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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.

CHRIS EVERETTE,

Defendant and Appellant.

E055145, E055146

(Super.Ct.Nos. RIF1102210 &
RIF10005064)

OPINION

APPEAL from the Superior Court of Riverside County. J. Thompson Hanks,
Judge. Affirmed in part; reversed in part with directions.

John F. Schuck, 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, A. Natasha Cortina and Ronald A.
Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Chris Everette seeks reversal of his conviction for simple possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)), because it is a lesser included offense of his conviction for possession of the same cocaine base for sale. (Health & Saf. Code, § 11351.5.) He also asks that his parole revocation restitution fine be dismissed. (Pen. Code, § 1202.45.)¹ We will reverse the possession charge and clarify which revocation restitution fine he is required to pay.

FACTS AND PROCEDURAL HISTORY²

Defendant is 58 years old and a long-time drug addict who has been smoking cocaine for more than 20 years. On April 23, 2011, he was on active (but “non-revocable”) parole³ and probation⁴ for earlier drug offenses when he was arrested while

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² This appeal consolidates two cases: E055145 and E055146. E055145 concerns the current offenses. E055146 concerns a felony drug-possession conviction (Health & Saf. Code, § 11350, subd. (a)) on October 26, 2010, in which defendant pled guilty and was granted 36 months probation pursuant to section 1210.1 (Proposition 36 substance abuse treatment program). Probation in that case (RIF10005064) was revoked on April 27, 2011, four days after defendant was arrested for the current offense.

³ Defendant’s parole was subsequent to concurrent two-year prison sentences imposed on March 19, 2009, for four separate drug convictions (case numbers RIF137620, RIF142927, RIF145342 and RIF144815). On January 28, 2010, defendant was approved for “non-revocable parole” and on June 7, 2010, he was released to “NRPU” (which we take to mean the “non-revocable parole unit”). Non-revocable parole became available to non-violent-non-sex offenders after January 25, 2010, via section 3000.03. The section provides, for eligible persons, that: “Notwithstanding any other provision of law, the Department of Corrections and Rehabilitation shall not return to prison, place a parole hold on pursuant to Section 3056, or report any parole violation

[footnote continued on next page]

in possession of six individually-wrapped chunks of rock cocaine concealed inside a ChapStick container, another six individually-wrapped chunks inside a Crazy Glue container, and one separately-wrapped chunk in his pocket.

Defendant was charged by amended information with, among other things, possession of cocaine base for sale (Health & Saf. Code, § 11351.5 (count 1)); and possession of the same cocaine base (Health & Saf. Code, § 11350, subd. (a) (count 2).) In relation to count 1, the information alleged that defendant had a prior drug transportation conviction (Health & Saf. Code, §§ 11352 & 11370.2, subd. (a)). The information further alleged that he had served three prior prison terms without remaining free of confinement for a period of five years after his release. (§ 667.5, subd. (b).)

On October 6, 2011, a jury convicted defendant of counts 1 and 2. In a separate proceeding on October 11, 2011, the trial court found the allegation of a prior transportation conviction true, struck one of the three prison priors, and found the remaining two priors true.

On November 14, 2011, the court sentenced defendant to a split term of 12 years under the Criminal Justice Realignment Act of 2011 (§ 1170, subd. (h)). Defendant received nine years for his current offenses (nine years total on count 1 plus two years on

[footnote continued from previous page]

to the Board of Parole Hearings or the court” Since this species of parole cannot be revoked, it follows that there can be no associated parole revocation restitution fine.

⁴ See footnotes one and two, *ante*, regarding the case for which defendant was on probation. Defendant was granted probation on October 26, 2010 despite the fact that he was still on (non-revocable) parole following his release from prison after serving part of his sentence for the March 19, 2009, violation of the same statute.

count 2, stayed per § 654), plus three consecutive years for the probation violation. The sentence was to be served as six years in jail and six years on mandatory supervised release. In addition, in connection with the current offenses, the court orally imposed a “parole restitution” fine of \$200.

In connection with the violation of probation case, the court stated: “Then we also have his probation case, case ending in 064. In that matter, probation previously revoked will remain revoked. [¶] . . . [¶] Also, he has to pay the restitution fine of \$200. Parole restitution of \$200, stayed unless parole is revoked.”⁵ The court asked defendant if he understood and accepted the supervised release terms applicable to both his cases. After conferring with his attorney, who assured the court that she had explained the sentence to her client, defendant said he accepted the terms. Defendant and his attorney both signed the sentencing memorandum which included the terms and detailed the fines being imposed.

Two weeks later, on November 28, 2011, the court modified defendant’s sentence. The split of his nine-year sentence for the current convictions was changed to five years in county jail and four years on supervised release and the three-year term for the violation of probation conviction (RIF10005064) was made concurrent with, rather than consecutive to, the nine years. (§ 1170, subd. (h)(5)(B).) The revised sentencing memorandum form reflected these changes. The revised memorandum also included a

⁵ As the People suggest, it appears that the trial court misspoke and meant to impose a probation revocation restitution fine rather than a parole revocation restitution fine. Both the minute order and abstract of judgment reflect the imposition of the former.

reduction in the section 1202.4, subdivision (b) restitution fine from \$1800 to \$200, the imposition of a \$200 probation revocation restitution fine pursuant to section 1202.44, a recalculation of credit for time served, and some minor changes regarding the times within which he would need to report to the enhanced collections division. At this sentencing hearing, as at the hearing on November 14, 2011, defense counsel did not object to any of the terms. On December 6, 2011, defendant filed a notice of appeal.

