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

THE PEOPLE,

Plaintiff and Respondent,

v.

BRUCE KALVIN BERNA,

Defendant and Appellant.

F068377

(Fresno Super. Ct. No. F12900089)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. F. Brian Alvarez, Judge.

Kendall D. Wasley, under appointment by the Court of Appeal, for Defendant and Appellant.

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

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\* Before Levy, Acting P.J., Poochigian, J. and Franson, J.

## INTRODUCTION

Appellant/defendant Bruce Calvin Berna was arrested for being a felon in possession of a firearm after agents from the Department of Justice searched the trailer where he lived and found a Mossberg 12-gauge pump action shotgun and a box of 12-gauge shotgun shells. Defendant had a prior felony conviction, which prohibited him from possessing a firearm.

Defendant filed a motion to suppress the evidence and argued the search of his trailer was unconstitutional. After an evidentiary hearing, the court found defendant consented to the search and denied the suppression motion. Thereafter, defendant pleaded no contest to being a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1)), admitted one prior strike conviction, and was sentenced to two years eight months in prison based on a negotiated disposition.

On appeal, his appellate counsel has filed a brief that summarizes the facts with citations to the record, raises no issues, and asks this court to independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).

Defendant has filed a letter brief and challenges the court's denial of the suppression motion. We affirm.

## FACTS

The following facts are from the contested evidentiary hearing on defendant's motion to suppress evidence and the validity of the warrantless search of defendant's trailer. The parties stipulated to defendant's status as a felon for purposes of the hearing.

### The Prosecution's Evidence

Department of Justice Special Agent Luke Powell testified that on September 8, 2011, he received an anonymous tip that defendant was a felon in possession of a weapon. The tipster provided defendant's name, approximate age, and address. Powell conducted a background check and confirmed defendant's name, address, and age, and that he had two felony convictions. Powell also conducted a firearms-ownership check,

and determined a Jennings .22-caliber semiautomatic pistol and a .32-caliber Smith and Wesson handgun were registered in defendant's name.

On the same day, Agent Powell and four other agents went to defendant's residence on East Nees in Clovis. Powell testified they were dressed in uniforms that identified themselves as police officers. Agents Powell and Navarro testified they were wearing blue uniform shirts with shoulder patches that identified them as police officers, and black Department of Justice load-bearing vests, which also contained badges and identified them as officers. They drove to the residence in two unmarked cars.

Agent Powell testified the residence was located on acreage in the country. There was a long driveway into the property and a detached trailer near the house. Powell did not have any information about the trailer or whether defendant lived in it.

Agent Powell contacted defendant in the front yard of the main house. Defendant was washing a car. As he talked to defendant, an older man emerged from the house. This man was later identified as Stephen Huha (Huha), defendant's stepfather. Powell testified Huha did not participate in his conversation with defendant.

Agent Powell testified he asked defendant about the two handguns registered in his name. Defendant said he got rid of the handguns, 12 years and 20 years ago, respectively. Powell testified his records search did not indicate that defendant had sold the weapons in a legal transaction.

Agent Powell determined defendant lived in the trailer and asked defendant if he could search the trailer. Powell testified defendant "paused for a few seconds to think about it and then stated yes." Powell testified he never asked defendant about drugs or methamphetamine.

Agent Powell testified he could not see the trailer from the location where he was standing with defendant in the front yard. Powell stayed in that location with defendant, and told Agent Navarro that defendant consented to a search of his residence, which was the trailer parked near the house. Powell also told Navarro that defendant said he no

longer owned the two weapons registered to him. Navarro was not present when defendant consented to the search, and he did not hear defendant give consent.

Agents Navarro and Fuerte walked to the trailer. Navarro testified the trailer's front door was "wide open" and the screen door was closed. Navarro testified that he stood about three feet away from the screen door and could clearly see through it. Navarro testified that "in plain view looking through the screen I saw a shotgun propped against the table and a box of shotgun shells sitting on the table." The shotgun and shells were two feet inside the doorway, "[r]ight in front of the door."

