

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES DEAN HOLDWAY,

Defendant and Appellant.

A105749

**(San Mateo County
Super. Ct. No. SC053636)**

Defendant James Dean Holdway appeals from a judgment entered following his conviction for possession of methamphetamine for sale. He contends that the trial court erred in denying his motion for a new trial based on ineffectiveness of counsel. He contends that his trial counsel was ineffective for failing to renew the motion to suppress drugs and other evidence discovered during a warrantless search of his truck. We reverse, concluding that trial counsel was prejudicially deficient in failing to renew the challenge to the illegal search and the trial court erred in denying the motion for a new trial.

PROCEDURAL BACKGROUND

Defendant James Dean Holdway was charged by complaint with possession of methamphetamine for sale. At the close of the preliminary hearing Holdway moved to suppress the evidence obtained in the search of his truck, including all of the

methamphetamine. The magistrate denied the motion and found that there was probable cause to believe Holdway was guilty.

The matter went to trial before a jury; Holdway's counsel did not renew the motion to suppress before the trial judge. The jury found defendant guilty. The trial court denied defendant's motion for a new trial, suspended imposition of sentence, and granted probation with the condition that Holdway serve 120 days in county jail. This appeal followed.

FACTUAL BACKGROUND

Because we reverse based on counsel's failure to renew the motion to suppress, we summarize the preliminary hearing testimony concerning the circumstances leading up to the search. The trial testimony about those circumstances was not materially different. It is unnecessary to detail the evidence admitted at trial. Suffice it to say that the evidence would have been insufficient to sustain a conviction if the controlled substance the defendant was convicted of possessing had been excluded from evidence.

At around 8:50 p.m. on November 17, 2002, Redwood City police officer Eric Acha was on patrol in an area known for narcotics activity. He observed a pickup truck parked at a location known for narcotics transactions. The location where the car was parked was also a drop-off site for Goodwill-type donations. Officer Acha observed two people leaning into the open passenger door of the truck and a man standing at the back of the truck. He recognized one of the people leaning into the truck as Paris Tyree, a known narcotics user on probation for a drug-related offense. He later identified the second person leaning into the truck as Linda Rehfeld and the man at the back of the truck as defendant Holdway.

Officer Acha approached the truck, and all three persons looked surprised upon seeing him and slightly distanced themselves from the vehicle. Officer Acha asked some questions and learned that the truck belonged to Holdway, that Holdway and Rehfeld were engaged and living together, and that they had driven to the area together. The officer also determined that Rehfeld was on probation for a drug-related offense and

subject to a search condition. He conducted probation searches of both Tyree and Rehfeld but found no narcotics.

Officer Acha told Holdway that he was going to search the truck, and Holdway objected and became angry. The officer searched the truck anyway, finding methamphetamine in a purse on the floor in the front passenger side and a “pay-owe” sheet on the seat. He continued to search the truck and in the back of the passenger compartment he found a backpack containing more methamphetamine, drug-dealing paraphernalia, and indicia connecting the backpack to Holdway.¹

DISCUSSION

Holdway failed to preserve for appeal the validity of the search of his truck because he did not renew his suppression motion before the trial judge. (*People v. Lilienthal* (1978) 22 Cal.3d 891, 896.) Following the jury’s verdict of guilt, Holdway moved for a new trial, contending that his trial counsel’s failure to renew the motion on his behalf violated his constitutional right to effective assistance of counsel.

“In assessing claims of ineffective assistance of trial counsel, we consider whether counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.]” (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) “If the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance ‘unless counsel was asked for an explanation and failed to provide

¹ At trial, Officer Acha described a subsequent search of Holdway and Rehfeld’s home, which disclosed another pay-owe sheet, an empty bottle of prescription medicine, and other items, but no methamphetamine.

one, or unless there simply could be no satisfactory explanation.’ [Citation.]” (*People v. Kipp* (1998) 18 Cal.4th 349, 367.) In this case, we conclude that the trial court erred in denying the motion for a new trial because the search was illegal, the failure to renew the motion to suppress constituted deficient performance, and the deficient performance was prejudicial. (See *People v. Hart* (1999) 74 Cal.App.4th 479, 486-487, citing *Strickland v. Washington* (1984) 466 U.S. 668, 686.)

