Filed 1/18/18 P. v. Becerra CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. SAMUEL OMAR BECERRA, Defendant and Appellant.	2d Crim. No. B279461 (Super. Ct. No. 1474234) (Santa Barbara County)

The trial court convicted Samuel Omar Becerra of one count of manufacturing butane honey oil (BHO). (Health & Saf. Code, § 11379.6, subd. (a).) It suspended imposition of sentence and granted Becerra three years of probation with terms and conditions, including 90 days in county jail. The court also ordered Becerra to refrain from associating with gang members.

Becerra contends the judgment should be reversed because the trial court convicted him for an incident unrelated to the charge in the information and the evidence adduced at the preliminary hearing. He also claims the court abused its

discretion when it admitted evidence of a prior uncharged offense and imposed an invalid probation condition. We affirm.

FACTUAL AND PROCEDURAL HISTORY

On February 26, 2015, law enforcement officers searched Becerra's home on charges unrelated to this appeal. In his bedroom, they found a glass dish with residue that tested positive for cannabis. They also found a glass tube filled with marijuana, four jars of marijuana, two propane torches, and a silicon mat, all of which can be used to manufacture BHO; two pipes with metal attachments and three bongs, which can be used to smoke BHO; and BHO in a small paper bindle. The BHO weighed one gram and was in the form usually sold at a dispensary.

In other locations in the house, officers found more jars of marijuana, a digital scale, cans of butane, a vacuum system that smelled of marijuana, glass dishes, and glass tubes. These items are commonly used to produce BHO. The glass dishes and glass tubes had residue inside.

Becerra later told a sheriff's deputy he made BHO five or six months prior to the search of his house, but said he quit making it because it was too dangerous. Becerra also told the deputy he purchased the BHO found in his room four to six weeks before the search. He told a police officer he understood the glass tubes found in his house could be used to make BHO, but reiterated his claims that he had purchased the BHO found in his room and that he had not made the substance for several months.

The prosecution filed a felony complaint charging Becerra with manufacturing BHO "[on] or about February 26, 2015." Nearly all of the evidence adduced at the preliminary

hearing pertained to that date. The information also charges Becerra with manufacturing BHO "[o]n or about February 26, 2015."

Becerra and the prosecution agreed to a bench trial. During trial, the prosecution introduced evidence that law enforcement found a glass tube packed with marijuana, a can of butane, and a glass dish containing BHO in Becerra's bedroom while executing a search warrant in November 2012. There were more cans of butane and a bag of marijuana in other parts of the house, and a message on Becerra's phone that referred to BHO.

Becerra objected to the evidence obtained during the 2012 search. He denied manufacturing BHO in 2012, and argued the evidence was not substantially similar to the 2015 charge, was not relevant, and was more prejudicial than probative. The trial court admitted the evidence, and ruled that any dissimilarities would go to weight rather than admissibility.

At the close of the prosecution's case, Becerra moved for a judgment of acquittal. (Pen. Code, § 1118.) The prosecution opposed Becerra's motion based on his admission he made BHO four to six months before police searched his house in 2015. The trial court denied the motion. Becerra's expert then testified that the glass tubes in Becerra's house appeared to have been used to manufacture BHO "a couple of weeks" to a month before police executed the search warrant.

The trial court found Becerra guilty of manufacturing BHO. The court stated it based its conviction on either Becerra's admission that he made BHO four to six months before the search of his home, or his expert's testimony that Becerra manufactured BHO two to four weeks before the search.

At sentencing, the trial court prohibited Becerra from associating with gang members as a condition of probation. The court found the probation condition appropriate because police reports indicate he is a "known associate of the Eastside Santa Barbara gang."

DISCUSSION

Date of the offense

Becerra contends insufficient evidence supports his conviction for manufacturing BHO because his conviction is based on facts not contained in the information or the evidence adduced at the preliminary hearing. We disagree.

An accusatory pleading need not state the "precise time" a defendant commits a criminal offense. (Pen. Code, § 955.) But the defendant must be "informed of the nature and cause of the accusation" (U.S. Const., 6th Amend.) to have a "reasonable opportunity to prepare and present [a] defense and not be taken by surprise by [the] evidence offered at . . . trial. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 317 (*Jones*).) The required notice is provided through the information, the evidence presented at the preliminary hearing, and pretrial discovery. (*Ibid.*) The information gives the defendant notice of the "kind and number" of offenses, while the evidence at the preliminary hearing details the "time, place, and circumstances of the charged offenses." (*People v. Avina* (1989) 211 Cal.App.3d 48, 57.) "'Whether an accused has been adequately advised depends on the nature of the crime and the available defenses thereto.' . . . [Citation.]" (*People v. Obremski* (1989) 207 Cal.App.3d 1346, 1353, italics omitted (*Obremski*).) We independently determine whether Becerra received adequate notice of the charge against him. (*People v. Cole* (2004) 33 Cal.4th 1158, 1205 (*Cole*).)

