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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ISIDRO SILVA HAROS,

Defendant and Appellant.

F061022

(Tulare Sup. Ct. No. VCF225836A)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Gerald F. Sevier, Judge.

Eloy I. Trujillo, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Heather S. Gimle, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

This appeal involves a judgment of conviction relating to possession and transportation of marijuana. The appellant was the subject of a surveillance project conducted by a special unit of the Tulare County Sheriff's Department. The surveillance activity was based on information provided by a confidential informant. The appellant contends, among other things, that his right to a fair trial was compromised by nondisclosure of the identity of the informant and denial of the right to cross examine the informant. We will affirm the judgment.

STATEMENT OF THE CASE

On June 21, 2010, appellant was convicted of felony transportation of marijuana (Health & Saf. Code, § 1360, subd. (a)) and misdemeanor possession of marijuana (Health & Safe. Code, § 11357, subd. (a)) by jury verdict. On September 2, 2010, the court denied appellant probation and sentenced appellant to the upper term of four years in state prison on the transportation count. The court did not impose any prison time on the possession count. The court initially awarded 98 days of custody credits and, after multiple applications by appellant, awarded 100 days of custody credits.

STATEMENT OF FACTS

The Confidential Informant

On August 13, 2009, the Tulare County Sheriff's Tactical Enforcement Personnel (STEP) unit received information from a confidential informant about an impending narcotics transaction in northern Tulare County. The informant advised Sheriff's Detective Richard Ramirez that an unidentified individual from Stockton was trying to sell 100 pounds of marijuana for \$200 a pound. The informant arranged a "buy" in the parking lot of the Orosi Mini Mart at Avenue 416 and Road 125 for the afternoon of August 13, 2009. On August 13, detectives conducted surveillance of the area around the

mini mart and watched the confidential informant meet with potential suppliers. However, the individuals who met with the informant did not have the contraband and set the buy for the next day. On August 14, 2009, Detective Ramirez received another phone call from the informant. The informant also said a brown GMC pickup truck and a silver Mercedes SUV would be involved in a transaction in the Orosi area. The informant indicated the two vehicles would meet in the parking lot of the Orosi Mini Mart at about 3:30 p.m.

The Surveillance

The STEP unit formed a surveillance detail based upon the informant's information. Detective Ramirez observed the brown GMC truck arrive at the Orosi Mini Mart and then depart down Avenue 416 toward the City of Dinuba. The surveillance detail followed the GMC truck to an auto parts store in Dinuba. According to Detective Ramirez, a silver Mercedes SUV arrived a few minutes later and parked near the GMC truck. The driver of the GMC truck got out of and walked behind his vehicle and spoke with the driver of the Mercedes for five minutes. Detective Ramirez testified he could not determine the identity of the SUV driver. The driver of the GMC truck returned to his vehicle and departed, with the Mercedes following behind him. Both vehicles turned westbound onto El Monte Way, which turns into Avenue 416, and headed for the Kingsburg area. The two vehicles remained in tandem as they approached the Avenue 416 overpass on Highway 99. The vehicles then turned southbound onto Highway 99 and proceeded in the direction of Visalia. The two vehicles eventually traveled on separate routes.¹ The GMC truck exited at Avenue 384 and went to a rest stop. Taking a different route, the SUV drove toward Traver, took the Merritt Drive exit, and parked at a

¹ Detective Ramirez testified that STEP officers conducted a surveillance of both the SUV and the GMC truck. Several members of the STEP team were stationed inside a van at the rest stop.

Tri-M Market store. Detective Ramirez saw appellant get out of the SUV and talk on a cell phone. Appellant stood in front of the market for five minutes, walked back to the driver's side of the SUV, and then drove northbound on Highway 99.

