Filed 2/28/12 P. v. Anderson CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

**California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MARK E. ANDERSON,<br><br>Defendant and Appellant. | B229870<br><br>(Los Angeles County<br>Super. Ct. No. VA115501) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Patrick T. Meyers, Judge. Affirmed.

---

Elana Goldstein, 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, Daniel C. Chang and Dana M. Ali, Deputy Attorneys General, for Plaintiff and Respondent.

---

Mark E. Anderson appeals from the judgment entered after a jury found him guilty of one count of possession of methamphetamine and not guilty of one count of being under the influence of methamphetamine. Anderson contends the trial court committed prejudicial error by admitting evidence that he was on parole at the time of the alleged offenses and by excluding him from a portion of the jury trial on his prior conviction and prior prison terms. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

An information, dated August 6, 2010 and amended by interlineation on October 6, 2010, charged Anderson with two counts: (1) possession of methamphetamine in violation of Health and Safety Code section 11377, subdivision (a); and (2) being under the influence of methamphetamine in violation of Health and Safety Code section 11550, subdivision (a). The information specially alleged that Anderson (1) had a prior serious or violent felony conviction for first degree burglary (Pen. Code, §§ 459, 460, subd. (a)) that qualified as a strike under the "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)); and (2) had served four prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).

2. *The Evidence Presented at Trial on the Alleged Offenses and the Jury's Verdict*

On April 2, 2010, about 5:30 p.m., Whittier Police Department Officer Hugo Figueroa, who was on bicycle patrol, noticed Anderson sitting on the sidewalk of Greenleaf Avenue. Within Anderson's reach were one open beer can and a closed one. Officer Figueroa asked Anderson if the beer cans belonged to him. Anderson replied that the unopened can was his, but the opened can was not. Officer Figueroa then asked Anderson if he was on parole or probation, and Anderson responded that he was on parole. Officer Figueroa asked permission to search Anderson, and Anderson agreed. After the officer searched Anderson standing up, he told Anderson to sit back down and take off his shoes and socks. When Anderson removed his socks, Officer Figueroa instructed him to flip them inside out. Anderson completely flipped the left sock inside out, but not the right one, appearing as if he were concealing something inside the sock.

Officer Figueroa examined the sock and found inside "a small plastic baggie with a crystal-like substance that resembled methamphetamine . . . ."

Anderson was "jittery, had random movements throughout his body. . . . He kept opening and closing his mouth, and he appeared to be grinding his teeth as well." Officer Figueroa asked Anderson if he had used methamphetamine, and Anderson replied that he had smoked methamphetamine the previous day at noon. Officer Figueroa tested Anderson to assess whether his system was accelerated and found the results consistent with methamphetamine use. Anderson's pulse was 158 beats per minute, well above the normal resting heart rate of 60 to 90 beats per minute, which indicated an accelerated system due to methamphetamine use. Anderson had calluses on his hands, which is consistent with holding a glass pipe to smoke methamphetamine. Based on these circumstances, Officer Figueroa believed that Anderson "was probably under the influence of methamphetamine" and arrested him.

After another officer, Officer Stoner, had transported Anderson to the jail at the police department, Officer Figueroa filled out a drug influence evaluation form, noticing that Anderson was "still jittery. He kept moving." In addition, one of Anderson's pupils drifted away when following an object, and his reaction to light was slow. His pulse still was elevated, and he had a white film on his mouth and tongue. Officer Figueroa opined that Anderson "was under the influence of a central nervous system stimulant consistent with methamphetamine."

The substance found in Anderson's sock tested positive for methamphetamine, both in a test performed at the police station and in later testing performed by a criminologist. A urine sample from Anderson also tested positive for methamphetamine.

Anderson testified in his own defense. According to Anderson, he was sitting on the sidewalk outside a theater on Greenleaf Avenue when approached by Officer Stoner. He acknowledged that the unopened beer can was his, claiming the opened beer can belonged to one of his two friends who had been sitting on the sidewalk with him but had left temporarily. Officer Stoner did not ask Anderson whether he was on parole or probation, nor did the officer request permission to search Anderson. Rather, the officer

said, "'I am going to search you,'" and proceeded to do so. When Anderson was sitting on the sidewalk taking off his socks as directed, Officer Stoner had a baggie in his hand and asked, "'What's this?'" Anderson replied, "'I don't know.'" Anderson thought the baggie was in Officer Stoner's hand the whole time, and he never had placed a baggie in his sock. The socks were not his, but those of another homeless person whom he had seen the previous night. Anderson denied that Officer Figueroa was present during this incident.

