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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KATHY L. BORHANI,

Defendant and Appellant.

In re

KATHY L. BORHANI

on

Habeas Corpus.

B233610

(Los Angeles County
Super. Ct. No. GA081483)

B237551

APPEAL from a judgment of the Superior Court of Los Angeles County,
Janice Claire Croft, Judge. Affirmed.

PETITION for writ of habeas corpus. Petition denied.

Jamie Lee Moore, under appointment by the Court of Appeal, for Defendant
and Appellant, and Petitioner.

No appearance for Plaintiff and Respondent.

Kathy L. Borhani pled no contest to possession of methamphetamine for sale (Health & Saf. Code, § 11378) and possession of hydrocodone (Health & Saf. Code, § 11350, subd. (a)). The trial court sentenced her to two years eight months in prison. She appeals from the judgment entered and seeks a writ of habeas corpus. We affirm the judgment and deny the petition.¹

FACTUAL AND PROCEDURAL BACKGROUND

*1. Facts on appeal.*²

At approximately 4:30 p.m. on October 21, 2010, Los Angeles County Deputy Sheriff Daniel Esqueda was on patrol near the Gale Motel on San Gabriel Boulevard in the City of Rosemead. Esqueda referred to the location as “a known high narcotics traffic[king] area.” Esqueda drove into the parking lot behind the motel, then pulled into a parking space “along side” a Honda Civic. Inside the Honda, Borhani was sitting in the driver’s seat. She was alone in the car.

Esqueda got out of his patrol car and approached the Honda’s open driver’s side window. He addressed Borhani and said, “ ‘Hi, how’s it going?’ ” Borhani replied, “ ‘I’m good, how are you?’ ” After a short conversation, during which Borhani told the deputy that she and her girlfriend had been staying at the motel for a couple of weeks, Borhani indicated that she had been about to leave in order to “ ‘sell some sweaters to a friend.’ ”

As he conversed with Borhani, Esqueda “noticed [that] she was displaying objective signs of being under the influence of a controlled substance. She was talking rapidly and loud, and appeared to be very nervous and fidgety (her hands and fingers were trembling).” In addition, Borhani’s “forehead and hands were . . . sweaty, even

¹ On December 1, 2011, Borhani filed a petition for writ of habeas corpus (Case No. B237551). On December 7, 2011, this court ordered that the writ petition be considered concurrently with Borhani’s appeal in Case No. B233610.

² The facts have been taken from the transcript of the preliminary hearing and exhibits from the record on appeal, including the police report.

though the temperature outside was cool.” Esqueda decided to detain Borhani “pending an under the influence investigation.”

Esqueda “escorted [Borhani] out of her [car,]” then asked her to close her eyes so that he could check “the steadiness of her eyelids.” Borhani’s eyelids were “fluttery while they were closed.” When he then checked the size of Borhani’s pupils, Esqueda found them to be larger than normal. They were approximately 7.0 millimeters wide while, under the same lighting conditions, “[n]ormal pupil size” is 3.0 to 6.5 millimeters. Moreover, Borhani’s pupils failed to react to Esqueda’s light. When he checked Borhani’s pulse, Esqueda found it to be 116 beats per minute. According to Esqueda, a “[n]ormal” heart rate is 60 to 90 beats per minute. Finally, Esqueda asked Borhani to close her eyes, tilt her head back and estimate when 30 seconds had passed. Borhani “estimated 21 seconds for 30 seconds.”

When Esqueda asked Borhani when she had last used narcotics, Borhani stated that she used only marijuana. She never used narcotics.

Esqueda asked Borhani “if there was anything illegal inside . . . the vehicle.” Borhani responded, “ ‘No. There isn’t. You can go ahead and search if you want, but you won’t find anything in there. The car is clean.’ ” Having obtained Borhani’s permission, Esqueda searched the Honda. Underneath the emergency brake cover he found a medicine bottle with six baggies inside, each of which contained what appeared to be methamphetamine.

