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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

YVETTE MARIE LOPEZ,

Defendant and Appellant.

B228848

(Los Angeles County
Super. Ct. No. KA091676)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Tia Fisher, Judge. Affirmed as modified.

Kari E. Hong, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Jonathan M. Krauss, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

Defendant Yvette Marie Lopez appeals from the denial of her motion to suppress evidence under Penal Code section 1538.5. After the denial of her motion, Lopez pled no contest to felony possession for sale of methamphetamine (Health & Saf. Code, § 11378). The court suspended imposition of sentence and placed Lopez on probation for three years and on appeal she challenges one condition of her probation as being overly vague.

FACTS AND PROCEEDINGS BELOW

I. October 19, 2010 Suppression Hearing

During the pretrial hearing on Lopez’s motion to suppress, the following evidence was introduced:

A. Prosecution Case

Officer Joe Maddox of the Claremont Police Department testified that on August 19, 2010, he and five or six other Claremont Police officers conducted a probation search at 356 West Point Drive. Officer Maddox believed that there were two individuals subject to probation residing at the home: Melanie Deem and John Schwartz. Both had search and seizure terms in their probation on drug-related charges.

At approximately 7:35 in the morning, the police officers knocked on the front and side doors of the house with guns drawn. Three individuals—later identified as Schwartz, Lopez and Susan Carlson—came out of the house from the side door and were detained outside the residence. Melanie Deem, though believed to live at this address, was not among them. At that time, officers did not ask any of the individuals who they were or where they lived,¹ but asked if anyone else was in the house. The individuals told the officers that no one else was in the house.

While the individuals were detained outside, Officer Maddox and two other officers “went inside to do a protective sweep to ensure there was no one else in the house before we started our probation search.” As the team went into the house, they had

¹ Officer Maddox had obtained a DMV photograph of Schwartz the day before and knew what Schwartz looked like.

their weapons drawn and called out “Police Department. Police Officer. If anybody’s in, come out to the sound of my voice.” No one responded.

The police entered through the kitchen, with two living rooms off of it. There were four bedrooms, with one being used as a storage area. Two bedrooms had their doors open and one bedroom had its door closed but was unlocked. The door to the fourth bedroom, later determined to be Lopez’s, was closed and locked. The officer had spent a “few minutes” executing the protective sweep and all other rooms had been swept when Officer Maddox approached the locked fourth bedroom door. Officer Maddox knocked on the door, apparently getting no answer. When he grabbed the handle and shook, the door was loose in the frame, moving a quarter- to a half-inch within the frame. It was a “typical interior door handle that was locked from the inside.”

The door had a sign that said “Red” on it. Officer Maddox had radio contact with the officers outside of the building who were with three individuals from the house, but Officer Maddox did not use the radio to find out who lived in the locked bedroom.

According to Officer Maddox, “I was able to use my knife to push the lock back and open the door. That’s how I got into the room to ensure that there was nobody else inside the room before we did our probation search.”

Officer Maddox then stated that “[w]hen I entered her room to ensure there was nobody inside, on the floor in plain view was a glass smoking pipe.” Believing that “there was a possibility there would be more narcotics and/or paraphernalia located inside,” Officer Maddox obtained a search warrant.

Officer Maddox did not seek nor receive Lopez’s consent to enter her room.

B. Defense Case

Jeffrey Carl Hendershot owned and lived at the 356 West Point Drive house but was not home on the day of the incident. Hendershot and Lopez each had a bedroom while Schwartz stayed in the living room. Deem had lived at the house since December 2007, but moved out on July 16, 2010 (or a month earlier) due to “rental issues” and an argument with Hendershot. Another friend had been temporarily staying in Deem’s old bedroom since her departure. Hendershot made signs with Lopez’s nickname “Red” and

Deem's name on them for their bedrooms when they moved in. The sign for Deem's old bedroom was not removed when she moved out. Hendershot's room did not have a sign.

C. Initial Argument Below and Recalling of Officer Maddox

In arguments to the court, the defense cited to *People v. Ledesma* (2003) 106 Cal.App.4th 857 (*Ledesma*), *Maryland v. Buie* (1990) 494 U.S. 325 (*Buie*), *People v. Woods* (1999) 21 Cal.4th 668 (*Woods*) and provided four reasons as to why the protective search was impermissible: (1) there was no "articulable fact" to indicate a reason to break into a room belonging to a person who is not the subject of the search; (2) the officers were not in fear, not looking for anyone who was armed and dangerous, and did not state there was any circumstance that placed them in danger; (3) all three residents in the house were outside cooperating with the police, further rebutting any sense of danger or harm to the officers; (4) the police had a duty to establish to whom a marked, locked room belonged before entering.

