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

THE PEOPLE,

Plaintiff and Respondent,

v.

XAVIER REYES, JR.,

Defendant and Appellant.

F071688

(Super. Ct. No. BF154163A)

**OPINION**

**THE COURT**\*

APPEAL from a judgment of the Superior Court of Kern County. Colette M. Humphrey, Judge.

Michele A. Douglass, 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., Detjen, J., and McCabe, J.†

†Judge of the Merced Superior Court, assigned by the Chief Justice pursuant to article IV, section 6, of the California Constitution.

## **INTRODUCTION**

Appellant Xavier Reyes, Jr., pled no contest to one count of possession of an assault weapon, a violation of Penal Code<sup>1</sup> section 30605, and one count of possession of methamphetamine for sale, a violation of Health and Safety Code section 11378, after his motion to suppress was denied. Reyes filed a notice of appeal challenging the denial of the motion to suppress. Appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. We affirm.

## **FACTS AND PROCEDURAL HISTORY**

On February 6, 2014, a traffic stop was effected of Reyes by Officer Sean Underhill of the Bakersfield Police Department. According to the field arrest report, once stopped for a traffic violation, Underhill observed a box of .45-caliber ammunition in the center console of Reyes's vehicle. Reyes told Underhill he had a pistol, rifle, and a "Tommy gun" in his vehicle. Underhill found the pistol concealed in the vehicle, and the rifle had been modified to have a detachable magazine, making it an assault weapon.

According to an affidavit submitted by Officer Robert Pair in support of a search warrant, at the time of his arrest, Reyes had a cell phone in his possession. He gave the pass code to the officers to open the phone and call his wife; upon unlocking the phone, officers saw a photograph and video of Reyes in possession of various assault weapons. Reyes was issued warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, waived his rights, and told officers additional assault weapons were located at his residence. The affidavit also noted that Reyes has a prior conviction for violating Health and Safety Code section 11377.

A search warrant was obtained to search Reyes's residence. During the search, officers discovered methamphetamine, a digital scale, money, and ammunition.

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<sup>1</sup>References to code sections are to the Penal Code unless otherwise specified.

On August 26, 2014, an information was filed charging Reyes with possession of an assault weapon (§ 30605, count 1); possession of methamphetamine for sale (Health & Saf. Code, § 11378, count 2); possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a), count 3); and concealing a firearm in a vehicle (§ 25400, subd. (a)(1), count 4). Counts 1 through 3 were charged as felonies; count 4 was charged as a misdemeanor.

On August 28, 2014, Reyes filed a motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 for discovery of the personnel files of Underhill and Pair. The People filed written opposition to the *Pitchess* motion. The trial court conducted an in camera hearing, after which it granted the motion and issued a protective order.

On February 13, 2015, Reyes filed a motion to traverse and quash the search warrant and to suppress evidence pursuant to section 1538.5. Reyes alleged that material misrepresentations and omissions had been made in the affidavit in support of the search warrant, and he sought to quash the warrant and suppress all evidence.

The People filed opposition to the motion to suppress. A contested section 1538.5 hearing was held on April 16 and 17, 2015.

### ***Suppression hearing***

At the suppression hearing, Underhill testified that, as he was leaving the police department's training center, he saw a Ford Expedition drive past him with Reyes at the wheel. As it did so, Underhill heard the car's "engine rev real loud, the horn honk, and I looked over and saw the driver of the vehicle making a gesture." Underhill pulled out in his patrol vehicle and followed Reyes for about half a mile before pulling him over.

Underhill testified that it was raining; the roads "were wet, slick, stopping distances [were] increased." Although Reyes appeared to be driving at the speed limit, he was following the car in front of him too closely, or "tailgating." Underhill pulled Reyes over for a Vehicle Code violation of following too closely; there was "less than half a car length" between the Ford and the car in front of it.

Once Underhill approached the car, he noticed a sticker on the back that said “Magpul.” Underhill knew Magpul made accessories for firearms. After he approached the driver’s side window, Underhill could see a box of .45-caliber ammunition in the cup holder. Underhill asked Reyes if he had any firearms in the vehicle; Reyes answered affirmatively.

