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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. CLYDE FORREY, Defendant and Appellant.	B282710 c/w B286006 (Los Angeles County Super. Ct. No. YA094700)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Affirmed as modified and remanded with directions.

Theresa Osterman Stevenson, 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, Senior Assistant Attorney General, Noah P. Hill and Heather B.

Arambarri, Deputy Attorneys General, for Plaintiff and Respondent.

We here address two consolidated appeals. In the appeal from his plea to possession of methamphetamine for sale and the sentencing that followed, appellant Clyde Forrey contends the trial court erred in denying his motion to suppress evidence -- over 21 grams of methamphetamine -- discovered by police officers after stopping his vehicle. Appellant contends the officers had no reasonable basis to believe he had violated a traffic law prior to initiating the stop. Appellant also contends, and respondent does not dispute, that a recent change in Health and Safety Code section 11370.2, governing sentencing enhancements for drug offenders, should be applied retroactively to reduce his sentence by three years.

In the appeal of the trial court's more recent order revoking his probation, appellant contends the court abused its discretion by adhering to a previous warning to imprison appellant should he fail to comply with the terms and conditions of probation, rather than considering the circumstances in effect when appellant violated.

Following our independent review of the evidence, including a video shot by the officers' dash camera, we conclude that the traffic stop was objectively reasonable. We

further conclude that the trial court considered the relevant factors in revoking appellant's probation and did not abuse its discretion. We agree that the new law should apply to appellant's sentence. Accordingly, we strike the three-year enhancement added by the court due to appellant's prior conviction of a drug offense under Health and Safety Code section 11379, reduce appellant's sentence, and remand for correction to the abstract of judgment. We otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Information*

Appellant was charged with one count of possession of methamphetamine for sale (Health & Safety Code, § 11378). The information also alleged that appellant suffered a strike prior within the meaning of Penal Code sections 667, subdivision (b) through (i) and 1170.12, subdivision (b),[1] two prison priors within the meaning of section 667.5, subdivision (b), and a drug prior within the meaning of Health and Safety Code section 11370.2, subdivision (c). Appellant pled no contest to the charge and admitted the priors.[2]

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[1] Undesignated statutory provisions are to the Penal Code.

[2] Appellant's 2005 conviction for a violation of Health and Safety Code section 11379 (transportation of a controlled substance) provided the strike prior, the drug prior and one of the prison priors. The other prison prior was based on a 2013 conviction for a violation of Vehicle Code section 10851, subdivision (a) (unlawful driving or taking of a vehicle).

B. *Suppression Hearing*

The methamphetamine that formed the basis of the charge against appellant was seized following a traffic stop. Prior to pleading no contest to the charge, appellant contended the officers had no reasonable suspicion to justify the stop and moved to suppress the evidence. The court held a suppression hearing.

Officer Humberto Ruvalcaba testified that on August 19, 2016, at approximately 3:21 a.m., he and his partner were on patrol in a marked car and were driving up an onramp to the 110 Freeway behind appellant's car. The onramp did not immediately disappear, but for a time became the freeway's number five lane. The officers merged left into the adjacent number four lane and began to speed up to pass appellant. Appellant, who had turned on his signal prior to the officers' lane change, merged into the number four lane in front of the patrol car in a manner Officer Rubalcava described as "unsafe." He testified that appellant "swerved right directly in front of [the officers' vehicle]," causing Officer Ruvalcaba's partner, who was driving to "hit [the] brakes."[3]

After appellant engaged in that maneuver, the officers activated the patrol car's lights and siren and conducted a traffic stop. Officer Ruvalcaba observed something "fly out"

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[3] Officer Ruvalcaba's report stated that his partner "slammed on [the brakes] in order to avoid colliding into the rear of [appellant's] car."

the passenger window of appellant's vehicle shortly before appellant stopped. The officer returned to the area of his observation and found a black bag containing a crystalline substance resembling methamphetamine weighing over 20 grams.[4] Appellant was the sole occupant of the vehicle.

