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

THE PEOPLE,

Plaintiff and Respondent,

v.

JEROME DEONTE SIMPKINS,

Defendant and Appellant.

F061396

(Super. Ct. No. BF124369A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Michael B. Lewis, Judge.

Elizabeth Campbell, 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, Stephen G. Herndon and Carlos A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Jerome Deonte Simpkins pled no contest to possessing cocaine base for sale following the trial court's denial of his combined motion to quash the wiretap authorization and suppress evidence obtained from the wiretap and to quash the search warrant and suppress evidence seized during the search of defendant's vehicle. On appeal, he contends the trial court erred in denying the motion. We will affirm.

PROCEDURAL SUMMARY

On September 26, 2008, following a preliminary hearing, the Kern County District Attorney filed an information charging defendant with possessing cocaine base for sale (Health & Saf. Code, § 11351.5; count 1). The information further alleged the offense was committed in association with a criminal street gang to assist in criminal conduct by gang members (Pen. Code, § 186.22, subd. (b)(1)(A)),¹ and that the cocaine base exceeded one kilogram by weight (Health & Saf. Code, § 11370.4, subd. (a)(1)). The information also alleged defendant had suffered a prior felony conviction (Health & Saf. Code, § 11370.2, subd. (a)) and had served a prior prison term (§ 667.5, subd. (b)).

On June 9, 2009, defendant filed a motion entitled "Motion to Suppress Evidence and To Quash and Traverse Wiretaps and Warrant," to which the prosecutor filed an opposition. After a hearing, the trial court reviewed the sealed documents in camera and denied the motion.

On July 28, 2010, defendant pled no contest to count 1, and the prosecutor dismissed the remaining allegations.

On November 15, 2010, the trial court denied probation and sentenced defendant to the middle term of four years in prison.

¹ All statutory references are to the Penal Code unless otherwise noted.

FACTS²

Defendant was under surveillance for selling narcotics. On February 12, 2008,³ a Kern County Superior Court judge signed a sealed court order authorizing the interception of communications to and from two particular cell phones for a 30-day period. Although the phones were not subscribed to by defendant, he was named as a target of the wiretap. (Wiretap No. 01-01.)

On July 9, the same judge signed a sealed court order authorizing the interception of communications to and from a third cell phone, this one subscribed to by defendant, for a 30-day period. Defendant was again named as a target of the wiretap. (Wiretap No. 08-07.)

During the several weeks of the wiretap investigation, officers intercepted hundreds of phone calls. They observed defendant driving various vehicles and meeting people in a variety of locations. They saw him driving a particular black Honda (the black Honda) on four occasions (April 7, June 24, July 18, and July 25).

On July 29, officers attempted to arrest defendant's girlfriend, Latoya Hicks, on a warrant. Latoya refused to pull her car over and drove instead to her house on Geneva Avenue. Latoya parked in the driveway and was arrested there. Meanwhile, the wiretap officer intercepted a conversation between defendant and Latoya's stepmother, who also lived at the Geneva Avenue house. Defendant asked her how many officers were there, if they had dogs, and where the black Honda was parked.

² Because this matter was resolved by a plea, we take the facts from the offense report, the preliminary hearing transcript, and the laboratory analysis, all of which the parties stipulated would serve as a factual basis for the plea.

³ All further dates refer to 2008 unless otherwise noted.

On the morning of August 1, 2008, officers executed a search warrant at Latoya's house. In the house, officers found cocaine and a key that opened the door of the black Honda, but did not start the engine.

Shortly after executing the warrant at Latoya's house, officers went to a vacant house across the street from Latoya's house on Geneva Avenue. There, they executed a search warrant on three vehicles parked in the driveway, one of which was the black Honda. The search of the black Honda revealed a hidden compartment that contained a scale and 15 packages of what appeared to be cocaine. The black Honda also contained some receipts with defendant's name, a flier for a birthday party for Titania Willis, and a business card for the Nile Bar. The wiretap investigation had revealed that defendant was planning a party for Titania Willis at the Nile Bar.

