

DEALING WITH PROCEDURAL PROBLEMS
IN SUPPRESSION MOTION APPEALS

By: Michael A. Kresser

INTRODUCTION:

In the plea bargain driven, litigation averse atmosphere of modern criminal courts, bringing a procedurally proper suppression motion on all meritorious grounds seems to be a lost or at least vanishing art. Frequently the defense files a “*Wilder*” motion (*Wilder v. Superior Court* (1979) 92 Cal.App.3d 90), which alleges that a particular search or seizure was made without a warrant, but does not address any possible justifications for the search or seizure. (See also *People v. Williams* (1999) 20 Cal.4th 119, 128-138.) *Williams* states the defense may wait until the prosecutor has raised justifications for the warrantless search before being required to respond, though the defense must eventually respond, or risk forfeiture. *Williams* also said the defense may anticipate justifications in its original moving papers, if it wishes.

Following the *Wilder* procedure creates potential procedural pitfalls. One is that it risks a failure to “point out inadequacies in that justification. [Citation.] Defendants who do not give the prosecution sufficient notice of these inadequacies cannot raise the issue on appeal.” (*Williams, supra*, 20 Cal.4th at p. 136.) The defense may not file a response to the prosecution’s opposition setting forth their justifications. If a response is filed, the defense may not address all the justifications relied upon by the prosecution. Even at the hearing on the motion, a justification may not be addressed by the defense.

In addition to these procedural pitfalls, certain basics of motion procedure are sometimes overlooked by trial counsel, and it is our job to try to get the client relief he or she is entitled to, in spite of any procedural mistakes that have been made. It is the burden of any moving party to: (a) to specify the order requested; (b) to specify the legal grounds for the requested order; and (c) to present whatever evidence is necessary to prove entitlement to the requested order. When trial counsel has arguably failed to carry these burdens, appellate counsel must try to get the appellate court to rule on the merits despite such arguable deficiencies or obtain a finding of ineffective assistance which will give the client the opportunity to return to the trial court and have the motion reheard.

The following are some recent cases in which procedural problems arose, along with our responses to them.

CASE ONE:

A. Facts.

Police arrive at house to question resident about a report that he had committed domestic violence the day before. Police smell strong odor of fresh MJ as they approach the house. Resident comes out on the porch to speak with police, as does second resident. Police arrest resident, who asks second resident to go into the resident's bedroom and get his shoes and keys. Officer says he has to accompany second resident into house and sees MJ and illegal fireworks in plain sight in resident's bedroom. Officer opens notebook, disclosing pay/owe sheet, and dresser drawer, finding psilocybin mushrooms.

Second resident is detained, and gives consent to search remainder of house, where more MJ, scales and sifting trays are found. Officer approaches detached garage in backyard, smells odor of fresh MJ.

Arrested resident is questioned at scene and admits there is an indoor MJ grow in garage. Police then use all of above evidence to obtain search warrant to search the detached garage.

B. Issues as Defined in Suppression Motion.

Sought suppression of evidence seized as a result of a "search pursuant to warrant," because initial police entry was unlawful, but concluded by asking that the motion be granted "with respect to the three drugs charges (and the fireworks count).

C. Procedural Problems Posed in Obtaining Full Appellate Review of Potentially Meritorious Suppression Issues.

1. Motion did not address that if initial entry deemed unlawful, there were still issues regarding second resident's consent to search house other than resident's room.
2. Motion did not address issue of whether, even if

evidence in the house were suppressed, the search warrant still established probable cause to search the garage after excision of the illegally seized evidence from the house.

3. Motion did not address D's admission to police that there was an indoor MJ operation in the garage, which itself established probable cause for the SW unless the admission was suppressed.
4. Motion did not include as an exhibit a copy of the search warrant affidavit so the court could perform necessary test to determine whether MJ in garage should be suppressed.
5. Motion did not address whether, even if the police entry was lawful, the search of the notebook and dresser drawer in the resident's bedroom exceeded the scope of a protective sweep, a point conceded in the DA's opposition but never mentioned or argued at the hearing, which would have knocked out felony psilocybin charge.

