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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Calaveras)

THE PEOPLE,

Plaintiff and Respondent,

v.

JEROME TAYLOR,

Defendant and Appellant.

C066183

(Super. Ct. No. F4652)

The day defendant Jerome Taylor was arrested, the arresting officer seized a small amount of marijuana. The next day, more than 23 grams of methamphetamine were found. Seven grams were found hidden in the arresting deputy's patrol car; the methamphetamine was packaged in the same type of baggies seen in defendant's car a day earlier. After obtaining a warrant to again search his vehicle, deputies found more than 16 grams of methamphetamine hidden in the engine compartment of defendant's car.

A jury found defendant guilty of transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a); all further statutory references are to the Health and Safety Code unless otherwise indicated), possession of methamphetamine for sale (§ 11378), possession of methamphetamine (§ 11377, subd. (a)), possession of hydrocodone without a prescription (§ 11350, subd. (a)), misdemeanor possession of marijuana (§ 11357, subd. (b)), and misdemeanor possession of drug paraphernalia (§ 11364).

On appeal, defendant contends trial counsel was inadequate for not objecting to the admission of the methamphetamine found in the engine compartment of his car. He argues the prosecution failed to establish that some third party did not alter defendant's car by stashing the drugs under the hood while it was stored in a tow yard. Defendant also contends the trial court abused its discretion when it declined to strike his prior strike conviction, a 1974 second degree murder conviction.

Defendant's contentions are without merit. We will direct the trial court to correct a clerical error in the abstract of judgment. In all other respects, we affirm.

FACTS AND PROCEDURAL HISTORY

Defendant's Arrest and Search

On July 27, 2009, defendant was stopped for driving his station wagon with a cracked windshield. Defendant consented to a vehicle search after informing the officer he had a knife inside the car. Before conducting the vehicle search, Deputy Huffman patsearched defendant for weapons.

While searching, Huffman noticed items that suggested defendant was living in his vehicle. There were laundry baskets, clothes, food, and toiletries. In the front passenger area, Huffman found a small amount of marijuana tucked inside a tissue box. Inside the cargo area, the deputy found a methamphetamine pipe wrapped in tissue paper, and two prescription narcotic pills inside an aspirin bottle. Huffman also noticed, but did not seize, approximately 100 Ziploc-type baggies, some with a blue number-one logo and others with a red apple logo.

Defendant was handcuffed after admitting he did not have a legal doctor's recommendation for the marijuana or a prescription for the pills. He was searched a second time before being placed in the back of Huffman's patrol car. Defendant was booked on charges of illegal possession of marijuana, prescription pills, and drug paraphernalia.

Defendant's car was searched and stored but not impounded because Huffman saw no evidentiary need for the vehicle. Huffman testified he did not search the vehicle's engine compartment, nor did he see any other officer raise the hood. Following the search, the vehicle was towed to a privately owned lot.

The Search of Huffman's Patrol Car

Huffman routinely searches his patrol vehicle at both the start and the end of each shift. He followed that practice on the day of defendant's arrest; no illegal drugs were found.

Nevertheless, the next morning, while completing a routine search of his patrol car, Huffman was surprised to come across an item not found during his search at the end of the prior day's shift. Tucked into a hole located between the front and back seats, Huffman noticed a sandwich bag that he thought was garbage from his lunch the day before. When Huffman pulled the plastic bag out of its hiding place, smaller Ziploc-type baggies spilled out of it. In total, Huffman discovered 13 blue number-one logo baggies, each filled with either .4 or .5 gram of methamphetamine, a larger bag without a logo filled with 1.8 grams of methamphetamine, and a bag with a red apple logo.

Huffman recalled seeing empty baggies with the same logos in defendant's car the day before. Although defendant was handcuffed with his hands behind his back while in the patrol car, his feet would have been directly in front of the hole where the drugs were stashed. Huffman would not have noticed if defendant had stuffed something from his shoe into the hole. Defendant was the only arrestee in Huffman's car that day. Huffman sought and, with the help of a narcotics officer, obtained a warrant to re-search defendant's vehicle.

