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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT MORRIS PARKER,

Defendant and Appellant.

E052633

(Super.Ct.Nos. RIF127201 &  
RIF150169 & RIF150800)

OPINION

APPEAL from the Superior Court of Riverside County. Rafael A. Arreola, Judge.  
(Retired judge of the San Diego Super Ct. assigned by the Chief Justice pursuant to art.  
VI, § 6 of the Cal. Const.) Affirmed with directions.

Kenneth H. Nordin, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Heidi T.  
Salerno, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Albert Parker, of possessing cocaine base for sale (Health & Saf. Code, § 11351.5),<sup>1</sup> transporting cocaine base (§ 11379, subd. (a)), and possessing cocaine base (§ 11350, subd. (a)). In bifurcated proceedings, defendant admitted having suffered a prior drug conviction as to the possession for sale and the transportation convictions (§ 11370.2, subd. (a)).<sup>2</sup> In the same proceeding, the trial court also found that defendant had committed either the transportation offense or both the transportation and the simple possession while on bail in another case.<sup>3</sup> Defendant was sentenced to prison for nine years.<sup>4</sup> He appeals, contending the trial court erred in

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<sup>1</sup> All further statutory references are to the Health & Safety Code unless otherwise indicated.

<sup>2</sup> That defendant admitted the prior in connection with these two counts, but not in connection with the simple possession conviction, is based on statements made by the trial court and counsel at the time of the admission.

<sup>3</sup> The trial court made contradictory statements to the courtroom clerk at the trial of the enhancement allegations, first telling the clerk twice that there were no enhancements attached to the simple possession conviction, then that the true finding as to the out-on-bail enhancement applied also to this conviction.

<sup>4</sup> The trial court also caused confusion (see fn. 3, *ante*), especially for the courtroom clerk, at sentencing, by not being clear about what terms applied to what enhancements. The court said that the three year term for a prior drug conviction and the two year term for defendant being out on bail when he committing one of the instant offenses were “mandatory” but it did not specify to which counts the enhancements it imposed were attached. As a consequence, in the abstract of judgment and minutes of the sentencing hearing, the clerk reported that both the out-on-bail enhancement and the prior drug conviction enhancement were imposed on the simple possession conviction. While the record is unclear whether the trial court made a true finding on the out-on-bail enhancement as to this conviction (see fn. 3, *ante*), it is clear that it made the true finding on the prior drug conviction enhancement only in connection with the possession for sale and transportation convictions, and not in connection with the simple possession

*[footnote continued on next page]*

overruling his *Batson/Wheeler*<sup>5</sup> objection to the peremptory challenge of a particular prospective juror and in failing to order the prosecutor to file a petition for his commitment to the California Rehabilitation Center (CRC). We reject his contentions and affirm, while directing the trial court to clarify certain aspects of its sentence and to have those clarifications reflected in the abstract of judgment and minutes of the sentencing hearing.

The facts of this case will be discussed in connection with defendant's second issue.

## **ISSUES AND DISCUSSION**

### *1. Overruling of Defendant's Batson/Wheeler Objection*

Defense counsel made a *Batson/Wheeler* objection when the prosecutor exercised her fifth peremptory challenge, which was to a female African-American prospective juror, S. Counsel asserted that S. worked at the University of California, Riverside, was single and had no jury experience, and there was no reason he could see on the record for her excusal except her race. The trial court overruled the objection, saying, "I'm not even

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*[footnote continued from previous page]*

conviction. (See fn. 3, *ante*, p. 2.). Therefore, the abstract of judgment must be amended to reflect the imposition of a three year term for the prior drug conviction enhancement on either the possession for sale conviction or the transportation conviction. Since we cannot determine from the record which the trial court chose, the trial court is directed to clearly state its choice on the record and direct the courtroom clerk to amend the abstract of judgment and the minutes of the sentencing hearing to reflect its choice. The same is true of the out-on-bail enhancement.

