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

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD DESHAWN HAWKINS,

Defendant and Appellant.

F064567

(Kern Super. Ct. No. BF138487A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Matthew A. Siroka, 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, Eric L. Christoffersen and Ivan P. Marrs, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Detjen, J. and Peña, J.

INTRODUCTION

Appellant/defendant Edward Deshawn Hawkins was convicted after a jury trial of bringing methamphetamine into jail (Pen. Code,¹ § 4573); possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)); and using a controlled substance (Health & Saf. Code, § 11550, subd. (a)), with a prior serious felony enhancement and a prior strike. He was sentenced to the second strike term of six years in prison.

On appeal, he contends that his conviction for possession of methamphetamine must be reversed because it is a lesser included offense of bringing methamphetamine into jail. He also challenges the calculation of his conduct credits. We affirm.

FACTS

Around 5:00 p.m. on September 3, 2011, Officers Esparza and Berumen responded to a welfare call on Hailey and Quincy Streets in Bakersfield. They found defendant lying face-down in the middle of the intersection. Defendant's eyes were closed. His face and lips were swollen, his head and mouth were bleeding, and he was surrounded by vomit. The officers were informed by witnesses that defendant had been banging his head and punching his hand against the pavement.

Officer Esparza tried to speak to defendant but he was unresponsive. He displayed seizure-like symptoms, as his body shook and his eyes rolled back into his head. As the officers waited for emergency personnel, defendant suddenly tried to get up and displayed an enormous amount of strength. Several officers had to hold him down. Esparza believed defendant was under the influence of PCP based on his condition and actions.

Defendant was taken to Kern Medical Center, where a nurse found a baggie hidden in his underwear. The baggie contained eight smaller baggies of

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

methamphetamine. Each baggie weighed about .29 grams, with a total weight of 3.7 grams. There was \$500 in defendant's shoe.

Officer Esparza placed an arrest hold on defendant for possession of narcotics. Officer Berumen spoke to defendant while he was being treated in a trauma room, and told him that he was under arrest and not free to leave. When defendant was given this information, his eyes were open, but he was not speaking clearly, and Berumen was not sure if he understood. Later that day, defendant walked out of the hospital without being discharged or arrested.

On September 12, 2011, defendant arrived at the Bakersfield Police Department and asked for the property taken from him at the hospital. Instead of getting his property, however, an officer arrested defendant on the outstanding possession charge. During the booking search at the jail, defendant was found in possession of a plastic bag hidden in his shorts which contained 1.55 grams of methamphetamine.

DEFENSE EVIDENCE

Defendant testified he was addicted to drugs, and people often gave him narcotics for free so he could test the quality of the drugs. On the morning of September 3, 2011, defendant smoked PCP and methamphetamine. A friend gave the drugs to him so he could test the quality and make sure the drugs were not "[g]arbage." He kept his rent money hidden in his shoe in case he was robbed. Defendant did not remember anything else about that day until he woke up in the hospital. When he saw the injuries on his face and body, he concluded the police beat him up in the street. No one told him that he had to stay at the hospital. He became scared, left the hospital, and walked to his apartment. Defendant contacted his family, and they said he had been missing for five days.

Defendant testified he went back to the hospital a few days later to recover his watch, cell phone, and cash. A hospital employee told him to contact the police. He went to the police department to get his property but he was arrested. Defendant asked the officer why he was being arrested, and the officer replied: "[F]or being dumb."

Defendant admitted he possessed methamphetamine when he was arrested, but claimed the drugs were only for his personal use.

PROCEDURAL HISTORY

Defendant was charged with count I, possession of methamphetamine for sale on September 3, 2011 (Health & Saf. Code, § 11378); count II, escape by a prisoner (§ 107); count III, bringing methamphetamine into jail on September 12, 2011 (§ 4573); count IV, possession of methamphetamine on September 12, 2011 (Health & Saf. Code, § 11377, subd. (a)); and count V, using a controlled substance on September 3, 2011 (Health & Saf. Code, § 11550, subd. (a)). It was further alleged defendant had one prior serious felony conviction (§ 667, subd. (a)(1)); and one prior strike conviction (§ 667, subd. (b)-(i)).

During defendant's jury trial, the court granted his motion for acquittal of count II, escape by a prisoner, because of insufficient evidence that defendant comprehended that he was under arrest and not free to leave the hospital. The jury subsequently found him not guilty of count I, possession for sale. He was convicted of count III, bringing methamphetamine into jail; count IV, possession of methamphetamine; and count V, using a controlled substance. He was sentenced to the second strike term of six years for count III, and the court stayed the term for count IV pursuant to section 654.

