Filed 10/25/11 P. v. Reese CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CALVIN LAMAR REESE,

Defendant and Appellant.

F060355

(Super. Ct. No. MF008239B)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Michael E. Dellostritto, Judge.

Carol A. Navone, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Calvin Lamar Reese (Reese) challenges his convictions for conspiracy to bring a controlled substance into a prison and conspiracy to possess drugs in a prison on the grounds admission of a laboratory report violated the Sixth Amendment confrontation clause. If this issue is deemed forfeited, Reese contends his defense counsel rendered ineffective assistance. Reese also argues that he can be convicted of only one conspiracy offense because there was only one agreement and therefore the conviction for conspiracy to possess drugs in a prison must be reversed.

The People concede, and we agree, the conviction for conspiracy to possess drugs in a prison must be reversed. On the confrontation clause issue, we conclude Reese forfeited the issue. Alternatively, we conclude Reese's counsel was not ineffective because admission of the lab report was not prejudicial under the facts of this case.

FACTUAL AND PROCEDURAL SUMMARY

In 2008, Correctional Officer Genaro Arellano worked in the investigative services unit (ISU) at Tehachapi State Prison in Kern County. Arellano received special training in drug recognition before joining the ISU. One of Arellano's duties in the ISU was to monitor prisoner mail and telephone calls.

On March 13, 2008, Arellano monitored a telephone call that had taken place the previous day.

The inmate making the telephone call was identified as Patrick Hall. Hall dialed Reese's residence and initially spoke to Reese's daughter. Hall asked to speak to Theresa Reese, Reese's wife. Hall told Theresa[1] that he was relaying information for "Eyes." Hall told Theresa, "I have a message for you. I'm going to read it to you verbatim." Reese's central file at the prison included the information that Reese's nickname is

[1]We will refer to Theresa Reese by her first name, not out of disrespect but to avoid any confusion to the reader.

"Green Eyes." Arellano concluded that Hall was calling the Reese residence on behalf of Reese.

In the phone call Hall asked Theresa, "What does the mail situation look like?" and "Did my cousin Jim get the request for the six CD's?" Arellano became suspicious because CD's are not allowed to be brought into the prison. After listening to the entire conversation, Arellano started monitoring Hall's and Reese's mail, as well as their telephone calls and visits.

Arellano monitored a second telephone call that was made from the prison on March 18, 2008. The telephone call was made to the Reese residence. The inmate making the call indicated he was calling for "Calvin." At one point during the telephone call, Reese came on the line and started talking. At the conclusion of the conversation, Reese said to Theresa, "If you can, check on those CDs for Saturday."

Because visitors cannot bring CD's to the prison, Arellano suspected that Reese and Theresa were talking about having Theresa bring drugs to the prison when she visited Reese on March 22, 2008, the next visiting date. Arellano indicated that one common way for inmates to obtain narcotics is to attempt to smuggle them from the visiting room back to their housing unit. Narcotics will be brought into the visiting room in prepackaged balloon bindles and then swallowed by the inmate or placed by the inmate in his or her anal cavity while in the visiting room.

Arellano obtained a warrant to conduct an unclothed search of Theresa for controlled substances when she next came to the prison. In his affidavit in support of the search warrant, Arellano declared that he had been involved in no fewer than eight narcotic investigations. He also had assisted other officers investigating narcotics being brought into the prison and had detained a female visitor who had come into the prison with marijuana in her bra.

When Theresa came to visit Reese on March 22, 2008, along with their daughter, Arellano spoke to Theresa in the office of the visiting center. In response to Arellano's

questions, Theresa denied that she was in possession of any narcotics. Theresa refused to consent to an unclothed body search and Arellano showed her the search warrant he had obtained. Arellano left the office and two female correctional officers entered and performed a complete body cavity search of Theresa. The female officers informed Arellano that they had found six balloon bindles in Theresa's vagina.

Arellano opened the balloon bindles using a knife. Each balloon bindle contained a green leafy substance wrapped in foil. The six balloon bindles were all wrapped together in cellophane. Arellano recognized the green leafy substance as marijuana by its look and unique smell. He weighed the marijuana and booked it into evidence.

The marijuana was tested at the Kern County Regional Crime Laboratory by Allison Kennedy, who confirmed that the green leafy substance was a "usable amount" of marijuana. At trial, however, Kennedy was not called to testify. The prosecution had filed a motion in limine to allow another criminalist to testify because Kennedy was scheduled to be "away from the office." Instead of Kennedy, Criminalist Jeanne Spencer testified. Reese's counsel did not object to having Spencer testify in place of Kennedy, stating it was "appropriate."

