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

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT RODRIGUEZ,

Defendant and Appellant.

F062690

(Super. Ct. No. BF131815A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

Steven S. Lubliner, 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, Carlos A. Martinez and Marcia A. Fay, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Robert Rodriguez of possession of methamphetamine for sale (Health & Saf. Code, § 11378). In a bifurcated proceeding, the trial court found true allegations that Rodriguez had two prior convictions for selling drugs (Health & Saf.

Code, § 11370.2, subd. (c)) and served two prior prison terms (Pen. Code, § 667.5, subd. (b)). At sentencing, the trial court struck the second prior prison term finding and sentenced Rodriguez to a total prison term of 10 years.

On appeal, Rodriguez contends the trial court erred when it admitted into evidence (1) his statement that he was unemployed, which he made during the booking process without *Miranda*¹ warnings, and (2) his prior drug sales convictions. We reject both contentions and affirm the judgment.

STATEMENT OF FACTS

On April 7, 2010, during a law enforcement search of Rodriguez's residence where he lived with his mother and brother, officers found Rodriguez and two females inside his detached garage. Also inside the garage were two glass methamphetamine pipes, numerous blue plastic one-inch square baggies commonly used to package narcotics (53 baggies were inside a larger baggie while 76 were out loose), and a black digital scale, on which was a substance that appeared to be methamphetamine residue. The digital scale and plastic baggies were found inside a camera box. One pipe was found on a workbench and the other between the cushions of a sofa located next to the workbench. After Rodriguez's arrest, officers recovered two baggies wrapped in a paper towel from his anus. It was later determined that the larger bag contained 3.52 grams of methamphetamine and the smaller bag contained .38 grams.

In the opinion of two officers at the scene, Rodriguez was not under the influence of methamphetamine. One of the officers, California Highway Patrol (CHP) Officer Robert Mailer, filled out a field arrest data sheet or probable cause declaration, which was required by the jail and court. Once completed, the form is turned over to the Kern County Sheriff's Department at the jail. In order to fill out the sheet, Mailer asked Rodriguez where he lived and if he was employed. Rodriguez said he lived at the address

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

where the search took place and he was not employed. Mailer did not ask Rodriguez his employment history, how much income he had or where his money came from. No money was found. While in the holding cell waiting to be booked, Mailer had to wake Rodriguez up because he fell asleep. According to Mailer, while someone can crash after using methamphetamine, heavy users do not crash that quickly. Mailer believed, given the totality of the circumstances, that Rodriguez was selling narcotics.

CHP Officer Matthew Iturriria, an expert in the possession of methamphetamine for sale, testified that there are certain things he looks for to determine if methamphetamine is possessed for the purpose of sale, including: whether the person is employed; whether they have cash, scales, packaging and baggies; and the amount of drug in the person's possession and whether it is a usable amount. The determination is made based on the totality of the circumstances. Based on facts consistent with this case, Iturriria opined the methamphetamine was possessed for sale. Iturriria did not have any information that Rodriguez had income from other sources. The amount of methamphetamine found would make about 39 or 40 dime bags, and drug users do not usually carry a scale, baggies and 39 bags of methamphetamine. The absence of cash merely indicated to Iturriria that the man had not yet sold the drugs. Iturriria also explained that heavy methamphetamine users do not fall asleep suddenly, although a user who remained awake while smoking a considerable amount over several days might crash after running out of drugs.

Rodriguez had two prior convictions for possessing methamphetamine for the purpose of sale in violation of Health and Safety Code section 11378, one in September 2005 and another in March 2008. The first conviction was based on an officer having found, in December 2004, (1) a 1.1 gram baggie containing methamphetamine in a couch in Rodriguez's living room, (2) .6 grams of methamphetamine concealed in a water bottle, and (3) an 11 gram baggie of methamphetamine on Rodriguez's person. A scale and baggies were found in the residence, and another scale was found in Rodriguez's car.

