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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS MACIAS GUZMAN,

Defendant and Appellant.

A140435

(Solano County
Super. Ct. No. FCR289829)

INTRODUCTION

Following a search of his home pursuant to a search warrant, defendant Jesus Macias Guzman was charged with, and eventually convicted by a jury of, receiving a stolen motorcycle that was discovered by Vacaville police officers in his dining room.

Pursuant to *People v. Hobbs* (1994) 7 Cal.4th 948 (*Hobbs*) defendant now asks this court to: (1) conduct an in camera review of the sealed portion of the search warrant to determine whether the trial court erroneously denied his motions to unseal and to quash the search warrant; (2) reverse his conviction because he was not present at the trial court's in camera review; and (3) modify the assertedly "vague and overbroad" condition of probation that defendant have no contact with two named victims. The Attorney General agrees that our independent review of the sealed material is appropriate, including the transcript of the in camera hearing. Having conducted our review, and finding no error or abuse of discretion, we affirm the judgment. We decline to modify the probation condition because it is not vague or overbroad.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2013, defendant went to trial on a consolidated information charging three counts of receiving stolen property in violation of Penal Code section 496d, subdivision (a)¹: 1) a stolen motorcycle in October 2011; 2) a stolen motorcycle in December 2011; and 3) a stolen license plate in December 2011. He was convicted on count 1, acquitted on count 3, and a mistrial was declared on count 2 after the jury could not reach a verdict. The prosecutor subsequently dismissed count 2 in exchange for defendant agreeing to execute a *Harvey*² waiver. The court suspended imposition of sentence, and placed defendant on probation for three years, with conditions including that he serve 120 days in jail, and that he have no contact with the two named victims in this matter.

We need not discuss the evidence at trial, because most of the appeal turns on what happened *before* trial in connection with the execution of a search warrant on October 25, 2011. This search warrant led to the discovery of a motorcycle in defendant's dining room that was the basis for the single count of conviction.

A portion of the affidavit in support of the search warrant (Appendix A) was sealed by the magistrate. Defendant made a motion to unseal the confidential portion of the search warrant. The court conducted an in camera review of the sealed search warrant affidavit, and denied the motion to unseal on July 19, 2012. Defendant subsequently moved to quash the search warrant pursuant to section 1538.5 on the ground that there was no probable cause. This motion was also denied. This appeal followed.

DISCUSSION

A. *The Search Warrant*

At defendant's request, we have reviewed the sealed attachment to the affidavit (Appendix A), as well as the sealed transcript of the in camera hearing held pursuant to *Hobbs*. The trial court did not err.

¹ All statutory references are to the Penal Code.

² *People v. Harvey* (1979) 25 Cal.3d 754

In essence, the search warrant authorized a search of defendant, a specific apartment in Vacaville at 490 Markham Avenue, and a specific vehicle associated with defendant. The warrant was based on the affidavit of probable cause attested to by Vacaville Police Detective Jason R. Johnson. The affidavit stated that defendant was the subject of a narcotics investigation over the last year, including a prior search warrant that had been served on defendant on September 15, 2011, as he sat outside 490 Markham Avenue. At that time, a cell phone was on the ground next to where defendant was sitting when he was detained; he tried to step on it to break it. No contraband was found, but defendant's cell phone was examined and found to contain text messages consistent with the sale of controlled substances, including methamphetamine and pills. At that time, defendant denied selling methamphetamine, but admitted using it. He also admitted that he lived at 490 Markham Avenue, in apartment 2. Defendant's truck wasn't present when the September 2011 warrant was served.

Detective Johnson stated in his affidavit that during the last several months preceding the search warrant now at issue in this matter, he had received information from two confidential informants (CI's) that defendant was selling methamphetamine. CI-1 purchased methamphetamine from defendant within the 10 days that preceded Johnson's affidavit. CI-1 also described defendant's pick-up truck (which matched the features of defendant's truck as Johnson knew it), identified defendant's pickup truck near 490 Markham Avenue, and said defendant hid methamphetamine in the truck. CI-1 positively identified defendant from a known DMV photo of defendant. CI-1 was providing information for consideration in a pending criminal matter, and Johnson had no information CI-1 was unreliable. CI-2 provided information that defendant was selling methamphetamine, that defendant lives in an apartment complex on Markham Avenue, and that CI-2 purchased methamphetamine from defendant within the three weeks preceding Johnson's affidavit. CI-2 was also providing information for consideration in a pending criminal matter, and Johnson had no information CI-2 was unreliable.

Johnson's affidavit referred to additional probative information in an attached "Appendix 'A'" to the affidavit, which the magistrate had ordered sealed.

The Affidavit Was Properly Sealed.

Our Supreme Court in *Hobbs* has set forth a procedure by which a search warrant affidavit, or, as here, a portion of one, may be sealed to protect the confidentiality of an informant's identity: "The Legislature and the courts have also sanctioned the procedure of sealing portions of a search warrant affidavit that relate facts or information which, if disclosed in the public portion of the affidavit, will reveal or tend to reveal a confidential informant's identity. The materials, usually sealed by the magistrate at the time the search warrant is signed and issued, are then made available for in camera review by the trial court in connection with any motion brought to challenge the warrant's validity or discover whether the informant is a material witness to defendant's guilt or innocence. [Citations.]" (*Hobbs, supra*, 7 Cal.4th at p. 963.)

"The court must first determine whether a valid basis exists to exclude the informational materials from the 'public' portion of the search warrant application, i.e., determine whether disclosure of those materials would compromise the confidentiality of the informant's identity. Any portions of the sealed materials which, if disclosed, would not reveal or tend to reveal the informant's identity must be made public and subject to discovery by the defense. [Citation.]" (*Hobbs, supra*, 7 Cal.4th at p. 963.)

