Filed 4/17/12 P. v. Pimentel 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. CARLOS JOSE PIMENTEL, Defendant and Appellant.	B230970 (Los Angeles County Super. Ct. No. VA116707)
In re CARLOS JOSE PIMENTEL, on Habeas Corpus.	B236194

APPEAL from a probation order of the Superior Court of Los Angeles County. Daniel S. Murphy, Judge. Affirmed with modifications.

ORIGINAL PROCEEDING, petition for writ of habeas corpus. Petition denied.

Robert Booher, under appointment by the Court of Appeal, for Petitioner, Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey,

Supervising Deputy Attorney General, and Tasha G. Timbadia, Deputy Attorney General, for Plaintiff and Respondent.

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Defendant Carlos Jose Pimentel was charged by information with one count of possession of a firearm by a felon (former Pen. Code, § 12021, subd. (a), Stats. 2010, ch. 711, § 4 [repealed]; Stats. 2011, ch. 15, § 501.5 [reenacted]). He was previously convicted of possession of a controlled substance for sale (Health & Saf. Code, § 11378). He was convicted by jury, granted probation for a term of 36 months, and ordered to serve 365 days in jail. On appeal, defendant challenges his probation conditions that he not "own, use, or possess any dangerous or deadly weapons, including any firearms, knives or other weapons," or "own, use, possess, buy or sell any narcotics, dangerous or restricted drugs, or associated paraphernalia, . . . and stay away from places where users, buyers or sellers congregate[, or] . . . associate with drug users or sellers unless attending a drug treatment program," contending they are unconstitutionally vague for failure to include an express knowledge requirement.

We modify the "do not associate" and "stay away" portions of the drug condition, but find that modification of the weapon condition and the portion of the drug condition prohibiting defendant from possessing drugs is unnecessary, because the conditions are sufficiently precise for defendant to know what is required of him, and knowledge is impliedly required.

In his petition for a writ of habeas corpus, defendant complains he received ineffective assistance of counsel, reasoning he was unlawfully detained and his attorney failed to seek suppression of the evidence found during the warrantless vehicle search. We deny defendant's petition, because on the facts stated, counsel's assistance was not ineffective, as any suppression motion would have been futile.

FACTUAL AND PROCEDURAL BACKGROUND

At 2:00 a.m. on September 2, 2010, Los Angeles Sheriff's Deputies Azam Flores and Byron Cwierz were patrolling the area near Toad's Bar in Los Angeles County. As they drove near the bar's parking lot, they noticed defendant standing near a white Acura. When Deputy Flores shone his spotlight on defendant, defendant appeared surprised. Defendant opened the driver's side door of the Acura, reached into his jacket, and threw a chrome object into the car. Deputy Flores said he "wasn't sure what it was, but to me -- I told my partner, hey, I think this guy just threw a gun in there." Defendant then abruptly walked to the bar. Deputy Flores told defendant to "stop," and detained him on suspicion of having a firearm. Deputy Flores patted defendant down, removed car keys and a wallet from his pockets, and put him in the back of the patrol car. As Deputy Cwierz walked to the Acura, defendant said, "That car is not mine. Whatever is in there, I am not responsible for." Deputy Cwierz took defendant's keys, opened the car, and shone his flashlight inside. He found a firearm on the driver's side floorboard. When the deputies searched the car, Deputy Flores found Department of Motor Vehicle paperwork for a pending registration or transfer in defendant's name, although Deputy Flores did not recall if the paperwork was for the Acura. Deputy Flores never determined who was the registered owner of the car.

Defendant was convicted and given probation. The relevant conditions of his probation required him to "not own, use or possess any dangerous or deadly weapons, including any firearms, knives or other weapons," and not to "use or possess any narcotics, dangerous or restricted drugs or associated paraphernalia, except with a valid prescription[,] and stay away from places where users or sellers congregate. Do not associate with drug users or sellers unless attending a drug treatment program." Defendant filed a timely notice of appeal.

DISCUSSION

Defendant's challenge to two of his probation conditions asserts they are unconstitutionally vague because they did not include an express knowledge requirement. In a petition for habeas corpus, which we consider together with this

appeal, defendant claims ineffective assistance of counsel. Respondent concedes the drug condition should be modified to contain a knowledge requirement, but contends the weapon condition is constitutionally adequate because the prohibited conduct is clearly defined. Although no objection to the above conditions was made in the trial court, both parties agree defendant's claims are cognizable on appeal, because a challenge to a "facial constitutional [vagueness or overbreadth] defect in the relevant probation condition" may be raised for the first time on appeal. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887.)