The incident was videotaped by the patrol car's dash camera, which also received and recorded input from the patrol car's mechanical systems. The videotape shows that appellant put on his signal before the officers moved into the number four lane and began to speed up to pass him. As appellant's vehicle moved into the number four lane in front of the patrol car, the officer driving it applied the brakes and slowed the patrol car's speed from 59 to 55.

After viewing the video, the court stated: "It does appear that the police car did have to slow down. There was no slamming on the brakes, but there was a slowing down. The motion is denied."

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[4] At the preliminary hearing, appellant's counsel stipulated that the substance was methamphetamine for purposes of the preliminary hearing only. According to the probation report and testimony at the preliminary hearing, the officers recovered from appellant's possession a cell phone with drug-related messages and $114 in currency in small bills.

C. *Plea and Sentence*

At the May 10, 2017 sentencing hearing, the court struck the strike under section 1385.[5] It imposed a sentence of eight years, consisting of the upper term of three years for possession for sale (see Health & Safety Code, § 11378; § 1170, subd. (h)(1)) and a consecutive sentence of three years pursuant to Health and Safety Code section 11370.2, subdivision (c), plus two years for the two prison priors pursuant to section 667.5, subdivision (b). The court stayed execution of the sentence and placed appellant on probation for five years subject to certain terms and conditions, including enrollment at Pacifica House (Pacifica), a residential drug treatment program, for one year. Prior to sentencing appellant, the court said to him: "And you understand if you violate probation, that eight-year prison sentence is going to come crashing down on your head."

D. *Revocation of Probation*

Three months after his sentencing, appellant failed to appear at an August 17, 2017 progress hearing, and his attorney reported he was not enrolled in Pacifica. The court revoked probation and issued a bench warrant. Appellant was taken into custody on August 18.

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[5] Section 1385, subdivision (a) authorizes the trial court to "order an action to be dismissed" if the dismissal is "in furtherance of justice." It permits the court to dismiss allegations that the defendant suffered a prior conviction. (*People v. Kim* (2012) 212 Cal.App.4th 117, 122-123.)

An evidentiary hearing was held on September 20, 2017. Gustavo Garcia, appellant's probation officer, testified that he saw appellant regularly between January 2017 and June 12, 2017. Appellant enrolled in Pacifica.[6] On June 12, appellant and Garcia set their next meeting for July 18. Appellant did not appear. Appellant was drug testing during the period he was under Garcia's supervision. Appellant tested positive in February and April 2017 and negative in June 2017.

Garcia testified that he learned appellant had gone to UCLA's hospital for medical treatment for diabetes sometime in June. Appellant did not return to Pacifica after his treatment and did not contact Garcia. Nor did he return to UCLA, despite having been given an appointment for further treatment. Garcia left multiple messages for appellant after learning that he had left Pacifica. Appellant finally returned one call. Garcia referred appellant to another facility, as he was concerned Pacifica would not take appellant back due to his going AWOL (absent without leave) after being treated at UCLA. Appellant did not report to the new facility.

Michael Millard, program director for Pacifica, testified that after appellant had been at the program for seven or eight days, he was given permission to go to UCLA for

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[6] Garcia said he enrolled in April 2017, but Pacifica's director said appellant was there only seven or eight days when he went AWOL on July 1.

medical treatment. Pacifica provided transportation and expected appellant to call for pickup once he was released. Appellant never called or returned to Pacifica. Appellant's initial treatment program was supposed to last 90 days.

Defense counsel did not dispute that appellant was in violation of his probation, but argued that he should be given another chance because he had been making progress and had contacted his probation officer after leaving Pacifica.