Underhill asked for Reyes’s driver’s license, insurance information, and any documentation or information indicating Reyes was “able to possess firearms.” Underhill also ran a records check on Reyes before searching the vehicle. The records check showed that Reyes had been convicted of possession of methamphetamine and that the conviction “had been reduced to a misdemeanor.” After finishing the records check from the patrol vehicle, Underhill went back to the Ford on the passenger side and saw a magazine of bullets on the passenger floorboard.

Underhill asked Reyes to step out of the Ford and apparently called for other officers to assist; Pair arrived on the scene. After Pair and other officers arrived, Underhill searched the vehicle and “saw a fully loaded magazine for a handgun laying on the passenger side floorboard.” Reyes indicated there was a handgun in the Ford, so Underhill looked for it and found it “tucked in between the seat and center console.” Reyes told Underhill there were other weapons in the vehicle, so Underhill looked in the cargo area and found a “Thompson submachine gun” and an “AR-15 semiautomatic rifle.”

Underhill was checking all the weapons to see if the ammunition was separate from the weapon “as it’s supposed to be.” He indicated the ammunition “wasn’t separate” from the handgun.

Underhill testified “the moment that traffic stop was initiated, [Reyes] was detained.” Reyes “was under arrest” “before all of us left the traffic stop ....” Underhill stated that Reyes “had already told me what was there” before he searched the vehicle. Underhill estimated the lapse of time to be about five minutes from the initial stop to the

time he commenced a search of the vehicle and another “five or ten minutes” for the search of the entire vehicle.

Pair testified that when Reyes was notified “he was going to be arrested,” Reyes “requested that he be able to contact his wife ....” Pair retrieved Reyes’s cell phone from Underhill, who had collected it from the vehicle. Reyes provided Pair with the code to unlock the phone. Pair dialed the number Reyes gave him to call and “eventually handed” the phone to Reyes.

After Reyes spoke with his wife, Pair “confronted” Reyes about the photograph of firearms Pair had seen on the cell phone after he unlocked it. Pair testified that, after he unlocked the phone, there was a “thumbnail in the lower left corner depicting a bunch of rifles.” Based upon his training and experience, Pair believed some of the rifles to be “AK variance” and possibly not “California compliant.” Pair didn’t “manipulate” the thumbnail any further at this point.

When Reyes finished calling his wife, Pair “struck up a conversation regarding the firearms ....” Pair asked if he could look at the pictures of the firearms and Reyes responded “sure.” Pair then opened up the camera app on the phone and looked at the stored photos and videos. Pair found photos of AK variant rifles with no butt stock; pistol grips; high capacity magazines; weapons that appeared to be consistent with MAC-10; sawed-off shotguns; rifles with scopes; and a video of Reyes firing more than 30 rounds consecutively, indicating the firearm was fully automatic. Based upon what he saw, Pair believed some of the weapons were not legal.

The defense called a defense investigator, Johanna Romero, who testified she was unable to locate a return on the search warrant. Romero also testified that she examined Reyes’s cell phone and the last picture on it was not of firearms, but showed a white background with black lettering. Romero stated the thumbnail showed the black and white picture.

Diane Reyes, Reyes's wife, testified that after the search of her home, no inventory list was provided by the police. She acknowledged on cross-examination that her husband called her from jail and told her to "Get everything out of the fucking safe." The jailhouse conversation was recorded. Pair testified that, when he searched the home, one safe was ajar and completely empty; the other had no firearms inside.

Joel Perette was called by the defense. Perette testified that Underhill and other officers raided his house in 2013 and arrested his son "for no reason." The officers tased the son as soon as he opened the door, arrested him for resisting arrest, and took away the son's phone and iPad. The son was released and called to retrieve his personal property; Underhill told him he would have him arrested again if he continued to call. Perette opined that Underhill was vindictive, dishonest, and immature. Perette thought these actions took place because he was a bail bondsman. On cross-examination, it was established that the son was on misdemeanor probation and terms of probation included submitting to a search of his person and residence.