The Second Search of Defendant's Vehicle

The deputies executed the warrant later the same day. Defendant's car was locked and parked in the tow yard when the officers arrived. An employee of the tow yard testified that all cars are subject to the same process upon arrival: the tow truck driver brings the car back to the tow yard, completes a full inventory of the car's contents, stores the valuables in a

secure location, disconnects the battery, and locks the vehicle with the keys inside. This process was followed for defendant's car. In fact, defendant's car was parked in the lot between two other cars; the space between the cars was so narrow that defendant's car had to be manually pushed out of the parking space before the doors could be opened.

Huffman was assigned to search the cargo, or trunk, area; again, he found no contraband. Inside defendant's personal items stored in lockup, a deputy found baggies with a blue number-one logo, baggies with a red apple logo, a roll of duct tape, a bag of balloons, and a spoon with methamphetamine residue on it. Under the hood of defendant's car, inside the air filter compartment, a third deputy found a gallon size plastic bag with a pouch made of duct tape. Inside the pouch, the officer found a scale with methamphetamine residue on it, a playing card cut into the shape of a scooper, and a smaller plastic bag in which was another bag that contained methamphetamine. The smaller bag had a red apple logo.

The Trial

Relying on a third-party culprit theory of defense, trial counsel advanced a theme of persistent blunder, oversight, and slipshod investigation. Defense counsel relied on various asserted investigative failures and lapses to support his argument that the drugs found in the patrol car could not properly be linked to defendant.

Counsel pointed to the following testimony concerning the search of Officer Huffman's patrol car:

During the previous year, Huffman had never looked in the area of his patrol car where the drugs were found and did not know the hole existed. In that time, he transported upward of 50 arrestees, some of whom were arrested for drug-related offenses. Huffman never tried to determine their identities after the hidden drugs were found, and he did not review surveillance cameras to make sure no one had used or otherwise accessed his car the night of defendant's arrest.

Although Huffman photographed the drugs spilling from the hole onto the floor, he did not mention the hole in his original report and did not take pictures of the actual hole until five months later upon the district attorney's request. Huffman's report failed to mention that a ride-along passenger, a dispatcher in the sheriff's office, was present when Huffman discovered the drugs in his patrol car.

None of the 13 small baggies found in the patrol car was dusted for fingerprints, and although the two larger baggies were dusted, the sheriff's office failed to secure official Department of Justice fingerprint examinations.

With respect to the search of defendant's car, counsel pointed to Huffman's failure to look under the hood during the initial search despite common knowledge that narcotics are often hidden in the engine compartment. Huffman testified he did not search under the hood because the engine was hot. As for the second search of the car, counsel pointed to evidence that it was stored in the tow yard for nearly 24 hours. An employee of the tow yard testified security was an issue as break-ins had

occurred in the past and tow truck drivers were frequently blamed for missing items. He explained the tow yard has no video surveillance and only a 10-foot wood plank fence that is locked nightly. Defense counsel argued the tow truck driver could have hidden the contraband in the car, and pointed to the failure to conduct fingerprint evidence of the items found in the car. The tow truck driver testified and, while admitting a prior conviction for possession of methamphetamine, described his towing procedures and rejected defense counsel's accusation.

Verdict and Sentence

A jury found defendant guilty as charged. Regarding the methamphetamine-related charges, the jurors were polled on whether their verdicts were based on evidence from the patrol car, defendant's engine compartment, or both; nine jurors replied "both," and three jurors replied "engine compartment." Therefore, the guilty verdicts were based on the methamphetamine found in defendant's engine compartment, evidence defendant claims should never have been introduced to the jury.

Defendant admitted a prior strike conviction within the meaning of California's "three strikes" law. (Pen. Code, § 667, subs. (d), (e).) His request to strike his prior, a 1974 conviction for second degree murder, was denied. (Pen. Code, § 1385.) Defendant was sentenced to six years in prison. (Pen. Code, § 1170.12, subd. (c)(1).)