The court found that appellant had violated the terms of his probation by failing to remain at Pacifica. The court revoked probation and ordered execution of the eight-year prison sentence. At the hearing, the court stated: "Your client knew that if he left the program, he would get the suspended sentence. [¶] I would have . . . considered sending him to another program if he would have walked in on his own or if he would have contacted someone asking for help. But he gave the excuse after eight days that he wanted to go to [UCLA] Hospital and he never came back, and [UCLA] gave him a return appointment and apparently he didn't honor that either. [¶] He's playing a game with you and the court and everybody else because he's an addict and he's going to get treatment, at least I'm hoping he can. [¶] He's in violation of probation. The suspended sentence of eight years is imposed. And the court is going to recommend that he serve that term at Donovan Prison which has a program."

DISCUSSION

A. *Suppression Hearing*

Appellant contends the trial court erred in denying his motion to suppress the evidence seized during the traffic stop. California courts may order the exclusion of evidence at trial if the remedy is required by the federal Constitution. (*People v. Camacho* (2000) 23 Cal.4th 824, 830.) The Fourth Amendment to the United Stated Constitution prohibits unreasonable searches and seizures, including "seizures of persons[] [for] brief investigative stops." (*People v. Souza* (1994) 9 Cal.4th 224, 229.) "It is well settled that the driver of a vehicle that is the subject of a traffic stop is seized within the meaning of the Fourth Amendment." (*People v. Vibanco* (2007) 151 Cal.App.4th 1, 8.) However, "[a] police officer's reasonable suspicion that a driver has violated the Vehicle Code justifies a traffic stop and detention." (*People v. Corrales* (2013) 213 Cal.App.4th 696, 699; accord, *People v. Wells* (2006) 38 Cal.4th 1078 1082 [not an unreasonable search and seizure for officer to "stop and detain a motorist on reasonable suspicion that the driver has violated the law"].) The officer's suspicion is considered reasonable "when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza, supra,* at p. 231.)

The denial of a motion to suppress evidence due to the unreasonableness of the detention "may be challenged by an

appeal from the judgment entered after defendant's guilty or no contest plea." (*People v. Leath* (2013) 217 Cal.App.4th 344, 350.) "'"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment."' (*Ibid.*)

Vehicle Code section 21658 provides that "[w]henever any roadway has been divided into two or more clearly marked lanes for traffic in one direction [a] . . .[¶] . . . vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from the lane until such movement can be made with reasonable safety." Vehicle Code section 22107 similarly provides: "No person shall turn a vehicle from a direct course or move right or left upon a roadway until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided in this chapter in the event any other vehicle may be affected by the movement." A violation of Vehicle Code section 21658 occurs whenever a driver straddles a lane or changes lanes unsafely. (*People v. Butler* (1978) 81 Cal.App.3d Supp. 6, 7-8.) A violation of Vehicle Code section 22107 may also be supported by an unsafe lane change. (See, e.g., *People v. Thompson* (2000) 79 Cal.App.4th 40, 61 ["[B]y its express terms, the statute applies to any movement to the left or right from a direct

course, and this is generally understood to include moving from one's lane (italics omitted)]; *Nevarov v. Caldwell* (1958) 161 Cal.App.2d 762, 777-779 [driver moving in front of car traveling in adjacent lane must use reasonable care to ascertain it could be done safely].)

Here, the evidence supports the trial court's finding that the officers had reasonable suspicion that appellant had violated a traffic law by moving from the number five lane to the number four lane in an unsafe manner.[7] As confirmed by the dashcam video, the patrol car had moved into the number four lane first and was speeding up to pass appellant's vehicle when he moved in front of it. The driver of the patrol car was required to hit his brakes to avoid running into the back end of appellant's car. Nothing in the roadway forced appellant to move when he did. Had he waited for the patrol car to pass, he could have safely moved into the number four lane and continued on his way. Accordingly, the officers' traffic stop was objectively justified by the totality of the circumstances, and the trial court did not err in denying appellant's motion to suppress.

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[7] In finding the detention of appellant reasonable, the court also stated "once he throws something from the car, that's littering." As respondent acknowledges, when appellant threw the bag out of the car "the officers had already activated the patrol car's lights" and "appellant had already submitted to their authority." Accordingly, that action could not serve to justify the detention.