Rodriguez, who did not appear to be under the influence of methamphetamine, admitted he recently had started to sell narcotics. The officer opined at the current trial that the methamphetamine Rodriguez possessed in December 2004 was possessed for the purpose of sale. The second conviction was based on an officer having found, in March 2007, three bindles of methamphetamine weighing 10 grams, eight grams and two grams, on a nightstand in Rodriguez's hotel room. Rodriguez did not appear to be under the influence of methamphetamine and there were no pipes, scales, baggies or signs of recent use. Based on the quantity of drugs, and the absence of signs of recent use or that Rodriguez was a chronic methamphetamine user, the officer opined at this trial that the methamphetamine Rodriguez possessed in March 2007 was possessed for purpose of sales.

Dwayne Terrell, a 13-year methamphetamine user who had been sober for six months, testified for the defense about his experience with methamphetamine and methamphetamine users. He opined that four grams of methamphetamine was not an unreasonable amount for three users to consume. Although Terrell could not speak for anyone but himself, he agreed methamphetamine affects people differently. He had known methamphetamine addicts who were overweight, did not have facial sores, and did not have burn marks on their lips. He at times had "crashed" when he stopped ingesting drugs after being awake and using for a period of days. He claimed it was not uncommon for a user to purchase three grams of methamphetamine. He had hidden the drug in the cheeks of his buttocks before, but he did not necessarily insert the drugs "all the way up."

Terrell opined that if three people, one of whom possessed 3.9 grams of methamphetamine, were in a garage which contained a couch, recliner and two pipes for smoking methamphetamine, the methamphetamine was for personal use. He also admitted that the methamphetamine was "[p]robably likely" for sale rather than personal use given the following hypothetical: a man was found in a garage with two females; also

in the garage were a digital gram scale with white residue and over a hundred small plastic baggies in a camera box, and two glass pipes; 3.5 grams and one fourth of a gram of methamphetamine were found in two bags protruding from the man's rectum; and two CHP officers determined the man was not under the influence of methamphetamine. In Terrell's experience, however, it was not unreasonable for someone possessing drugs for personal use to carry a scale and baggies with them.

DISCUSSION

I. Admission of Rodriguez's Statements Regarding Employment

Rodriguez contends the trial court erred when it admitted his statement to Mailer that he was unemployed because the statement was obtained without *Miranda* warnings.

A. Trial Proceedings

Before trial, Rodriguez filed a motion in limine seeking to exclude any of his statements obtained in violation of *Miranda*, while the People filed an in limine motion seeking to admit his statement that he was unemployed. At an evidentiary hearing held outside the jury's presence, Mailer testified that, in this case, he was responsible for filling out a probable cause declaration, which the jail requires before someone can be booked into the jail. Once the declaration is filled out, a copy goes to the arresting officer for the report, another copy goes to the defendant at booking, and the rest of the document goes to the jail. The declaration contains basic identifying information, such as name, date of birth, address, place of birth, charges, if the person is employed, the employer's name and address, and probable cause for the arrest. The declaration is used to get the information needed to book the defendant and to give probable cause to the judge to see if there is enough information to hold the defendant. In completing the declaration, the jail required the officer to get as much information as possible, although the defendant could be booked into jail even if the declaration was incomplete.

While Mailer was waiting with Rodriguez at the scene for the transportation unit to arrive, he asked Rodriguez questions contained on the probable cause declaration. At

that time, Rodriguez was in handcuffs and had not been informed of his *Miranda* rights. Mailer asked Rodriguez where he was born, his employment and if he had a telephone number. In asking whether Rodriguez was employed, Mailer said he was not seeking incriminating information. Mailer did not know what Rodriguez was going to say when he asked the question and did not talk to Rodriguez about the incident.

After argument, the trial court found the question was part of the standard information obtained for booking purposes, so the admission of the statement did not violate *Miranda*.

B. Analysis

Miranda's safeguards "come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301 (*Innis*)). "That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (*other than those normally attendant to arrest and custody*) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Id.* at p. 301, fn. omitted, italics added.) The high court emphasized that "since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." (*Id.* at pp. 301-302, original italics.)

