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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

ROGER ANDERSON INGRAM,

Defendant and Appellant.

C067429

(Super. Ct. Nos. 06F11307,
07F950, 10F4301)

An information filed in case No. 10F4301 charged defendant Roger Anderson Ingram with possession of cocaine base for sale (Health & Saf. Code, § 11351.5—count 1), possession of heroin for sale (Health & Saf. Code, § 11351—count 2), and possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)—count 3), and further alleged a prior drug conviction (Health & Saf. Code, § 11370.2, subd. (a)) and an on-bail enhancement (Pen. Code, § 12022.1).

A jury convicted defendant of all counts. The People dismissed the on-bail enhancement. The court sustained the prior drug conviction allegation and found that

defendant violated probation in case Nos. 06F11307 and 07F950, as well as in another case (07F8692).

Sentenced to state prison, defendant appeals. In case No. 10F4301, he contends (1) the trial court abused its discretion and committed prejudicial error in admitting evidence of his prior drug conviction, and (2) he is entitled to additional presentence custody credit. We will modify the custody credits and otherwise affirm the judgment.

FACTS¹

On June 13, 2010, officers went to an apartment to conduct a probation search of defendant. The parties stipulated that defendant had been convicted in 2007 of transportation of rock cocaine, a felony. The officers spoke with defendant's mother, who was in the carport area of the apartment. She claimed that defendant did not live at the apartment but that she would go inside and get him. She went inside and tried to close the door behind her, but Officer Eric Little stopped the door from closing. Defendant's mother announced that probation officers were present. Defendant, wearing shorts and a T-shirt, came out of a bedroom, and reached into the left front pocket of his shorts. Officer Shawn McGinnis grabbed defendant's arm. Officer McGinnis saw a black object in defendant's hand. Defendant tossed the object to the floor. After handcuffing defendant, the officer picked up the object, a black bag, and found three smaller pouches inside. One pouch contained five pieces of rock cocaine worth \$20 each, weighing a total of 1.55 grams, and two half-grams of heroin wrapped in plastic worth \$50 each, weighing a total of about .13 gram. Defendant claimed the items in the black bag belonged to a friend who had left them in the apartment. Defendant did not have any injection sites on his arms.

¹ We will not recount the facts underlying defendant's offenses in case Nos. 06F11307 or 07F950 since he raises no issues related to those cases.

A search of the apartment did not reveal any paraphernalia indicating defendant used heroin or rock cocaine. According to Officer McGinnis, a narcotics expert, a heroin user typically has syringes, bent spoons, cotton, and a flame source, and a rock cocaine user typically has a glass pipe and steel wool or a makeshift pipe made from tinfoil.

After waiving his rights, defendant was interviewed by Officer McGinnis. The jury heard a recording of the interview. Defendant stated he only used alcohol and marijuana. Defendant claimed the person who left the pouch stated he would give a “good price” if defendant knew someone who would buy the drugs, and he would give defendant a “few dollars” for selling the drugs. Defendant did not know how many pieces of rock cocaine were in the pouch. When shown the heroin, defendant “thought it was like a resin.” The following conversation ensued:

“[Officer McGinnis]: Well looked like you, one of your priors was for deal, for dealin’ some rock or dealin’ some coke of some kind.

“[Defendant]: No. No, somebody was ridin’ in a fuckin’ car. Dropped a fuckin’ bag. My, when my seat got searched, there was nothin’ on me or my person or nothin’ around.

“[Officer McGinnis]: [O]h, okay.

“[Defendant]: You know what I’m sayin’. But the second person to get out the car dropped a rock. And the officer was like, what’s that? I’m like, shit it ain’t me. You searched me up and down.

“[Officer McGinnis]: Ah, okay. So,

“[Defendant]: And I didn’t tell on the person ’cause[.]”

Defendant was booked into jail. In the watch pocket of defendant’s pants, an officer found a vial with residual methamphetamine that was potentially usable but not enough to “get someone high.” Defendant said he did not know it was there. He later stated that he had mixed the substance into a drink at a recent party. The officer also found a baggie with .35 gram of methamphetamine, constituting three or four usable

amounts, inside defendant's shoe. Defendant confirmed that the substance was methamphetamine.

Officer McGinnis opined that defendant was a street-level dealer and possessed both the rock cocaine and the heroin for sale. Officer McGinnis based his opinion on defendant's explanation that a dealer wanted defendant to sell the products, the lack of "track marks" on defendant's arms, the packaging and typical sizes sold to end users, and defendant's prior conviction for a rock cocaine offense where he had dropped rock cocaine in a gutter and claimed it belonged to someone else.

DISCUSSION

I

Defendant contends the trial court abused its discretion and committed prejudicial error in admitting evidence of his 2007 conviction for transportation of rock cocaine. He argues the prior was used as evidence of his propensity to sell controlled substances when knowledge was not in dispute. He claims only his intent was in dispute. He argues admission of the evidence violated Evidence Code section 352 and his federal due process rights, requiring analysis of prejudice under *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711] (*Chapman*). In the alternative, defendant contends the evidence was prejudicial under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) and that the limiting instruction was inadequate to mitigate the prejudice. We will conclude that any error in admission of the evidence was harmless in light of the overwhelming evidence of defendant's guilt.

