Filed 4/20/11 P. v. Kelley CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND LORENZO KELLEY, Defendant and Appellant.	2d Crim. No. B218204 (Super. Ct. No. 1284355) (Santa Barbara County)

Raymond Lorenzo Kelley appeals from conviction by jury of possession for sale of cocaine base (Health & Saf. Code, § 11351.5); sale, transportation, or offer to sell a controlled substance (Health & Saf. Code, § 11352, subd. (a)); and misdemeanor resisting arrest (Pen. Code, § 148, subd. (a)(1)). In a bifurcated proceeding, the trial court found true an allegation that appellant suffered a prior serious or violent felony conviction within the meaning of the Three Strikes law. (Pen. Code, §§ 667, subds. (d)(1) & (e)(1), 1170.12, subds. (b)(1) & (c)(1), 1192.7, subd. (c).) Appellant was sentenced to an aggregate term of 10 years in state prison.

Appellant contends that the court erred (1) when it permitted a narcotics officer to testify to the duration of a crack cocaine high, the number of doses in a particular quantity of crack cocaine, and the period of time over which cocaine can be detected in urine; (2) when it limited cross-examination of that

officer; (3) when it did not give a unanimity instruction on the charge of resisting arrest; (4) when it admitted the lab report of a non-testifying analyst; and (5) when it denied his motion to unseal, traverse or quash a search warrant. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On August 9, 2008, Santa Maria police were conducting surveillance of appellant and his home. Appellant drove into the alleyway and parked his car in his carport. Four officers, three in uniform, got out of an unmarked van and approached the car. They identified themselves as police officers, and told the occupants to put their hands up. Appellants' girlfriend was in the car with two children. Appellant got out and ran. Two officers chased and caught him. According to police testimony, appellant ran 50 to 75 yards before being tackled. According to appellants' testimony, he ran one car length before he realized the men were police officers and stopped.

Police searched appellants' car pursuant to a warrant and found 13.71 grams of cocaine base behind a panel. Corporal Woodrow Vega (Vega) was the surveillance team leader and was not initially present. He had been communicating with the officers by phone and radio. He arrived during the search of the car. Vega searched appellant and joined in the search of appellant's apartment, also pursuant to warrant.

In a closet in appellants' apartment, officers found three digital scales, two of which did not work. On the working scale, there were cut marks and cocaine base residue. They also found unused baggies. Appellant told police where to find the scale and told them that his girlfriend had nothing to do "with it." Officers did not find any crack pipes or pay owe sheets.

Appellant was in good physical condition. His teeth were not decayed and his fingertips were not callused or charred. He did not appear to be under the influence and his urine tested negative for cocaine base.

Before trial, the court sealed the search warrant affidavit to protect the identity of a confidential informant pursuant to *People v. Hobbs* (1989) 7 Cal.4th

948. The trial court denied appellant's motion to unseal, traverse or quash the search warrant affidavit after conducting an *in camera* hearing.

At trial, the court permitted Vega to offer the opinion that appellant possessed the cocaine base for purposes of sale. Vega's opinion was based on the quantity, the scale, cut marks on the scale which indicated "weighing off" portions, the absence of a pipe, and appellant's sobriety.

Vega testified that a dose of cocaine base is about 1/10 of a gram and lasts about six hours, if the user is non-tolerant. He testified that users typically possess only small amounts, ingest whatever they have immediately, and do not possess scales. Over defense objection that he lacked medical knowledge, Vega testified that 13.7 grams of rock cocaine is about 137 doses, that one dose can keep a person high for about six hours, depending on their tolerance level, and therefore 13.7 grams could keep a "non-tolerant user" high for about 820 hours. Vega testified that rock cocaine remains in a person's urine for up to 72 hours, also over defense objection. The court received into evidence a Department of Justice report of appellant's urine analysis, over foundation and hearsay objections.

On cross-examination, Vega testified that he had not conducted any test on the duration of a cocaine base high and could not recall the details of what medical experts have said on this subject. He conceded that a regular user could go through 13.7 grams in a week, and that the wholesale value of that amount was about $450.

Appellant and his girlfriend testified. His girlfriend testified that she had not seen appellant smoke cocaine in the five years they had lived together, but he had a history of addiction and she suspected recently that he fallen back into using drugs. She testified that the baggies were hers and she uses scales to measure food and medicine in her work as a private care attendant. However, the working scale was not hers. She said appellant was unemployed and she regularly gave him cash for his car payment.

Appellant testified that he bought the cocaine for his personal use for about $300. He said that 13.7 grams would last him about four to five days. He can go about a week without smoking; he had not used for a few days when he was arrested. He displayed no physical signs of use because he was immune. He had the scale to make sure that he got his money's worth when he bought cocaine. The baggies belonged to his girlfriend for jewelry making. He uses homemade pipes and disposes of them.

Appellant testified that he ran when the police surrounded his car because a man had been shot and killed in a car three blocks away the night before. He stopped running when he heard, "Police," but they tackled him. He did not see the officers' uniforms until they handcuffed him. On cross-examination, he acknowledged that he understood the consequences would be different if he possessed the cocaine for personal use rather than for sale. The court instructed the jury to consider this testimony only on the issue of bias or interest, and not to consider punishment.