The prosecution also cited to *Ledesma* and *Buie* to support its three arguments: (1) the police had a "good faith belief" that Deem still lived at the residence and the police officer "doesn't know if she's dangerous or not"; (2) the police officer reasonably believed that Deem "could possibly be in that room;" (3) under *Buie*, searching an adjacent room is proper. The prosecution then submitted.

After defense made additional arguments, the trial court announced that it would be recalling the police officer who testified because no one asked the questions on the issues. The court noted that in *Ledesma*, "it was enough to justify a protective sweep as the officer testified that because of his training and experience in narcotics cases that often weapons are used in narcotic cases. Nothing specific." The court noted that Officer Maddox did not remember the conditions of probation and there "may have been conditions of probation relating to weapons." The court then stated "[i]t needs to be flushed out in a more detailed manner" and asked "if the witness is [still] here." When told that Officer Maddox was still there, the court stated it was "not going to penalize anybody simply because [they] didn't ask the questions that I think you should have asked." Over defense objection, the trial court recalled Officer Maddox, saying "I want

him to come right in here and I'm going to ask him the questions myself because I don't know the answers."

D. Officer Maddox's Additional Testimony

Without a stop or pause in the proceedings, Officer Maddox returned to the stand and the trial court told Officer Maddox "I want to ask you some more questions because other issues have come up" and that the court now realized it was a *Ledesma* issue. After reminding Officer Maddox he was under oath, the court "asked if either side had a document that would refresh Officer Maddox's memory as to what Schwartz and Deem were on probation for. The court then allowed Officer Maddox to review the police report.

The trial court then elicited the following additional testimony from Officer Maddox: On August 14, another officer ran a check on a registered guest of a hotel and discovered that the guest, Deem, was on probation. That other officer was going to do a probation check at the hotel but Deem was not there. According to Deem's driver license record and her probation officer, her address was 356 West Point Drive. At the time of the incident, Officer Maddox knew what Deem was on probation for but no longer remembered.

The trial court then tried to elicit from Officer Maddox the reasons for the protective sweep:

COURT: Additionally, when you went in to do this protective sweep what was your—why do you do that?

THE WITNESS: To ensure there's nobody else.

COURT: Why?

THE WITNESS: It's for officer safety.

THE COURT: What about officer safety makes you think you need to ensure nobody else is inside?

THE WITNESS: Well, there's three people in the residence. We don't know who else could be there or who is living there, so we have to ensure for our safety there's not somebody hiding who could harm us.

The court then asked “What else could be there? What’s really going on in your mind?” at which point defense counsel objected and the court sustained the objection, saying the court was going to “stop here” other than on the issue of what Schwartz and Deems were on probation for. The trial court called for a 20-minute recess to permit the prosecution and witness to obtain copies of the probation reports to refresh his memory.

E. Officer Maddox’s Additional Testimony After Recess

After the recess, the court asked Officer Maddox whether he “now know[s]” the basis for the probation. The probation reports were marked for identification for the court to read. Officer Maddox reported that Schwartz was on probation for a controlled substance possession conviction, and Deem was on probation for “narcotics as well” and the trial court noted that it was for a controlled substance transportation conviction. The court then asked, “[i]n addition to the search and seizure conditions[,] were there any other conditions that you noted when you reviewed these documents that have refreshed your memory relative to what other issues or concerns you may have had going into that property . . .” After Officer Maddox replied in the affirmative, the trial court asked “[a]nd what nature of the offenses were?” and Officer Maddox again replied “yes.” The trial court then asked “What’s that?” In response, Officer Maddox stated that, “I know people who are involved in narcotics are often armed with weapons, including firearms.” The trial court then asked Officer Maddox if he was aware that the conditions of probation included a prohibition of weapons and a prohibition against associating with other drug users and yet Schwartz and Deem were together in the same house. Officer Maddox replied affirmatively. The defense again objected “as to the way this court is proceeding.”

The court explained that the defense attorney’s “boilerplate motion” did not give the court or prosecution notice of the issues, leaving the court with no other alternative than to explore the issues on her own.² Defense counsel noted that she had spoken to the

² Lopez filed a motion to suppress evidence under Penal Code section 1538.5 arguing that the search was without a warrant and that the prosecution bore the burden of establishing the legality of a warrantless search. The notice of motion contained an

assigned prosecutor before the hearing and discussed the proceeding but that the prosecutors were switched. The court stated, “I’m the fact-finder here. . . . It seemed pretty apparent to me that there were very, very few facts that were being elicited during this witness’s testimony that related to the issues and it wasn’t until I heard your argument that it caused me to wonder why weren’t these questions being asked that were related to it.” The defense stated that the protective sweep was mentioned in the police report and she believed the prosecution was on notice that the protective sweep was the main issue and argued “it’s the prosecution that needs to proceed with the questioning and eliciting as to the basis for the protective sweep or what was occurring.”

