Filed 2/26/09 P. v. Herrera CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. HONORIO MORENO HERRERA, Defendant and Appellant.	G039028 (Super. Ct. No. 05CF3817) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Daniel J. Didier, Judge. Reversed and remanded.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lynne G. McGinnis and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Honorio Moreno Herrrera of first degree murder (Pen. Code, § 187; all further statutory references are to this code unless otherwise indicated), and found true that defendant vicariously discharged a firearm causing death (§ 12022.53, subds. (d) and (e)(1)), and committed the crime for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b). The jury also found that the special circumstance of murder for criminal street gang purpose (§ 190.2, subd. (a)(22)) existed and that defendant was guilty of street terrorism (§ 186.22, subd. (a)). The court sentenced him to prison for life without possibility of parole.

Defendant's appeal asserts that the court erred in permitting a witness's preliminary hearing testimony to be read into evidence after the witness could not be found. For reasons stated below, we agree the prosecution failed to exercise due diligence and the court erred in permitting this testimony to be read. We therefore reverse the judgment. Defendant also raises a number of instances of alleged ineffective assistance of counsel; these issues are moot or should be raised, if at all, in a petition for habeas corpus. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.

FACTS

1. The Murder

Defendant, a member of the criminal street gang "Krazy Proud Criminals" or "KPC," and two of his fellow gang members drove into rival gang territory. There they saw Eric Peralta and Efren Enriquez. One of the car's occupants got out of the car and asked the two where they were from. The two continued to walk towards a 7-Eleven store. Then a second person came out of the car and started shooting. Peralta fell down. The assailants stated "KPC" and left the scene. Peralta died.

Months later, the police arrested Jose Portillo, a former KPC member, for evading a police officer. They also arrested defendant, who attempted to flee. Portillo subsequently told the police defendant had admitted to him that he was the shooter who had killed Peralta.

After he was arrested, defendant acknowledged his presence at the murder scene in a police interview, but he denied being the shooter. Defendant also testified during his trial and, again, admitted getting out of the car and being present during the shooting. But he refused to identify the shooter.

2. Admission of Former Testimony

Trial was originally scheduled for March 7, 2007. On that date it was continued to May 21, then trailed to May 25, again to May 29, and then again to May 30. On that day, the prosecution filed a "motion to admit preliminary hearing testimony of Jose Portillo and request for hearing." (Capitalization omitted.) The motion stated that Portillo was unavailable and requested "a hearing on the issue of due diligence." It also stated that, at the time of the preliminary hearing in this case, Portillo was in custody. Shortly thereafter, after having entered a plea, he was turned over to federal officials and deported to El Salvador.

District attorney investigator Ed Wood testified during the hearing on the motion regarding efforts to locate Portillo. He stated that he began looking for Portillo the previous Friday, May 25. (This was Friday before a three-day holiday weekend, with the trial scheduled to start on the following Tuesday.) Wood determined there were warrants for Portillo's arrest and contacted the Santa Ana police asking them to make out a "wanted flyer" for the witness. The flyer was disseminated to regional law enforcement agencies. No leads developed.

That same day, Wood, accompanied by another investigator, went to an apartment on Civic Center Drive; the occupant was unable to identify Portillo. Wood

called two phone numbers associated with Portillo but both had been changed. Still on the same day, Wood contacted a Mark Johnson, a special agent at Homeland Security, who told him that Portillo had been deported to El Salvador in September 2006. Wood then talked to Art Zorilla, another district attorney investigator in the foreign prosecution unit, requesting that Zorilla attempt to locate Portillo in El Salvador. Zorilla exchanged e-mails with his contacts in that country but Portillo was not located. Zorillo also advised Wood there is no treaty between the United States and El Salvador that would enable them to have Portillo extradited, even if he were found.

The trial court ruled the prosecution acted with due diligence in attempting to insure Portillo's presence and allowed Portillo's testimony from the preliminary hearing to be used.

DISCUSSION

Defendant raises two issues with respect to Portillo's transcribed testimony; the trial court erred in finding due diligence by the prosecutor in seeking Portillo's presence and admission of Portillo's recorded testimony violates the confrontation clause of the Sixth Amendment to the United States Constitution.

1. The prosecution failed to act with due diligence.

Evidence Code section 1291, subdivision (a)(2) provides that former testimony is admissible as an exception to the hearsay rule, if the witness is unavailable and "[t]he party against whom the former testimony is offered was a party to the action . . . in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." Section 240 defines "unavailable." It includes in the definition a witness who is "[a]bsent from the hearing and the court is unable to compel his or her attendance by

its process" (Evid. Code, § 240, subd. (a)(4)) or "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) Although these exceptions are stated in the alternative, constitutional provisions require that, in a criminal case, the prosecution show due diligence in its attempts to secure the attendance of the witness before prior testimony may be admitted.

