

CALIFORNIA COURT OF APPEAL, FIFTH DISTRICT

Cuevas v. Superior Court

58 Cal. App. 3d 406, 130 Cal. Rptr. 238 (Cal. Ct. App. 1976) · No. 2893 · Decided February 27, 1976

SUMMARY

The California Court of Appeal held that Penal Code section 1538.5, subdivision (b), uses permissive rather than mandatory language and did not prevent defendants from moving to suppress evidence at a preliminary hearing under subdivision (f). Because the magistrate refused to hear the suppression motion and all prosecution evidence stemmed from the challenged search warrant, the defendants were illegally committed. The court ordered a peremptory writ of prohibition restraining further proceedings other than dismissal.

CASE DETAILS

COURT	California Court of Appeal, Fifth District
WRITING FOR THE COURT	The Court; Brown (G.A.), P.J.; Gargano, J.; Franson, J.
JURISDICTION	California
DECIDED	February 27, 1976
DOCKET	2893
DISPOSITION	writ_granted
PROCEDURAL POSTURE	Petition for a writ of prohibition challenging the denial of a Penal Code section 995 motion to set aside an information after a municipal court magistrate refused to hear petitioners' Penal Code section 1538.5 motion to suppress at the preliminary hearing.
STANDARD OF REVIEW	The court reviewed whether the preliminary-hearing magistrate's refusal to hear the statutory suppression motion resulted in an illegal commitment and whether prohibition was an appropriate remedy.
PRECEDENTIAL VALUE	published opinion; precedential California Court of Appeal decision
PARTIES	Arthur Cuevas et al., Petitioners v. The Superior Court of Stanislaus County, Respondent

TOPICS

- suppression of evidence
- criminal procedure
- preliminary hearing
- statutory interpretation
- appellate procedure

PRACTICE AREAS

California criminal procedure

search and seizure

extraordinary writs

QUESTIONS PRESENTED

1. Whether Penal Code section 1538.5, subdivision (b)'s direction that a suppression motion should first be heard by the warrant-issuing magistrate is mandatory or permissive.
2. Whether a defendant charged with a felony initiated by complaint has a statutory right under Penal Code section 1538.5, subdivision (f), to move to suppress evidence at the preliminary hearing in the municipal or justice court, even when the search warrant was issued by a superior court judge.
3. Whether refusal to hear that suppression motion resulted in an illegal commitment requiring the information to be set aside under Penal Code section 995.
4. Whether a peremptory writ of prohibition was the proper remedy.

HOLDINGS

1. The word "should" in section 1538.5, subdivision (b), is permissive and recommendatory, not mandatory; the provision does not bar a defendant from making the suppression motion at the preliminary hearing under subdivision (f).
2. Petitioners had a statutory right to move at the preliminary hearing to suppress evidence obtained under the allegedly invalid search warrant, and the magistrate's refusal to hear the motion denied that right.
3. Because petitioners were prevented from exercising their statutory right to present the suppression motion and all of the People's evidence stemmed from the warrant, they were illegally committed and the denial of their section 995 motion was erroneous.
4. A peremptory writ of prohibition was proper because the record fully presented the determinative issues and petitioners were entitled to relief from further proceedings based on the illegal commitment.

KEY QUOTATIONS

"The word 'should' is used in a regular, persuasive sense, as a recommendation, not as a mandate." (409)

"The Supreme Court refused to 'reduce the preliminary hearing to an ex parte proceeding at which the defendant's presence would be a meaningless gesture.'" (410)

"Petitioners seek the opportunity provided by the statute to move at the preliminary hearing for suppression of evidence obtained under an allegedly invalid search warrant; this is their right, and, because they were prevented from exercising their statutory prerogative, petitioners were illegally committed and the motion to dismiss the information was denied erroneously." (411)

FACTUAL BACKGROUND

All evidence presented at the preliminary hearing derived from execution of a search warrant. Petitioners alleged that the warrant affidavit was factually insufficient and contained material inaccuracies and falsehoods, and they sought to challenge the warrant and suppress the evidence under Penal Code section 1538.5, subdivision (f). The

municipal court refused to hear the motion because the warrant had been issued by a superior court judge, and petitioners were held to answer on all charges.