Although we review the trial court’s denial of the motion for a new trial for abuse of discretion (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1251), Holdway’s claim of ineffective assistance of counsel turns on an issue of law regarding which we must exercise our independent judgment: the legality of the search of the truck in light of Officer Acha’s clear testimony. (*People v. Valenzuela* (1994) 28 Cal.App.4th 817, 823.) The trial court erred as a matter of law in denying the motion for new trial because, as we conclude, the search was illegal.

I. *Deficient Performance*

We review challenges to the admissibility of evidence obtained by police searches under federal constitutional standards. (*People v. Woods* (1999) 21 Cal.4th 668, 674.) The Fourth Amendment to the United States Constitution guarantees “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures” and provides that “no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” (U.S. Const., 4th Amend.) “The touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy, that is, whether he or she has manifested a subjective expectation of privacy in the object of the challenged search that society is willing to recognize as reasonable.” (*People v. Robles* (2000) 23 Cal.4th 789, 794-795.)

“A search conducted without a warrant is unreasonable per se under the Fourth Amendment unless it falls within one of the ‘specifically established and well-delineated exceptions.’ ” (*Woods*, at p. 674, quoting *Katz v. United States* (1967) 389 U.S. 347,

357.) One of these exceptions to the warrant requirement is the so-called “automobile exception.” (See, e.g., *California v. Acevedo* (1991) 500 U.S. 565, 566; *People v. Carrillo* (1995) 37 Cal.App.4th 1662, 1667.) The exception permits a warrantless search of an automobile and its contents “if based on facts that would justify the issuance of a warrant.” (*United States v. Ross* (1982) 456 U.S. 798, 809.) “In other words, the police may search without a warrant if their search is supported by probable cause.” (*Acevedo*, at p. 579.)

A second exception permits warrantless searches even without probable cause where based upon legally obtained and adequate consent. (See *Woods, supra*, 21 Cal.4th at p. 674, citing *Schneckloth v. Bustamonte* (1973) 412 U.S. 218.) “In California, probationers may validly consent in advance to warrantless searches in exchange for the opportunity to avoid service of a state prison term.” (*Woods*, at p. 674.) The California Supreme Court has repeatedly upheld the legality of such searches. (*Id.* at p. 675.)

In defending the legality of the search, respondent’s brief quotes at length Officer Acha’s testimony regarding his reasons for the search and offers an unadorned citation to *Woods, supra*, 21 Cal.4th 668. We construe the brief as arguing that the search of Holdway’s truck can be justified under both the consent and automobile exceptions.² We disagree.

A. *The Consent Exception*

As Officer Acha ascertained before searching Rehfeld and the truck, on the date in question Rehfeld was on probation subject to a search condition. Under the search

² The entirety of respondent’s analysis of the consent exception is as follows: “[O]nce Officer Acha learned of Rehfeld’s probation condition and found methamphetamine on Rehfeld, he could lawfully search the purse on the front floorboards of the car in which Rehfeld was seen engaging in a hand-to-hand transaction. (*People v. Woods* (1999) 21 Cal.4th 668, 704.)” This sentence actually contains three factual mischaracterizations: (1) the officer did not find methamphetamine on Rehfeld; (2) the officer was not aware of the purse until after he initiated the search of the truck; and (3) the officer did not observe a hand-to-hand transaction.

condition she effectively gave advance consent to warrantless searches of her person and property. (See *Woods, supra*, 21 Cal.4th at p. 674.)³ The issue in this case is whether Rehfeld’s consent was adequate to justify the search of Holdway’s truck, which search revealed a purse and backpack containing methamphetamine.

