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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JERRY CLIFFORD BRIANT,

Defendant and Appellant.

E060328

(Super.Ct.No. SWF1102106)

OPINION

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik, Judge.

Affirmed in part, reversed in part with directions.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, and Peter Quon, Jr., Randall D.
Einhorn, and Martin E. Doyle, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Jerry Clifford Briant of one count of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a), count 1), two counts of receiving stolen property (Pen. Code,¹ § 496, subd. (a), counts 2 and 3), one count of being a felon in possession of ammunition (Pen. Code, former § 12316, subd. (b)(1), count 5), and one count of possession of drug paraphernalia (Health & Saf. Code, § 11364, count 6). Defendant pleaded guilty to having served a prior prison term within the meaning of section 667.5, subdivision (b). The court sentenced defendant to an aggregate state prison term of five years, including consecutive terms of two years for count 1, eight months each for counts 2, 3, and 5, and one year for the prison prior, as well as a sentence of 100 days with respect to count 6 to be served concurrently.

On appeal, defendant raises five issues. First, he contends that the sentence on either count 2 or count 3 must be stayed, pursuant to section 654. Second, he argues his conviction on either count 2 or count 3 must be set aside for lack of substantial evidence because, though he possessed stolen items belonging to two individuals, those items were all stolen on a single occasion, and were discovered in a single bag. Third, defendant argues that his *Pitchess*² motion was improperly denied, and asks that we review in camera the documents submitted to the trial court by the Riverside County Sheriff's Department pursuant to that motion for any abuse of discretion by the trial court. Fourth,

¹ Further undesignated statutory references are to the Penal Code.

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

defendant argues that all of his convictions should be reversed, because in conducting the search that revealed the evidence against him, the officers executing the warrant violated the “knock and announce” principle, codified in section 1531. Finally, defendant argues that, pursuant to Proposition 47, we should set aside the sentences imposed with respect to counts 1, 2, and 3, deem those counts to be misdemeanors, and remand the matter to the trial court for resentencing.

For the reasons stated below, we agree that defendant’s second conviction for receiving stolen property must be reversed, thereby mooted his arguments regarding the application of section 654. We affirm the judgment in all other respects.

I. FACTS AND PROCEDURAL BACKGROUND

On July 14, 2011, Riverside County Sheriff’s deputies executed a search warrant at defendant’s residence. After knocking and demanding entry, and waiting 10 to 15 seconds, the deputies forced entry into the house, discovering defendant and his 17-year-old son inside; defendant was in his bed in the master bedroom, his son was in bed in another bedroom.

During the search, the deputies discovered, as relevant to this appeal, a small plastic bag containing methamphetamine, a glass pipe for smoking methamphetamine, 14 rounds of .22-caliber ammunition, and a plastic bag containing various documents belonging to two individuals, a woman (victim 1) and her then-husband (victim 2). Victim 1 testified at trial that her wallet had been stolen in April 2011 and had contained the recovered documents, including her credit cards, her checkbook, her Social Security

number, her driver's license, and her permanent resident alien card, as well as victim 2's driver's license.³ Neither victim knew defendant, and neither had given him permission to possess their documents. At trial, defendant denied owning any of the items, or knowing that any of them were inside his house.

II. DISCUSSION

A. The Evidence at Trial Was Sufficient Only to Support a Single Offense of Receiving Stolen Property.

Defendant argues that the evidence presented at trial was sufficient only to support his conviction on a single count of receiving stolen property. We agree.

“Where a defendant receives multiple articles of stolen property at the same time, this amounts to but one offense of receiving stolen property.” (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 461 (*Mitchell*)). Although commonly referred to as “receiving stolen property,” the offense described in section 496, subdivision (a) “may be committed in a number of ways, to wit, buying, receiving, concealing, selling, withholding, or aiding in concealing, selling, or withholding stolen property.” (*Mitchell, supra*, at p. 462; see § 496, subd. (a).) When the People's theory is that the defendant concealed or withheld stolen property from the owner, the People need not prove when the defendant received the property. Nevertheless, under this theory, if the People prove only that the defendant possessed and held items of stolen property on a single date, even if the items were stolen

³ Defendant was not accused of having been the one who stole victim 1's wallet; security video showed two other individuals did that.

from different owners at different times, the defendant can be convicted of only one violation of section 496, subdivision (a). (See *Mitchell*, *supra*, at pp. 462-463.)

