Filed 9/12/16 P. v. Altounian CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ARSEN ALTOUNIAN, Defendant and Appellant.	B265432 (Los Angeles County Super. Ct. No. 4PH04896)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jacqueline H. Lewis, Judge. Affirmed.

Katherine E. Hardie, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

During a parole search, law enforcement found Arsen Altounian in possession of a large amount of marijuana. The trial court found that Altounian violated the term of his parole requiring him to obey all laws. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 4, 2010 Altounian was released from prison on parole for a five-year period. Altounian's parole officer, Andrea Denegal, testified Altounian was required to "obey all laws."[1]

Altounian moved in with, and served as the caregiver for, his grandmother, who had cancer and diverticulosis, and his mother, who was HIV-positive, both of whom he said had medical marijuana cards. Altounian grew seven or eight marijuana plants in the backyard. He testified that he grew so many marijuana plants because he thought three or four of the plants would probably die. He testified that he grew the marijuana for use by his mother and grandmother. Altounian denied that he grew the marijuana to sell for profit,[2] and he believed he was in compliance with the law.

Altounian obtained his medical marijuana card on January 20, 2014. He testified that his doctor approved him for a medical marijuana card because of his "situation," which included anxiety, a troubled childhood, and 23 years of incarceration. Altounian

---

[1] Other than the testimony of Altounian's parole agent that Altounian had to obey all laws, there is no evidence in the record of the terms and conditions of Altounian's parole.

[2] Altounian testified, "The only thing that I was doing was I was going to get the trim, and I was going to get reimbursed. Because some dispensaries, they use their trim for lotions, for hemp material, for ropes, for clothing, for whatever purpose. And I was told that. And the pound usually goes for $100 to $150, so I was going to get reimbursed by the dispensaries for the trim."

also testified he had adult attention deficit/hyperactivity disorder. Altounian's grandmother's medical marijuana card was issued July 14, 2014. There was no evidence that Altounian's mother had a medical marijuana card.

Altounian had discussions with one of his parole officers, Shabazz Cherry, about getting a medical marijuana card. Altounian testified that when he asked Cherry about getting a medical marijuana card, Cherry stated, "Right now it's a gray area . . . some agents are allowing it; some agents are not allowing it. But to be on the safe side, to cover your butt, you should go get your license." Cherry testified that, if a parolee wanted authorization to possess marijuana, the parolee needed to obtain a medical diagnosis and approval by a supervisor in the parole office. Cherry could not recall whether Altounian ever told him that he had a medical marijuana card, nor could Cherry remember telling Altounian that smoking marijuana while he was on parole was permissible.

During one of his visits to Altounian's residence, Cherry found a glass pipe commonly used for smoking marijuana. At that time, Altounian told Cherry, "I don't smoke marijuana. It's totally tobacco in here."

On June 27, 2014 the Los Angeles County Sheriff's Department conducted a parole compliance search of Altounian's residence. Deputy Anthony Flores, one of the deputies who conducted the parole compliance check, searched the garage, where he smelled marijuana. He traced the source of the odor to a black backpack and found several large bags of marijuana inside the backpack. One of the bags contained 1,007.3 grams of marijuana, which is approximately 2.2 pounds. Another bag contained 55 grams, which is approximately 2 ounces. Deputy Flores found an additional bag of marijuana in an ice chest in the garage. He also found a large digital scale, along with a small cylinder container with marijuana inside. The marijuana inside the bags consisted of the flowers or buds of the plants, "which are the parts of the plant that are ideal for sale," without the sticks and stems of the plant, which had been removed. Deputy Flores

testified it was his opinion that Altounian possessed the marijuana for sale rather than for personal use.

Deputy Jason McGinty also participated in the parole search at Altounian's residence. After the deputies discovered the marijuana, Deputy McGinty read Altounian his *Miranda* rights,[3] and Altounian told Deputy McGinty that "he was selling the marijuana to compensate his income to pay his bills." Altounian testified he had no recollection of Deputy McGinty reading him his *Miranda* rights, he did not say he sold marijuana to pay his bills, and he did construction work in order to support himself. Altounian stated that he said to Deputy McGinty, "You know, I have a lot of bills to pay, and this is how [I] pay my bills," but Altounian was referring to his construction work.

