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

THE PEOPLE,

Plaintiff and Appellant,

v.

TAJ DUPREE CARTER,

Defendant and Respondent.

F062471

(Super. Ct. No. BF135772A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Charles R. Brehmer, Judge.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, George M. Hendrickson, Deputy Attorney General, for Plaintiff and Appellant.

Paul V. Carroll, under appointment by the Court of Appeal, for Defendant and Respondent.

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* Before Levy, Acting P.J., Cornell, J., and Gomes, J.

STATEMENT OF THE CASE

On April 28, 2011, defendant and respondent, Taj Dupree Carter, was charged in an amended information with being a felon in possession of a firearm (Pen. Code, § 12021, count one),¹ possession of marijuana for sale (Health & Saf. Code, § 11359, count two), being a felon in possession of ammunition (§ 12316, subd. (b)(1), count three), and active participation in a criminal street gang (§ 186.22, subd. (a), count four).² The information also alleged a prior serious felony conviction within the meaning of the three strikes law (§§ 667, subds. (c)-(j) & 1170.12, subds. (a)-(e)) and a prior prison term enhancement (§ 667.5, subd. (b)).

Defendant brought a motion pursuant to section 995 to set aside the gang offense. Among the issues defendant raised, was that he was the sole perpetrator of the offense for which he was charged and section 186.22(a) requires the accused to “promote, further, or assist in any felonious criminal conduct by *members* of the gang.” The People filed opposition to defendant’s motion. On April 28, 2011, the court granted defendant’s motion to set aside the gang offense alleged in count four pursuant to section 995.

Defendant subsequently entered into a plea agreement admitting the first three counts with the understanding that he could withdraw his plea if the gang offense is reinstated. Defendant was sentenced to prison for four years. The People appeal the trial court’s order setting aside count four, the gang offense.

¹ Unless otherwise designated, all statutory references are to the Penal Code.

Section 12021 was repealed, revised, and its operative provisions as related to count one were redesignated as section 29800, subdivision (a)(1) by the Legislature effective January 1, 2012.

² Section 186.22, subdivision (a) is hereafter referred to as section 186.22(a).

FACTS

On February 24, 2011, at 6:00 p.m., Bakersfield Police Officer Pete Beagley was at an apartment complex on Q Street where he saw defendant in the parking lot heading toward an apartment in the complex. Beagley knew defendant from past contacts. After defendant went inside the apartment and came back outside, Beagley contacted him. Beagley asked defendant if he was staying in the apartment. Defendant replied that the apartment belonged to his girlfriend. Beagley asked defendant for the keys to the apartment. Defendant handed them to Beagley who in turn gave them to Officer Matt Gregory who took over the investigation.

Officer Gregory testified that he and Officer Harless searched one of the bedrooms in the apartment. When they lifted the mattress on the bed, they found a revolver and a bag containing ammunition between the mattress and the box spring. The revolver appeared to be a functional firearm. Officer Harless found a large quantity of marijuana and a digital scale located in the top drawer of the bedroom dresser. The marijuana was found in several containers: a glass jar with 18.5 grams, a large plastic bag containing 4.5 grams, a smaller bag containing a little over 3 grams, and 13 individually wrapped baggies of marijuana each weighing .9 grams.

Defendant told Gregory he sold the marijuana because he was unemployed and needed the money. Defendant admitted that he was a member of the East Side Crips. Defendant was aware of and knew another East Side Crip member who had been convicted of several counts of murder.

Officer Brian Holcombe testified that he was a peace officer with six years' experience. Holcombe spent one year assigned to the gang unit and received gang training throughout his law enforcement career. Holcombe had formal training on gangs, kept current every day on gang culture, and stayed in touch with his contacts. Holcombe had executed search warrants on gang members' homes numerous times. Holcombe

knew and had spoken to members of the East Side Crips on hundreds of occasions and read over a hundred reports by other officers concerning crimes committed by this gang.

Holcombe knew the symbols used by the East Side Crips, including their other names and derogatory names. Holcombe described the streets that made up the boundary of the territory claimed by the gang. The primary criminal activities of the East Side Crips include assaults, weapons violations, narcotics sales, carjackings, burglaries, robberies, and intimidating witnesses. Drug sales and possession of illegal firearms fall into the category of offenses committed by the gang. The gang members that Holcombe has contacted are aware of the primary activities of the gang.

To communicate, gang members gather with each other on weekends and speak to each other on a regular basis. Anthony English of the East Side Crips was convicted of selling marijuana, possession of marijuana for sale with a gang enhancement, and the crime of gang participation after officers witnessed him engage in a hand-to-hand transaction in mid-May 2010. English was in his gang's territory and wearing its colors during the transaction. English was sentenced to prison. In Holcombe's expert opinion, English would not have been permitted to sell drugs within East Side Crip territory without being affiliated with that gang.

On July 18, 2009, Davion Colen and a fellow East Side Crip member robbed a person at gunpoint. Colen was found in possession of a firearm. Colen told investigating officers that the crime was one of opportunity. Colen was taking the gun "to the big homey who had directed him." Colen was convicted of robbery.

