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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LEROY GIPSON, III, Defendant and Appellant.	B231790 (Los Angeles County Super. Ct. No. YA066392)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alex Ricciardulli, Judge. Affirmed.

Libby A. Ryan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

Leroy Gipson, III, appeals from the judgment entered following revocation of probation granted after his pleas of nolo contendere to two counts of possession of a controlled substance, to wit, cocaine (Health & Saf. Code, § 11350, subd. (a)) (counts 1 & 3), two counts of possession of a device used for smoking a controlled substance (Health & Saf. Code, § 11364, subd. (a)) (counts 2 & 4), driving under the influence of alcohol or drugs (Veh. Code, § 23152, subd. (a)) (count 5) and his admissions with regard to counts 1 and 2 that he previously had suffered a conviction for robbery (Pen. Code, § 211) within the meaning of the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and his admissions with regard to count 1 that he had served five prison terms within the meaning of Penal Code section 667.5, subdivision (b). The trial court sentenced Gipson to eight years eight months in prison. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *The initial offense.*[1]

At approximately 1:00 p.m. on September 14, 2006, Gardena Police Officer Roberto Rosales was on patrol in the area of 135th Street and Vermont Avenue in the City of Gardena. As Rosales drove down Vermont, he saw Gipson, accompanied by a female companion, jaywalk across the street. At some point, Gipson placed his left hand inside his left pocket. He and his companion then walked approximately 50 yards into a trailer park and onto the porch of one of the mobile homes there.

Rosales made a U-turn on 135th Street and drove back up Vermont. He got out of his patrol car and, when he entered the mobile home park, saw Gipson knocking on the door of one of the units. His female companion was standing approximately 15 feet behind him.

Rosales approached Gipson and his companion and ordered them to walk toward his "patrol vehicle." Gipson turned so that his right side was facing the officer, then reached with his left hand into his left pocket, "removed his left hand from his left

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[1] The facts have been taken from the transcript of the preliminary hearing.

pocket" and opened his "closed fist" as if "he [were] throwing something onto the ground."

Rosales detained Gipson and his companion. Later, when he went back to the area where he had observed Gipson throw objects onto the ground, Rosales found "three off white colored . . . rocks resembling rock cocaine." When Rosales searched a blue sweater which belonged to Gipson, he "found a glass pipe commonly used to smoke rock cocaine."

Back at the police station, Rosales booked into evidence the off-white rocks resembling rock cocaine and the pipe found in Gipson's sweater. It was stipulated that an expert forensic chemist was deemed to have been called and testified that he had examined the off-white, rock-like items and formed the opinion that they contained "a net weight of approximately .44 grams of [a] solid substance containing cocaine in the base form[.]"

b. *The probation violation.*

On September 14, 2010, Los Angeles Police Department (L.A.P.D.) Detective Salvador Reyes was assigned to the Central Division Narcotics Enforcement Detail. During the evening hours of that day, Reyes and his partner, Officer Kellogg, were sitting in their unmarked vehicle which was parked on the east side of Gladys Avenue, just south of 6th Street. The officers, who were in plain clothes, were "monitoring [the] . . . location for narcotics activity."

At 6:35 p.m., Reyes spotted Gipson walking on the west side of Gladys Avenue with an individual later identified as Hue Lieu. The two men were walking south, "almost shoulder-to-shoulder." As Reyes observed Gipson and Lieu through binoculars, he saw them stop. Gipson then "placed his right hand over Mr. Lieu's left hand and dropped what appeared to be a single off-white solid that resemble[d] rock cocaine." Lieu brought the item "closer to his face" and examined it, then placed "folded U.S. currency" into Gipson's right hand. It appeared that Lieu gave to Gipson more than one bill, which Gipson "simply shoved . . . into his front right pants pocket." Believing that a

narcotics transaction had just taken place, Reyes "advised the chase units to first detain Mr. Lieu and then go after" Gipson.

While Reyes watched, Lieu stopped, placed the off-white rock into a glass cocaine pipe and began to smoke it. By the time Lieu was detained, there was "a very small melted off-white solid inside the glass cocaine pipe."