The trial court found by a preponderance of the evidence that Altounian violated the terms and conditions of his parole by possessing marijuana for sale and possessing paraphernalia used in drug trafficking. The trial court found that Altounian's uncorroborated testimony lacked credibility, and the court gave little weight to the evidence of the medical marijuana cards, because they were photocopies that were not supported by any other evidence. The trial court also emphasized that Altounian's grandmother did not obtain a medical marijuana card until 18 days after police arrested Altounian, which undermined Altounian's testimony. In contrast, the court ruled, the large bags of marijuana hidden in the garage, the digital scale, and Cherry's testimony that he never told Altounian to get a medical marijuana license supported the conclusion that it was more likely than not Altounian possessed marijuana for sale and, thus, violated the conditions of his parole.

---

3 *Miranda v. Arizona* (1966) 384 U.S. 436.

The court remanded Altounian to the custody of the California Department of Corrections and Rehabilitation for future parole consideration under Penal Code section 3000.08, subdivision (h).[4] Altounian timely appealed.

DISCUSSION

A. *Substantial Evidence Supports the Trial Court's Finding That Altounian Violated the Conditions of His Parole*

"Parole revocation determinations shall be based upon a preponderance of evidence." (§ 3044, subd. (a)(5); see *In re Miller* (2006) 145 Cal.App.4th 1228, 1234-1235.) We review the trial court's finding for substantial evidence. (*People v. Urke* (2011) 197 Cal.App.4th 766, 773; *People v. Kurey* (2001) 88 Cal.App.4th 840, 848.) On review for substantial evidence, "great deference is accorded the trial court's decision, bearing in mind that '[p]robation is not a matter of right but an act of clemency, the granting and revocation of which are entirely within the sound discretion of the trial court.'" (*People v. Urke*, at p. 773; see *People v. Kurey*, at pp. 848-849 ["our review is limited to the determination of whether, upon review of the entire record, there is substantial evidence of solid value, contradicted or uncontradicted, which will support the trial court's decision"].) "Parole revocation and probation revocation after the imposition of a sentence are constitutionally indistinguishable." (*People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1198; accord, *In re Miller*, at p. 1235; see *People v. Rodriguez* (1990) 51 Cal.3d 437, 441 ["[p]arole and probation revocation hearings are equivalent in terms of the requirements of due process"].)

---

[4] Penal Code section 3000.08, subdivision (h), provides that, if "the court determines that the [parolee] has committed a violation of law or violated his or her conditions of parole, the person on parole shall be remanded to the custody of the Department of Corrections and Rehabilitation and the jurisdiction of the Board of Parole Hearings for the purpose of future parole consideration." (Pen. Code, § 3000.08, subd. (h).)

1. *There Was Substantial Evidence That Altounian Possessed Marijuana for Sale*

Altounian argues that there was insufficient evidence that he possessed the marijuana with the intent to sell it. Possession of a controlled substance for sale requires proof the defendant had knowledge of both the presence of the controlled substance and its illegal character, and the requisite intent to sell. (*People v. Harris* (2000) 83 Cal.App.4th 371, 374; see *People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 754.) The People may establish intent to sell by circumstantial evidence. (*People v. Ramos* (2016) 244 Cal.App.4th 99, 104; *People v. Meza* (1995) 38 Cal.App.4th 1741, 1746.)