The facts of *Mitchell* are instructive, and indistinguishable from the present case in any meaningful respect. In that case, among other things, the defendant was accused of receiving stolen checks of one victim, and a Discover card belonging to another victim, all of which were discovered by police in her car on December 20, 2004. (*Mitchell*, *supra*, 164 Cal.App.4th at p. 449.) She was charged with two counts of receiving stolen property on that basis. (*Id.* at p. 461.) There was no evidence the defendant had personally stolen the property of either victim, or any evidence as to when she came into possession of the items. (*Id.* at p. 463.) As such, “defendant’s guilt turned on when she concealed or withheld the property from its owner.” (*Ibid.*) The court of appeal concluded that “[b]ecause the evidence showed defendant possessed both the checks of [the first victim] and the Discover card of [the second victim] on or about December 20, 2004, she could not be convicted on both offenses.” (*Ibid.*)

Here, the evidence at trial established that the items belonging to victim 1 and victim 2 were stolen at the same time, in April 2011, by someone other than defendant. There was no evidence as to when defendant received the items, or any evidence that he bought or sold the items; rather, the People presented evidence that the items were in his possession at his residence on July 14, 2011, when the search warrant was executed. Under *Mitchell*, this evidence is sufficient to support only a single count of receiving stolen property.

People v. Morelos (2008) 168 Cal.App.4th 758, relied on by the People, is distinguishable on its facts. In that case there was some evidence—namely, the admission of the defendants—that the various receiving counts involved “different property stolen from different victims at different times.” (*Id.* at pp. 762-763.) There was no evidence that they had received the stolen property on a single occasion. (*Id.* at p. 763.) As such, the jury reasonably could infer that the goods were not received at the same time or in the same transaction, thereby supporting multiple punishment for multiple receiving counts. (*Ibid.*) Here, the evidence does not support a similar inference.

Neither does *People v. Correa* (2012) 54 Cal.4th 331 require a contrary result. In that case, the Supreme Court upheld the defendant’s conviction and punishment for seven counts of being a felon in possession of a firearm, among other things, based on police discovery of his cache of seven weapons. (*Id.* at pp. 334-335.) This holding rested, however, on specific statutory language defining possession of each weapon to be a “distinct and separate offense.” (*Id.* at p. 342.) No similar statutory language applies to the present case.

Because we find defendant’s conviction on one of the two counts of receiving stolen property must be reversed, his argument that the punishment for that second count must be stayed pursuant to section 654 is moot.

B. Defendant Has Demonstrated No Error With Respect to Denial of His *Pitchess* Motion.

Defendant asks this court to independently review records submitted to the trial court by the Riverside County Sheriff's Department for in camera review in relation to his *Pitchess* motion. The People have "no objection" to this request. As best can be determined, however, there are no such records.

Under *Pitchess*, "on a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer accused of misconduct against the defendant. [Citation.] . . . If the defendant establishes good cause, the court must review the requested records in camera to determine what information, if any, should be disclosed. [Citation.] Subject to certain statutory exceptions and limitations [citation], 'the trial court should then disclose to the defendant "such information [that is relevant to the subject matter involved in the pending litigation.]"' [Citations.]" (*People v. Gaines* (2009) 46 Cal.4th 172, 179.)

Defendant filed a *Pitchess* motion, which was heard by the trial court on March 29, 2013. But the trial court's minute order relating to the motion does not indicate that any documents were submitted to the trial court for in camera review, and no such documents exist in the record on appeal, or in the records of the trial court. Rather, the minute order indicates that the motion was simply denied; apparently, the trial court found no good cause to order documents be submitted for in camera review. On appeal, plaintiff has articulated no specific argument as to why this decision was erroneous,

simply assuming or asserting—without citation to the record or any specific argument—that good cause was established.

We cannot review records that do not exist, even when the parties agree that we should do so. Defendant has failed to demonstrate any error with respect to the trial court’s denial of his *Pitchess* motion.

C. Defendant’s Trial Counsel Did Not Perform Inadequately by Failing to Raise Purported Violation of Knock and Announce Principle.

Defendant asserts that the deputies who searched his home failed to comply with the notice provisions of section 1531 by forcing entry into his residence too quickly—waiting only 10 to 15 seconds before entry—thereby violating his constitutional rights. He argues that, based on that purported violation, his attorney should have moved to suppress the evidence discovered in the search, which formed the basis for his convictions. Because his attorney did not make such a motion, or otherwise raise the issue, defendant contends he was denied the effective assistance of counsel. We disagree.

“In *Wilson v. Arkansas* (1995) 514 U.S. 927, 929 . . . the Supreme Court held that the ‘common-law “knock and announce” principle forms a part of the reasonableness inquiry under the Fourth Amendment.’ That principle has long been codified under Penal Code section 1531, which states: ‘The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.’” (*People v. Martinez* (2005) 132 Cal.App.4th 233, 242.) However, in *Hudson v. Michigan* (2006) 547 U.S.

