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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

XUE BIN LIANG,

Defendant and Appellant.

A134581

**(San Mateo County
Super. Ct. No. SC070823A)**

Xue Bin Liang (defendant) pleaded no contest to felony drug charges after the superior court denied his second pretrial motion to suppress evidence (Pen. Code, § 1538.5),¹ finding it lacked jurisdiction to hear such a motion. On appeal from the judgment of conviction, defendant contends he is entitled to a hearing on the motion because it is made on grounds not raised in his first motion due to the ineffective assistance of counsel. We conclude that the superior court erred in finding it lacked jurisdiction to hear defendant's second motion without deciding, in the first instance, whether he had established that prejudicial ineffective assistance of counsel deprived him of a full determination of the Fourth Amendment issues impacting his case. The matter is remanded to the superior court for further proceedings.

¹ Unless otherwise specified, all further statutory references are to the Penal Code.

FACTUAL BACKGROUND

On December 18, 2008, Daly City police responded to a residence at 365 Frankfort Street at the request of the owner, Holly Wong (Wong). Police spoke with Wong inside the garage to the residence, and she told them she had been trying for over a month to contact the tenants who leased the residence from her. She asked the officers to enter the residence to ensure that no one was inside.

Wong said that, in an attempt to contact the tenants, she and her father had entered the residence earlier that day through an unlocked door in the garage. She smelled marijuana inside the residence, and her father told her to call the police, as he believed there was marijuana growing there. While speaking with Wong, one officer observed “multiple electrical wires coming out of and going through holes in the sheetrock inside the garage” and a plastic bag containing green plant material she believed to be marijuana. The officers smelled an odor of marijuana coming from the residence.

As Wong did not have a key to the residence,² Daly City police called the Daly City Fire Department to open a door. Daly City police entered the residence and found “numerous marijuana plants growing inside, with high power lights and fans.” They did not find anyone inside the residence.

Daly City police exited the residence and called the San Mateo County Narcotics Task Force, which responded to the residence. Special agent Michael Price spoke with Wong, who said she had leased the property to an older Asian male, Yiu Cho Chung, in July 2006, for 24 months. Wong stated that she was now trying to sell the property and had been calling Chung since early November 2008, to ask him to vacate. She said she had not been able to reach him, and he had not returned her calls. Agent Price noted that all of the front windows of the residence were covered, and he observed condensation on two windows. From the sidewalk, he could hear a loud humming noise coming from inside the residence. He found these conditions consistent with use of the residence for the cultivation of marijuana.

² When leaving the residence, Wong and her father inadvertently locked the door through which they had gained entry from the garage.

Agent Price began preparing an application for a search warrant and instructed other San Mateo County Narcotics Task Force agents to monitor the house. Agent Koti Fakava (Fakava) saw defendant drive by the residence in a white Lexus, slowing as he passed. Agent Pat Moran (Moran) saw defendant enter the residence, and shortly thereafter, Fakava saw defendant walk out of the garage, carrying a garage door opener. Fakava and Moran detained defendant in handcuffs and did a pat search, which produced a cell phone, several hundred dollars in cash, and a set of keys from his pants pocket. They also searched defendant's car.

Soon thereafter, agents obtained a search warrant for the residence. They seized over 200 marijuana plants in various stages of growth, as well as grow lights and other equipment used in growing marijuana.

PROCEDURAL HISTORY

In April 2010, following a preliminary hearing, defendant was charged by information with felony counts of cultivating marijuana (Health & Saf. Code, § 11358) (count 1), and possessing marijuana for purpose of sale (Health & Saf. Code, § 11359) (count 2).³ He entered a plea of not guilty to both counts.

The following month, defendant's appointed counsel filed a section 1538.5 motion in the superior court, seeking "[t]o suppress as evidence all material . . . seized from [defendant's] person, or under his control, at the time of his detention on December 18, 2008" by Fakava and Moran. Specifically, the motion sought to suppress observations by the officers, statements by defendant and witnesses at the scene, and "[a]ny information that was learned during this investigation after the initial contact and subsequent detention, search, and arrest." The motion was made on the grounds that "the initial contact and subsequent detention and arrest of [defendant] were . . . not supported by reasonable suspicion or probable cause, [and] searches of [his] vehicle and person were conducted without the benefit of [a] warrant"

³ The information also included a third count of stealing utility services (§ 498, subd. (d)) that was later dismissed.