The SUV proceeded to a gas station near or adjacent to the Avenue 384 rest area and parked near the same GMC truck on the north portion of the gas station property. Ramirez said the only thing that divided the gas station property from the rest area was an overpass on Highway 99. The Mercedes departed 5 to 15 minutes after it parked next to the GMC truck. Detective Ramirez testified that he watched the SUV for about 45 minutes – from the time it arrived at the parking lot of the Dinuba auto parts store. Ramirez was positioned 45 to 50 yards away when the two vehicles were at the rest stop. He could not see appellant at the rest stop. However, he could see the back of the SUV was open and several people were looking inside the rear of the SUV. Ramirez did not see anyone place anything inside the SUV or remove anything from the SUV. Ramirez did see the driver and a passenger get out of the SUV. Detective Bari Molyneux testified that he observed someone in a black T-shirt walk away from the vehicles and then return to the rear of the vehicles. The two vehicles eventually drove away from the rest area.

Facts of the Offenses

On the afternoon of August 14, 2009, Tulare County Sheriff's Deputy Michael Yandell was assisting the STEP unit. Deputy Yandell saw a silver Mercedes SUV pass a truck/trailer rig on northbound Highway 99 near the Road 384 rest stop in the London area of Tulare County. Deputy Yandell clocked the SUV at 74 miles per hour. Deputy Yandell initiated a traffic stop of the SUV, which came to rest near the 18th Avenue exit on Highway 99.

Yandell approached the SUV and found appellant in the driver's seat and another individual in the front passenger seat. Appellant and his passenger did not speak English. Yandell was able to speak to appellant in Spanish and asked to see his license. When

Yandell made the request, he noticed a strong odor of marijuana emanating from the interior of the SUV. Yandell asked appellant about the aroma and asked whether he had a marijuana card. Appellant shook his head and answered “no” after Yandell mentioned the word “marijuana.”

Yandell requested that appellant step out of the vehicle and appellant complied. Yandell removed a large folding knife from appellant’s belt for reasons of safety. As Yandell spoke with appellant, the passenger in the SUV fled the scene on foot. Yandell stayed with appellant, advised dispatch that the passenger had fled the scene, and asked appellant to sit in the back seat of his patrol car.

Yandell opened the tailgate of the SUV and found three large trash bags filled with marijuana. The bags contained 23 individually-wrapped one-pound packages of processed marijuana. Detective Ramirez testified that the 23 pounds of individually-wrapped packages of processed marijuana had a value of \$92,000, was possessed for purposes of sale, and could not have been held for personal use.

Defense Evidence

Appellant testified on his own behalf. He testified that he was a friend of Roberto “Beto” Rodriguez, who owned a Mercedes SUV. Appellant and Beto had worked together at an Oakdale dairy some six years earlier. Appellant said he was stopped at a store near Fresno when Beto asked him to drive Beto’s cousin, Primo, in the Mercedes SUV. Appellant was unemployed at the time Beto made the request. Appellant testified he drove Beto’s SUV for about three hours and made stops at several stores at Primo’s request. The first store was located near the outskirts of Fresno. The second store was located in Tulare County and “some guys” greeting Primo there. Appellant said he and Primo went to a third store and then to the rest area.

Appellant admitted driving the Mercedes SUV to the rest area. Appellant testified that when he stopped at the rest area, he stayed in the driver’s seat while Primo got out of

the SUV to speak to some people. Appellant said he eventually got out of the SUV to use the restroom. When appellant returned to the SUV, Primo said they could leave the rest area. Appellant said he did not know there was marijuana in the SUV at that point in time. After they departed the rest area, appellant detected an unknown odor in the SUV. Appellant began to ask Primo about the odor when an officer pulled up behind the appellant, turned on the emergency lights, and detained the SUV.

DISCUSSION

I. THERE WAS NOT A REASONABLE POSSIBILITY THAT NONDISCLOSURE OF THE IDENTITY OF A CONFIDENTIAL INFORMANT DENIED APPELLANT OF A FAIR TRIAL UNDER EVIDENCE CODE SECTION 1042, SUBDIVISION (D)(7).

Appellant contends the unsealed portion of the record reveals a reasonable possibility that nondisclosure of the confidential informant's identity deprived him of a fair trial. He urges this court to independently review the superior court's denial of his motion.