<sup>5</sup> *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

going to go beyond that. There's several other African-Americans still on the jury. I don't know if any other African-Americans will be seated. There's no systematic excuse of anybody else, and I don't think there's any problems with *Batson Wheeler* . . . ." The trial court agreed with defense counsel that the latter could make the objection based on the excusal of one prospective juror. The trial court asked the prosecutor if she wanted to respond. She said she exercised her peremptory because S. appeared to be young, she worked at U.C. Riverside, which "tends to be a liberal place[.]" and the prosecutor preferred people who were older, had more ties to the community and were married. The prosecutor added that she used her peremptory challenge on S. "merely because the fact [that] she worked on a college campus . . . where drugs tend to be more prevalent[.]" The court said it was overruling the objection without prejudice, which it would reconsider if there were "patterns established."

Before the People exercised their sixth peremptory challenge, they accepted the jury as then constituted. After the defense excused another prospective juror, the prosecutor excused prospective juror, L. When defense counsel asked to approach the bench, the trial court said, "I'm not even going to waste time on that one. It will be put on the record." Outside the presence of the prospective jury, defense counsel objected to the excusal of L. on the basis of *Batson/Wheeler*. Counsel said that L. was the second Hispanic female the prosecutor had excused—that the first had five children and no jury experience and had answered questions privately about her qualifications, during which

she asserted she could be fair.<sup>6</sup> He pointed out that L. was a single mother who lived in Moreno Valley and had no jury experience. Also, during private voir dire, she had said that she had been the victim of a crime. Counsel asserted that there was a “pattern of kicking Hispanic females . . . , on top of kicking African-Americans.”

The trial court overruled the objection, noting that it had done the same previously, which, as stated above, had concerned S., an African-American. The court continued, “[L., the court and counsel] had a private discussion, and based on the private discussion we had and by the answers given by [L.],<sup>7</sup> there’s plenty of reasons why anyone who doesn’t feel comfortable would ever want to excuse her and use a peremptory.” During that private discussion, L. had told the court and counsel that she was embarrassed to answer one of the voir dire questions in front of the other prospective jurors. She said she had been the victim of an assault and battery and vandalism five months before committed by the girlfriend of her children’s father. She explained that the girlfriend had kicked down her door, attacked her in her home, in front of her children, and dragged her outside. L. had sustained minor injuries as a result. The father of L.’s children was involved in the attack and an attempt was being made to prosecute him. L. had been subpoenaed to go to court in the girlfriend’s case, but the girlfriend had

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<sup>6</sup> What defense counsel failed to mention was that this prospective juror, during private voir dire, reported that she had been charged with felony child abuse and had pled guilty to misdemeanor child abuse. When the prosecutor exercised a peremptory to excuse this prospective juror, the defense did not object.

<sup>7</sup> The People’s assertion that the trial court overruled the objection concerning L. due to answers provided by the first Hispanic prospective juror to be excused by the prosecutor during her private voir dire (see fn. 6, *ante*) is incorrect.

pleaded guilty and a restraining order had been issued. The trial court asked L. if this would affect her in deciding the instant case. First, L. replied, “No. I just thought I would.” The trial court said it was important that they knew and asked her again. This time she said it would not.

Based solely on a Ninth Circuit opinion, *Montiel v. City of Los Angeles et al.* (1993) 2 F.3d 335 (*Montiel*), defendant asserts that the trial court here summarily denied his *Batson/Wheeler* objection to the excusal of L. “without inquiry or discussion,” therefore, the matter must be remanded for the trial court to engage in a proper consideration of the objection or we should reverse his convictions. We disagree.

Defendant correctly admits that we are not bound by federal appellate court decisions. Even if *Montiel* is entitled to great weight, it is distinguishable from the instant case. In *Montiel*, the Ninth Circuit criticized the district court’s denial of a challenge to the excusal of an African-American prospective juror, which the latter court did summarily, without hearing argument or asking for an explanation from counsel who had exercised the peremptory. (*Montiel, supra*, 2 F.3d at pp. 339-340.) Without even addressing whether the district court’s summary denial constituted a finding that a prima facie case of racial discrimination had not been made with regard to this prospective juror, the Ninth Circuit rushed headlong into its conclusion that the reasons offered for the previous excusals of three Hispanics “appear[ed] suspect and pretextual.” (*Id.* at p. 340.) Based on the excusal of these Hispanic prospective jurors and that of two of the three African-Americans in the jury pool, leaving only one minority member in the pool, the Ninth Circuit concluded that it “appeared evident” that the excusals of all were race-

based. (*Ibid.*) Bolstering this conclusion was the Ninth Circuit’s view that the one remaining minority member in the jury pool would be “looked upon favorably by” the party who exercised the peremptories against all the others. (*Ibid.*) The facts in *Montiel* are not replicated here, therefore, it is not persuasive authority that the trial court ruling here was “clearly erroneous.” (*Ibid.*)