Here, there is reasonable, credible, and solid evidence supporting the trial court's conclusion that Altounian possessed the marijuana for sale. Altounian had three bags of marijuana, one of which weighed approximately 2.2 pounds. Police found a digital scale nearby. (See *People v. Majors* (1998) 18 Cal.4th 385, 395 [presence of a scale is evidence of drug sales]; *People v. Morris* (2015) 239 Cal.App.4th 276, 278 ["digital scales [are] commonly used to weigh drugs"].) Deputy McGinty testified that Altounian stated he was selling marijuana to generate income to pay his expenses. While Altounian's testimony contradicted Deputy McGinty's testimony, the court believed Deputy McGinty and not Altounian, and we defer to the court's credibility findings. (See *People v. Williams* (2015) 61 Cal.4th 1244, 1262 ["[w]e defer to the trial court's credibility assessments 'based, as they are, on firsthand observations unavailable to us on appeal'"]; *People v. Zamudio* (2008) 43 Cal.4th 327, 357 ["'[c]onflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends'"].)

Moreover, Deputy Flores testified that, in his expert opinion, Altounian possessed the marijuana for sale. "'In cases involving possession of marijuana and heroin, it is settled that an officer with experience in the narcotics field may give his opinion that the narcotics are held for purposes of sale based upon matters such as quantity, packaging, and the normal use of an individual.'" (*People v. Dowl* (2013) 57 Cal.4th 1079, 1084; see *People v. Harris*, *supra*, 83 Cal.4th at pp. 374-375.) Deputy Flores's opinion is also substantial evidence supporting the trial court's finding.

2. *Altounian's Parole Violation Was Willful*

"A court may not revoke probation unless the evidence supports 'a conclusion [that] the probationer's conduct constituted a willful violation of the terms and conditions of probation.'" (*People v. Cervantes* (2009) 175 Cal.App.4th 291, 295.) A willful violation requires """'simply a purpose or willingness to commit the act . . . ,' *without regard to motive, intent to injure, or knowledge of the act's prohibited character*."'"" (*In re Kevin F.* (2015) 239 Cal.App.4th 351, 363.) A violation is not willful when the probationer is incapable of fulfilling all the terms of parole, or where unforeseen circumstances prevent him from satisfying the terms of parole. (See, e.g., *People v. Galvan* (2007) 155 Cal.App.4th 978, 984-985 [physical incapability]; *People v. Zaring* (1992) 8 Cal.App.4th 362, 379 [unforeseen circumstances].)

Assuming that a parole violation, like a probation violation, must be willful, there was substantial evidence that Altounian's violation was willful. Altounian does not argue he was incapable of complying with the conditions of his parole. Instead, he contends that he negligently, not willfully, violated the conditions of his parole when he found himself in the unforeseen position of having to care for family members who needed marijuana. He relies on *People v. Zaring*, *supra*, 8 Cal.App.4th 362, where the court held that revoking probation for a tardy court appearance caused by circumstances beyond probationer's control was an abuse of discretion. (*Id.* at p. 379; see *People v. Cervantes*, *supra*, 175 Cal.App.4th at p. 295 ["[w]here a probationer is unable to comply with a

probation condition because of circumstances beyond his or her control and defendant's conduct was not contumacious, revoking probation and imposing a prison term are reversible error"]; *People v. Galvan*, *supra*, 155 Cal.App.4th at p. 982 ["the evidence must support a conclusion the probationer's conduct constituted a willful violation of the terms and conditions of probation"].)

Zaring is distinguishable. Altounian was not "confronted with a last minute unforeseen circumstance" beyond his control. (*People v. Zaring*, *supra*, 8 Cal.App.4th at p. 379.) Altounian engaged in the prohibited act of possessing, for sale, large quantities of marijuana without first obtaining approval to modify, and a modification of, the terms and conditions of his parole. Because he engaged in this conduct intentionally, Altounian violated the terms of his parole willfully.

3. *The Compassionate Use Act Defense Does Not Apply*

Altounian contends that using marijuana for medical purposes with a physician's recommendation is a defense to a parole violation for possessing marijuana. Altounian argues that he possessed the marijuana for his mother and grandmother in his capacity as their primary caregiver.