The trial court responded with, “[t]he court can take complete control of proceedings and that’s what I have done and I will cite the authority for that.” After more discussion and questions from the court about when the prosecutor was given the case, a recess was taken.

F. Hearing Suspended

During the recess, Lopez was apparently taken into custody by bail bondsmen and could not be located. The court suspended the hearing for six days and ordered Officer Maddox to return.

unchecked box before the statement “The defendant hereby demands the source of probable cause in this case. (*Harvey/Madden*)” The prosecution filed its opposition the morning of the suppression hearing while defense counsel and the court were in hearing on other matters and apparently, neither was aware of it before the suppression hearing. In opposition, the prosecution alleged that the glass pipe was found in plain view during the protective sweep of the locked bedroom, that there were pictures of Lopez on the wall, that Lopez refused to consent to a search of her bedroom and that a search warrant was obtained and executed, resulting in the discovery of three clear bags with white crystals resembling methamphetamine, a digital scale, and a box of empty baggies. The prosecution argued that the protective sweep was justified under *Ledesma, supra*, and its standard of “reasonable suspicion.” “[T]here must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” (106 Cal.App.4th at p. 863, citation omitted.) The prosecution also noted that “[t]he *Harvey/Madden* rule does not apply in this case.”

II. October 25, 2010 Continued Hearing

At the opening of the next continued hearing, defense again objected to “judicial misconduct” that occurred when reopening the proceedings. “I understand that the court’s already made some statements regarding proceeding in this fashion, but I’m going to renew my objection today. . . . We had rested. Both parties rested.” The defense asserted that the trial court had interrupted argument to permit the “People [to] look further into the issues [on] which there’s already a record.” The court became “over zealous [sic] in trying to discover reasons for why the officer was there. It seem [sic] seemed that the court was leading the officer in certain directions that he couldn’t answer. . . . [I]t just appeared that the court was determined in trying to get this officer to articulate things that would fit the case.”

The court defended its conduct by explaining that it was seeking objective information about the probation that was not presented by the parties but was not or could not be disputed. The trial court noted that because the court was unaware of the prosecution’s opposition, it assumed based on the defense motion that the suppression hearing would focus on probable cause issues and it was not until argument that it was clear that the focus was the *Ledesma* protective sweep issue.

The prosecution moved to reopen proceedings again to present information not elicited at the first hearing and first reopening. The court denied the request noting that the prosecution was aware of the *Ledesma* protective sweep issue before the hearing because it was raised in prosecution’s opposition. Moreover, the court noted the prosecutor spoke to Officer Maddox about *Ledesma* during the recess. “[T]he minute he came back then he’s—his first answer, before we took the break, was basically in line with *Ledesma*.” The trial court also noted that Officer Maddox had been given open-ended questions and “had plenty of opportunity” to mention officer safety and a belief that “somebody might be in there” as a reason for the protective sweep but Officer Maddox did not do so.

When invited to present any additional arguments, the defense emphasized that there was no evidence to infer that the probationers would have weapons. Moreover,

everyone at the scene was cooperative with the police. The prosecution argued that the probationers were convicted of felony drug offenses and their probation terms include weapon conditions.

The court then continued the argument for two days so that the transcript of Officer Maddox's testimony could be prepared and reviewed by counsel and the court.

III. October 27, 2010 Argument and Denial of Suppression Motion

When the hearing resumed, both sides made additional arguments and then stipulated that Deem and Schwartz were on probation for drug offenses with standard conditions.

The court then ruled that "[i]t is my opinion, as a matter of law, that a prudent officer is entitled to do what he did." The court noted that while Officer Maddox "did not articulate that he knew anybody to be in the room," "[h]e did articulate that he thought somebody might be in the room. Because the door locked from the inside." The court found it reasonable to suspect there may be a person inside a room when it is locked from inside but that there was also the issue of whether that person could pose a danger to officer safety. Although Officer Maddox started talking about officer safety near the end of his testimony, the court stated "I'm discounting that because that was after all the hoop-la of stopping to get what I needed."