Much in the manner of the Ninth Circuit in *Montiel*, defendant wants this court to imply that the trial court here was in a hurry to get voir dire completed, an implication which we will not accept based on the record before us.

Next, defendant asserts that the trial court erred by relying on non-racial reasons it found supported by the record for excusing L., rather than soliciting from the prosecutor her actual reasons. However, defendant ignores the fact that the record does not show that the trial court made a finding that defendant had made a prima facie case in regard to L. Not only did the trial court not make such a finding expressly, but it did not solicit from the prosecutor her reasons for excusing L., which is often the basis for the implication that a prima facie case had been made to the trial court’s satisfaction. (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 135.) Defendant cites no authority holding that a prima facie finding is to be implied under the circumstances that existed here.<sup>8</sup> In fact, Supreme Court authority is to the contrary.

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<sup>8</sup> We disagree with the People’s assertion that defendant argued in his opening brief at pages 40-42 that because three Hispanics had been excused, a prima facie case had been made. Not only is there no such assertion on those pages, as defendant makes clear in his reply brief, he is only appealing from the overruling of his objection as to L.

In *People v. Elliott* (2012) 53 Cal. 4th 535, 570 (*Elliott*), the defendant brought a *Batson/Wheeler* challenge after the prosecutor had excused a Hispanic from a death penalty jury. The trial court responded that this prospective juror wrote on her questionnaire that she did not believe in the death penalty. (*Elliott*, at p. 570.) Defense counsel argued that this prospective juror explained her answer during voir dire and asserted that she could and would impose death in the appropriate case. (*Id.* at p. 571.) The trial court responded that the answer on the questionnaire and this prospective juror’s changing of positions during voir dire justified her excusal and it was coincidental that she was Hispanic. (*Ibid.*) The Supreme Court held, “Because the trial court overruled the defense [*Batson/Wheeler*] objection without asking the prosecutor to state her reasons for the peremptory [excusal] of [this p]rospective [j]uror, we construe the trial court’s ruling as a finding that the defense failed to make a prima facie case . . . . [Citations.] As in other recent cases where we cannot be sure the trial court used the correct standard,<sup>9</sup> ‘we review the record independently to resolve the legal question whether the record supports an inference that the prosecutor excused a juror on the basis of race.’ [Citation.] [¶] To determine here whether [the] defendant has established a prima facie case, we may consider whether the record discloses neutral, nondiscriminatory reasons for the challenges. [Citations.] This approach seems particularly appropriate here because *the*

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<sup>9</sup> Before *Johnson v. California* (2005) 545 U.S. 162, 168, was decided, California courts required that the standard for peremptory excusals that the totality of relevant facts give rise to an inference of discriminatory purpose be demonstrated by a showing of a strong likelihood that the excusal was racially motivated. *Johnson* did away with the “strong likelihood” standard. (*Ibid.*)

*prosecutor had previously indicated, when explaining her peremptory challenge of [another p]rospective [j]uror . . . that she intended to peremptorily challenge prospective jurors whose questionnaire responses indicated they were ‘weak on death.’ . . . [This prospective juror’s] questionnaire answer put [her] squarely in the category of being ‘weak on death’ and provides a valid and persuasive explanation of the prosecutor’s peremptory challenge. We therefore agree . . . that the defense failed to establish a prima facie case that discrimination has occurred.” (Id. at p. 571, italics added.)*

Similarly, here, the record supports the excusal of L. for race-neutral reasons. As the prosecutor stated when she excused S., “She’s single. I tend to like people who are older[, who] have more ties to the community . . . [,] to be married, things like that” applied equally to L. Moreover, L.’s recent involvement in the criminal justice system, depending on her satisfaction with the outcome of the cases involving the father of her children and his girlfriend, could have an influence on how she decided this case. We note that when first asked about that, she said she thought it would. It was only after the trial court told her that her answer to the question was important and something they needed to know that she changed her answer, much like the prospective juror in *Elliott*. Similarly to *Elliott*, the record here discloses non-racial reasons for excusing L., therefore the trial court did not err. Moreover, the fact that the People accepted the jury as constituted when there were several minority members on it suggests that the prosecutor was not motivated in her excusal of L. by race. (See *People v. Thomas* (2012) 53 Cal.4th 771, 796.)

