

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL BRUCE PRYOR,

Defendant and Appellant.

C068159

(Super. Ct. Nos.
NCR77278, NCR79990,
NCR80380 & NCR81206)

In three consolidated cases that were based on multiple searches taking place on three different dates, a jury convicted defendant of two counts of cultivating marijuana (Health & Saf. Code, § 11358) (counts I and IV), three counts of possession of marijuana for sale (Health & Saf. Code, § 11359) (counts II, V and IX), transporting marijuana (Health & Saf. Code, § 11360, subd. (a)) (count VIII), and misdemeanor driving on a revoked license (Veh. Code, § 14601.1, subd. (a)) (count X). Defendant admitted the special allegations that he was released on bail when he committed the offenses in the later two cases (Pen.

Code, § 12022.1). In a fourth case, defendant pled no contest to conspiracy (Pen. Code, § 127). He was sentenced to nine years in prison.

Defendant contends his conviction must be reversed because he was not permitted to challenge the legality of one of the searches during trial. He contends that once the trial court learned at trial of evidence suggesting the first search may have been illegal, the court had a duty to investigate the legality of that search. Defendant also contends, and the People concede, that several of the on-bail enhancements were erroneously imposed. We agree with defendant's last contention, and shall strike the on-bail enhancements imposed on counts IV, V, and IX. In all other respects, we shall affirm.

BACKGROUND

The Crimes

On July 30, 2009, members of the Tehama Interagency Drug Enforcement Task Force searched four locations: defendant's residence on Ivy Lane, his business on Vista Way, his wife's business also on Vista Way, and property on Balis Bell Road that defendant leased from Norman Andreini. The Balis Bell Road property was rural property 25 miles west of downtown Red Bluff. There was no house on the property, only a travel trailer.

The task force members found three garden sites on the Balis Bell Road property, containing 91, 75, and 25 marijuana plants, respectively. In the opinion of the investigator (also a sworn officer), these plants were possessed for sale, given

the large number. A search of defendant's residence disclosed \$5,700 in \$20 bills, a denomination consistent with drug sales.

On August 30, 2010, officers obtained a search warrant to search three locations: property defendant leased on Emerson Road, property defendant leased on Stice Road, and defendant's residence on Ivy Lane. On the Emerson Road property, officers found marijuana growing in three locations, for a total of 197 plants. They found 30 marijuana plants growing outside at Stice Road and 23 plants growing inside at defendant's residence. An expert opined that based on the respective amounts, the marijuana was possessed for sale.

On October 27, 2010, defendant was stopped pursuant to a traffic stop. In the back of his SUV was a plastic tub that contained 11 individual packages of marijuana bud, each weighing about a pound.

Defendant's Motion for a Mistrial

The first witness at trial was Norman Andreini, who testified about his lease arrangement with defendant for the Balis Bell Road property. On cross-examination, Andreini testified he had flown over the property in the summer of 2009 because defendant had stopped making lease payments and Andreini was going to evict him. Andreini entered the property once during the eviction process; "[t]he night before he was raided." When asked how he knew defendant was going to be raided, Andreini responded, "Because I was asked by the officers to make sure the plants were still there and if he was." Andreini

confirmed that the officers asked him to inspect the property and make sure the plants were still there.

Defense counsel, claiming he was surprised to hear about this advance inspection, argued he was entitled to bring a suppression motion, if necessary. The court called a recess and met with counsel in chambers off the record. After the recess, the defense had no more questions for Andreini. The trial proceeded with other witnesses.

The next day, defendant moved for a mistrial, claiming that Andreini went to the property "probably prior" to the search warrant being signed. Counsel explained this was the first that he had learned of Andreini's visit and, had he known earlier, he would have made a proper motion under Penal Code section 1538.5. He argued a due process violation, but could point to no authority supporting his request for a mistrial. He claimed prejudice, arguing the People had used information from a warrantless search by an agent to get a search warrant. The court found no information to support that conclusion and denied the mistrial.¹

¹ An arguably more plausible explanation, suggested by the trial court, is that Andreini discovered the marijuana during his flight over the property and reported it to the police, who then investigated and obtained a search warrant. Before executing the warrant, the officers asked Andreini to confirm that the marijuana was still there. Andreini led the officers to the Balis Bell Road property. Even if the flight over the property was at the direction of law enforcement--and there is no evidence that it was--aerial surveillance of open fields without a warrant is legal. (*People v. Stanislawski* (1986) 180 Cal.App.3d 748, 754.)

DISCUSSION

I

Alleged Inability to Challenge the July 2009 Search

Defendant contends the judgment must be reversed due to his "inability" to challenge the July 30, 2009 search. He contends the use of Andreini as a police agent violated the Fourth Amendment.

A. *The Law*

Bringing a motion to suppress evidence during trial is generally disfavored because it thwarts the purposes of Penal Code section 1528.5 and misuses judicial resources. (*People v. Jackson* (1992) 7 Cal.App.4th 1367, 1370, fn. 3; *People v. Smith* (1973) 30 Cal.App.3d 277, 280.) Such a motion is permitted, however, under limited circumstances. "If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial." (Pen. Code, § 1538.5, subd. (h).)

B. *Analysis*

Defendant has not shown that he attempted to make a motion to suppress during trial.² Even if we assume that, during the conference in chambers, the trial court denied defendant's request to bring a suppression motion, defendant still fails to

² We remind defendant that it is *his* burden on appeal to present an adequate record to affirmatively show error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

show error. There is a "due diligence" requirement for a belated motion to suppress under Penal Code section 1538.5. (*People v. Martinez* (1975) 14 Cal.3d 533, 537-538; *People v. Frazier* (2005) 128 Cal.App.4th 807, 828.) While defendant established that he did not know about Andreini's visit to the property the day before the search, he did not establish that he could not have discovered this fact exercising due diligence. More importantly, he has failed to establish that the search warrant, which was signed on July 29, was based in any part on Andreini's visit of the same day.³ As the trial court found, there is simply no evidence that the search warrant was improper or that Andreini's visit at the direction of law enforcement played any role in obtaining the search warrant.

