total of 80 rocks, and a "Krazy Glue" container with 17 rocks of cocaine inside. The marked $10 bill was among the $29 in currency appellant held in his hand. The recovered cocaine substances consisted of cocaine base. The People's expert opined appellant possessed the 97 rocks of cocaine for sale.

In the 2008 incident, LAPD Officer Rudy Gonzales was working narcotics enforcement near Stanford Avenue and Sixth Street in Los Angeles on September 18, 2008, when, at approximately 4:10 p.m., he observed an undercover officer, Officer Bugarin, approach Eddie Bouche. Following a brief conversation, Burgarin handed Bouche some currency, and the two walked together down the street to appellant. After Bouche handed the currency to appellant, the latter removed an item from a compact disc (CD) player, gave the item to Bouche, who then gave it to Bugarin. Following appellant's arrest, a search of the CD in appellant's hand produced two plastic baggies, each containing items resembling cocaine base, and two $5 bills were recovered from his pants pocket. During a station strip search, two plastic baggies containing items resembling cocaine base were recovered in appellant's buttocks. The substances recovered were cocaine in the form of cocaine base.

Pursuant to CALCRIM No. 375, the trial court gave a limiting instruction and restricted the jury's consideration of the above uncharged evidence of prior offenses to the issues of identity and intent as to the charged crime.[5]

Initially, we point out appellant forfeited his due process violation claim by failing to object on this ground before the trial court, and, to the extent his "claim is a constitutional gloss on his trial objection and therefore not forfeited, it is without merit because there was no abuse of discretion" or error. (*People v. Riggs* (2008) 44 Cal.4th 248, 304.)

"As a general rule, evidence the defendant has committed crimes other than those for which he is on trial is inadmissible to prove bad character, predisposition to criminality, or the defendant's conduct on a specific occasion. [Citation.] However, . . . section 1101[(b)], permits evidence of a defendant's past criminal acts when relevant to prove a material fact at issue, such as identity, motive, or knowledge. [Citation.] In prosecutions for drug offenses, evidence of prior drug use and prior drug convictions is generally admissible under [this section] to establish that the drugs were possessed for sale rather than for personal use and to prove knowledge of the narcotic nature of the drugs. [Citation.]" (*People v. Williams* (2009) 170 Cal.App.4th 587, 607 (*Williams*).)

"In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to the charged offense to support the inference that the defendant probably acted with the same intent in each instance. [Citations.] The decision whether to admit other crimes evidence rests within the discretion of the trial court. [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 23.)

---

5 The trial court instructed the jury to consider such evidence only if the jury first determined the People had proved appellant in fact committed the uncharged offense(s) and if so, the jury could consider such evidence only for the limited purpose of deciding whether appellant "knew the substance was cocaine base when he allegedly acted in this case and that he intended to sell it." The court expressly admonished the jury "not [to] consider this evidence for any other purpose" and "not [to] conclude from this evidence that [appellant] has a bad character or is disposed to commit crime." The court cautioned the jury if it concluded appellant "committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of selling cocaine base. The People must still prove the charge beyond a reasonable doubt."

Appellant contends evidence of the uncharged prior drug offenses was irrelevant, because his intent and knowledge were not disputed issues and his defense was that the sale at issue was of cigarettes, not cocaine. He is mistaken. That he disputed the sale was of cocaine placed into issue the very nature of the item sold. Additionally, the burden fell on the prosecution in the first instance to prove the item appellant sold was cocaine base. The prosecution needed to establish appellant knew the item was present; he knew the item was a controlled substance; and he sold the item with this knowledge. Evidence of the uncharged prior offenses was highly probative to this end.

Although the buyer handed appellant the currency, appellant did not hand the buyer the piece of rock cocaine. Rather, he placed the rock cocaine, which was about the size of a Tic Tac, a very tiny object, on a cardboard box, and the buyer picked up the rock from that location. This was a conscious attempt on the part of appellant to distance himself from the sale of this controlled substance. To connect appellant to the sale of the rock, i.e., intent to sell, the prosecution presented evidence that on two prior occasions appellant used similar ploys, which evidence tended to show intent through a common scheme or plan. In the 2004 rock cocaine sale, he attempted to "launder" the sale of the rock cocaine by using a middleman to whom the buyer gave the money and to whom appellant in return gave three pieces of rock cocaine, which the middleman handed to the buyer and the third he kept as his "take." In the 2008 incident, appellant again used a middleman. Although he cut out the middleman here, appellant still avoided giving the rock cocaine to the buyer by placing it on the box, which conduct continued appellant's scheme or plan to distance himself from its sale.