We agree that portions of the drug condition are vague but conclude the weapon condition is adequate. And, because defendant introduced no evidence (and alleged no facts) outside the appellate record in his habeas petition which would warrant relief, and from the facts appearing in the record any motion to suppress would have been futile, the petition is denied.

1. Probation Conditions

"A probation condition is unconstitutional when its terms are so vague people of '"'common intelligence'"' must guess at its meaning. [Citation.] To survive a challenge on the ground of vagueness, a probation condition "'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated."' [Citation.] A condition is sufficiently precise if its terms have a 'plain commonsense meaning, which is well settled . . . .'" (*In re R.P.* (2009) 176 Cal.App.4th 562, 566-567.) Courts have found "probation conditions to be unconstitutionally vague or overbroad when they do not require the probationer to have knowledge of the prohibited conduct or circumstances." (*People v. Kim* (2011) 193 Cal.App.4th 836, 843.)

One of the disputed conditions requires that defendant not "use or possess any narcotics, dangerous or restricted drugs or associated paraphernalia, except with a valid prescription[,] and stay away from places where users or sellers congregate. Do

not associate with drug users or sellers unless attending a drug treatment program."[1] Defendant contends the provision is vague because he could "unwittingly violate the condition[] . . . by unknowingly being in a place which users, buyers, or sellers congregate." Courts have generally held that "a probation condition prohibiting association with a type of person must include knowledge of the person's status. . . . [¶] This reasoning has been applied to probation conditions prohibiting a probationer's . . . presence in [certain] areas [where gang members or drug users congregate]." (*People v. Kim*, *supra*, 193 Cal.App.4th at p. 844, citation omitted.) This is because a condition that a probationer not associate with certain people "impinge[s] appellant's constitutional right of freedom of association. [Citations.] Thus it '"must be narrowly drawn."'" (*People v. Garcia* (1993) 19 Cal.App.4th 97, 102; see also *People v. Lopez* (1998) 66 Cal.App.4th 615, 628-629.)

In these situations, an express knowledge requirement is reasonable and necessary because the status of certain people and places is not obvious. (*People v. Kim*, *supra*, 193 Cal.App.4th at p. 845; see also *People v. Garcia*, *supra*, 19 Cal.App.4th at pp. 100-102 [a probation condition to "not associate with any felons,

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1 We note that appearing immediately after the disputed condition in the minute order is a condition that defendant "not associate with persons *known by you* to be narcotic or drug users or sellers." (Italics added.) Defendant does not challenge this condition, and although this condition includes a knowledge requirement, and duplicates one of the disputed conditions, because it is inconsistent with the other provision and could create confusion, it does not render our inquiry unnecessary.

We also note that the reporter's transcript is inconsistent with portions of the minute order, and recites "Do not associate with persons *known by you* to be narcotic or drug users or sellers, except in an authorized drug counseling program," *without* the inconsistency noted in the minute order. (Italics added.) Although the oral pronouncement of judgment controls over a conflicting document (*People v. Thompson* (2009) 180 Cal.App.4th 974, 978), neither party noticed this inconsistency. In the absence of any argument on the point, and because the propriety of a knowledge requirement for the associational condition bears on the resolution of other matters at issue in this appeal (and because the court's minutes should be accurate), we will reach the issue of whether modification is necessary.

ex-felons or users or sellers of narcotics" is unconstitutionally overbroad for lack of a knowledge requirement]; *People v. Lopez*, *supra*, 66 Cal.App.4th at pp. 628-629 [probation condition prohibiting the appellant from associating with gang members was vague and overbroad].) We therefore agree with defendant and respondent that the "stay away" and associational portions of the drug condition are unconstitutionally vague. The condition is therefore modified as follows: ". . . stay away from places where you know users or sellers congregate. Do not associate with people known to you to be drug users or sellers unless attending a drug treatment program." By doing so, we eliminate any inconsistency between the oral pronouncement of judgment and the court's minutes. (See fn. 1, *ante*, at p. 5.)

However, we are not required to accept respondent's concession that the portion of the drug condition prohibiting drug possession is vague (*People v. Alvarado* (1982) 133 Cal.App.3d 1003), especially because we find respondent's concession is inconsistent with its position that the weapon condition is constitutionally adequate (discussed *post*). The prohibitions against possessing drugs and weapons are materially different from the associational prohibitions discussed *ante*, because they do not implicate defendant's constitutional rights. Defendant, as a convicted felon has no constitutional right to own a firearm. (*People v. Kim*, *supra*, 193 Cal.App.4th at p. 847.) He also has no constitutional right to possess controlled substances (without a valid prescription). (*People v. Davis* (1979) 92 Cal.App.3d 250, 258-260.)