PROCEDURAL HISTORY

Petitioners were charged by information with possession of stolen property and controlled-substance offenses. At the preliminary hearing, the municipal court refused to entertain their motion to suppress evidence obtained under a search warrant, reasoning that the motion should have been made before the superior court judge who issued the warrant; petitioners were held to answer. The superior court denied their section 995 motion to set aside the information, concluding that the error did not deprive them of a substantial right and could be cured by a later superior court suppression hearing. Petitioners declined that proposed cure and sought prohibition. The Court of Appeal issued a peremptory writ restraining further proceedings other than dismissal.

DISPOSITION

writ_granted

REMAND INSTRUCTIONS

A peremptory writ of prohibition shall issue restraining the Stanislaus County Superior Court from taking any further proceedings other than dismissals against petitioners.

CASES CITED

- Jaffe v. Stone, 18 Cal. 2d 146, 150, 114 P.2d 335, 135 A.L.R. 775 (1941)
- People v. Elliot, 54 Cal. 2d 498, 503-505, 354 P.2d 225, 6 Cal. Rptr. 753 (1960)
- Jennings v. Superior Court, 66 Cal. 2d 867, 875-880, 428 P.2d 304, 59 Cal. Rptr. 440 (1967)
- People v. Mardian, 47 Cal. App. 3d 16, 37, 121 Cal. Rptr. 269 (1975)
- People v. Sanchez, 24 Cal. App. 3d 664, 691, 101 Cal. Rptr. 193 (1972)
- San Diego Wholesale Credit Men's Assn. v. Superior Court, 35 Cal. App. 3d 458, 465, 110 Cal. Rptr. 657 (1973)
- Goodenough v. Superior Court, 18 Cal. App. 3d 692, 697, 96 Cal. Rptr. 165 (1971)
- Bolles v. Superior Court, 15 Cal. App. 3d 962, 963, 93 Cal. Rptr. 719 (1971)

OPINION

PER CURIAM.

58 Cal. App. 3d 406 (1976) 130 Cal. Rptr. 238 ARTHUR CUEVAS et al., Petitioners, v. THE SUPERIOR COURT OF STANISLAUS COUNTY, Respondent; THE PEOPLE, Real Party in Interest. Docket No. 2893. Court of Appeals of California, Fifth District. February 27, 1976. *407 COUNSEL Brunn & Lacey and Dale H. Thayer for Petitioner. No appearance for Respondent. Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, Arnold Overoye, Assistant Attorney General, Gregory W. Baugher and Paul H. Dobson, Deputy Attorneys

General, for Real Party in Interest. *408 OPINION THE COURT.[*] Petitioners seek a writ of prohibition to restrain the Stanislaus County Superior Court from taking any further proceedings against petitioners on the ground that their motion to set aside the information (Pen.

Code, § 995) was denied erroneously by Judge Frank Pierson because petitioners were prevented from challenging a search warrant pursuant to Penal Code section 1538.5 at the preliminary hearing. All evidence produced at the hearing came from the execution of a search warrant issued by Judge Pierson; petitioners allege that they have valid grounds for a motion to suppress the evidence introduced against them because the search warrant was issued on the basis of an affidavit which was factually insufficient and which contained material inaccuracies and falsehoods.

Petitioners also allege, and offered to prove at the preliminary hearing, that criminal defendants in Stanislaus County are being denied the right to challenge evidence against them seized pursuant to a search warrant because of a conscious effort on the part of the District Attorney of Stanislaus County to seek search warrants only from superior court judges, not from municipal court judges, thinking that a defendant must attack a search warrant before the magistrate who issued it, so that defendants may not challenge illegally seized evidence and illegally issued warrants at their preliminary hearings in the municipal court.

