

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S260130

THE PEOPLE,
Plaintiff and Respondent,

v.

TREYVON LOVE OLLO,
Defendant and Appellant.

Court of Appeal of California
Second District, Division Two
No. B290948

Superior Court of California
Los Angeles County
No. KA115677

Appellant's Opening Brief on the Merits

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Appellant's Opening Brief on the Merits

ISSUE PRESENTED FOR REVIEW

When a drug user voluntarily ingests drugs provided by a defendant, and those drugs result in an overdose or other injury, is the defendant always subject to the sentence enhancement for personal infliction of great bodily injury (Pen. Code, § 12022.7), regardless of the specific facts?

STATEMENT OF THE CASE

I. The Proceedings Below

On April 26, 2018, a jury convicted appellant of furnishing a controlled substance, Fentanyl, to a minor ([Health & Saf. Code, § 11353](#)); and found true an allegation of personal infliction of great bodily injury (GBI) ([Pen. Code, § 12022.7, subd. \(a\)](#)).

Appellant moved to dismiss the GBI enhancement, arguing that there was insufficient evidence to support the enhancement based on [People v. Slough \(2017\) 11 Cal.App.5th 419](#).

On May 21, 2018, the court denied appellant's motion. The court sentenced appellant to the upper term of nine years, plus three years for the enhancement, for a total of twelve years in prison.

Appellant appealed, arguing that the trial court violated appellant's constitutional rights by improperly precluding trial counsel from arguing in his summation that the prosecution had

not proven the personal infliction element of the GBI enhancement based on the victim's volitional act of taking the drugs.

On December 5, 2019, the Second District Court of Appeal, Division Two, affirmed the judgment. (*People v. Ollo* (2019) 42 Cal.App.5th 1152.) This Court granted review.

II. Statement of Facts

Appellant, age eighteen, texted his sixteen-year-old girlfriend, R., that he had some "coke", and she came over that night. Appellant gave her some white powder that he believed to be cocaine, but which was actually a lethal dose of the far more potent drug Fentanyl. R. cut the powder into lines and snorted a single line up her nose. Appellant did not partake. R. passed out within half an hour in appellant's bed, and appellant went to sleep in the same bed. R. died at some point during the night of Fentanyl overdose.

ARGUMENT

When A Drug User Voluntarily Ingests Drugs And Those Drugs Result In An Overdose Or Other Injury, The Question of Whether the Person Who Furnished The Drugs Is Subject To Sentence Enhancement For Personal Infliction Of Great Bodily Injury Is Fact Specific; The Trial Court's Preclusion of This Defense Violated Appellant's Right To Due Process.

A. Trial Court Proceedings

Appellant brought a motion to dismiss the GBI enhancement, which the trial court denied. ([Pen. Code, § 1118.1](#)) (3 RT 646–647.) Trial counsel argued that there was insufficient evidence to support the enhancement based on *People v. Slough, supra*, [11 Cal.App.5th 419](#). In that case, the appellate court found that the defendant's act of providing the fatal dose of drugs was not sufficient to support a GBI enhancement. But the trial court found that the instant case was more similar to *People v. Martinez* (2014) [226 Cal.App.4th 1169](#), in which the defendant and the victim were sleeping in the same bed when the victim died, after the defendant had given her drugs and alcohol. (3 RT 649–650.) The trial court precluded trial counsel from arguing in his summation to the jury, that the prosecution had not proven the personal infliction element of the GBI enhancement based on the victim's volitional act of taking the drugs, finding that such argument was precluded by *Martinez*. (3 RT 651–655.)

The trial court explained this as follows.

THE COURT: ...[T]he [*Martinez*] court ... said that's unavailing. Not available. Can't do it. That's the way

I interpret it. I think it's contrary to the law. Again I realize there is factual distinctions [sic] and you have your case and all of that, and unfortunately there's no case that's directly on point, but they said that even if a person voluntarily takes drugs, that does not preclude a defendant from being found guilty of personally inflicting great bodily injury.

TRIAL COUNSEL; Doesn't preclude, but I can still argue.

THE COURT: But you can't argue to the contrary of that. They're saying here, the fact that she voluntarily took the drugs doesn't mean he didn't personally inflict great bodily injury. So you can't turn that around and say she voluntarily took the drugs, therefore he can't be found guilty or in violation of great bodily injury. That's inconsistent.

So you know, you might be right, I might be wrong, but my best view is to stick with what I mentioned earlier. I think if your argument is going to be that she brought the drugs, then, yeah, she took them on her own, that's fair game. If your argument is going to be he gave her the drugs -- if you believe he gave her the drugs, he's not responsible because she voluntarily took them, I don't think that can be done because I think it's in contravention to this case [*Martinez*].

