Filed 2/14/13 P. v. Brown CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT LEE BROWN, SR., Defendant and Appellant.	B239266 (Los Angeles County Super. Ct. No. BA389318)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dennis J. Landin, Judge. Affirmed.

Goldstein Legal Office and 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, Victoria B. Wilson and Seth P. McCutcheon, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Robert Lee Brown, Sr. (defendant) appeals from his conviction of possession of a controlled substance. He contends that the prosecution failed to prove that he possessed a usable amount of the drug and that he is entitled to additional presentence custody credits. Respondent contends that the trial court's failure to state reasons for striking an enhancement resulted in an unauthorized sentence. We reject defendant's contentions and find that respondent has failed to preserve the sentencing issue for review. We thus affirm the judgment.

BACKGROUND

1. Procedural history

Defendant was charged with one count of possession of a controlled substance in violation of Health and Safety Code section 11350, subdivision (a). The information also alleged pursuant to the "Three Strikes" law (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)),[1] that defendant had suffered a qualified prior conviction. The information also alleged a prior conviction for which defendant had served a prison term within the meaning of section 667.5, subdivision (b).

After a jury trial, defendant was convicted as charged, and he admitted the prior convictions. On February 2, 2012, the trial court denied probation and sentenced defendant to 32 months in prison, consisting of the low term of 16 months, doubled due to the prior strike. The prosecutor asked the court to strike the enhancement alleged under section 667.5, subdivision (b). Although the court did not expressly rule on the motion, it did not impose a sentence enhancement under that statute. The trial court imposed mandatory fines and fees, and awarded defendant 369 days of presentence custody credits, comprised of 247 actual days and 122 days of conduct credit. Defendant filed a timely notice of appeal.

2. Prosecution evidence

Los Angeles Police Officers Dario Machado and Angel Lozano were on patrol together on June 1, 2011, when they observed defendant leaning into a car while standing

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

on a red curb. They detained defendant for a narcotics investigation and the car sped away. When Officer Machado patted defendant down for weapons he found a small metal container in defendant's pocket. Inside the container were three small balloons containing what felt like a solid substance. Bits of dark powder in the tin appeared to be heroin. Based upon Officer Machado's experience and training, he testified that the color of the substance and the manner in which the substance was wrapped in the balloons suggested that it was heroin.

Criminalist Buffy Miller (Miller) testified as an expert in narcotics analysis that the balloons contained a powdery substance that initially felt like a solid because the balloons had been tightly packed and tied. Miller opened the balloons, weighed and analyzed the contents, and determined that the total net weight of the contents was .40 grams. Tests revealed that the three balloons contained a drug in the heroin family. Miller performed an additional test on the contents of one of the balloons, which confirmed that it was heroin.

Defendant called no witnesses.

DISCUSSION

I. Substantial evidence of usable amount

Defendant contends that there was insufficient evidence that the heroin found in his possession contained a "usable quantity" of the drug and thus did not support his conviction.

When a criminal conviction is challenged as lacking evidentiary support, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) We must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]"

(*Ibid*.) We do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Reversal on a substantial evidence ground "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

"The essential elements of possession of a controlled substance are 'dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character. . . .' [Citations.]" (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1242.) A usable quantity means more than "*useless* traces or residue of such substance. Hence the possession of a minute crystalline residue of narcotic useless for either sale or consumption . . . does not constitute sufficient evidence in itself to sustain a conviction." (*People v. Leal* (1966) 64 Cal.2d 504, 512; see also *People v. Rubacalba* (1993) 6 Cal.4th 62, 65.)

There need not be direct evidence that the quantity was usable for consumption or sale, as that fact may be established with circumstantial evidence. (*People v. Palaschak*, *supra*, 9 Cal.4th at p. 1242.) When the substance containing the narcotic is packaged, as in this case, in a balloon which is placed in a protective container, such a circumstance "bespeaks that it qualitatively had sufficient heroin to make it usable for sale or consumption." (*People v. Perry* (1969) 271 Cal.App.2d 84, 97.)

Defendant contends that because the prosecution objected to instructing the jury with regard to circumstantial evidence with CALCRIM No. 224, respondent may not now "sandbag" the defense by relying on circumstantial evidence to support the judgment. Defendant argues that instructing with CALCRIM No. 224 would have helped the defense, particularly the following language: "If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence."

Defendant's contention is without merit. Defendant withdrew his request for the jury instruction concerning circumstantial evidence (CALCRIM No. 224) and it was not

given. However the jury was instructed that one of the essential elements of the crime of possession of a controlled substance is that "The controlled substance was in a usable amount." (CALCRIM No. 2304.) And "[a] *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces or debris are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user." (*Ibid*.) Furthermore, both the prosecutor and defendant's trial counsel addressed the issue in their closing arguments. The prosecutor invited the jury to closely examine the exhibits so they could see the actual size of the balloons containing heroin in order to appreciate that the quantity was "more than a useless trace or debris." Defendant raised the lack of "discussion about a usable amount. No witness explained what a usable amount is." With that information the jury was able to assess the evidence and reach a proper decision.

