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

THE PEOPLE,

Plaintiff and Respondent,

v.

VIENG NGEUN SASONE,

Defendant and Appellant.

F071673

(Super. Ct. No. BF155265B)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Brian M. McNamara, Judge.

Rex A. Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Darren K. Indermill, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Poochigian, J. and Smith, J.

Defendant Vieng Ngeun Sasone was convicted of transportation of marijuana. On appeal, he contends an amendment to the statute under which he was convicted applies to him retroactively. The People concede and we agree. We reverse.

PROCEDURAL SUMMARY

On August 8, 2014, the Kern County District Attorney charged defendant with transportation of marijuana (Health & Saf. Code, § 11360, subd. (a);¹ count 1), possession of marijuana for sale (§ 11359; count 2), and driving with a suspended license (Veh. Code, § 14601.1, subd. (a); count 3).

On April 7, 2015, defendant pled no contest to count 3.

On April 14, 2015, the jury found defendant guilty of count 1, but was unable to reach a verdict on count 2. The trial court declared a mistrial as to count 2. The prosecutor dismissed count 2 on the condition that the verdict in count 1 remain in full force and effect. The parties stipulated that a reversal of the judgment on count 1 would provide the prosecutor another opportunity to pursue count 2.

On May 12, 2015, the trial court granted defendant three years' formal probation with one year of jail time.

DISCUSSION

At the time of defendant's conviction of transportation of marijuana, section 11360, subdivision (a) did not require proof of transportation *for sale*. Transportation for personal use was sufficient. Effective January 1, 2016, however, section 11360 was amended to require proof of transportation for sale (Stats. 2015, ch. 77, § 1), adding an element to the crime and benefitting defendant by decreasing the likelihood that he is guilty of the offense. (See *People v. Vinson* (2011) 193 Cal.App.4th 1190, 1197-1198).

¹ All statutory references are to the Health and Safety Code unless otherwise noted.

The parties agree that the statutory amendment applies to defendant in this case because his judgment is not final and the amendment does not contain a saving clause. (*In re Estrada* (1965) 63 Cal.2d 740, 744, 748 [“where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed”]; *People v. Babylon* (1985) 39 Cal.3d 719, 722 [if the statute does not contain a saving clause, the defendant is entitled to the benefit of the change during the pendency of his appeal]; *People v. Nasalga* (1996) 12 Cal.4th 784, 792-793 [the rule applies to a statutory amendment that effectively adds an element to the crime].)

The jury in this case was asked to decide intent to sell in connection with count 2 only, but the jury was unable to reach a verdict on that count. Accordingly, the jury did not decide this issue. Thus, as the parties agree, the judgment must be reversed. And, as the parties stipulated, the charge in count 2, possession of marijuana for sale (§ 11359), must be reinstated.

DISPOSITION

The judgment of conviction on count 1, transportation of marijuana (§ 11360, subd. (a)) is reversed. The charge in count 2, possession of marijuana for sale (§ 11359), is reinstated. The matter is remanded for possible retrial of both counts 1 and 2.