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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MARCUS MILLER, Defendant and Appellant.	B284655 (Los Angeles County Super. Ct. No. BA392749)

APPEAL from a judgment of the Superior Court of Los Angeles County, David M. Horwitz, Judge. Reversed and remanded with instructions.

William L. Heyman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Blythe J. Leskay and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Marcus Miller challenges the trial court's denial of his petition for redesignation or dismissal of his conviction for marijuana possession pursuant to Health and Safety Code section 11361.8.[1] Respondent Attorney General agrees with appellant that the trial court erred and joins his request that the matter be remanded. We agree with the parties, reverse the order, and remand with directions to grant the petition. Pursuant to the stipulation of the parties and the prior order of this Court, remittitur is to issue three days after this opinion is filed.

FACTUAL AND PROCEUDRAL BACKGROUND

On January 10, 2012, Los Angeles Police Department officers stopped appellant for driving his vehicle with expired registration tags.[2] While talking to appellant, officers smelled a strong marijuana odor. They also learned that he was on active parole and was driving with a suspended license. The officers searched appellant's vehicle and found a large canvas bag that contained at least 45 bags of marijuana, a large metal scale, several unused plastic baggies, and a wooden club.

The Los Angeles County District Attorney subsequently filed a felony complaint charging defendant with felony possession of marijuana for sale (§ 11359) and misdemeanor driving with a suspended license (Veh. Code, § 14601, subd. (a)). The complaint further alleged appellant suffered one prior conviction for a serious felony (Pen. Code, § 1192.7) and served eight prior prison terms (Pen. Code, § 667.5, subd. (b)).

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[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

[2] Both parties refer to the probation report for these facts.

On January 23, 2012, appellant pled guilty to both charges and admitted one of the prison priors, a 2009 conviction for possession of cannabis for sale. (§ 11359.) The trial court sentenced appellant to a total of four years in county jail: the upper term of three years on the possession count and one year for the prior prison term. In addition, the trial court sentenced defendant to time served on the misdemeanor driving without a license count.

In November 2016, "the electorate passed the Control, Regulate and Tax Adult Use of Marijuana Act, Proposition 64, which amended Health and Safety Code section 11359 to provide, generally, that '[e]very person 18 years of age or over who possesses marijuana for sale shall be punished by imprisonment in a county jail for a period of not more than six months or by a fine of not more than five hundred dollars ($500), or by both such fine and imprisonment.' (Health & Saf. Code, § 11359, subd. (b).)" (*People v. Rascon* (2017) 10 Cal.App.5th 388, 392.) That is, it generally reduced section 11359 from a felony to a misdemeanor. However, the offense remained a felony if "[t]he person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code," or "[t]he person has two or more prior convictions under subdivision (b)," or "[t]he offense occurred in connection with the knowing sale or attempted sale of cannabis to a person under the age of 18 years." (§ 11359, subd. (c).)

Proposition 64 also added section 11361.8, which allows a "person who has completed his or her sentence for a conviction under Sections 11357, 11358, 11359, and 11360, whether by trial

or open or negotiated plea, who would not have been guilty of an offense or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that Act been in effect at the time of the offense, [to] file an application before the trial court that entered the judgment of conviction in his or her case to have the conviction dismissed and sealed because the prior conviction is now legally invalid or redesignated as a misdemeanor or infraction . . . ." (§ 11361.8, subd. (e).) The trial court "shall presume the petitioner satisfies the criteria in subdivision (e) unless the party opposing the application proves by clear and convincing evidence that the petitioner does not satisfy the criteria in subdivision (e). Once the applicant satisfies the criteria in subdivision (e), the court shall redesignate the conviction as a misdemeanor or infraction or dismiss and seal the conviction as legally invalid as now established under the Control, Regulate and Tax Adult Use of Marijuana Act." (§ 11361.8, subd. (f).)

Appellant filed a petition to redesignate or dismiss his 2012 section 11359 possession conviction on June 30, 2017. The trial court denied the petition on August 3, 2017, on the ground that appellant was not qualified for relief because he had three prior cannabis convictions: two possession convictions under section 11359 and one transportation conviction under section 11360. Appellant timely appealed.

DISCUSSION

Appellant contends that the trial court erred in denying his petition. He acknowledges that there are some circumstances in which violations of section 11359 remain felonies, but argues that none of those circumstances are applicable to him or this particular conviction. Respondent agrees, as do we.

For a person to be ineligible to have his or her felony section 11359 conviction reduced to a misdemeanor, he or she must have "two or more prior convictions under subdivision (b)" of section 11359; one or more prior convictions that qualify as serious or violent under Penal Code section 667, subdivision (e)(2)(C) or require registration under Penal Code section 290, subdivision (c); or commit the instant offense by knowingly selling or attempting to sell cannabis to someone under age 18. (§ 11359, subd. (c).) None of the convictions the court relied upon was serious, violent, or required registration, and none involved sale of cannabis to a minor. Therefore, the relevant question is whether there was clear and convincing evidence that he had "two or more prior convictions under subdivision (b)" of section 11359. If not, the trial court was required to redesignate appellant's current offense to a misdemeanor.

One of the three convictions the court cited involved a violation of section 11360; it accordingly was not a "prior conviction under subdivision (b)" of section 11359. The other two cited convictions arose under section 11359. We agree with appellant and respondent that one of them, the 2009 conviction, was properly counted. Appellant admitted the conviction as part of his guilty plea; accordingly, its existence was sufficiently proven under the clear and convincing standard applicable to the section 11361.8 inquiry. We further agree that the second section 11359 conviction should not have been counted. The trial court identified it by the case number of the instant offense, meaning it was not a "prior conviction" at the time appellant pled guilty. The trial court thus identified only one prior conviction under section 11359, subdivision (b), which is not sufficient to render the instant offense a felony. Appellant was therefore entitled to

have the instant offense redesignated as a misdemeanor.

DISPOSITION

The order is reversed. The matter is remanded to the trial court with directions to grant appellant's June 30, 2017 petition and redesignate his January 23, 2012 section 11359 conviction as a misdemeanor. Pursuant to the stipulation of the parties and the prior order of this Court, remittitur is to issue three days after this opinion is filed.

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COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.