Filed 7/23/07 P. v. Macias CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CELIA R. MACIAS, Defendant and Appellant.	B191006 (Super. Ct. No. VA090686)

APPEAL from a judgment of the Superior Court of Los Angeles County. Cynthia Rayvis, Judge. Affirmed.

Courtney M. Selan, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

Celia Macias appeals from a judgment entered after a jury found her guilty of possessing cocaine for sale.[1] Macias contends evidence the police obtained from her "dayplanner" (or date book) and an intercepted cellular telephone call violated her Fourth Amendment right to be free from unreasonable searches and seizures, and the failure to exclude this evidence at trial violated her Fourteenth Amendment right to due process. Macias also contends the trial court violated her Sixth Amendment right to a jury trial when it imposed an upper term sentence on the offense based on factual findings not made by the jury. We conclude the search was reasonable and the trial court did not err in imposing the upper term sentence. Accordingly, we affirm.

FACTS AND PROCEEDINGS BELOW

As Macias acknowledges on appeal, at the time of the charged offense she was on probation in another case due to an April 4, 2005 conviction for possession of a controlled substance[2] (Case No. VA087939). As a condition of her probation, Macias agreed to submit her "person and property to a search at any time of the day or night by any law enforcement officer or probation officer with or without a warrant or probable cause."

At about 4:20 p.m. on August 11, 2005, the date of the incident at issue here, two Huntington Park Police Department officers arrived at a hotel room registered to Macias to serve her with an arrest warrant.[3] After identifying themselves and entering the room, the officers observed Macias attempting to conceal a white object in her pants. The officers grabbed her hand and recovered more than six grams of rock cocaine. The officers arrested Macias and proceeded to search her hotel room. The officers recovered

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[1] Health and Safety Code section 11351.5.

[2] Health and Safety Code section 11350, subdivision (a).

[3] Apparently the warrant related to a probation violation for possession of a controlled substance.

a "dayplanner"[4] which included what appeared to be monetary notations, $146.09 in coins and currency in a purse, a second, significantly smaller piece of cocaine, and a razor blade with white residue on it. The officers did not recover any paraphernalia typically associated with the use of rock cocaine (i.e., glass tubes). Macias told the officers she swallowed the rock cocaine as a medicine.

Before Macias was taken to the police station, the arresting officers "observed what appeared to be the outline of a cell phone in the rear of her pants." In compliance with police policy, the two male officers did not remove the object from Macias's pants. Instead they told the officer who transported Macias to the station to have a female officer search Macias and remove the item. The officer who transported Macias had cleaned out the back seat of the patrol car before Macias entered. Shortly after Macias exited the vehicle, the officer found a cell phone in the back seat, which he turned over to one of the arresting officers at the station.

At about 4:45 p.m., the cell phone rang and one of the arresting officers asked a Spanish-speaking officer to answer it. The caller asked for a "20" of "rock" and said she would meet the officer to pick it up. The officers did not answer the cell phone again even though it rang several more times.

An information charged Macias with possession of cocaine for sale and also alleged a prior conviction for the same offense. At trial, the prosecution presented to the jury evidence pertaining to the dayplanner the police recovered from Macias's hotel room and the conversation the officer had on Macias's cell phone. Macias did not object to this evidence. She testified in her own defense, stating she combined the rock cocaine with oils and applied it topically to her body or bathed in it to relieve soreness, and also used the rock cocaine orally for tooth pain. Macias claimed she did not sell cocaine, and earned money by cleaning residences and doing laundry. She also claimed the notations in her dayplanner were a record of money owed to the hotel. While Macias was on the

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[4] On appeal, Macias describes this recovered item as a "date book."

stand, the trial court took judicial notice of the fact she was on probation for possession of a controlled substance at the time of her arrest for the charged offense.

A jury found Macias guilty of possessing cocaine for sale, and also found she had been convicted of the same charge in April 2002. The trial court sentenced Macias to the upper term of five years for the offense, finding two aggravating factors: Macias was on felony probation at the time of the present offense and her prior performance on probation was unsatisfactory. Macias did not dispute the truth of either aggravating factor, and the trial court did not find any factors in mitigation. The court also sentenced Macias to a consecutive three-year term based on her prior conviction.[5] Thus, she received a total sentence of eight years.

DISCUSSION

I. THE POLICE OFFICERS DID NOT VIOLATE MACIAS'S CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.

Macias claims the officers acted outside the scope of the arrest warrant when they recovered the dayplanner from her hotel room and answered the cell phone found in the back of the police car, thereby violating her Fourth Amendment right to be free from unreasonable searches and seizures. The People argue Macias waived this claim on appeal by failing to move to suppress the evidence below under Penal Code section 1538.5. We agree.