He did. The information charges Becerra with manufacturing BHO on or about February 26, 2015. And while most of the evidence adduced at the preliminary hearing pertained to that date, there was also evidence that Becerra admitted to manufacturing BHO in the past. More significantly, Becerra knew the prosecution had evidence he manufactured BHO four to six months before the date charged in the information; he admitted this to a sheriff's deputy and a police officer. And he knew, based on the pretrial briefs, that the prosecution intended to rely on that evidence. (Cf. *People v. Crawford* (1990) 224 Cal.App.3d 1, 8-9 [defendant could not have been surprised by felony-murder instruction because theory was suggested in a pretrial hearing].)

Moreover, it is unclear how Becerra's defense would have changed were a different manufacturing date alleged in the information. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 906-907 [where preliminary hearing gives notice of charge, a defendant's ability to prepare a defense is not affected where evidence at trial shows offense occurred at different time].) Nor does he explain how he would have dealt with his pretrial admissions. (*Obremski*, *supra*, 207 Cal.App.3d at p. 1353.) Because the evidence supports that Becerra had manufactured BHO prior to February 26, 2015, he cannot claim he was "taken by surprise by evidence offered at his trial." (*Jones*, *supra*, 51 Cal.3d at p. 317.) There was no due process violation.

Becerra's reliance on *People v. Burnett* (1999) 71 Cal.App.4th 151 (*Burnett*) is misplaced. In *Burnett*, the prosecution presented evidence at the preliminary hearing that the defendant possessed a .38 caliber revolver during an altercation with two men. (*Id.* at p. 164.) But at trial, the

prosecution introduced evidence related to that firearm, and evidence that the defendant possessed a .357 magnum on a previous date in the presence of a different man. (*Id*. at p. 168.) The evidence presented at trial allowed the jury to find the defendant guilty of possessing a firearm based on either incident. (*Id*. at p. 171.) He thus did not have the requisite "notice of the offense being prosecuted." (*Id*. at p. 174.)

Here, the trial court was not required to choose between discrete criminal acts or victims to find Becerra guilty of manufacturing BHO. All of the evidence presented at trial pertained to a single act of manufacturing that occurred within six months of the date specified in the information. Unlike the *Burnett* prosecutor, the prosecutor here did not "change[] horses in midstream by substituting a different 'act' for the single 'act' described by the evidence at the preliminary hearing." (*Burnett*, *supra*, 71 Cal.App.4th at p. 176.)

Becerra alternatively claims that, even if there was no due process violation, the trial court erred when it convicted him of manufacturing BHO based on his actions prior to February 26, 2015, because subdivision (a) of section 11379.6 of the Health and Safety Code only criminalizes the present, ongoing manufacture of a controlled substance, not the completed manufacture of the substance. None of the cases he cites supports his claim. (See *People v. Luna* (2009) 170 Cal.App.4th 535, 543 ["Health and Safety Code section 11379.6, subdivision (a), criminalizes participation in each and every stage of the manufacturing process, 'from inception through completion'"]; *People v. Heath* (1998) 66 Cal.App.4th 697, 705 [methamphetamine "had been produced" when police searched the premises]; *People v. Lancellotti* (1993) 19 Cal.App.4th 809,

814 (*Lancellotti*) [defendant's "tidal theory of manufacturing culpability, with liability flowing in during the 'bubbling away' stages and ebbing at 'boxed' stages, is . . . contrary to the statute"]; *People v. Jackson* (1990) 218 Cal.App.3d 1493, 1503 [manufacture of a controlled substance may "include the culmination of the manufacturing process, the finished . . . product"].) We decline to part ways with this authority and endorse a rule that a prosecution under Health and Safety Code section 11379.6, subdivision (a), is impossible unless police catch a defendant in the act of manufacturing.

As Becerra recognizes, the manufacture of BHO is a near-instantaneous process. (See *People v. Bergen* (2008) 166 Cal.App.4th 161, 165-166.) The rule he proposes would thus require police to intercede in the few minutes it takes to extract and filter BHO. Law enforcement need not be so omniscient. (*Lancellotti*, *supra*, 19 Cal.App.4th at p. 813 [a defendant "is not entitled to acquittal because [the] clandestine laboratory . . . was not 'bubbling and reacting when the police arrived'"].)

Evidence of prior uncharged acts

Becerra next contends the trial court abused its discretion when it admitted evidence of his prior manufacture of BHO because it was not relevant and was more prejudicial than probative.[1] We again disagree.