Petitioners were charged by information with possession of stolen property (Pen. Code, § 496, subd. 1), possession of barbituates and amphetamines (Health & Saf. Code, § 11377) and possession of peyote (Health & Saf. Code, § 11350). At the preliminary hearing counsel for the defendants stated his intention to make a motion to suppress the evidence obtained through the execution of the search warrant.

(Pen. Code, § 1538.5.) The deputy district attorney urged the court to refuse to hear any such motion because of section 1538.5, subdivision (b), of the Penal Code which states: "When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant." *409 After looking at the code section, the municipal court judge said that the motion to suppress should have been made before Judge Pierson, the superior court judge who issued the warrant, and ruled that the motion would not be entertained.

The evidence, subject of the motion to suppress, was introduced, and defendants were held to answer on all three counts. On January 27, 1976, defendants moved in the superior court to set aside the information (Pen. Code, § 995) on the basis that error had occurred in the commitment.

The deputy district attorney said that error had in fact occurred but that it did not constitute a denial of a substantial right to defendants and was curable under *People v. Mardian* (1975) 47 Cal.

App. 3d 16, 37 [121 Cal. Rptr. 269]. Defendants had not requested a hearing in the superior court under section 1538.5 of the Penal Code to cure the error at the time of the hearing on the 995 motion and declared that they would not request such a hearing.

The superior court judge found that defendants had not been deprived of a substantial right and could challenge the affidavit and search warrant prior to trial in the superior court. The trial judge denied the motion to set aside the information on January 28, 1976, and on February 2 defendants filed their petition for writ of prohibition in this court. (1a) The language in section 1538.5, subdivision (b), is not mandatory, but permissive.

The word "should" is used in a regular, persuasive sense, as a recommendation, not as a mandate. Other subdivisions of the section contain words which are clearly mandatory and which could have been used in subdivision (b) had that been the intent of the Legislature. Rather, it seems clear that subdivision (b) is inapplicable when it is in contradiction to other portions of the statute; in this instance it is inconsistent with subdivision (f) which provides: "If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing."

"The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and the expense of a criminal trial. Many an unjustifiable prosecution is stopped at that point, where the lack of probable cause is clearly disclosed." (Jaffe v. Stone (1941) 18 Cal. 2d 146, 150 [114 P.2d 335, 135 A.L.R.

775].) *410 In People v. Elliot (1960) 54 Cal. 2d 498, 504-505 [6 Cal. Rptr. 753, 354 P.2d 225], the California Supreme Court declared that a "preliminary examination is not merely a pretrial hearing," and the "Legislature has specifically conferred upon an accused the right to protect his name from being maligned at a preliminary examination. This protection is too important to the innocent, as well as to the guilty, to permit it to be ignored by the committing magistrate."

In Jennings v. Superior Court (1967) 66 Cal. 2d 867, 875-880 [59 Cal. Rptr. 440, 428 P.2d 304], it was urged that error in limiting a defendant's right of cross-examination was not prejudicial because the evidence presented was sufficient to show probable cause to hold defendant to answer.

The Supreme Court refused to "reduce the preliminary hearing to an ex parte proceeding at which the defendant's presence would be a meaningless gesture." The court held that "the refusal to grant a continuance and the restriction on cross-examination amounted to a denial of petitioner's 'substantial rights' in the preliminary hearing proceedings, and the resulting illegal commitment may be reached by way of prohibition."

(Pp. 879-880.) The court in the Jennings case, supra, also held that to effectuate the recognized purpose of the preliminary hearing the defendant must be permitted, if he wishes, "to elicit

testimony or introduce evidence tending to overcome the prosecution's case or establish an affirmative defense." (P. 880.)