Here, after defendant made his motion to unseal, the trial court reviewed the entire affidavit at an in camera hearing, and determined that Appendix A had been properly sealed. We have reviewed Appendix A, and the in camera hearing transcript, and agree. It would tend to reveal the identity of the CI's.

The Affidavit, in its Entirety, Establishes Probable Cause to Search.

We next consider the motion to quash. "[I]f the affidavit is found to have been properly sealed and the defendant has moved to quash the search warrant (Pen. Code, § 1538.5), the court should proceed to determine whether, under the 'totality of the circumstances' presented in the search warrant affidavit and the oral testimony, if any, presented to the magistrate, there was 'a fair probability' that contraband or evidence of a crime would be found in the place searched pursuant to the warrant. [Citations.]" (*Hobbs, supra*, 7 Cal.4th at p. 975.)

The trial court here followed the proper procedure. Our independent review of the record, including the sealed portions, confirms the trial court's determination that under the totality of the circumstances, there was probable cause to issue the search warrant.³

It Was Not Error to Exclude Defendant and his Attorney From the In Camera Hearing.

Defendant contends that the *Hobbs* procedure itself violated his Sixth Amendment right to counsel and his Fourteenth Amendment right to present a defense, because neither he nor his attorney were permitted to be present at the in camera hearing. Defendant candidly acknowledges that the trial court and this court are bound by *Hobbs*, which flatly rejects his claim. (*Hobbs, supra*, 7 Cal.4th at p. 973 [“[t]he prosecutor may be present at the in camera hearing; defendant and his counsel are to be excluded unless the prosecutor elects to waive any objection to their presence”].) We need say no more. (*See Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [“decisions of this court are binding upon and must be following by all the state courts of California”].)

B. Probation Condition

As a condition of probation, the trial court ordered defendant to have no contact with the two victims in this case, who were identified by the trial court at the sentencing hearing, and in the written order, by name.⁴ At the time the condition was imposed, the trial judge noted that he did not know if one of the victims (identified as the motorcycle owner) was “even local anymore.” In response to the trial court's question, the prosecutor stated that the defendant and the victims had no relationship and did not know each other.

³ The sealed Appendix A to Johnson's affidavit of probable cause, and the transcript of the in camera hearing on the motion to unseal the warrant, were not part of the record on appeal. We requested augmentation of the record to include them, and they are filed in this court under seal.

⁴ The written minute order and order of probation, signed by the court, defendant, and his interpreter, states: “have no contact with the victims in this case” and then identifies the two victims by name.

Defendant now contends that this probation condition is “vague and/or overbroad because appellant does not know the victims. . . . Since appellant does not know the victims in this case, and saw them only briefly during their testimony, appellant could encounter the victims without recognizing them and have accidental contact with them without knowing that he was in violation of the probation condition. Thus, appellant could violate the condition without knowing he was violating it.” Defendant urges us to modify his probation term to prohibit him from having “knowing” contact with the victims. The Attorney General does not object.

We have previously discussed constitutional challenges to conditions of probation in *In re Victor L.* (2010) 182 Cal.App.4th 902. “Under the void for vagueness doctrine, based on the due process concept of fair warning, an order ‘ “must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated.” ’ ([*In re*] Sheena K. [(2007)] 40 Cal.4th [875,] 890.) The doctrine invalidates a condition of probation ‘ “so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.’ ” ’ (*Ibid.*) By failing to clearly define the prohibited conduct, a vague condition of probation allows law enforcement and the courts to apply the restriction on an ‘ “ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.’ ” ’ (*Ibid.*)” (*In re Victor L. supra*, 182 Cal.App.4th at p. 910.)

“In addition, the overbreadth doctrine requires that conditions of probation that impinge on constitutional rights must be tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.” (*In re Victor L., supra*, 182 Cal.App.4th at p. 910.)

As our colleagues in Division 1 recently catalogued, “[c]onditions determined to be unconstitutionally vague include those that restrict otherwise lawful activity by broadly prohibiting ‘association with certain categories of persons, presence in certain types of areas, or possession [or use] of items that are not easily amenable to precise definition.’ ([*People v.*] *Moore* [(2012)] 211 Cal.App.4th [1179,] 1185.) The concern

with broadly prohibiting probationers from otherwise lawful conduct involving these categories is that the prohibitions may fail to give adequate notice of what probationers are supposed to be doing.” (*People v. Hall* (2015) 236 Cal.App.4th 1124, 1129.)

The probation condition of which defendant complains is neither vague nor overbroad. It clearly gives defendant notice of the names of two people with whom he must have no conduct. These two people testified against him at trial. This condition is in stark contrast to a probation condition that a defendant not associate with anyone disapproved of by a probation officer, where a defendant truly might not have knowledge of which persons fit into that category. (See *In re Sheena K.*, *supra*, 40 Cal.4th at p. 892 [approving appellate court’s insertion of qualification that defendant have knowledge of who was disapproved by probation officer, “and thus securing the constitutional validity of the probation condition”].)

Further, “the implied mens rea of willfulness must be established to find a probation violation, and this protects [defendant] from being punished for an unwitting failure to comply with a condition.” (*People v. Hall*, *supra*, 236 Cal.App.4th at p. 1136.) For all of these reasons, the request to modify the probation condition on appeal is denied.

DISPOSITION

The judgment is affirmed.

Miller, J.

We concur:

Kline, P.J.

Richman, J.