Filed 2/9/17 P. v. Carrillo CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT CARRILLO, Defendant and Appellant.	B270660 Los Angeles County Super. Ct. No. BA436610

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Dabney, Judge. Affirmed.

Richard L. Fitzer, 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, Michael R. Johnsen, Supervising Deputy Attorney General, and Lindsay Boyd, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Robert Carrillo appeals from a no contest plea entered after the trial court denied his motion to suppress. Appellate counsel filed an opening brief in which he raised no issues (*People v. Wende* (1979) 25 Cal.3d 436), and we requested briefing on the validity of the search. Defendant now contends that the court erred in denying his motion to suppress because the People failed to present sufficient evidence to justify the warrantless search. We affirm.

PROCEDURAL BACKGROUND

By information filed June 17, 2015, defendant was charged with one count of possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1); count 1). The information also alleged that the predicate conviction for count one, a 2008 conviction for assault with a firearm (Pen. Code, § 245, subd. (a)(2)), also constituted a strike prior (Pen. Code, § 667, subds. (b)–(i); Pen. Code, § 1170.12, subds. (a)–(d)) and a prison prior (Pen. Code, § 667.5, subd. (b)). Defendant pled not guilty and denied the allegations.

On July 23, 2015, defendant filed a motion to suppress the evidence obtained after a warrantless vehicle search. Following a contested hearing on July 31, 2015 at which defense counsel argued that the police lacked reasonable suspicion to detain defendant, the court denied the motion.

On November 10, 2015, defendant entered a negotiated plea of no contest to count one and admitted the prior strike. On January 6, 2016, the court sentenced him to 32 months in state prison—the low term of 16 months, doubled for the strike prior.

Defendant filed a timely notice of appeal (Pen. Code, § 1538.5, subd. (m)) and we appointed counsel to represent him. On June 14, 2016, appointed counsel filed a brief in which he raised no issues and asked us to review the record independently.

After reviewing the record, the superior court file, and the exhibits in this case, we asked defense counsel and the People to provide us with supplemental briefing on four issues related to the denial of the motion to suppress: Did trial counsel challenge the warrantless search? Does any exception to the warrant requirement justify the vehicle search in this case? If counsel did *not* challenge the search, does that failure constitute ineffective assistance of counsel? If counsel *did* challenge the search, did the court err by denying the motion to suppress?

FACTUAL BACKGROUND

On May 15, 2015 at 10:45 p.m., Los Angeles Police Department Officers Avila and Chel saw defendant driving a blue Toyota sedan at 40 miles-per-hour in a 35 mile-per-hour zone. At some point, the car straddled the number two lane for two to five seconds in violation of Vehicle Code section 21658, an infraction (Veh. Code, § 40000.1); the car did not signal a lane change.[1] Believing the car was a threat to public safety, the officers turned on their cruiser's light bar, which automatically activated their dashboard camera and microphone, and stopped defendant for lane straddling.

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[1] Avila apparently misspoke when he testified that defendant violated Vehicle Code section 26158; there is no such statute. Vehicle Code section 21658, subdivision (a), however, provides that on a two-lane road, a "vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from the lane until such movement can be made with reasonable safety."

After defendant pulled over and stopped the car, the officers exited the patrol car, drew their weapons, and ordered defendant to get out with his hands up. Avila testified that defendant yelled, "I'm sick of this." The video does not record those comments, but it does show defendant driving away slowly and occasionally making "furtive movements." The officers followed. Shortly thereafter, one officer told the other to turn off the microphone. The audio feed ends immediately.

About a minute after defendant was first stopped, the officers stopped him again, this time for failing to yield to an emergency vehicle, in violation of Vehicle Code section 21806, an infraction (Veh. Code, § 40000.1); they used their public address system to tell defendant to pull over. The video ends as defendant pulls over to the curb; the following 18 minutes of the encounter were not recorded. Defendant was immediately taken into custody. The record does not reveal whether the police formally placed defendant under arrest at this point or their basis for taking him into custody.

When the video resumes, additional officers have arrived on scene and are searching defendant's car. In a hidden compartment in or under the center console, they discovered a glass pipe and an eyeglass case containing white powder resembling methamphetamine. Officers were also able to remove the center cup holder. Under the cup holder, they discovered a loaded .38-caliber revolver.

When they were done searching the car, one of the officers explained that he was "super happy with how it turned out" because had they not found anything, "it would have sucked." In response, another officer emphasized that they would have to "explain two things—the stop and the furtive movement and the

first stop where he pulled away. And then, that's why—that's probably the reason why we tore the car apart 'cause he was really not stopping … ." The officers did not indicate, however, that the seized items—the pipe, the white powder, and the revolver—had any connection to the reasons defendant was stopped—namely, lane straddling and failing to yield to an emergency vehicle. There is also no indication that defendant was a probationer or parolee subject to warrantless search, or that the Toyota would have been impounded and searched under standardized police department procedures.

