Filed 6/19/09 P. v. Newell CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. NATHANIEL EDWARD NEWELL, Defendant and Appellant.	B206128 (Los Angeles County Super. Ct. No. VA101603)

APPEAL from a judgment of the Superior Court of Los Angeles County, Yvonne T. Sanchez, Judge. Affirmed.

Frank Duncan for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Keith H. Borjon, Supervising Deputy Attorney General, and A. Scott Hayward, Deputy Attorney General, for Plaintiff and Respondent.

Nathaniel Newell appeals from the judgment entered following his negotiated plea of no contest to possession of cocaine base for the purpose of sale and his admission that he possessed a firearm in the commission of the offense. Defendant was sentenced to the middle term of four years for possession of cocaine with a four-year enhancement for possession of the firearm. He contends that the trial court erred in denying an evidentiary hearing on his motion to traverse a search warrant affidavit and to quash the warrant. We affirm.

BACKGROUND

Following waiver of a preliminary hearing, defendant filed a motion to traverse the search warrant affidavit and to quash the warrant pursuant to which his residence was searched and contraband was seized. The warrant granted permission to search the second floor of a duplex at 8905 1/2 Beach Street in Los Angeles.

In the affidavit in support of the warrant, Los Angeles County Deputy Sheriff Jerry Montenegro averred that between July 1 and July 7, 2007, he received information from a confidential informant that "a male black, approximately 6'00", 200 lbs, known as 'Cat' or 'Catfish' from the criminal street gang '92 Bishop Bloods', is selling rock cocaine and marijuana from his residence at 8905 1/2 Beach Street." Montenegro was further told that the male drives a white Cadillac and a green Ford van.

On July 8 (the date the affidavit was written), Montenegro saw Andrew Hill washing a white Cadillac on the street in front of the Beach Street address. The Cadillac was in violation of the Vehicle Code in that it had improperly displayed registration tags and was parked more than 18 inches from the curb. Hill told Montenegro that the Cadillac belonged to "Cat" and that "Cat" lived at 8905 1/2 Beach Street but was not home.

While talking to Hill, Montenegro could see a man (defendant) who fit the physical description of "Cat" looking out of a second-story window of 8905 1/2 Beach Street. Montenegro walked up to the front door of the residence, from which a strong odor of marijuana was being emitted. As defendant continued to look out the second-story window, Montenegro asked if his name was "Cat." Defendant answered that it was.

Montenegro asked defendant to come outside to verify the ownership of the Cadillac and to advise defendant of the Vehicle Code violations. Defendant complied. When defendant arrived downstairs, he identified himself by his proper name and further stated that he was known as "Cat" and was a member of the 92 Bishop Blood gang. Montenegro detected the odor of marijuana emanating from defendant.

While speaking with defendant, Montenegro was advised by another deputy that the odor of marijuana was being emitted from the interior of a green Ford van that was parked in front of defendant's address and that the butt of a handgun could be seen through the window of the van. Defendant told Montenegro that the van was his, but it was registered to his girlfriend, Deiatra McClellan. (Meanwhile, a check of the Cadillac's registration showed that it also belonged to McClellan.) The Ford van was searched and numerous plastic bags containing large amounts of marijuana, as well as a handgun, were recovered.

Based on the above information, Montenegro formed the opinion that additional drugs and weapons would be found inside defendant's residence. The affidavit further stated that deputies had secured the residence and requested permission for nighttime service of the search warrant. (The record does not state what items were seized during the search of the residence.)

In defendant's motion, he asserted that the affidavit contained intentional falsehoods, misrepresentations, and omissions, and that cross-examination of affiant Montenegro was therefore required.