A. Procedural History of Motion

1. The December 10, 2009, In Camera Hearing

On November 19, 2009, appellant filed a motion to disclose the identity of the confidential informant or dismiss charges on the ground "the informant in question is a material percipient witness on the issue of reasonable cause to make an arrest or search without a warrant and the disclosure of that informant's identity is essential to a full and fair determination of a [Penal Code] section 1538.5 suppression motion with regard to an arrest or search that was made without warrant." Appellant attached Detective Ramirez's August 18, 2009, report to his motion. In the narrative portion of that report, Ramirez indicated that the surveillance was based on information from a confidential informant.

On December 10, 2009, the court conducted an in camera hearing based upon the prosecution's opposition to the motion and assertion of privilege. The prosecution

initially asserted that disclosure was not required because the confidential informant was not a material witness to guilt or innocence.

Detective Ramirez testified that he met the confidential informant through an officer with a Kern County narcotics task force team known as South County HIDTA. The Kern County officer advised Ramirez that the confidential informant had helped them with several successful controlled buys of marijuana and methamphetamine. Ramirez also spoke with a Fresno police detective who advised Ramirez that the informant was helping his agency with several large methamphetamine cases.

Ramirez said the informant called him on August 13 and advised that a subject in the Stockton area was dealing in green dope marijuana and selling it for \$2,000 a pound. Ramirez set up a deal in which the informant was going to have law enforcement officers meet with the subject in the Oroquieta area. The subject from Stockton arrived and advised the informant that he only had 10 pounds with him and needed to retrieve more in Stockton. At that time, the informant did not see any marijuana, and the subject left. Ramirez contacted the informant the next day, and the informant advised that the Stockton subject was returning to the Oroquieta area. Ramirez arranged for the STEP unit to conduct surveillance.

Ramirez said the subjects arrived in a brown Chevrolet truck at a store near Avenue 416 and Road 125 in the Oroquieta area. They contacted the informant, said they were in town, but noted that they had to drive to a different location to pick up the marijuana. The informant called Ramirez, who arranged for law enforcement officers to track the suspect vehicle. The officers watched the brown truck proceed westbound down Avenue 416 to an auto parts store at Crawford Street in Dinuba. The truck met up with a gray Mercedes. The driver of the truck exited his vehicle, spoke with the driver of the Mercedes, and the two vehicles drove toward the Kingsburg area. The surveillance team followed them from the auto parts store to southbound Highway 99. The two

vehicles parked in the rest stop at Highway 99 and Avenue 384. According to Ramirez, all of the parties from both involved vehicles alighted. The informant met them there, and they went to the tailgate area of the Mercedes.

Ramirez testified that several subjects looked in the tailgate area of the Mercedes, and then the informant got in his own vehicle and left, leaving the occupants of the brown truck and gray Mercedes at the scene. Ramirez said two subjects got into the truck and next left the scene, going over the overpass and stopping in the middle of a roadway. Law enforcement officers detained the truck for blocking a roadway. The Mercedes departed northbound on Highway 99 and was stopped for speeding. Ramirez said the informant was not present when the two vehicles were detained. The informant provided him with accurate descriptions of the truck and Mercedes before the vehicles arrived at the meeting point. He also testified that the informant provided accurate information about the location of the meeting point and the number of people involved.

Ramirez testified the deputy who made the stop of the Mercedes detected a strong odor of marijuana coming from the vehicle. Detective Ramirez confirmed the informant was only present at the rest stop and not at any other place or point in time during the surveillance process. The court found the informant was reliable and that “given the charges presently existing against each of the accused, that disclosure of the reliable informant is not required, nor is there any ... need for such disclosure to protect the rights of any of the defendants, and I further find that based upon the representations made, that the informant is not a material [witness] on the issue of guilt or innocence.”

The informant testified under oath and said he saw plastic bags filled with marijuana in the tailgate of the Mercedes. The informant confirmed Detective Ramirez’s testimony that the trunk of the Mercedes was open, and that the occupants of both vehicles were in a physical position to view the contents. The informant said at least two occupants of the truck and the Mercedes suggested that additional marijuana was

available and two other occupants of those vehicles heard the statements. The informant testified, “[T]hey just said, you know, take these [bags of marijuana] for now and I’ll give you the rest later.” The informant confirmed that he did not see law enforcement officers detain the pickup truck and Mercedes because he was already gone from the scene.