“It long has been settled that a consent-based search is valid when consent is given by one person with common or superior authority over the area to be searched; the consent of other interested parties is unnecessary . . . [¶] . . . The ‘common authority’ theory of consent rests ‘on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.’ ” (*Woods, supra*, 21 Cal.4th at pp. 675-676, quoting *United States v. Matlock* (1974) 415 U.S. 164, 171, fn. 7.) The reviewing court must determine whether at the time of the search the officer “reasonably believe[d]” that the probationer had complete or joint control over the area to be searched such that it can be said that the owner assumed the risk of consent by the probationer. (*Woods*, at p. 682.)

We consider whether Officer Acha reasonably believed that Rehfeld exercised joint control over the truck. We think not. The officer testified that he observed Rehfeld and Tyree leaning into the truck on the passenger side while Holdway stood at the back of the truck; he learned that Holdway owned the truck, Rehfeld got a ride in the truck that night, and Holdway and Rehfeld lived together and were engaged; and Holdway strongly

³ The terms of the search condition is not in the record. Those terms are not important in this case because we conclude that there was no reasonable basis to conclude that Rehfeld had sufficient control over the truck to consent to its search. The search could not be justified as a consent search, regardless of the breadth of the search condition. We assume for purposes of this appeal that the search condition contained standard language authorizing warrantless searches of Rehfeld’s person and property. (See, e.g., *People v. Bravo* (1987) 43 Cal.3d 600, 602; *Robles, supra*, 23 Cal.4th at p. 792.)

objected to any search of his truck. Although it may have been reasonable for Officer Acha to assume that Rehfeld regularly rode in the truck, the officer had no basis to conclude that Rehfeld had “ ‘joint access or control for most purposes.’ ” (*Woods, supra*, 21 Cal.4th at p. 676.) For example, there is no indication that Rehfeld had keys to or regularly borrowed the truck. There simply was no basis to conclude that Holdway had given Rehfeld a degree of access and control over the truck such that it can be said that he had assumed the risk of her giving consent to its search. Stated differently, we cannot conclude that Holdway “retained no legitimate privacy interest in [his truck] as against [Rehfeld] or [her] invitees.” (*People v. Clark* (1993) 5 Cal.4th 950, 979.) Accordingly, the search cannot be upheld as a consent search pursuant to Rehfeld’s probation condition.

B. *The Automobile Exception*

Despite the lack of consent, the search of the truck was legal if Officer Acha had probable cause to believe that the truck contained contraband or evidence of a crime. We conclude he did not.

“The long-prevailing standard of probable cause protects ‘citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,’ while giving ‘fair leeway for enforcing the law in the community’s protection.’ [Citation.]” (*Maryland v. Pringle* (2003) 540 U.S. 366, 370.) While an investigatory detention may be based on “an articulable suspicion that a person has committed or is about to commit a crime” (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784), a warrantless search of an automobile must be “based on objective facts that could justify the issuance of a warrant...” (*United States v. Ross, supra*, 456 U.S. at p. 808.) Probable cause to issue a search warrant must be based on information “providing a substantial basis from which the magistrate can reasonably conclude there is a fair probability that a person has committed a crime or a place contains contraband or evidence of a crime.” (*Bailey v.*

Superior Court (1992) 11 Cal.App.4th 1107, 1111, citing *Illinois v. Gates* (1983) 462 U.S. 213; see also *Pringle*, at pp. 370-371.) The determination of the existence of probable cause is based on the totality of circumstances. (*Pringle*, at p. 371.) We examine the events leading up to the search and then decide “ ‘whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to’ probable cause [citation].’ ” (*Ibid.*)

