Filed 5/31/12 P. v. Close CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DANIEL S. CLOSE, Defendant and Appellant.	2d Crim. No. B230496 (Super. Ct. No. NA084889) (Los Angeles County)

Daniel Close appeals the judgment following his conviction for transportation of marijuana. (Health & Saf. Code, § 11360.)[1] He was sentenced to two years in prison. Close contends the trial court improperly instructed the jury regarding circumstances it should consider in determining whether transportation of marijuana was for medical purposes under the Compassionate Use Act (CUA) (§ 11362.5) and Medical Marijuana Program (MMP) (§ 11362.7 et seq.). He also contends that the trial court's denial of probation violated his First Amendment right to free speech. We affirm.

FACTS

Close is a medical marijuana user from Humboldt County who cultivates marijuana as part of a small collective of medical marijuana users. In February 2010, he was attending a reggae music festival in Long Beach, California.

---

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

Long Beach police officers arrested Close at the music festival after seeing him lean against a motor vehicle and hand the driver a package of marijuana. Police found marijuana, hashish, $1,444 in cash, and a medical marijuana identification card in his pockets. Police also found keys to a car rented by Close. The rental car contained 2.7 pounds of marijuana, an undetermined amount of hashish, a digital scale, empty "baggies," and several doctors' recommendations for medical marijuana use. At trial, a prosecution expert opined that the marijuana was possessed for the purpose of sale because of its large amount and the presence of another drug, a digital scale, substantial cash, and empty baggies in the car. The expert also considered the circumstances of Close's arrest. Close told police that he had carried the marijuana from his home in Humboldt County, and offered testimony that the amount of marijuana was reasonable for the personal use of himself and other members of his collective.

Close was charged with both transportation and sale of marijuana (§ 11359), but the jury found him not guilty of the possession charge.

DISCUSSION

No Instructional Error

Close contends the trial court erred by instructing the jury to consider "whether the method, timing, and distance of the transportation were reasonably related to the patient's and/or the collective's current medical needs" in the jury's determination of whether his transportation of marijuana was for medical purposes. (CALCRIM No. 2361.)[2] We disagree.

---

[2] The version of CALCRIM No. 2361 used by the trial court provided in relevant part: "The law allows a person to possess or transport marijuana for personal medical purposes or as the primary caregiver of a patient or as a collective or cooperative with medical needs when a physician has recommended such use. [¶] Under the law, patients with a medical need and for whom a physician has recommended the use of marijuana and the designated primary caregivers of patients with a medical need and for whom a physician has recommended the use of marijuana who collectively or cooperatively associate to cultivate marijuana for medicinal purposes, shall not, solely on the basis of that fact, be guilty of possessing marijuana for sale or the transportation of marijuana. . . . [¶] The amount of marijuana possessed or transported must be reasonably related to the patient's or the collective's current medical needs. In deciding if marijuana was transported for medical purposes, *also consider whether the method, timing, and distance of the*

The CUA was adopted in 1996 "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana . . . ." (§ 11362.5, subd. (b)(1)(A).) Sections 11357 and 11358 prohibiting the possession and cultivation of marijuana do not apply "to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (§ 11362.5, subd. (d).) The CUA does not specify the amount of marijuana which may be lawfully possessed or cultivated, but "the quantity possessed by the patient or the primary caregiver, and the form and manner in which it is possessed, should be reasonably related to the patient's current medical needs." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1549; see also *People v. Kelly* (2010) 47 Cal.4th 1008, 1017.)

In effect, section 11362.5, subdivision (d) provides an affirmative defense to the otherwise criminal acts of possession or cultivation of marijuana. (*People v. Kelly, supra,* 47 Cal.4th at p. 1013; *People v. Mower* (2002) 28 Cal.4th 457, 464.) The defendant bears the burden of proof as to the facts underlying the defense, but is required "merely to raise a reasonable doubt" as to those facts rather than to prove them by a preponderance of the evidence. (*Mower*, at p. 464.)

The instructional language concerning transportation of marijuana which is challenged by Close in this appeal was proposed in *Trippet*. In *Trippet*, the court recognized that the CUA expressly provided a defense to the possession and cultivation of marijuana but not to its transportation. (§ 11360.) *Trippet* concluded that "practical realities dictate that there be *some* leeway" regarding transportation in cases that otherwise fall under the protection of the CUA. "The test should be whether the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs. If so, we conclude there should and can be

---

transportation were reasonably related to the patient's and/or the collective's current medical needs." (Italics added.)

an implied defense to a [transportation] charge; otherwise, there is not." (*People v. Trippet, supra,* 56 Cal.App.4th. at pp. 1550–1551.) After other panels of the Court of Appeal reached disparate conclusions, our Supreme Court granted a hearing to resolve the transportation issue. (See *People v. Wright* (2006) 40 Cal.4th 81, 84-85.)

In 2003, while the Supreme Court case was pending, the Legislature enacted the MMP which, among other provisions, expressly extended CUA protection to the transportation of marijuana. (§ 11362.765.) Although the MMP mooted the issue, the Supreme Court indicated its approval of the *Trippet* analysis in a footnote stating that "[a]s both sides acknowledged at argument, however, *Trippet*'s test for whether the defense applies in a particular case survived the enactment of the MMP and remains a useful analytic tool to the extent it is consistent with the statute." (*People v. Wright, supra,* 40 Cal.4th at p. 92, fn. 7.)

In addition, the *Trippet* view that "the quantity transported and the method, timing and distance of the transportation" are critical considerations in determining CUA protection has been followed in *People v. Wayman* (2010) 189 Cal.App.4th 215. *Wayman* states that the CUA "does not focus on whether the subject *marijuana* was for the patient's medical use. Instead, it focuses on whether the *transportation* of the marijuana was for the patient's medical use. By its terms, it provides immunity from criminal liability only when a qualified patient 'transports . . . marijuana *for his or her own personal medical use*.'" (*Id*. at p. 222, quoting in part from § 11362.765, subd. (b)(1).) The "amount of marijuana involved, as well as the method, timing and distance of the transportation, logically pertain" to whether the transportation was for the patient's own personal medical use. (*Id.* at p. 223.) We agree with that conclusion.

No Error in Denial of Probation

Close contends that the trial court violated his First Amendment rights by denying him probation based upon his beliefs regarding marijuana laws. We disagree.

Close forfeited his claim by failing to raise it in the trial court at the time of sentencing or otherwise. The forfeiture doctrine applies to claims regarding sentencing choices. (*People v. Brown* (2000) 83 Cal.App.4th 1037, 1041-1042; *People v. Scott*

(1994) 9 Cal.4th 331, 354-355.) In any event, the claim lacks merit. The trial court did not rely on Close's personal beliefs that marijuana should be legal for all purposes. The court concluded that, based in part on these beliefs, Close would violate any conditions of probation regarding the offense. Also, Close was ineligible for the alternate sentencing scheme of Proposition 36 for the same reasons. (See *People v. Dove* (2004) 124 Cal.App.4th 1, 10.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

James B. Pierce, Judge

Superior Court County of Los Angeles

John Raphling, 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, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Daniel C. Chang, Deputy Attorney General, for Plaintiff and Respondent.