Holcombe testified that selling marijuana was a primary activity of the East Side Crips. Members of the gang had been arrested numerous times for selling marijuana. The gang uses marijuana sale profits to buy additional drugs, including different types of drugs. Gang members also use drug sale profits to purchase weapons, rent vehicles to sell drugs outside their territory, and to lead a "gangster lifestyle."

Given defendant's possession of a digital gram scale and a large quantity of marijuana, some of it placed into 13 bags each weighing .9 grams, Holcombe believed defendant possessed marijuana for sale. Accessing pictures of defendant's tattoos from a database for parolees, defendant had tattoos affiliated with the East Side Crips. These included "SGC," for Spooky G Crips, and "ESC," for East Side Crips. Based on defendant's history, his admission of East Side Crip membership in jail, tattoos, and numerous contacts with the Bakersfield Police Department and other agencies, Holcombe opined that defendant was a member and active participant of the East Side Crip gang.

Holcombe also opined that the circumstances surrounding defendant's offenses indicate that the offenses were gang-related crimes, defendant was selling marijuana for the purposes of sales, and it would behoove a gang member to have a firearm. Through sales of marijuana, gang members are able to purchase more marijuana, purchase firearms, and lead a gangster life which is dependent on the amount of money, status, and respect a gangster has. Defendant's possession of marijuana and a firearm were gang crimes that also benefited the gang.

Holcombe further explained that defendant could not simply take off his "gang hat" and do things on his own by just going to a different side of town. The apartment in which defendant was staying was not in East Side Crip territory. The area is disputed with other gangs. By going outside traditional East Side Crip territory, defendant would bring less attention to himself. Gang members also derive personal profit from their criminal activity. Holcombe conceded that because no money was found in this case, there was no direct evidence that profits from defendant's drug sales were used by the gang.

DISCUSSION

The People argue that the magistrate erred in granting defendant's section 995 motion to set aside count four, the substantive gang offense alleged pursuant to section 186.22(a), because there was no evidence that defendant was acting with other gang members when he committed his offenses.³ At issue is whether a defendant can commit a crime, or crimes, as a sole perpetrator and still violate section 186.22(a).⁴ We agree with the People and will reverse the order of the magistrate setting aside count four.

Defendant acknowledges that in *People v. Ngoun* (2001) 88 Cal.App.4th 432, 434-436 (*Ngoun*), and *People v. Salcido* (2007) 149 Cal.App.4th 356, 363-370 (*Salcido*), this court concluded section 186.22(a), may be violated when a defendant acts alone as the sole perpetrator of an offense and there is no evidence that other members of the gang also participated in the offense. Our reasoning and result in those cases was accepted and adopted by Division Two of the Court of Appeal, Fourth Appellate District, in *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1305-1308.

Defendant argues that *Ngoun* and *Salcido* were wrongly decided. Criticizing *Ngoun* and *Salcido*, defendant relies on the earlier Supreme Court decision in *People v. Castenada* (2000) 23 Cal.4th 743, 750. As stated in *Salcido*, "*Castenada* discussed the

³ The elements of the gang offense are (1) active participation in a criminal street gang with participation being more than nominal or passive; (2) knowledge that the gang's members engage in criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of the gang. (*People v. Albillar* (2010) 51 Cal.4th 47, 56.)

⁴ On January 12, 2011, our Supreme Court granted a petition for review in *People v. Rodriguez*, S187680, formerly published at 188 Cal.App.4th 722 to consider the question of whether a defendant who is an active participant in a criminal street gang may be found guilty of violating section 186.22(a), if he or she, acting entirely alone, commits a felony and there is no other evidence indicating the gang had anything to do with the felony.

crime of gang participation in terms of aiding and abetting. We clarified in [*People v.*] *Ngoun* [(2001) 88 Cal.App.4th 432, 436] that section 186.22, subdivision (a), also applies to a direct perpetrator's gang-related criminal conduct." (*Salcido, supra*, 149 Cal.App.4th at p. 367.) Until and unless we are instructed otherwise by our Supreme Court, we will adhere to our holdings in *Ngoun* and *Salcido*, which we believe were correctly decided.

We further note that there was testimony from Officer Holcombe that gang members both benefit from the protection of gang affiliation while conducting solitary sales of drugs and that members of gangs cannot sell drugs as single actors. Holcombe explained that the gang itself benefited from its members selling drugs. Holcombe further explained that even though defendant was outside his gang's territory, the sale of drugs outside the territory brought less attention to himself and helped to profit the gang. It can be reasonably inferred too from this testimony that defendant was expanding the gang's territory and influence by conducting drug sales in disputed territory.

Holcombe's testimony created an evidentiary nexus between defendant's solitary sales of drugs and a direct benefit to the East Side Crips gang. Since a sole perpetrator acting alone can violate section 186.22(a), defendant's challenge to the sufficiency of the evidence fails. Accordingly, the magistrate erred in setting aside count four.

DISPOSITION

The ruling of the magistrate setting aside the gang offense allegation, count four of the amended information, is reversed and the matter is remanded for further proceedings.