2. The December 21, 2009, Preliminary Hearing

At the preliminary hearing held December 21, 2009, appellant’s trial counsel argued “[t]his entire case is based on observations and surveillance that are the result and the direct result of information being supplied to law enforcement by this confidential informant. [¶] In this case, the confidential informant was the only person under the direction of law enforcement who was communicating directly to these individuals [associated with the pickup truck and Mercedes].” During an exchange of views with appellant’s trial counsel, the court recalled that “part of my reason [in denying disclosure of the informant’s identity at the in camera hearing] was that the confidential informant is not a material witness” At the conclusion of the discussion with counsel, the court reiterated its ruling that “the People at this hearing did not posit its probable cause on ... anything other than the officer’s observations.”

3. The Renewed Motion at Trial to Disclose the Informant’s Identity

At trial on July 19, 2010, appellant’s counsel argued: “The only person that was in a position to see who was exercising control of this marijuana shortly before the stop is the confidential informant in this case, and I think that certainly is relevant to the issue of his guilt or innocence.” Counsel further argued that “none of these officers ... can testify that he was present when this person showed the marijuana to the confidential informant. We don’t know because none of ‘em were in position.” Defense counsel ultimately acknowledged he was seeking to renew the motion to disclose the identity of the confidential informant. To the extent appellant’s counsel renewed the motion to disclose,

the court denied the motion at that point but indicated it would review the transcript of the first in camera hearing.

On July 20, 2010, the court instructed the jury and then conferred with counsel outside the presence of the jury. The court explained, “[W]hat I intend to do is to follow up on the issue relating to the informant, go in in camera and have Detective Ramirez provide testimony. It may be redundant to what the record already is.” At the in camera hearing, the prosecutor acknowledged, “Detective Ramirez was the investigating officer and also the confidential informant’s handler and was the person primarily dealing with the confidential informant.”

On direct examination during the in camera hearing, Detective Ramirez testified the informant provided him with information about the vehicles in the case. Ramirez testified he conducted surveillance and said the informant was not present when the surveillance started at the auto parts store or any point prior to the rest stop. Ramirez said the informant did meet with individuals in the brown GMC truck and the gray Mercedes SUV at the rest stop. Ramirez estimated the informant was with those individuals for “[m]aybe five to 10 minutes.” Ramirez said the informant left at that point and was not present when Detective Yandell conducted his vehicle stop or when any of the evidence was examined. He said the informant was not involved in the case at all after he left the rest stop. Ramirez acknowledged that the informant negotiated with appellant and several other parties to the buy. Ramirez said the informant did not know Primo, the individual who was the passenger in the front seat of the SUV. The informant never indicated whether he had any prior dealings with Primo.

At the conclusion of Detective Ramirez’s testimony, the court tentatively observed: “[I]nasmuch as ... this person [the informant] was a percipient witness to what went on at the rest stop, considered in tandem, to use the phrase, with Mr. Haros’s claim that he went to the restroom and had no idea how the marijuana got into the vehicle, that

the likely correct ruling is to require disclosure of the names of all people known to law enforcement of people present at the rest stop.” Proceedings resumed on July 21, 2010, outside the presence of the jury. The court stated that it had conducted an in camera hearing on the preceding afternoon and then reviewed the transcript of the December 10, 2009, in camera hearing, at which the confidential informant testified under oath. The court concluded: “I have reviewed that testimony, and part of it goes squarely to the issue of whether or not there’s a reasonable possibility that the person whose identity is sought can give evidence on the issue of guilty which might result in defendant’s exoneration... [¶] I’ve considered that standard. I’ve reviewed the testimony, and it is my determination that there is no reasonable possibility that the undisclosed informant could give evidence that might result in the defendant’s exoneration.” The court denied appellant’s renewed motion to disclose the identity of the confidential informant.

