Filed 7/30/18 P. v. Bingaman CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD ALLEN BINGAMAN,

Defendant and Appellant.

2d Crim. No. B287360
(Super. Ct. No. 2016036665)
(Ventura County)

Ronald Allen Bingaman appeals a judgment following conviction of possession of a controlled substance in a jail facility, with a finding that he suffered two prior serious felony strike convictions. (Pen. Code, §§ 4573.6, 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)[1] We conclude that the trial court properly declined to exclude a jailhouse videotape as a sanction for late disclosure of discovery, and affirm.

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

FACTUAL AND PROCEDURAL HISTORY

On October 12, 2016, the Ventura County District Attorney charged Bingaman by complaint with possession of a controlled substance in a jail facility, with allegations of two prior serious felony strike convictions and service of two prior prison terms. (§§ 4573.6, 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b).) Following Bingaman's not guilty plea, the trial court held a preliminary examination on October 26, 2016. During the examination, Ventura County Sheriff's Deputy Michael Ledesma testified that he reviewed a jailhouse videotape reflecting a baggie of heroin "appear[ing] on the ground" during Bingaman's booking search.

The trial court held Bingaman to answer for the heroin possession charge and the prosecution proceeded to trial. At one point during the following 10 months, the prosecutor offered Bingaman a six-year prison term in exchange for a guilty plea. Bingaman refused the plea offer and trial commenced on August 31, 2017.

Defense Request for the Videotape

Following the testimony of the first trial witness, the prosecutor informed the court that "just prior to being sent out to trial," defense counsel requested a copy of the jailhouse videotape capturing Bingaman's booking search. The prosecutor requested a time waiver from Bingaman, but he refused to waive time. Before that point in time, the prosecutor had not intended to introduce the videotape into evidence.[2]

---

[2] The trial prosecutor was not the initial prosecutor and apparently was unaware of the videotape until defense counsel requested it shortly before trial.

The prosecutor explained to the trial court that she received a copy of the videotape from the sheriff's department at 4:50 p.m. on Friday, September 1, 2017. She was unable to view the videotape, however, due to incompatible programming. After downloading compatible programming, the prosecutor viewed the videotape and made a copy for Bingaman. When trial resumed on Tuesday, September 5, 2017 (Monday, September 4, 2017, was a national holiday), defense counsel was unable to view the videotape due to her incompatible programming. The prosecutor then obtained a compatible copy for defense counsel that morning.

The videotape was mentioned in the police report and the preliminary examination that occurred 10 months earlier. Defense counsel stated that she had requested a copy of the videotape by two e-mails "a couple months ago" sent to the former prosecutor. The current prosecutor replied that she was assigned the prosecution in May but had no requests for production of the videotape in her file. The prosecutor also stated that her office had requested the videotape from the sheriff's department in December 2016 but that the department had not responded.

Defense counsel then requested that the trial court exclude evidence of the videotape as a discovery sanction. The court responded that Bingaman "waived [that remedy] by inaction." The court stated: "[N]either party really worked very hard at making [production] happen. . . . But, but, because the defendant did not invoke the protocol required of [section] 1054 in the way required . . . , I'm going to deny the request to exclude it."

The trial court then inquired if Bingaman was seeking any remedy other than exclusion. The court also stated that Bingaman did not suffer undue prejudice from the late discovery.

Defense counsel responded that if Bingaman had viewed the videotape earlier, he may have been inclined to enter a plea agreement. Defense counsel did not request, however, another type of sanction.

In sum, the trial court concluded that Bingaman waived the procedural protections of section 1054 by not acting earlier or seeking a court order: "[T]here just isn't a legal basis procedurally for me to exclude this or invoke any other sanctions at this point. . . . So that request [for exclusion] is denied."