Both the United States and the California Constitutions entitle a criminal defendant to confront adverse witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) The right to confrontation seeks "to ensure that the defendant is able to conduct a 'personal examination and cross-examination of the witness, in which [the defendant] has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' [Citations.]" (*People v. Louis* (1986) 42 Cal.3d 969, 982, quoting *Mattox v. United States* (1895) 156 U.S. 237, 242-243 [15 S.Ct. 337, 39 L.Ed 409].)

As noted by the parties, our Supreme Court dealt with the issue in the context of unavailable witnesses in *People v. Cromer* (2001) 24 Cal.4th 889 (*Cromer*). There, the court stated, "Generally, a witness is not unavailable for purposes of the right of confrontation 'unless the prosecutorial authorities have made a good-faith effort to obtain [the witness's] presence at trial.' [Citations.] (As we mentioned at the outset, and as we explain in detail later, under California law the prosecution must show reasonable or due diligence in locating the witness.)" (*Id.* at p. 897, fn. omitted.)

Cromer also held "that appellate courts should independently review a trial court's determination that the prosecution's failed efforts to locate an absent witness are sufficient to justify an exception to the defendant's constitutionally guaranteed right of confrontation at trial." (*Cromer, supra,* 24 Cal.4th at p. 901, fn. omitted.) Employing

such independent review, we must disagree with the trial court and conclude that the prosecution failed to use due diligence in attempting to locate Portillo. We reach this conclusion, in part, by comparing the facts in this case with those in *Cromer*, which likewise found lack of due diligence in attempting to locate a missing witness. In order to do so, we must quote rather extensively from that case.

"At the preliminary hearing on June 13, 1997, Culpepper testified under subpoena and appeared to be a cooperative witness. About two weeks later, however, officers patrolling the neighborhood where she lived noticed and reported that Culpepper was no longer there.

"Trial was originally set for September 9, 1997, and was then rescheduled for November 20, 1997, December 11, 1997, and January 12, 1998. Subpoenas issued for Culpepper to attend trial on September 9 and December 11, but the prosecution made no effort to serve them. No subpoena issued for Culpepper to attend trial on November 20.

"Despite Culpepper's June 1997 disappearance from her neighborhood, it was not until December 1997, with the January 12, 1998, trial date looming ahead, that the prosecution made any serious effort to locate her. Two investigators went to Culpepper's former residence five or six times, only to be informed by a woman at that address that Culpepper no longer lived there.

"Trial was continued to January 14, 1998, and then to January 20, 1998, when both sides announced ready for trial. The matter was put over to January 22, 1998, the last permissible day on which to bring defendant to trial.

"On January 20, 1998, a man at Culpepper's former home told prosecution investigators that Culpepper was living with her mother, Mildred Culpepper, in San Bernardino. Despite the urgency of the situation, prosecution investigators did nothing to follow up this information until two days later, when an investigator obtained Culpepper's mother's address (apparently from Department of Motor Vehicle records)

and drove to her San Bernardino home. A woman at the house said Culpepper's mother was out but would return the next day. She said that Culpepper did not live there, and that she had no idea where Culpepper was. The investigator left a copy of a subpoena for Culpepper, but he did not return the next day, or ever, to speak to Culpepper's mother, nor did he attempt to find other ways to contact Culpepper's mother, such as at a work location or by telephone. Apart from consulting computerized information systems, the county jail, and the county hospital, the prosecution made no other efforts to locate Culpepper.

"On January 27, 1998, after a hearing at which the prosecution presented evidence of these facts, the trial court determined that the prosecution had exercised due diligence in attempting to locate Culpepper, and it ruled that the prosecution could use her former testimony in evidence against defendant." (*Cromer, supra,* 24 Cal.4th at pp. 903-904.)

Cromer concluded this factual recital by stating: '"We have said that the term 'due diligence' is 'incapable of a mechanical definition,' but it 'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.' [Citations.] Relevant considerations include"' whether the search was timely begun '"[citation], the importance of the witness's testimony [citation], and whether leads were competently explored [citation]." (*Cromer, supra,* 24 Cal.4th at pp. 903-904.) *Cromer* concluded that the preliminary testimony of the witness was improperly admitted because the prosecution failed to demonstrate due diligence in attempting to locate the witness. (*Id.* at p. 904.)

We cannot conclude that the prosecution in this case engaged in "persevering application, untiring efforts in good earnest, efforts of a substantial character." In *Cromer,* the prosecution waited until two weeks or more before the then scheduled January 12 trial date before attempting to locate the missing witness. This was not enough. Here the prosecution made no effort until the last business day before the

trial was scheduled to start. Nothing was done until the Friday before a three-day weekend, with the trial then scheduled to start the following Tuesday (although it was trailed to Wednesday May 30, 2007).

Portillo was deported to El Salvador in September 2006, presumably a not unexpected event. But even if he had not been deported, what was the likelihood he would still live in the same Civic Center Drive apartment he occupied a year earlier? What was the probability that the flyer disseminated one business day before the trial was scheduled to start would have resulted in Portillo's arrest in time for him to testify at the trial? It took Wood less than a day to learn that Portillo had been deported. Had this been discovered a few weeks before the trial, efforts could have been made to obtain his return to this country and, if such efforts proved unsuccessful, the diligence requirement might have been satisfied. Furthermore, it is not unheard of that a deported felon returns to the United States. Again, the prosecution did not give itself enough time to permit an adequate investigation of his whereabouts.

