Filed 5/1/12 P. v. Beck CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SHAWN RICHARD BECK, Defendant and Appellant.	G045544 (Super. Ct. No. 09SF0045) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Francisco P. Briseño, Judge. Affirmed.

Shawn Richard Beck, in pro. per.; Thomas K. Macomber, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

On August 27, 2009, a jury convicted defendant Shawn Richard Beck of three counts of first degree burglary, one count of attempted first degree burglary and one count of receiving stolen property. On March 16, 2010, the court suspended criminal proceedings because both the court and defense counsel had a doubt about the mental competency of defendant. The court ordered psychological and psychiatric examinations of defendant. On August 20, 2010, the court found defendant was not a mentally incompetent person under Penal Code section 1368. The court sentenced defendant to seven years four months in state prison.

We appointed counsel to represent defendant on appeal. Counsel filed a brief which set forth the facts of the case. Counsel did not argue against the client, but advised the court no issues were found to argue on defendant's behalf. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was given 30 days to file written argument on defendant's own behalf. On November 23, 2011, defendant's 11-page handwritten brief was filed. We have examined the record and found no arguable issue, but discuss what was raised by counsel and defendant. We affirm.

I

FACTS

On December 25, 2008, Orange County Sheriff's Department investigated burglaries in the Dove Canyon area of Santa Margarita. While an officer was interviewing one of the victims, he saw a suspicious vehicle drive by. Defendant was stopped and some of the stolen items were found inside his car. Investigator Cheryl Hodgson conducted an in-field show-up with one of the victims. The victim was not able to identify defendant, but said, "That's definitely the car. I remember the big dent."

Defendant's Statements to Police

At the police station on December 25, Hodgson advised defendant of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436. He said he understood them. He

then asked to call his attorney. Defendant was permitted to call his lawyer, but told the police no one answered. The following questions and answers between the prosecutor and Hodgson describe what the officer said next happened:

"Q. And after he told you that there was no answer, did you initiate any other conversation with him?

"A. He voluntarily told me he wanted to talk to me still.

"Q. Once he told you that he wanted to talk to you, did you begin to question him about the events that took place?

"A. No.

"Q. What did you do?

"A. I again iterated that he had the right to an attorney prior to me questioning him. If he wanted his attorney available, that was his right. I told him he would be giving up that right, and he said he understood.

"Q. So you basically once again went over some of the advisements; is that correct?

"A. Yes.

"Q. He indicated he still wanted to talk to you?

"A. Yes.

"Q. At that point did you start to question him about some of the events that occurred?

"A. Yes."

Defendant told Hodgson he decided to look for unlocked vehicles to take items out of them. He said he found a few vehicles open and took items. After that, he opened the sliding glass door of a residence and went through the house to the garage. He took items out of both cars in the garage. He tried a few more doors to residences until he found another that was unlocked, and took a power saw out of the garage of that

residence. He then entered the garage of a third residence and took a bag full of presents. He tried to enter doors and windows of other residences but found them all locked.

During trial, out of the presence of the jury, the court heard testimony and argument regarding whether or not defendant's statements to the officer violated *Miranda v. Arizona*, *supra*, 384 U.S. 436. The court ruled as follows: "I'm going to overrule the objection as to the admissibility of any statements made by the defendant. I believe the officer's testimony as to the circumstances that took place during the interview. It doesn't appear there was any lengthy interview process, and there [were] no indications of any coercion or threats . . . ."