B. *Sentence Under Health & Safety Code Section 11370.2*

At the time of appellant's sentencing, Health and Safety Code section 11370.2, subdivision (c) required "in addition to any other punishment authorized by law" a "full, separate and consecutive" three-year term if a defendant was convicted of violating Health and Safety Code sections 11378 or 11379 and had suffered a previous conviction for various drug offenses, including Health and Safety Code section 11379. (Stats. 1998, ch. 936, § 1, p. 6846.) In sentencing appellant, the court applied this provision, as appellant had a prior conviction under Health and Safety Code section 11379. Senate Bill No. 180, effective January 1, 2018, amended section 11370.2. It now requires a full, separate, and consecutive three-year term for current violations of Health and Safety Code sections 11378 or 11379 only if the defendant had a prior conviction for violating Health and Safety Code section 11380.[8] (Sen. Bill No. 180 (2017-2018 Reg. Sess.), Stats. 2017, ch. 677, § 1, p. 5031.) Both parties contend that the amended provision should be applied to appellant's sentence, as his case had not yet become final when the amended provision became effective. (See *People v. Millan* (2018) 20 Cal.App.5th 450, 455-456.) We agree. We further agree that as the parties recommend,

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[8] Section 11380 applies where the defendant uses a minor as an agent in committing a drug offense.

we may strike the enhancement and order the abstract of judgment amended to reflect the new sentence.

C. *Decision to Revoke Probation*

A court may revoke probation after proper notice and hearing if the probationer has violated the terms imposed. (§ 1203.2 (subd. (a).) The role of the trial court at a revocation proceeding is to determine "whether a violation of the terms of probation has occurred and, if so, whether it would be appropriate to allow the probationer to continue to retain his conditional liberty." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 348.) "A probation violation does not automatically call for revocation of probation and imprisonment." (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1420.) The court has discretion to reinstate probation or modify and reinstate. (*Ibid.*) "The decision whether to reinstate probation or terminate probation (and thus send the defendant to prison) rests within the broad discretion of the trial court." (*Id.* at p. 1421.)

On appeal "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 . . . .'" (*People v. Urke* (2011) 197 Cal.App.4th 766, 773.) "'[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. Rodriguez* (1990) 51 Cal.3d 437, 443.)

Appellant asserts that the trial court abused its discretion in terminating probation and sending him to

prison. He claims the court "prejudged the disposition on the probation violation" and "revoked probation and executed sentence in large part because it had warned [appellant] it would do so at the time he entered his plea" rather than consider "the totality of the circumstances" at the time of the revocation hearing. The record does not support appellant's contentions. The witnesses at the revocation hearing provided evidence of appellant's actions in the months after his sentencing. Following the grant of probation, appellant enrolled in Pacifica, but went AWOL almost immediately, using his medical condition as an excuse, and missed a scheduled meeting with his probation officer. Although he eventually returned one of probation officer Garcia's calls after his disappearance, appellant made no effort to enroll in the alternate program to which Garcia directed him during that call, and failed to keep in contact with the probation officer thereafter. The comments made by the court in issuing its ruling confirmed that the court considered the relevant evidence. The court's statement that it "would have . . . considered sending [appellant] to another program" had he walked in on his own or contacted someone asking for help, its expression of "hope" that appellant would obtain treatment, and its recommendation that appellant serve his sentence in a prison with a treatment program confirmed that it had not prejudged the matter and that its intent was not punitive. Appellant's decision to leave Pacifica after a few days and his failure to enroll in a new program offered by his probation officer supported the

court's conclusion that he would not, or could not, comply with the treatment conditions of his probation, and that a custodial sentence was appropriate. The court did not abuse its discretion in revoking appellant's probation.

DISPOSITION

The three-year sentence enhancement imposed under Health and Safety Code section 11370.2 is stricken. The judgment is otherwise affirmed, as is the trial court's order revoking appellant's probation. The matter is remanded to correct the abstract of judgment to reflect the striking of the section 11370.2 enhancement. Upon remand, the trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.