Defendant contends that once evidence of a *possible* illegality in the search came to light, the trial court had a duty to investigate it. Defendant cites no authority for this proposition, but instead equates it with a court's duty to inquire into conflicts between counsel and client or juror misconduct. However, and to the contrary, absent a proper showing by defendant, a trial court is directed *not* to entertain a suppression motion during trial. (*People v. Smith, supra*, 30 Cal.App.3d at p. 280 [although the trial court chose to entertain a belated suppression motion at trial, "it was incumbent upon the court not to do so"].)

³ Neither the search warrant, nor the affidavit of probable cause supporting it, is in the record on appeal.

C. *Ineffective Assistance of Counsel/Open Fields Doctrine*

Defendant contends any failure by defense counsel to investigate and bring a timely motion to suppress was ineffective assistance of counsel. Again, he has failed to make the proper showing.

"Defendant has the burden of proving ineffective assistance of counsel. [Citation.] To prevail on a claim of ineffective assistance of counsel, a defendant "must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice.'" [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 389.) Defendant has failed to show prejudice.

As explained *ante*, defendant has failed to show that Andreini's visit to the property had any effect on obtaining the search warrant. Further, even a warrantless search of the Balis Bell Road property would have been legal under the "open fields" doctrine.⁴ In *Oliver v. United States* (1984) 466 U.S. 170 [80 L.Ed.2d 214], the United States Supreme Court revived the "open fields" doctrine, announced in *Hester v. United States* (1924) 265 U.S. 57, 59 [68 L.Ed. 898, 900], which holds the special protection afforded by the Fourth Amendment does not apply to open fields. The *Oliver* court held that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the

⁴ Defendant does not respond to the People's argument that the search was legal under the "open fields" doctrine.

home." (*Oliver v. United States, supra*, 466 U.S. 170 at p. 178 [80 L.Ed.2d at p. 224].) "In defining 'open fields area,' the court noted that the term 'may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither "open" nor a "field" as those terms are used in common speech.' [Citation.] A thickly wooded area, for example, may be considered an open field for the purposes of the Fourth Amendment analysis. [Citation.]" (*People v. Channing* (2000) 81 Cal.App.4th 985, 990-991.)

The evidence supports a finding that the marijuana gardens found at the Balis Bell Road property qualified as "open fields." The property was hilly terrain, 25 miles from town, accessible only by a seven-mile gravel road. The nearest house was three miles away. There was only a travel trailer on the property and the marijuana garden closest to the trailer was one-eighth of a mile away, "not like next door in a residential area."

In *People v. Messervy* (1985) 175 Cal.App.3d 243 (*Messervy*), defendant grew marijuana on leased land in a wilderness area; the marijuana was a quarter mile from a mobile home-type trailer. In affirming denial of his motion to suppress, the court found defendant "had no right to an expectation of privacy concerning the crop of marijuana." (*Messervy, supra*, 175 Cal.App.3d at p. 246.) The same is true here. Any suppression motion would have failed.

II

On-Bail Enhancements

The information in this case consolidated three separate cases. In each of counts IV and V, arising from the August 2010 search, the information alleged defendant was released on bail and on his own recognizance in the prior case (arising from the July 2009 search). In each of counts VIII and IX, arising from the October 2010 traffic stop, the information alleged defendant was released on bail and on his own recognizance in each of the two prior cases. Thus, a total of six on-bail enhancements were alleged.

The trial court sentenced defendant on *each* on-bail enhancement.⁵ Defendant contends the on-bail enhancements for each count other than the two enhancements on count VIII, the principal term for sentencing purposes, must be stricken as an unauthorized sentence. The People concede the error. We agree with the parties.

In *People v. Tassell* (1984) 36 Cal.3d 77 (overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401), our Supreme Court distinguished between two types of enhancements: "[Penal Code s]ection 1170.1 refers to two kinds

⁵ In count VIII, the court sentenced defendant to the low term of two years plus two years for each of the two on-bail enhancements, for a total of six years. In count IV, the court sentenced him to one-third the midterm (eight months) for both the offense and the enhancement, for a total of 16 months. The sentences on counts V and IX were similar, but concurrent.

of enhancements: (1) those which go to the nature of the offender; and (2) those which go to the nature of the offense. Enhancements for prior convictions--authorized by sections 667.5, 667.6 and 12022.1--are of the first sort. The second kind of enhancements--those which arise from the circumstances of the crime--are typified by sections 12022.5 and 12022.7: was a firearm used or was great bodily injury inflicted? Enhancements of the second kind enhance the several counts; those of the first kind, by contrast, have nothing to do with particular counts but, since they are related to the offender, are added only once as a step in arriving at the aggregate sentence." (*People v. Tassell, supra*, 36 Cal.3d at p. 90, fn. omitted.)

The on-bail enhancement of Penal Code section 12022.1 goes to the nature of the offender and does not attach to a particular count. Instead, it is added only once as the final step in computing the final sentence. Accordingly, only two on-bail enhancements are permissible; the other four must be stricken.

DISPOSITION

The on-bail enhancements imposed for counts IV, V, and IX are stricken. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting this modification and to forward a certified

copy of the amended abstract of judgment to the California Department of Corrections and Rehabilitation.

DUARTE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.