Agents Navarro and Fuerte returned to Agent Powell, and told him about the shotgun. Defendant was present, admitted the shotgun belonged to him, and that he had had it "for quite some time." Powell took defendant into custody. Navarro and Fuerte entered the trailer and seized the shotgun and the shells.

### **Defense Evidence**

Defendant and Huha also testified at the hearing on the suppression motion and offered a different version of events from the testimony of the agents.

Huha testified he owned the East Nees property, which was two and one-half acres. Huha testified defendant lived in the trailer. Defendant worked on the property in exchange for parking his trailer on Huha's property. Huha testified he did not own the trailer; defendant owned it. Both defendant and Huha testified Huha did not have the right to enter defendant's trailer.

Defendant testified he kept a shotgun in the back closet of his trailer. He used it to kill ground squirrels and always returned it to the closet. Defendant kept the shells on the shelf across from the closet. The shotgun and the shells were in the closet and not on the table on the day the agents arrived on the property. Defendant admitted he had a prior felony conviction, and he was not supposed to possess a shotgun.

Defendant and Huha testified they were in the front yard when two cars arrived, and two men got out. Defendant was washing Huha's car. Defendant was about 150 feet away from the trailer, which was barely visible beyond the house.

Defendant testified all the blinds and windows in the trailer were closed when the two cars arrived. The trailer's back door was closed and locked. The front door was partially open, two to three feet. The front screen door was closed. Defendant testified the screen door was very dirty. A person could not see through the screen into the trailer unless "[y]ou ... pretty much put your face right up against it to see anything inside."

Defendant testified that when the two cars arrived on the property, he thought the occupants were lost. Two people got out of the car and they were wearing regular clothes, which defendant described as blue jeans and short-sleeved collared shirts. They were not wearing uniforms, badges, or anything to indicate they were officers.

Defendant testified one man stood near him but did not speak to him. Another man walked up to Huha and spoke to him. Defendant thought the men were Huha's friends from church and did not pay attention to them.

Huha testified defendant and some officers were standing about 30 feet away, and Huha could not hear their conversation. Huha testified an officer walked up to him and asked for permission to search defendant's trailer. Huha said no. The officer repeatedly asked for consent, and Huha kept saying no. Huha testified he became "perturbed," and eventually "made a mistake" and said, " 'Well, go ahead and go. Go ahead and search the trailer.' "

Huha testified that immediately after he said yes, he also said: " 'This is wrong. This is wrong. I can't do this. I don't own that trailer.' " The officer never asked Huha who owned the trailer."

Huha testified the officer went into the trailer. He was inside for a few seconds, and came out with a gun.

Defendant testified that he noticed that one man spoke to Huha, and then walked over to his trailer and went inside. Defendant said, “ ‘What the heck?’ ” Defendant started to walk to the trailer and another man stopped him. The man asked defendant, “ ‘Where is the meth? Where is the meth?’ ” Defendant testified the man produced a badge and identified himself as an officer. This was the first time that defendant knew the men were officers. Defendant testified the same man told him: “ ‘We can call in a K-9 unit to sniff it out, and my partner over there is going to tear your trailer apart. So you—you’re better off just telling us where it is at before he tears it all the way apart.’ ” Defendant replied there was no meth in the trailer, and he did not know what he was talking about.

Defendant testified the man never asked for permission to search the trailer, and never asked him about any guns. Another man was in his trailer for less than five minutes and walked out with the shotgun and shells.

Defendant was arrested and placed in the back of the officers’ car. Defendant testified that after he was placed in the car, an officer asked him for the first time about the two guns that were registered to him.

### **The Parties’ Arguments**

At the conclusion of the hearing testimony, defense counsel argued the warrantless search of defendant’s trailer was unconstitutional, Huha lacked authority to consent to the search, and the officers never asked or obtained defendant’s consent.