Although *Innis* defined an interrogation to exclude police "words or actions" that are "normally attendant to arrest and custody," booking questions were not at issue in that case. Seven years later, this court, applying the standard announced in *Innis*, concluded that an officer's question to the defendant, after he had completed the booking process and placed the defendant in a holding cell, of whether they should "anticipate any type of problem with his being there in jail," went beyond the type of neutral questioning permissible in a booking interview. (*People v. Morris* (1987) 192 Cal.App.3d 380, 389

(*Morris*.) The court further concluded the officer's next question, which asked who the defendant "was accused of killing" and elicited an admission that he killed his sister-in-law, "was the type of police conduct which 'the police should know [is] reasonably likely to elicit an incriminating response from the suspect.'" (*Morris, supra*, 192 Cal.App.3d at pp. 388, 389, quoting *Innis, supra*, 466 U.S. at p. 301.) The court explained that "when the police know or should know that [] an inquiry [to ensure jail security] is reasonably likely to elicit an incriminating response from the suspect, the suspect's responses are not admissible against him in a subsequent criminal proceeding unless the initial inquiry has been preceded by *Miranda* admonishments." (*Morris, supra*, 192 Cal.App.3d at pp. 389-390.) Since the questions were asked after the defendant invoked his right to remain silent under *Miranda*, the court held they were improperly admitted. (*Morris, supra*, at pp. 389-391.) Nevertheless, reversal was not required because the error was harmless beyond a reasonable doubt. (*Id.* at p. 392.)

The following year, adjudicating a challenge to evidence of an arrestee's initial refusal to give his name to an arresting officer, the Court of Appeal, Sixth Appellate District, noted that the high court's "specific exclusion of words and actions 'normally attendant to arrest and custody' from the definition of 'interrogation' suggests that routine booking inquiries are outside the scope of interrogation." (*People v. Hall* (1988) 199 Cal.App.3d 914, 921 (*Hall*), quoting *Innis, supra*, 446 U.S. at p. 301.) Observing that "a majority of the federal circuit courts have held that incriminating evidence derived from a routine booking interview is admissible despite the fact that no *Miranda* warnings were given," *Hall* found no error in the admission of the evidence at issue. (*Hall, supra*, at p. 921.)

A decade after *Innis*, the high court specifically addressed booking questions in *Pennsylvania v. Muniz* (1990) 496 U.S. 582 (*Muniz*). "Without obtaining a waiver of the suspect's *Miranda* rights," the plurality opinion in *Muniz* noted, "the police may not ask questions, even during booking, that are *designed* to elicit incriminatory admissions."

(*Muniz, supra*, at p. 602, fn. 14, italics added (plur. opn. of Brennan, J.)) Questions and answers during booking about “name, address, height, weight, eye color, date of birth, and current age,” the plurality reasoned, are “admissible because the questions fall within a ‘routine booking question’ exception which exempts from *Miranda*’s coverage questions to secure the ‘biographical data necessary to complete booking or pretrial services.’” (*Muniz, supra*, at p. 601, quoting *United States v. Horton* (8th Cir. 1989) 873 F.2d 180, 181, fn. 2.)

“The fact that the information gathered from routine booking questions turns out to be incriminating does not, by itself, affect the applicability of the exception.” (*People v. Gomez* (2011) 192 Cal.App.4th 609, 629 (*Gomez*)). In *Gomez*, the Court of Appeal, Fourth Appellate District, Division Two, stated that “[i]n determining whether a question is within the booking question exception, courts should carefully scrutinize the facts surrounding the encounter to determine whether the questions are legitimate booking questions or a pretext for eliciting incriminating information.” (*Gomez*, at p. 630.) The *Gomez* court summarized factors courts have considered, including: “the nature of the questions, such as whether they seek merely identifying data necessary for booking [citations]; the context of the interrogation, such as whether the questions were asked during a noninvestigative, clerical booking process and pursuant to a standard booking form or questionnaire [citations]; the knowledge and intent of the government agent asking the questions [citations]; the relationship between the question asked and the crime the defendant was suspected of committing [citations]; the administrative need for the information sought [citations]; and any other indications that the questions were designed, at least in part, to elicit incriminating evidence and merely asked under the guise or pretext of seeking routine biographical information.” (*Gomez, supra*, 192 Cal.App.4th at pp. 630–631.)