Spencer testified that she did not participate in the testing or weighing of the evidence and did not move the evidence from the evidence locker to the testing room. Spencer stated that Kennedy's lab report noted receipt of the evidence in the lab as of June 6, 2008, but there was no indication in the chain of custody documents Spencer had that showed where the evidence was between March 22, when it was found on Theresa, and June 6, when it was received in the lab. According to the report, Kennedy analyzed three of the six bindles; the bindles contained a total of less than one ounce of marijuana. There was no mention in the report of any aluminum foil wrapping.

Spencer testified she did a "technical review" and an "administration review" of Kennedy's report. The technical review is to make sure that "the testing that was done and the results that come from that testing support the results obtained by the analyst."

The administration review looks for spelling errors and to see whether laboratory policy was followed during the analysis.

At the conclusion of the trial, on June 11, 2009, the jury found Reese guilty of conspiracy to bring a controlled substance into a prison and of conspiracy to possess drugs in a prison. The jury also returned true findings on the overt acts allegations. Reese admitted three prior serious felony convictions.

On July 31, 2009, Reese filed a motion for new trial. The motion stated that counsel had objected, in chambers, to allowing any criminalist other than Kennedy to testify regarding Kennedy's report and analysis. The motion asserted the trial court had overruled the objection because California law permitted another criminalist to testify. Reese's motion for new trial was based on the then newly published case of *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527] (*Melendez-Diaz*), construing the confrontation clause. The motion for new trial also argued that Penal Code section 654[2] applied to the convictions and additionally asked the trial court to exercise its discretion to strike the prior convictions pursuant to section 1385.

Also on July 31, Reese requested a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 seeking to replace his trial counsel, Fred Gagliardini. The trial court granted the *Marsden* motion. The hearing on the motion for new trial was continued pending appointment of substitute counsel.

On February 10, 2010, Reese's new counsel, Brian McNamara, filed a motion for new trial on the basis of ineffective assistance of counsel by Gagliardini. The motion filed by McNamara did not raise any of the issues raised in the motion filed on July 31, 2009. Instead, the second motion for new trial contended only that Gagliardini had rendered ineffective assistance because he failed to call witnesses who would verify that Reese had a CD player in his cell and his request for CD's was reasonable.

[2]All further statutory references are to the Penal Code unless otherwise stated.

The motions for new trial and to strike Reese's prior convictions were heard and denied on May 6, 2010.

The trial court sentenced Reese to a term of 25 years to life in prison for the offense of conspiracy to bring a controlled substance into prison. The trial court stayed the sentence for the conviction of conspiracy to possess drugs in a prison pursuant to section 654.

DISCUSSION

Reese makes three arguments here. He claims (1) admission of the lab report violated the confrontation clause; (2) if the confrontation clause issue is deemed forfeited, counsel rendered ineffective assistance; and (3) his conviction for conspiracy to possess drugs should be reversed because there was only one agreement, and therefore he can be convicted of only one conspiracy.

I. Violation of Confrontation Clause

Reese contends his conspiracy convictions must be reversed because his confrontation clause rights were violated by admission of the lab report. He relies on *Melendez-Diaz, supra,* 557 U.S. ___ [129 S.Ct. 2527] and *Bullcoming v. New Mexico* (2011) ___ U.S. ___ [131 S.Ct. 2705] to support his claim. Reese, however, has forfeited this issue.

Although Reese's new trial motion asserted, with some hesitation, that an objection to admission of the lab report by way of Spencer's testimony was made in chambers, there is no evidence of this in the record. Granted, chambers discussions are not reported, but it is customary to place on the record any results of such discussions, such as objections. When Gagliardini was called to testify at the hearing on the motion for new trial, no one questioned him on this point, under either direct or cross-examination.

What the record does disclose is that when the People filed a motion in limine seeking to admit the lab report by way of Spencer's testimony, Reese's counsel stated this was "appropriate."

The circumstances disclosed by this record do not fit the general rule that a motion in limine to exclude evidence normally is sufficient to preserve an issue for review without the necessity of the defendant renewing the objection when the evidence is offered. (*People v. Morris* (1991) 53 Cal.3d 152, 190, overruled on another point in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) If any objection was made in chambers, counsel needed to ensure that ruling was entered into the record or, alternatively, to object when Spencer was called to testify in order to preserve the issue for appeal. (See *People v. Danielson* (1992) 3 Cal.4th 691, 729.)

Here, Reese did not object during the hearing on the motion in limine, so an objection at the time the evidence was offered would be needed to preserve the issue for appeal. The record, however, reflects that no objection was made at the time Spencer testified.