DISCUSSION

I. Defendant was properly convicted of multiple offenses

Defendant asserts his conviction for possession of methamphetamine must be reversed because it is a lesser included offense of bringing methamphetamine into jail, and he could not be convicted of both a greater and lesser included offense. As we will explain, his argument lacks merit.

A. Multiple convictions

“In general, a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. ‘In California, a single act or

course of conduct by a defendant can lead to convictions “of *any number* of the offenses charged.” [Citations.]’ [Citation.] Section 954 generally permits multiple conviction. Section 654 is its counterpart concerning punishment. It prohibits multiple punishment for the same ‘act or omission.’ When section 954 permits multiple conviction, but section 654 prohibits multiple punishment, the trial court must stay execution of sentence on the convictions for which multiple punishment is prohibited. [Citations.]” (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227 (*Reed*), italics in original.)

“A judicially created exception to the general rule permitting multiple conviction ‘prohibits multiple convictions based on necessarily included offenses.’ [Citation.] ‘[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.’ [Citation.]” (*Reed, supra*, 38 Cal.4th at p. 1227; *People v. Montoya* (2004) 33 Cal.4th 1031, 1034 (*Montoya*).) This exception is based on the rationale that if the greater offense cannot be committed without committing the lesser, conviction of the greater offense is also conviction of the lesser, and thus to permit conviction of both offenses in effect convicts the defendant twice of the lesser offense. (*People v. Medina* (2007) 41 Cal.4th 685, 702.)

There are two tests to determine if an offense is necessarily included within another offense: the “elements” test and the “accusatory pleading” test. (*Reed, supra*, 38 Cal.4th at p. 1227.) “Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former. [Citation.]” (*Id.* at pp. 1227-1228.)

The “statutory elements” test is used to determine whether a charged crime is a lesser included offense of a separately charged greater offense for purposes of the multiple conviction bar. (*Reed, supra*, 38 Cal.4th at pp. 1229, 1231.) In contrast, the “accusatory pleading” test is used to determine whether to instruct a jury on an uncharged

lesser offense, and is not used to determine whether multiple convictions of charged offenses are appropriate. (*Id.* at p. 1231; *Montoya, supra*, 33 Cal.4th at p. 1035.)

“The accusatory pleading test arose to ensure that defendants receive notice before they can be convicted of an uncharged crime. ‘As to a lesser included offense, the required notice is given when the specific language of the accusatory pleading adequately warns the defendant that the People will seek to prove the elements of the lesser offense.’ [Citation.] ‘Because a defendant is entitled to notice of the charges, it makes sense to look to the accusatory pleading (as well as the elements of the crimes) in deciding whether a defendant had adequate notice of an uncharged lesser offense so as to permit conviction of that uncharged offense.’ [Citation.] But this purpose has no relevance to deciding whether a defendant may be convicted of multiple charged offenses. ‘[I]t makes no sense to look to the pleading, rather than just the legal elements, in deciding whether conviction of two charged offenses is proper. Concerns about notice are irrelevant when both offenses are separately charged’ [Citation.]” (*Reed, supra*, 38 Cal.4th at pp. 1229-1230.)

B. Analysis

We thus turn to the statutory elements test to evaluate defendant’s contentions—whether all the legal elements of the lesser offense are included in the legal elements of the greater offense. (*Montoya, supra*, 33 Cal.4th at p. 1034.)

In count IV, defendant was charged and convicted of violating Health and Safety Code section 11377, subdivision (a). The offense has four elements: (1) defendant exercised control over or the right to control an amount of any controlled substance; (2) defendant knew of its presence; (3) defendant knew of its nature as a controlled substance; and (4) the substance was in an amount usable for consumption. (Health & Saf. Code, § 11377, subd. (a); *People v Palaschak* (1995) 9 Cal.4th 1236, 1242; *People v. Tripp* (2007) 151 Cal.App.4th 951, 956.) Based on the statutory elements, Health and Safety Code section 11377, subdivision (a) can only be violated based on the defendant’s possession of *a controlled substance*.

The information alleged that defendant committed count IV based on his possession of methamphetamine, and that he committed count III by bringing

methamphetamine into a jail in violation of section 4573, with both offenses occurring on September 12, 2011. However, the manner in which defendant was charged does not mean that he was convicted of a greater and lesser included offense because the “accusatory pleading” test is not applicable to determine if he could be convicted of multiple *charged* offenses.