The prosecutor replied the search was valid solely based on defendant’s consent to Agent Powell. The prosecutor conceded the plain view and third-party consent doctrines were not applicable to this case.

### **The Court’s Ruling**

The court acknowledged that the agents and defendant testified to “dramatically opposite” versions of the search, and the question was whether defendant consented to the search of his trailer. The court further noted that since defendant claimed he never

gave consent, that testimony removed any issues about whether the officers obtained consent by express or implied force and/or duress.

The court denied defendant's suppression motion: "[B]ased on [the] totality of the circumstances before this Court on this case, I cannot find that there was not consent to enter the trailer."

### **Plea and Sentence**

On September 3, 2013, after the denial of the suppression motion, defendant pleaded no contest to the charged offense of being a felon in possession of a firearm, and admitted the prior strike conviction, based on a negotiated disposition for an indicated sentence of two years eight months.

On November 8, 2013, the court sentenced defendant to two years eight months in prison.

On November 12, 2013, defendant filed a notice of appeal based on the denial of his motion to suppress.

### **DISCUSSION**

As noted above, defendant's counsel has filed a *Wende* brief with this court. The brief also includes the declaration of appellate counsel indicating that defendant was advised he could file his own brief with this court. By letter on July 7, 2014, we invited defendant to submit additional briefing. As noted above, he has filed a letter brief which challenges the court's denial of his motion to suppress.

Defendant contends the court should have granted his suppression motion because both Agents Powell and Navarro committed perjury, Navarro "changed his story" between the preliminary hearing and suppression motion, defendant was assigned a different public defender after the preliminary hearing, and that attorney was prejudicially ineffective for failing to read the preliminary hearing transcript and "didn't recognize the differences" in Navarro's testimony.

## **A. Motion to Suppress**

We begin with the well-settled standards for a motion to suppress evidence. A warrantless search is presumed to be unreasonable, and the prosecution bears the burden of demonstrating a legal justification for the search. (*People v. Redd* (2010) 48 Cal.4th 691, 719.) “It is ‘well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.’ [Citations.]” (*People v. Woods* (1999) 21 Cal.4th 668, 674.)

The existence and voluntariness of consent is a factual question to be determined from the totality of the circumstances. (*People v. Boyer* (2006) 38 Cal.4th 412, 445–446.) “‘The existence of consent to a search is not lightly to be inferred,’ [citation], and the government ‘always bears the burden of proof to establish the existence of effective consent.’ [Citations.]” (*United States v. Shaibu* (9th Cir. 1990) 920 F.2d 1423, 1426.)

“As the finder of fact in a proceeding to suppress evidence [citation], the superior court is vested with the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences in deciding whether a search is constitutionally unreasonable. [Citation.]” (*People v. Woods, supra*, 21 Cal.4th at p. 673.)

“The standard of appellate review of a trial court’s ruling on a motion to suppress is well established. We defer to the trial court’s factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]” (*People v. Glaser* (1995) 11 Cal.4th 354, 362; *People v. Redd, supra*, 48 Cal.4th at p. 719.) In doing so, we consider the record in the light most favorable to the People as respondents, since “‘all factual conflicts must be resolved in the manner most favorable to the [superior] court’s disposition on the [suppression] motion.’ [Citation.]” (*People v. Woods, supra*, 21 Cal.4th at p. 673.)

## **B. The Preliminary Hearing**

One of defendant's primary appellate issues is that his defense attorney was prejudicially ineffective for failing to impeach the witnesses at the suppression hearing with alleged contradictory testimony introduced at the preliminary hearing. We thus turn to the preliminary hearing record in order to address this contention.

At the preliminary hearing, Agent Navarro was the only witness. Agent Powell, defendant, and Steven Huha did not testify.

Agent Navarro testified his office investigated defendant because he had two prior felonies, and he was the "last known owner of two handguns." Agent Powell advised the agents that defendant was prohibited from possessing firearms. The prosecution introduced certified records, which showed defendant had a prior felony strike conviction that prohibited him from possessing firearms.