B. Applicable Law

Evidence Code section 1042, subdivision (d) provides in relevant part that if “the court concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial,” the confidential informant’s identity must be disclosed or charges dismissed. The People contend that the standard of review for a trial court’s determination whether to order disclosure after an in camera hearing is not settled, citing *People v. Gordon* (1990) 50 Cal.3d 1223, 1246, among other cases. Although *Gordon* states that the law in this area is not settled, the California Supreme Court in *People v. Borunda* (1974) 11 Cal.3d 523, 529 (*Borunda*) has held that the issue is one of law and subject to de novo review. (See *People v. Otte* (1989) 214 Cal.App.3d 1522, 1535-1536.)

Borunda has been cited with approval by numerous cases addressing disclosure of a confidential informant’s identity. (See, e.g., *People v. Lawley* (2002) 27 Cal.4th 102, 159; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123.) In *People v. Lee* (1985) 164 Cal.App.3d 830 (*Lee*), this court addressed a trial court’s decision on disclosure of a

confidential informant after an in camera hearing. We cited to *Borunda*, exercised independent judgment on whether the facts required disclosure of the confidential informant, and concluded the trial court had erred. (*Lee, supra*, at pp. 835, 840.)

Following our holding in *Lee*, we will apply a de novo standard of review in this case.

The confidential informant privilege (Evid. Code, § 1041) is necessary to promote the free flow of information to law enforcement. Anonymity provides protection to the informant and the public interest would suffer if an informant's identity always were discoverable. (*People v. Hobbs* (1994) 7 Cal.4th 948, 958.) Although retaining confidentiality promotes a strong public interest, fundamental fairness requires that the privilege be limited in its scope. “ ‘Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.’ [Citation.]” (*Id.* at p. 959.)

With specified exceptions, “a public entity has a privilege to refuse to disclose the identity of a person who has furnished information [to a law enforcement officer] purporting to disclose a violation of a law of ... this state” (Evid. Code, § 1041, subd. (a).) Moreover, “otherwise admissible evidence of information communicated to a peace officer by a confidential informant” may be introduced in a criminal proceeding under specified conditions “ without requiring that the name or identity of the informant be disclosed” (Evid. Code, § 1042, subd. (c).) The state's interest in preserving confidentiality, however, must be balanced against the defendant's right to due process and a fair trial. (*People v. Lee, supra*, 164 Cal.App.3d at p. 835; Heafey, Cal. Trial Objections (Cont.Ed.Bar 10th ed. 2011) Privilege for Identity of Informer, § 44.9, pp. 599-600.)

When there is a “reasonable possibility” that nondisclosure might deprive the defendant of a fair trial, the confidential informant’s identity must be disclosed. (*People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1080.) To establish a reasonable possibility that an informant could give exonerating testimony, the defendant must show something more than “sheer speculation,” but need not establish the informant would give favorable testimony. (*People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1043-1044.)

C. Analysis

At the December 10, 2009, in camera hearing, the confidential informant testified under oath that Detective Ramirez’s testimony about the Mercedes SUV was accurate, i.e., that the tailgate of the SUV was filled with marijuana and the occupants of both the SUV and the GMC pickup truck were in a physical position to view the contents of the SUV. The informant said the occupants of the two vehicles “were around me when they showed me the plastic bags of the weed.” The informant said none of the occupants of the two vehicles made statements suggesting surprise about the contents of the hatch of the Mercedes SUV. The informant explained that “a couple guys” from the GMC pickup truck and the Mercedes SUV said they wanted to give the informant the bags in the tailgate area and “there was another car that had the rest of the weed, but that was the only weed they had in that car.” The informant further explained that two of the occupants of the pickup and SUV made the statements, and that the other occupants of the two vehicles were in a physical position to hear the comments but said nothing in response to the comments about additional marijuana being made available. According to the informant, the two who spoke said, “[Y]ou know, take these for now and I’ll give you the rest later.”

