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

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES RILEY THURMAN,

Defendant and Appellant.

F069166

(Super. Ct. No. CRF35339)

OPINION

APPEAL from a judgment of the Superior Court of Tuolumne County. Eric L. DuTemple^{*} and James A. Boscoe, Judges.[†]

Francine R. Tone, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Larenda R. Delaini, Deputy Attorneys General, for Plaintiff and Respondent.

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* Retired Judge of the Tuolumne Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

† Judge DuTemple presided over appellant's trial; Judge Boscoe sentenced appellant.

On April 27, 2011, appellant was arrested after a packet of methamphetamine was discovered on his person. Following a jury trial, appellant was convicted of one count of transporting methamphetamine (count I; Health & Saf. Code, § 11379, subd. (a)),¹ and one misdemeanor count of being under the influence of a controlled substance (count III; § 11550, subd. (a)). Outside the presence of the jury, appellant admitted one prior strike (Pen. Code, § 667, subds. (b)-(i)) and two prison priors (Pen. Code, § 667.5, subd. (b)). Appellant was sentenced to an aggregate term of eight years in prison, and the trial court imposed additional fines and fees.

On appeal, appellant argues that the amended language of section 11379 should be applied retroactively to his case, and that retroactive application requires a reversal of his conviction for transporting methamphetamine. This argument is persuasive, and the judgment will be reversed in part and remanded to the trial court for possible retrial.

FACTS

On April 27, 2011, appellant was approached by a police officer after the officer observed appellant pulling into a driveway. The officer eventually searched appellant, and recovered a bag of methamphetamine from appellant's pants pocket. At trial, it was established that the packet contained 0.4 grams of methamphetamine, approximately four "hit[s]" worth of the drug for a chronic user. The officer also conducted a field sobriety test, which was consistent with a stimulant use, and obtained a urine sample, which tested positive for methamphetamine.

The officer placed appellant under arrest, and appellant was subsequently charged and convicted of transporting methamphetamine and being under the influence of a controlled substance.² This appeal followed.

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

² Appellant originally agreed to a plea agreement, which was vacated by this court in a nonpublished opinion.

DISCUSSION

I. The Amended Language of Section 11379 Applies Retroactively to Appellant’s Conviction for Transportation of Methamphetamine, and that Conviction Must be Reversed

A. Standard of Review

Whether a law is to be applied retroactively or prospectively is a question of law that we review de novo. (*People v. Failla* (2006) 140 Cal.App.4th 1514, 1520.)

B. Analysis

At the time of appellant’s trial, section 11379 prohibited the transportation of methamphetamine, which courts had interpreted to include transportation for personal use. (*People v. Rogers* (1971) 5 Cal.3d 129, 134.) Prior to appellant’s sentencing, however, section 11379 was amended to define ““transports”” as “transport for sale,” and to exclude personal use, effective January 1, 2014. (§ 11379, subd. (c).)

As appellant’s trial took place prior to the statutory amendment, no effort was made at trial to establish that appellant had transported the methamphetamine in question for any reason other than personal use. Absent a savings clause, however, a statutory amendment that benefits a defendant must be applied retroactively to all convictions that are not final at the time the amendment takes effect. (*In re Estrada* (1965) 63 Cal.2d 740, 745; *People v. Rossi* (1976) 18 Cal.3d 295, 298-299.) A conviction is not final until it has reached final disposition in the highest court authorized to review it. (*People v. Rossi, supra*, at p. 304.)

Given the lack of evidence that appellant had any intent to sell the narcotics that were in his possession, the Legislature’s amendment to section 11379 benefitted appellant by imposing an additional element of the charged offense that was not established at trial. Therefore, absent a savings clause, the amendment to section 11379 must be applied retroactively to appellant’s case, so long as appellant’s case was not final

at the time the amendment took place. (*In re Estrada, supra*, 63 Cal.2d at p. 745; *People v. Rossi, supra*, 18 Cal.3d at pp. 298-299.)

Here, as appellant's case has not reached final disposition in the highest court authorized to review it, appellant's conviction was not final on January 1, 2014, the date the amendment went into effect. (*People v. Rossi, supra*, 18 Cal.3d at p. 304; § 11379.) Further, section 11379, as amended, does not contain any explicit savings clause prohibiting retroactive application of the amended statutory language, nor is there any other indication of "clear legislative intent" that the amended statutory language is only to be applied prospectively. (*People v. Rossi, supra*, at p. 299.)

Therefore, as the amendment contained no savings clause and appellant's conviction had not reached disposition when then amendment went into effect, appellant is entitled to the benefit of the additional element, and his conviction for transporting methamphetamine must be reversed. In fact, the People concur with this analysis. This reversal, however, does not preclude the People from retrying appellant under the amended statutory elements of section 11379. Indeed, when a statutory amendment adds an additional element to an offense, the prosecution is afforded the opportunity to establish the additional element upon remand, and such a retrial is not barred by the constitutional prohibition of the double jeopardy clause or ex post facto laws. (*People v. Figueroa* (1993) 20 Cal.App.4th 65, 71-72 & fn. 2.)

DISPOSITION

Given the foregoing, the judgment is reversed with regard to appellant's conviction for transporting methamphetamine, and the matter is remanded to the trial court for possible retrial. The judgment is affirmed in all other respects.

Kane, J.

WE CONCUR:

Levy, Acting P.J.

Franson, J.