On rebuttal, Police Officer Matthew Kline testified that appellant continued to run after the officers identified themselves as police. When they got appellant to the ground he did not comply with their orders. Vega did not arrive until after these events. Vega testified in rebuttal that Kline told him at the scene that there had been a brief struggle. Defense counsel sought to question Vega about a statement in his report that appellant was arrested "without incident," in order to prove that Vega was motivated to influence Kline to testify in a way that would increase appellant's punishment. The trial court did not allow the question pursuant to Evidence Code section 352.

DISCUSSION

Admission of Testimony of Narcotics Detective

Appellant contends that the trial court abused its discretion, impermissibly invaded the province of the jury, and lessened the prosecution's burden of proof in violation of the Fifth and Sixth Amendment when it permitted

Vega to testify to the duration of a cocaine base high, the number of doses in a particular quantity of cocaine, and the period of time over which crack cocaine can be detected in urine. His contentions go to the weight of the evidence and we reject them.

A properly qualified expert may offer an opinion on matters related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. (Evid. Code, § 801, subd. (a).) An expert is qualified if he or she has special knowledge, skill, experience, training, or education on the subject matter of the testimony. (Evid. Code, § 720, subd. (a).) Expert testimony has no evidentiary value if it is based on assumptions unsupported by the record, matters not reasonably relied on by other experts, or facts which are speculative, remote or conjectural. (*Pacific Gas & Electric. Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.) Expert testimony should be excluded when the subject is one of common knowledge. (*People v. Hernandez* (1977) 70 Cal.App.3d 271, 280-281.)

The court has broad discretion to determine expert qualifications. (*People v. Chavez* (1985) 30 Cal.3d 823, 828.) We will reverse its determination only for manifest abuse of discretion. (*People v. Mayfield* (1997) 14 Cal.4th 668, 766.)

The trial court did not abuse its discretion when it determined that Vega was qualified to offer opinions on the subject of dose and duration. Vega testified that he was familiar with street level narcotics sales, use, dosage, and effects, based on his 15 years as a police officer, 8 of which he worked as a narcotics detective, and extensive training in narcotics investigation. He received special training to identify street drugs and to identify people who are under the influence. He taught these subjects at the police academy. He was involved in hundreds of narcotics arrests. The trial court acted within its discretion when it determined that Vega had special knowledge on the subject of cocaine base dosage that was sufficiently beyond common experience to assist the trier of fact and that

his testimony was based on reasonably reliable information. Defense counsel was permitted to fully explore the limits of Vega's medical knowledge on cross-examination and to contradict his testimony about the duration of a cocaine base high. Appellants' concerns about the degree of Vega's knowledge go to the weight of the evidence rather than to its admissibility. (*People v. Bolin* (1998) 18 Cal.4th 297, 321-322.)

Limits on Cross-Examination

Appellant contends that his conviction for resisting arrest must be reversed because the court did not allow him to cross-examine Vega during rebuttal on the difference between his report, which stated that appellant had been arrested without incident, and his testimony, in which he recalled Kline telling him that there had been a struggle. We disagree.

The Confrontation Clause protects a defendant's right to engage in appropriate cross-examination of the witnesses against him and to thereby expose facts from which jurors could appropriately draw inferences relating to their reliability. (*Davis v. Alaska* (1974) 415 U.S. 308, 318.) The court retains wide latitude to restrict cross-examination that is repetitive, prejudicial, confusing or of marginal relevance. (Evid. Code, § 352; *People v. Frye* (1998) 18 Cal.4th 894, 946, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) A trial court does not violate the defendant's right to confrontation unless the defendant can show that the prohibited cross-examination would have produced a significantly different impression of the witness's credibility. (*People v. Chatman* (2006) 38 Cal.4th 344, 372.)

The trial court did not abuse its discretion when it determined that any probative value of further cross-examination of Vega's rebuttal testimony outweighed the risk of undue consumption of time and juror confusion. Defense counsel sought to question Vega about the report in order to prove that Vega tried to influence Kline's testimony to increase appellant's punishment. The trial court acted within its discretion when it determined that evidence that an officer would be

motivated to achieve greater punishment by changing his story could confuse the jury and could unduly encourage them to consider punishment. The evidence had little probative value because Vega had already conceded that he was not a percipient witness to the arrest. It was cumulative because counsel had already fully examined Vega and Kline about whether Vega tried to influence Kline's testimony. Appellant has not demonstrated that the prohibited cross-examination would have produced a significantly different impression of either officers' credibility.

Absence of Unanimity Instruction on Resisting Count

Appellant contends that the trial court erred when it refused his request for a unanimity instruction on the resisting count. We reject the contention.