An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant, on which issue the defendant has the burden of producing some

evidence. Defendant's showing must rise above the level of sheer speculation and reach at least the low plateau of reasonable possibility. The defendant must show that the informant was in a position to perceive the commission or the immediate antecedents of the alleged crime. The fact a confidential informant is a percipient witness to an offense does not mandate disclosure. Rather, disclosure is required only if the defendant makes an adequate showing that the informant can give exculpatory evidence. (*Davis v. Superior Court* (2010) 186 Cal.App.4th 1272, 1276-1277.)

Evidence adduced at an in camera hearing can potentially establish there was no reasonable possibility a particular percipient eyewitness/informer could give evidence on the issue of guilt which might result in a defendant's exoneration. In such a situation, the witness would not be material under the test for materiality established by the California Supreme Court. (*People v. Lanfrey* (1988) 204 Cal.App.3d 491, 502-503.) "[A]n informant is not a 'material witness' nor does his nondisclosure deny the defendant a fair trial where the informant's testimony, although 'material' on the issue of guilt, could only further implicate rather than exonerate the defendant." (*People v. Alderrou, supra*, 191 Cal.App.3d at pp. 1080-1081.)

In this case, officers conducting surveillance observed appellant driving the Mercedes SUV to the rest stop. Appellant himself admitted driving the SUV into the rest stop. Detective Ramirez testified that he observed the occupants of the SUV and the GMC pickup truck gather near the tailgate door of the SUV at the rest stop. Appellant was the driver of the SUV when Officer Yandell conducted a stop of the vehicle. Officer Yandell detected the strong odor of marijuana coming from the interior of the SUV. When Yandell asked appellant about the aroma of marijuana, appellant replied, "No," and shook his head. When appellant testified at trial, he said he did not detect the odor of marijuana before arriving at the rest stop but did become aware of the aroma after leaving the rest stop in the SUV. Appellant claimed he went to the restroom after arriving at the

rest stop and that his passenger, Primo, spoke to other individuals. Detective Ramirez testified that he never saw appellant walk away from the SUV at the rest stop. Ramirez explained there was an open area of 15 to 20 yards between the SUV and the restroom at the rest area. He said, “Nobody ever walked to the restroom. They stayed to the vehicle [sic].” Officer Bari Molyneux testified, “The two subjects that got out of the truck and the two subjects that got out of the SUV all met at the back of the vehicles.” He said they were together at the rear of the vehicles for 10 or 15 minutes. Molyneux said an individual in a black T-shirt did walk away from the vehicles. However, appellant was not that individual because Molyneux personally detained the individual in the black T-shirt at a later point in time.

Nothing in the transcripts of the in camera hearings or trial proceedings suggests a reasonable possibility that the confidential informant could give evidence on the issue of guilt that might exonerate the appellant. Appellant was charged with transportation of marijuana and possession of marijuana for sale. The jury found him guilty of transportation (Health & Saf. Code, § 11360) and misdemeanor possession of more than one ounce of marijuana (Health & Saf. Code, § 11357, subd. (c)), a lesser included offense of possession of marijuana for sale. The elements of the transportation of marijuana are (1) a person transported, concealed, conveyed, or carried marijuana and (2) the person knew of its presence and illegal character. The essential elements of the offense of unlawful possession of a controlled substance are actual or constructive possession in an amount sufficient to be used as a controlled substance with knowledge of its presence and its nature as a controlled substance. Actual or constructive possession is the right to exercise dominion and control over the contraband or the right to exercise dominion and control over the place where it is found. Exclusive possession is not necessary. A defendant does not avoid conviction if his or her right to exercise dominion

and control over the place where the contraband was located is shared with others.

(*People v. Busch* (2010) 187 Cal.App.4th 150, 156-157, 161.)

Appellant was the driver of the Mercedes SUV before reaching the rest stop, when it arrived at the rest stop, and after it departed the rest stop. The SUV contained multiple bags of marijuana emanating an odor in the vehicle that Officer Yandell immediately detected upon stopping the vehicle. Detective Ramirez and Officer Molyneux were part of the STEP surveillance team and did not see appellant go to the restroom at the rest stop. The officers did not see anyone move the bags into the tailgate area of the Mercedes SUV from some other place or vehicle. The confidential informant testified in camera that all occupants of the two vehicles, the SUV and the GMC pickup truck, were present at the rear of the SUV at the rest stop. The informant said two of the occupants commented on the contraband in the tailgate area while the other occupants were in immediate physical proximity and offered no additional input.

