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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.

JESUS LOZANO MAGANA,

Defendant and Appellant.

E061955

(Super.Ct.Nos. RIF1300942 &
SWF029531)

OPINION

APPEAL from the Superior Court of Riverside County. Charles J. Koosed, Judge.

Affirmed.

Steven S. Lubliner, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jesus Lozano Magana was found in possession of 14 grams of methamphetamine and 227 grams of marijuana while riding in a car. He was found guilty of one count of violating Health and Safety Code section 11379, subdivision

(a),¹ transportation of methamphetamine for sale, and one count of violating section 11378, possession of methamphetamine for sale. Defendant was further found to have suffered one prior conviction of violating section 11379, subdivision (a), within the meaning of section 11370.2, subdivision (c).² Defendant was granted formal probation for a period of three years.

Defendant essentially makes one claim on appeal, that his prior conviction of violating section 11379, subdivision (a), did not qualify as a prior conviction subject to a three-year sentencing enhancement under section 11370.2.

FACTUAL AND PROCEDURAL HISTORY

We need only provide a brief summary of the facts of the current offense since defendant's claim on appeal concerns the prior conviction suffered in 2007. On June 26, 2012, a Moreno Valley police officer conducted a traffic stop of a vehicle in which defendant was a passenger. During a probation search of defendant's person, \$500 cash was found in his pants pocket. Defendant told the officer that he did not have a job. In another pocket, the officer found 14 grams of methamphetamine, which was an amount consistent with sales. Defendant had several text messages on his cellular telephone that were indicative of methamphetamine sales. Defendant's vehicle, which was parked nearby, was also searched and contained 227 grams of marijuana.

¹ All further statutory references are to the Health and Safety Code unless otherwise indicated.

² The trial court also found defendant violated his probation in Riverside County Superior Court case No. SWF029531. The trial court reinstated the probation for a period of three years.

DISCUSSION

Defendant contends that his 2007 conviction for violating section 11379, subdivision (a) does not qualify as a prior conviction subjecting him to a potential three-year sentence under section 11370.2, subdivision (c). When defendant was convicted in 2007 of violating section 11379, subdivision (a), that section provided that all transportation of controlled substances, including for personal use, constituted a violation of the section. Defendant stipulated in 2007 that the controlled substances he possessed were being transported for personal use only. In 2014, the Legislature amended the section by adding a definition of transport; that it means “to transport for sale.” Despite the fact that his 2007 conviction was final prior to the amendment, defendant insists the Legislature intended to apply the definition to his prior conviction making him ineligible for the sentencing enhancement under section 11370.2.

A. ADDITIONAL FACTUAL BACKGROUND

Prior to trial, the People wanted to admit defendant’s Health and Safety Code section 11379, subdivision (a) prior as Evidence Code section 1101, subdivision (b) evidence. The parties discussed that defendant had pleaded guilty to the prior, but according to the plea agreement, the district attorney and the public defender stipulated that the transportation of controlled substances was for personal use. The People explained that the reason for the stipulation was so that defendant could qualify for probation under Penal Code section 1210.1. The trial court agreed that the facts of the prior conviction, which actually showed possession for sales, were highly probative in the instant case.

At trial, Riverside County Sheriff's Deputy Christopher Angelo testified that on December 28, 2006, he was on duty in Perris when he conducted a traffic stop on a vehicle driven by defendant. Inside the vehicle, Deputy Angelo found 28 individual baggies. Eight of them contained a total of 2.47 grams of methamphetamine, and the other baggies contained a total of 58 grams of marijuana. Defendant admitted he was aware of the controlled substances in his car. He told Deputy Angelo that he had been laid off of his job and needed to make money.

After defendant was convicted in the instant case, defendant's counsel stipulated that defendant suffered the prior conviction of violating section 11379, subdivision (a) on August 14, 2007, in case No. SWF019433. Defendant later admitted he had suffered the prior conviction.

Despite admitting to having suffered the prior conviction, defendant's counsel argued that the prior conviction did not qualify for the three-year sentence enhancement under section 11370.2, because section 11379 was amended effective January 2014 to only apply to those violations of section 11379 where transportation of controlled substances was for purposes of sales. Prior to 2014, a person could be convicted of violating section 11379 by transporting controlled substances for personal use. Defendant referred to Exhibit 9, which was the record of the prior conviction in Case no. SWF019433 admitted by the People.