Trial Evidence

Booking Search

On October 4, 2016, Ledesma was the assigned booking deputy at the Ventura East Valley jail. His duties included searching arrestees for contraband, including controlled substances. That morning, Bingaman was arrested on unrelated charges and brought to the jail booking area. Ledesma searched Bingaman in front of a blue-colored padded wall as another deputy searched another arrestee three to four feet away.

Approximately one hour later, Ledesma found a plastic baggie on the floor where he had searched Bingaman. The baggie had a distinctive printed outline of a bear. A brown substance that emanated a vinegar odor was inside the baggie. Based upon his training and experience, Ledesma suspected that the brown substance was heroin. A presumptive test that he then performed confirmed his suspicion. Forensic laboratory testing also confirmed his suspicion; the baggie contained 0.04 grams of heroin. At trial, Ledesma opined that the heroin inside the baggie was a useable quantity. The prosecutor presented into evidence a photograph of the baggie containing the brown substance.

Following Ledesma's discovery of the plastic baggie, he reviewed the jail surveillance videotape and saw the baggie fall from Bingaman during the booking search. The baggie lay on the floor between Bingaman and the blue padded wall. At trial, the prosecutor played the 10-minute silent videotape to the jury. The videotape depicted a baggie on the floor after Bingaman removed his sweater.

Strip Search

Ventura County Sheriff's Deputy Steven Donlon conducted a strip search of Bingaman following the booking search. During the strip search, Bingaman covered his genitals and ignored commands to remove his hands. Donlon then noticed a white object protruding from Bingaman's hand and again ordered Bingaman to remove his hands. When Bingaman shifted his hands, Donlon heard the sound of paper "crumbling." Donlon then grabbed Bingaman's left arm as Bingaman resisted and dropped a white plastic baggie with a printed outline of a bear on the floor. When Donlon attempted to then restrain Bingaman against the wall, Bingaman seized the baggie from the floor and "shoved it into his mouth."

Ledesma then entered the shower area to assist Donlon. After the deputies handcuffed Bingaman, he spit a brown substance with a vinegar odor on the floor. Based upon Donlon's training and experience, he suspected that the substance was heroin. A presumptive field test confirmed his suspicion.

Defense, Conviction, and Sentencing

At trial, Bingaman testified and admitted that he had used heroin the day of his arrest. He denied dropping a baggie containing heroin during the booking search. Bingaman also

denied that he possessed the baggie found during the strip search or that he placed it in his mouth.

The jury convicted Bingaman of possession of a controlled substance in a jail facility.[3] (§ 4573.6.) In a separate proceeding, Bingaman admitted that he suffered two serious felony strike convictions and served two prior prison terms. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b).) The trial court sentenced Bingaman to a subordinate consecutive two-year sentence, to be served consecutively to the sentence imposed in an unrelated case, and it struck the prior prison term allegations pursuant to section 1385. The court also imposed a $300 restitution fine, a $300 parole revocation restitution fine (suspended), a $40 court security assessment, a $515.08 criminal justice administration fee, and a $30 criminal conviction assessment. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a), Gov. Code, §§ 29550, 29550.3, 70373.) It awarded Bingaman 309 days of presentence custody credit.

Bingaman appeals and contends that the trial court abused its discretion by not excluding the jailhouse videotape from evidence based upon the prosecutor's violation of the discovery statute. (§ 1054.1.)

DISCUSSION

Bingaman argues that the trial court erred by not excluding the videotape as the appropriate remedy for the prosecutor's belated production. He also contends that he

---

[3] At trial, the prosecutor informed the jury that the charged count concerned only the baggie of heroin found during the booking search. She stated that the strip search incident was relevant to establish Bingaman's knowledge that he possessed heroin and was not the basis for the charged count.

properly complied with section 1054.5 regarding discovery, but that the prosecutor did not provide the videotape 30 days prior to trial as required by section 1054.7. Bingaman correctly points out that section 1054.5 does not require that he bring a motion to compel production prior to seeking discovery sanctions. (*People v. Jackson* (1993) 15 Cal.App.4th 1197, 1202 [informal discovery procedures required but motion to compel optional pursuant to the plain language of section 1054.5, subdivision (b)].) He also argues that the videotape evidence caused him substantial prejudice.