Appellant has failed to show, by the production of some evidence, a reasonable possibility that the confidential informant could give evidence on the issue of guilty that might exonerate appellant. (*Davis v. Superior Court, supra*, 186 Cal.App.4th at pp. 1276-1277.) The trial court did not err in declining to order disclosure of the identity of the confidential informant.

II. THE TRIAL COURT DID NOT DENY APPELLANT HIS RIGHTS TO DUE PROCESS, CROSS-EXAMINATION OF ADVERSE WITNESSES, AND THE RIGHT TO PRESENT A DEFENSE BY DENYING HIS MOTION TO DISCLOSE THE IDENTITY OF THE CONFIDENTIAL INFORMANT.

Appellant contends the trial court's denial of his motion to disclose the identity of the confidential informant violated his Sixth Amendment right to cross-examine adverse witnesses at trial. Appellant also contends the in camera procedure deprives criminal

defendants like appellant of their Fourteenth Amendment rights to present a defense and subject the People's case to adversarial testing.

In *People v. Hobbs*, *supra*, 7 Cal.4th at pp. 957-975, the Supreme Court implicitly approved the in camera hearing procedure embodied in Evidence Code section 1042, noting the state had a strong and legitimate interest in protecting the confidentiality of its informants and that the codified rules and privileges were devised to implement that fundamental right. (*People v. Hobbs*, *supra*, at p. 967.) In *People v. Levine* (1984) 152 Cal.App.3d 1058, 1070-1071, the Second Appellate District held the use of an in camera hearing did not deprive a narcotics offender of his constitutional rights to a public trial, to the compulsory attendance of witnesses, to be present and have effective aid of counsel, to confront and cross-examine witnesses, and to due process of law. In *People v. Reel* (1979) 100 Cal.App.3d 415, 420, footnote 1, a case involving an ex-felon in possession of a concealable firearm, the Second Appellate District noted “[t]he constitutionality of the *in camera* proceeding has been upheld.” (Original italics.) In *People v. O’Brien* (1976) 61 Cal.App.3d 766, 774-775, a burglary case, the First Appellate District held that use of an in camera hearing as provided for in Evidence Code section 1042, subdivision (d) did not deprive defendants of their constitutional rights of confrontation, cross-examination, compulsory process, and effective use of counsel. In *People v. Pacheco* (1972) 27 Cal.App.3d 70, 81-82, the First Appellate District observed: “It is the invocation of the basic privilege [of a public entity to decline disclosure of an informant’s identity] that denies the informer’s name to the defendant, not the *in camera* hearing, which is only the method by which the court determines the applicability of the privilege. If the Sixth Amendment were to apply, it would deny the privilege, the right to which has been determined to be valid.” (*Id.* at p. 82, original italics.)

In view of the foregoing authorities, appellant’s challenge to the established in camera hearing procedures set forth in Evidence Code section 1042 must be rejected.

III. THE TRIAL COURT PROPERLY AWARDED APPELLANT 100 DAYS OF CUSTODY CREDITS.

On August 17, 2011, appellant filed his opening brief on appeal, contending the sentencing court erred by not awarding him a total of 100 days of presentence custody credits.

On August 24, 2011, the superior court filed a minute order stating:

“The minute order dated September 2, 2010 and the Abstract of Judgment dated September 15, 2010 is hereby amended to reflect the following:

“Defendant is given credit for 50 days actual time with an additional 50 days statutory conduct credits for a total of 100 days.” (Emphasis omitted.)

Since the superior court granted appellant the requested relief, no further discussion is required.

DISPOSITION

The judgment is affirmed.

Poochigian, J.

WE CONCUR:

Wiseman, Acting P.J.

Detjen, J.