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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MARCOS ALVAREZ,

Petitioner,

v.

THE SUPERIOR COURT OF THE CITY
& COUNTY OF SAN FRANCISCO,

Respondent;

THE PEOPLE,

Real Party in Interest.

A135305

(San Francisco County
Super. Ct. No. 10030719)

The Court:¹

By timely petition for writ of prohibition, (Pen. Code, §§ 1510, 999a), Marcos Alvarez challenges the denial of his motion to set aside the information on file against him (Pen. Code, § 995). Alvarez is charged in count I with a violation of Vehicle Code section 23153, subdivision (a) driving under the influence of alcohol causing injury, and in count II with a violation of subdivision (b) of the same section, driving with an 0.08 percent blood-alcohol content causing injury. As to both counts, the information alleges that Alvarez's conduct inflicted great bodily injury and injury to multiple victims. (Pen. Code, §§ 12022.7, subd. (a) & Veh. Code § 23558.)

¹ Before Marchiano, P. J., Dondero, J., and Banke, J.

Alvarez contends insufficient evidence was presented at the preliminary hearing to support the charges. For the reasons explained below, we will grant the petition as to count II (driving with an 0.08 percent blood-alcohol content).²

On review of a Penal Code section 995 denial, we review the magistrate's holding order de novo. (*People v. Jones* (1998) 17 Cal.4th 279, 301; *People v. Laiwa* (1983) 34 Cal.3d 711, 718.) "Evidence that will justify a prosecution need not be sufficient to support a conviction. [Citations.] 'Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused.'" [Citations.] An information will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it. [Citations.] [¶] A reviewing court may not substitute its judgment as to the weight of the evidence for that of the magistrate, and, if there is some evidence to support the information, the court will not inquire into its sufficiency. [Citations.] Every legitimate inference that may be drawn from the evidence must be drawn in favor of the information." (*Rideout v. Superior Court* (1967) 67 Cal.2d 471, 474.)

With these principles in mind, we examine the preliminary hearing evidence. Testimony of several of the victims established Alvarez and the victims (a group of his friends) spent several hours drinking before, and during, visits to two different bars the evening of October 7, 2010, into the early morning hours of October 8, 2010. "All" of the group "were drinking" that evening. Alvarez was drinking beer before the group arrived at the first bar. He consumed a "shot" at the first bar and later shared another shot. At the second bar for over three hours, all were drinking. Eventually, with Alvarez driving at a high rate of speed in a 35-mile-per-hour zone, the car in which the group was riding crashed, resulting in major front end damage to the vehicle and serious injuries to Alvarez and the passengers. Alvarez stipulated to the multiple victim and great bodily injury allegations.

² We previously stayed further proceedings on this charge.

Because the foregoing evidence is sufficient for purposes of the preliminary hearing to establish a rational ground to assume Alvarez was driving under the influence when the accident occurred, we will summarily deny the petition as to count I of the information by separate order filed this date.

The same cannot be said for the evidence Alvarez's blood-alcohol level was at 0.08 percent. The People failed to present sufficient evidence to support this charge. Two photographs, each a picture of three vials, were admitted into evidence. In one photo, the vials are marked with a label stating "Subject's Name Marcos Hermilando Alvarez," and "Requesting Officer DM 2345." In addition, the photo shows a partial label stating "D-5," "EN ACCES," "BL-AM," and "10/08/20." In the other photo the three vials each have a label as follows: "Date 10-8-10, Time 0255, Taken By (Initial) CV," and "D-5521 PK." There is also a partial label "E7852" and "NITIALS: PW."

Medical Examiner's Office toxicologist Karamanidis testified he tested three vials of blood he obtained from a police station evidence locker. Karamanidis also stated he signed a report on January 10, 2011, (which showed the blood to have tested at an 0.17 percent blood-alcohol level). The report had been prepared by someone else. Karamanidis also explained that the vials he tested bore the name Alvarez; however, the magistrate struck this statement as hearsay.

Inspector Cook testified he was assigned to the case to do follow-up investigation, and on October 10, 2010, went to San Francisco General Hospital to interview witnesses and Alvarez. Inspector Cook received a report from the Medical Examiner's Office; such reports are usually faxed. The report bore a different case number than his request, the two conflicting by one digit. The report, titled "Report of Forensic Alcohol Analysis," was admitted into evidence. It bears the name "Alvarez, Marcos Hermilando." Among other things, it states: "Specimen Collection: 10/08/2010, 0255 hrs;" "Specimen Receipt: 10/08/2010, 0747 hrs;" "Case No.: D-5521;" "Date of Report: 01/10/2011;" and "Blood Ethanol: 0.17 % (w/v)."

Inspector Cook also explained “[u]pon the blood being picked up by the toxicology department medical examiner’s office, I requested—personally responded to the medical examiner’s office and asked for a full panel screening of the blood.”

As Alvarez correctly argues, there is no evidence concerning: “1) whether the blood samples were taken from Alvarez; 2) when they were taken; 3) whether they were taken in an appropriate manner; 4) who took the samples; and 5) how they were stored or transferred to the police station.” In contrast to the record before us, in *People v. Hall* (2010) 187 Cal.App.4th 282, relied upon by the People below, the officer who took Hall to the hospital to have a blood test “testified that Hall’s blood was drawn.” (*Id.* at p. 296.) There was evidence medical personnel drew the blood in a hospital setting. The protocol followed by the police department and crime lab concerning blood draws was described at length by the criminalist who also explained the procedures for transporting and analyzing a blood sample. (*Ibid.*) A reasonable chain of custody from beginning to end was established.

Like *People v. Jimenez* (2008) 165 Cal.App.4th 75, the evidence in this case, however, is “nothing more than a link here, a link there, with little more than speculation to connect the links.” (*Id.* at p. 81.) Evidence, not speculation, must support an information. Here, no evidence establishes that any blood draw from Alvarez occurred in an appropriate setting, according to proper procedure. No evidence explains the several numbers and initials on the photographs of the blood vials and their labels. Likewise, there is no evidence that Alvarez’s blood, if drawn, was transported to and placed in the evidence locker to be later removed by Karamanidis.

We notified the parties that we might choose to act by issuing our peremptory writ in the first instance. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177–180.) No useful purpose would be served by issuance of an alternative writ and oral argument.

Let a peremptory writ of prohibition issue restraining respondent from conducting any further proceedings on count II (“Violating Section 23153(b) of the California Vehicle Code, a Felony”) of the information on file in *People v. Marcos Alvarez* (San

Francisco Co. Sup. Ct. No. 10030719), other than dismissal pursuant to Penal Code section 995.

The stay of count II previously imposed shall remain in effect until the remittitur issues.