Defendant now appeals.

DISCUSSION

I. Ineffective Assistance of Counsel

Contending trial counsel's performance was prejudicially deficient, defendant seeks reversal of all convictions. He argues a reasonably diligent advocate would have moved to exclude the later-found methamphetamine for lack of sufficient chain of custody.¹ According to defendant, the prosecution failed "to establish that it is reasonably certain that the methamphetamine pouch was not hidden there while the car sat in the tow yard for around 24 hours." Therefore, the argument continues, the methamphetamine convictions must be reversed because absent the methamphetamine there would have been no evidence to support the methamphetamine charges. Further, defendant reasons, it is reasonably probable that the jury would not have found defendant guilty of the remaining charges if the

¹ "The rules for establishing chain of custody are as follows: "The burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight."" [Citations.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 444 (*Lucas*)).

methamphetamine-filled pouch had not been presented to the jury. Defendant's argument lacks merit.

To establish ineffective assistance of counsel, the burden is on the defendant to show that counsel's performance was deficient and that the defendant suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 [80 L.Ed.2d 674, 693, 696]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216.) To establish counsel's actions were deficient, the defendant must show "trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates." (*People v. Pope* (1979) 23 Cal.3d 412, 425 (*Pope*), overruled on other grounds in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.)

The appellate court looks to the record for any explanation for the challenged aspect of representation. If an explanation exists in the record, "the court must inquire whether the explanation demonstrates that counsel was reasonably competent and acting as a conscientious, diligent advocate. For example, where the record shows that counsel's omissions resulted from an informed tactical choice within the range of reasonable competence, the conviction must be affirmed." (*Pope, supra*, 23 Cal.3d at p. 425.)

Thus, courts "reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 980.)

Here, the record affirmatively discloses a rational tactical purpose for trial counsel's omission. As shown above, counsel was aware that the 24-hour lapse in discovery time was a weakness in the prosecution's case. However, he chose to use this fact, in connection with others, to establish a series of investigative failures in the hope of giving rise to reasonable doubt. As the California Supreme Court explained, "[f]laws in the chain [of custody] are often mere technical omissions that competent counsel may consider unworthy of extended debate. [Citation.] In fact, an objection on chain of custody grounds may be less productive for defendant than a decision to permit the prosecutor to establish a shoddy chain of custody that can be pointed out to the jury in the hope of giving rise to a reasonable doubt." (*Lucas, supra*, 12 Cal.4th at pp. 445-446.)

Trial counsel could have chosen, as defendant now suggests, to object on the ground there was some vital link in the chain of possession of defendant's car that was not accounted for. However, it was also well within the range of competent advocacy for counsel to exploit what he considered to be lousy police work by making the argument to the jury rather than the court. "The decision whether to object to evidence at trial is a matter of tactics and, because of the deference accorded such decisions on appeal, will seldom establish that counsel was incompetent." (*Lucas, supra*, 12 Cal.4th at p. 444.) We conclude defendant has failed to show counsel was incompetent for not moving to suppress the methamphetamine on chain of custody grounds.

II. Prior Strike Conviction

Defendant contends, under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, the trial court abused its discretion in denying his request to strike his prior strike conviction. He argues the request should have been granted because his prior strike conviction for second degree murder was 36 years old; he had since led a "felony free li[f]e"; and his arrest history, without convictions, should have carried no probative weight. Again, we reject his contention.

The purpose of California's three strikes law is to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses. (Pen. Code, § 667, subd. (b).) Where, as here, a defendant has one prior conviction that qualifies as a strike, the defendant is to receive a mandatory state prison sentence of twice the term otherwise provided for the current offense. (§ 667, subd. (e).) However, a trial court may on its own motion or upon the prosecutor's request, and "in furtherance of justice," exercise its discretion under Penal Code section 1385 to strike or vacate a prior strike for purposes of sentencing under the three strikes law. (*People v. Williams* (1998) 17 Cal.4th 148, 151-152 (*Williams*); see Pen. Code, §§ 667, subs. (b)-(i), 1170.12.)

