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

THE PEOPLE,

Plaintiff and Respondent,

v.

DESHAWN EUGENE COHEN,

Defendant and Appellant.

F070273

(Super. Ct. No. BF152046A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush and Colette M. Humphrey, Judges.†

Paul Kleven, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna, Doris Calandra and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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

† Judge Bush denied appellant's motion to suppress; Judge Humphrey accepted appellant's plea and sentenced him.

INTRODUCTION

Appellant Deshawn Eugene Cohen was charged with nine separate counts involving sexual offenses against his minor daughter. He pled no contest to five counts, with the understanding he would be sentenced to 18 years in prison. In exchange for his plea, the remaining counts were dismissed.

On appeal, Cohen asserts, for the first time, that his phone was searched without a warrant and in violation of his Fourth Amendment rights. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

On December 4, 2013, Officer John Otterness and Detective Daniel McAfee of the Bakersfield Police Department spoke with Jane Doe, then 13 years of age, regarding a report of sexual assault. She told the officers that her biological father had engaged in sexual conduct with her.

Jane Doe stated that on November 30, 2013, while at a motel on a family vacation, Cohen told her to undress and orally copulate him. She told her father ““No.”” Cohen grabbed her by the hair and pulled, telling her ““You’re going to do what I say until you turn 14.”” She then orally copulated Cohen and, after about a minute, he inserted his penis into her anus.

Jane Doe also stated that starting when she was about 8 years old, Cohen would rub his naked penis on her vagina. Starting when she was around 11 or 12 years old, Cohen would engage in oral sex with her, during which he would ejaculate in her mouth, and also anal sex. She described digital penetrations of her vagina by Cohen. She told the officers that Cohen would video record the sexual conduct on his cell phone.

On December 5, 2013, McAfee looked for Cohen and found him seated in a vehicle on Taylor Street. As McAfee approached Cohen, he saw illumination caused by a cell phone coming from “right in front of” Cohen; Cohen was holding the phone. Cohen was told to show his hands and Cohen put the phone down. Cohen was asked to exit the vehicle and was taken into custody. Cohen asked the officers to take his phone

and wallet; he did not want either item left in his vehicle. McAfee did not impound Cohen's vehicle or conduct an inventory search.

McAfee then transported Cohen to the police station and read him his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. Cohen agreed to be interviewed. The phone was booked as evidence and the wallet was placed into defendant's property at the jail.

During the interview with police, Cohen admitted to multiple acts of oral and anal sex with Jane Doe, as well as digitally penetrating her vagina and rubbing his penis on her vagina. Cohen stated that the oral and anal sex had been occurring since the victim was about 11 or 12 years old.

Cohen provided McAfee with the passcode for his phone. McAfee entered the passcode, it opened up the phone, and a photograph found on the phone depicted Jane Doe with a man's penis in her mouth. McAfee could clearly identify Jane Doe from the picture and he asked Cohen whose penis was in the picture; Cohen stated it was his.

Cohen was charged with two counts of aggravated sexual assault on a child under 14 years (counts 1 & 2); sodomy with a child under the age of 14 years (count 3); penetration of the genital or anal opening of a child under 14 years with a foreign object (count 4); oral copulation with a child under 14 years (counts 5 & 6); lewd or lascivious acts on a child under 14 years (count 7); and sexual exploitation of a child (count 8).

On April 21, 2014, Cohen filed a motion to suppress the phone as evidence contending the phone had been seized without a warrant. The People filed opposition on April 29, 2014. The motion was heard on May 5, 2014. When asked by the trial court whether Cohen was challenging the search of the phone, Cohen stated he was challenging the entry into the car and the seizure of the phone.

McAfee testified the cell phone had been in Cohen's hands when he was asked to put his hands up, Cohen set the phone down, and was arrested. Cohen asked the officers to take his wallet and cell phone and not leave them in the car. Prior to arresting Cohen,

McAfee testified he had received information that the cell phone contained potential evidence.

The trial court found that Cohen asked “the officer to seize [the phone.]” Defense counsel asked for an opportunity to submit further briefing and the trial court submitted the matter pending receipt of points and authorities from the parties, which were to be filed no later than May 12, 2014. On May 15, 2014, the trial court issued a minute order denying the motion to suppress.

Count 9, lewd or lascivious acts on a child under the age of 14 years, was added on September 3, 2014. Also on September 3, 2014, Cohen pled no contest to counts 3, 4, 5, 6, 7 and 9 pursuant to a plea agreement. The plea agreement called for Cohen to serve a stipulated 18-year prison term; register as a sex offender; and for the remaining counts to be dismissed. Cohen had signed a written waiver of rights and plea form, which the trial court thoroughly questioned Cohen about before accepting his no contest plea.

Cohen was sentenced on October 1, 2014, to a term of 18 years in prison in accordance with the plea agreement. Various fines, fees and conditions were imposed, including the requirement to register as a sex offender pursuant to Penal Code section 290.¹

A timely notice of appeal was filed on October 8, 2014.

DISCUSSION

On June 25, 2014, after the trial court conducted the suppression hearing, the United States Supreme Court held that police may not search data or images contained in cell phones without a warrant in the absence of exigent circumstances. (*Riley v. California* (2014) 573 U.S. __ [134 S.Ct. 2473, 2485, 2487–2488, 2493–2494] (*Riley*)). Based on the holding in *Riley*, Cohen asks us to “determine that the search of [the] cell

¹ References to code sections are to the Penal Code unless otherwise specified.

phone violated [his] Fourth Amendment rights, and exclude all evidence discovered during that search.”