While the officers were searching the vehicles, the wiretap officer intercepted several calls defendant made to a woman who was somewhere in the area of the house on Geneva Avenue, watching the officers conducting the search. Defendant repeatedly asked the woman what the officers were doing. Defendant or the woman referred to the black Honda as defendant's car. Defendant seemed upset and in a panic. He seemed very nervous that officers were searching the black Honda, and he was concerned that search dogs were near it. He said it was not registered to him.

During this search, the wiretap officer called the searching officers to determine their actions so he could confirm that defendant and the woman were talking about these events.

The 15 packages found in the black Honda were confirmed to contain usable amounts of crack cocaine, totaling about 3.35 pounds. This amount of cocaine is generally possessed for purpose of sales. The black Honda also contained a CD bearing defendant's fingerprint.

About 11:50 a.m., defendant called Kelly Goddard and asked her to come to his house to pick him up. He told her things were bad. Officers observed defendant leave

his house and get into a white Buick, which the officers followed and stopped. A search of defendant produced a large bundle of money in his front pants pocket. The bundle contained \$3,700 worth of \$5, \$10, and \$20 bills. Kelly told an officer that the Buick was defendant's, and he had lent it to her. After she picked defendant up, they were going to take her back home and drop her off. Defendant would keep the Buick. When defendant realized the officers were following them, he told Kelly to flee, but she refused and pulled over. When the officers searched the Buick, they found a \$8,040 bundle of \$20 and \$100 bills under the driver's seat. Defendant was transported to his house, where officers were preparing to execute a search warrant.

No drugs were found in the search of defendant's house. Although a canine alerted to the rear quarter panel of a vehicle in the garage, no drugs were found in the vehicle. Officers seized some cell phones, bank account information, and miscellaneous paperwork from the house.

Officers discovered that the black Honda was registered to Tracy White. On August 7, 2008, an officer contacted Tracy and asked her about the black Honda. She said she had bought it about five months earlier from defendant, and she had recently sold it to someone named José. As the officer continued to question Tracy, she ultimately told him that defendant came to her on the afternoon of August 1, 2008, and had her sign paperwork saying she had sold the black Honda to José Reyes. When the officer asked Tracy what vehicles she had seen defendant in, she mentioned the black Honda, a maroon Lincoln Navigator, and a white Buick. She said she had registered the Lincoln Navigator in her name for defendant.

After the district attorney filed charges against him, defendant denied the charges and moved to quash and traverse the wiretaps and warrant, and suppress all evidence obtained as a result of wiretaps, detentions, or searches. Defendant contended that the wiretap interception of his conversations was an unreasonable invasion of his privacy interests, and that any search warrant based on information gained from that interception

was fruit of the poisonous tree. He further argued that the warrant to search the black Honda was not based on probable cause.

All documents submitted in support of the wiretaps were sealed.

DISCUSSION

I. Wiretaps

“‘In general, California law prohibits wiretapping.’ [Citations.] The Presley-Felando-Eaves Wiretap Act of 1988 authorized specified law enforcement officials to apply for a court order to intercept wire communications, but only where there was probable cause to believe the target was involved in the importation, possession for sale, transportation, manufacture, or sale of heroin, cocaine, PCP, or methamphetamine in specified quantities, or in a conspiracy to commit those offenses. [Citation.] In 1995, the Legislature enacted section 629.50 et seq. in order ‘to expand California wiretap law to conform to the federal law.’ [Citation.] Thus, the district attorney or other specified individual could apply to the presiding judge of the superior court (or a designee) for an order to intercept not only wire communications but also ‘electronic digital pager’ and ‘electronic cellular telephone’ communications. [Citation.] The new scheme also expanded the list of target crimes to include murder, solicitation to commit murder, the commission of a crime involving the bombing of public or private property, or aggravated kidnapping. [Citation.] Subsequent amendments added to the list of target crimes the participation in a criminal street gang [citation] as well as felonies involving weapons of mass destruction or restricted biological agents [citation].” (*People v. Leon* (2007) 40 Cal.4th 376, 383-384.)