Instead, we turn to the statutory elements of the offense charged in count IV—section 4573, subdivision (a), which reads in full:

“Except when otherwise authorized by law, or when authorized by the person in charge of the prison or other institution referred to in this section or by an officer of the institution empowered by the person in charge of the institution to give the authorization, *any person, who knowingly brings or sends into, or knowingly assists in bringing into, or sending into, any state prison, prison road camp, prison forestry camp, or other prison camp or prison farm or any other place where prisoners of the state are located under the custody of prison officials, officers or employees, or into any county, city and county, or city jail, road camp, farm or other place where prisoners or inmates are located under custody of any sheriff, chief of police, peace officer, probation officer or employees, or within the grounds belonging to the institution, any controlled substance, the possession of which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code, any device, contrivance, instrument, or paraphernalia intended to be used for unlawfully injecting or consuming a controlled substance, is guilty of a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years. (§ 4573, subd. (a), italics added.)*

Section 4573 is violated when a defendant brings or sends drugs *or drug paraphernalia* into a jail or prison. (*People v. Gutierrez* (1997) 52 Cal.App.4th 380, 386.) “[A]rrestees and other persons in custody can violate section 4573” by bringing drugs or drug paraphernalia into jail “when the entry is officially compelled” and the contraband is “secreted on their person. [Citations.]” (*People v. Low* (2010) 49 Cal.4th 372, 383, 384.)

Based on the statutory elements of the two offenses, a violation of Health and Safety Code section 11377, subdivision (a) is not necessarily included in a violation of

section 4573. Health and Safety Code section 11377 solely prohibits the possession of *a controlled substance*, while section 4573 may be violated through the bringing of either a controlled substance or *the paraphernalia used to ingest a controlled substance* into a jail or prison. A defendant may violate section 4573 by bringing paraphernalia into a custodial setting, without bringing—or possessing—a controlled substance.

Defendant asserts that section 4573 is a greater offense of possession, even under the statutory elements test, because “the essence” of a violation of section 4573 is “bringing drug contraband into a correctional facility, not the specific type of contraband.” However, “[t]he ultimate evil with which the Legislature was concerned was drug use by prisoners. Nevertheless, it chose to take a prophylactic approach to the problem by attacking the very presence of drugs *and drug paraphernalia* in prisons and jails. [Citation.]” (*People v. Gutierrez, supra*, 52 Cal.App.4th at p. 386, italics added.)

The statutory elements of the two offenses thus refute defendant’s contentions. He was properly convicted of both counts III and IV, and the court properly stayed the term imposed for count IV pursuant to section 654.

II. Custody credits

Defendant was charged and convicted of committing offenses on September 3 and 12, 2011. His jury trial occurred in January 2012, and he was sentenced on February 12, 2012. He was continuously in custody. At the sentencing hearing, the court calculated his custody credits based on “two days, for four days,” because he committed the offenses prior to October 1, 2011, and had a prior serious or violent felony conviction. Defendant did not object.

On appeal, defendant contends he was entitled to enhanced presentence conduct credits (“one for one”) based on the current version of section 4019, amended pursuant to the Criminal Justice Realignment Act of 2011 (Realignment Act), effective October 1, 2011. Defendant concedes he committed the offenses prior to the effective date, but argues he should receive those enhanced credits since his custodial period overlapped the

effective date, and his rights to due process and equal protection would be violated if he did not receive the benefit of the Realignment Act. We disagree.

As defendant acknowledges, this court rejected similar arguments in *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1548 (*Ellis*), which relied on *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*), and held the custody credit provisions of the Realignment Act were only applicable to crimes committed after October 1, 2011. Defendant argues *Ellis* was wrongly decided and asks this court to reconsider the ruling. We agree with *Ellis* and decline to reconsider it.

Defendant also argues *Ellis* and *Brown* are inapplicable to the instant case because he is raising a different argument: his right to equal protection was violated by the denial of enhanced conduct credits for the time he served between October 1, 2011, and the date of the sentencing hearing. However, these precise arguments were rejected in *People v. Rajanayagam* (2012) 211 Cal.App.4th 42 (*Rajanayagam*). Although *Rajanayagam* found that defendants who served time in jail on or after October 1, 2011, regardless of the date they committed their offenses, were indeed similarly situated for purposes of equal protection, the court concluded there was no equal protection violation because there was a rational basis for the legislative classification. (*Id.* at pp. 53-56.) As the court explained, the legislative purpose behind the amendment at issue is “ ‘to reduce recidivism and improve public safety, while at the same time reducing corrections and related criminal justice spending.’ ” (*Id.* at p. 55.) The court concluded “the classification in question does bear a rational relationship to cost savings.” (*Ibid.*) Therefore, the defendant’s equal protection rights were not violated. (*Id.* at p. 56; see also *People v. Verba* (2012) 210 Cal.App.4th 991, 996-997; *People v. Kennedy* (2012) 209 Cal.App.4th 385, 387-389.)

Even assuming we were to find defendant is similarly situated with persons who do benefit from the legislation, we agree with *Rajanayagam*, *supra*, 211 Cal.App. 42 that there is a rational basis for the classification. No equal protection violation occurred.

DISPOSITION

The judgment is affirmed.