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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.

CANDICE WILKES,

Defendant and Appellant.

B265686

(Los Angeles County
Super. Ct. No. LA077753)

APPEAL from the judgment of the Superior Court of
Los Angeles County, Martin L. Herscovitz, Judge. Affirmed.

Gideon Margolis, under appointment by the Court of
Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

After the trial court denied her motion to suppress evidence, appellant Candice Wilkes pled no contest to two counts of first degree residential burglary. (Pen. Code, §§ 459, 460, subd. (a), 1538.5; counts 1 & 7.) The court sentenced appellant to prison for five years four months. In this *Wende*¹ case, appellant, in her supplemental brief, challenges the denial of her suppression motion. She argues there was no probable cause or arrest warrant to support her arrest and the arresting officers illegally took a buccal swab DNA sample from her while she was at the station. We affirm.

FACTUAL and PROCEDURAL SUMMARY

On April 22, 2014, appellant burglarized the Malibu residence of Juan and Rebecca Baron. On May 6, 2014, appellant burglarized the Agoura Hills residence of Manuel Edber.² Count 1 of the information filed August 26, 2014, alleged the Edber burglary. Count 7 of the information amended May 18, 2015, alleged the Baron burglary.

1. The Search Warrant, Affidavit, Statement of Probable Cause, and Supplemental Report.

On September 15, 2014, a magistrate issued a search warrant commanding the search of the premises at 9515 South Samoline Avenue in Downey for six Louis Vuitton purses, six other purses (by Gucci, Prada, Fendi, Gryson, Kate Spade, and Burberry, respectively), a leopard purse, a gold bracelet with diamonds, a Cartier watch, an aquamarine ring,

¹ (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*)).

² Codefendants Timothy Jerome Bavis, Rushie Edward Jackson, and Antawn Morte Robinson are not parties to this appeal.

shoes, and two printers. Attachment A to the warrant identifies the specific address to be searched. Attachment B to the warrant identifies the specific property to be seized.

The search warrant and affidavit in support of the warrant are both included on a single page form. The affidavit, signed by Los Angeles County Sheriff's Deputy Samuel Taylor, incorporates a "statement of probable cause." Neither the warrant nor the affidavit, itself, expressly authorizes the taking of a buccal swab DNA sample from appellant. The incorporated statement of probable cause, however, includes a request for "permission to take a buccal swab from Candice Wilkes," and affiant Taylor states, "I believe this is necessary since her DNA profile is not currently in the California DNA database."

The statement of probable cause sets forth the facts in support of the warrant. On December 20, 2013, a residential burglary occurred at 11419 Eberle Circle in Cerritos. An ice pick was found below a broken window at the residence. DNA was taken from the handle of the ice pick. Between 7:30 p.m. and 7:42 p.m. on April 22, 2014, a residential burglary occurred at 3541 Las Flores Canyon, the Baron residence in Malibu. Several items, including rare purses, were taken. A substance resembling blood was in several areas of the residence and a technician recovered a sample. Between 10:00 a.m. and 12:20 p.m. on May 2, 2014, the Baron residence in Malibu was burglarized again. Jewelry was taken.

On May 11, 2014, Taylor received an email from victim Rebecca Baron. Rebecca stated that Craigslist was advertising for sale two of her stolen purses. One was a Fendi bag with a strap she had improperly repaired. The advertisement depicted a repaired strap for that purse. The other purse was a rare Louis Vuitton Papillion bag.

The advertisement listed phone number (562) 270-5024. Taylor had a technician call the number. A female answered the phone, was angry she had received a call from a blocked phone number, and hung up. A Google search of the phone number revealed adult Web sites containing advertisements for escort services. Photographs in the advertisements depicted the escort, who appeared to be an African-American woman in her late 20's.

Three months later, on August 2, 2014, Taylor learned female DNA recovered from the Baron residence in Malibu matched female DNA obtained from the ice pick associated with the Cerritos burglary. Taylor distributed to other detectives photographs of the escort. Taylor's partner, Los Angeles County Sheriff's Deputy Timothy Cooley, immediately identified the escort as appellant. Cooley told Taylor that, several days before, Cooley was in a Van Nuys court where appellant was a defendant in a residential burglary case being handled by Los Angeles Police Detective Stupar.

Taylor determined the photograph of appellant on her driver's license matched the photographs on the advertisements. Appellant's address on her driver's license was 11422 Eberle Circle in Cerritos, directly across the street from the burglarized Cerritos residence. Taylor observed that even though appellant had been arrested for burglary, her DNA profile had never been collected.