Video

Prior to argument by counsel or final instructions by the court, but after the close of evidence, defense counsel informed the court: "Yesterday during the cross-examination of the second-to-the-last officer, I forget his name, I asked him about whether or not he was the one that pulled over the vehicle Mr. Beck was driving, if they had a video in the vehicle, and he indicated yes, which I was surprised at, because I inherited this case from another lawyer, and I assumed that all the discovery that had been propounded to that lawyer was passed on to me when I got the file. That video was not included, neither were the pictures, but I had counsel give me the pictures and then counsel just informed me today that oh, yeah, we have the video, and it was delivered to counsel, counsel just didn't give it to me. [¶] So I don't know what's on that video. . . . Counsel indicated there isn't anything of significance on that video." The court stated: "Nevertheless, I think you should have an opportunity to view that. So I'm going to proceed on the representation of counsel that there is nothing that's significant on that video. [¶] . . . [¶] When the jury starts their deliberations, I'm going to task the district attorney to get us a copy of that so we can have counsel look at that. [¶] . . . [¶] That's the best I can do in the situation we are in."

While the jury was deliberating the court noted the prosecutor provided the video to defense counsel and that defense counsel requested it be shown to the jury. The jury was brought into the courtroom and the video was played.

Posttrial Proceedings and Sentencing

On March 16, 2010, defendant himself stated to the court: "I would like to request to dismiss Frederick Fascenelli as representing attorney for myself due to the fact of ineffective assistance, which I have a motion here that I would like to file with the county clerk, as well as a request for dismissal on all counts due to a *Brady* violation, as well as, if not that, a new trial motion based on the fact of *Pitchess* as well as due process violation, your Honor." The court ordered defendant's motions filed, expressed a doubt about defendant's competency, appointed two doctors to examine his competency to stand trial and suspended proceedings.

On July 30, 2010, defense counsel declared a conflict. The court appointed another lawyer to represent defendant. The court found defendant was competent to proceed with the matter and reinstated criminal proceedings on August 20, 2010.

On January 21, 2011, the court conducted a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. Immediately thereafter, Defense Counsel George Abbes declared a conflict. A conflict attorney was appointed. The conflict attorney also declared a conflict, and the court appointed alternate Defense Counsel Salvatore Ciulla. On March 4, 2011, Ciulla declared a conflict, so the court appointed Maltaise Cini to represent defendant. The court sentenced defendant on June 23, 2011.

II

DISCUSSION

Pursuant to *Anders v. California* (1967) 386 U.S. 738, 744, appellate counsel stated the record "might arguably support the appeal" with regard to the following issue: "Did admission of [defendant's] statements to Investigator Hodgson

violate the Fifth and Sixth Amendments?" and "Was appellant's attorney ineffective?" because he "argued the case to the jury prior to viewing the evidence of [defendant's] initial contact with officers?" Defendant's brief discusses the video, too, as well as a defendant's entitlement "to show past acts of misconduct and bias, inter alia, to show the officer's motive, intent, bias, habit or custom." But he cites to nothing in the record of his trial which indicates error, and we see nothing which indicates error. "'It is an appellant's burden to demonstrate the existence of reversible error. [Citation.]' [Citation.]" (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1443.)

"[*M*]*iranda* holds that '[t]he defendant may waive effectuation' of the rights conveyed in the warnings 'provided the waiver is made voluntarily, knowingly and intelligently.' [Citation.]" (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) "If the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him. [Citation.]" (*Davis v. U.S.* (1994) 512 U.S. 452, 458.)

"[T]he trial court's legal conclusion as to the voluntariness of a confession is subject to independent review on appeal. [Citations.] The trial court's resolution of disputed facts and inferences, its evaluation of credibility, and its findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence. [Citations.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 752.)

Our independent review of the testimony leads us to the same conclusion reached by the trial court. Under the circumstances we find in this record, we conclude defendant's statements to the police were voluntary, and the trial court properly denied defendant's motion to suppress them.

Regarding the possibility of an appellate issue concerning the video, we find nothing to indicate that is the case. To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. (*Strickland v. Washington* (1984) 466

U.S. 668, 687-688.) "Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." (*People v. Benavides* (2005) 35 Cal.4th 69, 93.) Once he realized there was a piece of evidence he did not have, defense counsel properly informed the court, and the prosecutor produced it forthwith. The court granted defendant's request that the jury see the video. It did. This record reveals no deficiency on the part of counsel and no prejudice to defendant as a result of the video being produced late in the proceedings.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.