Penal Code section 1538.5, subdivision (a)(1) provides: "A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds: [¶] (A) The search or seizure without a warrant was unreasonable. [¶] (B) The search or seizure with a warrant was unreasonable because any of the following apply: [¶] (i) The

[5] Health and Safety Code section 11370.2, subdivision (a).

warrant is insufficient on its face. [¶] (ii) The property or evidence obtained is not that described in the warrant. [¶] (iii) There was not probable cause for the issuance of the warrant. [¶] (iv) The method of execution of the warrant violated federal or state constitutional standards. [¶] (v) There was any other violation of federal or state constitutional standards." Subdivision (m) of section 1538.5 states, in pertinent part: "The proceedings provided for in this section, and Sections 871.5, 995, 1238, and 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him or her. . . . Review on appeal may be obtained by the defendant provided that at some stage of the proceedings prior to conviction he or she has moved for the return of property or the suppression of the evidence."

Macias asserts her Fourth Amendment right to be free from unreasonable searches and seizures is a fundamental constitutional right which may not be waived or forfeited on appeal under the circumstances of this case.[6] We disagree.[7] "The proposition that 'certain' constitutional challenges are preserved without a trial objection hardly establishes that *all* such claims are preserved, or that [Macias]'s claim is preserved. None of the examples cited in [the cases Macias references] bears any resemblance to the

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[6] See *People v. Vera* (1997) 15 Cal.4th 269, 276-277 ("Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights," like the constitutional right to a jury trial). Macias also cites *People v. Saunders* (1993) 5 Cal.4th 580, 589, footnote 5 (a defendant would not be precluded from raising a double jeopardy claim or a violation of his or her constitutional right to a jury trial based on a failure to object below).

[7] See *People v. Ledesma* (1987) 43 Cal.3d 171, 235-236 (conc. opn. of Mosk, J.) (by failing to object in the trial court, the defendant forfeited his evidentiary claim pertaining to a telephone call intercepted by the police, which implicated the defendant's Fourth Amendment right to be free from unreasonable searches and seizures).

constitutional-evidentiary issue [Macias] seeks to raise here."[8] Moreover, the procedure and principles outlined in Penal Code section 1538.5 would be rendered meaningless if a defendant could raise a Fourth Amendment search and seizure claim on appeal without first moving to suppress the evidence in the trial court.

In any event, to affirm the conviction, we need not rely on this waiver or forfeiture argument alone. Nor do we need to decide whether the search and seizure fell inside or outside the scope of the arrest warrant. In her opening appellate brief, Macias acknowledges she was on probation in Case No. VA087939 at the time of her arrest for the offense charged in this case. As a condition of her probation, Macias agreed to submit her "person and property to a search at any time of the day or night by any law enforcement officer or probation officer with or without a warrant or probable cause."

Under the Fourth Amendment, a warrantless search is unreasonable per se unless it falls under a recognized exception.[9] A probation search is one recognized exception to the warrant requirement.[10] Such a search is valid provided law enforcement officers are aware of a probationer's status,[11] the search is not motivated by either the desire to harass or for arbitrary or capricious reasons,[12] and the search is reasonably related to the purposes of probation.[13] In recognizing a broader range of constitutionally permissible searches under the terms of probation, courts have emphasized the diminished privacy expectations a probationer possesses who has agreed to search terms, and courts have contextualized this privacy intrusion within the spectrum of available criminal

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[8] *People v. Viray* (2005) 134 Cal.App.4th 1186, 1208-1209 (the defendant failed to object in the trial court to "evidence obtained through her interrogation by the prosecutor" in violation of her constitutional right to counsel, and therefore her claim was not preserved for appeal).

[9] *People v. Robles* (2000) 23 Cal.4th 789, 795.

[10] *People v. Robles, supra* 23 Cal.4th at page 795.

[11] *People v. Robles, supra* 23 Cal.4th at page 797.

[12] *People v. Bravo* (1987) 43 Cal.3d 600, 610.

[13] *People v. Robles, supra* 23 Cal.4th at page 797.

sanctions.[14] Furthermore, search provisions in the probation context encourage rehabilitation of a convicted felon and protect society from future criminal conduct.[15] A warrantless search made pursuant to a probation search condition which eliminates the need for probable or reasonable cause is unquestionably constitutional if the search is supported by a reasonable suspicion of criminal activity.[16]

The record makes clear one or both of the officers who entered Macias's hotel room on August 11, 2005 to serve an arrest warrant knew Macias was on probation and had agreed to submit to searches as a condition of her probation.[17] The officers recovered an "extraordinary [*sic*] large amount" of rock cocaine, leading at least one of them to believe Macias possessed the cocaine for sale. At trial, one of the officers estimated the amount of cocaine Macias had "could be converted from anywhere to 24 to 50 doses." Moreover, the officers did not see any paraphernalia typically associated with the use of rock cocaine (i.e., glass tubes). There is overwhelming evidence indicating the officers had a reasonable suspicion Macias possessed the cocaine for sale. Thus, it was not unreasonable for them to open the dayplanner and answer the cell phone in their search for additional evidence of sales activities.[18]

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[14] See e.g. *United States v. Knights* (2001) 534 U.S. 112, 118-119; *People v. Robles, supra*, 23 Cal.4th at page 795.

