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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID ARLEN ACKELBEIN,

Defendant and Appellant.

A132997

(Napa County  
Super. Ct. No. CR155871)

**I.**

**INTRODUCTION**

Appellant David Arlen Ackelbein pleaded no contest to two counts of selling methamphetamine. (Health & Saf. Code, § 11379, subd. (a).) He admitted a prior drug conviction (Health & Saf. Code, § 11370.2) and a prior prison term (Pen. Code, § 667.5, subd. (b)).<sup>1</sup> Appellant was sentenced to an agreed upon term of eight years in prison. The trial court issued a certificate of probable cause.

On appeal, appellant contends that the court erroneously denied his pretrial motion to dismiss the charges claiming that Napa County, where the case was filed and prosecuted, was an improper venue. He also claims that the prosecution's "unrestricted

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<sup>1</sup> All undesignated statutory references are to the Penal Code.

forum shopping” violated the Sixth Amendment’s vicinage clause.<sup>2</sup> We affirm the judgment.

## II.

### BACKGROUND FACTS

Because the matter was resolved by plea, our statement of facts is taken from the pleadings filed on appellant’s motion to dismiss for lack of venue. On January 20, 2011, Napa Special Investigations Bureau Agent Chet Schneider telephoned appellant from Napa County. During the phone call, appellant agreed to sell Agent Schneider an “eight ball” of methamphetamine for \$200 at the Food 4 Less parking lot in Vallejo, which is in Solano County. Agent Schneider then met with appellant at the Food 4 Less and purchased four grams of methamphetamine.

On January 25, 2011, Agent Schneider telephoned appellant a second time from a location in Napa County. Appellant thereafter sold Agent Schneider another “eight ball” of methamphetamine at the Food 4 Less in Vallejo.

On February 8, 2011, Agent Schneider telephoned appellant a third time from a location in Napa County to set up a controlled buy. Appellant once again sold Agent Schneider methamphetamine at the Food 4 Less parking lot in Vallejo. Shortly after the February 8, 2011 drug sale, law enforcement agents went to appellant’s house in Vallejo with a search warrant. Among other items, the search yielded four baggies containing methamphetamine, numerous empty baggies, cutting agent, and a digital scale.

A criminal complaint was filed by the Napa County District Attorney charging appellant with three counts of selling methamphetamine (Health & Saf. Code, § 11379, subd. (a)), one count of possession of a controlled substance for sale (Health & Saf. Code, § 11378), and one count of possession of a controlled substance (Health & Saf.

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<sup>2</sup> “[V]icinage refers to the area from which the jury pool is drawn. . . .” (*Price v. Superior Court* (2001) 25 Cal.4th 1046, 1054 (*Price*)). The federal constitution guarantees the right to trial by a jury “of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .” (U.S. Const., 6th Amend.)

Code, § 11377, subd. (a)). Two prior prison term offenses were charged (§ 667.5, subd. (b)) as well as three prior controlled substance offenses (Health & Saf. Code, § 11370.2).

Following the presentation of evidence at the preliminary hearing, defense counsel argued that Napa County was not the proper venue for this case, and that all charges should be dismissed. Defense counsel pointed out that “all of the purchases took place in the county of Solano, in the city of Vallejo. So the only connections [*sic*] to Napa County was that an agent was physically in Napa County when he made calls to arrange a later transaction.” The court overruled this objection, holding “I do find that this is the proper venue under Penal Code section 781 for the Prosecution [*sic*] of this case as to those first three counts [relating to sale of methamphetamine].” However, the court dismissed two counts alleging possession of methamphetamine (Health & Saf. Code, §§ 11378, 11377, subd. (a)), after concluding that “I don’t think this is the proper place to prosecute those two crimes . . . .”

Thereafter, appellant entered a negotiated disposition whereby he would enter a plea of no contest to two counts of selling methamphetamine (Health & Saf. Code, § 11379, subd. (a)) and would admit to one prison term prior (§ 667.5, subd. (b)) and one controlled substance prior (Health & Saf. Code, § 11370.2) in exchange for an eight-year prison sentence. At the time the plea was entered, defense counsel indicated, “we’re not waiving” appellant’s position that Napa County was not the proper venue for this case. Thereafter, appellant sought, and the trial court issued, a certificate of probable cause. Among the issues purportedly preserved for appeal is whether the trial court erred in “finding venue in Napa County, insofar as all the charged acts occurred in Solano County . . . .”

### **III.**

#### **DISCUSSION**

##### **A. Was Venue Properly Situated in Napa County?**

Appellant claims reversal of his convictions is required because Napa County constituted an improper venue for this case. Assuming this argument is properly before

us, it is meritless. (*People v. Krotter* (1984) 162 Cal.App.3d 643, 648 [due process challenge to denial of change of venue motion was waived by no contest plea].)

“Determining venue or jurisdiction in a criminal case is a question of fact. [Citation.] Where there is some evidence to support the magistrate’s decision on this question at the preliminary hearing, neither the superior court nor the Court of Appeal is permitted to inquire into its sufficiency. [Citation.] In addition, circumstantial evidence is sufficient to establish venue or jurisdiction [citation], and venue or jurisdiction need not be proved beyond a reasonable doubt but only by a preponderance of the evidence. [Citation.]” (*People v. Tabucchi* (1976) 64 Cal.App.3d 133, 141 (*Tabucchi*), disapproved on another ground in *People v. Barella* (1999) 20 Cal.4th 261, 271; accord, *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1117.)