Trial counsel objected, based on appellant's Fifth, Sixth and Fourteenth Amendment rights as well as the caselaw. (3 RT 654–655.)

B. Court of Appeal Opinion

The Court of Appeal held that “a defendant’s act of furnishing drugs and the user’s voluntary act of ingesting them constitute concurrent direct causes, such that the defendant who so furnishes personally inflicts great bodily injury upon his victim when she subsequently dies from an overdose.” (*People v. Ollo, supra*, 42 Cal.App.5th at p. 1158, Slip Opinion, pp. 6–7.)

The Court of Appeal disagreed with *Slough*, finding that the factual differences between *Slough* and *Martinez* were not significant to its analysis, because in its interpretation of the law, the user’s voluntary act of ingesting the drugs *never* precludes a finding of personal infliction by the drug provider.

...[A] concurrent direct cause of an injury remains such even if the act and injury are separated by time and space. By placing dispositive weight on the temporal and spatial distance between the defendant’s conduct of furnishing and the victim’s act of ingesting, *Slough* contravenes this principle of direct concurrent causation. *Slough* ...effectively treats the victim’s ingestion as an intervening or superseding cause (albeit an entirely foreseeable one). Because superseding cause is a concept relevant to proximate causation, it is irrelevant to the very different question of direct causation.

(*Ollo, supra*, at pp. 1158–1159, Slip Opinion, p. 8, citations omitted.)

Thus, the Court of Appeal upheld the trial court’s decision to not allow appellant’s counsel to argue that the prosecution had not proven the personal infliction element of the enhancement,

recognizing that its “disagreement with *Slough* means that, under our holding, drug dealers are liable for additional prison time *whenever* the persons to whom they furnish drugs are subjected to great bodily injury due to their drug use.” (*Id.* at p. 1159, Slip Opinion, p. 8, emphasis added.)

C. Standard of Review

A court’s ruling on matters of law is reviewed de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 894.) The trial court has discretion to control the duration and limit the scope of closing argument. (*Pen. Code*, § 1044; *Herring v. New York* (1975) 422 U.S. 853, 862.) But where, as here, a decision rests on an error of law, the court has abused its discretion. (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 742; *In re Anthony M.* (2007) 156 Cal.App.4th 1010, 1016.)

D. The Personal Infliction Sentence Enhancement

Section 12022.7, subdivision (a), provides that “[a]ny person who *personally inflicts* [GBI] on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years.” (Italics added.)

The meaning of the statutory requirement that the defendant *personally inflict* the injury does not differ from its nonlegal meaning. Commonly understood, the phrase “personally inflicts”

means that someone “in person”, that is, directly and not through an intermediary, causes something damaging or painful to be endured. (*Martinez, supra*, 226 Cal.App.4th at p. 1184.)

In enacting [section 12022.7](#), the Legislature intended to impose an additional penalty for causing GBI only on those principals who perform the act that directly inflicts the injury. The defendant must directly cause an injury, not just proximately cause it. Accordingly, one who merely aids, abets, or directs another to inflict the physical injury is not subject to the enhanced penalty of [section 12022.7](#). (*Slough, supra*, 11 Cal.App.5th at p. 423, citing *People v. Cole* (1982) 31 Cal.3d 568 and *People v. Guzman* (2000) 77 Cal.App.4th 761.)

Although [section 12022.7, subdivision \(a\)](#), is broadly construed, “our Supreme Court has made clear that proximate cause does not equate with personal infliction and that “[t]he Legislature is aware of the difference.” (*Slough, supra*, 11 Cal.App.5th at p. 424, citations omitted, quoting *People v. Bland* (2002) 28 Cal.4th 313, 336.)

E. The *Slough* and *Martinez* Decisions

In *Slough*, the victim died of a drug overdose and the jury found the defendant, who had supplied heroin to the victim at the victim's request, personally inflicted GBI within the meaning of [section 12022.7](#). (*Slough, supra*, at p. 422.) The Court of Appeal reversed the GBI finding and, in doing so, it distinguished *Martinez, supra*, 226 Cal.App.4th 1169.

Martinez gave his victim more than a dozen methadone and hydrocodone pills while the two drank alcohol together. In

concluding the evidence was sufficient to support the GBI enhancements, the *Martinez* court reasoned that “More than one person may be found to have directly participated in inflicting a single injury.” (*Martinez*, 226 Cal.App.4th at p. 1185.) “Appellant may not have forced [the victim] to take a lethal quantity of drugs, but he supplied her with them knowing that the drugs were more dangerous when combined with alcohol. Appellant continued to supply drugs to [the victim] as he watched her continue to consume alcohol and become [more] intoxicated.... Appellant's act of personally providing [the victim] a lethal quantity of drugs while she was in an intoxicated state was the direct cause of [the victim's] death.” (*Id.* at p. 1186.)