When asked why he searched the truck, Officer Acha explained, “Well, a couple of things. Again, based on my training and experience, I felt that the activity that I saw with Mr. Tyree and Ms. Rehfeld leaning into the vehicle and coupled with their reaction and my knowledge that Mr. Tyree was a probationer, I felt that it may possibly be a narcotics transaction in progress. And that is also based on the complaints that I received in the area and my personal knowledge of this exact location. [¶]Also, their surprised look when I first came up led me to believe that, again, this may be a transaction—a narcotics transaction.” Respondent does not proffer any additional justifications for the search supported by evidence in the record.⁴

The circumstances described by Officer Acha did not provide probable cause for search of the truck. Nervousness and presence in a high crime area do not give rise to reasonable suspicion, much less probable cause. (*Moreno v. Baca* (9th Cir. 2005) 400 F.3d 1152, 1164 [collecting cases]; *People v. Pitts* (2004) 117 Cal.App.4th 881, 887 [presence at suspected drug sales site does not justify detention].) The fact that Tyree and Rehfeld were leaning into the parked car was not an indicator of criminal activity, especially in the absence of evidence that anything “ ‘was being concealed, disposed of,

⁴ Respondent does assert that Officer Acha found methamphetamine on Rehfeld following the search of her person. But Officer Acha several times very specifically stated that he found nothing in his search of Rehfeld. Respondent also asserts that Officer Acha observed a “hand-to-hand transaction,” which is not accurate. The officer only testified that he saw Rehfeld and Tyree leaning into the truck. We disregard these two assertions which lack support in the record.

exchanged, or even carried.’ ” (*People v. Loewen* (1983) 35 Cal.3d 117, 127; see also *Pitts*, at p. 888 [“While ‘observations of evasive or erratic driving tactics or other furtive conduct by people coming to and going from a particular residence’ can be considered as indicia of illegal activity,” the conduct observed in the case did not itself suggest illegal activity].) And such innocent activity cannot give rise to *probable cause* simply because one of the participants is a known drug-user on probation for a drug offense. Otherwise, anyone associating with probationers in high crime neighborhoods would put him or herself at risk of routine and highly intrusive searches. (Cf. *Robles*, *supra*, 23 Cal.4th at p. 799 [“Many law-abiding citizens might choose not to open their homes to probationers if doing so were to result in the validation of arbitrary police action”].) Even considered in their totality, the circumstances known to Officer Acha at the point he initiated the warrantless search of Holdway’s truck did not provide a substantial basis from which he could reasonably conclude there was a fair probability that the truck contained contraband or evidence of a crime. (See *Bailey*, *supra*, 11 Cal.App.4th at p. 1111.)

At the time of Holdway’s motion for a new trial, his trial counsel testified and was asked why she failed to renew the motion to suppress. She testified that, based on her research, she thought the motion would be unsuccessful. That conclusion was in error. In light of the illegality of the search, the fact that exclusion of the fruits of the search would have led to the exclusion of all significant evidence against Holdway, and the absence of any tactical considerations weighing against renewal of the motion, we conclude that counsel’s performance was deficient. (See *Hart*, *supra*, 74 Cal.App.4th at pp. 486-487.)

II. *Prejudice*

Understandably, respondent does not attempt to argue that the erroneous admission of the fruits of the truck search was not prejudicial. That search disclosed methamphetamine in the purse on the floor on the front passenger side, a pay-owe sheet

on the front passenger seat, and, in the back of the passenger compartment, a backpack with Holdway's indicia containing methamphetamine and drug dealing paraphernalia. No other methamphetamine was admitted as evidence in the case. There can be no doubt that admission of the fruits of the search was prejudicial. (*See Hart, supra*, 74 Cal.App.4th at p. 487.)⁵ The motion for a new trial should have been granted.

DISPOSITION

The judgment is reversed.

GEMELLO, J.

We concur.

JONES, P.J.

STEVENS, J.

⁵ Because we conclude that Holdway was prejudiced by his counsel's failure to renew the motion to suppress, we do not reach Holdway's other claims of deficient performance.