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

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON LIEBEL,

Defendant and Appellant.

F065133

(Super. Ct. No. BF140644A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Colette M. Humphrey and Kenneth C. Twisselman, II, Judges.†

Janice Wellborn, 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, Doris Calandra, and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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

† Judge Humphrey denied appellant’s first suppression motion. Judge Twisselman presided over appellant’s second suppression motion, trial, and sentencing hearing.

INTRODUCTION

Appellant, Jason Liebel, was found guilty at the conclusion of a jury trial on May 11, 2012, of possession of methamphetamine for sale (Health & Saf. Code, § 11378, count 1),¹ possession of methamphetamine (§ 11377, subd. (a), count 2), being under the influence of a controlled substance (§ 11550, subd. (a), count 3), and possession of drug paraphernalia (§ 11364.1, count 4). In a bifurcated proceeding, the trial court found true a prior prison term allegation (Pen. Code, § 667.5, subd. (b)).

On June 11, 2012, the court sentenced appellant to a term of four years in county jail consisting of the upper term of three years on count 1 plus a consecutive term of one year for the prior prison term enhancement. Appellant's total sentence is four years. Appellant contends the trial court erred in failing to grant his motion to suppress information on his cell phone presented at trial. Appellant further contends that he could not be convicted of both possession of methamphetamine for sale and for the lesser included offense of simple possession of methamphetamine. We reject these contentions and affirm the judgment.

FACTS

Pretrial Suppression Hearing

Appellant filed a written motion to suppress evidence seized in the room by Bakersfield police officers Robert Pair and John Buoni. On April 20, 2012, the trial court conducted a hearing on the motion. Pair testified that he was dispatched to room 219 of the La Quinta Motor Inn. Officer John Buoni knocked on the door. Appellant answered the door and talked to the officers. Pair could tell that appellant appeared to be under the influence of a central nervous system stimulant. Appellant had rapid speech, body

¹ Unless otherwise designated, all statutory references are to the Health and Safety Code.

tremors, and he was hopping from foot to foot. Appellant was arrested and searched by Buoni who retrieved a glass methamphetamine smoking pipe from appellant's right rear pants pocket.

The door to the room was partially open. After the arrest, Pair pushed the door wide open and saw another person inside who identified himself as Joshua Edwards. When Pair asked Edwards if he was on probation or parole, Edwards replied that he was on probation. Pair confirmed this fact by performing a computer check. Edwards was sitting on one of two beds in the room.

Inside the room, Pair saw an operable gram scale with white residue on it. Pair found several test tubes containing a white residue and a bag containing over 100 one and one-half by one inch ziplock baggies with heart designs on them.

Pair found a cell phone. Baggies of methamphetamine were in the bathroom near the toilet under a white towel, which was underneath the cell phone. Another baggie of methamphetamine was found inside a shoe near the bed. The baggies contained useable amounts of methamphetamine. Pair searched the cell phone itself. During cross-examination, defense counsel did not ask Pair what he viewed on the cell phone. Defense counsel argued that appellant was not under any search condition, was not on probation or parole, and the search was valid only as to Edwards. The trial court denied the suppression motion.

Suppression Hearing During Trial

At trial, defense counsel renewed his suppression motion. Counsel argued that the officers violated appellant's Fourth Amendment rights when they searched the contents of the phone without a search warrant. Defense counsel sought to suppress a specific text message on the phone that said, "bring that ball."

Defense counsel argued that he was renewing his motion pursuant to Penal Code section 1538.5, subdivision (h). Counsel noted that the search of the contents of the cell

phone occurred after appellant was arrested and without a search warrant. Counsel tried to distinguish the California Supreme Court's decision in *People v. Diaz* (2011) 51 Cal.4th 84 (*Diaz*). Counsel argued this case was more analogous to *United States v. Chadwick* (1977) 433 U.S. 1 in which the United States Supreme Court found that the search of a defendant's footlocker found in a vehicle after he was arrested and brought to the police station required a search warrant. Relying on the *Diaz* case, the trial court denied appellant's renewed suppression motion.