The *Slough* court emphasized that “[i]n *Martinez*, the defendant repeatedly supplied drugs to the victim while observing her increasing intoxication; the furnishing was akin to administering. [*Slough*], by contrast, played no part in [his victim]'s ingestion of the drugs. He neither performed nor participated in the act that directly inflicted the injury, so the GBI enhancement cannot apply.” (*Slough*, 11 Cal.App.5th at p. 425.)

The *Slough* Court further explained that the contrasting “result in *Martinez* is also consistent with the requirement that the personal infliction of GBI occur ‘in the commission of a felony....’ (Pen. Code, § 12022.7, subd. (a).) In *Martinez*, defendant’s acts were ongoing when the injury was inflicted; in *Slough*, the drug dealer and user went their separate ways after exchanging money for drugs and the dealer was not present when the user ingested the overdose. Thus, the crime of furnishing the drug had concluded and was complete when the GBI occurred.

The *Slough* Court also pointed out that any concern that a seller or furnisher of illegal drugs cannot otherwise be punished for GBI or death proximately resulting from the use of the drugs is allayed by the potential to charge a homicide. (*Slough*, at p. 425, fn. 3.)

F. Providing Drugs To A Drug User Who Overdoses Should Not Automatically Be Considered Personal Infliction Of GBI, As Exemplified By The Tragic Case Here.

In the instant case, although appellant was with R. when she took the drug, she self-administered only a single small dose, and died at some point later. Appellant did not give her more and more as in *Martinez*. He did not know the true nature of the substance R. took and that a single snort would be fatal. The two were not drinking, nor was R. in an intoxicated state at the time she took the drug. The felony of giving a minor drugs had concluded and was complete at the time that R. died.

The Court of Appeal concluded that these specific facts were irrelevant because “a defendant’s act of furnishing drugs and the user’s voluntary act of ingesting them constitute concurrent direct causes, such that the defendant who so furnishes personally inflicts great bodily injury upon his victim when she subsequently dies from an overdose” -- *in every case*. (*Olo*, *supra*, at p. 1158, Opinion, pp. 6–7.)

The Court of Appeal based this in part on precedent it construed as holding that when the acts of more than one person combine to inflict great bodily injury, each of those persons has directly caused that injury and each has personally inflicted that

injury. (E.g., *People v. Modiri* (2006) 39 Cal.4th 481, 486 [multiple assailants engaged in a group attack.]) The Court also relied on cases holding that a defendant may be liable for personal infliction under [section 12022.7](#) even if the injury is inflicted accidentally (*People v. Guzman, supra*, 77 Cal.App.4th at p. 764), and even if the injury occurs some time after the defendant's act (*People v. Cross* (2008) 45 Cal.4th 58, 66, 68–69 [defendant's act of engaging in sexual intercourse may be a direct cause of subsequent conception and pregnancy]). (Opinion, p. 6.)

However, none of these cases applied the personal infliction enhancement in a blanket fashion to general fact patterns. *Modiri* held only that those who participate directly and substantially in a group beating should not be *immune* from a personal-infliction finding for the sole reason that the resulting confusion prevents a showing or determination of this kind. (*People v. Modiri, supra*, 39 Cal.4th at pp. 496–497.) This Court's *Modiri* analysis is specific to group beatings where it may be difficult to determine who struck the fatal blow. *Modiri* still requires that the physical force personally applied by the defendant must have been sufficient to produce great bodily injury either (1) by itself, or (2) in combination with other assailants, excluding persons who merely assist someone else in producing injury, and who do not personally and directly inflict it themselves. (*Id. at p. 494.*) Thus, the inquiry is fact-dependent.

The Court of Appeal Opinion also cites *People v. Guzman* for the proposition more than one person can personally inflict the same injury. In *Guzman*, the defendant, while intoxicated, made an unsafe left turn in front of another vehicle, which as a result crashed into Guzman's car, and a passenger in the other vehicle

was injured. The Court of Appeal upheld imposition of the personal infliction enhancement because *Guzman*'s volitional act was the direct cause of the collision and therefore the direct cause of the injury. More than one person may be found to have directly participated in inflicting a single injury. (*Guzman, supra*, 77 Cal.App.4th at p. 764.) However, the *Guzman* Court did not hold that the enhancement necessarily applies to *all* drivers who are at fault in car accidents involving injury. For example, in *People v. Valenzuela*, also cited in the Court of Appeal Opinion, the appellate court held that the defendant's admission that he drove recklessly and proximately caused GBI was insufficient to prove personal infliction without proof that the defendant "directly, personally, himself" inflicted the injury. (*People v. Valenzuela* (2010) 191 Cal.App.4th 316, 322.)