Agent Navarro testified he went to the East Nees property in an unmarked car with Agents Powell, Fuerte, Cariaga, and Frausto. The property was in a rural area. When they arrived, defendant and another man were present. Navarro testified he did not know the other man's identity, and he did not interview him.

Agent Navarro testified they did not have a search warrant. The agents were only there to investigate the firearms. Navarro testified it was not a drug case, and he did not ask anyone about drugs.

Agent Navarro testified about defendant's consent:

"Agent Powell asked [defendant] about the two firearms, the two handguns, that were registered to him. He indicated that he no longer had either firearm. Agent Powell asked him if he would give consent to search his property and residence to determine if he was currently in possession of any other firearms and *he indicated we could search his property.*" (Italics added.)

Agent Navarro testified defendant said he lived in "a detached trailer outside of the residence." "I walked over to the trailer area and I observed, through a closed screen

door, *a shotgun and a box of shotgun shells lying on a table inside the trailer.*” (Italics added.)

Agent Navarro notified Agent Powell about the weapon, and “[w]e opened the door and secured the shotgun. I made sure it was empty and not loaded and then we seized it as evidence.” Navarro testified it was a Mossburg 12-gauge pump action shotgun with a box of unspent 12-gauge shotgun shells.

Agent Navarro testified Agent Powell spoke to defendant about the shotgun, and “I believe [defendant] told him that it was his.” Defendant told Powell “the shotgun was his. He had had it for years.” Navarro testified defendant was arrested.

At the conclusion of the preliminary hearing, defendant was held to answer. He did not move to suppress the evidence at the preliminary hearing, but filed a separate motion to suppress, which was heard at another hearing as set forth above.

### **C. Analysis**

Defendant complains the court improperly denied the suppression motion and believed Agents Powell and Navarro even though they allegedly committed “perjury.” Defendant asserts the agents’ testimony was inconsistent with other evidence introduced at the preliminary and the suppression hearings, particularly the testimony from defendant and Huha. Defendant cites to numerous conflicts between the prosecution and defense witnesses about the search, what the agents said, how they asked for consent, defendant refused to give consent.

Defendant asserts that based on these evidentiary conflicts, the court should have granted his suppression motion because agents’ testimony at the suppression hearing contained statements which were “impossible, [ridiculous] or outright perjury.”

As explained above, however, in reviewing the superior court’s ruling on a motion to suppress, we defer to the court’s factual findings, express or implied, where supported by substantial evidence, and exercise our independent judgment to determine, on the facts so found, whether the search or seizure was reasonable under the Fourth Amendment.

(*People v. Glaser, supra*, 11 Cal.4th at p. 362; *People v. Redd, supra*, 48 Cal.4th at p. 719.)

In this case, the superior court acknowledged it was presented with contradictory accounts of the search from Agents Powell and Navarro, who testified defendant consented to the search; Huha, who testified he reluctantly consented but withdrew his consent because he lacked authority since it was defendant's trailer; and defendant, who testified he was never asked and never consented to the search. The court found there was consent for the search and impliedly determined Powell and Navarro were credible. Defendant now asserts we should reject this factual finding of credibility because of alleged perjury, inconsistencies, and inherent improbabilities in the agents' testimony.

“To reject the statements given by a witness whom the trial court has found credible, either they must be physically impossible or their falsity must be apparent without resorting to inferences or deductions. [Citation.] *When two or more inferences can reasonably be deduced from the facts as found, a reviewing court is without power to substitute its deductions for those of the trier of fact.* [Citation.]” (*People v. Duncan* (2008) 160 Cal.App.4th 1014, 1018, italics added.)