In a criminal case, a jury verdict must be unanimous. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) When one criminal act is charged, but the evidence shows commission of more than one such act, the prosecution must elect one act or the trial court must instruct the jury to agree on the same act. (*Ibid.*) However, no unanimity instruction is required when multiple acts proved are part of one transaction. "Even when the prosecution proves more unlawful acts than were charged, no unanimity instruction is required where the acts proved constitute a continuous course of conduct." (*People v. Napoles* (2002) 104 Cal.App.4th 108, 115.)

Here, the prosecution charged one count of resisting, obstructing or delaying arrest. (Pen. Code, § 148, subd. (a).) It offered evidence that appellant ran when police identified themselves and did not stop until he was tackled. In rebuttal, Kline also testified that officers had to pull appellant's arm out from under him. The trial court properly concluded that these acts were so closely connected as to be part of a continuous course of conduct. No unanimity instruction was required.

Admission of Lab Report of Non-testifying Analyst

Appellant contends that the trial court violated his constitutional right to confront witnesses against him when it admitted the urine analysis report of a

non-testifying analyst and allowed Vega to testify concerning its contents. We reject the contention because it was forfeited.

The question whether admission of a report of a non-testifying lab analyst violates a defendant's constitutional right to confront witnesses is pending before the California Supreme Court,[1] but appellant made no constitutional objection at trial. A defendant forfeits a constitutional confrontation claim when he does not articulate it in the trial court. (*People v. Burgener* (2003) 29 Cal.4th 833, 869.)

Before Vega testified, the trial court overruled appellant's hearsay and foundation objections to the Department of Justice toxicology report. During Vega's testimony, the court received the report into evidence, over counsel's statement that, "Again, for the record, object to the entrance of this piece of evidence." Vega testified, without further objection, that he collected appellant's urine and sent it to a lab, and received a report indicating that it was negative for rock cocaine. On cross-examination, defense counsel asked Vega to look at the report and answer, "Was the GCMS test conducted on the urine sample, or a

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[1] On December 2, 2009, the California Supreme Court granted review in *People v. Dungo* (2009) 176 Cal.App.4th 1388, S176886, to consider the questions: "(1) Was defendant denied his right of confrontation under the Sixth Amendment when one forensic pathologist testified to the manner and cause of death in a murder case based upon an autopsy report prepared by another pathologist? (2) How does the decision of the United States Supreme Court in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___, 129 S.Ct. 2527, affect the California Supreme Court's decision in *People v. Geier* (2007) 41 Cal.4th 555?" The California Supreme Court has granted review in a number of cases raising similar questions. (*People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted Dec. 2, 2010, S176620; *People v. Lopez* (2009) 177 Cal.App.4th 202, review granted Dec. 2, 2009, S177046; *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted Dec. 2, 2009, S176213; *People v. Anunciation*, review granted Mar. 18, 2010, S179423; *People v. Schwartz*, review granted Mar. 20, 2010, S180445; *People v. Benitez* (2010) 182 Cal.App.4th 194, review granted May 12, 2010, S181137; *People v. Bowman* (2010) 182 Cal.App.4th 1616, review granted Jun. 9, 2010, S182172; *People v. Chikosi* (2009) 185 Cal.App.4th 238, review granted Aug. 11, 2010, S184190; and *People v. Miller* (2010) 187 Cal.App.4th 902, review granted Nov. 10, 2010, S186758.

different test?" She also asked Vega whether he could vouch for the accuracy of the report. Vega testified, "I do not know. I'm not a toxicologist and I didn't do the testing." As the prosecution rested its case, defense counsel reasserted that the report had not been properly authenticated. None of defendant's objections was sufficient to preserve his constitutional claim and the court did not err in admitting the evidence at trial.

Motion to Unseal, Quash and Traverse Search Warrant

The parties agreed that this court should review the sealed portion of the record relating to appellant's motion to unseal the search warrant pursuant to *People v. Hobbs, supra,* 7 Cal.4th 948.

All or part of a search warrant may be sealed to protect the identity of confidential informants. (*People v. Hobbs, supra,* 7 Cal.4th at p. 971.) Where a defendant moves to quash or traverse a sealed warrant, the trial court should conduct an in camera hearing to first determine whether sufficient grounds exist for maintaining the confidentiality of the informant's identity. The court next determines whether the extent of the sealing is necessary to avoid revealing the informant's identity. (*Id.* at p. 972.) If the affidavit has been properly sealed and defendant has moved to traverse the warrant, the court determines if any defense allegations of material misrepresentations or omissions are supported by the search warrant affidavit or testimony offered at the in camera hearing. If the affidavit has been properly sealed and defendant moves to quash the warrant, the court determines whether, under the totality of the circumstances there was a fair probability that contraband or evidence of a crime would be found in the place searched. (*Id.* at p. 975.) The court reports its conclusions to the defendant, and maintains the sealed material for review on appeal.

We independently review the record, including the sealed documents, to determine whether the trial court's determinations constituted an abuse of discretion. (*People v. Martinez* (2005) 132 Cal.App.4th 233, 241.) Having conducted an independent review of the affidavit and the testimony of the *in*

camera hearing, we conclude that appellant's motions to unseal, quash and traverse the search warrant were properly denied.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Jed Beebe, Judge

Superior Court County of Santa Barbara

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