DISCUSSION

Defendant first argues that his conviction for possession of illegal drugs, specifically cocaine base (Health & Saf. Code, § 11350, subd. (a)), must be vacated because it is a lesser included offense of possession of the same cocaine base for sale (Health & Saf. Code, § 11351.5). The People agree, as do we.

Lesser Included Offense

Generally, multiple convictions may not be based on necessarily included offenses. (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227, 1229.) “[I]f the statutory elements of the greater offense include all of the elements of the lesser offense, the latter is necessarily included in the former.” (*Id.* at pp. 1227, 1229.) “Under the clear language of the statutes, possession of cocaine base within the meaning of section 11350 is a lesser necessarily included offense of possession of cocaine base for sale in violation of section 11351.5.” (*People v. Adams* (1990) 220 Cal.App.3d 680, 690.) Accordingly, here, defendant’s conviction for possession of the same cocaine base for which he was convicted on count 1 cannot stand. Based on the foregoing, we will reverse the conviction for count 2.

Revocation Restitution Fines

Parole

Defendant's second argument is that the parole revocation fine orally imposed as part of the sentence for his current offense must be stricken because, under the realignment statute, he has been sentenced to jail, not prison. Therefore he will not be subject to a period of parole when he is released to begin his period of mandatory supervision and cannot be subject to a parole revocation restitution fine. The People agree that a parole revocation restitution fine does not apply where, as here, a sentence does not include a period of parole. (*People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1097.) We also agree, and will order the parole revocation restitution fine imposed for the current offenses reversed.

Probation

The People go on to assert, however, that "Obviously, the trial court misspoke[.]" when it purported to be imposing a *parole* revocation fine of \$200, and meant instead to be imposing a *probation* revocation fine of \$200. The People support their position by pointing out that, although generally the oral pronouncement of sentence prevails, in this case a "fair reading" shows that the court meant to impose a probation revocation [restitution] fine as a term of defendant's supervised release. They note that the Clerk's Transcript and sentencing memorandum record the fine as a "probation revocation restitution fine" pursuant to section 1202.44.

Defendant responds that it makes no difference whether the fine imposed for his current offenses was a parole revocation restitution fine or a probation revocation

restitution fine. In his view, both are improper: the former for the reasons we have given, and the latter because he was not released on probation, but was actually sentenced to jail for his current offenses. In addition, he maintains, “release on mandatory supervision under section 1170, subdivision (h)(5)(B) is *not* release on probation.” Thus, imposition of a probation revocation restitution fine was, like imposition of a parole revocation restitution fine, improper. As to his current offenses, defendant is correct; there could be no probation revocation restitution fine as part of his sentence.

In sum, at the time defendant was sentenced for his current offenses in case number RIF1102210, although a restitution fine (§ 1202.4, subd. (b)) was mandatory, and correctly imposed by the trial court, neither a probation revocation restitution fine (§ 1202.44) nor a parole revocation restitution fine (§ 1202.45) could be imposed on a defendant sentenced under the realignment statute (§ 1170, subd. (h)(5)).⁶ Accordingly, the probation revocation restitution fine imposed in case number RIF1102210 must be stricken.

⁶ The omission of a revocation restitution fine for persons sentenced under the realignment statute gave rise to the legal anomaly that persons granted probation, and persons who had served their sentences and were now eligible for parole, were subject to revocation restitution fines, while offenders receiving the newly-fashioned benefit of a split sentence were not. This anomaly was remedied by the 2012 amendment of section 1202.45, which added the current version of subdivision (b). Effective January 1, 2013: “In every case where a person is convicted of a crime and is subject to . . . mandatory supervision under subparagraph (B) of paragraph (5) of subdivision (h) of Section 1170, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional . . . mandatory supervision revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4.

However, by operation of law, stay of the probation revocation restitution fine imposed in “the case ending in 064” was dissolved and payment became due when probation was revoked and defendant was sentenced to prison. (§ 1202.44.) The abstract of judgment fails to reflect this requirement and must be corrected.

DISPOSITION

The judgment is reversed in part, and the superior court is directed to resentence defendant, with the following changes: 1) Defendant’s conviction and sentence for simple possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)) are reversed; 2) The probation revocation restitution fine imposed in case number RIF1102210 is stricken; 3) The stay of defendant’s obligation to pay the probation revocation restitution fine in case number RIF10005064 is dissolved and payment is due immediately. (§ 1202.44.) In all other respects, the judgment is affirmed.

The superior court clerk is directed to send a minute order to the sheriff reflecting the new sentence.

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CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

RICHLI
J.