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

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD HERFURTH,

Defendant and Appellant.

F067181/F068039

(Super. Ct. No. VCF278068)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Darryl B. Ferguson, Judge.

Carol Foster, 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, Daniel B. Bernstein and Craig S. Meyers, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Detjen, J. and Chittick, J.†

† Judge of the Superior Court of Fresno County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Appellant, Richard Herfurth, was charged with possession of concentrated cannabis (Health & Saf. Code, § 11357, subd. (a)), transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)), driving under the influence of alcohol or drugs (Veh. Code, § 23152, subd. (a)), and driving with a blood alcohol content of .08 percent or higher (Veh. Code, § 21352, subd. (b)). He pleaded no contest to possession of concentrated cannabis and driving with a blood alcohol content of .08 percent or higher. The court placed appellant on three years' probation on the former offense and five years' probation on the latter.

Prior to the entry of appellant's pleas, the prosecuting attorney in the case filed a document stating appellant was not eligible for deferred entry of judgment (DEJ)¹ under Penal Code sections 1000, et seq.;² appellant filed a motion requesting DEJ as to, inter alia, the possession offense;³ and the court denied the motion.

On appeal, appellant's sole contention is that there was no evidence supporting the prosecuting attorney's finding that appellant was not eligible for DEJ, and therefore the judgment must be set aside and the matter remanded to allow the court to consider whether to grant appellant DEJ. We affirm.

PROCEDURAL BACKGROUND

Attached to, and filed with, the felony complaint was a form entitled "TULARE COUNTY DISTRICT ATTORNEY DEFERRED ENTRY OF JUDGEMENT/DRUG COURT ELIGIBILITY STATEMENT" (DEJ eligibility form) which stated that "[u]pon review of our file," appellant was found to be not eligible for DEJ "pursuant to [section 1000, subdivision (a)]" for the following reason: "There is evidence of a violation

¹ DEJ is often referred to in the case law as "diversion." (See, e.g., *People v. Hudson* (1983) 149 Cal.App.3d 661 (*Hudson*)).

² Except as otherwise indicated, all further statutory references are to the Penal Code.

³ Appellant also sought DEJ as to the count of transportation of marijuana charged in the felony complaint and subsequently dismissed at sentencing.

relating to narcotics or restricted dangerous drugs other than a violation of the sections listed in [section 1000, subdivision (a)].”

DISCUSSION

“Sections 1000 to 1000.4 allow trial courts to defer the entry of judgment for drug offenders who are charged with and plead guilty to certain drug offenses and who meet other codified criteria. The purposes of the statutory scheme are rehabilitation of the occasional drug user who has committed relatively minor drug offenses and conservation of judicial resources.” (*People v. Sturiale* (2000) 82 Cal.App.4th 1308, 1312-1313 (*Sturiale*)). “Section 1000 sets forth two general criteria of eligibility for judicial consideration of [DEJ]. First, the offense, as charged, must come within the enumerated list of controlled substance offenses.” (*Hudson, supra*, 149 Cal.App.3d at p. 664.) That list, set forth in section 1000, subdivision (a), includes the drug offense of which appellant stands convicted: possession of concentrated cannabis. (§ 1000, subd. (a).) “Second, the district attorney must determine the defendant meets the conditions set forth in subdivisions (a)(1) through (a)(6).” (*Hudson*, at p. 664.) Included among these conditions is the following: “There is no evidence of a violation relating to narcotics or restricted dangerous drugs other than a violation of the sections listed in [subdivision (a) of section 1000].” (§ 1000, subd. (a)(3).)

The eligibility assessment is made by the “prosecuting attorney,” who “shall review his or her file to determine whether or not paragraphs (1) to (6), inclusive, of subdivision (a) apply to the defendant.” (§ 1000, subd. (b); *Sturiale, supra*, 82 Cal.App.4th at p. 1313.) When the prosecuting attorney determines a defendant is ineligible for DEJ, he or she “shall file with the court a declaration in writing or state for the record the grounds upon which the determination is based, and shall make this information available to the defendant and his or her attorney.” (§ 1000, subd. (b).)

Here, as indicated above, the prosecuting attorney filed a DEJ eligibility form in which she stated appellant was not eligible for DEJ because “[t]here is evidence”

appellant committed a disqualifying drug offense and therefore did not meet the eligibility condition set forth in section 1000, subdivision (a)(3). Appellant acknowledges he was charged with such an offense—transportation of marijuana in violation of Health and Safety Code section 11360, subdivision (a)—but, he argues, that charge was later dismissed and there is no evidence he committed that offense or any other disqualifying offense. Therefore, he contends, the judgment must be set aside and the matter remanded to permit the trial court to consider whether to grant DEJ. We disagree.

Regardless of whether there is evidence that appellant does not meet the conditions listed in subdivisions (a)(1) through (a)(6) of section 1000, he is ineligible on another, independent ground: As indicated above, he was charged with a disqualifying drug offense, i.e., a drug offense not listed in section 1000, subdivision (a). On this point we find instructive *Hudson, supra*, 149 Cal.App.3d 661.