Applying the above factors, Rodriguez contends the routine booking exception does not apply because the employment question was “clearly incriminating,” it was

asked by the arresting officer rather than a booking officer screened from the investigation, it was part of a probable cause declaration which ultimately was provided to the court, and his employment status was not critical to jail operations or administration. The Attorney General responds that the question was the type of routine booking question that might be asked without a *Miranda* warning, citing *United States v. Gotchis* (2nd Cir. 1986) 803 F.2d 74. There, the federal appellate court concluded that asking whether the defendant was employed fell “within the benign category of ‘basic identifying data’ required for booking and arraignment,” even though his response that he was unemployed turned out to be incriminating because it supported the inference he intended to sell cocaine. (*Gotchis, supra*, 803 F.2d at pp. 78-79.) The Attorney General points out that Mailer was not seeking incriminating information, but asked the question as part of the booking information requested on the form, and he did not talk to Rodriguez about the incident.

Considering the facts surrounding the encounter, we cannot say the trial court erred in its ruling. (Cf. *People v. Mayfield* (1997) 14 Cal.4th 668, 733 (*Mayfield*) [in reviewing trial court determination as to whether a defendant’s statement was made in response to police interrogation within the meaning of *Miranda*, a reviewing court must “accept the trial court’s factual findings, based on its resolution of factual disputes, its choices among conflicting inferences, and its evaluations of witness credibility, provided that these findings are supported by substantial evidence.”].) By itself, a booking question regarding employment is innocuous. It serves the purpose of providing the arresting agency with information as to whether a defendant has been properly identified, where to locate the defendant if released on bail, or whether the defendant may need the services of the public defender’s office. Thus, there is a legitimate administrative function for this question.

That Mailer was the arresting officer as well as the one taking the booking information does not compel the conclusion his questions were designed to elicit

incriminatory admissions. While under some circumstances, including those in the present case, questions regarding employment will lead to incriminating responses, in many other instances the answers to such questions will have no bearing on the question of guilt. Here, as demonstrated above, the record indicates that the challenged question arose from a form used for everyone booked into the Kern County Sheriff's jail. Despite the form's use as a probable cause declaration, the fact it was used for every person booked provides substantial evidentiary support for the court's implied finding that whatever effect Mailer's question might have had, he did not ask about Rodriguez's employment for the purpose of eliciting incriminating information. Accordingly, we must uphold that finding. (Cf. *Mayfield*, *supra*, 14 Cal. 4th at p. 733.)

Even if Rodriguez's statement that he was unemployed was inadmissible, the error in permitting Mailer's testimony was harmless. We evaluate error in the admission of a defendant's statements under the "harmless beyond a reasonable doubt" standard of *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). Here, the prosecution's theory was that Rodriguez possessed the drugs for sale, while Rodriguez claimed he possessed them only for his own personal use. While the prosecution's expert relied on Rodriguez's lack of employment in rendering his opinion that Rodriguez possessed the drugs for sale, this was not the only circumstance upon which he based his opinion, which he explained turned on the totality of the circumstances. Those circumstances overwhelmingly support the finding that Rodriguez possessed the drugs for sale. He was found with nearly four grams of methamphetamine hidden in his rectum, a scale with white residue on it, over 100 small baggies commonly used to package narcotics, and he was not under the influence of methamphetamine. As the prosecution expert explained, the amount of methamphetamine was enough to produce 39 packages for sale. Even Rodriguez's expert, Terrell, admitted the drugs were likely for sale given the presence of the scale and baggies.

In addition, the jury heard the testimony of two other officers who previously had arrested Rodriguez upon being found with large amounts of methamphetamine; in one case, Rodriguez also had a scale and baggies. In the officers' opinions, Rodriguez possessed those drugs for sale and in both cases, Rodriguez pled guilty to possessing methamphetamine for the purpose of sale. Moreover, as the defense argued to the jury, Rodriguez only stated that he was not employed; nothing was said about how much income he might otherwise have.

Based on the record before this court, the verdict was not attributable to any error in admitting evidence of the booking question regarding employment.