Trial Evidence

At 7:15 p.m. on February 5, 2012, Officers Pair and Buoni were dispatched to the La Quinta Motor Inn to investigate suspicious activity, possibly involving narcotics. There was heavy foot traffic in and out of room 219. Pair had responded to the motel before and testified the area was known for narcotics.

When the officers arrived to room 219, Buoni knocked on the door. Someone inside the room asked who was there. Buoni replied, "Bakersfield Police Department." Pair explained that after that, Buoni added either the word police or officer. No one immediately opened the door. Pair could hear footsteps inside moving back and forth as well as mumbling and whispering. It took about one minute for appellant to open the door. Appellant remained in the doorway. Another person was sitting on one of two beds in the room.

Appellant displayed symptoms of being under the influence of a central nervous system stimulant. Appellant was hopping from foot to foot, unable to stand still. He displayed an extremely exaggerated itching motion with his arms jerking. Appellant's eyelids were twitching, his pupils were dilated, he was talking extremely quickly, and grinding his teeth. Based on Pair's training and experience, appellant appeared to be under the influence of methamphetamine.

Pair asked appellant when he last used. Appellant replied he had used meth a couple of days earlier. Pair placed appellant under arrest for being under the influence of a controlled substance. This occurred outside the door of the room. Pair had appellant sit down outside the room. Buoni searched appellant after the arrest. Buoni found a glass methamphetamine smoking pipe in appellant's right rear pants pocket. The tube of the pipe had a white residue on the inside and the end of the pipe appeared to be charred. Appellant also possessed \$150 in currency.

The other person in the room was still on the bed. Pair never lost sight of him. Pair searched the room, locating a working gram scale, eight test tubes which had white residue on them and had the odor of methamphetamine, and a roll of unused ziplock baggies. Pair found a shoe Edwards claimed was his that contained a baggie with .39 grams of methamphetamine. In the bathroom, Pair found appellant's cell phone on top of a stack of white towels. Underneath one towel and the cell phone, Pair found three baggies. A criminalist determined the baggies contained respectively .11 grams, 1.92 grams, and 1.68 grams of methamphetamine.

Pair testified that there was no reason to possess so many empty baggies unless one was selling methamphetamine. The value of the baggies of methamphetamine in the bathroom ranged in value from as low as \$20 to as high as \$320. Pair read a text message on appellant's cell phone that said, "bring that ball and a soda." Pair explained that in his opinion, this was referencing a term of measurement for narcotics. An eight-ball is 3.5 grams of narcotics.

Appellant told Pair the room belonged to his girlfriend who had recently purchased the drugs with her tax refund. Appellant said he was just a user. Pair stated that he did not see a female come by the room.

Edwards told the officers that the methamphetamine in the shoe belonged to him and he was using methamphetamine in the room. Appellant claimed the room belonged

to his girlfriend. The fact that appellant's phone was in the room showed appellant had a tie to the room. Pair believed appellant was in possession of methamphetamine for sale.

SEIZURE OF TEXT MESSAGE

Appellant contends the trial court erred in denying his suppression motion of the text message because the search of the cell phone was not incident to a lawful arrest, the text message was key evidence crucial to the prosecution's case, and admission of the evidence was prejudicial beyond a reasonable doubt. Respondent argues that the text message could be viewed without a search warrant pursuant to *Diaz*, and, even if the evidence was improperly admitted, it was harmless beyond a reasonable doubt.²

In *Diaz*, the California Supreme Court held that where a cell phone is properly seized incident to a lawful arrest, there is no distinction between the phone itself and its digital contents. If the phone can be lawfully seized, investigating officers may view the digital contents, such as text messages, on the phone without first obtaining a search warrant. (*Diaz, supra*, 51 Cal.4th at pp. 93-101.) Although the search here was pursuant to a probation search condition rather than one incident to a lawful arrest, we find the