The judge can authorize a wiretap after making four determinations “on the basis of the facts submitted by the applicant.” (§ 629.52.) First, there must be probable cause to believe that an individual has committed, is committing, or is about to commit a specified offense—such as possessing cocaine for sale. (§ 629.52, subd. (a)(1).) Second, there must be probable cause to believe that the wiretap will intercept communications

regarding the offense. (§ 629.52, subd. (b).) Third, there must be probable cause to believe that the facilities from which the communications are to be intercepted will be used by the person whose communications are to be intercepted. (§ 629.52, subd. (c).) And fourth, it must be shown that “[n]ormal investigative procedures have been tried and have failed or reasonably appear either to be unlikely to succeed if tried or to be too dangerous.” (§ 629.52, subd. (d).) This last requirement is often referred to as the “necessity” requirement. (See, e.g., *People v. Leon*, *supra*, 40 Cal.4th at p. 384.)

Defendant requests that in accordance with *People v. Hobbs* (1994) 7 Cal.4th 948, which governs appellate review of sealed affidavits supporting search warrants, we review the sealed affidavits in this case to determine whether the trial court’s order to seal the affidavits was valid and whether the affidavits demonstrate both probable cause and necessity for issuance of the wiretap authorizations. Pursuant to *Hobbs*, we have carefully reviewed the sealed documents. We find that the facts provided probable cause to believe that defendant was in the business of cocaine sales, that the wiretaps would intercept communications regarding cocaine sales, and that defendant would be communicating through the intercepted lines. The facts further demonstrated that normal investigative procedures were unlikely to succeed and would also jeopardize the ongoing investigation, and thus the wiretap was necessary to investigate the criminal enterprise of defendant and others. Probable cause and necessity supported the authorization of the wiretaps. Furthermore, the documents were properly sealed and must remain so to protect the identities of any informants.

II. Search Warrant

“We review a trial court’s ruling on a motion to suppress evidence under section 1538.5 by applying the substantial evidence test to the factual determinations made by the court, with all presumptions favoring the trial judge’s findings.” (*People v. Manderscheid* (2002) 99 Cal.App.4th 355, 359.) “However, we use our independent judgment to determine whether those facts establish probable cause. [Citation.] We are

prohibited from ordering the suppression of evidence unless federal constitutional standards require us to do so.” (*People v. Lim* (2000) 85 Cal.App.4th 1289, 1296.)

To justify issuance of a warrant, “[t]here must be probable cause to believe that the material sought to be seized will be on the premises to be searched when the warrant is served.” (*People v. Gibson* (2001) 90 Cal.App.4th 371, 380.) “The order issuing a warrant in a criminal case may be set aside only if the affidavit, as a matter of law, does not establish ‘probable cause.’” (*County of Contra Costa v. Humore, Inc.* (1996) 45 Cal.App.4th 1335, 1346.) We thus evaluate the affidavit for probable cause, which “exists when all the circumstances set forth in the affidavit demonstrate a fair probability that contraband or evidence of a crime will be found in a particular place.” (*People v. McDaniels* (1994) 21 Cal.App.4th 1560, 1564.) “‘A reviewing court will consider the totality of the circumstances to determine whether the information contained in an affidavit supporting the application for a warrant establishes a fair probability that a place contained contraband or evidence of a crime. [Citation.] Doubtful or marginal cases are to be resolved by the preference to be accorded to warrants....’ [Citation.]” (*People v. Lim, supra*, 85 Cal.App.4th at p. 1296.) “On appeal, we accord the magistrate’s determination great deference, inquiring only whether there was a substantial basis to conclude that the warrant would uncover evidence of crime.” (*People v. Stanley* (1999) 72 Cal.App.4th 1547, 1554.)

Defendant contends the evidence seized pursuant to the warrant to search the black Honda must be suppressed because the wiretaps were authorized in error and consequently we cannot consider any information gained from the intercepted communications. But we have already concluded the wiretaps were not authorized in error, and we now conclude ample evidence from the wiretaps and other surveillance of defendant provided probable cause to believe drugs would be found in the black Honda—defendant was suspected of selling drugs, he had been seen driving the black Honda, and he was upset when he learned that officers were searching around “his” black Honda. In

addition, drugs and a key to the black Honda were found in his girlfriend's house across the street from where the black Honda was parked at a vacant house. The search warrant was justified.

The trial court did not err in denying defendant's motion to quash and traverse the wiretaps and warrant, and suppress all evidence obtained as a result of wiretaps, detentions, or searches.

DISPOSITION

The judgment is affirmed.

Kane, J.

WE CONCUR:

Dawson, Acting P.J.

Franson, J.