In support of the motion, defendant declared on information and belief that McClellan had hired Hill to wash the Cadillac, that Hill made this clear to the officers who questioned him, and that Hill did not say that the Cadillac or the Ford van belonged to "Cat." The declaration continued that it was "untrue" that officers saw defendant standing in the window of his apartment and asked him if he was "Cat," that he responded in the affirmative, and that he "voluntarily complied" with the officers' request to come downstairs. Rather, officers "flashed a flashlight" into the window of the

apartment, "ordered [him] to come down on the street," and he was immediately detained in the back seat of a police car when he did so.

Defendant further declared that he had not smoked any marijuana, had not been in a place where marijuana was being smoked, and had not admitted ownership of the Cadillac. While the search warrant was being secured, officers engaged in the ruse of telling defendant that they were waiting for a witness to arrive to identify him as a participant in a robbery. The detention lasted for over two hours before the warrant arrived, during the course of which officers searched his apartment three times.

Defendant argued in his motion that once the falsehoods were excised from the affidavit and the omitted facts included, probable cause for the warrant was lacking because officers had no valid basis for ordering him to come downstairs from his apartment, for believing the Cadillac or the Ford van belonged to him, or for searching the Ford.

At the hearing on the motion, the court confirmed that defendant's declaration was the only evidence that defendant was offering. The court denied the motion without an evidentiary hearing, explaining: "[T]he defense has not met the burden per the transversal [*sic*] motion, failure . . . to make a substantial preliminary showing, and I find the magistrate did have a substantial basis for concluding that probable cause did exist."

DISCUSSION

"Under *Franks v. Delaware* [(1978)] 438 U.S. 154 [98 S.Ct. 2674], a defendant has a limited right to challenge the veracity of statements contained in an affidavit of probable cause made in support of the issuance of a search warrant. When presented with such a challenge, the lower court must conduct an evidentiary hearing *if* a defendant makes a substantial showing that (1) the affidavit contains statements that are deliberately false or were made in reckless disregard of the truth, and (2) the affidavit's remaining contents, after the false statements are excised, are insufficient to support a finding of probable cause. The defendant must establish the statements are false or reckless by a preponderance of the evidence. [Citations.] Innocent or negligent misrepresentations will not defeat a warrant. [Citation.] 'Moreover, "there is a presumption of validity with

respect to the affidavit. To merit an evidentiary hearing[,] the defendant['s] attack on the affidavit must be more than conclusory and must be supported by more than a mere desire to cross-examine. . . . The motion for an evidentiary hearing must be 'accompanied by an offer of proof . . . [and] should be accompanied by a statement of supporting reasons. Affidavits or otherwise reliable statements of witnesses should be furnished,' or an explanation of their absence given."' [Citation.] Finally, '[a] defendant who challenges a search warrant based upon an affidavit containing omissions bears the burden of showing that the omissions were material to the determination of probable cause.' [Citation.]" (*People v. Panah* (2005) 35 Cal.4th 395, 456.) "We review denial of a *Franks* hearing de novo. [Citation.]" (*Id*. at p. 457.)

Here, defendant failed to provide a statement from Hill (the man who was washing the Cadillac) or an explanation of its absence or to offer any other competent evidence that would contradict Montenegro's averment that Hill said the Cadillac, which was in violation of the Vehicle Code, belonged to defendant. Nor has defendant provided any competent evidence that would contradict the averment that Montenegro was told the odor of marijuana was being emitted from the Ford van and the butt of a gun was visible through the van's window, and that the van was registered to the same person as the Cadillac. Finally, defendant failed to establish any legal relevance to his factual assertion that he was "ordered" down from his apartment, misled into believing that he was being detained until a witness to a robbery arrived to make an identification, and that the officers searched his apartment during the two hours when the warrant was being secured.

Accordingly, even disregarding the portions of the affidavit that defendant personally contested regarding his admission of ownership of the Cadillac and the Ford and further including the facts that defendant claims were omitted, probable cause existed to connect defendant with the marijuana and the firearm found in the van, and to provide a basis for the search of his residence. Defendant's motion to traverse and quash was properly denied without an evidentiary hearing.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

FERNS, J.*

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.