Esqueda advised Borhani of her constitutional rights, including her right to remain silent. After she indicated that she understood her rights, Borhani told the deputy that the car was registered to her friend, but actually belonged to both of them. With regard to the bottle of methamphetamine, Borhani indicated that it “belonged to a friend of hers” named “Victor” who sells methamphetamine and that she was “holding it for him.” Borhani told Esqueda that she was unemployed, however she had on her person \$94 in “miscellaneous denominations.”

Just after Esqueda searched the car, Borhani's friend, Rebecca Valencia, came out of their room and walked over to where Esqueda and Borhani were standing. Valencia told the deputy that Borhani was correct; the Honda was registered to her but actually belonged to both women. Valencia then indicated that she had not known that "the baggies of suspected methamphetamine were inside . . . the vehicle."

Esqueda asked Borhani if there was "anything illegal inside of their motel room." When Borhani stated that " 'there shouldn't be[,] ' " Esqueda asked if he could search it. Borhani replied, " 'Yeah, but the room is registered to my girlfriend.' " Esqueda then asked Valencia if there was anything illegal inside the motel room and if he could search it. Valencia indicated that she did not think there was anything illegal in the room and that Esqueda was welcome to search it. Valencia then signed an " 'Entry/Search Waiver' " and allowed Esqueda to enter the room.

Before searching the room, Esqueda asked Borhani what property belonged to her. Borhani told the deputy that a black duffel bag sitting on a dresser underneath the television was hers. Inside the bag, Esqueda found a bottle which contained "19 and a half pills of hydrocodone[, which is] also known as Vicodin." The prescription on the bottle indicated that the Vicodin was for Jannette Gomez. When Esqueda asked Borhani who the pills belonged to, Borhani told the deputy that she had gotten them from her friend Jannette. Borhani had needed the medication for a toothache. However, when Esqueda asked Borhani if she could give him Janette's phone number so that he could call her and verify Borhani's story, Borhani indicated that she did not have the number.

Based on the number of baggies containing "suspected methamphetamine" and the number of Vicodin pills, Esqueda "formed the opinion that [Borhani] was in possession of the narcotics with the intent to sell." Esqueda placed Borhani under arrest and transported her and the narcotics to the Temple Police Station. There, the hydrocodone pills, along with the methamphetamine, were booked into evidence.

It was stipulated for purposes of the preliminary hearing that the substance found in Borhani's car was analyzed "by Senior Criminalist Robert Takeshita" and was found to contain "a total net weight of approximately 1.19 grams of powder containing

methamphetamine” and that the container found in Borhani’s duffel bag contained “a total of 19 and one-half tablets with physical markings indicating that they contained hydrocodone; and [that] one tablet was tested and found to contain hydrocodone.”

2. *Procedural history.*

Following a preliminary hearing, on November 30, 2010 Borhani was charged by information with possession for sale of methamphetamine (Health & Saf. Code, § 11378) (Count 1), possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) (Count 3), possession of hydrocodone (Health & Saf. Code, § 11350, subd. (a)) (Count 4), and possession for sale of hydrocodone (Health & Saf. Code, § 11351) (Count 5).³ It was further alleged, with regard to counts 1, 3, 4 and 5 that Borhani previously had been convicted of four felonies which precluded a grant of probation (Pen. Code, § 1203, subd. (e)(4)), and subjected her to a one-year sentence enhancement (Pen. Code, § 667.5, subd. (b)). It was alleged with regard to count 5 that Borhani was subject to a three-year sentence enhancement (Health & Saf. Code, § 11370.2, subd. (a)).

At proceedings held on February 4, 2011, Borhani made a *Marsden*⁴ motion. After the prosecutor left the courtroom, Borhani complained that, although she had been represented by counsel for approximately three months, he had failed to file any motions, including a *Pitchess*⁵ motion and a motion to suppress evidence. Borhani indicated that she wanted an attorney who was “more aggressive.” In addition to his failure to make the motions she had requested, Borhani had given her counsel information regarding an individual who she believed could exonerate her of the charges and she was of the opinion that counsel had not made a sufficient effort to find him. Under these circumstances, Borhani believed she was entitled to the appointment of new counsel.

³ Count 2 was dismissed after the preliminary hearing.