586 (*Hudson*), the Supreme Court of the United States held that the exclusionary rule, applicable to warrantless home searches and arrests, is inapplicable to violations of the knock and announce rule. (*Id.* at p. 594 [“What the knock-and-announce rule has never protected, however, is one’s interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.”].) California courts have followed *Hudson*. (*In re Frank S.* (2006) 142 Cal.App.4th 145, 151-152 (*Frank S.*.)

We need not address the question of whether the 10 to 15 seconds that the deputies who searched defendant’s residence waited before forcing entry was adequate under section 1531. *Hudson* and *Frank S.* hold that violation of the knock and announce principle does not justify application of the exclusionary rule. Had defendant’s trial counsel made a motion to suppress evidence based on purported violation of the knock and announce rule, the motion would have been properly denied, regardless of whether a violation of the knock and announce rule was found.

Defendant admits as much, but suggests that had the purported knock and announce violation been raised, the trial court’s rulings on motions to suppress evidence on other grounds, and to disclose the identity of a confidential informant, would have been different. This argument fails for a variety of reasons. Among other things, the argument was raised for the first time in defendant’s reply brief, and is therefore waived. (See *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th

1277, 1292, fn. 6 [“Arguments presented for the first time in an appellant’s reply brief are considered waived.”].) Also, the argument rests on pure speculation, and is therefore insufficient to raise a reasonable probability that defendant would have obtained a more favorable result if his trial counsel had acted differently. (See *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241 [to demonstrate ineffective assistance of counsel, a defendant “must prove prejudice that is a “demonstrable reality,” not simply speculation”].)

In short, defendant has not demonstrated that if his trial counsel had made a motion to suppress evidence based on purported failure to comply with the knock notice requirement of section 1531, the motion would have been successful, or defendant otherwise would have obtained a more favorable result. The absence of such a showing, in turn, requires us to conclude that his counsel’s representation was not deficient.

D. Proposition 47 Does Not Empower This Court to Reduce His Convictions for Methamphetamine Possession and Receiving Stolen Property to Misdemeanors, as Defendant Requests.

Defendant understands Proposition 47, enacted in November 2014, combined with a judicial presumption regarding retroactive application of legislation that mitigates punishment, to require his convictions for possession of methamphetamine and receiving stolen property be reduced to misdemeanors, and that the matter be remanded so that he may be resentenced accordingly. We disagree.

No part of the Penal Code is retroactive, unless expressly so declared. (§ 3; *People v. Brown* (2012) 54 Cal.4th 314, 319.) The Proposition 47 initiative is silent about its application to cases that are not yet final on appeal, such as defendant’s.

In *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), the court established the principle that a reduction in punishment yields an “inevitable” intrinsic inference of retroactive application to all cases not yet final on appeal absent some form of saving clause from which a court can find an intent of prospective application. (*Id.* at pp. 744-745, 747-748.) However, at least arguably, Proposition 47 has the functional equivalent of such a savings clause, namely, a statutory remedy whereby defendants previously sentenced may petition for recall of sentence. (§ 1170.18.) In *People v. Yearwood* (2013) 213 Cal.App.4th 161, the court of appeal applied *Estrada* to hold that Proposition 36—enacted in November 2012, and creating statutory remedy for previously sentenced defendants (§ 1170.126) similar to that of Proposition 47—was not retroactive and did not apply to defendants sentenced before the effective date of the law. (*Yearwood, supra*, at pp. 173-174.)

The California Supreme Court is currently reviewing the issue of the retroactivity of Proposition 36.⁴ Given the present state of the law, however, we find it most appropriate to follow *Yearwood* and *Estrada* and hold that Proposition 47 is not retroactive, and does not permit defendant to receive automatic resentencing. Instead, we

⁴ See, e.g., *People v. Conley*, review granted Aug. 14, 2013, S211275.

conclude that he must pursue his statutory remedy to petition the trial court for recall of sentence, resentencing, and a determination of dangerousness. (§ 1170.18; *Yearwood, supra*, 213 Cal.App. 4th at pp. 170, 177.)

III. DISPOSITION

The judgment is reversed as to count 3 and affirmed as to all other counts. The result is a reduction of eight months in defendant's aggregate sentence. The trial court is directed to correct the abstract of judgment to reflect the foregoing. The trial court is further directed to forward the corrected abstract to the Department of Corrections and Rehabilitation.

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HOLLENHORST

Acting P. J.

We concur:

MILLER

J.

CODRINGTON

J.