People v. Cross, cited in the Opinion, dealt with the question of what constitutes GBI, holding that in some cases, a jury can reasonably find pregnancy of a 13-year-old to constitute GBI. (*People v. Cross, supra*, 45 Cal.4th at p. 66.) Again, the question is fact-specific: this Court did not hold in *Cross* that *every* act of unlawful sexual intercourse that results in pregnancy is always subject to the personal infliction enhancement.

The Court of Appeal in the instant case explained that its "conclusion is consistent with the purpose of [section 12022.7](#) to punish (and hence deter) those defendants who themselves directly cause the injury; indeed, "[a] contrary [conclusion] would mean that those who" personally furnish drugs that cause a fatal overdose "would often evade enhanced punishment." (*Ollo, supra*, at p. 1158, Slip Opinion p. 7.)

However, it is applying the enhancement to all drug providers *whenever* the drugs cause injury that would lead to an incongruous result. If this Court adopts the blanket rule proposed by the Court of Appeal, any unwitting drug buyer who shares what he thinks is a safe quantity of cocaine would always be punished more severely than the drug dealer who substituted the lethal dose of fentanyl for cocaine, or the manufacturer flooding the market with inexpensive fentanyl. The dealer or manufacturer would never subject to a personal infliction enhancement in this kind of case because they did not give the drug directly to the person who died.

The Court of Appeal also based its conclusion on [section 12022.7, subdivision \(g\)](#), which spells out specific crimes to which the personal infliction enhancement is inapplicable (murder, manslaughter, or arson). The Court reasoned that “Were we to conclude that a victim’s voluntary ingestion of a drug furnished by another breaks the causal chain as a matter of law, we would effectively be adding the crime of furnishing controlled substances to subdivision (g)’s list.” (*Ollo, supra*, at p. 1158. Slip Opinion, p. 7.) This reasoning is flawed because appellant does not contend that one who gives or sells drugs to another person who then overdoses *never* personally inflicts GBI. Rather, appellant contends that the answer to this question should depend on the facts.

For example, in *Martinez*, appellant supplied the victim with drugs knowing that the drugs were more dangerous when combined with alcohol, and continued to supply her with more drugs as he watched her continue to consume alcohol and become increasingly intoxicated. “Appellant’s act of personally providing

Ms. Groveman a lethal quantity of drugs while she was in an intoxicated state was the direct cause of Ms. Groveman's death.”(*Martinez*, 226 Cal.App.4th at p. 1186.). As the *Slough* court observed, Martinez’ “furnishing was akin to administering.” (*Slough*, 11 Cal.App.5th at p. 425.) By contrast in *Slough*, the defendant handed off drugs to the user in exchange for money. After that, they each went their separate ways. “Slough played no part in [the user]’s ingestion of the drugs. He neither performed nor participated in the act that directly inflicted the injury, so the GBI enhancement cannot apply. (*Ibid.*)

The instant case is more similar to *Slough* than to *Martinez*. Appellant simply gave R. the drug. There was no evidence that he was drinking with her or repeatedly gave her more and more drugs while she became increasingly intoxicated, and thus lost volitional control and became more and more susceptible to overdose from the combination of drugs and alcohol. Moreover, as in *Slough*, appellant’s felony of providing her with drugs had concluded and was complete at the time that R. tragically died.

This Court should hold that when a drug user voluntarily ingests drugs provided by a defendant, and those drugs result in overdose or other injury, the question of whether the defendant is subject to sentence enhancement for personal infliction of GBI must be determined based on the specific facts.

This Court should also find that precluding appellant from arguing at trial that the evidence was insufficient to support personal infliction of GBI violated appellant’s constitutional right to due process, and reverse the enhancement finding. (See

Herring v. New York, supra, 422 U.S. at p. 865; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734; *United States v. Kellington* (9th Cir. 2000) 217 F.3d 1084, 1099–1100.)

CONCLUSION

For the foregoing reasons, this Court should hold that when a drug user who voluntarily ingests a drug suffers great bodily injury as a result of that drug, the question of whether the person who provided the drug is subject to the sentence enhancement for personal infliction of great bodily injury ([Pen. Code, § 12022.7](#)) should be determined based on the specific facts, reverse the enhancement finding and remand for resentencing.

Respectfully submitted,

Dated: July 6, 2020

By: /s/ Rachel Lederman

Attorney for Appellant
Treyvon Love Olo

CERTIFICATE OF COMPLIANCE

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Dated: July 6, 2020

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