A claim that there has been a violation of the confrontation clause must be timely asserted at trial or it is considered forfeited for purposes of appeal. (*Melendez-Diaz, supra,* 557 U.S. at p. ___ [129 S.Ct. at p. 2534, fn. 3]; *People v. Burgener* (2003) 29 Cal.4th 833, 869.) Because Reese did not object to admission of the lab report or to Spencer testifying on the basis it would violate the confrontation clause, he has forfeited this issue.

II. Ineffective Assistance of Counsel

Alternatively, Reese contends that if the confrontation clause issue is deemed forfeited, then Gagliardini rendered ineffective assistance, requiring reversal of his convictions. We conclude that despite the failure to preserve the confrontation clause issue for appeal, there was no ineffective assistance of counsel.

In order to "establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant. [Citations.]" (*In re Resendiz* (2001) 25 Cal.4th 230, 239.) We first address the prejudice prong of the analysis because if no prejudice is shown, we need not determine whether counsel's performance was deficient. (See *Strickland v. Washington* (1984) 466 U.S. 668, 697; *In re Jackson* (1992) 3 Cal.4th 578, 604.)

Here, Reese was charged with conspiracy to possess drugs in a prison and conspiracy to bring a controlled substance into a prison; he was not charged with possession. Two overt acts were alleged in furtherance of the conspiracy. One overt act alleged was that "on or about and between March 12, 2008 and March 18, 2008," Reese "made or caused to be made phone calls to" Theresa, "asking her to bring drugs to prison." (Capitalization omitted.) The jury found this overt act to be true.

"The crime of conspiracy is defined in the Penal Code as 'two or more persons conspir[ing]' '[t]o commit any crime,' together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance thereof. (Pen. Code, §§ 182, subd. (a)(1), 184.)" (*People v. Swain* (1996) 12 Cal.4th 593, 600 (*Swain*).) "The necessary elements of a criminal conspiracy are: (1) an agreement between two or more persons; (2) with the specific intent to agree to commit a public offense; (3) with the further specific intent to commit that offense; and (4) an overt act committed by one or more of the parties for the purpose of accomplishing the object of the agreement or conspiracy. [Citations.]" (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1128.)

A conspiracy conviction can rest on a single overt act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1131-1136.) Here, the jury found true that Reese had committed an overt act in furtherance of the conspiracy when he called, or caused others to call, his

wife and asked her to bring drugs to prison. This single overt act was sufficient to sustain the conspiracy conviction. (*Ibid.*)

As the trial court stated when it denied the motions for new trial, "the bottom line is simply this: To find the defendant guilty of the conspiracy, they simply had to find there was an agreement and then they had to find one of the overt acts to be true." The trial court was correct in its analysis. A guilty verdict on the conspiracy counts is not and was not dependent on a finding that Theresa brought marijuana into the prison. "Conspiracy is an inchoate crime." (*Swain, supra,* 12 Cal.4th at p. 599.) It does not require the commission, or completion, of the substantive offense that is the object of the conspiracy. (*Id.* at pp. 599-600.)

Consequently, for purposes of the conspiracy counts, it is irrelevant whether Theresa brought marijuana or any other controlled substance into the prison. It therefore follows that admission of the lab report was not prejudicial to Reese because the elements of the conspiracy were established, regardless of the nature of the substance carried into the prison by Theresa.

As no prejudice has been shown from admission of the lab report, Reese has failed to establish ineffective assistance of counsel. (*People v. Scott* (1997) 15 Cal.4th 1188, 1211; *In re Fields* (1990) 51 Cal.3d 1063, 1078.)

III. Conviction for Conspiracy to Possess

Reese contends that because there was evidence of only one agreement, he can be convicted of only one conspiracy. The People concede the point.

A single agreement cannot be taken to be several agreements and hence multiple conspiracies because the conspiracy envisages the violation of several statutes rather than one. (*Braverman v. United States* (1942) 317 U.S. 49, 53.) "The single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute." (*Id.* at p. 54.)

Reese cannot be convicted of two conspiracies based upon exactly the same conduct. (*People v. Patrick* (1981) 126 Cal.App.3d 952, 965.) The conviction for conspiracy to possess drugs in a prison (count 2) must be reversed and the fees imposed pursuant to that count stricken. (*People v. Jasso* (2006) 142 Cal.App.4th 1213, 1223.)

DISPOSITION

The conviction for conspiracy to possess drugs in a prison (count 2) is reversed and the fees imposed for that count are stricken. In all other respects the judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment and to transmit the same to the appropriate authorities.

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CORNELL, J.

WE CONCUR:

_____
LEVY Acting P.J.

_____
FRANSON, J.