CONTENTIONS

In response to our request for supplemental briefing, defendant argues that the prosecution failed to present sufficient evidence to justify the warrantless search; therefore, the court erred by denying his motion to suppress.

DISCUSSION

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (U.S. Const., 4th Amend.) Warrantless searches are presumed to be unreasonable, "subject only to a few specifically established and well-delineated exceptions." (*Katz v. United States* (1967) 389 U.S. 347, 357.) Accordingly, when a defendant challenges "the legality of a warrantless search or seizure, the People are obligated to produce proof sufficient to show, by a preponderance of the evidence, that the search fell

within one of the recognized exceptions to the warrant requirement." (*People v. Romeo* (2015) 240 Cal.App.4th 931, 939 (*Romeo*).)

A motion to suppress need not be overly detailed to trigger this requirement. "[W]hen defendants move to suppress evidence, they must set forth the factual and legal bases for the motion, but they satisfy that obligation, at least in the first instance, by making a prima facie showing that the police acted without a warrant." (*People v. Williams* (1999) 20 Cal.4th 119, 136 (*Williams*).) "Defendants need only be specific enough to give the prosecution and the court reasonable notice." (*Id.* at p. 131.) Thus, even exceedingly brief motions, like the one in this case, are usually sufficient to shift the burden to the prosecution. (See, e.g., *Romeo*, *supra*, 240 Cal.App.4th at p. 935 [motion's citations were sufficiently specific to put the prosecution on notice].)

What a motion to suppress lacks in depth, however, it should provide in clarity. (*Williams*, *supra*, 20 Cal.4th at p. 135 [The "determinative inquiry in all cases is whether the party opposing the motion had fair notice of the moving party's argument and fair opportunity to present responsive evidence."].) At minimum, a defendant challenging a warrantless search must make it clear that he is doing so; he may not "lay a trap for the prosecution by remaining completely silent until the appeal about issues the prosecution may have overlooked." (*Id.* at p. 131.) Therefore, when assessing whether a suppression issue was properly raised below, our touchstone is "elemental … fairness in giving each of the parties an opportunity adequately to litigate the facts and inferences relating to the adverse party's contentions." (*Id.* at p. 136.)

1. Proceedings Below

On July 23, 2015, trial counsel filed a boilerplate motion to suppress the evidence recovered from defendant's car. The supporting facts and argument stated, in their entirety:

> According to the police reports, officers Chel and Avila[] observed a blue Toyota Corolla driving northbound on Vermont straddling the lanes in violation of Vehicle Code § 21658(a).
>
> The search and seizure in this case occurred without a warrant. A search without a warrant is presumptively illegal, and must be justified by the prosecution. The prosecution bears the burden of establishing the legality of a warrantless search. [Citations.]

In support of this premise, counsel cited four cases—one of which involved a court-ordered blood draw, one of which involved a warrantless arrest, and two of which involved the warrantless search of a home. None involved a vehicle search.

On July 31, 2015, the court held a hearing on the defense motion. The court began by explaining, "It's kind of hard to determine what exactly it is that you are contesting on it other than the fact that there wasn't a warrant." Turning to defense counsel, the court asked, "I'm assuming you're contesting the initial stop; is that correct?" Counsel responded, "Yes, your honor." The court replied, "All right. Then we'll hear evidence just as to that." Counsel did not reply.

The prosecutor called Avila to testify. After questioning him about the circumstances of the stop—but before concluding her direct examination—the prosecutor asked, "And, your honor,

I just wanted to clarify. I know you did this at the beginning, but the issue is only as to the initial stop and not the search?" According to the reporter's transcript, at this juncture, defense counsel "(moves head up and down.)"

2. Defendant waived any challenge to the search.

The People read the transcript to mean that counsel explicitly waived any claim that the search was unreasonable—as long as officers had reasonable suspicion to detain defendant in the first instance. Defendant does not address that question; he simply asserts that there was no waiver here. The implication of this position seems to be that trial counsel's affirmative response to the court's initial question—"I'm assuming you're contesting the initial stop; is that correct?"—indicated that she was indeed challenging the detention, but revealed nothing about whether she was also challenging the search. As head nodding is not a typical notation in a reporter's transcript, the argument implies, counsel's response to the prosecutor's question cannot constitute an explicit waiver. We are thus left with the motion itself, which, defendant contends, placed the prosecutor on notice that she would need to justify both the detention and the search; because she failed to meet her burden as to the latter, the evidence should have been suppressed.