Under Health and Safety Code section 11362.5, also known as the Compassionate Use Act of 1996, "it is the defendant's burden to show 'that he or she was a "patient" or "primary caregiver," that he or she "possesse[d]" or "cultivate[d]" the "marijuana" in question "for the personal medical purposes of [a] patient," and he or she did so on the "recommendation or approval of a physician" (§ 11362.5, subd. (d)).'" (*People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441; see *People v. Leal* (2012) 210 Cal.App.4th 829, 838 [the Compassionate Use Act "'gives a person who uses marijuana for medical purposes on a physician's recommendation a defense to certain state criminal charges involving the drug, including possession'"].) Thus, Altounian had the burden of proving (1) he was his grandmother's primary caregiver, (2) he possessed medical

marijuana for his grandmother, and (3) a physician approved Altounian to possess medical marijuana for his grandmother in his capacity as her primary caregiver.

Even assuming Altounian was his grandmother's primary caregiver, Altounian did not meet his burden. First, the deputy sheriffs found the marijuana during the parole compliance search on June 27, 2014. Altounian's grandmother did not obtain a medical marijuana license until July 14, 2014. Altounian could not have possessed the medical marijuana for his grandmother because a physician did not approve use of medical marijuana by Altounian's grandmother until after the parole search. Second, Altounian did not have physician approval to possess medical marijuana for his grandmother in his capacity as her primary caregiver. Instead, Altounian testified that he obtained his medical marijuana card for himself, not his grandmother, after he told his physician about his background and psychological issues. Third, Health and Safety Code section 11362.77 limits the quantity a primary caregiver may possess. "A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient." (Health & Saf. Code, § 11362.77, subd. (a).) Even assuming Altounian's grandmother was a qualified patient, the most Altounian could lawfully possess under this statute was 16 ounces. Altounian possessed more than twice this amount. Finally, Altounian never requested a modification of the terms and conditions of parole. (See Health & Saf. Code, § 11362.795, subd. (b)(2) ["where a physician recommends that the parolee use medical marijuana, the parolee may request a modification of the conditions of the parole to authorize the use of medical marijuana"].)

B. *The Trial Court Did Not Abuse Its Discretion in Revoking Parole and Remanding Altounian*

We review the trial court's decision to revoke parole for abuse of discretion. (*People v. Rodriguez, supra*, 51 Cal.3d at p. 443; *People v. Galvan*, *supra*, 155 Cal.App.4th at p. 983.) "'"[O]nly in a very extreme case should an appellate court

interfere with the discretion of the trial court in the matter of denying or revoking probation.'"'" (*People v. Urke*, *supra*, 197 Cal.App.4th at p. 773.)

Relying on *People v. Buford* (1974) 42 Cal.App.3d 975 (*Buford*), Altounian argues that his conduct amounted to a "de minimis [violation] and so did not warrant revocation of parole." In *Buford*, the trial court revoked the defendant's probation for his failure to register as a sex offender, despite failure by the court and law enforcement to inform the defendant that such registration was a condition of his probation. (*Id.* at p. 984.) The Court of Appeal reversed, concluding that "[t]o revoke [the defendant's] probation for his noncompliance with [the law], while excusing the noncompliance of the sentencing court, the jail officials, and/or the probation officer[,] constituted an abuse of discretion." (*Id.* at p. 987.) Here, however, unlike *Buford*, there is no dispute that Altounian knew he had to "obey all laws." Altounian characterizes his violation as merely "possessing medical marijuana without having gone through the appropriate procedures with the parole agency." This chacterization assumes that his parole supervisors necessarily would have approved the request to modify the terms of Altounian's parole to allow him to possess marijuana. Altounian provided no evidence to support this assumption.

Moreover, the evidence showed that Altounian did not possess a de minimus amount of marijuana for his personal use. Even if Altounian had requested a modification in the terms of his parole, and even if he had been successful, such a modification would only allow Altounian to possess marijuana, not to sell it. As noted, the quantity of marijuana and the number of plants Altounian possessed, together with the expert opinion of the arresting officer, support the conclusion that Altounian possessed the marijuana for sale, rather than in his role as a caregiver for his mother and grandmother. Because the parole agency did not and could not have modified the conditions of Altounian's parole to allow him to possess marijuana for sale, Altounian's parole violation was not de minimis.

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

ZELON, Acting P. J.

GARNETT, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.