⁴ *People v. Marsden* (1970) 2 Cal.3d 118.

⁵ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

With regard to the motion to suppress evidence, Borhani's counsel stated: "She wanted a motion to suppress. But I advised her that since . . . the officer observed her with symptoms of being [under the influence] and . . . was going to arrest her for that," his search of the Honda, conducted with her permission for the "possible source of her being under the influence" did not merit a motion to suppress evidence. Counsel stated, "I didn't think that there [were] grounds for a motion to suppress there." As to the individual who could exonerate her, Borhani had given counsel only a first name. Although counsel had taken several steps to find the individual, so far they had been to no avail. Counsel was, however, continuing his search.

After Borhani's counsel explained why he had not made several of the motions requested by Borhani and had indicated what steps he had taken to find the witness she claimed could exonerate her, the trial court denied Borhani's *Marsden* motion. The trial court indicated that, considering his trial experience and his expertise in criminal law, it was counsel's "call as to what motions [should] get filed and what [should not]." The trial court addressed Borhani and stated: "Your attorney has outlined steps he's been taking on your behalf to investigate the information you've given him. So I don't agree with your characterization that the case isn't getting anywhere. It's set for trial, and he's pursuing a defense on your behalf, and also trying to follow up on the information that you provided."

Borhani's counsel filed a *Pitchess* motion with regard to Deputy Esqueda on February 7, 2011. Counsel requested records regarding "acts of fabrication of charges, fabrication of evidence, false arrest, perjury, dishonesty, and [the] writing of false police reports." After the trial court conducted an in-camera review of the relevant records, it concluded there was no discoverable information.

During proceedings held on March 7, 2011, the prosecutor indicated that Borhani's maximum exposure in the matter was eight years eight months. After it was determined that the case could not be resolved at that point, the matter was continued.

On March 21, 2011, Borhani's counsel made a motion to dismiss the case pursuant to Penal Code section 995. After hearing argument, the trial court denied the motion.

On March 22, 2011, defense counsel indicated that the People had made an offer of two years eight months and that Borhani had decided to accept it. The two years was to be imposed for the possession of methamphetamine for sale in violation of Health and Safety Code section 11378 as alleged in count 1 of the information and the eight months, or one-third the mid-term, would be imposed for possession of hydrocodone in violation of Health and Safety Code section 11350 as alleged in Count 4.

After waiving her right to a jury or court trial, her right to confront and cross-examine the witnesses against her, her right to use the subpoena power of the court to present a defense, her right to testify in her own defense and her privilege against self-incrimination, Borhani indicated that she believed it was "in [her] best interest" to accept the plea bargain. Borhani then entered pleas of no contest to the crime of possession for sale of a controlled substance, methamphetamine (Health & Saf. Code, § 11378) and possession of a controlled substance, hydrocodone (Health & Saf. Code, § 11350, subd. (a)). The trial court found there was a factual basis for the pleas based on "the stipulation of counsel and the court's reading of the eight-page probation report."

For her conviction of possession for sale of methamphetamine, the trial court sentenced Borhani to two years in state prison. For her conviction of possession of hydrocodone, the trial court imposed a consecutive term of one-third the mid-term, or eight months. In total, Borhani was sentenced to two years eight months in prison.

Borhani was awarded presentence custody credit for 153 days actually served and 153 days of conduct credit, for a total of 306 days. She was ordered to pay a \$200 restitution fine (Pen. Code, § 1202.4, subd. (b)), a stayed \$200 parole revocation restitution fine (Pen. Code, § 1202.45), a \$30 criminal conviction assessment (Gov. Code, § 70373), a \$40 court security assessment (Pen. Code, § 1465.8, subd. (a)(1)), a \$50 laboratory analysis fee (Health & Saf. Code, § 11372.5) and a \$50 penalty assessment (Pen. Code, § 1464; Gov. Code, § 76000). After imposing the fines and assessments, the trial court dismissed counts 3 and 5 and all the remaining allegations.

On April 26, 2011, Borhani filed a petition for writ of replevin (return of property). In the petition, she indicated that Deputy Esqueda had been the last person to have control over her property, which included her wallet, credit and debit cards and several pieces of jewelry worth, in total, approximately \$4,800.