In that case, the two defendants were each charged with a qualifying drug offense—possession of cocaine—and a disqualifying drug offense—possession of marijuana for sale. The trial court denied a motion for DEJ made on behalf of both defendants, and thereafter a jury acquitted them of the cocaine possession charge and convicted them of possession of marijuana, which is (1) a lesser included offense of possession of marijuana for sale and (2) a qualifying drug offense. On appeal, the defendants argued for reversal of the judgment and reconsideration of their motion for DEJ on the ground that “they were only convicted of possession of marijuana, an offense making them statutorily eligible for diversion.” (*Hudson, supra*, 149 Cal.App.3d at p. 663.) The appellate court rejected this argument, reasoning as follows:

“In the present case possession of marijuana for sale (Health & Saf. Code, § 11359), is not an offense included in the list of divertible offenses set forth in Penal Code section 1000, subdivision (a), and therefore, at the time of their motion for diversion, defendants were ineligible for diversion under the first criterion [“the offense,

as charged, must come within the enumerated list of controlled substance offenses”], i.e., they were charged with a nondivertable offense. The statutory scheme of Penal Code section 1000 et seq. reveals that diversion is a *pretrial* alternative to further prosecution. [Citations.] Prior to their trial, defendants were never eligible for diversion.” (*Hudson, supra*, 149 Cal.App.3d at p. 664; accord, see *People v. Alonzo* (1989) 210 Cal.App.3d 466, 468, 469 (*Alonzo*) [trial court order granting DEJ reversed; trial court erred in granting pretrial motion for DEJ because defendant, charged with a qualifying drug offense, was not eligible because he was also charged with a disqualifying drug offense]; *People v. Brackett* (1994) 25 Cal.App.4th 488, 500 [defendant charged with both qualifying and disqualifying drug offenses “is not eligible for pretrial diversion even if he is later acquitted of [disqualifying drug] offense,” citing *Hudson* and *Alonzo*].) Thus, even though the defendants were not convicted of possession of marijuana for sale, a disqualifying drug offense, because they were charged with that offense, they were not eligible for DEJ, notwithstanding that they were each convicted of only a qualifying drug offense. Similarly, appellant, although he stands convicted of only a qualifying offense, was never eligible for DEJ because he was *charged* with a disqualifying drug offense. Accordingly, it is beside the point whether or not the ground set forth in the DEJ eligibility statement for finding appellant not eligible lacked evidentiary support. As *Hudson* states, there are two general criteria for determining eligibility for DEJ, and appellant was ineligible under one of them, regardless of whether evidence supported such a finding on the other.

Appellant relies chiefly on *Sledge v. Superior Court* (1974) 11 Cal.3d 70 (*Sledge*). In that case, as here, the district attorney made a finding of ineligibility for DEJ based on section 1000, subdivision (a)(3). Our Supreme Court held that a defendant may not challenge the district attorney’s finding of ineligibility in a pretrial proceeding. Instead, a defendant may raise the issue of whether there was evidence of other drug offenses within the meaning of subdivision (a)(3) of section 1000 on appeal from a judgment of

conviction. A defendant may also raise the issue on appeal from a judgment of conviction after a plea of guilty. (*People v. Hayes* (1985) 163 Cal.App.3d 371, 373.)

The court in *Sledge* also stated that on appeal, the defendant “may raise ... the question whether there was ‘evidence’ as defined herein, of his commission of other narcotics offenses within the meaning of subsection (3) of subdivision (a); if the defendant prevails, the judgment must be set aside and the case remanded to permit the trial court to exercise its discretion to divert the defendant under the remaining portions of the statute.” (*Sledge, supra*, 11 Cal.3d at p. 76, fn. omitted.) The Supreme Court defined the “evidence” required to support the district attorney’s ineligibility determination as “more than mere suspicion or rumor; it means, in this context, reports of actual instances of trafficking or other information showing that the defendant has probably committed narcotics offenses in addition to those listed in the statute.” (*Id.* at p. 75, fn. omitted.)

Appellant argues that the district attorney’s statement in the DEJ eligibility form that appellant committed a disqualifying drug offense does not constitute “evidence” as defined in *Sledge* because (1) it is merely an allegation, i.e., an “assertion made without evidence,” and (2) “it does not on its face evidence that appellant was a member of the class of persons that the statute was designed to exclude from DEJ eligibility.” In support of this second claim, appellant notes that *Sledge* stated: “*Subsection (3) of section 1000, subdivision (a)* is intended by the Legislature to render ineligible for [DEJ] a relatively limited class of persons, i.e., those who are dealing in illegal narcotics but who have never previously been convicted of any drug offense and whom the district attorney cannot or does not choose to charge with drug trafficking.” (*Sledge, supra*, 11 Cal.3d at p. 75, italics added.)

Sledge does not support appellant’s position. As indicated by the portion of the quotation we have italicized in the preceding paragraph, *Sledge* dealt only with the second criterion for eligibility identified in *Hudson*, viz., whether the defendant meets the

conditions set forth in subsections (1) through (6) of section 1000, subdivision (a). The defendant in *Sledge*, unlike appellant, was not charged with a disqualifying drug offense. As demonstrated above, there are two general criteria for determining DEJ eligibility and appellant was rendered ineligible for DEJ under the one not at issue in *Sledge*, viz., whether a defendant is charged with a disqualifying offense. Because appellant was disqualified from DEJ on this basis, it is of no moment whether there was evidence he met the conditions set forth in section 1000, subdivision (a)(1) through (a)(6). Moreover, we note, appellant's disqualification for DEJ is consistent with the purpose of subsection (3) of section 1000, subdivision (a) which, *Sledge* tells us, limits the class of persons eligible for DEJ to those "whom the district attorney cannot or does not choose to charge with drug trafficking." (*Sledge, supra*, 11 Cal.3d at p. 75.) Appellant, by virtue of the charge of transportation of marijuana, does not fall within this class of persons.

DISPOSITION

The judgment is affirmed.