Filed 3/8/12 In re Lincoln A. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re LINCOLN A., a Person Coming Under the Juvenile Court Law.	B233260 (Los Angeles County Super. Ct. No. FJ48336)
THE PEOPLE, Plaintiff and Respondent, v. LINCOLN A., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Robert J. Totten, Commissioner. Reversed.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, and Michael J. Wise, Deputy Attorney General, for Plaintiff and Respondent.

Minor Lincoln A. appeals from the order declaring him a ward of the juvenile court after the court found he had possessed marijuana for sale in violation of Health and Safety Code section 11359. Appellant contends there is insufficient evidence to support the order. We agree and reverse the order.

PROCEDURAL BACKGROUND

In a single felony count petition filed in juvenile court on January 21, 2011, pursuant to Welfare and Institutions Code section 602, the district attorney alleged that appellant possessed marijuana for sale, in violation of Health and Safety Code section 11359.

After a contested adjudication and appellant's unsuccessful motion to dismiss based on insufficient evidence (Welf. & Inst. Code, § 701.1), the court sustained the petition and subsequently declared appellant a ward of the juvenile court. Custody and control of appellant were removed from his parents and he was ordered suitably placed at a juvenile rehabilitation facility. The court declared the offense a felony, set the maximum confinement period at three years and awarded appellant predisposition credits.

FACTUAL BACKGROUND

On the afternoon of November 22, 2010, Los Angeles Police Department (LAPD) Officer Bruce O'Bryant and his partner were searching for appellant, whom Officer O'Bryant knew from past contacts and who had been reported as a runaway. Officer O'Bryant saw appellant on a bike and stopped him. Appellant denied being a runaway, but later admitted he was the person for whom Officer O'Bryant was searching. Appellant smelled strongly of marijuana as the officers approached him.

Officer O'Bryant's partner asked appellant if he "had anything on him." Appellant said he had "'stress'" (slang for marijuana) in his pocket. Officer O'Bryant found four baggies of similar size, each of which contained a substance later identified as marijuana in appellant's pocket. A criminalist determined the baggies contained a total net weight of 1.64 grams of marijuana.

At the time of the adjudication, Officer O'Bryant had had 30 hours of training in narcotics and narcotics recognition at the police academy, had worked for 15 years for the LAPD, had made numerous arrests involving narcotics, had conducted over 200 narcotic-related investigations and had testified as an expert in the area of narcotics and narcotics sale investigations more than 80 or 90 times. Officer O'Bryant opined that appellant possessed a "usable" amount of marijuana and he believed he possessed the drugs for sale. His opinion was based on the fact that appellant had multiple baggies, the nature of the packaging (individual bindles uniformly packaged in small usable quantities, sold easily and for the same price), the fact that the area in which appellant was found was known to be an area in which narcotics were sold, and the fact that appellant carried no paraphernalia by which to ingest the marijuana at the time he was detained. No money, no cell phone and no pay-owe sheets were recovered from appellant during the search, and no drug tests were performed on him at the station.

DISCUSSION

Appellant contends there is insufficient evidence to support the juvenile court's finding that he possessed the marijuana with the intent to sell it. We agree.

Unlawful possession of marijuana for sale requires proof, among other things, that the defendant possessed the marijuana with the intent to sell it. (*People v. Harris* (2000) 83 Cal.App.4th 371, 374.) This intent may be established by circumstantial evidence. (*Ibid*.)

We apply the substantial evidence test to determine whether the prosecution submitted sufficient evidence to meet its burden. (*People v. Cuevas* (1995) 12 Cal.4th 252, 260.) Under this test, we review the record "in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66.) We focus on the record as a whole, not on isolated bits of evidence. (*People v. Johnson* (1980) 26 Cal.3d 557, 577.) "By definition, 'substantial

evidence' requires *evidence* and not mere speculation." (*People v. Cluff* (2001) 87 Cal.App.4th 991, 1002.)