Lieu was detained by L.A.P.D. Detective Charles Bailey, who had also been in the area of 6th Street and Gladys Avenue on the evening of September 14, 2010. At approximately 6:35 p.m. that evening, Bailey received a communication from Detective Reyes in which Reyes asked him to detain Hue Lieu. As Bailey approached Lieu, he saw him drop to the sidewalk "[a] glass cocaine pipe with an off-white solid resembling cocaine base." Bailey "collected" the pipe and off-white rock from the sidewalk and gave it to Detective Reyes.

As Reyes was watching Lieu, two other detectives, Kellogg and Kitzmiller, were observing Gipson. They saw Gipson place his hand over his mouth, then place it over a shopping cart and drop into the cart "off-white solids resembling rock cocaine [which] were individually wrapped" in cellophane. L.A.P.D. Detective Arthur Gamboa was also working the "Narcotic[s] Enforcement Detail" that evening. He, too, saw Gipson "spit out several plastic bindles." Gamboa approached Gipson from behind and placed him under arrest. Gamboa then recovered from the shopping cart seven packets containing off-white objects which were later determined to contain cocaine base. A subsequent search of Gipson revealed $347 in cash stuffed into his pants pockets. "There were six $20 bills, eight $10 bills, fifteen 5's and 72 single dollar bills."

Based on his background, training and experience, Reyes was of the opinion that the baggies of off-white objects recovered from the shopping cart were possessed for sale. In coming to this conclusion, Reyes relied on "[t]he transaction [he had observed between Gipson and Lieu], the absence of paraphernalia on . . . Gi[p]son, the denomination[s]" of currency and "the way they were stuffed in [Gipson's] pockets . . . , the amount of the narcotics [possessed]" and "the location."

Gipson testified in his own defense. He stated he was in the area of 6th Street and Gladys Avenue on the evening of September 14, 2010 because an Alcoholic Anonymous meeting, which he was required to attend, was being held at the park there. Gipson had "completed a live-in drug program in the skid row area" and had "been at that . . . particular meeting, several times."

Gipson turned, intending to walk past a shopping cart and into the park. However, before he reached the shopping cart, he was detained by police officers. Gipson was not in possession of any controlled substances that day. He had cash in his pockets because he had just received some money from F.D.C. for child care. In addition, he had a number of $1 bills because he "sell[s] single cigarettes." Gipson admitted that he had been convicted of robbery in July 1990.

Habib Barye is a criminalist for the Los Angeles Police Department and is assigned to the Narcotics Analysis Section of the Crime Lab. On September 16, 2010, Barye, who has a Bachelor's Degree in Biology from the University of California at Los Angeles and is currently working on a Master's Degree in Criminalistics there, took the appropriate package from the narcotics locker, photographed the envelope then unsealed it. Inside he found two Ziploc bags, one containing a glass pipe and the other containing seven bindles of an off-white solid material. The off-white solid from the seven bindles, without the packaging, weighed 1.13 grams.

After determining the substance's weight, Barye performed some preliminary "presumptive, color screening tests." He then performed two "microcrystal tests, which are confirmatory tests. [¶] On a separate date [he] performed . . . an instrumental analysis." That test involves "placing reagents on the item and observing a color change reaction." The reagent on cocaine base causes it to turn blue. The second test is "the Wagner's color test. This produces a brown precipitate." The "color test is a two-step process. The first reagent [added] is called a cobalt thiocyanate reagent. After the addition of that reagent, if there is a reaction, then . . . [an] acid [is added] and a precipitate reaction is the result." In the present case Barye observed both reactions.

The color test simply narrows the scope of the analysis. Next, Barye performed a "microcrystal test" to determine the specific "morphology" of the crystals of the substance contained in the seven bindles. Here, the morphology, or shape of the crystals, indicated that they contained cocaine. Finally, he performed a "confirmatory microcrystal test on one of the bindles." The result indicated that the bindle contained "cocaine in the form of cocaine base."[2]

Barye tested only the bindles. He performed no tests on the pipe.

2. *Procedural history*.

Following a preliminary hearing, an information in case No. YA066392 was filed on February 9, 2007. It was alleged that Gipson possessed a controlled substance, cocaine, in violation of Health and Safety Code section 11350, subdivision (a) (Count 1) and possessed a smoking device in violation of Health and Safety Code section 11364, subdivision (a) (Count 2). It was further alleged that Gipson had suffered a conviction for robbery (Pen. Code, § 211) within the meaning of the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and had served five prison terms within the meaning of Penal Code section 667.5, subdivision (b). At his arraignment, Gipson entered pleas of not guilty to the charges and denied the special allegations.