On review, courts will not generally find implied waiver where a defendant properly raises a suppression issue but then fails to vigorously contest the prosecution's response. In *People v. Smith* (2002) 95 Cal.App.4th 283, for example, the defendant challenged a warrantless search in his moving papers but did not dispute the prosecution's proffered justification in his reply brief. (*Id*. at pp. 288–289.) At the subsequent hearing, however, defense counsel specifically stated that he was not conceding the

legality of the search and argued that the People had the burden of justifying it. (*Id.* at p. 290.) On appeal, the People argued that defendant's failure to address the asserted warrant exception impliedly waived any objection to that exception. The reviewing court disagreed. It held that because the defense had consistently challenged the warrantless search throughout the proceedings, the prosecution retained the burden of establishing legality. (*Id.* at p. 300.)

The People contend that while *Smith* addressed the consequences of counsel's failure to follow through on a previously asserted issue, this case involves an explicit waiver. In *Smith*, the motion to suppress put the prosecution on notice that it had to justify the warrantless search; to the extent defendant's reply brief created any ambiguity on that point, counsel's statements at the suppression hearing clarified the issue. Here, the People argue, counsel *explicitly* waived any challenge to the search by assuring the prosecutor and the court alike that she was concerned only with the detention. In so doing, counsel expressly relieved the prosecution of its burden to justify the search.

Defendant does not argue that the People misread *Smith* and does not respond to their characterization of the suppression proceedings.[2] He nevertheless argues that the four-sentence suppression motion was sufficient to place "the prosecution on notice that it had to prove that the search fell within one of the recognized exceptions to the warrant requirement." To the extent this amounts to a contention that the suppression motion was

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[2] In fact, he does not mention trial counsel's comments at all.

sufficiently clear to apprise the prosecutor of this argument *notwithstanding* counsel's comments at the hearing, we disagree.

Romeo, *supra*, 240 Cal.App.4th 931 is instructive. In that case, defendant filed a suppression motion that was nearly as concise as the motion at issue here. There, however, counsel's citations to *People v. Harvey* (1958) 156 Cal.App.2d 516 and *People v. Madden* (1970) 2 Cal.3d 1017 raised "a specific challenge to the search team's basis for conducting a probation search" sufficient to place the prosecution on notice of the type of search at issue. (*Romeo*, *supra*, at p. 935.) Here, on the other hand, while defendant's citations correctly identified the general legal principle at issue, the authorities were relevant only insofar as they all involved some form of warrantless search or seizure.

The two most recent opinions cited by defendant below did not involve motions to suppress—and one of them did not even involve a search. (See *People v. Osband* (1996) 13 Cal.4th 622, 673 [sufficient probable cause to support a court order compelling capital defendant to provide hair and blood samples]; *Welsh v. Wisconsin* (1984) 466 U.S. 740, 749–750 [suspected DUI was insufficient exigent circumstance to justify warrantless nighttime entry to home to arrest defendant].) The other citations are similarly inapt. *People v. James* addressed the voluntariness of a defendant's consent to the search of his home and *Mincey v. Arizona* rejected two arguments that are both irrelevant to this case—whether a homicide investigation is by definition an exigent circumstance, and whether an in-custody defendant has a diminished expectation of privacy in his apartment. (*People v. James* (1977) 19 Cal.3d 99, 106; *Mincey v. Arizona* (1978) 437 U.S. 385.)

We therefore conclude that even if trial counsel did not explicitly waive her challenge to the post-arrest vehicle search, when her comments are viewed in conjunction with the written motion to suppress, the prosecutor lacked a fair opportunity to litigate the issue. Because defendant failed to preserve the issue below, we do not reach the merits of his Fourth Amendment claim.[3]

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[3] We expressly invited briefing on the question of whether, in light of this court's opinion in *People v. Evans* (2011) 200 Cal.App.4th 735, 744–755 (no probable cause to support vehicle search incident to arrest or automobile exception), any waiver constituted ineffective assistance of trial counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668, 686, 690–694.) Appellate counsel declined to make that argument, however, choosing instead to rely solely on his mistaken view that there was no forfeiture. Counsel explained that "[s]ince trial counsel did not fail to challenge the constitutionality of the search, appellant does not believe she was constitutionally ineffective in regard to the motion to suppress …" and that he "is confident there is no colorable claim [of ineffectiveness] to be made on appeal or in a separate petition for writ of habeas corpus." Because the defense bears the burden of establishing ineffective assistance, we do not address the issue.

DISPOSITION

The judgment is affirmed.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

GOSWAMI, 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.