[15] See *United States v. Knights, supra* 534 U.S. at page 119; *People v. Robles, supra* 23 Cal.4th at page 795.

[16] See *United States v. Knights*, *supra* 534 U.S. at page 121, ("When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable").

[17] At Macias's preliminary hearing, arresting Officer Bonzer testified, prior to the time he arrived at the hotel room, he "knew that [Macias] was on felony probation with a search and seizure clause as a condition of probation." At trial, Officer Thoreson testified he and Officer Bonzer knew before they went to the hotel that Macias was on probation.

[18] While we are sensitive to the possibility a prolonged period of police interception of cell phone calls pursuant to a probation search condition might inappropriately invade a probationer's reasonable expectation of privacy, we are not concerned with that possibility here where the officer answered the cell phone only about 25 minutes after the arresting officers first showed up at the hotel room door.

Macias argues the scope of the probation search condition was limited to evidence relating to the offense for which she was on probation: possession of a controlled substance. She asserts the officers had no "authority" to open her dayplanner or answer her cell phone because these things had nothing to do with her possession of cocaine for her own personal use. Based on the broad terms of the search condition Macias agreed to be bound by and the case law cited above, it is clear Macias is wrong. A reasonable suspicion of criminal activity is all that was required to permit the police to search Macias's person and property.

For the foregoing reasons, even if Macias had not waived or forfeited this claim, we would find the use of this evidence at trial did not violate any of Macias's constitutional rights.

II. THE TRIAL COURT DID NOT COMMIT "*CUNNINGHAM* ERROR" IN SENTENCING MACIAS TO THE UPPER TERM.

In *Cunningham v. California*,[19] the United States Supreme Court reiterated the rule it expressed in *Apprendi v. New Jersey*[20] and other cases: "the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, *other than a prior conviction*, not found by a jury or admitted by the defendant."[21] Applying this rule to California's determinate sentencing law, the Court held the law violates the defendant's Sixth Amendment right to a jury trial to the extent it permits the imposition of an upper term sentence based "on

[19] *Cunningham v. California* (2007) 549 U.S. ____, 127 S.Ct. 856.

[20] *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.

[21] *Cunningham v. California*, *supra*, 127 S.Ct. at page 860, italics added; see *Blakely v. Washington* (2004) 542 U.S. 296, 301.

facts found discreetly and solely by the judge."[22] Macias contends such a violation occurred here.[23] We disagree.

In sentencing Macias to the upper term for possession of cocaine for sale the trial court found two aggravating factors: Macias was on felony probation at the time of the offense, and "[h]er prior performance on probation was unsatisfactory when she was previously convicted of the same offense in 2002."[24]

A number of jurisdictions, including California, have interpreted the "prior conviction" exception to extend beyond the mere fact of a prior conviction to include facts more broadly characterized as the defendant's recidivism, including the defendant's status as a probationer at the time of the current offense.[25] Accepting our Supreme Court's interpretation of the scope of the "prior conviction exception," as we must, the trial court's finding Macias was on probation at the time of the offense and her prior performance on probation was unsatisfactory is valid under *Cunningham*. Her counsel asked the court to take judicial notice of her probation status, and the fact she performed

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[22] *Cunningham v. California*, *supra* 127 S.Ct. at page 868.

[23] The People argue Macias forfeited this claim by not asserting an objection below. This argument is without merit. At the time Macias was sentenced, our Supreme Court held California's determinate sentencing law did not violate the bright-line rule articulated by the United States Supreme Court. (Compare *People v. Black* (2005) 35 Cal.4th 1238, 1244 with *Blakely v. Washington*, *supra*, 542 U.S. at p. 301 and *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490.) Following Macias's sentencing the United States Supreme Court overruled *Black* in pertinent part. (*Cunningham v. California*, *supra* 127 S.Ct. at p. 871.) At the sentencing hearing, however, the trial court had no alternative but to follow *Black.* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Thus, it would have been futile for Macias to have objected on these grounds to the imposition of the upper term sentence. (*People v. Boyette* (2002) 29 Cal.4th 381, 432; *People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

[24] See California Rules of Court, rule 4.421(b)(4) and (5).

[25] See discussion in *People v. McGee* (2006) 38 Cal.4th 682, 702-707, citing *Almendarez-Torres v. United States* (1998) 523 U.S. 224; see also *People v. Thomas* (2001) 91 Cal.App.4th 212, 221-222.

unsatisfactorily was necessarily found by the jury beyond a reasonable doubt when it convicted her of the current offense.[26]

DISPOSITION

The judgment is affirmed.

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JOHNSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.

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[26] To the extent the trial court meant Macias's performance on probation due to her April 2002 conviction for possession of cocaine for sale was unsatisfactory, Macias cannot dispute that either. Her probation report indicates she had a September 9, 2003 conviction for misdemeanor petty theft while she was on probation in that other case.