Defense counsel argued that Underhill did not have "probable cause for the stop," and there was no Vehicle Code violation. He also argued that, "unless you fully consent to the search of the cell phone," the contents are protected under the Fourth Amendment.

The People argued that Underhill had a valid, articulated reason for stopping Reyes's vehicle: the probable Vehicle Code violation. The People also argued that Reyes gave consent for the search of his cell phone.

The trial court found Underhill's testimony that Reyes was driving within a half a car length of the vehicle in front of him to be credible and found the traffic stop to be "legal." The trial court found that Pair did not access the photographs or camera on Reyes's phone until after he had a conversation with Reyes; that Reyes described the guns as his "babies" and claimed all the guns were legal; and that Reyes consented to the search of the phone. As to the search of the vehicle, the trial court found that, once Reyes

admitted there were weapons in the car and Underhill could not see the weapons, it was appropriate to search the vehicle for the weapons.

The trial court denied the motion to suppress and denied the motion to traverse and quash the warrant.

### ***Plea***

On April 17, 2015, Reyes pled no contest to counts 1 and 2. At the June 1, 2015 sentencing hearing, the trial court suspended imposition of sentence on count 1 and placed Reyes on probation for three years; ordered Reyes to serve the first 16 days in custody and awarded 16 days of custody credits; and ordered Reyes to complete a drug treatment program through Veteran's Affairs or another program approved by the probation office. Various terms of probation were imposed, and Reyes was ordered to pay various fines and fees. As to count 2, the trial court imposed a concurrent term of three years' probation, with the same terms and conditions as those on count 1.

Reyes filed a notice of appeal and requested a certificate of probable cause, which was granted.

### **DISCUSSION**

Appellate counsel filed a *Wende* brief on October 23, 2015. (*People v. Wende, supra*, 25 Cal.3d 436.) That same day, this court issued its letter inviting Reyes to submit supplemental briefing. Reyes submitted a letter brief on December 2, 2015.

In his letter, Reyes contends the traffic stop was effected merely for “giving the finger” to Underhill; he did not receive a list of items removed from his home pursuant to the search warrant; and his cell phone was searched illegally.

An appellate court reviews the trial court's factual determinations on a motion to suppress under the deferential substantial evidence standard; the determination of whether the applicable law as applied to the facts discloses a violation of Fourth Amendment rights is subject to independent review. “On appeal we consider the correctness of the trial court's ruling *itself*, not the correctness of the trial court's *reasons*

for reaching its decision.”” (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 364-365.)

The trial court acknowledged Reyes had made a gesture which annoyed Underhill, but the trial court found that the traffic stop of Reyes was effected for violating the Vehicle Code provision against following too closely, not for making an annoying gesture. Underhill’s testimony supports this finding. Underhill had an articulated, reasonable suspicion that Reyes had violated the Vehicle Code, which is a valid basis for effecting a traffic stop and a detention. (*People v. Saunders* (2006) 38 Cal.4th 1129, 1135.)

As for the execution of the search warrant, section 1534, subdivision (a), specifies that a warrant shall be executed and returned within 10 days after issuance. The failure to file a return within 10 days, however, is not a “violation of constitutional dimensions, and does not give rise to the remedy of suppression.” (*People v. Kirk* (1979) 99 Cal.App.3d 89, 94.)

Regarding Reyes’s claim the search of his cell phone was illegal, on June 25, 2014, after the search in this case, the United States Supreme Court held that the 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].) The trial court found, however, that Reyes consented to the search of his cell phone and the evidence supports this finding. Reyes voluntarily gave Pair the pass code to the phone and consented to allow Pair to look through the pictures and video of firearms that were on the phone. Without Reyes’s cooperation, Pair could not have unlocked the iPhone and Pair did not examine the phone’s camera contents until after Reyes gave consent. (*People v. Ramirez* (1997) 59 Cal.App.4th 1548, 1558.) Officers were not required to inform Reyes that he could refuse to provide the pass code or access to the pictures. (*People v. James* (1977) 19 Cal.3d 99, 106.)

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

**DISPOSITION**

The judgment is affirmed.