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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL WAYNE CAMPBELL,

Defendant and Appellant.

E061360

(Super.Ct.No. RIF1307671)

OPINION

APPEAL from the Superior Court of Riverside County. David A. Gunn, Judge.

Affirmed in part; reversed in part.

Edward Mahler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric Swenson and Barry Carlton, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant appeals from an order placing him on probation following his entry of a plea of guilty to felony possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and misdemeanor counts of being under the influence of a controlled substance (Health & Saf. Code, § 11550) and possession of a device for ingesting controlled substances (Health & Saf. Code, § 11364.1). Defendant contends that the prosecutor erred in finding he was not eligible for deferred entry of judgment; his conviction of possession of methamphetamine must be reduced to a misdemeanor under Proposition 47; and the trial court erred in imposing certain fines and fees.

We conclude the record does not contain sufficient evidence to support the trial court's finding of defendant's ability to pay certain fines and fees. In all other respects, we affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

Our statement of facts is taken from the record of the preliminary hearing. On July 25, 2013, pursuant to a search warrant, police officers searched the mobilehome, which defendant shared with his girlfriend, Denise Ackerly. When the officers arrived, defendant and his girlfriend were in the single bedroom, which contained both male and female clothing. Both defendant and his girlfriend appeared to be under the influence of methamphetamine.

During the search, the police found a bag on the floor near the bed which contained 8.29 grams of a white crystalline substance, which tested positive for methamphetamine. They also found a makeup bag on the floor below a shelf in the hallway/bathroom. Inside the bag was an envelope with the name Denise written on it and a pouch containing .97 grams of methamphetamine.

The police also found more than 50 unused sandwich size plastic baggies, a digital scale, a pellet or BB gun under a nightstand next to the bed, and \$30 or \$40 in cash on the nightstand. Another digital scale was found in the living room. Empty baggies that appeared to have residue of suspected methamphetamine were found in a plastic bin in the bedroom. The police found two cellular phones, one of which contained text messages that appeared to relate to the sale of narcotics, but they did not determine who owned either phone. A television set on top of a dresser in the bedroom was hooked up to a closed-circuit monitoring system, with a camera positioned toward the street, behind the residence; the television set was displaying a live view toward the entrance of the mobilehome park.

Based on the “large quantity” of methamphetamine found in the mobilehome, as well as the digital scales and packaging, the closed-circuit television system, and the text messages, a detective opined that the methamphetamine was possessed for the purpose of sales.

Additional facts are set forth in the discussion of the issues to which they pertain.

DISCUSSION

Eligibility for Deferred Entry of Judgment

Defendant contends that the prosecutor erred in finding he was not eligible for deferred entry of judgment.

Additional Background

Defendant requested deferred entry of judgment under Penal Code section 1000, but the prosecutor determined he was not eligible because “there’s evidence or indicia of sales in this case. It has already gone to prelim, and [defendant] was held to answer on the sales case. The People . . . only charge[d] possession in the Information, however.”

Defendant obtained a certificate of probable cause to appeal the denial of deferred entry of judgment.

Analysis

Under deferred entry of judgment, a defendant pleads guilty to the charged offenses and is then placed on probation under terms and conditions, including completing a drug program. If the program is successfully completed, the charges are dismissed. (Pen. Code, § 1000.3; *Terry v. Superior Court* (1999) 73 Cal.App.4th 661, 664.)

A person charged with specified drug-related offenses, including a violation of Health and Safety Code section 11377, can participate in deferred entry of judgment if all of the following apply:

“(1) The defendant has no conviction for any offense involving controlled substances prior to the alleged commission of the charged offense.

“(2) The offense charged did not involve a crime of violence or threatened violence.

“(3) There is no evidence of a violation relating to narcotics or restricted dangerous drugs other than a violation of the sections listed in this subdivision.

“(4) The defendant’s record does not indicate that probation or parole has ever been revoked without thereafter being completed.

“(5) The defendant’s record does not indicate that he or she has successfully completed or been terminated from diversion or deferred entry of judgment pursuant to this chapter within five years prior to the alleged commission of the charged offense.

“(6) The defendant has no prior felony conviction within five years prior to the alleged commission of the charged offense.” (Pen. Code, § 1000, subd. (a).)

Subdivision (a)(3) is the only condition of eligibility at issue in this case.