The requirement that defendant not "use or possess any narcotics, dangerous or restricted drugs or associated paraphernalia, except with a valid prescription" is sufficiently precise to give defendant notice of what's required of him, and to guide courts and the probation department in determining what constitutes a violation. All of the terms have well understood meanings, both in the law and common sense. (See Health & Saf. Code, §§ 11014.5 [defining drug paraphernalia]; 11054 et seq. [defining controlled substances]; 11019 [defining "narcotic drug"]; Bus. & Prof. Code, § 4022 [defining "dangerous drug"].) Defendant contends he could violate the condition "by possessing something he did not know to be a dangerous or restricted drug."

However, given the well-established definitions, we consider that to be highly unlikely. Moreover, drug offenses routinely require proof that a defendant has knowledge of a drug's presence and status as a restricted drug. (See *People v. Wilson* (1967) 256 Cal.App.2d 411, 419.) The danger of innocent violation is slight, particularly in light of defendant's extensive criminal history, which includes several drug-related offenses.

Defendant also contends the probation condition prohibiting him from owning, using or possessing "any dangerous or deadly weapons, including any firearms, knives or other weapons" is unconstitutionally vague because he "could unwittingly violate the condition[] by possessing something he did not know was a dangerous or deadly weapon." A similar argument was considered and rejected in *In re R.P.*, *supra*, 176 Cal.App.4th 562, where the court observed that "deadly weapon" is uniformly defined by statute (Pen. Code, § 245, subd. (a)(1)), case law (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1037), and jury instructions (CALCRIM Nos. 875, 2503, 3130). (*In re R.P.*, at pp. 567-568.) Similarly, "firearm" is defined by statute (Pen. Code, § 16520), case law (*People v. Law* (2011) 195 Cal.App.4th 976, 983), and jury instructions (CALCRIM Nos. 875, 965). Based on these well established definitions, we believe the condition is sufficiently precise for defendant to know what is required of him.

Likewise, the condition is not susceptible to innocent violation simply because of the exclusion of the term "knowingly." In *People v. Kim*, the challenged probation condition provided: "'You shall not own, possess, have within your custody or control any firearm or ammunition for the rest of your life under Section[s] 12021 and 12316[, subdivision] (b)(1) of the Penal Code.'" (*People v. Kim*, *supra*, 193 Cal.App.4th at p. 840.) The court concluded the probation condition was coextensive with sections of the Penal Code prohibiting possession of firearms and ammunition by convicted felons (the defendant was on felony probation), and that the statutes included an implied knowledge requirement. Therefore, the court found that modification of the probation term to include an express knowledge requirement was unnecessary because knowledge was impliedly required. (*People v. Kim*, at p. 847.)

Here, defendant's felony convictions (including a conviction, incidentally, for possession of a firearm by a felon) and status as a felony probationer render him ineligible to own or possess firearms. (See Pen. Code, § 29800.) Possession of dangerous and concealable weapons is prohibited by Penal Code section 16590, among other sections. These sections require that violations be knowing and willful. (See, e.g., *People v. King* (2006) 38 Cal.4th 617, 627; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922.) Because defendant's probation condition merely "implements statutory provisions that apply to the probationer independent of the condition," the probation condition does not require an express knowledge requirement. (*People v. Kim*, *supra*, 193 Cal.App.4th at p. 843.)

As a matter of common sense, probation conditions concerning drugs and weapons are much less susceptible to innocent violation than probation conditions barring association with drug users or gang members. Whereas it is unreasonable to expect a probationer to stay away from people and places he does not know to be prohibited, it is not unreasonable to require a probationer to avoid possession of clearly defined contraband. In the exceedingly rare case where a probationer might innocently find himself in possession of a weapon or drugs, there is no real risk of any criminal consequence because the Penal Code requires the probationer's conduct be willful and knowing in order to constitute a probation violation. The knowledge and wrongful intent requirements are so manifestly implied that to require they be expressly stated is neither logical nor necessary. (See, e.g., *In re Jorge M.* (2000) 23 Cal.4th 866, 872 ["the requirement that, for a criminal conviction, the prosecution prove some form of guilty intent, knowledge, or criminal negligence is of such long standing and so fundamental to our criminal law that penal statutes will often be construed to contain such an element despite their failure expressly to state it"].)

Upon remand, the trial court may choose to add a knowledge requirement to all of these probation conditions, if it sees fit. We simply hold that such a requirement is not constitutionally necessary under the circumstances of this case.

2. Petition for Writ of Habeas Corpus

Defendant contends his trial counsel was ineffective because counsel failed to seek suppression of evidence. Specifically, defendant contends that "the officer did not know what [he] threw into the car, and only hoped it was a gun [and therefore] detained [him] without probable cause," making defendant's "detention and . . . subsequent searches . . . unlawful." We disagree.