Background

Prior to trial, the People sought to introduce defendant's 2007 felony drug convictions for sale or transportation of rock cocaine (Health & Saf. Code, § 11352, subd. (a)) and being under the influence of cocaine while in possession of a firearm (Health & Saf. Code, § 11550, subd. (e)) to establish knowledge, course of conduct or common plan, and absence of mistake or accident. Defendant objected, claiming that the

evidence was inadmissible propensity evidence which was more prejudicial than probative. Defendant also claimed correctly that his conviction was for transportation, not sale, of rock cocaine. The court excluded defendant's under-the-influence conviction but admitted his transportation conviction to show knowledge and intent, stating that a limiting instruction would be given. The court later gave a limiting instruction to the jury with the agreement of both counsel that the evidence went to knowledge, (absence of) mistake or accident, and common plan. (CALCRIM No. 375.)²

Analysis

The prosecutor sought to admit the prior crimes evidence to show knowledge, common plan, and absence of mistake. The trial court admitted the prior crimes evidence over defendant's objection, finding it admissible as evidence of defendant's knowledge and intent, but instructed the jury that the evidence was admitted for the purpose of showing knowledge, (absence of) mistake or accident, and common plan.

Defendant asserts knowledge of the nature or character of controlled substances and knowledge of the presence of the controlled substances, required elements of the current charges, were not at issue in light of his trial counsel's opening statement and closing argument.

Even assuming error in the admission of the prior crimes evidence, the error was harmless. The evidence of simple possession of methamphetamine and intent to sell rock cocaine and heroin was overwhelming. Defendant was caught with five pieces of rock cocaine and two pieces of heroin. He had no drug paraphernalia in his possession and displayed no other indication of personal use. Indeed, he disclaimed use of cocaine or heroin and admitted he possessed the drugs, claiming they were given to him by some

² On appeal, defendant does not raise an issue with respect to the instruction given other than to argue that it was inadequate to cure the prejudice due to the admission of the prior crime evidence.

unidentified person to sell in exchange for a few dollars. At the jail, defendant had methamphetamine in a vial in his pocket, which he admitted he had used to mix in a drink, and had a baggie of methamphetamine in his shoe. Exclusion of evidence of his prior would not have led to a different result, and its admission was harmless, even under *Chapman, supra*, 386 U.S. at p. 24.

II

Defendant contends, and the People concede, that the trial court miscalculated presentence custody credit. The court awarded 360 actual days and 360 conduct days. As the parties contend, the chart in the probation report, which we summarize below, reflects that defendant served 370 actual days, not 360 actual days as erroneously calculated by the probation officer and awarded by the trial court. The dates of arrest and release and the number of days of custody are as follows:

12/09/06 to 12/09/06	1
06/09/07 to 08/08/07	61
10/26/07 to 10/27/07	2
04/16/08 to 12/04/08	233
06/05/10 to 06/05/10	1
06/13/10 to 06/13/10	1
07/12/10 to 07/16/10	5
12/01/10 to 02/04/11	<u>66</u>
Total	370

Since briefing, the California Supreme Court decided *People v. Brown* (2012) 54 Cal.4th 314, holding that former Penal Code section 4019, which temporarily increased conduct credits, was not retroactive to benefit a prisoner who served time in local custody before January 25, 2010. Thus, defendant's 297 actual days served prior to January 25, 2010, are subject to the former rule, which provided that a term of six days would be deemed to have been served for every four days spent in actual custody. (Pen. Code, § 4019, former subs. (b), (c), (f); Stats. 1982, ch. 1234, § 7, pp. 4553-4554.) Applied to the 297 actual days served prior to January 25, 2010, defendant is entitled to

148 conduct days. Defendant's seven actual days served after January 25, 2010, and prior to September 28, 2010, are subject to the rule which provided that a term of four days will be deemed to have been served for every two days spent in actual custody. (Pen. Code, § 4019, former subds. (b), (c), (f); Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.) Applied here to the seven actual days served, defendant is entitled to six conduct days (no rounding up). Defendant's 66 actual days after September 28, 2010, are subject to the one-for-one rule, which eliminated the loss of one day when a person serves an odd number of days in custody. (Pen. Code, § 2933, former subd. (e)(1), (2), (3); Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010, and repealed by Stats. 2011, 1st Ex. Sess., ch. 12, § 16, eff. Sept. 21, 2011.) Applied here to the 66 actual days served, defendant is entitled to 66 conduct days. Conduct credits total 220 days. We will order the judgment modified to reflect 370 actual days and 220 conduct days, for a total of 590 days of presentence custody credit.

DISPOSITION

The judgment is modified to provide 370 actual days' credit and 220 conduct days' credit, for a total of 590 days of presentence custody credit. The trial court is directed to prepare an amended abstract of judgment accordingly and to forward a certified copy thereof to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

RAYE, P. J.

We concur:

HULL, J.

ROBIE, J.