The trial court then reasoned that because the standard is objective, even without the officer testifying that he is an expert on drug cases and "know drug dealers sometimes have guns," the conditions of probation "speak for themselves." But the court stated that the probation conditions and the knowledge that drug dealers sometimes are armed is "not as pivotal as this particular unique situation as the door's locked from the inside, someone might be in there. It's unknown what's in there. . . . No one knows whether there's guns in there. No one knows what's in there."

Thus, while there was "[n]o specific information in the officer's mind that there's going to be weapons there", under the circumstances it is reasonable and prudent for an officer to check to see if anyone is in the locked room because if there is, "that person

could become an incredible danger to a police officer who is in another room doing a search.” The court then denied the suppression motion.

IV. No Contest Plea and Sentence

On October 28, 2010, Lopez pled no contest to one count of felony possession for sale of methamphetamine (Health & Saf. Code, § 11378). She was sentenced to three years probation, to 180 days (less 20 days credit) of community service, various fines and fees and ordered to “stay away from places where users or sellers congregate” and not to “associate with drug users or sellers unless attending a drug treatment program.”

DISCUSSION

On appeal, Lopez raises two issues. First she challenges the denial of her motion to suppress, arguing that a protective sweep must be supported by “articulable facts” causing a reasonable officer to believe a dangerous individual is present and that Officer Maddox failed to articulate any such facts. Second, she challenges as unconstitutionally vague her probation condition requiring her to stay away from places where users or sellers congregate because it lacks a knowledge requirement.

I. Denial of Motion to Suppress

On appeal from a denial of a motion to suppress, “all presumptions are in favor of the trial court’s factual findings, whether express or implied, where supported by substantial evidence, and we review de novo the facts most favorable to the People to determine whether the officers’ conduct in performing the protective sweep of defendant’s home was reasonable under the Fourth Amendment.” (*Ledesma, supra*, 106 Cal.App.4th at p. 862.) Under article I, section 28, subdivision (d) of the California Constitution, we evaluate the legality of police conduct under federal constitutional standards. (*Woods, supra*, 21 Cal.4th at p. 674; *Ledesma, supra*, 106 Cal.App.4th at pp. 862-863.)

As set forth by the United States Supreme Court in *Buie*, protective sweeps are governed by the “reasonable suspicion” standard requiring that “there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual

posing a danger to those on the arrest scene.” (*Buie, supra*, 494 U.S. at p. 333.) Although *Buie* involved a protective sweep in the context of an arrest, a protective sweep may also precede a probation search. (*Ledesma, supra*, 106 Cal.App.4th at p. 864.) In the probation search context, “[t]he officers’ safety concerns were increased by the probable duration of the search, the fact that it would occur on their ‘adversary’s ‘turf’” [citation], and the inherent distraction of conducting a careful examination of all the nooks and crannies of a probationer’s bedroom.” (*Ledesma, supra*, 106 Cal.App.4th at p. 864.)

While *Ledesma* “reject[ed] the notion that a protective sweep is *always* justified prior to a search,” it accepted that “a prudent officer will consider the safety concerns triggered by a search in determining the appropriateness of first conducting a sweep.” (*Ledesma, supra*, 106 Cal.App.4th at pp. 864-865.) Likewise, “the type of criminal conduct underlying the arrest or search is significant in determining if a protective sweep is justified.” (*Id.* at p. 865.)

Applying these principles, we find the challenged protective sweep to be justified. Here, officers conducted a probation search for two convicted drug offenders whom they reasonably believed shared the residence. When officers arrived to conduct the search and ordered the residents to come out, one probationer exited along with two other individuals (one of whom was Lopez), but the second probationer did not. Although it turned out that the second probationer had moved out of the house about a month before the search, the officers were unaware of this relocation as the probationer had not updated her address with her probation officer or for her driver’s license. The door to the fourth bedroom was “locked from the inside.”

In such a situation, we find it reasonable for officers to suspect that a house where (as far as police knew) two convicted drug felons were living together might be the site of ongoing narcotics activity and for officers further to suspect that someone might still be inside given the fact that the bedroom door was “locked from the inside” and that the second probationer, who had a drug trafficking conviction, did not exit the house. Firearms are one of the “tools of the trade” of the narcotics business. (*Ledesma, supra*,

106 Cal.App.4th at p. 865.) Officer Maddox testified that he wanted to ensure that no one else was in the house for officer safety and explained “there’s three people in the residence. We don’t know who else could be there or who is living there, so we have to ensure for our safety there’s not somebody hiding who could harm us” and that Officer Maddox knew that “people who are involved in narcotics are often armed with weapons, including firearms.” Accordingly, we conclude that “the information known to the investigating officers, filtered through the lens of their experience and training, justified the protective sweep undertaken” and satisfies the requirements of *Buie*. (*Ledesma*, *supra*, 106 Cal.App.4th at p. 865.)