Evidence of a defendant's prior acts is inadmissible to prove "conduct on a specified occasion" but admissible to prove intent. (Evid. Code, § 1101, subds. (a) & (b).) To admit prior acts evidence, the trial court must determine that: (1) the facts to be

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[1] Becerra also argues the evidence was cumulative, but he did not make that argument below. It is forfeited. (*People v. Brady* (2010) 50 Cal.4th 547, 582; see Evid. Code, § 353.)

proved are material, (2) the evidence tends to prove those facts, and (3) Evidence Code section 352 does not require exclusion of the evidence. (*People v. Carpenter* (1997) 15 Cal.4th 312, 378-379, abrogated on another point by *People v. Diaz* (2015) 60 Cal.4th 1176, 1190-1191.) We review rulings under Evidence Code sections 352 and 1101 for abuse of discretion (*People v. Lewis* (2001) 25 Cal.4th 610, 637), and will not find error unless Becerra demonstrates a manifest abuse of that discretion (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10).

The trial court did not abuse its discretion when it admitted the evidence from 2012 because the evidence was relevant to show Becerra's intent in 2015. Our Supreme Court has "long recognized 'that if a person acts similarly in similar situations, [the person] probably harbors the same intent in each instance' [citations], and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent." (*People v. Robbins* (1988) 45 Cal.3d 867, 879, superseded by statute on another ground as stated in *People v. Jennings* (1991) 53 Cal.3d 334, 387, fn. 13.) "To be admissible to show intent, 'the prior conduct and the charged offense need only be sufficiently similar to support the inference that [the] defendant probably harbored the same intent in each instance.' [Citations.]" (*Cole*, *supra*, 33 Cal.4th at p. 1194.)

Here, law enforcement found several items used to manufacture BHO at Becerra's residence in 2012. The same or similar items were found again in 2015. Becerra admitted he manufactured BHO in 2012. Because Becerra admittedly intended to manufacture BHO in 2012, it is rationally inferred he harbored the same intent in 2015. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 ["'the recurrence of a similar result . . . tends to

establish . . . the presence of the normal, i.e., criminal, intent accompanying such an act'"].) The evidence from 2012 was thus relevant. (*People v. Guerrero* (1976) 16 Cal.3d 719, 724 (*Guerrero*).)

And its admission was not prejudicial. Becerra claims a "'grave danger of prejudice'" (*People v. Thompson* (1980) 27 Cal.3d 303, 317) because of "'[t]he natural and inevitable tendency . . . to give excessive weight'" to prior acts evidence (*Guerrero*, *supra*, 16 Cal.3d at p. 724). But this claim ignores that he waived a jury trial: With the court as the trier of fact, prior acts evidence is unlikely to evoke the emotional bias Evidence Code section 352 is designed to prevent. (*People v. Banks* (1976) 62 Cal.App.3d 38, 45-46.) We presume the court knew and followed the law. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913.) And absent some showing to the contrary we presume the court used the evidence solely for the limited purpose it admitted it. (*In re Jose M.* (1994) 21 Cal.App.4th 1470, 1481.) Becerra makes no contrary showing here.

Probation condition

Becerra contends the trial court abused its discretion when it restricted his contact with gang members as a condition of probation because there is no evidence of gang-related activity in this case. Not so.

A trial court may impose probation conditions it deems "fitting and proper . . . for the reformation and rehabilitation of the probationer." (Pen. Code, § 1203.1, subd. (j).) The court has broad discretion to determine the conditions of probation. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120-1121.) We will not find an abuse of discretion unless the probation condition "'"(1) has no relationship to the crime of

which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . ." [Citation.]' [Citation.]" (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*).) "This test is conjunctive . . . . [E]ven if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality. [Citation.]" (*Id.* at pp. 379-380.)

Irrespective of whether Becerra's manufacture of BHO was gang related, the trial court did not abuse its discretion when it restricted his contact with gang members as a condition of probation because that condition is reasonably related to preventing future criminality. (*Olguin*, *supra*, 45 Cal.4th at p. 380.) As numerous courts have recognized, "[a] trial court may impose probation conditions to discourage defendants from engaging in gang-connected activities. [Citation.]" (*People v. Perez* (2009) 176 Cal.App.4th 380, 383-384; see e.g., *People v. Lopez* (1998) 66 Cal.App.4th 615, 626 (*Lopez*); *In re Laylah K.* (1991) 229 Cal.App.3d 1496, 1501.) Such conditions are "reasonably related to avoidance of future criminality" and "assist [defendants] in successfully completing probation." (*People v. Robinson* (1988) 199 Cal.App.3d 816, 818.)

Here, the trial court determined that Becerra had gang contacts. The probation condition was thus reasonable to prevent future criminality. (*Lopez*, *supra*, 66 Cal.App.4th at p. 626; *In re Laylah K.*, *supra*, 229 Cal.App.3d at p. 1501.) This is true even if Becerra has little or no involvement with gangs, as he claims: There is "no logical or beneficial reason to require a

court to wait until [a defendant] has become entrenched with a gang, only then to apply mere prophylactic remedies." (*Ibid*.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Pauline Maxwell, Judge

Superior Court County of Santa Barbara

Arielle Bases, under appointment by the Court of Appeal, for Defendant and Appellant.

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