In making a decision on whether to strike a prior conviction, the court considers the nature and circumstances of the current offenses; the nature and circumstances of the prior strike convictions; and the defendant's background, character,

and prospects for the future to determine whether the defendant should be considered outside the spirit of the three strikes law. (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).)

"[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*Carmony, supra*, 33 Cal.4th at p. 375.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.) "Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Id.* at p. 378; see also *People v. Strong* (2001) 87 Cal.App.4th 328, 337-338.)

In this case, we cannot find the trial court abused its discretion. With respect to the nature and circumstances of the present offense, the evidence shows defendant was operating as a mobile drug dealer. He told the arresting deputy he was living out of his car. Further, although most of the methamphetamine found under the hood was not prepackaged, defendant had everything he needed to package drugs -- nearly 100 empty baggies, a spoon, a scooper, and balloons. Finally, to be sure

that his clients received no more than they were due, he also kept a scale accessible.

Regarding the nature and circumstances of the prior strike conviction, defendant admitted he was convicted of second degree murder. In fact, as the trial court noted, it was a murder committed with a deadly weapon. Defendant contends the circumstances of the prior are mitigated by the fact he shot a man who was also armed with a firearm. However, there is no evidence in the record concerning the factual circumstances of the 1974 conviction. Thus, there is nothing about either the present offense or the prior conviction that is favorable to defendant's position.

Defendant's background, character, and prospects are also of little help. Aside from emphasizing the 36-year lapse of time since the homicide conviction, defendant points to no extraordinary circumstances, such as having lived a crime-free life, not just a felony-free life. To the contrary, as defense counsel admitted at sentencing, defendant "has a reputation over the years associated with methamphetamine . . . but he was never convicted of it." Defendant himself admitted he "currently uses the drug to help his circulation," although he denied having any problem with methamphetamine.

With regard to future prospects, defendant recounts his age, history of medical issues associated with his diabetes, and serious financial issues. He "believes the prospects of sentencing him to prison for these drug violations will actually be the end of his life."

Further, while we note the trial court did not take defendant's arrest record into consideration, we conclude defendant's entire criminal history, as reflected by his criminal history report, is an important component of his character and background. This report indicates more than 15 arrests and five misdemeanor convictions, all occurring since his release from prison in 1981. On this record, there is no indication that since conviction for second-degree murder defendant has so changed his life, i.e., conformed his behavior to the law, as to now be deemed outside the spirit of the three strikes law.

We do not ignore the fact that defendant was 23 years old at the time of the homicide, has since raised a family and run an auto repair business, is now 61 years old, and is in poor physical and financial health. However, defendant closed his business two years ago, is now unemployed, and continues to use, possess, and sell drugs and otherwise violate the terms and conditions of his probation. In short, defendant has not demonstrated that the trial court misapplied relevant factors or otherwise abused its discretion in concluding he falls squarely within the spirit of the three strikes law and denying his request to strike his prior strike conviction.

III. Abstract of Judgment

We note a discrepancy between the abstract of judgment and the court's oral imposition of sentence. "Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement

controls." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385; see *People v. Mesa* (1975) 14 Cal.3d 466, 471.)

The trial court orally imposed a four-year sentence for possession of hydrocodone without a prescription, to be served concurrently with the six years imposed for the transportation of methamphetamine conviction.² (§ 11350, subd. (a).) The abstract of judgment does not reflect this felony conviction or its attendant prison term. The trial court shall amend the abstract of judgment to reflect this conviction.

DISPOSITION

As corrected, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting defendant's conviction and imposition of sentence under Health and Safety Code section 11350, subdivision (a) and to forward a certified copy of said amended abstract to the Department of Corrections and Rehabilitation.

RAYE, P. J.

We concur:

BUTZ, J.

HOCH, J.

² Pursuant to Penal Code section 654, the court imposed and then stayed two four-year sentences, one for possession of methamphetamine for sale and one for simple possession of methamphetamine.