The prosecutor has the initial responsibility of determining if a defendant satisfies the requirements for participation in deferred entry of judgment based on the information contained in the prosecutor’s file. (Pen. Code, § 1000, subd. (b); *People v. Hayes* (1985) 163 Cal.App.3d 371, 374.) That determination is not considered a judicial act, but is a preliminary screening for eligibility. (*Sledge v. Superior Court* (1974) 11 Cal.3d 70, 72, 75 (*Sledge*)). The trial court has no power to review the prosecutor’s unilateral determination of ineligibility. (*People v. Sturiale* (2000) 82 Cal.App.4th 1308, 1313-1314.) “Although fact finding is a traditional judicial function, the task of the district attorney under the diversion statute is not to resolve conflicts but instead to review the evidence in his files to determine whether they show that ‘defendant has probably

committed narcotics offenses in addition to those listed in the statute.’ [Citation.] In making that determination, ‘the district attorney need not have information sufficient to prove possession for sale in order to file a declaration of diversion ineligibility.’ [Citation.] If there is substantial evidence to support that determination, it will be upheld on appeal, even in close cases. [Citation.] If there is not, then 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.’ [Citation.]” (*People v. Brackett* (1994) 25 Cal.App.4th 488, 500.)

In *Sledge*, the court explained the showing necessary for the prosecutor to preclude a defendant from participating in deferred entry of judgment: “The statute specifies there must be ‘evidence’ that the defendant is a member of that class before he can be excluded. ‘Evidence,’ of course, means 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.” (*Sledge, supra*, 11 Cal.3d at p. 75.)

In *People v. McAlister* (1990) 225 Cal.App.3d 941 (*McAlister*), the court applied the *Sledge* definition of “evidence” to the facts before it: “While there was no evidence of actual trafficking, the evidence discovered at defendant’s residence was sufficient to support the district attorney’s determination that defendant had probably engaged in sales of cocaine. The issue is a close one, since many of the usual indicia of drug sales were missing, such as significant quantities of contraband, cash, diluting agents, or packaging. The absence of these items, however, is not determinative since the district attorney need

not have information sufficient to prove possession for sale in order to file a declaration of diversion ineligibility. [Citation.] The evidence was not entirely consistent with personal use only. While it is possible that a personal user might be found in possession of a scale and perhaps a sifter, here defendant had two each of these items, in addition to two cocaine bindles and two coin bags and three glass vials with white powder residue. Defendant was also found in possession of two empty bindles, several empty coin bags, and one empty small glass vial. It was reasonable for the district attorney to infer that the items with white powder residue had been used by defendant in past sales of cocaine and that the items without residue would be used in future sales. Furthermore, although the amount of cocaine seized was relatively small, it arguably could have supported a possession for sale conviction. [Citations.] *A fortiori*, it was sufficient to support the ineligibility determination.” (*McAlister*, at pp. 945-946.)

The facts of the present case are similar to those of *McAllister*. Here, defendant was found in possession of two digital scales, more than 50 unused baggies and a number of baggies containing apparent residue, a cellphone that contained text messages apparently related to drug sales, and an operating closed-circuit television system, with a camera directed toward the entrance of the mobilehome park. Most significantly, the quantity of methamphetamine found was consistent with possession for the purpose of sales. An officer testified as to his expert opinion that defendant possessed the methamphetamine for the purpose of sales.

Defendant argues that the *McAllister* court's assessment of the evidence was inconsistent with the standard set forth in *Sledge*, which held that the information must show that it was *probable* that the defendant was engaged in drug sales, not merely that the evidence would have been sufficient to support holding the defendant to answer or to convict him on such a charge. “““The term, probable, has been defined as meaning ‘having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt.’ [Citations.]””” (*People v. Hutson* (1960) 177 Cal.App.2d 595, 598.) The evidence in the record here amply meets that standard.

Defendant also argues that the evidence was insufficient to establish possession for sales because two people occupied the mobilehome, and it would be surmise that he either individually or jointly possessed the items found. However, the trial court found that the evidence was overwhelming that defendant and his girlfriend were “clearly each connected to each other and to the drugs.” Based on the record of the preliminary hearing, we agree with that conclusion.

Reduction of Offense Under Proposition 47

Defendant next contends his conviction for felony possession of methamphetamine must be reduced to a misdemeanor under Proposition 47. (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014).)

Additional Background

While this appeal was pending, defendant petitioned the trial court to have his felony conviction reduced to a misdemeanor, and the trial court granted the request.

Defendant contends the issue is nonetheless not moot. Under Penal Code section

1170.18, subdivision (k), “Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under [the chapter of the Penal Code prohibiting firearm access by persons with certain criminal convictions].”

As a general rule, a statute reducing the punishment for a crime applies in all cases not yet final on appeal unless the Legislature or electorate has clearly indicated an opposite intent. In *People v. Shabazz* (2015) 237 Cal.App.4th 303 (*Shabazz*), the defendant had pleaded no contest to methamphetamine possession (Health & Saf. Code, § 11377, subd. (a)) and receiving stolen property (Pen. Code, § 496, subd. (a)). (*Shabazz*, at p. 307.) While his appeal was pending, but after he had completed his sentence for those convictions, Proposition 47 was adopted. The court addressed whether it was required to reduce his felony convictions to misdemeanors. The court framed the retroactivity question as whether the voters intended that the amendatory provisions reducing specified crimes to misdemeanors should be automatically applied on appeal. (*Shabazz*, at p. 312.) The court observed that because Proposition 47 and Penal Code section 1170.18 included provisions that addressed both persons currently serving sentences for the specified crimes (Pen. Code, § 1170.18, subd. (a)) and persons who had completed their sentences for those crimes (Pen. Code, § 1170.18, subd. (f)), the voters intended those to be the sole remedies for securing lesser punishment. (*Shabazz*, at p. 313.)