Exhibit 9 included the information for the prior conviction. Defendant had been originally charged in a information filed on January 23, 2007, with a violation of section 11378, possession of methamphetamine for sale, and a violation of section 11359,

possession of marijuana for sale. On August 14, 2007, defendant negotiated a plea deal wherein he would plead to a violation of section 11379, subdivision (a). Included in the written plea agreement were the words that defendant “will plead to an amended count 3—HS 11379(A) DA & PD agree to stip. for personal use.”

Defendant’s counsel argued that the Legislature amended section 11379, subdivision (a) to make it clear the section only applies to persons who transport drugs for sale. Since defendant and the People had negotiated that his violation of section 11379, subdivision (a) would only be for transportation for personal use, his conviction would not subject him to additional punishment under section 11370.2.

The People acknowledged there were no cases discussing the issue. The People argued that section 11370.2 applied. Defendant was convicted of the prior conviction in 2007, prior to the change in section 11379. There was no intention by the Legislature to apply the changes to section 11379 retroactively to those convictions that were already final.

The trial court agreed that if the Legislature intended that prior convictions of section 11379 for transportation for personal use should not qualify under section 11370.2, it would have also amended section 11370.2. The trial court felt that the Legislature did not state that prior violations of section 11379 for transportation for personal use were impacted by the 2014 amendment.

B. THE AMENDMENT DOES NOT APPLY³

Health and Safety Code section 11370.2, subdivision (a) provides, “Any person convicted of a violation of, or of a conspiracy to violate, [Health and Safety Code 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, [Health and Safety Code sections] 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, or 11383, whether or not the prior conviction resulted in a term of imprisonment.”

Former and current section 11379, subdivision (a) provides in pertinent part 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 attempts to import into this state or transport any controlled substance . . . shall be punished by imprisonment . . . for a period of two, three, or four years.” Effective January 1, 2014, section 11379 was amended to add subdivision (c), which states, “For purposes of this section, ‘transports’ means to transport for sale.” (§ 11379, as amended by Stats. 2013, ch. 504, § 2.)

Defendant insists that his conviction of violating section 11379, subdivision (a), to which the People stipulated in 2007, was for transportation for personal use, and does not

³ On December 3, 2015, the California Supreme Court granted review in *People v. Maita* (Oct. 19, 2015, C074872 [nonpub. opn.]; review granted December 3, 2015, S230957) on the same issue raised in this appeal.

qualify as a prior conviction under section 11370.2. However, the statutory language is clear that the amendment to section 11379 does not apply to prior convictions under section 11370.2. “The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first, to the words of the statute, giving them their usual and ordinary meaning. [Citations.] When the language of a statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.” (*People v. Flores* (2003) 30 Cal.4th 1059, 1063.)

Here, the language of the statutes is clear. When section 11379 was amended, there were no similar amendments to section 11370.2. As such, the three-year sentencing enhancement still applies to any convictions of section 11379 suffered prior to January 1, 2014. Further, there is nothing in the language of the amendment to section 11379 that it was to apply to all prior convictions of that section. This makes sense considering the “sentencing enhancement provided in Health and Safety Code section 11370.2 is related to the defendant’s status as a repeat offender, not the manner in which his current crime was committed.” (*People v. Oakley* (2013) 216 Cal.App.4th 1241, 1246.)

Moreover, there is nothing in the language that made the change in the definition of “transport” retroactive to all prior convictions. “No part of [the Health and Safety]

Code] is retroactive, unless expressly so declared.”” (*People v. Brown* (2012) 54 Cal.4th 314, 319.) “ “[I]n the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.”” (*Ibid.*)

The court in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) held an amended act that imposes a lighter punishment can be applied retroactively “provided the judgment convicting the defendant of the act is not final.” (*Id.* at p. 745.)

Estrada retroactivity does not apply in this case because defendant’s prior conviction became final in 2007.⁴ Accordingly, the 2014 amendment to section 11379 does not apply to his prior conviction.