Defendant does not appear to contest the People's assertion that when a prima facie case has not been made, no further inquiry is required by the trial court. (*People v. Alvarez* (1996) 14 Cal.4th 155, 193.) Defendant does nothing, either in his opening or reply briefs, to assert that the trial court erred in failing to find that a prima facie case had been made. Rather, he asserts only that *Montiel* dictates that the trial court erred, which we have already concluded is not the case. To the extent defendant wishes us to consider the excusal of another Hispanic prospective juror after the excusal of L. as somehow being relevant to the propriety of the trial court's ruling concerning L., his point is unmeritorious because that was a matter that was not before the court at the time it ruled and defendant does not here challenge the excusal of this prospective juror.

2. *Failing to Order the District Attorney to File a Petition for Commitment of Defendant to CRC*

In their sentencing memo, the People reported that defendant was on probation for a conviction of selling cocaine when, on April 15, 2009, 0.2 grams of methamphetamine was found under the seat of the car he was driving and \$211 in cash in small denominations, unused clear plastic baggies, a scale, 4.45 grams of cocaine, 6.42 grams of cocaine and 0.5 grams of marijuana in plastic in defendant's bedroom. On defendant's person was a cell phone containing text messages indicating drug sales. On June 3, 2009, defendant, who was still on probation, was driving with a baggie containing 3 rocks (1.4 grams) of cocaine base, \$880 and a cell phone. The 64-year-old defendant was convicted of his first offense, "2nd [d]egree [b]urglary and [s]tealing" as an adult when he was 19. He was convicted of fraudulent use of a credit card three years later, first degree robbery

two years after that, possession of controlled substances eight years after that, larceny two years after that and sale of controlled substances three years after that, which resulted in a 10 year prison sentence. All of the foregoing convictions occurred in Missouri. In the state of Arizona, defendant committed a series of minor crimes (shoplifting and marijuana possession) for which he received jail time. These occurred in 1992, 1993, 1995, 1996, and 1997. Then it was on to Southern California, where defendant was convicted in 1998 of theft and assault, and the following year of second degree burglary. He violated parole twice in 2001, was convicted of making a criminal threat and violated parole the following year, and suffered another violation of parole and was convicted of theft with a theft prior in 2003, for which he was sentenced to prison for 16 months. In 2008, he was convicted of selling cocaine<sup>10</sup> and was placed on probation, which he was on when he committed the instant offenses. The People asserted that defendant was not eligible for commitment to CRC because his record and the probation report indicated such a pattern of criminality that he was not a fit subject for such commitment. The probation report included a comment from the prosecutor that defendant was a known drug dealer to the Riverside Police Department. Additionally, the People asserted that the opinion of the psychologist, appointed to evaluate defendant to determine whether he was an addict or in danger of becoming an addict, that defendant met all seven criteria for being an addict, was based purely on defendant's unsupported statements to the psychologist. Finally, at the sentencing hearing, the prosecutor asserted that committing

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<sup>10</sup> Contrary to defendant's assertion, this offense was not for transporting, but for selling.

someone with defendant's history of committing crimes and dealing drugs to CRC would be "like putting a wolf in the hens' house."

At the sentencing hearing and in their sentencing memorandum, defense counsel asserted that defendant had a 40-year addiction. He urged the trial court to impose a sentence of six years or less so defendant would be eligible for CRC. This could be accomplished by imposing the mid-term on the possession for sale conviction, a one-third the mid-term sentence on the transportation conviction and dismissing both enhancements. Counsel also asserted that defendant's prior convictions were "old" except for the 2008 conviction of selling cocaine, for which defendant had been placed on probation.<sup>11</sup> Concerning the fact that defendant was on probation when he committed the instant offenses, counsel said that defendant had received only outpatient treatment for drugs.

