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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MAN MINH NGUYEN,

Defendant and Appellant.

G045443

(Super. Ct. No. 10WF0900)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Gregg L. Prickett, Judge. Reversed.

David Andreasen, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and
Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

In the middle of the night, police officers discovered defendant Man Minh Nguyen sleeping in his car with the motor running; marijuana was found inside the glove box and trunk of the car. The arresting officers did not see defendant drive the car.

Defendant argues the trial court erred by denying his Penal Code section 1118.1 motion to dismiss the charge of transportation of marijuana, based on the prosecution's failure to prove the element of transportation. The record does not show sufficient evidence at the close of the prosecution's case-in-chief to establish transportation; therefore, the motion should have been granted. We reverse the judgment, and direct that a judgment of acquittal be entered.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

About 2:50 a.m. on April 25, 2010, Garden Grove Police Officer Marcos Alamillo noticed exhaust coming from defendant's car, which was parked on a residential street. Officer Alamillo found defendant in the driver's seat, Tung Lu in the front passenger seat, and a third person, referred to only as Kau, in the rear seat behind defendant; all were asleep. The car was parked in front of Lu's house. The car was registered to defendant; his driver's license showed defendant's residence to be in Fullerton.

Officer Alamillo knocked on the car window to awaken defendant and asked him to present his driver's license and vehicle registration. When defendant opened the glove box to retrieve his registration, Officer Alamillo noticed marijuana inside a glass jar in the glove box. The marijuana was later weighed, and determined to be 4.3 grams. Officer Alamillo and another officer, who responded to the scene, removed the occupants from the car and searched the interior. Officer Alamillo searched the trunk of the car and found 2.04 ounces of marijuana in a jar inside a box, along with Ziploc baggies, air freshener, pipe cleaners, and a scale. The officers did not find any marijuana on defendant when he was searched.

Another police officer, who testified for the prosecution as an expert witness, opined that defendant was transporting marijuana to sell or furnish it; his opinion was based on the totality of the circumstances, including the scale, the baggies, the amount of marijuana in the car, the marijuana's location in two different areas of the car, the large amount of marijuana in the trunk, and the time of night. Three text messages were found on defendant's cell phone. One incoming message, dated February 14, 2010, read: "How much the QP of some bomb?" Another message on the same date in response read: "I got what I gave you for 8." Another incoming message, dated February 26, 2010, read: "Cool. What you got on deck?" The expert witness testified these messages strengthened his opinion that defendant was transporting marijuana on April 25, 2010, for the purpose of selling or furnishing it.

Defendant was charged in an amended information with one count of transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)). At the close of the prosecution's case-in-chief, defendant made a motion to dismiss pursuant to Penal Code section 1118.1, on the ground the prosecution had failed to establish the necessary element of transportation. The court took the motion under submission, and denied it at the close of evidence. The jury found defendant guilty. Imposition of sentence was suspended, and defendant was placed on three years' formal probation; terms and conditions were imposed, including, but not limited to, serving 90 days in county jail. Defendant timely appealed.

DISCUSSION

Defendant argues there was insufficient evidence of the element of transportation because the prosecution failed to prove he drove the car while it contained the marijuana.

In reviewing the denial of a Penal Code section 1118.1 motion, we test the sufficiency of the evidence as it stood at the close of the prosecution's case-in-chief. (*People v. Trevino* (1985) 39 Cal.3d 667, 695.) We independently review the record to

determine whether there is substantial evidence of the existence of each element of the charged offense, considering all the evidence presented by the prosecution and all reasonable inferences that may be drawn from the evidence. (*People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213.) “A reasonable inference “may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work.” [Citation.] It must logically flow from other facts established in the action.’ [Citation.]” (*People v. Velazquez* (2011) 201 Cal.App.4th 219, 231.)

“Transportation of a controlled substance is established by carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character. [Citations.] The crimes [of transportation and possession for sale] can be established by circumstantial evidence and any reasonable inferences drawn from that evidence. [Citations.]” (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1746.) “[T]o satisfy the element of ‘transportation’ . . . , the evidence need only show that the vehicle was moved while under the defendant’s control.” (*People v. Emmal* (1998) 68 Cal.App.4th 1313, 1318.)

The prosecution’s evidence relevant to the transportation charge consisted of the following: Officer Alamillo found defendant asleep in the driver’s seat of his car with the engine running in the middle of the night. The car was parked in front of the home of defendant’s friend, Lu, who was also asleep in the car. Defendant’s driver’s license listed his residence in another city. An expert witness opined defendant was transporting the marijuana, based on the amount and location of the marijuana in the car, and the presence of a scale and baggies, among other things. The expert witness also opined that the text messages defendant sent and received more than two months earlier strengthened his opinion.

Based on this evidence, any inference that defendant’s car was moved while the marijuana was even in the car would be based on pure speculation. Such an inference would not be reasonable, and the trial court should have granted the Penal Code

section 1118.1 motion. There was no evidence defendant was the last person to drive the car or whether the marijuana was in the car the last time it was driven. We acknowledge that the car, the marijuana, and defendant did not simply appear in the location where defendant was arrested. But there is a difference between inferring defendant drove his car to the location, on the one hand, and inferring the marijuana was in the car when he drove it, on the other. The evidence before the trial court at the time the dismissal motion was made does not support a reasonable inference of the latter, and therefore does not satisfy the applicable legal test.¹

DISPOSITION

The judgment is reversed. We direct the trial court to enter a judgment of acquittal.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.

¹ Because of our holding, we need not fully address defendant's separate argument that the trial court erred by failing to instruct the jury, sua sponte, on attempted transportation of marijuana as a lesser included offense. Briefly, because attempted transportation is equally punishable under Health and Safety Code section 11360, subdivision (a), there is not a separate lesser included offense of attempted transportation of marijuana.