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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

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THE PEOPLE,

Plaintiff and Respondent,

v.

MARTY DUPREE HILLIARD,

Defendant and Appellant.

C067574

(Super. Ct. No. NCR79807)

A jury found defendant Marty Dupree Hilliard guilty of transportation of a controlled substance (Health & Saf. Code, § 11352, subd. (a))<sup>1</sup> and resisting arrest (Pen. Code § 148, subd. (a)(1)). In bifurcated proceedings, the trial court found defendant had two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b), and a prior controlled substance conviction within the meaning of section 11370.2. Defendant was sentenced to an aggregate term of 10 years, which

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<sup>1</sup> Undesignated statutory references are to the Health and Safety Code.

included a consecutive three-year term for the prior controlled substance conviction.

With regard to the prior controlled substance conviction, which occurred in Oregon, defendant argues the trial court erroneously concluded that "delivery" under Oregon law equates with "transportation" under California law. Because California law does not expressly include "delivery," defendant argues that the consecutive three-year term should be stricken. We conclude that the record of the Oregon prior conviction presented by the prosecution at the bifurcated proceedings contains insufficient facts to support the trial court's finding that the prior controlled substance conviction qualified as an enhancement. Accordingly, we reverse the finding and remand for retrial on the enhancement allegation and resentencing.<sup>2</sup>

**DISCUSSION**

Section 11370.2, subdivision (a), provides: "Any person convicted of a violation of, or of a conspiracy to violate, Section 11351, 11351.5, or 11352 shall receive, in addition to any other punishment authorized by law, including Section 667.5 of the Penal Code, a full, separate, and consecutive three-year term for each prior felony conviction of, or for each prior felony conviction of conspiracy to violate, Section 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380,

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<sup>2</sup> We dispense with a recitation of the facts underlying defendant's current offenses because those facts are not relevant to the issue on appeal.

11380.5, or 11383, whether or not the prior conviction resulted in a term of imprisonment." Out-of-state prior convictions may qualify as enhancements. (§ 11370.2, subd. (f).)

Here, the information alleged, pursuant to section 11370.2, subdivision (a), that defendant was convicted on March 3, 2005, in Jackson County, Oregon, Superior Court case No. 040729AFE of violating Oregon Revised Statutes section 475.992.

"A common means of proving the fact and nature of a prior conviction is to introduce certified documents from the record of the prior court proceeding and commitment to prison, including the abstract of judgment describing the prior offense. [Citations.] [¶] '[The] trier of fact is entitled to draw reasonable inferences from certified records offered to prove a defendant suffered a prior conviction . . . .' [Citations.] . . . [¶] Thus, if the prosecutor presents, by such records, prima facie evidence of a prior conviction that satisfies the elements of the recidivist enhancement at issue, and if there is no contrary evidence, the fact finder, utilizing the official duty presumption, may determine that a qualifying conviction occurred. [Citations.] [¶] However, if the prior conviction was for an offense that can be committed in multiple ways, and the record of conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense. [Citations.] In such a case, if the statute under which the prior conviction occurred could be violated in a way that does not qualify for the alleged enhancement, the evidence is thus insufficient, and the People

have failed in their burden. [Citations.] [¶] On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt. [Citations.]” (*People v. Delgado* (2008) 43 Cal.4th 1059, 1066-1067.)

To prove the prior Oregon conviction, the prosecution introduced into evidence the following documents: the indictment, the petition to enter a plea of guilty, and the judgment. The indictment alleged in count I that defendant violated Oregon Revised Statutes section “475.999, class A felony, crime category 8.” Defendant was “accused by the Grand Jury of the County of Jackson by this indictment of the crime of [¶] delivery of a controlled substance committed as follows: [¶] The said defendant, on or about the 11th day of February, 2004, in the said County of Jackson and State of Oregon, then and there being, did unlawfully and knowingly deliver cocaine, a schedule II controlled substance, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.” The allegation that defendant committed the offense within 1,000 feet of a school was deleted by handwritten strike-through.<sup>3</sup> Defendant was also accused in

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<sup>3</sup> Oregon Revised Statute 475.904 (formerly Oregon Revised Statute 475.999) provides that “[u]nlawful manufacture or

the indictment of manufacture of cocaine within 1,000 feet of a school (count II) and being a felon in possession of a firearm (count III).

The petition to enter a plea of guilty signed by defendant on March 3, 2005, reflects that defendant pled guilty to "Count I (Delivery of a Controlled Substance)" and "Count III (Felon in Possession of a Firearm)," and that the factual basis for the plea was "as alleged in the Indictment."

The judgment of conviction reflects that defendant was convicted based on his guilty plea of delivery of a controlled substance (under Oregon Revised Statute 475.992A) and being a felon in possession of a firearm. It further reflects that count II was dismissed. The court granted probation for a term of two years "subject to 120 sanction units with 60 jail units" on count I and 15 months incarceration on count III.