On March 20, 2007, the People amended the information by interlineation to add possession of a controlled substance in violation of Health and Safety Code section 11350, subdivision (a) (Count 3), possession of an opium pipe in violation of Health and Safety Code section 11364, subdivision (a) (Count 4) and driving under the influence of drugs or alcohol in violation of Vehicle Code section 23152, subdivision (a) (Count 5).

After waiving his right to a jury or court trial, his right to confront and cross-examine the witnesses against him, his ability to subpoena witnesses to testify in his defense and his privilege against self-incrimination, on March 20, 2007 Gipson withdrew

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[2] For reasons that he "[was] not aware of," another criminalist had begun to test the substances recovered from Gipson, but had been unable to finish. Accordingly, Barye "reanalyze[d] the package."

his pleas of not guilty and entered instead pleas of no contest to the five counts and admitted the special allegations.

At proceedings held on June 22, 2007, the trial court sentenced Gipson to the upper term of three years in prison for his conviction of possession of a controlled substance, cocaine, in violation of Health and Safety Code section 11350, subdivision (a) as alleged in count 1, one-third the mid-term, or eight months, for his conviction of possession of a controlled substance as alleged in count 3, and five 1-year terms for his admissions that he had previously served prison terms pursuant to Penal Code section 667.5.[3]

After sentencing Gipson to eight years eight months in prison, the trial court suspended imposition of sentence and placed him on formal probation for a period of five years. As one condition of probation, Gipson was to enroll in a two-year, drug-treatment program at the Salvation Army. However, when the Salvation Army was unable to accept Gipson, the trial court ordered Gipson to enter a drug-treatment program administered by the Midnight Mission.

At proceedings held on February 15, 2011, it was indicated that Gipson was facing charges in a new matter, case No. BA375930. The trial court indicated that, in the new case, Gipson's maximum exposure was 14 years in prison. Although the People had made an offer of "five years at 50 percent," Gipson had rejected it.[4]

After hearing testimony presented at a hearing held on February 17, 2011, the trial court found by a preponderance of the evidence that Gipson was in violation of his probation in case No. YA066392. Gipson's probation in that matter was revoked and the trial court imposed the sentence of eight years eight months. In addition to the imposition

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[3] As no sentences were imposed with regard to counts 2, 4 and 5, and the trial court made no mention of the Three Strikes allegation, it can be presumed those counts were stayed and the Three Strikes allegation was stricken in furtherance of justice pursuant to Penal Code section 1385.

[4] At the February 17, 2011 proceedings, case No. BA375930 was ultimately dismissed in furtherance of justice pursuant to Penal Code section 1385.

of sentence, the trial court ordered Gipson to pay a $40 court security assessment (Pen. Code, § 1465.8, subd. (a)(1)), a $30 criminal conviction assessment (Gov. Code, § 70373), a stayed $200 parole revocation restitution fine (Pen. Code, § 1202.45), a $200 restitution fine (Pen. Code, § 1202.4, subd. (b)), a $200 probation revocation restitution fine (Pen. Code, § 1202.44), a $50 lab analysis fee and a $35 Government Code assessment (Pen. Code, § 1464; Gov. Code, § 76000). Gipson was awarded presentence custody credit for 157 days actually served, 157 days of good time/work time and 541 days of "back time," for a total of 855 days.

Gipson filed a timely notice of appeal on February 22, 2011.

This court appointed counsel to represent Gipson on appeal on June 13, 2011.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed October 20, 2011, the clerk of this court advised Gipson to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. Gipson filed a supplemental brief on December 28, 2011. There he contended: (1) The trial court abused its discretion when it revoked his probation because the prosecutor did not show by a preponderance of the evidence that he was a danger to himself or society; and (2) the trial court erred by failing to give him presentence custody credit for the time he served in the live-in rehabilitation program.