Because "a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them." (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) The petition must "state fully and with particularity the facts on which relief is sought," and "include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." (*Ibid*.) "Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing." (*People v. Karis* (1988) 46 Cal.3d 612, 656.) "An appellate court receiving such a petition evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief." (*People v. Duvall*, at pp. 474-475.) If so, the required prima facie showing has been made. If no prima facie case is made, we will summarily deny the petition. On the other hand, if the allegations of the petition, taken as true, establish a claim for relief, we will issue an order to show cause why relief should not be granted. (*Id*. at p. 475.)

We find defendant has not stated a prima facie claim for relief, and therefore summary denial of the petition is proper. Defendant introduced no evidence and alleged no facts outside the appellate record which would warrant relief. The appellate record reveals no ineffective assistance of counsel, as the facts amply show that no motion to suppress could have succeeded.

"Under both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, a criminal defendant has a right to the assistance of counsel. [Citations.] This right 'entitles the defendant not to some bare

assistance but rather to *effective* assistance.' [Citation.]" (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 466.) In order to demonstrate ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that he was prejudiced by counsel's performance. (*Id*. at pp. 466-467.) In the context of the failure to make a suppression motion, prejudice must be demonstrated by showing that such a motion would be successful. (See *People v. Gonzalez* (1998) 64 Cal.App.4th 432, 437-438.)

Counsel is not required to make futile motions to appear competent. Reversal of a conviction on the basis of inadequate counsel is required only if the record reveals no rational tactical purpose for his or her act or omission. (*People v. Terrell* (1999) 69 Cal.App.4th 1246, 1252-1253.) Here, the record does not disclose the actual reason why defendant's trial attorney did not challenge the validity of defendant's detention and search, and defendant's trial counsel has not responded to appellate counsel's inquiry requesting a reason. Nevertheless, the record discloses a rational reason why the motion was not made; it would have been futile.

Police contacts with individuals fall into three general categories: consensual encounters; detentions of limited duration, scope, and purpose; and arrests (or comparable restraints on a person's liberty). (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784.) "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231.) Probable cause for arrest exists only when the facts known to the arresting officer "would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested is guilty of a crime." (*People v. Price* (1991) 1 Cal.4th 324, 410.) An "'unparticularized suspicion or "hunch[]"'" is insufficient. (*United States v. Sokolow* (1989) 490 U.S. 1, 7.)

"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.' [Citations.]" (People v. Woods (1999) 21 Cal.4th 668, 674.) The automobile exception permits the warrantless search of a car if there is probable cause to believe the car contains evidence of a crime, even though there are no exigent circumstances that preclude obtaining a search warrant. (*Maryland v. Dyson* (1999) 527 U.S. 465, 466-467; see also *United States v. Ross* (1982) 456 U.S. 798, 825.)

The police clearly had probable cause search the vehicle in this case. When deputies shone their spotlight on defendant, he discarded a "chrome" object into the car, and walked briskly away, causing Deputy Flores to exclaim, "I think this guy just threw a gun in there." Contrary to defendant's contention, his flight and nervous behavior were not the sole bases for defendant's detention and the search. Deputy Flores saw an object he thought was a gun. (See former Pen. Code, § 12031, subd. (a)(1) [crime to carry a loaded firearm in public], Stats. 2010, ch. 711, § 4 [repealed effective January 1, 2012].) Defendant's characterization of the deputy's testimony that he merely "hoped" or had a hunch it was a gun is inaccurate; the deputy testified that although he "wasn't sure what it was," he thought it was a gun. He did not have to be certain, as long as he could articulate facts which "would lead a person of ordinary care and prudence to entertain an honest and strong suspicion" that the car contained evidence of a crime. (*People v. Price, supra*, 1 Cal.4th at p. 410.) The time of night, defendant's furtive behavior, the size and chrome color of the object, defendant's statement that he was not responsible for what was found in the car, all together, reasonably support the detention and search. Therefore, because the detention and search were not illegal, a motion to suppress would have been futile, and does not provide any basis for a claim of ineffective assistance of counsel.

The petition is denied.

DISPOSITION

The judgment is affirmed as modified, and the petition is denied. The probation conditions that defendant "stay away from places where users or sellers congregate" and "not associate with drug users or sellers unless attending a drug treatment program" are modified as follows: ". . . stay away from places where you know users

or sellers congregate, and do not associate with people known to you to be drug users or sellers unless attending a drug treatment program." Upon remand, the trial court shall amend the minute order to include the modified probation conditions.

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GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.