At a June 17, 2010, hearing on the suppression motion, defense counsel confirmed that defendant was challenging only his initial detention and the subsequent search of his person.⁴ Defendant maintains on appeal that the transcript of this hearing indicates his counsel “was not aware that officers had entered the residence before securing a search warrant.” He also notes statements in which defense counsel explained that her motion raised no objection to the search of the house by Daly City police “because [defendant] is not the lessee and, therefore, does not have standing for the house.”

The superior court denied the motion, finding “justification for a search incident to an arrest, arresting the person being responsible [based on a] reasonable conclusion . . . that . . . Mr. Chung was not present or identified and the defendant apparently took over the home[,] having the garage door opener indicative of possession of the home.”

In September 2011, defendant retained private counsel, who substituted for his attorney of record.

On November 14, 2011, defendant’s new attorney filed a second pretrial motion under section 1538.5, seeking to suppress the evidence seized under the search warrant, as well as related lab results; observations, photographs, and videos of the premises; comments made by defendant to law enforcement following his detention and arrest; all items seized from defendant’s person, including a key ring, currency, and a cell phone; “[a]ll indicia” seized from his vehicle, including a “[k]eychain with keys”; and “any records, notes, and witness testimony regarding same[.]” The grounds for the motion were that law enforcement initially entered the residence without a warrant and without justification for a warrantless entry, and that the search warrant “relied entirely on observations gleaned during the illegal entry into the residence.” Defendant maintained he had been denied a full determination of his Fourth Amendment rights “[d]ue to ineffective assistance on the part of . . . prior counsel,” who “neglected to raise this critical issue.”

⁴ The prosecutor stipulated “that no evidence acquired or could have been acquired from the car will be introduced into evidence by the People”

On November 23, 2011, a different superior court judge held a hearing on the motion and denied it, concluding the court lacked jurisdiction to hear a second motion to suppress. The judge stated he was not “voicing any thoughts whatever with regard to the merits of the second motion or the issue of alleged incompetence of [prior counsel].”

On December 19, 2011, defendant withdrew his not guilty plea and entered a plea of no contest to both counts. At sentencing on January 30, 2012, the superior court suspended imposition of sentence and ordered three years’ probation, subject to various terms and conditions, including seven months in the county jail.

Defendant filed a timely notice of appeal from the judgment of conviction, challenging the validity of his plea based on the denial of his second motion to suppress evidence.

DISCUSSION

Defendant contends he “is entitled to a hearing on the [second] motion to suppress evidence” because prior counsel’s ineffectiveness “deprived [him] of his right to a full determination of the motion to suppress.”

As a general rule, a defendant is allowed only one pretrial suppression motion under section 1538.5 in the superior court, which lacks jurisdiction to hear a second motion. (*People v. Nelson* (1981) 126 Cal.App.3d 978, 981 (*Nelson*), relying upon *Madril v. Superior Court* (1975) 15 Cal.3d 73, 77-78 [“[D]etermination of a [section] 1538.5 motion at a special hearing in the superior court . . . deprives that court of jurisdiction to reconsider the matter unless the People, pursuant to subdivision (j), seek to reopen the matter at trial upon a showing of good cause”], italics omitted.)

There are exceptions to the general rule barring reconsideration of suppression motions, including circumstances in which a defendant is denied the right to fully litigate the motion at a hearing. (*People v. Ramirez* (1992) 6 Cal.App.4th 1583, 1589, fn. 4 [“Under the current law, a defendant is entitled to renew a suppression motion in the trial court . . . where defendant was not afforded a full and fair opportunity to litigate the issues raised in the original motion”]; see § 1538.5, subd. (i) [“[I]f the offense was initiated by indictment . . . the defendant shall have the right to fully litigate the validity

of a search or seizure on the basis of the evidence presented at a special hearing”). In *People v. Brooks* (1980) 26 Cal.3d 471 (*Brooks*), the reviewing court was asked to decide “whether, after reversal on appeal of a pretrial order of suppression, the [superior] court has jurisdiction to entertain a new or renewed motion to suppress based on grounds raised in the initial motion but which the [superior] court declined to reach” in the first instance. (*Id.* at p. 474.) The *Brooks* court found that such jurisdiction exists, reasoning that where the defendant “was deprived of an opportunity for a full hearing on the merits of his entire motion to suppress as initially made,” “the renewed hearing amounted to neither consideration of a second section 1538.5 motion nor a relitigation of his original motion, but rather a completion of the full hearing to which he was entitled.” (*Brooks*, at p. 481.)