The evidence amply demonstrated that defendant kept the substance containing heroin in tightly tied balloons inside a metal container. It is unlikely he would have gone to such lengths for a useless residue. (See *People v. Perry*, *supra*, 271 Cal.App.2d at p. 97.) We conclude that substantial evidence supported the jury's implied finding that the balloons contained an amount of heroin usable for sale or use.

II. Custody credits

The trial court awarded defendant 369 days of presentence custody credits, comprised of 247 actual days and 122 days of conduct credit. Defendant contends that his presentence custody credit should have been calculated under the amended section 4019, effective October 1, 2011, for all days served in custody on and after the effective date, for an additional award of 62 days. As respondent notes, however, the amendment expressly applies only to defendants who committed their crimes on or after October 1, 2011. (§ 4019, subd. (h).) As defendant committed his crime on June 1, 2011, he is not eligible for the additional credit provided under the amended statute. (*People v. Ellis* (2012) 207 Cal.App.4th 1546, 1548 (*Ellis*).)

Defendant contends that *Ellis* was badly reasoned and departed from the California Supreme Court's holding in *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*).[2] Defendant points out that in *Brown*, the court concluded that "prisoners whose custody overlapped the statute's operative date . . . earned credit at two different rates." (*Id.* at pp. 320, 322.) That conclusion is inapplicable here, as the court was addressing the amendment to section 4019 which became effective January 25, 2010, not the current section 4019. (*Brown*, *supra*, at p. 318; Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.) The former statute did not contain an express provision regarding prospective application, as it does now; and *Brown* did not hold, as defendant's argument suggests, that any subsequent amendment to section 4019, regardless of express language or legislative intent, would result in two accrual rates if it became effective during a prisoner's incarceration.

Moreover, *Ellis* is not in conflict with the holding of *Brown*. The court held that the increased accrual rate in the former section 4019 could not be given retroactive effect in the absence of express legislative intent to the contrary. (*Brown*, *supra*, 54 Cal.4th at pp. 318-319.) In doing so, the court reaffirmed that in construing statutes, courts must abide by an "express legislative declaration . . . ." (*Id.* at p. 324.) The current statute provides that its changes "shall apply prospectively and shall apply to prisoners who are confined to a [jail] for a crime committed on or after October 1, 2011." (§ 4019, subd. (h).) We thus abide by that express legislative declaration.

Defendant points to the final sentence of section 4019, subdivision (h): "Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." He contends that this sentence would be pointless unless the statute were construed as permitting credit accrual at the new rate to begin on October 1, 2011, for prisoners incarcerated for crimes committed prior to that date. We disagree. At most, the

---

[2] Defendant also takes issue with *People v. Rajanayagam* (2012) 211 Cal.App.4th 42. That case is inapplicable here in any event, as the appellant there conceded the prospective effect of the amendment, but challenged the statute on equal protection grounds. Defendant does not make that argument here.

final sentence creates an ambiguity "'"with respect to retroactive application [which must be] construed . . . to be unambiguously prospective."' [Citations.]" (*Brown, supra,* 54 Cal.4th at pp. 319-320.) Giving effect to the express language of the subdivision and resolving any ambiguity against retroactive application, as we must, we conclude that defendant is not entitled to credit calculated under the amendment to section 4019 that became effective October 1, 2011.

Defendant's credits were thus correctly calculated under the former section 4019, subdivision (f), which provided that "if all days [were] earned under this section, a term of six days [would] be deemed to have been served for every four days spent in actual custody." (Stats. 2010, ch. 426, § 2.) As defendant spent 247 actual days in custody, he was entitled to no more than the 122 days of conduct credit that he received.

III. Respondent's assignment of error

Respondent contends that the absence of an express ruling on the prosecutor's motion to strike the enhancement under section 667.5, subdivision (b), resulted in an unauthorized sentence. While purporting to seek correction of the sentence, respondent asks that the matter be remanded for the trial court to enter an order imposing or striking the enhancement and to provide a statement of reasons for its ruling.

There is no need for a new ruling on whether to impose or strike the enhancement, as it is apparent from the record that the trial court did in fact strike it at the prosecutor's request. The trial court asked the prosecutor, "And then are you suggesting that I strike the one-year prior?" The prosecutor replied, "Yes, sir," and the court then said, "All right." The court made no further mention of the prior conviction and did not impose the one-year enhancement.

We agree that the trial court was required to state its reasons for granting the motion. (See § 1385, subds. (a), (c)(1); Cal. Rules of Court, rule 4.406(b)(10).) However, as respondent acknowledges, it was within the trial court's discretionary power to strike the enhancement. (See *People v. Campbell* (1999) 76 Cal.App.4th 305, 311.) A failure to state reasons for an otherwise proper discretionary sentencing choice does not result in an unauthorized sentence that may be challenged for the first time on appeal.

(*People v. Scott* (1994) 9 Cal.4th 331, 354-355.) Thus, when a trial court fails to state reasons for striking an enhancement, the People may challenge the ruling on appeal only if an objection was made below. (Cf. *People v. Rivadeneira* (1985) 176 Cal.App.3d 132, 137-138.) As the enhancement was stricken at the request of the People and there was no objection to the omission of reasons, we conclude that respondent has not preserved the issue for review.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST