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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RYLEY LYNN LYON,

Defendant and Appellant.

H038242

(Santa Cruz County

Super. Ct. No. F21996)

Defendant Ryley Lynn Lyon pleaded no contest to felony transportation of cocaine (Health & Safety Code, § 11352, subd. (a)) with a loaded firearm enhancement (Penal Code, § 12022, subd. (c)).¹ Imposition of sentence was suspended for three years, and defendant was placed on probation. Defendant's plea came after he unsuccessfully attempted to suppress evidence discovered as the result of a traffic stop based on alleged violations of the Fourth Amendment to the United States Constitution. On appeal, defendant contends the Superior Court erred in finding defendant had forfeited certain arguments related to his suppression motion by failing to raise them during his preliminary hearing. Alternatively, defendant argues he was denied effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution by his trial counsel's failure to preserve all Fourth Amendment arguments. For the reasons stated herein, we will affirm the judgment.

¹ All further unspecified statutory references are to the Penal Code.

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 3, 2012 at approximately 4:00 p.m., Santa Cruz County Deputy Sheriff Troy Zube was on patrol on Ocean Street in Santa Cruz.² A black four-door sedan caught Deputy Zube's attention because it had expired registration tags. Additionally, the tail light fixture on the driver's side was hanging from the car and appeared to be attached only by its electrical cable. Due to the apparently expired registration and the hanging tail light, the deputy pulled the sedan over. The car had two occupants, defendant in the driver's seat and Felicia Pyette in the front passenger seat. When Deputy Zube asked for identification, Pyette informed him she was on felony probation with search terms. Deputy Zube later verified Pyette's probation status and search condition.

While talking with the defendant and Pyette, Deputy Zube noted several items in plain view from his vantage point outside the sedan. In the back seat, he saw rolled papers that looked like targets one would use at a shooting range, with holes in the center consistent with the appearance of bullet holes. He also saw two headsets that appeared to be used for ear protection when shooting a gun. On the floorboard in front of the front passenger seat at Pyette's feet, he saw pieces of plastic with the ends or corners torn off, which he recognized as "possibly packaging for heroin."

Deputy Zube then asked Pyette to exit the sedan so that he could conduct a search pursuant to her probation search condition. He first patted down Pyette and, finding nothing, asked her to sit in the back of his patrol car while he conducted a search of the sedan. To maintain safety, Deputy Zube also asked defendant to sit in the patrol car during the vehicle search.

Deputy Zube then returned to the sedan and confirmed that the papers in the back seat were targets and that the headsets were of the type commonly used as ear protection when firing guns. Based on the presence of those items, the deputy asked defendant whether there was a gun in the car. Defendant initially hesitated but eventually told the officer there was a gun in the back seat. With this information, Deputy Zube returned to

² This factual background is based on Deputy Zube's testimony at defendant's preliminary hearing.

the sedan and found a handgun loaded with six .45 caliber shells in the back seat directly behind the driver's seat within arm's reach of both the driver's seat and front passenger's seat. When he examined the gun, the deputy noticed the serial number had been filed off.

Continuing his search of the back seat area, Deputy Zube discovered a small plastic container with eight grams of heroin and six grams of cocaine. The drugs were wrapped in clear plastic similar to the plastic the deputy viewed on the floorboard in front of the passenger seat. Also in the container were clear plastic baggies, one containing powder residue. Next to the plastic container, Deputy Zube found a digital scale with black, tar-like residue on the top consistent with the appearance of heroin. Moving his search to the front seats, the deputy inspected the pieces of plastic on the passenger's side floorboard and noted one of them appeared used because of powder residue. In the ashtray, he found approximately one gram of methamphetamine.

After discovering the various illegal items in the sedan, Deputy Zube arrested defendant. During a search of defendant, he found .45 caliber shell casings, a counterfeit \$100 bill, two pocket knives, and \$166 in cash.

Based on the foregoing evidence, the People charged defendant with: (1) transportation of two controlled substances, heroin and cocaine (Health & Safety Code, § 11352, subd. (a)); (2) the special allegation of transporting controlled substances while armed (§ 12022, subd. (c)); (3) possession of controlled substances, heroin and cocaine, with a firearm (Health & Safety Code, § 11370.1, subd. (a)); (4) receiving stolen property (§ 496, subd. (a)); (5) carrying a loaded firearm in a vehicle within a city (former § 12031, subd. (a)(1)); and (6) possession for sale of controlled substances, heroin and cocaine (Health & Safety Code, § 11351).

At his preliminary hearing, defendant moved to suppress all evidence found in the vehicle, arguing neither the expired registration nor the hanging tail light gave the officer reasonable suspicion to stop the sedan. The magistrate found Deputy Zube had adequate suspicion for the traffic stop and held defendant to answer the charges. Defendant then filed a renewed motion to suppress in the Superior Court, arguing for the first time that the search was unlawful because: (1) nothing in plain view gave Deputy Zube probable

cause to search the sedan; and (2) Pyette's probation condition did not justify the search of the back seat. The Superior Court denied the renewed motion, reasoning section 1538.5 allows only one full evidentiary hearing regarding the suppression of evidence. Citing *People v. Bennett* (1998) 68 Cal.App.4th 396, the court found defendant's failure to raise the new theories at the preliminary hearing foreclosed his ability to raise them before the Superior Court.

II. DISCUSSION

On appeal, defendant argues the Superior Court erred in refusing to allow him to raise the plain view and probation condition scope issues in his renewed motion to suppress. Alternatively, defendant argues his trial counsel provided ineffective assistance by failing to raise these suppression theories at the preliminary hearing. Because we will find Deputy Zube's search was reasonable in light of Pyette's probation search condition, we will affirm the Superior Court's decision.

A. DENIAL OF DEFENDANT'S RENEWED SUPPRESSION MOTION

In deeming defendant's plain view and probation search suppression theories waived, the Superior Court relied on section 1538.5, subdivision (i), and *Bennett, supra*, 68 Cal.App.4th 396. Section 1538.5, subdivision (i), sets out the procedure for suppressing evidence in felony cases initiated by complaint. If, as here, a motion to suppress is brought at the preliminary hearing, the defendant has a right to a full evidentiary hearing regarding the suppression issues raised. However, if the defendant wishes to renew the suppression motion once the matter is before the Superior Court, the scope of the evidence to be considered is limited to the transcript from the preliminary hearing, evidence that could not have reasonably been presented at the preliminary hearing, and testimony from any witness who testified at the preliminary hearing the People choose to recall. (§ 1538.5, subd. (i).)

In *Bennett*, the court reasoned that allowing new issues to be raised at a second suppression hearing would be contrary to the legislative intent to allow only one evidentiary hearing for suppression motions, because the prosecution would often have to recall witnesses or obtain testimony of additional witnesses to develop facts associated

with the new issues. (*Bennett, supra*, 68 Cal.App.4th at pp. 405-406.) To prevent this, the *Bennett* court held that defendants who seek suppression at a preliminary hearing may not argue suppression theories in a renewed motion in the Superior Court unless those theories were litigated at the preliminary hearing. (*Id.* at pp. 406-407.)

Defendant argues *Bennett* interpreted section 1538.5, subdivision (i), too broadly and that a defendant should be allowed to raise new theories in a renewed motion to suppress so long as those theories do not require any additional factual development. With this interpretation in mind, defendant claims there was adequate factual development at the preliminary hearing for the Superior Court to determine the plain view and probation search theories for suppression. Here, however, we need not decide this interpretive question because, even assuming section 1538.5, subdivision (i), allows new theories in a renewed motion to suppress, Deputy Zube's search of the sedan was reasonable based on Pyette's probation search condition.

B. SCOPE OF PYETTE'S PROBATION SEARCH CONDITION

The lower court concluded the traffic stop was lawful. When Deputy Zube asked for identification after stopping the sedan, Pyette acknowledged that she was on probation and subject to search terms. After learning this, the deputy confirmed the existence of the probation search condition with Santa Cruz County Superior Court records before searching the car. While defendant does not contest these matters on appeal, in his opening brief he argues Deputy Zube's search of the entire passenger compartment exceeded the scope of Pyette's probation search condition. In his reply, however, defendant notes the recent California Supreme Court case of *People v. Schmitz* (2012) 55 Cal.4th 909, and essentially concedes that his scope argument no longer has merit in light of *Schmitz*. We agree with defendant's concession.

In *Schmitz*, the police stopped a noncommercial five-passenger car driven by the defendant, determined the front passenger was on parole with search terms, and searched the passenger compartment of the car on that basis. (*Schmitz, supra*, 55 Cal.4th at pp. 914, 925.) In the back seat area of the car, police found two syringes in a chips bag and methamphetamine in a shoe. (*Id.* at p. 914.) *Schmitz* sought to suppress the syringes and

methamphetamine, claiming the scope of the passenger's parole search extended only to the front passenger's seat and the floor in front of that seat. After the defendant prevailed in the appellate court, the Supreme Court reversed. (*Id.* at pp. 914-915.)

The Supreme Court first contrasted reasonable expectations of privacy in a dwelling with expectations in a vehicle, noting that the expectation is significantly lower with regard to vehicles. (*Schmitz, supra*, 55 Cal.4th at pp. 919-920.) The court also made clear that to determine the reasonableness of a search for purposes of the Fourth Amendment, courts must look at the totality of the circumstances. (*Id.* at p. 921.) The court then looked to federal and California authorities and concluded that once an officer is aware of the parole status of a passenger in a vehicle, "the driver cannot reasonably expect to shield the interior of the car *completely* from any search aimed at uncovering criminal activity by the parolee." (*Id.* at pp. 922-923.) Rather, the driver can only reasonably expect the search to be strictly tied to the circumstances authorizing it and not conducted in an arbitrary, capricious, or harassing manner. (*Id.* at p. 923.)

Turning to the scope of the allowable search based on a front passenger's parole status, the Supreme Court considered the following factors: (1) the government's substantial interest in supervising parolees; (2) the defendant's reduced expectation of privacy in a vehicle rather than a dwelling; (3) the further reduction of the defendant's expectation of privacy by virtue of allowing others to ride in his vehicle; (4) the social conventions associated with noncommercial vehicles, where passengers do not act as if they are confined to separate compartments and, to the contrary, generally feel free to stow their belongings throughout the passenger compartment; and (5) the front passenger parolee's "ready access" to the front and back seats due to the size of the vehicle. (*Schmitz, supra*, 55 Cal.4th at pp. 923-925.)

Balancing these factors, the court held that the reasonable scope of the search of a parolee in a noncommercial vehicle "is confined to those areas of the passenger compartment where the officer reasonably expects that the parolee could have stowed personal belongings or discarded items when aware of police activity." (*Schmitz, supra*, 55 Cal.4th. at p. 926.) For the defendant in *Schmitz*, the court determined this reasonable

scope extended to the back seat where the police found the syringes and methamphetamine. (*Ibid.*) Because the police found the evidence within the area covered by the front passenger's parole search condition, the court held the motion to suppress should have been denied.

Though parolees and probationers are not the same because parolees have already served sentences, “ ‘[p]arole and probation are equally important aspects of the state’s penal system and optimum successful functioning thereof is of compelling public interest.’ [Citation.] ” (*People v. Thomas* (1975) 45 Cal.App.3d 749, 757.) Like parolees, if subject to search conditions, probationers and their immediate surroundings can be searched by the police without any suspicion so long as the officer is aware of the condition and the search is not conducted in an arbitrary, capricious, or harassing manner. (*People v. Hoeninghaus* (2004) 120 Cal.App.4th 1180, 1196 [“a probationer does not waive Fourth Amendment protection against searches that are arbitrary, capricious, or harassing”].)

Here, Deputy Zube found the handgun, cocaine, and heroin on the back seat. The deputy testified the revolver was within arm’s reach of both Pyette and defendant. Additionally, the methamphetamine was located in the sedan’s ashtray which, while not entirely clear from the record, presumably is located below the dashboard between the driver and front passenger. This area would be within Pyette’s reach from the front passenger seat. The areas where Deputy Zube discovered the challenged evidence were therefore within the area where an officer could have reasonably expected Pyette to have stowed personal belongings. (*Schmitz, supra*, 55 Cal.4th at p. 926.) We conclude Deputy Zube’s search was reasonable and defendant’s renewed suppression motion would have been denied even if the Superior Court had allowed him to argue the new suppression theories.

Because we find the Superior Court would have denied defendant’s renewed motion to suppress even with the addition of the plain view and probation condition theories, defendant’s ineffective assistance of counsel argument must fail because he is unable to show a reasonable probability that the outcome of the suppression motion

would have been different but for his trial counsel's alleged error. (See *People v. Anderson* (2001) 25 Cal.4th 543, 569.)

III. CONCLUSION

For the foregoing reasons, we affirm the judgment.

Grover, J.

WE CONCUR:

Premo, Acting P.J.

Mihara, J.