At oral argument, Cohen conceded the search of the phone was not raised in the trial court, but argued we should nevertheless find, pursuant to *Riley*, that the contents of the phone should be suppressed. He asserts that a “newly announced rule of constitutional protection ‘is available on direct review as a *potential* ground for relief.’”²

We are precluded from addressing this issue on appeal. A party to an action has the burden of bringing an issue to the attention of the trial court and the opposing party; if the party fails to do so, the party waives the right to raise the issue on appeal. (*People v. Williams* (1999) 20 Cal.4th 119, 128; *People v. Turner* (1992) 8 Cal.4th 137, 177 [Fourth Amendment claim waived by failure to make specific and timely objection in the trial court], overruled on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5; *People v. Coleman* (1991) 229 Cal.App.3d 321, 324 [failure to raise legality of arrest in the trial court precludes the defendant from raising the issue on appeal].) This rule includes an issue, like this one, that was not raised in the motion to suppress below. (*People v. Eckstrom* (1986) 187 Cal.App.3d 323, 332.)

Even if we were to assume the issue was preserved for appeal, and were to assume the phone was searched without a warrant,³ Cohen has not demonstrated the search was illegal.

² Cohen does not take the position there were ““scant grounds”” to challenge the search of the phone in the trial court. (*See People v. Rangel* (2016) 62 Cal.4th 1192, 1215.) Instead, he argues the law in effect at the time of the search “did not establish binding appellate precedent ... authorizing the search of a cell phone that was on the seat of a car at the time of arrest.”

³ At the preliminary hearing, McAfee testified that, during his interview with Cohen, he asked Cohen for the passcode to the phone. Cohen provided the passcode, which unlocked the phone. McAfee viewed a picture in the photo section of the phone. At the subsequent hearing on the motion to suppress, the court asked defense counsel if defendant’s motion related to the “entry into the phone[,]” and noted “the detectives ... a day later got a search warrant and ... [the court] assume[s] they locate[d] something.” When Cohen was “picked up, there was not a search warrant.”

A defendant may move to suppress evidence on the grounds a search or seizure without a warrant is unreasonable. (§ 1538.5, subd. (a)(1)(A).)

California courts may exclude evidence obtained in violation of the Fourth Amendment only if that exclusion is mandated by the federal Constitution. (Cal. Const., art. I, § 28; *People v. Robinson* (2010) 47 Cal.4th 1104, 1119 (*Robinson*).) Exclusion applies only where it results in “““appreciable deterrence””” to law enforcement conduct. (*Herring v. United States* (2009) 555 U.S. 135, 141 (*Herring*).) As the United States Supreme Court stated in *Herring*:

“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.” (*Herring, supra*, 555 U.S. at p. 144.)

The evidence at the suppression hearing established that Cohen had the phone in his hands when approached by officers and set the phone down when told to put his hands up. When he was placed under arrest, Cohen asked the officers to take the phone from his car. The trial court made an explicit finding that the officers seized the phone at Cohen’s request. After being *Mirandized* and agreeing to speak, Cohen gave officers the passcode to unlock the phone when he was asked for the passcode.

As for the officers’ search of Cohen’s phone, the California Supreme Court previously held that the police may conduct a warrantless search of a cell phone seized from a person at the time of arrest. (*People v. Diaz* (2011) 51 Cal.4th 84, 93 (*Diaz*).)⁴ At the time the officers searched Cohen’s phone, *Diaz* was binding precedent in California and authorized the search. The officers could reasonably rely on *Diaz* at the time of the search, and the good faith exception precludes application of the exclusionary rule.

⁴ The issue of whether *Diaz* creates a good faith exception is before the California Supreme Court in *People v. Macabeo*, review granted November 25, 2014, S221852.

(*Davis v. United States* (2011) 564 U.S. 229, 232 [131 S.Ct. 2419, 2423–2424] [“Because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.”].)

Where official action is pursued in good faith, but there is later found to be a defect in a warrant or other basis for a search, the evidence seized as a result of the search is not excluded. (See e.g., *United States v. Leon* (1984) 468 U.S. 897, 919–920; *People v. Downing* (1995) 33 Cal.App.4th 1641, 1656–1657; *People v. Fields* (1981) 119 Cal.App.3d 386, 390.)

Even if, as Cohen argues, *Diaz* does not justify the seizure and search, Cohen’s implied consent does. Cohen asked the officers to take the phone when he was placed under arrest; Cohen agreed to speak after being *Mirandized* and Cohen voluntarily gave officers the passcode to the phone so they could examine the contents. Without Cohen’s cooperation, McAfee could not have unlocked the phone and examined the contents. (*People v. Ramirez* (1997) 59 Cal.App.4th 1548, 1558–1559.) Officers were not required to inform Cohen that he could refuse to provide the passcode. (*People v. James* (1977) 19 Cal.3d 99, 106–107.) It was objectively reasonable for the officers to view this as consent to search the contents of the phone. Excluding the evidence would serve no appreciable deterrent purpose under these circumstances. (*Herring, supra*, 555 U.S. at p. 141.)

Harmless Error

Regardless, to the extent the admission of the phone was erroneous, any error was harmless. Jane Doe provided details about the sexual conduct to which Cohen had subjected her and Cohen, after being properly *Mirandized*, admitted to multiple acts of oral and anal sex with Jane Doe, as well as digitally penetrating her vagina and rubbing his penis on her vagina. Cohen stated that the oral and anal sex had been occurring since

the victim was about 11 or 12 years old. Consequently, any error in denying the suppression motion was harmless in light of Cohen's admissions and Jane Doe's statements. (*People v. Moore* (2011) 51 Cal.4th 1104, 1128–1129.)

DISPOSITION

The judgment is affirmed.