In *Nelson*, *supra*, 126 Cal.App.3d 978, the defendant maintained “that the *Brooks* exception permitted him, at a second 1538.5 hearing, to raise a ground for suppression not raised by him at the first such hearing.” (*People v. Sotelo* (1996) 47 Cal.App.4th 264, 270 (*Sotelo*)). The *Nelson* court rejected this argument, stating: “In contrast to *Brooks*, the defendant here raised a ground for suppression at the second hearing which was not raised at the first. Hence defendant’s second hearing was not a completion of his first motion ‘as initially made’ [citation] *Brooks*, therefore, is inapplicable to the present case. [¶] We conclude that, having failed to show good cause why the sufficiency of the affidavit offered in support of the search warrant was not challenged at the initial section 1538.5 hearing, defendant was not entitled, under section 1538.5, to a second pretrial suppression hearing” (*Nelson*, at p. 984 [first suppression motion challenged the execution of a search warrant, but not its validity, as the second motion did].)

In this case, the superior court concluded it lacked jurisdiction to hear defendant’s second motion to suppress, finding the analysis in *Nelson*, as set forth by the court in *Sotelo*, “exactly on point here.” We disagree.⁵ As in *Nelson*, defendant’s second motion

⁵ The Attorney General concedes: “The trial court was mistaken when it found that it had no jurisdiction to hear [defendant’s] second suppression motion.” Notwithstanding this statement, the Attorney General appears to be conceding only the superior court’s jurisdiction generally to consider new grounds for suppression not raised in an earlier

sought to suppress evidence he failed to challenge in his first motion; unlike this case, however, there is no indication that the defendant in *Nelson* attributed the deficiencies in his initial motion to the ineffective assistance of counsel, claiming he had been deprived of a full determination of the applicable Fourth Amendment issues.

In *People v. Superior Court (Corona)* (1981) 30 Cal.3d 193 (*Corona*), the court considered the jurisdiction issue in a similar context. In that case, the court “held that the *Brooks* exception to the *Madril* principle applied to a case where the defendant’s conviction had been reversed on the ground that he had, in the first trial, been denied effective assistance of counsel.” (*Sotelo, supra*, 47 Cal.App.4th at p. 270; *Corona*, at p. 200.) The court stated: “It seems obvious . . . that if the ineffectiveness of counsel infected the first suppression hearing, the defendant cannot be said to have had opportunity for ‘full determination’ within the meaning of *Brooks*.” (*Corona*, at p. 200.) The court concluded, accordingly, that the superior court had jurisdiction to hear on remand defendant’s section 1538.5 motion seeking to relitigate his earlier challenges to the validity of two search warrants. (*Corona*, at pp. 196, 199-202.)

In this case, the superior court appears to have concluded that *Corona* allows a superior court to hear an additional motion to suppress only when an *appellate* court has found ineffective assistance of counsel. We do not find this distinction persuasive. Nothing in *Corona* limits the court’s holding to cases in which an appellate court has found ineffective assistance of counsel, and *Corona*’s analysis supports a broader application. The *Corona* court simply applied the *Brooks* exception in a different context; as with any case in which a defendant was denied a full determination of his search and seizure claims in the first instance, *Corona* held the superior court has

suppression motion due to the ineffective assistance of counsel. We address the jurisdictional question, nonetheless, as the superior court’s authority to hear a second motion to suppress under section 1538.5 implicates its fundamental subject matter jurisdiction, which cannot be conferred by consent. (See *People v. Williams* (1999) 77 Cal.App.4th 436, 447; see, e.g., *People v. Thomas* (1983) 141 Cal.App.3d 496, 499; *People v. Superior Court* (1971) 4 Cal.3d 605; accord, *People v. Superior Court (Mitchell)* (2010) 184 Cal.App.4th 451, 457-458.)

jurisdiction to decide those claims at a subsequent hearing when that denial is due to ineffective assistance of counsel.

