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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY ALLEN TILLOTSON,

Defendant and Appellant.

C080749

(Super. Ct. No. 62-074170)

Does the resentencing provision of Proposition 47, Penal Code section 1170.18,¹ apply to a change in the law limiting the crime of transportation of a controlled substance (Health & Saf. Code, § 11379) to transportation for the purpose of sale? Defendant Jeffrey Allen Tillotson, in his appeal from the trial court's denial of his section 1170.18 petition, says that it does. We hold that it does not.

¹ Undesignated statutory references are to the Penal Code.

BACKGROUND

We dispense with the facts of defendant's crimes, as they are unnecessary to resolve this appeal.

In April 2008, defendant pleaded no contest to transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)) and was placed on three years' formal probation. In July 2009, probation was terminated and defendant was sentenced to an eight-month prison term for the offense, as part of a three-year four-month term involving convictions for possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and felony failure to appear (§ 1320, subd. (b)) in unrelated cases.

In June 2015, defendant filed a section 1170.18 petition seeking redesignation of the transportation offense to misdemeanor possession of methamphetamine. The trial court denied the petition, finding the crime was ineligible for section 1170.18 relief.

DISCUSSION

Defendant collaterally attacked his conviction in the trial court through a petition brought pursuant section 1170.18, which was enacted as part of Proposition 47. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1092.) “Proposition 47 makes certain drug- and theft-related offenses misdemeanors unless the offenses were committed by certain ineligible defendants.” (*Id.* at p. 1091.) Subdivision (a) of section 1170.18 states: “A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section (‘this act’) had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Sections 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.” A person who has completed his or her sentence “may file an application before the trial court that entered

the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.” (§ 1170.18, subd. (f).)

While the statutes defining the crime of transportation of a controlled substance were amended in 2013 to include a requirement that the transportation be for the purpose of sale (see Health & Saf. Code, §§ 11379, subd. (c), 11352, subd. (c)), these changes were enacted by the Legislature (Stats. 2013, ch. 504, §§ 1, 2) rather than through Proposition 47. The transportation offenses are not included as crimes subject to the redesignation and resentencing procedure set forth in Health and Safety Code section 1170.18.

Although Proposition 47 did not purport to change and does not reference Health and Safety Code section 11379, defendant nonetheless maintains that Health and Safety Code section 1170.18 is a vehicle for reducing his transportation conviction to a conviction for misdemeanor possession where the transportation was for personal use. He is wrong.

The legislative amendment to Health and Safety Code section 11379 did not include an explicit savings clause prohibiting retroactive application of the amended statutory language, nor is there any other indication of “clear legislative intent” that the amended statutory language is only to be applied prospectively. (*People v. Rossi* (1976) 18 Cal.3d 295, 299.) Because the amendment benefits a defendant by eliminating criminal liability for drug transportation in cases involving possession for personal use, it must be applied retroactively to any case in which the judgment was not final when the amendment occurred. (See *In re Estrada* (1965) 63 Cal.2d 740, 745.) Since defendant’s conviction was long final at the time of the amendment, the changes to Health and Safety Code section 11379 do not apply to his case.

Defendant notes that *Estrada* does not bar retroactive application of a change to the law to final judgments of conviction when the Legislature intends for the change to apply retroactively. (See *People v. Flores* (1979) 92 Cal.App.3d 461, 472-473.) He

additionally points out that retroactive application is not an issue when the legislative amendment merely clarifies existing law. (See *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922 (*Carter*) [“[a] statute that merely clarifies, rather than changes, existing law is properly applied to transactions predating its enactment”].)

Asserting that the legislative history of the bill changing the transportation statute shows it was intended to merely clarify existing law, defendant concludes the change to the transportation offense should apply to his conviction.

In *People v. Rogers* (1971) 5 Cal.3d 129 (*Rogers*), our Supreme Court held that the offense of transportation of marijuana (Health & Saf. Code, former § 11531) did not require “a specific intent to transport contraband for the purpose of sale or distribution, rather than personal use.” (*Rogers, supra*, at pp. 132, 134.) As the court explained, “Neither the word ‘transport,’ the defining terms ‘carry,’ ‘convey,’ or ‘conceal,’ nor [Health and Safety Code former] section 11531 read in its entirety, suggests that the offense is limited to a particular purpose or purposes. [¶] . . . [N]othing in that section exempts transportation . . . of marijuana for personal use. Had the Legislature sought to restrict the offense of transportation to situations involving sale or distribution, it could easily have so provided.” (*Id.* at pp. 134-135.) Until the recent changes to the transportation statutes, it remained the law in California that the illegal transportation of controlled substances did not require the transportation to be for purposes of sale. (See *People v. Eastman* (1993) 13 Cal.App.4th 668, 674-677.)

The “ ‘interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts’ ” and “[w]hen [the California Supreme Court] ‘finally and definitively’ interprets a statute, the Legislature does not have the power to then state that a later amendment merely declared existing law. [Citation.]” (*Carter, supra*, 38 Cal.4th at p. 922.) Any legislative intent is irrelevant to the question of whether an amendment changes or clarifies the law. In *Rogers*, the Supreme Court held that transportation of a controlled substance did not include a requirement that the

transportation be intended for sale. The Legislature did not clarify that decision when it added the for sale requirement. Rather, it legislatively overruled *Rogers*.

Finally, defendant argues that he is entitled to retroactive application of the change to the transportation crime as a matter of equal protection. He is not.

Defendant claims “the legislature has adopted a classification that affects people who have convictions for simple possession of a controlled substance, for personal use as opposed for sale,” and that he is similarly situated to those persons. Not so.

“However, the Legislature was entitled to assume that the potential for harm to others is generally greater when narcotics are being transported from place to place, rather than merely held at one location. The Legislature may have concluded that the potential for increased traffic in narcotics justified more severe penalties for transportation than for mere possession or possession for sale, without regard to the particular purpose for which the transportation was provided, a matter often difficult or impossible to prove. Moreover, a more severe penalty for those who transport drugs may have been deemed appropriate to inhibit the frequency of their own personal use and to restrict their access to sources of supply, or to deter the use of drugs in vehicles in order to reduce traffic hazards and accidents, as well as to deter occurrences of sales or distributions to others. The relative privacy and increased mobility afforded by the automobile offers expanded opportunities for the personal use and acquisition of drugs; greater penalties may legitimately be imposed to curtail those opportunities.” (*Rogers, supra*, 5 Cal.3d at pp. 136-137, fns. omitted.)

Nor does it violate equal protection to limit the retroactive application of a change in the law that reduces criminal liability. “ ‘[T]he 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.’ ” (*People v. Floyd* (2003) 31 Cal.4th 179, 191, quoting *Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S. 502, 505 [55 L.Ed. 561, 563].)

Section 1170.18 is not a vehicle for the retroactive application of changes in the law outside those brought by Proposition 47. This is particularly true where, as here, the change in the law does not apply to defendant's case.

DISPOSITION

The judgment (order) is affirmed.

NICHOLSON, Acting P. J.

We concur:

DUARTE, J.

RENNER, J.