And, although Portillo was subjected to fairly extensive cross-examination during the preliminary hearing, the type of cross-examination during such a proceeding does not necessarily encompass the same scope of cross-examination in which counsel would engage during a jury trial.

The Attorney General argues that, although Wood testified he did not start looking for Portillo until Friday May 25, "there is no evidence with regard to when the prosecutor actually began to look for Portillo." But the burden is on the prosecution to present evidence substantiating due diligence. (*People v. Smith* (2003) 30 Cal.4th 581, 610.) It there was such evidence, it should have been presented and we cannot now speculate that such evidence existed. And the only Court of Appeal cases cited by the Attorney General holding that a search began shortly before or during the trial is sufficient to satisfy the diligence requirement were all decided before *Cromer*. Further,

even during the single day the prosecution allowed itself to try to find Portillo, the search was, at best, perfunctory.

As pointed out by defendant, no effort was made to determine if Portillo's attorney had information about his whereabouts. No real search was made for friends and family. As defendant further notes: "The District Attorney's office also failed to explore several other potential leads. Indeed, the District Attorney's office had information that Portillo grew up on Durant Street and had lived in the area for 10 or 11 years. [Citations.] The [District Attorney's] office also knew that: (1) Portillo was a longtime member of the KPC gang; [citation] (2) he had lived with his mother on Baker Street; [citations] (3) he had a daughter and sister (who was married and had two children) who lived in Santa Ana; [citations] (4) he had been employed; [citation] and (5) he had gone to school or taken classes to get his high school diploma [citation]. None of these leads were explored." Even if not each of these leads constitute the kind of "obvious places" where inquiry would be required, the fact that none of these was tried illustrates the lack of seriousness in the search efforts. The prosecution apparently assumed that Portillo would not be available and went through a last-minute, perfunctory search in an attempt to make a showing of due diligence. This was not enough.

2. The error was not harmless.

The Attorney General contends that the error in permitting admission of the hearsay evidence was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 LEd.2d 705]. In support of this contention, the Attorney General relies in part on defendant's own testimony. But the fact that defendant decided to take the stand may well have been motivated by his need to contradict Portillo's testimony that he had confessed to being the shooter. We cannot speculate that he would have testified without Portillo's recorded testimony. And, absent the statement defendant told the witness that, after identifying the victim as being from a competing

gang, "he got off the car and shot them once or twice, and that was it[,]" defendant may well have decided not to take the stand. Portillo also characterized defendant's attitude after the murder as "he was just celebrating that fact that he's - - he's doing a lot for the - - so-called neighborhood."

We cannot conclude that the recorded testimony, the only evidence identifying defendant as the shooter, was harmless beyond a reasonable doubt. Although, as the Attorney General points out, defendant could have been found guilty under an aider and abettor theory, even if he was not the shooter, we are not persuaded beyond a reasonable doubt that this is what the jury would necessarily have concluded.

DISPOSITION

The judgment is reversed and the case is remanded to the trial court for a new trial or such other proceedings as the court deems appropriate.

RYLAARSDAM, ACTING P. J.

I CONCUR:

MOORE, J.

ARONSON, J., Dissenting.

I respectfully dissent. The evidence shows federal authorities deported Portillo to El Salvador in September 2006. Efforts to locate the witness in El Salvador proved fruitless, but even if authorities had located him, the prosecution lacked the means to compel his attendance because no extradition treaty exists between El Salvador and the United States. I agree with the majority deported felons may return to the United States, but the facts here do not support this assumption because the witness faced several outstanding warrants for his arrest. (*People v. Guiterrez* (1991) 232 Cal.App.3d 1624, 1640, disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 [witness had strong motive to avoid jurisdiction because of an outstanding warrant].)

I do not quarrel with the majority's conclusion the prosecution waited too long to begin its efforts to locate the witness. But once begun, the prosecution took reasonable steps to locate the witness by checking the witness's last known address and trying to locate the witness's family and friends. The prosecution's investigator also contacted law enforcement to learn if any leads existed that would assist the prosecution's search. True, as the majority points out, the investigator could have done more, such as contact Portillo's former attorney. But these additional efforts were not likely to succeed given Portillo's incentive to stay away from a jurisdiction seeking to incarcerate him. Simply put, further efforts to locate the witness would have been futile. As our Supreme Court has observed, the prosecution need not engage in futile acts to locate an absent witness likely beyond the court's jurisdiction. (*People v. Smith* (2003) 30 Cal.4th 581, 611 [further efforts to procure witness's attendance would have been futile because

witness returned to Japan].) Consequently, I conclude the trial court did not err in admitting Portillo's preliminary hearing testimony.

ARONSON, J.