Indeed, in *Sotelo*, the court suggested, albeit in dicta, that a superior court may properly hear a second motion to suppress evidence when the defendant establishes a prejudicial ineffective assistance of counsel in connection with the first suppression motion. In that case, the superior court denied defendant’s initial motion to suppress evidence improperly obtained by police when they entered his home in violation of the knock-notice requirements of section 1531. (*Sotelo, supra*, 47 Cal.App.4th at p. 267.) Thereafter, defendant retained new counsel and filed a second motion again seeking to suppress evidence seized in his home, contending police knowingly used false information from an informant to obtain a search warrant (the *Franks* grounds). (*Id.* at pp. 267-268; see *Franks v. Delaware* (1978) 438 U.S. 154, 155-156.) The superior court concluded that the defendant’s prior counsel provided ineffective assistance in failing to challenge the validity of the search warrant, and that the defendant therefore was entitled to raise the additional issue under section 1538.5. (*Sotelo*, at p. 268.) The superior court rejected the defendant’s challenge to the warrant’s validity but granted the motion on the ground that police had not complied with the knock-notice requirements. (*Id.* at pp. 268-269.) Because the superior court granted the second suppression motion on the same legal ground that was at issue in the first motion, the reviewing court reversed the judgment. (*Id.* at pp. 269-274.) The court noted, however: “The authority discussed above would conceivably support the proposition—patently not before us—that [the judge] could grant the second motion on the *Franks* grounds urged by defendant” (*Id.* at p. 273.)⁶

The Attorney General argues that “[defendant’s] instant claim nevertheless fails” because “[his prior counsel] was not incompetent for failing to challenge the validity of

⁶ In *People v. Jones* (2010) 186 Cal.App.4th 216, Division Two of this court—which also decided *Sotelo*—notes its earlier unpublished decision in the same case holding “that the [trial] court erred in refusing to hear a motion alleging ineffective assistance of counsel affecting the result of the first motion to suppress.” (*Id.* at p. 220.)

the warrant.” We do not decide this question, as it presents a jurisdictional determination for the superior court. (See 2 Witkin, Cal. Procedure (5th ed. 2008) Jurisdiction, § 339, p. 963 [“[A] tribunal has the duty, and therefore the authority or power (jurisdiction), to decide in the first instance whether it has jurisdiction of the subject matter and the parties, and whether it also has jurisdiction to act in a particular manner. This process may involve the determination of jurisdictional facts, or of jurisdictional questions of law. In either case, the lower tribunal should be permitted to reach its decision without interference by a higher court . . .”].)

We therefore remand this matter for a determination of whether defendant has shown prejudicial ineffective assistance of counsel in connection with former counsel’s filing and litigation of his first motion to suppress evidence, which he claims deprived him of a full determination of the Fourth Amendment issues impacting his case. If so, the superior court shall hear and decide his second motion to suppress.⁷ If the court denies the motion, defendant’s conviction shall remain in place. If the court grants the motion, it shall vacate defendant’s conviction, permit him to withdraw his plea, and conduct such further proceedings as it deems appropriate. (*People v. Miller* (1983) 33 Cal.3d 545, 550-551 [“ ‘the doctrine of harmless error is inapplicable in the context of an appeal under section 1538.5, subdivision (m). The accused must be afforded an opportunity to personally elect whether . . . the suppression of certain items of evidence would alter the

⁷ To establish that the alleged ineffective assistance of counsel was prejudicial, defendant must show his first motion would have been successful. (*People v. Wharton* (1991) 53 Cal.3d 522, 576 [“ ‘Where defense counsel’s failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excluded evidence in order to demonstrate actual prejudice’ ”], quoting *Kimmelman v. Morrison* (1986) 477 U.S. 365, 375.) To make such a showing, defendant must overcome the Attorney General’s contention that the search warrant affidavit is sufficient without the contested observations of the officers. (*People v. Weiss* (1999) 20 Cal.4th 1073, 1081 [court “must excise all tainted information but then must uphold the warrant if the remaining information establishes probable cause”].)

situation in a sufficiently favorable manner so as to render a plea of not guilty strategically preferable' ”]; *People v. LeBlanc* (1997) 60 Cal.App.4th 157, 168-170.)

DISPOSITION

The matter is remanded to the superior court with instructions to proceed as indicated above.

Jones, P.J.

We concur:

Needham, J.

Bruiniers, J.