In view of Gipson's contentions, on February 1, 2012, this court sent a letter to the parties requesting that they address the following issues: (1) "Whether, in view of the fact that it appears this was appellant's first violation of . . . probation [in this particular case[5]] and involved a drug-related condition, the trial court erred by revoking [his]

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[5] After hearing argument by the parties, during which prior crimes committed by Gipson, including those involving narcotics, were mentioned, the trial court stated: "The court, having found the defendant in violation of his probation, I do not believe that further probation is warranted in this case. This is not the defendant's first violation. And given the underlying charges, that he's selling narcotics in an area where there's

probation and imposing a previously stayed prison term. [Citations.]" And (2) "If a prison term [was] lawfully imposed, whether appellant is entitled to . . . credit for time spent in [the] live-in narcotics rehabilitation facility. [Citation.]"

With regard to the first contention, we note that Penal Code section 1210.1 subdivision (f)(3)(A) indicates that "[i]f a defendant receives probation under subdivision (a), and violates that probation either by committing a nonviolent drug possession offense, or a misdemeanor for simple possession or use of drugs or drug paraphernalia, being present where drugs are used, or failure to register as a drug offender, or any activity similar to those listed in subdivision (d) of Section 1210, or by violating a drug-related condition of probation, and the state moves to revoke probation, the court shall conduct a hearing to determine whether probation shall be revoked. The trial court shall revoke probation if the alleged probation violation is proved and *the state proves by a preponderance of the evidence that the defendant poses a danger to the safety of others*." (Italics added.)

Here, although Gipson was charged with the mere possession of cocaine, the People presented, not merely a preponderance of evidence, but substantial evidence to show he possessed the cocaine for the purpose of sale. Gipson was observed selling cocaine to Lieu, who was then seen smoking it from a cocaine pipe. Moreover, when Gipson was detained, he was found to be in possession of seven individual packets, each of which contained an off-white substance later determined to be cocaine. This evidence shows that Gipson possessed the cocaine, not strictly for his own use, but for sale to others. Under these circumstances, the trial court properly determined Gipson had violated a non-drug related condition of his probation (the sale of cocaine had nothing to do with his own drug habit)[6] and that he posed a danger to the safety of others (selling

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other users, I believe that a prison sentence should be imposed." In making this statement, it appears the trial court was referring, not only to this matter, but to Gipson's lengthy criminal history, including the matter which was dismissed, case No. BA375930.

[6] "Penal Code section 1210.1, subdivision (f), defines the term 'drug-related condition of probation' as 'includ[ing] a probationer's specific drug treatment regimen,

narcotics to others may put their safety in jeopardy). (Pen Code, § 1210.1, subd. (f)(3)(A); see *People v. Guzman* (2003) 109 Cal.App.4th 341, 348; *In re Taylor* (2003) 105 Cal.App.4th 1394, 1397-1398.)

As to the second contention, we turn to Penal Code section 2900.5, subdivision (a). That section provides that "[i]n all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, including, but not limited to, any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution, all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, credited to the period of confinement pursuant to . . . Section 1203.018, shall be credited upon his or her term of imprisonment . . . ."

Although, in general, under section 2900.5, an individual would receive presentence custody credit for time spent in a halfway house or rehabilitation facility, that condition can be waived. Here, the court stated: "So the understanding is that you're going to plead no contest to all five counts; you're going to admit five one-year prison priors; you're going to receive a total state prison sentence of eight years and eight months. [¶] Execution of that sentence is going to be suspended over your head. . . . You'll be spending a full year in county jail or 243 days, at the conclusion of which you will go to [the halfway house or rehabilitation facility]. You're going to live there for two full years after your jail sentence is completed. [¶] The amount of time you spend at [the rehabilitation center] *will not apply towards custody credits* if you violate probation in the future and you're sentenced to state prison . . . ." (Italics added.) The trial court then asked Gipson if he "accept[ed] these and [understood] this?" Gipson replied, "Yeah."

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employment, vocational training, educational programs, psychological counseling, and family counseling.' " (*People v. Davis* (2003) 104 Cal.App.4th 1443, 1446-1447, italics omitted.)

Since Gipson accepted the term without objection, he cannot now complain of his inability to challenge that "a trial court may impose as a standard and consistent condition of probation the waiver of custody credits for time served in a drug treatment program;" and that "a defendant who does not object to that probationary condition when it is imposed, waives the right to later challenge its validity on appeal." (*People v. Torres* (1997) 52 Cal.App.4th 771, 783; see *People v. Jeffrey* (2004) 33 Cal.4th 312, 319-320.)

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.