Section 1054.1, subdivision (c) requires the prosecutor to produce "[a]ll relevant real evidence seized or obtained as a part of the investigation" if it is in the possession of the prosecuting attorney or "if the prosecuting attorney knows it to be in the possession of the investigating agencies." If a party does not comply with section 1054.1, a court may "make any order necessary to enforce the provisions of this chapter," including ordering immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, or continuance of the matter. (§ 1054.5, subd. (b).)

The trial court's ruling on a discovery motion is reviewed pursuant to an abuse of discretion standard. (*People v. Prince* (2007) 40 Cal.4th 1179, 1232; *People v. Ayala* (2000) 23 Cal.4th 225, 299.) To conclude that the court abused its discretion, we must decide that the court's ruling was irrational, capricious, patently absurd, or without a fairly debatable justification. (*People v. Perez* (2018) 4 Cal.5th 421, 443; *People v. Clark* (1992) 3 Cal.4th 41, 111, abrogated on other grounds as stated by *People v. Edwards* (2013) 57 Cal.4th 658, 704-705.)

In our analysis, we consider whether the discovery violation was willful, whether the violator hoped to gain a tactical advantage from the violation, whether lesser sanctions were adequate, and whether any prejudice to the opposing party and the adversarial process exists. (*People v. Jackson*, *supra*, 15 Cal.App.4th 1197, 1203 [e.g., discovery sanction of exclusion of testimony warranted where witness no longer available].) The sanction of exclusion of evidence for a discovery violation is appropriate only if the prejudice to the defense is "substantial and irremediable" and the failure to disclose was willful and motivated by a desire to gain a tactical advantage. (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1757.) This is true because the exclusion of evidence may undermine the reliability of the conclusion of the trier of fact. (*Ibid.* [the truth-determining function of the trial process weighs in the decision to exclude evidence as a discovery sanction].)

The trial court did not abuse its discretion by not excluding the videotape. The prosecutor stated that she had not planned to admit the videotape into evidence, implying that her discovery violation was not willful. Bingaman's explanation of prejudice – failure to engage in pretrial settlement – was not substantial or irremediable prejudice requiring exclusion of the videotape. (*People v. Verdugo* (2010) 50 Cal.4th 263, 282 [generalized statement that timely disclosure would have enabled counsel to adjust his theory of the case to fit the facts is insufficient to establish prejudice].) Bingaman rejected a plea agreement providing for a six-year prison term; he also could have requested the sanction of a continuance to engage in further plea bargaining. (*Id.* at p. 281 ["[A] continuance appears to have been more than adequate to remedy the violation of the discovery

statute, and defendant does not attempt to demonstrate otherwise"]; *People v. Gonzales*, *supra*, 22 Cal.App.4th 1744, 1757 [remedy of continuance or delay in presentation of evidence to allow surprised party an opportunity to prepare].) Although the court may have been mistaken regarding the necessity for a motion to compel production, its finding of a lack of prejudice to Bingaman is amply supported.

Moreover, the trial court's ruling did not deprive Bingaman of due process of law. He saw the videotape prior to and during trial and cross-examined Ledesma regarding the presence of other arrestees in the booking area and Ledesma's absence when the arrestees arrived. Bingaman also refused to request another type of discovery sanction, including a continuance. "Not every discovery violation is a due process violation – only those that undermine confidence in the outcome." (*People v. Ochoa* (1998) 19 Cal.4th 353, 474.) Due process concerns itself with the fairness of the trial as a whole. (*Ibid.*)

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Matthew P. Guasco, Judge

Superior Court County of Ventura

Laurie A. Thrower, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephanie A. Miyoshi, Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.