Stupar indicated to Taylor that records pertaining to appellant's personal mobile phone number had been obtained pursuant to a search warrant. Taylor reviewed the records and they reflected at 7:34 p.m. on April 22, 2014 (the day of the first Malibu burglary), a call was made from appellant's mobile phone. The call connected to a Malibu cell tower close to the Baron residence in Malibu. At 11:59 a.m. on May 2, 2014 (the day of the second Malibu burglary), appellant made a phone call. The call connected to a cell tower near Pacific Coast Highway, between Pacific Palisades and Santa Monica. The tower was on a route near the Santa Monica freeway, which one would take to travel between Malibu and Los Angeles.

Stupar told Taylor that Stupar had conducted extensive surveillance of appellant and she was living at the Samoline address. Stupar said appellant drove a 2005 BMW with license plate 7BEE971, registered in her name. On August 13 and 14, 2014, Taylor went to the Samoline address and saw the BMW in the driveway. Another detective saw appellant enter and exit the residence numerous times, as recently as September 4, 2014.

Taylor opined various facts implicated appellant in the Baron burglaries, including the facts that DNA came back to a female, appellant's phone was close to the Baron residence during the time frames in which both Baron burglaries occurred, and Rebecca had identified her stolen property depicted in the Craigslist advertisement.

In the probable cause statement, Taylor asked for permission to search appellant's apparent residence at the Samoline address and said he believed he would find the stolen property specified in Attachment B at the residence. He also stated, "Your Affiant is also requesting permission to take a buccal swab from [appellant]. I believe this is necessary since her DNA profile is not currently in the California DNA database. Your Affiant believes that by granting these requests evidence will be collected which will aid in the successful prosecution of Candice Wilkes for the crime of burglary."

On January 23, 2015, Taylor wrote a supplemental report that reflected as follows. Appellant was arrested and an oral sample was taken from her. On October 16, 2014, a criminalist told Taylor the sample "was a match to the biological evidence found inside the Baron's home." On December 22, 2014, a criminalist determined appellant's sample "was a match to the blood sample taken from the . . . Cerritos burglary."

2. The Hearing on the Motion to Suppress and the Court's Ruling.

On May 20, 2015, appellant filed a motion to suppress evidence pursuant to Penal Code section 1538.5. The written motion sought suppression of evidence seized on September 17, 2014, from appellant's residence pursuant to the warrant. At the May 20, 2015 hearing on the motion, Taylor testified in pertinent part as follows. Taylor sought "to get [a] swab as part of the search warrant." The narrative portion of the statement of probable cause mentioned he wanted a swab but the warrant itself did not. Taylor believed the warrant gave him authority to obtain a swab from appellant.

Taylor was at the scene when the warrant was executed and he contacted appellant. Taylor was going to arrest appellant whether or not anything was found at the residence. Taylor believed he had probable cause to arrest appellant, based on the information in the statement of probable cause incorporated into his affidavit. After being at the station for two to three hours, deputies requested a swab sample from appellant, which is standard booking procedure at his station. Appellant asked to see a search warrant, which deputies showed her. A law enforcement technician that “does DNA and fingerprint” obtained the swab from appellant at the station.

Appellant testified as follows. In 2000 and 2002, appellant was convicted of commercial burglary and selling cocaine. On September 17, 2014, appellant was living at 9515 “Sandline” (*sic*) Avenue in Downey and deputies came to her home. Her son awoke her and she went downstairs wearing a shirt and boxers. Deputies handcuffed her, placed her in a patrol car, and drove her away before they searched the residence. Deputies drove her to the Lost Hills sheriff’s station in Malibu.

After appellant’s arrest, deputies at the station said they “had a search warrant to take a DNA swab” from her. Appellant testified, “[Deputies] said they had a search warrant to take a DNA swab and they showed me the affidavit – not a search warrant, but the copies behind it, the affidavit that said they were – that they requested to do a DNA search swab and said it was a warrant.” (*Sic.*) Deputies took a DNA swab from appellant at the station.

Following the testimony, appellant's counsel argued suppression of the swab was required because the warrant and attachments did not authorize taking of a swab sample even though "the declaration or the affidavit" did. Appellant's counsel also argued suppression was required because (1) the taking of the swab was the product of an illegal arrest because the arrest was not supported by probable cause to arrest and (2) the taking was the product of an unlawful delay of two to three hours.

The trial court ruled the swab was lawfully seized because appellant had been arrested for a felony and the arrest was supported by probable cause to arrest. The trial court ruled that, independently, the swab was lawfully seized pursuant to the warrant because it was a "combined form," i.e., "affidavit and warrant," and the "affidavit" stated, "Affiant is also requesting permission to take a buccal . . . swab from [appellant]." The trial court denied the suppression motion.