Anderson admitted that he had been convicted of a felony in 2004. He denied being under the influence of methamphetamine on April 2, 2010, and said that he did not admit using methamphetamine to either Officer Stoner or Officer Figueroa, who was not at the scene. He had a dry mouth and jittery movements because he takes a mental health medication once a day, and he has had a wandering eye since birth.

The jury found Anderson guilty of possession of a controlled substance as charged in count 1, but not guilty of being under the influence of methamphetamine as charged in count 2.

3. *The Evidence Presented at Trial on the Alleged Prior Conviction and Prior Prison Terms, the Jury's Verdict and Sentencing*

In a bifurcated jury trial on the prior conviction and prior prison terms, a paralegal from the District Attorney's Office testified that Anderson had been convicted on (1) May 18, 1994 for possession of cocaine in violation of Health and Safety Code section 11350, subdivision (a); (2) September 13, 2001for taking a vehicle without the owner's consent in violation of Vehicle Code section 10851, subdivision (a); (3) July 12, 2004 for first degree burglary under section 459; and (4) August 4, 2009 for possession of a controlled substance in violation of Health and Safety Code section 11377, subdivision (a). Anderson was paroled for the last offense on January 11, 2010 and had not been discharged from parole. He served a prison term for each of the offenses, or for a violation of probation, and in all circumstances did not remain free from prison for five years before committing his next offense. The trial court determined

beyond a reasonable doubt and told the jury that the individual identified in the prosecution's exhibits regarding the prior offenses was Anderson.

The jury found true the special allegation that Anderson previously had been convicted of a serious or violent felony—burglary—under the Three Strikes law and had served four prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).

The trial court sentenced Anderson to a state prison term of five years, consisting of the middle term of two years for possession of methamphetamine, doubled to four years under the Three Strikes law, plus one year for one of the prior prison terms under Penal Code section 667.5, subdivision (b). Pursuant to Penal Code section 1385, subdivisions (a) and (c), the court struck the additional three prior prison term enhancements.

## DISCUSSION

1. *The Trial Court Did Not Commit Prejudicial Error by Admitting Evidence That Anderson Was on Parole at the Time of the Alleged Offenses*

We review the admissibility of evidence for an abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.) This standard of review applies to the exercise of discretion under Evidence Code section 352, which gives the trial court "broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice . . . ." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Even if an evidentiary ruling is erroneous under this standard, reversal is not warranted unless it is reasonably probable that the defendant would have received a more favorable result absent the error. (*Id.* at p. 1125.)

Anderson contends the trial court committed prejudicial error by allowing Officer Figueroa to testify that Anderson told the officer that he was on parole. Even assuming error, however, Anderson has not demonstrated that, absent admission of evidence that he was on parole at the time of the alleged offenses, it is reasonably probable that he would have obtained a more favorable result at trial. During his own testimony, Anderson admitted that he had been convicted of a felony in 2004. Given this

admission, his status as a parolee at the time of the alleged offenses would not have significantly diminished his credibility with the jury as he suggests. Indeed, the jury found him not guilty of being under the influence of methamphetamine, despite extensive testimony from Officer Figueroa regarding his observations of Anderson and a positive urine sample.

2. *The Trial Court Did Not Commit Prejudicial Error by Excluding Anderson for a Portion of the Jury Trial on His Prior Conviction and Prior Prison Terms*

As the paralegal from the District Attorney's Office began to testify during the bifurcated jury trial on Anderson's prior conviction and prior prison terms, stating that her duties were to research prior convictions, obtain documents to support the convictions and occasionally testify at trial regarding the documents, Anderson, although represented by counsel, interjected, "Objection. You're reading them for the jury." The trial court responded, "All right." Anderson continued, "You're reading for the jury. They can't read for themselves?" The court said, presumably to the jury, "[g]o into the jury room." Anderson continued, "They can't read for themselves? Yeah, exactly." The court said, "Thank you. Take a brief break." Anderson persisted, "Exactly. You know that strike's not a strike. Car theft is not a car theft. Kidnap is not a kidnap. Roman did it. Roman created it. Law enforcement family. Get out of this country, law enforcement family."

After the jury was out of the courtroom, the court instructed, "Mr. Anderson, if you cannot comport yourself, as you were able to do in the trial of this case, in the remaining bifurcated —" Anderson interrupted, "Your honor." The court continued, "— trial — Listen up. Listen up." Anderson again interrupted, "You have got to hear me. I don't want to listen. I am tired of listening." The court said, "Take him out." Anderson replied, "Good. Angry court anyway." Addressing Anderson's counsel, the court stated, "You may make a record before he goes in his presence, whatever it is. His behavior and conduct has become unduly disruptive." Anderson said, "Yeah, right." The court explained, "We do not have to put up with that. . . . Nor do the jurors." Anderson continued interrupting, "Fair — [¶] . . . [¶] —

Fair, donners, conners, donners. Court proceeding . . . — [¶] . . . [¶] . . . [¶] —All dead. You're next till then." Anderson's attorney indicated that she had nothing to state.