"[R]easonableness [is] the ultimate standard under the substantial evidence rule. (*People v. Kunkin* (1973) 9 Cal.3d 245, 250 (*Kunkin*).) "'The appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.'" (*Ibid*.) "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence, it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Redmond* (1969) 71 Cal.2d 745, 755 (*Redmond*); *Kunkin*, at p. 250.) The same test applies in juvenile as in adult criminal matters. (*In re Roderick P*. (1972) 7 Cal.3d 801, 809; *In re Arcenio V*. (2006) 141 Cal.App.4th 613, 615.)

In support of the trial court's order, respondent relies on the fact that the police recovered four individual packages of the same size from appellant, coupled with the fact that he was not carrying any paraphernalia with which to ingest the marijuana and was detained in an area known for gang activity and drug sales. This evidence is insufficient to support a finding that appellant possessed marijuana with the specific intent to sell it.

A conviction under Health and Safety Code section 11359 for unlawful possession of marijuana for sale requires "proof the defendant possessed the contraband with the intent of selling it and with knowledge of both its presence and illegal character." (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1745–1746.) The defendant's intent to sell marijuana "may be established by circumstantial evidence" and any reasonable inferences that may be drawn from it. (*People v. Harris* (2000) 83 Cal.App.4th 371, 374.) The opinion of an experienced officer that the marijuana is possessed for sale may be based on the quantity seized, the nature of the packaging, the normal use of an individual and the lack of drug paraphernalia found. (*Ibid*.; *People v. Parra* (1999) 70 Cal.App.4th 222, 227.)

Officer O'Bryant believed that appellant possessed the marijuana for sale because of "the packaging of the narcotics, the amount of the packages and the area where we

located him at." He also based his opinion on the fact that appellant possessed no smoking devices when he was detained. We conclude the evidence is insufficient to support a finding that appellant possessed the marijuana with the specific intent to sell it. Instead, the totality of the circumstances surrounding appellant's possession of the marijuana makes unreasonable the conclusion that he possessed the marijuana for sale.

First, the amount of marijuana possessed was 1.64 grams, or less than one ounce, the amount contemplated as being within the limits of personal use. (See Health & Saf. Code, § 11357, subd. (b) ["[e]xcept as authorized by law, every person who possesses not more than 28.5 grams of marijuana, other than concentrated cannabis, is guilty of an infraction punishable by a fine of not more than one hundred dollars ($100)"].)

Second, the likelihood that appellant more likely possessed the marijuana for personal use is not defeated by the fact that he had no smoking paraphernalia in his possession. Rather, it is reasonable to conclude that whatever paraphernalia he planned to use was stowed in the place where he planned to go to smoke the marijuana he bought.

Third, the fact that appellant had no money on him suggests not that he had not yet sold the marijuana, but rather that he had spent his funds buying it. Appellant had none of the tools one might expect a dealer to carry, such as pay-owe sheets or a cell phone. Nor did he lie to the police about his possession of the marijuana or flee when he saw them. In short, there was no indicia that appellant was the seller of marijuana rather than someone who had just purchased four bindles.

Fourth, the fact that appellant was found in a place known for its narcotics sales is irrelevant for, if one wants to buy marijuana, that is exactly the neighborhood to which one must go. Again, the evidence is just as indicative that appellant was a buyer of marijuana.

Fifth and most persuasively, as Officer O'Bryant approached appellant, he noticed he had "a strong odor of marijuana." That fact strongly suggests appellant was a user and not a seller of drugs. The conclusion that appellant was a user not a seller of drugs was further buttressed by the disposition here: he was sent to drug court and, ultimately, to Phoenix House to treat his addiction.

"Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence, it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*Redmond*, *supra*, 71 Cal.2d at p. 755; *Kunkin*, *supra*, 9 Cal.3d at p. 250.) Under the totality of the circumstances, the juvenile court's true finding that appellant possessed marijuana for sale within the meaning of Health and Safety Code section 11359 was unreasonable and premised on nothing more than an officer's suspicion that appellant possessed the marijuana with the specific intent to sell it. The true finding must be reversed.

DISPOSITION

The order determining that minor Lincoln A. was a ward of the juvenile court for having violated Health and Safety Code section 11359 is reversed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.