3. Appellant's No Contest Pleas and Subsequent Proceedings.

On May 21, 2015, appellant, pursuant to negotiations, pled no contest to counts 1 and 7 as previously indicated.³ On July 13, 2015, the court sentenced appellant to prison as previously indicated. The court dismissed the remaining counts, subject to the continuing validity of the plea. The court awarded

³ Earlier, on April 23, 2015, and May 20, 2015, appellant made motions for substitution of counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. The court denied both motions. In the April 23, 2015 motion, appellant made arguments she has made in her supplemental brief filed with this court and discussed *post*.

appellant presentence credit and imposed various fines and fees. On August 10, 2015, appellant filed a notice of appeal.

CONTENTIONS

On May 13, 2016, appointed counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record. On July 18, 2016, appellant filed a supplemental brief. In it, she states, “Once I arrived at the Malibu station[,] the officers put me in a holding tank and told me they had a warrant for my DNA. I requested to see the warrant. [Taylor] states, ‘The police requested the swab. I requested to see a search warrant. [Taylor] states they showed me the warrant[.] . . . I refused because I didn’t believe there was a warrant for my DNA. My DNA was eventually taken by [a technician] under false pretense that the police had a warrant for my DNA. After my DNA was taken[,] a police officer booked me for 459 burglary.”

Appellant also states, “[Taylor] assumed because he requested to take a DNA swab sample it was ok. He also requested to search my residence in the statement of probable cause and that was the only request granted which was listed in the search warrant in Attachment ‘A’ and ‘B’, which was very specific of the place, persons, and items to be searched.” (*Sic.*) She further states Taylor “took it upon [himself] to use the warrant as permission.”

Appellant makes two arguments on appeal: (1) her arrest was illegal because it was not supported by an arrest warrant or probable cause to arrest, and (2) the warrantless taking of the sample violated the Fourth Amendment.

1. *Probable Cause to Arrest Supported Appellant's Warrantless Arrest.*

A warrantless arrest for a felony is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed. (*People v. Thompson* (2006) 38 Cal.4th 811, 817.) Probable cause to arrest exists if facts known to the arresting officer would lead a person of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that an individual is guilty of a crime. (*People v. Kraft* (2000) 23 Cal.4th 978, 1037.)

In the present case there was substantial evidence to establish probable cause to arrest appellant. The Baron home in Malibu was burglarized and the stolen items included several purses. Victim Rebecca Baron saw her stolen purses advertised on Craigslist. The advertisement contained photographs depicting a young African-American female, the advertisement listed a phone number, and, when it was called, a female answered.

Female DNA taken from the Cerritos burglary and the Baron burglaries matched. Taylor's partner identified appellant as both the female depicted in the Craigslist photographs and a defendant in an unrelated residential burglary case. Appellant lived across the street from the home burglarized in Cerritos. Appellant lived in Downey but her cell phone was in the area of the Baron residence in Malibu during the period within which that residence was burglarized on April 22, 2014. During the

period within which that residence was burglarized on May 2, 2014, a call was made on appellant's cell phone and the cell phone connected to a cell tower near Pacific Coast Highway, between Pacific Palisades and Santa Monica. The tower was on a route near the Santa Monica freeway, which one would take to travel between Malibu and Los Angeles. In sum, these facts alone establish probable cause to arrest appellant, whether or not the search of her residence yielded additional evidence.

2. A Warrant Is Not Necessary to Collect DNA Incident to a Felony Arrest.

Appellant also argues collection of DNA requires a search warrant and the warrant at issue here does not authorize collection of her DNA. We disagree and conclude the trial court properly denied her suppression motion.

First, the Fourth Amendment permits law enforcement to take buccal swab DNA samples where a defendant is arrested for a serious offense, e.g., the felony of residential burglary. (*Maryland v. King* (2013) 569 U.S. ___ [186 L.Ed.2d 1] (*King*)). “When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee’s DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.” (*King, supra*, 569 U.S. at p. ___ [186 L.Ed.2d at p. 32].)

Second, deputies took the buccal swab sample from appellant on September 17, 2014, following her arrest for residential burglary, a felony. Penal Code section 296, subdivision (a)(2)(C) provides, in relevant part, “(a) The following persons shall provide buccal swab samples, . . . [¶] . . . [¶] (C) Commencing on January 1 of the fifth year following enactment of the act that added this subparagraph, as amended, any adult person arrested or charged with any felony offense.” (Pen. Code, § 296, subd. (a)(2)(C), as amended by Proposition 69, § 3, approved by voters Nov. 2, 2004, eff. Nov. 3, 2004.)⁴

REVIEW ON APPEAL

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

⁴ The issue of whether the compulsory collection of a biological sample from all adult felony arrestees for purposes of DNA testing violates the Fourth Amendment is pending before our Supreme Court in *People v. Buza*, 231 Cal.App.4th 1446, review granted February 18, 2015, S223698.

DISPOSITION

The judgment is affirmed.

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STRATTON, J.*

We concur:

ALDRICH, Acting P. J.

LAVIN, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.