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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

WALTER CEJA ESPINOZA

Defendant and Appellant.

F061500

(Super. Ct. Nos. 09CM1818 &
10CM1277)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Nannette J. Stomberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Hill, P.J., Levy, J. and Kane, J.

Defendant appeals from the judgment entered against him after he pled no contest to one count of transportation of methamphetamine.¹ Defendant challenges the prior conviction enhancement included in the sentence, on the ground both the conviction and the commission of the offense that gave rise to the enhancement occurred after the commission of the offense for which he was then being sentenced. The People concede the error. We will strike the enhancement and affirm the judgment as so modified.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2009, the complaint was filed in case No. 09CM1818, alleging four counts of violations involving controlled substances; in count 1, defendant was charged with transportation of methamphetamine in violation of Health and Safety Code section 11379, subdivision (a).² The offenses allegedly occurred on June 6, 2009. In July 2009, defendant pled no contest to the first count, the remaining counts were dismissed, and defendant was placed on probation for five years.

In May 2010, the complaint was filed in case No. 10CM1277. After amendment, it alleged four counts of violations involving controlled substances and resisting arrest. In count 1, defendant was charged with transportation of methamphetamine in violation of section 11379, subdivision (a). The offenses were allegedly committed on June 4, 2009, two days before the offenses charged in case No. 09CM1818. The amended complaint also alleged the conviction in case No. 09CM1818 as a prior conviction under section 11370.2, subdivision (a). On June 29, 2010, defendant pled no contest to count 1 in a negotiated plea agreement, and was again placed on probation.

¹ Defendant obtained a certificate of probable cause in accordance with Penal Code section 1237.5.

² All further statutory references are to the Health and Safety Code unless otherwise indicated.

Defendant was later charged with violating probation in both cases. He challenged the prior conviction enhancement imposed in case No. 10CM1277, contending he had not admitted it at the time he entered his plea. The court disagreed. At the sentencing hearing, defendant also contended the enhancement was improper because the offense that formed the basis of case 10CM1277 occurred prior to the date of conviction in case No. 09CM1818. Thus, he asserted, the conviction in case No. 09CM1818 did not qualify as a prior conviction under section 11370.2. The trial court did not determine the validity of defendant's admission of the charged prior conviction, because the issue before it was the alleged violation of probation; it concluded defendant had obtained the benefit of his plea bargain and imposed a sentence that included a three-year enhancement for the prior conviction. Defendant obtained a certificate of probable cause and appeals, challenging the enhancement. The People concede that the conviction in case No. 09CM1818 did not occur prior to the offense charged in case No. 10CM1277, and that the enhancement was therefore improper.

DISCUSSION

Section 11370.2 authorizes the trial court to impose on a defendant convicted of a violation of section 11379 an additional three-year enhancement for a prior similar felony conviction. (§ 11370.2, subd. (c).) For purposes of section 11370.2, a conviction occurs upon ascertainment of guilt, which occurs when the defendant pleads guilty. (*People v. Rhoads* (1990) 221 Cal.App.3d 56, 59.) Addressing similar recidivist statutes, courts have held that the prior conviction must have occurred before the offense currently charged in order for the enhancement to apply. (*People v. Balderas* (1985) 41 Cal.3d 144, 201 (*Balderas*); *People v. Rojas* (1988) 206 Cal.App.3d 795, 802.) “The presumed rationale of such laws is that an offender undeterred by his *prior brushes with the law* deserves more severe criminal treatment.” (*Balderas, supra*, at p. 201.) Further, “[t]he purpose of deterring recidivism would not be effectuated by enhancing a present offense by an offense not yet committed.” (*People v. Shivers* (1986) 181 Cal.App.3d 847, 850.)

Here, not only did the *prior* conviction occur after the offense charged, the *prior* offense itself occurred two days after the offense charged as a subsequent offense. Consequently, the three-year enhancement for the conviction in case No. 09CM1818 was improperly imposed and should be stricken.

“When sentencing error does not require additional evidence, further fact finding, or further exercise of discretion, the appellate court may modify the judgment appropriately and affirm it as modified. [Citations.]” (*People v. Haskin* (1992) 4 Cal.App.4th 1434, 1441.) Accordingly, we will modify the judgment by striking the unlawful sentence enhancement.

DISPOSITION

The judgment is modified to strike the three-year prior conviction enhancement and, as so modified, is affirmed. The matter is remanded to the trial court for the limited purpose of correcting the abstract of judgment and forwarding a corrected abstract to the Department of Corrections.