D. Solutions to the Procedural Problems.

1. Construe the motion as favorably as possible to cure procedural problems.
 - a. Potentially inadequate description of evidence to be suppressed. We just said that the motion sought to suppress all the evidence that supported the three drug charges (cultivation of MJ, possession of MJ for sale, and possession of psilocybin and the fireworks charge), which it did, albeit in the conclusion and contrary to the notice of motion which specified only the evidence seized with search warrant.
 - b. Failure to assert that notebook and dresser drawer searches were beyond the scope of protective sweep. We argued that the purpose of the

forfeiture rule would not be served, because the adverse party recognized and conceded the issue, and the court was thus aware of the issue. Interestingly, AG claimed trial court did suppress the psilocybin and pay/owe sheets, though the trial court denied the motion with no exceptions and the defendant pled guilty to possession of psilocybin!

- c. Just went after tainted consent by second resident straight on the merits as the inevitable result of a favorable ruling on the illegal initial entry issue. AG raised no objection, conceding that if the initial entry was unlawful, we were entitled to a reversal.

2. Argue IAC in the Suppression Motion as a Backup In the Appeal.

- a. AG will claim can't raise IAC in the suppression motion without a certificate of probable cause, but there is no supporting authority. Cite *People v. Collins* (2004) 115 Cal.App.4th 137, permitting litigation of denial of *Ptichess* motion brought in aid of a suppression motion, without a certificate of probable cause. "An issue that is intertwined with litigating the validity of the search" may be litigated after a guilty plea without a certificate. (*Id.*, at p. 151.)
- b. Recognize and distinguish *People v. Mendoza-Tello* (1997) 15 Cal.4th 264, which reversed a Court of Appeal decision reversing a conviction for ineffective assistance, and stated that IAC should generally be litigated via habeas. In *Mendoza-Tello*, no motion to suppress had been brought but an on the record IAC claim was made on appeal. The claim was based on the officer's testimony at trial that he was in the process of patting down the driver of a car stopped because a passenger had been spotted lighting a joint,

when the driver discarded drugs. CA said IAC because pat down unjustified, motion to suppress should have been made.

California Supreme Court said can't find IAC on record because issue of legality of search had not been litigated at all, and there may be additional facts that justified officer's conduct. However, recognized that if a full hearing on a suppression motion has been conducted, the record may be adequate for an appellate court to find IAC. (*Id.*, at pp. 267-268.)

- c. Specific on the record IAC claims: (i) failure to move to suppress evidence seized in resident's bedroom beyond scope of protective sweep, and (ii) failure to challenge second resident's consent as fruit of illegal entry.
- d. Argue IAC in subjunctive: *if* court determines issues not properly preserved, then counsel was ineffective. Avoid directly contradictory arguments, i.e. I: counsel preserved issue; II: counsel was ineffective because he did not preserve issue.

3. Bring Habeas petition.

- a. Had to do so to challenge evidence seized from garage. Moving party has obligation to provide adequate record in support. Failure to provide search warrant affidavit meant court could not perform necessary excise and retest to determine if lawfully seized evidence in the search warrant affidavit established probable cause.
- b. Beyond failure to provide adequate record, no argument of point and no litigation of facts surrounding resident's admission after arrest to show Fourth Amendment taint. Because resident's arrest for domestic violence was lawful, had to show he was confronted with illegally seized evidence to show a ground for suppression.

Supporting declaration of client filed, stating that he saw police officers carrying evidence seized from house as he was being questioned about whether there was MJ cultivation in garage.

CASE TWO:

A. Facts.

Client detained for expired registration tag. Police are informed by police dispatcher that client has misdemeanor warrant, is on probation, and has search condition including his home. Officer decides to search client's residence. Client tells police that his search clause does not include his house. They enter anyway.

B. Issue Defined in Suppression Motion.

Because probation search condition as pronounced by judge specifically excluded the client's home from its scope, and police were so advised, police entry violated Fourth Amendment.