The trial court determined that defendant's prior Oregon conviction was the equivalent of violating California's transportation offense (§ 11352, subd. (a)). At the time defendant was sentenced, section 11352, subdivision (a), provided that "every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempt to import into this state or transport . . . any controlled substance [including cocaine] . . . shall

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delivery of a controlled substance within 1,000 feet of a school is a Class A felony."

be punished by imprisonment in the state prison for three, four, or five years."

Oregon Revised Statutes section 475.992, which was renumbered to 475.840 after the date of defendant's offense, makes it unlawful for "any person to manufacture or deliver a controlled substance" listed in title 21, section 812, schedule II of the United States Code, which includes cocaine. (Or. Rev. Stat. § 475.992, subd. (1)(b), now § 475.840, subd. (1)(b); see Or. Rev. Stat. § 475.005, subd. (6); 21 U.S.C. § 812, schedule II(c); *State v. Alvarez-Garcia* (Or.Ct.App. 2007) 159 P.3d 357.) "'Deliver' or 'delivery' means the actual, constructive or attempted transfer, other than by administering or dispensing, from one person to another of a controlled substance, whether or not there is an agency relationship." (Or. Rev. Stat. § 475.005, subd. (8).) "'Person' includes a government subdivision or agency, business trust, estate, trust or any other legal entity." (Or. Rev. Stat. § 475.005, subd. (17).) Defendant argues that because section 11352, subdivision (a), does not include the word "delivery," his Oregon offense does not qualify as a prior controlled substance conviction.

Defendant's argument that delivery of cocaine in violation of Oregon Revised Statutes former section 475.992 does not necessarily, under the least adjudicated elements test, equate with transportation of cocaine under section 11352, subdivision (a), has merit. Under Oregon law, delivery includes an attempt to transfer a controlled substance. An attempt to transfer is

sufficient to constitute a violation of Oregon Revised Statutes section 475.992 (now § 475.840). (*State v. Alvarez-Garcia, supra*, 159 P.3d at p. 358.)

In California, "attempts of most crimes are not defined within a statute, but are governed by the general attempt statute . . . . [Citation.]" (*People v. Medina* (2007) 41 Cal.4th 685, 697.) "Although certain crimes and a conspiracy to commit certain crimes are listed [in section 11370.2, subdivision (a)], an *attempt* to commit a certain crime is not listed. An attempt to commit a crime is neither a completed crime nor a conspiracy to commit a crime. An attempt is an offense 'separate' and 'distinct' from the completed crime. [Citations.]" (*People v. Reed* (2005) 129 Cal.App.4th 1281, 1283 (*Reed*)). "As the statute now reads, neither a current conviction of an attempt to commit a specified crime nor a prior conviction of an attempt to commit a specified crime supports an enhancement under section 11370.2, subdivision (a). '[I]f the Legislature had intended to include attempts in the enhancement provisions, it would have specifically stated the enhancement applie[d] to the "commission or attempted commission" of specific crimes . . . .' [Citation.]" (*Reed*, at p. 1285.)

Under the principle set forth in *Reed*, attempt is not a separate crime from the completed crime unless the statute includes attempt to commit the crime as an offense. Here, section 11352, subdivision (a), expressly includes an "attempt" to "import" or "transport." Such attempts are treated as separate crimes from the completed crime of importing or

transporting and are punished the same as the completed crime. However, the principle in *Reed, supra*, 129 Cal.App.4th 1281 applies here because section 11352, subdivision (a), does not include other attempted transfers, that is, an attempt to sell, furnish, or give away, or attempted offers to do so, or an attempt to offer to import or transport.

No evidence was presented with respect to the facts underlying defendant's Oregon conviction. When defendant entered his plea, he agreed that the factual basis was "as alleged in the indictment." The indictment alleged that defendant "did unlawfully and knowingly deliver cocaine, a schedule II controlled substance." There was no evidence presented that defendant's prior Oregon conviction involved a completed delivery rather than an attempted delivery or what type of transfer was involved.

Additionally, under Oregon law, a trace amount of a controlled substance is sufficient for conviction. (*State v. Henry* (Or.App. 1992) 840 P.2d 1335.) In California, a usable quantity is required. "Transportation of a controlled substance is established by carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character." (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1746.)

In sum, the People did not establish that defendant's prior Oregon conviction was for an offense that qualified as an enhancement under section 11370.2, subdivision (a). If defendant's Oregon conviction involved an attempted delivery or transfer, other than an attempt to "import" or "transport," the

offense would not qualify as an enhancement under section 11370.2, subdivision (a). Likewise, defendant's Oregon conviction would also not qualify as an enhancement under section 11370.2, subdivision (a), if defendant delivered only a trace amount of cocaine. Accordingly, we reverse the trial court's finding and remand for retrial of the prior conviction allegation. Retrial of a prior conviction allegation is not barred. (*People v. Barragan* (2004) 32 Cal.4th 236, 241.)

**DISPOSITION**

The trial court's finding on the prior controlled substance conviction allegation is reversed. The matter is remanded to the trial court for further proceedings. In all other respects, the judgment is affirmed.

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HOCH, J.

We concur:

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RAYE, P. J.

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MAURO, J.