Defendant argues that the Legislature intended to include prior convictions of section 11379 by relying on the legislative history of the change in section 11379.⁵ Defendant points to the language from the hearing that, “ “AB 721 would clarify the Legislature’s intent to only apply felony drug transportation charges to individuals involved in drug trafficking or sales. Currently, an ambiguity in state law allows prosecutors to charge drug users—who are not in any way involved in drug trafficking—with TWO crimes for simply being in possession of drugs. While current law makes it a

⁴ Defendant insists in his reply brief that the principles in *Estrada* dictate that the amendment applies to his prior conviction. However, this would ignore the language in *Estrada* that retroactivity is applied if the defendant’s judgment is not final. (*Estrada, supra*, 63 Cal.2d at p. 745.)

⁵ Defendant requested that we take judicial notice of the Hearing of the Assembly Committee on Public Safety for AB721, which pertained to the amendment to section 11379. We grant that request.

felony for any person to import, distribute or transport drugs, the term “transportation” used in the Health and Safety Code has been widely interpreted to apply to ANY type of movement—even walking down the street—and ANY amount of drugs, even if the evidence shows the drugs are for personal use and there is no evidence that the person is involved in drug trafficking. As a result, prosecutors are using this wide interpretation to prosecute individuals who are in possession of drugs for only personal use, and who are not in any way involved in a drug trafficking enterprise. [¶] This bill makes it expressly clear that a person charged with this felony must be in possession of drugs with the intent to sell. Under AB 721, a person in possession of drugs ONLY for personal use would remain eligible for drug possession charges. However, personal use of drugs would no longer be eligible for a SECOND felony charge for transportation.”

Defendant insists that based on this language, it is “unthinkable that the Legislature intended to eliminate the crime of transportation for personal use,” but still allow a defendant to receive an additional three-year punishment for a prior conviction based on personal use. However, the Legislature made no changes to section 11370.2. Nor did it include language that the amendment was to apply to all prior section 11379 convictions. We simply cannot conclude that the Legislature intended to include all prior convictions of section 11379.

Defendant also insists that based on the statutory scheme involving nonviolent drug offenses, which he states includes Health and Safety Code sections 11379, subdivision (a), 11370.2, and Penal Code section 1210.1, it is clear the Legislature intended to include prior convictions of Health and Safety Code section 11379. As

stated, when defendant was convicted, Health and Safety Code section 11379, subdivision (a), made any transportation of a controlled substance punishable as a felony, even if it was for personal use. It was advantageous for a defendant to show that the transportation of controlled substances was for personal use so that he would be entitled to drug treatment probation under Proposition 36. (Pen. Code, § 1210.1, subd. (a); see *People v. Dove* (2004) 124 Cal.App.4th 1, 4-7.) Penal Code section 1210.1 provides that any person convicted of a nonviolent drug offense shall be granted probation.

“‘Nonviolent drug possession offense,’ as defined in Proposition 36, includes ‘the unlawful personal use, possession for personal use, or transportation for personal use’ of specified controlled substances, including cocaine base.” (*Dove*, at p. 6.)

Defendant claims that by failing to amend Penal Code section 1210.1 by eliminating “transportation for personal use,” which after the amendment to Health and Safety Code section 11379, is merely a restatement of possession for personal use, all of the statutes read together show that his violation of Health and Safety Code section 11379 in 2007 does not qualify under Health and Safety Code section 11370.2. We find no merit in his claim. Penal Code section 1210.1 is only concerned with the punishment for nonviolent drug offenses for which it provides a general definition. That section does not refer to Health and Safety Code sections 11379 or 11370.2. It is not a reasonable interpretation that because Penal Code section 1210.1 still refers to transportation for

personal use, the Legislature intended to apply the amendment to Health and Safety Code section 11379 to all prior convictions.⁶

We note that “[T]he Fourteenth 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.” (*Baker v. Superior Court* (1984) 35 Cal.3d 663, 668-669.) Here, the Legislature amended section 11379 by adding additional language defining transport effective January 1, 2014. Neither the statutory language, nor the legislative history, supports that the amendment was to apply to prior convictions of violating section 11379. We reject defendant’s claim.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.

⁶ At oral argument, defendant argued at length regarding whether the trial court could consider the facts of the underlying crime or whether the People were bound by their stipulation to a personal use conviction. However, we have decided this case based on retroactivity.