The trial court cited defendant's long criminal history and his failure in the past to change, despite being in prison and on probation, as reasons for not finding unusual circumstances to justify imposing a total sentence of six years or less. As already stated, the court concluded that the enhancements were mandatory.<sup>12</sup>

Defendant contends that the trial court abused its discretion in refusing to order the prosecutor to file a petition for defendant to be committed to CRC (*People v. Masters*

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<sup>11</sup> This was the result of a plea bargain.

<sup>12</sup> See footnote four, *ante*, page two.

(2002) 96 Cal.App.4th 700, 704).<sup>13</sup> Defendant concedes that the trial court's statement of reasons was adequate in the opinion of the Third and Fifth District Courts of Appeal (*id.* at p. 706; *People v. Granado* (1994) 22 Cal.App.4th 194), but not in the opinion of the First District, Division Two (*People v. McGinnis* (2001) 87 Cal.App.4th 592, 597). We conclude that the trial court's statement here, in light of the record, provides sufficient specificity to permit meaningful review. Defendant's criminal record was staggeringly extensive and included crimes that were clearly not committed just so defendant could obtain money for drugs. The court's reference to defendant's failure to change was clearly a reference to his inability or unwillingness to stop committing crimes and stop using drugs despite numerous incarcerations, being on probation and parole and receiving outpatient drug treatment. The current offenses, despite defendant's contrary assertions, demonstrated that defendant did more than merely possess drugs for his own personal use—he sold them also. Certainly, he had, which resulted in his conviction the previous year.

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<sup>13</sup> The People assert that Penal Code section 1170.12, subdivision (a)(4) prohibited the commitment of defendant to CRC. Defendant correctly points out that this is not the case. Penal Code section 1170.12's prohibition on a CRC commitment applies only if the People plead and prove that defendant had suffered a prior conviction for a serious or violent felony (Pen. Code, § 1170.12, subd. (b)(1)). Defendant's prior drug sales conviction allegation, found true in connection with the possession for sale and transportation convictions, does not qualify (see Pen. Code, §§ 667.5, subd. (c) and 1192.7, subd. (c)). Although the People had alleged that defendant had suffered a prior burglary conviction for which he served a prison term for the purpose of imposing a sentence enhancement, the prosecutor dismissed this allegation. Moreover, it was for second degree burglary, rather than first degree, as required by Penal Code section 1192.7, subdivision (c)(18).

Defendant asserts that the trial court abused its discretion in not dismissing both enhancements. In so doing, defendant merely reasserts the arguments he advanced below for why he should be committed to CRC. This does not demonstrate that the trial court acted outside the bounds of reason (*People v. Williams* (1998) 17 Cal.4th 148, 162). The trial court did not find that defendant was not a drug addict or that he did not suffer from other medical conditions. It simply found that due to his lengthy criminal record and the fact that he failed to take advantage of past incarcerations, grants of probation and parole and outpatient drug treatment to stop committing crimes or stop using drugs, he was not a suitable candidate for CRC. This was not unreasonable.

Contrary to defendant's assertion, the record does not demonstrate that the trial court *ignored* relevant facts—merely that it gave different weight to those facts than defendant would have wished. This is not an abuse of discretion. Also contrary to defendant's assertion, he is not a “non-violent” offender. Some of his convictions were for violent crimes. Therefore, defendant's assertion that the trial court ignored the interest in having such offenders receive drug treatment is meritless.

#### **DISPOSITION**

The trial court is directed to state on the record to which conviction (possession for sale or transportation) it imposed the three year prior drug conviction enhancement under section 11370.2, subdivision (a) and to which conviction (transportation or simple possession) it imposed the two year out-on-bail enhancement under Penal Code section

12022.1 and to amend the abstract of judgment and the minutes of the sentencing hearing to correctly reflect its choice. In all other respects, the judgment is affirmed.

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RAMIREZ  
P.J.

We concur:

RICHLI  
J.

KING  
J.