We agree with the reasoning and conclusion of the court in *Shabazz*. Defendant has already availed himself of the remedy provided in Penal Code section 1170.18, subdivision (b), the only remedy available to him. Penal Code section 1170.18, subdivision (k), specifies that he is still subject to restrictions on firearm possession.

Fines and Fees

Defendant contends the trial court erred in imposing various fines and fees. Defendant challenges the imposition of probation supervision fees, drug education fees, and booking fees on the ground that the trial court never actually ordered him to pay those fees and did not know the amount of the fees it was imposing. He argues that the trial court made a boilerplate finding that he had the ability to pay attorney fees in the amount of \$239 but made no findings as to any other fees and delegated its discretionary authority to an unknown “they.” Finally, he asserts the trial court failed to follow statutory procedure in determining his ability to pay fees and contends the evidence failed to show he had such ability.

Additional Background

After accepting defendant’s guilty plea, the trial court imposed 36 months of probation with “all other terms and conditions.” The court stated, “I’m going to place you on . . . probation on all the terms indicated.” The court referred to the “forms that I have up here,” which apparently included the sentencing memorandum. The sentencing memorandum indicated the imposition of a drug program fee and penalty assessment of \$200 under Health and Safety Code section 11372.7; a booking fee of \$434.08 under Government Code section 29550; and probation supervision costs of \$591.12 to \$3,744

under Penal Code section 1210. The sentencing minute order shows the same fees and costs were imposed, except that the drug program fee under Health and Safety Code section 11372.7 was set at \$190. The sentencing memorandum also showed a “Recorse” fee of \$1,139.36 and attorney fees of \$239.

Defendant’s attorney requested the court address defendant’s ability to pay. Defendant told the court he was a sheet metal worker, but said he had been unemployed for five years. He lived with his girlfriend, who paid for everything; although the girlfriend was not working, she received money from her mother. The trial court stated it would strike the “Recorse” fee and would assess two hours of attorney fees at \$119.50 an hour with 30 days to pay.

Defendant Has Forfeited All Challenges Except Ability to Pay

Although defendant raises a multipronged challenge to the imposition of fines and fees, the only issue he raised at the sentencing hearing was his ability to pay. He has therefore forfeited all other challenges. (*People v. Aguilar* (2015) 60 Cal.4th 862, 867-868; *People v. Trujillo* (2015) 60 Cal.4th 850, 858.)

The Record Contains Insufficient Evidence of Ability to Pay

Each of the statutes under which the challenged fees were imposed contains an ability to pay provision. (Health & Saf. Code, § 11372.7, subd. (b); Gov. Code, § 29550, subd. (d)(2); Pen. Code, §§ 987.2, subd. (b), 1203.1b, subd. (a).) To preserve an issue of ability to pay fines and fees, a defendant must raise the issue before the sentencing court. (*People v. Trujillo, supra*, 60 Cal.4th at p. 858; *People v. Aguilar, supra*, 60 Cal.4th at

pp. 867-868.) Here, defendant's attorney requested a hearing on defendant's ability to pay, and the trial court questioned defendant about his financial circumstances.

With respect to an order imposing attorney fees, there must be sufficient evidence of the defendant's "present ability" to pay. (Pen. Code, § 987.8, subd. (b); see *People v. Verduzco* (2012) 210 Cal.App.4th at 1406, 1421.) "'Ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs" (Pen. Code, § 987.8, subd. (g)(2).) "Ability to pay" requires consideration of the defendant's "present financial position," defendant's reasonably discernable future financial position over the subsequent six months following the hearing, the likelihood defendant will be able to obtain employment in six months, and any factors that may weigh on defendant's financial capability to reimburse the county. (Pen. Code, § 987.8, subd. (g)(2); see *Verduzco*, at p. 1421; *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217.) "'[T]he court [must] consider what resources the defendant has available and which of those resources can support the required payment,' including both the defendant's likely income and his or her assets." (*Verduzco*, at p. 1421.)

As recounted, *ante*, defendant represented to the court that he had no income and had been unemployed for five years, although he was looking for work. He lived with his girlfriend, who was also unemployed, and whose expenses were paid by her mother. The People argue that "[i]t appears that, based on the information [defendant] provided, the court concluded he could pay the ordered fees." However, the record contains *no* evidence supporting such a conclusion. We conclude the probation supervision fees, drug education fees, booking fees, and attorney fees must be reversed.

DISPOSITION

The probation supervision fees, drug education fees, booking fees, and attorney fees are reversed. In all other respects, the judgment is affirmed.

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McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.