C. Procedural Problem Posed.

The suppression motion was held *de novo*, with no other facts were stipulated into evidence. Defense counsel never established what evidence was seized after entry, and therefore what evidence he was asking the court to suppress. General rule is that moving party must adequately specify evidence it is asking court to suppress. (*People v. Superior Court (Pierson)* (1969) 274 Cal.App.2d 228; *People v. Mendoza* (1982) 129 Cal.App.3d Supp. 10.)

D. Solution.

On the record IAC claim, because preliminary examination transcript in record detailed the firearm, cocaine and drug paraphernalia seized during the search.

CASE THREE:

A. Facts.

Four police and one probation officer go to a residence to conduct a probation search of woman resident, after receiving information that drugs were being sold from residence. Woman sought was not actually on probation on that date and was in custody.

Police watch the residence for a half hour, and see the client pull unto the driveway in a minivan. Police approach, armed with duty revolvers, baton, handcuffs and extra magazines. Several people including client are outside the front of the house. Police ask if anyone knew the woman they sought and if anyone was on probation or parole. Client says he's on parole. Police ask group if they wouldn't mind waiting with two officers outside while two other police and probation officers go into house.

Occupant of house says woman sought was in custody, but consents to search of house. One bedroom door is locked. Occupant says it's client's room. Police search room.

B. Issue Defined in Suppression Motion.

A *Wilder/Williams* motion was filed, alleging that client's detention and the seizure of evidence were made without warrant.

C. Procedural Problem.

After prosecution filed an opposition arguing there was no detention and that the bedroom search was lawful due to a parole search condition, the defense did not respond in writing, nor did it address the prosecution's justifications at the suppression motion hearing. Potential forfeiture of detention issue.

D. Solutions.

1. Argue that issue is cognizable on appeal. Rely upon *People v. Smith* (2002) 95 Cal.App.4th 283. In *Smith, Williams/Wilder* motion filed regarding warrantless seizure of evidence from a car trunk. Prosecution claims probable cause and, in the alternative, inventory search, in summary fashion: “Officers impounded the car, so a search to inventory car was lawful.” When trial judge points out prosecution burden to show standardized procedure to establish a lawful inventory search, prosecution declines to address it because defense had not contested the inventory search justification, arguing only that because the defendant’s arrest was unlawful, the impoundment was unlawful. Trial judge denies motion in reliance on local rule requiring defense to specify in a reply brief any inadequacies in the prosecution’s justification.

Smith rules that even in absence of a reply pointing out inadequacies, prosecution retains the burden of proof to establish its justification. Remands for further hearing on any standardized policy regarding inventory searches.

Point out defense expressly challenged detention in moving papers, so prosecutor had notice.

2. Argue IAC in appeal as back up. Failure to effectively litigate meritorious suppression motion is ineffective assistance, if suppression would undermine confidence in the outcome. *Kimmelman v. Morrison* (1986) 477 U.S. 365. In *Kimmelman*, attorney failed to make motion to suppress sheet seized without warrant from client’s apartment in a rape case. Trial counsel had failed to request discovery and was unaware of the seizure of the sheet until day of trial, too late to make motion. *Kimmelman* holds that failure to bring motion may constitute deficient performance and may have prejudiced client under *Strickland*. Remands for

litigation of whether the omitted motion was meritorious and, if so, whether suppression of evidence would undermine confidence in outcome.

Other helpful cases: *Northrop v. Trippett* (6th Cir. 2001) 265 F.2d 372; *State v. Silvers* (Neb. 1998) 587 N.W.2d 325; *Commonwealth v. Davis* (Pa. Super.Ct. 1999) 743 A.2d 946; *Owens v. United States* (7th Cir. 2004) 387 F.3d 607. *Owens* is particularly helpful because the defense counsel made motion, but screwed it up by arguing that house from which evidence was seized was not client's, leading to finding by court that client lacked reasonable expectation of privacy in house, in situation in which evidence of client's ownership of house was overwhelming.