² Respondent initially argues this issue was forfeited because at the first suppression hearing appellant only sought suppression of the cell phone and did not seek suppression of the digital content of the cell phone. Respondent contends that the prosecutor was not given specific notice of all of the issues relevant to the suppression motion. We reject this contention. First, the *Diaz* case specifically holds that there is no distinction between the physical cell phone and its digital contents. (*Diaz, supra*, 51 Cal.4th at pp. 93-101.) If appellant was seeking to suppress the cell phone itself, ipso facto he was also trying to suppress its digital contents. Second, the notice from appellant that he was seeking suppression of the cell phone in the first suppression hearing appears to be broad enough to encompass the digital contents of the cell phone as well as the physical phone itself. At the second suppression hearing, the parties and the court were aware of the specific contention being made by defense counsel. The prosecution had fair notice of the basis for appellant's motion. (See *People v. Williams* (1999) 20 Cal.4th 119, 135-138.) We therefore reject respondent's forfeiture argument.

rationale of *Diaz* fully applicable here and further find that the trial court properly applied the *Diaz* case in its ruling denying appellant's suppression motion.

Appellant argues that the seizure and search of his cell phone were not incident to a lawful arrest because both appellant and Edwards were outside the hotel room while the search was being conducted. The authorities cited by appellant are inapposite to our analysis of this issue because the officers learned both from Edwards himself and a separate computer search that Edwards was on probation. (*People v. Sanders* (2003) 31 Cal.4th 318, 335 [officers must know the person is on probation or parole in order to conduct a probation or parole search].)

In California, probationers may validly consent in advance to a probation search. (*People v. Woods* (1999) 21 Cal.4th 668, 674.) During a valid probation search, investigators can search the portions of a residence occupied by the probationer and to which he or she had access regardless of whether the cotenant consents to the search. (*Id.* at pp. 681-682.) Both appellant and Edwards appeared to have joint access and control of the hotel room, including the bathroom where appellant's cell phone and three of four baggies of methamphetamine were located.

Finally, under the facts of this case, we find that even if the search and seizure of appellant's cell phone message was unreasonable under the Fourth Amendment, admission of the text message was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18. Even had the text message not been admitted into evidence, the officers still found an operable gram scale, a significant quantity of methamphetamine in four separate baggies, empty plastic baggies, and test tubes with evidence of white residue. Also, appellant's personal cell phone was found on top of a stack of towels. Underneath the towels there were three baggies of methamphetamine. There was a substantial amount of evidence before the jury that appellant was engaged in the sale of narcotics. We therefore reject this contention on appeal.

CONVICTION FOR LESSER INCLUDED OFFENSE

Appellant also contends that he could not be convicted of both possession for sale of methamphetamine and simple possession of methamphetamine because simple possession is a lesser included offense of possession for sale. We disagree because we find appellant had multiple criminal objectives for each offense.

A defendant cannot be convicted of both an offense and a lesser included offense based on the defendant's commission of an identical act. (*People v. Sanchez* (2001) 24 Cal.4th 983, 987 [disapproved on another ground in *People v. Reed* (2006) 38 Cal.4th 1224, 1228-1229].) Possession of methamphetamine is a lesser included offense of possession of methamphetamine for the purpose of sale. (*People v. Oldham* (2000) 81 Cal.App.4th 1, 16.) Where, however, the facts demonstrate that defendant possessed some methamphetamine for sale and some for personal use, there is separate and distinct conduct which would support convictions for both the possession of narcotics for sale and possession of narcotics for personal use. (See *People v. Moseley* (2008) 164 Cal.App.4th 1598, 1604; *People v. Fortier* (1970) 10 Cal.App.3d 760, 765-766; *People v. Tenney* (1958) 162 Cal.App.2d 458, 463.)

Here, the officers found an operable gram scale, a significant quantity of methamphetamine in four separate baggies, empty plastic baggies, and test tubes with evidence of white residue. Appellant's cell phone was found in the bathroom on top of a stack of towels. Three baggies of methamphetamine were underneath the towels. A reasonable inference can be drawn that this evidence, along with the significant quantities of methamphetamine found, indicated appellant was selling methamphetamine. There was additional evidence, however, that appellant was under the influence of methamphetamine when he answered the door. One of the three baggies found under the cell phone and towel had a smaller quantity of methamphetamine. Clearly appellant was personally using methamphetamine as well as selling it. We conclude there was evidence

that appellant had multiple objectives and was not just selling methamphetamine. Under these circumstances, appellant could be convicted of both possession of methamphetamine for sale and simple possession of methamphetamine.

DISPOSITION

The judgment is affirmed.