In 1967 the Legislature enacted section 1538.5 of the Penal Code, a procedure for attacking unconstitutional searches and seizures; it was made available whether or not the search or seizure was under a warrant. Subdivision (f) of section 1538.5 states clearly that in the case of "a felony offense initiated by a complaint" the motion to suppress evidence may be made in the municipal or justice court at the preliminary hearing, and the statute further states that if the motion is denied and defendant is held to answer he may make the motion again in superior court.

(See Witkin, Cal. Evidence (2d ed. 1974 Supp.) § 71E, p. 46.) The petitioners have not been allowed their opportunity to present the motion at the preliminary hearing as provided by the statute and they do not choose to have the error "cured" in the superior court, but instead seek a writ of prohibition on the ground that their motion to dismiss should have been granted. *411 (2) Penal Code section 995 provides that upon motion the information must be set aside if the defendant has not been legally committed by a magistrate; if he has been illegally committed and his motion to set aside the information on that ground has been denied erroneously, a conviction must be reversed even after a trial on the merits.

(People v. Elliot, supra, 54 Cal. 2d 498, 503.) The rule is a recognition of the constitutional provision that criminal offenses be prosecuted either by indictment or "by information, after examination and commitment by a magistrate," (Cal. Const., art. I, § 8) in compliance with statutory provisions relating to preliminary examinations and holding a defendant to answer.

(See People v. Sanchez (1972) 24 Cal. App. 3d 664, 691 [101 Cal. Rptr. 193].) (1b) All of the evidence presented by the People at the preliminary hearing stemmed from the execution of the search warrant. When defendants chose to attack the validity of that warrant pursuant to Penal Code section 1538.5, subdivision (f), at the preliminary hearing, the magistrate refused to allow defendants to make their motion to suppress.

Defendants pressed their case at each opportunity; at the motion to dismiss the information (Pen. Code, § 995) in the superior court, defendants objected to the magistrate's refusal to entertain their motion to suppress the evidence; when no relief was available at the 995 hearing in the superior court, they sought a writ of prohibition.

We are not faced with the issue considered in People v. Mardian, supra, 47 Cal. App. 3d 16, 37, where the court stated that any error which was committed by a magistrate in refusing to receive evidence on the issue of the accuracy of an affidavit at the preliminary hearing was cured by a subsequent correct determination of the issue in the superior court. Petitioners seek the opportunity provided by the statute to move at the preliminary hearing for suppression of evidence obtained under an allegedly invalid search warrant; this is their right, and, because they were prevented

from exercising their statutory prerogative, petitioners were illegally committed and the motion to dismiss the information was denied erroneously.[1] The petition filed with this court, the opposition filed by the real party in interest, the transcript of the preliminary hearing, the transcript of the hearing on the 995 motion and the reply brief of petitioners "... fully *412 present the determinative issues in the premises.

An alternative writ or order to show cause would add nothing to the full presentation already made." (San Diego Wholesale Credit Men's Assn. v. Superior Court (1973) 35 Cal. App. 3d 458, 465 [110 Cal. Rptr. 657].) A peremptory writ of prohibition is proper (Code Civ. Proc., §§ 1088, 1105; Goodenough v. Superior Court (1971) 18 Cal. App. 3d 692, 697 [96 Cal. Rptr.

165]; Bolles v. Superior Court (1971) 15 Cal. App. 3d 962, 963 [93 Cal. Rptr. 719]; 5 Witkin, Cal. Procedure (2d ed. 1971) Extraordinary Writs, § 149, p. 3919) and should issue. Let a peremptory writ of prohibition issue restraining the Stanislaus County Superior Court from taking any further proceedings other than dismissals against petitioners. NOTES [*] Before Brown (G.A.), P.J., Gargano, J. and Franson, J. [1] Had petitioners moved to suppress the evidence under section 1538.5 in the superior court, instead of standing on their rights, the error would have been cured; petitioners chose not to do so, but sought relief by way of writ of prohibition after preserving their right to object by arguing the error at the 995 hearing.