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

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT LEE BELL,

Defendant and Appellant.

F067686

(Super. Ct. No. CRM026572)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Merced County. Marc A. Garcia, Judge.

Holly Jackson, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Poochigian, J., and Franson, J.

PROCEDURAL AND FACTUAL SUMMARY

Appellant, Robert Lee Bell, was charged in an information filed on March 20, 2013, with felony possession for sale of methamphetamine (Health & Saf. Code, § 11378, count 1) and felony possession of cocaine base for sale (Health & Saf. Code, § 11351.5, count 2). The information further alleged one serious felony conviction within the meaning of the three strikes law (Pen. Code, §§ 667 & 1170.12) and three prior prison term enhancements (Pen. Code, § 667.5, subd. (b)).

On April 30, 2013, the trial court heard appellant's suppression motion prior to the commencement of a jury trial. Merced Police Officer Ramon Ruiz testified that at 4:24 p.m. on February 15, 2013, he was at McNamara Park when he saw appellant approach a car in what appeared to be a drug transaction. McNamara Park is known for being a location of high crime and narcotics sales. There was a female nearby in or by an alley that Ruiz knew from prior contacts who was looking back and forth in both directions. She appeared to Ruiz to be acting as a lookout. When appellant made eye contact with Ruiz, he started to walk away from the vehicle.

Ruiz exited his patrol car with a reserve officer without activating the lights of his patrol car. Ruiz walked over to appellant and asked him if he had any narcotics. Appellant replied that he had a couple of baggies of methamphetamine in his pocket. Appellant gave Ruiz permission to retrieve the baggies. When Ruiz searched appellant, he found a pill bottle with two baggies of methamphetamine inside. Appellant testified that Ruiz searched him even though appellant told Ruiz he was not on probation or parole. Appellant further testified that he did not give Ruiz consent to search.

The trial court found the officer's testimony more credible than appellant's testimony. In denying the suppression motion, the court found there was no detention and that appellant consented to the search.

At the conclusion of the trial, the jury found appellant guilty of count 1 and guilty in count 2 of the lesser offense of possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)). In a bifurcated proceeding, the court found the special allegations to be true.

On July 2, 2013, the trial court refused to reconsider appellant's request to strike the prior serious felony conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.¹ The court sentenced appellant to the upper term of three years on count 1, doubled to six years pursuant to the three strikes law. The court imposed a consecutive sentence on count 2 of one-third the midterm, or eight months, doubled to 16 months pursuant to the three strikes law. Appellant's total prison term was set at seven years four months.² The trial court awarded 138 days of credits for the time appellant was in custody plus 20 days of conduct credits for total custody credits of 158 days.

Appellate counsel has filed a brief seeking independent review of the case by this court pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).

FACTS

Officer Ruiz testified that he had ten years of experience as a police officer, with a fairly large proportion of that experience in dealing with drugs. At 4:24 p.m. on February 15, 2013, Ruiz was driving past McNamara Park, an area known for a high amount of criminal narcotic and gang activity. Ruiz saw a parked car and appellant walking toward it. Appellant walked directly up to the driver's door. Ruiz and appellant

¹ At the commencement of trial, the court denied appellant's request to strike the prior serious felony allegation.

² No sentence was imposed on the prior prison term enhancements, apparently in the interests of justice.

then made eye contact, and appellant started to walk away. Ruiz circled back around to the location and noticed a female in or by an alley looking back and forth.

Ruiz exited his patrol car and contacted appellant. Appellant tried to divert his attention away from Ruiz and said he was just talking to a friend. Ruiz told appellant that he thought appellant was involved in a narcotics transaction. When Ruiz asked appellant if he had any drugs on him, appellant replied he had a couple of baggies of methamphetamine that were in a pill bottle in his pants pocket.

Appellant gave Ruiz permission to search him. Ruiz found a pill bottle with individually wrapped baggies of a crystal rock-like substance that appeared to be methamphetamine. Ruiz also found a baggie of what appeared to be rock cocaine in appellant's wallet. Ruiz read appellant his *Miranda* rights.³ Appellant told Ruiz he was holding the methamphetamine for a friend.