Section 777 states the general rule for venue in criminal actions: “[E]xcept as otherwise provided by law the jurisdiction of every public offense is in any competent court within the jurisdictional territory of which it is committed.” “In other words, under section 777 venue lies in the superior court of the county in which the crime was committed, and a defendant may be tried there. [Citations.]” (*People v. Posey* (2004) 32 Cal.4th 193, 199 (*Posey*).)

Section 781 provides one of the many exceptions to the general rule for venue. (*Posey, supra*, 32 Cal.4th at p. 199.) Section 781 states: “When a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory.”

Section 781 is to be construed liberally to achieve its underlying purpose: expansion of venue beyond the single county in which a crime may be said to have been committed. (*People v. Betts* (2005) 34 Cal.4th 1039, 1057.) Section 781’s phrase “ ‘acts or effects . . . requisite to the consummation’ ” of a crime encompasses preparatory acts. (*People v. Betts*, at p. 1057.)

We conclude the evidence in this case supports the court’s decision that venue was properly situated in Napa County under section 781. Under section 781, it has been held that “the county in which the ‘preliminary arrangements’ for the crime are made is a proper county in which to prosecute the completed offenses, even though the acts performed in such county do not constitute an essential element of the crime. [Citations.]” (*Tabucchi, supra*, 64 Cal.App.3d at p. 140.) This principle is illustrated by *Posey, supra*, 32 Cal.4th 193, a case with facts similar to the present facts. In *Posey*, a Marin County Sheriff’s detective paged the defendant in San Francisco to arrange a drug purchase. (*Id.* at p. 202.) The defendant telephoned the detective, who falsely said he was in Sonoma County when he actually was in Marin County. (*Ibid.*) The defendant agreed to sell the detective cocaine base and later completed the sale in San Francisco. (*Ibid.*) Some days later, the detective again paged the defendant, who telephoned the detective in Marin and agreed to another drug transaction in San Francisco. (*Ibid.*)

Our Supreme Court concluded that Marin County was an appropriate place for trial. The court reasoned that, just as the phrase “ ‘acts or effects . . . requisite to the consummation’ of a crime . . . have been liberally construed to include *preparatory acts*” in the charging county, “[b]y the same token, [the phrase] . . . should be liberally construed to embrace *preparatory effects*, such as the placement of a telephone call into a county leading to a crime” in another county. (*Posey, supra*, 32 Cal.4th at p. 219, original italics.) The court pointed out that “[t]here was evidence that defendant placed several telephone calls—not merely one—to Marin from San Francisco as part of the negotiations leading up to his two sales of cocaine base in San Francisco. Defendant’s telephone calls to Marin constituted ‘effects . . . requisite to the consummation’ of the crimes in question” sufficient to establish venue in Marin County. (*Id.* at p. 221, italics omitted.)

Appellant claims the instant case is distinguishable from *Posey*. He points out that in *Posey*, the defendant made phone calls to Marin County, in response to being paged by the undercover officer, and compares it to the facts in this case where all of the calls originated from Napa County and were made by the undercover officer. However, the

evidence shows that appellant participated in telephone communications with the undercover officer, who was physically present in Napa County, in order to make arrangements for illegal drug sales. Thus, the plan to purchase methamphetamine began with a phone conversation taking place in Napa County, and ended with a drug sale in Vallejo. Consequently, the evidence shows appellant committed the type of preparatory effects in Napa County which the *Posey* court envisioned. (See *People v. Thomas* (2012) 53 Cal.4th 1276, 1285-1286 (*Thomas*) [“a defendant who commits a crime in one county with effects in another county that are ‘requisite to . . . the achievement of the [defendant’s] unlawful purpose’ may be tried in the latter county under section 781, even though the effects were not elements of the offense”].) Therefore, the trial court’s finding was supported by substantial evidence, and the court did not err in finding venue in Napa County was proper.

#### **B. Was the Sixth Amendment’s Vicinage Requirement Violated?**

Appellant alternatively claims “the type of forum shopping employed in this case” violates the vicinage clause set out in the Sixth Amendment. However, as appellant concedes, the California Supreme Court has held, “the [Sixth Amendment’s] vicinage clause is not applicable in a state criminal trial.” (*Price, supra*, 25 Cal.4th at p. 1069, italics omitted.) The court reasoned, “Nothing in the history of the Fourteenth Amendment . . . suggests to us that in making the right to jury trial applicable to the states, there was an intent to include the vicinage clause of the Sixth Amendment.” (*Id.* at p. 1063, fn. omitted.) And “[v]icinage is not a right that is fundamental and essential to the purpose of the constitutional right to jury trial, the test for incorporation from the Fourteenth Amendment . . . .” (*Id.* at pp. 1064-1065.)

Recently, our Supreme Court had an opportunity to reaffirm its ruling, indicating that “defendant provides no persuasive reason to depart from our more recent holdings . . . that the Sixth Amendment vicinage requirement does not apply to the states.” (*Thomas, supra*, 53 Cal.4th at p. 1288.) As appellant recognizes, all he can do “is preserve the Sixth Amendment issue by raising it at the first appellate opportunity” as we

are bound by the California Supreme Court's holding. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

**III.**  
**DISPOSITION**

The judgment is affirmed.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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RIVERA, J.