Borhani filed a request for a certificate of probable cause on May 14, 2011 and a notice of appeal on May 23, 2011. The trial court denied the request for the certificate of probable cause on May 31, 2011.

CONTENTIONS ON APPEAL

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record. By notice filed November 18, 2011, the clerk of this court advised Borhani to submit within 30 days any contentions, grounds of appeal or arguments she wished this court to consider. No response has been received to date.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

THE PETITION FOR WRIT OF HABEAS CORPUS

1. The petition.

On December 1, 2011, Borhani filed a petition for writ of habeas corpus. On December 7, 2011, it was ordered that the writ petition (Case No. B237551) be considered concurrently with Borhani's appeal (Case No. B233610).

In her petition for writ of habeas corpus, Borhani claims that her "imprisonment is unlawful because she was deprived of her rights under the Fourth, Sixth and [Fourteenth] Amendments to the United States' Constitution and article I, sections 13 and 15 of the California Constitution" when her "[t]rial counsel [proved to be] ineffective[.] [She claims she] was . . . prejudiced" by counsel's failure "to investigate and file a motion to suppress evidence pursuant to California Penal Code section 1538.5. [She asserts] [i]t is reasonably probable that a result more favorable to [her] would have occurred, [had] trial

counsel . . . investigated and filed a motion to suppress evidence, because the evidence against petitioner was seized pursuant to [an] unconstitutional investigative stop.”

2. *Declaration by petitioner, Kathy L. Borhani.*

In her declaration in support of her petition for writ of habeas corpus, Borhani indicates that Los Angeles Deputy Sheriff Daniel Esqueda was on patrol in “a known high narcotics traffic[king] area” in the City of Rosemead when he pulled into the parking lot of the Gale Motel. Borhani was staying at the motel and she indicated that, as one “enter[s] the motel driveway, there is a single story building with motel rooms on the right and a two-story building with motel rooms on the left. The motel parking lot extends behind the two-story building.” She indicated that “[t]he parking lot is a dead end, so any cars parked behind the two-story building can only exit by driving back down the main driveway” At the time the deputy pulled into the lot, Borhani was sitting in the driver’s seat of a Honda Civic parked there. She was on her way to sell sweaters to a friend who was going to sell them at a swap meet.

According to Borhani, Esqueda drove into the parking lot and pulled his patrol car in so that it was “partially parked ‘along side’ her car. . . . [However,] [a]bout one-half of the patrol car was parked in the driveway and blocking her . . . exit.” Borhani indicated that, in addition, she could not leave on foot “because Esqueda was standing at the car door blocking her exit. . . . Esqueda’s sudden and unexpected appearance prevented [Borhani] from leaving before Esqueda was standing directly outside her car door.” Esqueda, however, gave “no particularized reasonable suspicion [for] stop[ping]” Borhani.

Esqueda seemed to want to simply engage Borhani in casual conversation. He “asked [her] how [she] was doing, if [she] was from around there, and whether [she] lived at the motel.” Borhani, however, was “too intimidated to refuse to talk with [the deputy], [to] ask him to move his patrol car, or to step aside so [she] could leave.”

3. *Discussion.*

“In assessing claims of ineffective assistance of trial counsel, we consider whether counsel’s representation fell below an objective standard of reasonableness under

prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.]” (*People v. Carter* (2003) 30 Cal.4th 1166, 1211; see *Strickland v. Washington* (1984) 466 U.S. 668, 694.) If the defendant makes an insufficient showing with regard to either component, the claim must fail. (*People v. Holt* (1997) 15 Cal.4th 619, 703.)

Here, Borhani claims her initial contact with Deputy Esqueda amounted to an unlawful detention and that her trial counsel was ineffective for failing to have made a motion to suppress the contraband found as a result of the encounter. She bases this claim on her assertion that the deputy parked his car behind hers in such a way that she could not leave. In making this argument, Borhani relies on *People v. Wilkins* (1986) 186 Cal.App.3d 804 (*Wilkins*).