After Anderson left the courtroom, the court expressed its belief that Anderson's conduct "was preventing th[e] trial from going forward . . . [and] shows no promise of ceasing. [Anderson] seems intent on disrupting the matter. . . ." The court again gave Anderson's counsel an opportunity to make a record, and she stated, "I believe that if the court felt that time would allow Mr. Anderson to calm down and be able to be present, that the court would allow that for a recess, but I understand the court's opinion and what's been going on throughout this day. He's been progressing to what's just occurred." The court responded, "Well, I am not sure that we are exactly on the same page there . . . but . . . he did not behave, except on a couple of occasions, erratically during the trial. And he fortunately did not do anything during . . . the reading of the prior testimony. However, a bit contrary to what your own impression is, he seemed to be listening to you when you were counseling him. And once he started, however, making the statements, the outburst, after behaving, you know, at least arguably appropriate[], his volume increased. He became animated at the counsel table. The deputy positioned himself behind him as the deputy indicated to the court and to him that he would do if he started to act out. And he showed no sign of conducting himself appropriately as he largely had I would concede during the first part of the case, the first phase. And we need to conclude these matters. And I am apprehensive of . . . someone trying to work a mistrial of this case, and I don't intend to let that succeed. And he seemed on course to do that or tried to do that. So we're just going to have to go forward without him." Anderson's counsel responded, "I understand. Thank you."

When the jury returned to the courtroom, the court instructed, "[Y]ou should not hold the outburst in court against this defendant in making the determinations you're called upon to determine, the burden remains the same. He is a defendant in this case. He is a party, and you need to determine whether or not the People have proved what they need to prove to prove these allegations beyond a reasonable doubt. And you are directed and ordered by the court not to take the defendant's absence or the circumstances

leading to his absence into your consideration at all in making those determinations. That is the instruction."

The prosecutor continued to examine the paralegal regarding the prior conviction and prior prison terms. Anderson was not present for the remainder of her testimony, the instructions to the jury or the court's finding that he was the person indentified in the prosecution's exhibits. His counsel presented no witnesses or argument. He returned to the courtroom for the reading of the jury's verdict.

The Sixth and Fourteenth Amendments of the United States Constitution, as well as article I, section 15 of the California Constitution, guarantee a defendant the right to be present at trial. (*People v. Hines* (1997) 15 Cal.4th 997, 1038-1039.) The right also is statutorily guaranteed as provided in Penal Code sections 977 and 1043. (*Id*. at p. 1039.) Nevertheless, the right is not absolute. (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1393.) "For example, a disruptive defendant can be removed from the courtroom without violating his right to be present." (*Id*. at pp. 1393-1394, citing *Illinois v. Allen* (1970) 397 U.S. 337, 343 [90 S.Ct. 1057, 25 L.Ed.2d 353] and *People v. Welch* (1999) 20 Cal.4th 701, 773.) As the United States Supreme Court has stated, "a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." (*Illinois*, at p. 343.) The same principle is reflected in Penal Code section 1043, subdivisions (a) and (b)(1): "[T]he defendant in a felony case shall be personally present at the trial[,]" except in "[a]ny case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom." "Erroneous exclusion of the defendant is not structural error that is reversible per se, but trial error that is reversible only if the defendant proves prejudice. [Citations.]" (*People v. Perry* (2006) 38 Cal.4th 302, 312.)

Anderson contends that the judgment should be reversed because the trial court did not warn him adequately before removing him from the courtroom. Again, even assuming error, Anderson was not prejudiced. The prosecution introduced evidence, through testimony and exhibits, that Anderson had been convicted of four felonies, including one for first degree burglary, and that he had not remained free from prison for five years following incarceration for each of those convictions (or a related probation violation). Anderson presented no evidence or argument to rebut the prosecution's evidence. Although he claims on appeal that his removal from the courtroom prevented him from testifying at the trial on his prior convictions and prior prison terms, his trial counsel gave no indication that Anderson planned or wanted to testify in that phase, nor did his appellate counsel explain how testimony from Anderson might have rebutted the prosecution's evidence. Moreover, after removing Anderson from the courtroom, the court instructed the jury to disregard his outburst and his absence in making its determinations and to require the prosecution to meet its burden of proof beyond a reasonable doubt. Under these circumstances, removing Anderson from the courtroom did not prejudice his case.

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.