Lopez argues that Officer Maddox failed to articulate facts upon which reasonable inferences established that a reasonable officer would believe that a dangerous person was in the locked bedroom, arguing that the trial court stated that it was discounting Officer Maddox’s testimony about officer safety concerns because it occurred after a recess during which the prosecutor coached the witness about *Ledesma*. While the trial court did state that it court was “discounting that because that was after all the hoop-la of stopping to get what I needed,”³ Officer Maddox in fact testified about “officer safety” both before and after the recess. Prior to the recess, Officer Maddox stated that he was checking the locked room for “officer safety” because “there’s three people in the residence. We don’t know who else could be there or who is living there, so we have to ensure for our safety there’s not somebody hiding who could harm us.” After the recess, Officer Maddox testified “I know people who are involved in narcotics are often armed with weapons, including firearms.” Therefore, even discounting his statement made after the recess, Officer Maddox had raised officer safety as the reason for the protective sweep earlier in his testimony. Moreover, the other facts Officer Maddox testified to provide a basis for rational inferences that would warrant a reasonably prudent officer to believe that the locked room might harbor a dangerous individual.

³ The trial court stated several times that it found Officer Maddox’s testimony to be credible in other respects.

Lopez also argues that the trial court incorrectly assumed that the locked door could only be locked from inside and notes that as it turned out there was no one in the room. When an officer is confronted with two reasonable competing inferences, one justifying the search and one that would not, the officer is entitled to rely on the reasonable inference justifying the search. (*People v. Troyer* (2011) 51 Cal.4th 599, 613.) Here, it was reasonable for officers to infer that the locked door meant someone was in the bedroom irrespective of other reasonable inferences.

Lopez analogizes her situation to two cases where courts found protective sweeps to be unconstitutional because the officers did not articulate “any reason to believe that other victims or suspects were involved in the [crime preceding the police’s response], or inside the apartment” (*People v. Ormonde* (2006) 143 Cal.App.4th 282, 291) and officers did not have “information as to whether anyone was inside the house” (*People v. Celis* (2004) 33 Cal.4th 667, 679). Both *Ormonde* and *Celis* involved protective sweeps taken inside a house or apartment when the arrest or detention occurred outside the house. (*Ormonde, supra*, 143 Cal.App.4th at p. 291; *Celis, supra*, 33 Cal.4th at p. 679.) In contrast, for a probation search of a residence, safety concerns are increased by the necessity of conducting the search inside a residence that officers are unfamiliar with, the probable duration of the search, and the inherent distraction of carefully examining the nooks and crannies of a probationer’s residence. (*Ledesma, supra*, 106 Cal.App.4th at p. 864.) Moreover, in this case, officers reasonably believed that two probationers resided at the house, but only one had exited when officers began the sweep.

Finally, Lopez argues that the trial court erred in reopening proceedings to take additional testimony from Officer Maddox after determining that the prosecution had not met its burden. The trial court has broad discretion to order a case reopened and allow the introduction of additional evidence. (*People v. Riley* (2010) 185 Cal.App.4th 754, 764; *People v. Goss* (1992) 7 Cal.App.4th 702, 706.) The court has no less discretion in a court tried case. (See, e.g., Pen. Code, § 1044 [duty of judge to “control all proceedings”]; Evid. Code, § 320 [discretion of court to “regulate the order of proof”].) Here, the trial court did not abuse its discretion. Prior to the initial close of evidence and

counsel's arguments, the trial court was unaware that the focus of the suppression motion was a protective sweep and that the evidence introduced did not address issues relevant for a protective sweep analysis. It was within the trial court's discretion to seek such relevant information.

Finding Lopez's arguments to be without merit, we affirm the trial court's denial of the suppression motion.

II. Modification of Terms of Probation

As a condition of her probation, Lopez was ordered to "stay away from places where users or sellers congregate." On appeal, Lopez contends, and the Attorney General aptly concedes, that this condition is overly vague because it lacks a knowledge element and should be modified to include a knowledge element. Such a modification is supported by the case law. (*In re Sheena K.* (2007) 40 Cal.4th 875, 891-892 [citing cases]; *People v. Garcia* (1993) 19 Cal.App.4th 97, 102-103). Accordingly, we direct the trial court to modify Lopez's conditions and terms of probation to reflect a knowledge element.

DISPOSITION

Lopez's probation condition is modified to read "stay away from place where *she* knows that users or sellers congregate." As modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.