In *Wilkins, supra*, 186 Cal.App.3d at page 807, a San Jose police officer was on patrol in an area noted for thefts from stores and narcotics activity. The officer was driving through the parking lot of a convenience store when he “noticed that two occupants in the front seat of a parked Pontiac station wagon ‘. . . seemed to lower themselves to conceal themselves in a crouched down position . . .’ as he drove past.” The officer drove through the parking lot again, this time parking his patrol car diagonally behind the station wagon so that he was blocking their exit. When the officer got out of the car and approached the driver’s side of the station wagon, he “ ‘smelled a strong odor of burning incense’ ” which he knew was sometimes used to conceal the odor of burning contraband. After asking the two men what they were doing there, the officer obtained identification from both men, ran warrant checks and discovered that Wilkins was subject to a probation search condition. The officer then proceeded to perform a full search of Wilkins’s clothing.

The appellate court determined that there had been an unlawful detention. The court indicated that the occupants of the station wagon were “ ‘seized’ ” when the officer parked his patrol car in such a way that they could not leave. The seizure had been unlawful in that there were no objective factors on which it was based. The “police

avoidance behavior, the reputation of the area for crime, and [the] time of night [(approximately 10:30)],” were “[in]sufficient to cause a reasonable suspicion of criminality.” (*Wilkins, supra*, 186 Cal.App.3d at p. 811.)

The present case is distinguishable. Here, there is no reliable evidence to indicate that Deputy Esqueda parked his vehicle in such a way that Borhani could not leave. In his report, Esqueda states that he pulled into a parking space “along side” of the Honda. Borhani’s statement to the contrary is not credible. A defendant’s statement, in and of itself, is insufficient to establish a disputed fact. It “must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked flow of easily fabricated claims.” (*In re Alvernaz* (1992) 2 Cal.4th 924, 938.)

In addition, unlike the situation in *Wilkins, supra*, 186 Cal.App.3d at page 807, where the police officer stopped to investigate based on the fact that the two occupants of the car crouched down when he drove past, in the present matter the deputy did not approach Borhani’s vehicle in response to her behavior. When he saw Borhani in the Honda, he walked up to the open driver’s side window in a casual, informal manner. He simply asked Borhani how things were going, then discussed her stay at the motel. A fair reading of the record indicates that, when he first approached her, Esqueda’s intent was not to detain Borhani or to prevent her from leaving. The deputy simply wished to talk with her for a moment or two. “ ‘Obviously, not all personal intercourse between policemen and citizens involves “seizures” of persons.’ ” (*Id.* at p. 809, quoting *Terry v. Ohio* (1968) 392 U.S. 1, 19, fn. 16.)

Although Borhani’s initial encounter with Esqueda did not amount to a detention, after speaking with her for some time the deputy noticed that she was exhibiting signs of being under the influence of a narcotic. At that time, the contact became legitimately investigatory. The “ ‘circumstances known or apparent to the [deputy] . . . include[d] specific and articulable facts [which] caus[ed] him to suspect that (1) some activity relating to crime ha[d] taken place or [was] occurring . . . , and (2) the person he intend[ed] to stop or detain [was] involved in that activity.’ ” (*People v. Leyba* (1981) 29 Cal.3d 591, 597, quoting *In re Tony C.* (1978) 21 Cal.3d 888, 893.) Once Esqueda

performed a number of tests on Borhani, it became “objectively reasonable” for him to believe that she was under the influence of a controlled substance and that he could lawfully detain her. (*Leyba*, at p. 597.) Once she had been detained, Borhani consented to the searches of the car and her duffle bag.

Under these circumstances, counsel cannot be deemed to have been ineffective. A review of the record indicates that counsel’s representation was more than adequate and that Borhani suffered no prejudice as a result of counsel’s failure to make a motion to suppress evidence. As the initial encounter, the resulting detention and the search of Borhani’s car and bag were lawful, the making of such a motion would have been futile. (See *People v. Carter, supra*, 30 Cal.4th at p. 1211.)

DISPOSITION

The judgment is affirmed.

The petition for writ of habeas corpus is denied.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.