The parties stipulated that if the Department of Justice criminologist who tested the suspected drugs came to testify, she would confirm the substances tested positive for methamphetamine and rock cocaine. She would further testify that her report, which was admitted into evidence as Exhibit No. 102, was accurate. Ruiz testified the drugs were possessed for sale, not mere personal use.

Appellant testified that he had used illegal drugs since 1985, including cocaine, methamphetamine and marijuana. Appellant said he used between a bag and a bag and a half of methamphetamine in a day. Appellant denied selling drugs at McNamara Park, but admitted that he sometimes purchased drugs there. Appellant was talking to his friend Mr. Neal when Ruiz arrived. Neal had just paid appellant for helping him move.

Appellant testified that Ruiz asked him if he was on probation or parole and appellant replied that he was not. When asked if he let Ruiz search him, appellant replied

³ *Miranda v. Arizona* (1966) 384 U.S. 436.

that he let Ruiz “do what he had to do.” Appellant denied telling Ruiz that he had drugs on his person. Appellant had the drugs on his person because he uses them. Appellant denied selling drugs.

APPELLATE COURT REVIEW

Appellant’s appointed appellate counsel has filed an opening brief that summarizes the pertinent facts, raises no issues, and requests this court to review the record independently. (*Wende, supra*, 25 Cal.3d 436.) The opening brief also includes the declaration of appellate counsel indicating that appellant was advised he could file his own brief with this court. By letter on February 28, 2014, we invited appellant to submit additional briefing. Appellant replied with two handwritten letters rearguing the facts of his case, denying that he told Officer Ruiz that he had drugs on him and asserting the search was illegal. Appellant claims his trial attorney was ineffective because he “dumped” appellant’s case, and argues he has used drugs but has never sold them.

In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. It is the jury, not the appellate court, which must be convinced of a defendant’s guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 and *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

In reviewing a challenge to the sufficiency of the evidence, appellate courts do not determine the facts. We examine the record as a whole in the light most favorable to the judgment and presume the existence of every fact the trier of fact could reasonably deduce from the evidence in support of the judgment. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129 [questioned on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151]; *People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Unless the testimony of a single witness is physically impossible or inherently improbable, it is sufficient for a conviction. (Evid. Code, § 411; *People v. Young* (2005) 34 Cal.4th 1149, 1181.)

An appellate court must accept logical inferences that the jury might have drawn from circumstantial evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) Before setting aside the judgment of the trial court for insufficiency of the evidence, it must clearly appear that there was no hypothesis whatever upon which there was substantial evidence to support the verdict. (*People v. Conners* (2008) 168 Cal.App.4th 443, 453; *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.)

Concerning appellant's assertion that he was illegally searched, the trial court found the testimony of Officer Ruiz more credible than appellant's testimony. The court ruled that appellant consented to the search. A defendant's consent to a search is an exception to the requirement that officers have probable cause to arrest and search a defendant or that they secure a search warrant. (See *People v. Valencia* (2011) 201 Cal.App.4th 922, 928.) Appellant's remaining factual argument focuses on his disputes with Officer Ruiz's testimony. The jury, however, heard appellant's version of the facts and rejected his defense on count 1 that he only possessed methamphetamine for personal use.⁴

⁴ The jury accepted appellant's argument that he only possessed rock cocaine for personal use and acquitted him of possession of rock cocaine for sale. The jury convicted appellant of the lesser included offense of possession of rock cocaine.

Appellant's challenges can be construed to be a challenge to the effectiveness of his trial counsel. The defendant has the burden of proving ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of trial counsel, the defendant must establish not only deficient performance, which is performance below an objective standard of reasonableness, but also prejudice. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Tactical errors are generally not deemed reversible. Counsel's decisionmaking is evaluated in the context of the available facts. To the extent the record fails to disclose why counsel acted or failed to act in the manner challenged, appellate courts will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or, unless there simply could be no satisfactory explanation. Prejudice must be affirmatively proved. The record must affirmatively demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*People v. Maury* (2003) 30 Cal.4th 342, 389.) Attorneys are not expected to engage in tactics or to file motions that are futile. (*Id.* at p. 390; also see *People v. Mendoza* (2000) 24 Cal.4th 130, 166.)

Appellant has failed to demonstrate that his trial counsel's representation was below professional norms.

After independent review of the record, we have concluded there are no reasonably arguable legal or factual issues.

DISPOSITION

The judgment is affirmed.