“The inherently improbable standard addresses the basic content of the testimony itself—i.e., could that have happened?—rather than the apparent credibility of the person testifying. Hence, the requirement that the improbability must be ‘inherent,’ and the falsity apparent ‘without resorting to inferences or deductions.’ [Citation.] In other words, the challenged evidence must be improbable ‘“on its face” ’ [citation], and thus we do not compare it to other evidence (except, perhaps, certain universally accepted and judicially noticeable facts). The only question is: Does it seem *possible* that what the witness claimed to have happened actually happened? [Citation.]” (*People v. Ennis* (2010) 190 Cal.App.4th 721, 729, italics in original)

“Consequently, ‘[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the

trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]’ [Citation.] ‘Testimony may be rejected only when it is inherently improbable or incredible, i.e., “ ‘unbelievable per se’ ” physically impossible or “ ‘wholly unacceptable to reasonable minds.’ ” ’ [Citation.]” (*People v. Ennis, supra*, 190 Cal.App.4th at p. 729.)

For example, in *People v. Thompson* (2010) 49 Cal.4th 79, the California Supreme Court flatly rejected the contention that a certain witness’s testimony was “inherently incredible” on the basis it contradicted physical evidence, noting the witness’s testimony “did not recount facts that were physically impossible, nor did it exhibit falsity on its face. Rather, defendant’s contention that [the witness’s] testimony was inherently incredible depends on the asserted inconsistencies that defendant argues exist between [the witness’s] testimony and other evidence presented at trial. We reject defendant’s attempt to reargue the evidence on appeal and reiterate that ‘it is not a proper appellate function to reassess the credibility of the witnesses.’ [Citation.]” (*Id.* at pp. 124–125.)

As in *Thompson*, defendant’s claim of inherently improbable “is based entirely on comparisons, contradictions and inferences” and “amounts to nothing more than an attack on witness credibility, and cannot be the basis for a reversal ... on appeal.” (*People v. Ennis, supra*, 190 Cal.App.4th at p. 725.) “Inherently improbable ... means that the challenged evidence is ‘unbelievable per se’ ..., such that ‘the things testified to would not seem possible.’ [Citation.] The determination of inherent improbability must be made without resort to inference or deduction, and thus cannot be established by comparing the challenged testimony to other evidence in the case.” (*Ibid.*)

Defendant asserts his defense attorney was prejudicially ineffective for failing to impeach Agent Navarro, based on an alleged conflict between Navarro’s testimony at the preliminary and suppression hearings about where the shotgun was found. At the preliminary hearing, Navarro testified: “I walked over to the trailer area and observed, through a closed screen door, *a shotgun and a box of shotgun shells lying on a table*

*inside the trailer.”* (Italics added.) At the suppression hearing, Navarro testified he went up to the trailer’s door and “in plain view looking through the screen *I saw a shotgun propped against the table and a box of shotgun shells sitting on the table.*” (Italics added.)

Defendant interprets Agent Navarro’s preliminary hearing testimony to mean that he saw both the shotgun and the box of shells on the table, but that he only testified the shells were on the table at the suppression hearing, and concludes his defense counsel was prejudicially ineffective for failing to point out this alleged perjury. Navarro’s testimony on this point was not inherently impossible or incredible. His preliminary hearing testimony could be interpreted to mean he saw the shotgun, and he also saw the shells lying on the table. At the suppression hearing, he provided more detail and explained the shotgun was propped against the table and the shells were on the table. We cannot say defense counsel was prejudicially ineffective based on these passages.

We acknowledge that the evidence, as presented, could have resulted in different factual findings. Defendant and Huha testified to a different version of the entire incident than Agents Powell and Navarro. Indeed, the superior court recognized this conflict and was well aware of its responsibilities as the finder of fact as to the credibility of the witnesses on all points. We cannot say that no rational trier of fact could have concluded defendant consented to the search, or that the testimony from Agents Powell and Navarro was inherently improbable or obviously false. We are therefore bound by the superior court’s factual findings, and similarly conclude defendant consented to the search.

After independent review of the record, we find that no reasonably arguable factual or legal issues exist.

### **DISPOSITION**

The judgment is affirmed.