Additionally, contrary to appellant's claim, the trial court did not abuse its discretion in admitting evidence of the similar uncharged prior cocaine sale evidence as more probative than prejudicial under Evidence Code section 352. Any prejudicial impact such evidence that might have arisen was dispelled by the clear and concise limiting instruction the trial court gave in this regard. The jury is presumed to have understood and adhered to this instruction. (*Williams, supra*, 170 Cal.App.4th at p. 607.)

3. No Doyle *Violation Nor Abuse of Discretion Transpired*

Appellant contends the prosecutor committed *Doyle* error by improperly commenting on his post-*Miranda* silence and, alternatively, the trial court abused its discretion under Evidence Code section 352 by admitting evidence of his post-*Miranda* silence. The record does not support his contention.

At trial, appellant admitted he sold cocaine in 2004, 2006,[6] and 2008 and that he had been convicted in those three cases. He explained that he admitted having sold cocaine base in those cases, because "it was quite evident that's what I [had] done. I didn't try to pursue the matter because I was guilty of it." On cross-examination, appellant acknowledged he had not admitted the crime in the 2004 case and, instead, had been convicted of the crime by a jury. On redirect examination, he explained that he had attempted to enter a plea in the 2004 case but was precluded by his codefendant's refusal to take a "deal."

On further cross-examination, in response to the prosecutor's inquiry, appellant agreed that he had tried to accept responsibility for his prior crimes at the earliest possible time. Appellant's attorney objected, as improper, to the prosecutor questioning appellant about his not speaking to police in the prior cases, because appellant had the constitutional right not to do so. The trial court rejected the objection and allowed this line of questioning.

Appellant admitted in the 2004 and 2006 cases, he declined to discuss the crimes after being read his *Miranda* rights and given an opportunity to speak to the police. On further redirect, he explained that although he did not speak to the police, because he was exercising his constitutional rights, he did admit his guilt at the disposition hearing, because he believed this was his earliest opportunity.

In *Doyle*, the federal Supreme Court held the use a defendant's postarrest silence following *Miranda* warnings to impeach the defendant's exculpatory trial testimony violated due process and fundamental fairness. (*Doyle, supra*, 426 U.S. 610, 617-619.)

---

6 Defendant initially identified 2007 as the year in question but later clarified that the year he was convicted was in fact 2006.

No *Doyle* violation transpired. Appellant's exculpatory explanation was he sold the buyer cigarettes, not rock cocaine. The prosecutor's line of questioning did not attack this explanation and, instead, simply sought to impeach appellant's voluntary testimony at trial that, as to his *prior* crimes, he tried to accept responsibility at the earliest possible time. In other words, the prosecutor was merely challenging his claim of immediate admission of guilt by eliciting his contrary postarrest, post-*Miranda* conduct.

Appellant was not entitled to present, unchallenged, to the jury his position that (1) he admitted his guilt in the uncharged prior offenses at the earliest opportunity; (2) he thus would have done so in this case if he in fact were guilty; and (3) the jury therefore should find him not guilty, because he had not admitted his guilt of the current charge. Accordingly, the trial court did not abuse its discretion or err in allowing the prosecutor to elicit appellant's admission that, as for the prior uncharged offenses, he did not speak to the police after being given his *Miranda* rights and an opportunity to do so.

4. No Cumulative Prejudicial Effect of Errors Established

Appellant contends reversal of the judgment is warranted based on the cumulative prejudicial effect of the assigned errors. We disagree. No error has been established. The cumulative effect of its assigned errors therefore is nil. (See, e.g., *People v. Loewen* (1983) 35 Cal.3d 117, 129; see also *People v. Calderon* (2004) 124 Cal.App.4th 80, 93 [where "court did not err at all," the "effect of [the claimed] errors, even if multiplied, remains zero"].)

DISPOSITION

The judgment is affirmed.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J. GRIMES, J.