II. Admission of Evidence of Prior Drug Sales

This case first was assigned to the Honorable John Somers in Department 10 for jury trial. On the first day of trial, Judge Somers addressed the motions in limine, one of which the prosecution brought seeking to admit evidence of Rodriguez's two prior convictions pursuant to Evidence Code section 1101, subdivision (b), to show his intent. While Judge Somers agreed the evidence was admissible under that code section, he found the evidence to be unduly prejudicial and excluded it pursuant to Evidence Code section 352. He stated, however, the motion could be renewed and was subject to reconsideration. Jury voir dire began that day, but was not completed.

The next day, before a jury was selected and over the prosecutor's objection, Rodriguez entered a no contest plea and admitted the allegations in exchange for an indicated sentence of probation and one year in jail. At the December 1, 2010 sentencing, however, Judge Somers decided not to adhere to the indicated sentence in light of what he learned in the probation report, and set aside Rodriguez's plea. Judge Somers then "reset the matter for trial" and placed it "on the trial calendar within the statutory time, which is no more than 60 days from today's date. So I'm going to reset the matter on the trial calendar on January the 18th of 2011. That will be at nine-o'clock in Department 1." Judge Somers also reset the matter for "further readiness hearing" to

be held on January 7, 2011 in Department 1, and ordered Rodriguez back to Department 1. At defense counsel's request, Judge Somers set the matter for hearing on the motions on January 5, 2011. As shown in the court's minutes, Judge Somers granted Rodriguez's motion to withdraw his plea and Rodriguez entered a plea of not guilty and denied the allegations.

The case was eventually assigned to Department 6 for trial before the Honorable John R. Brownlee. On March 28, 2011, Judge Brownlee considered the parties' in limine motions. This included the prosecution's newly drafted Evidence Code section 1101, subdivision (b) motion to admit Rodriguez's prior convictions. The next day, Judge Brownlee determined the outcome of the motion hinged on an Evidence Code section 352 analysis and granted the prosecution's motion to admit the evidence.

Rodriguez does not contend Judge Brownlee abused his discretion in granting the prosecution's motion to admit his prior convictions. Instead, he argues that, since Judge Somers denied the pretrial motion in the first trial, Judge Brownlee did not have the authority to grant the motion. Likening Judge Somers's resetting of the trial following the withdrawal of the no contest plea to a continuance, Rodriguez contends Judge Brownlee did not have the authority to reconsider Judge Somers's ruling. In support of his position he cites authorities that address when one judge may reconsider another judge's ruling, such as *People v. Riva* (2003) 112 Cal.App.4th 981 (*Riva*), *People v. Barros* (2012) 209 Cal.App.4th 1581, and *In re Alberto* (2002) 102 Cal.App.4th 421.

Rodriguez's argument, however, assumes that Judge Somers's in limine rulings survived the withdrawal of the no contest plea. While as a general rule one trial judge cannot reconsider and overrule an order of another trial judge (*Riva, supra*, 112 Cal.App.4th at p. 991), this presupposes there is an order to reconsider. Here, Judge Somers declined to follow the indicated sentence and set aside the no contest plea, which he was empowered to do by Penal Code section 1192.5. The plea was withdrawn and Rodriguez reentered his not guilty plea. Judge Somers then placed the case back on the

trial calendar, set a trial date within 60 days of the arraignment, as required by Penal Code section 1382, subdivision (a)(2), and set new dates for hearings on readiness and pretrial motions. In doing so, Judge Somers placed the case procedurally back to where it was before he received it, i.e. before he made any rulings in the case, thereby impliedly vacating his pretrial rulings. Since Judge Somers vacated his pretrial rulings, there was nothing for Brownlee to reconsider in making his rulings on the in limine motions; instead, the case proceeded as if it had never gone to trial. Accordingly, Rodriguez's claim is meritless.

III. Cumulative Error

Rodriguez argues that reversal of the judgment is imperative since prejudicial error arose from the cumulative impact of individual errors. Since Rodriguez fails to persuade us that any error occurred or that any assumed error was prejudicial, his cumulative error argument is meritless. (See *People v. Gonzales* (2011) 52 Cal.4th 254, 308; *People v. Heard* (2003) 31 Cal.4th 946, 982.)

DISPOSITION

The judgment is affirmed.

Gomes, Acting P.J.

WE CONCUR:

Poochigian, J.

Franson, J.