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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.

NORMAN G. RICHMOND,
Defendant and Appellant.

2d Crim. No. B233345
(Super. Ct. No. BA371830)
(Los Angeles County)

Norman G. Richmond appeals his conviction by jury for misdemeanor possession of more than 28.5 grams of marijuana (count 1; Health & Saf. Code, § 11357, subd. (c))¹ and felony possession for sale (count 2; § 11359). Appellant was sentenced to two years state prison for possession for sale plus two years on prior prison enhancements which were admitted (Pen. Code, § 667.5, subd. (b)). The trial court stayed the sentence on count 1 for simple possession. (Pen. Code, § 654).

We reverse the conviction on count 1 for simple possession because it is necessarily included in the greater offense of possessing marijuana for sale. (*People v. Muran* (1970) 1 Cal.3d 755, 763; *People v. Oldham* (2000) 81 Cal.App.4th 1, 16; *People v. Magana* (1990) 218 Cal.App.3d 951, 954.

¹ All statutory references are to the Health and Safety Code unless otherwise stated.

Facts

On May 10, 2010, Los Angeles Police Officers Francisco Zaragoza and Jesus Toris observed appellant sitting on a milk crate across from the police station on 5th Street. Willie Wright approached and handed appellant money. Appellant drew a black plastic bag from his pocket, reached into the bag, and handed Wright a zip-lock baggie filled with marijuana.

The officers detained Wright and recovered a zip-lock baggie with 2.47 grams of marijuana.

The officers detained appellant and found \$118 on his person. Appellant was still holding the black bag which contained 40.40 grams of marijuana in a clear plastic baggie and two zip-lock baggies.

Appellant was charged with sale of marijuana (count 1; § 11360, subd. (a)) and possession for sale (count 2; § 11359). The trial court instructed that possession of more than 28.5 grams of marijuana was a lesser included offense to both counts. (CALCRIM 2375.) The jury convicted on count 2 (possession for sale). On count 1 (sale of marijuana), it returned a not guilty verdict and convicted on the lesser offense of simple possession.

Lesser Included Offense

Appellant argues that the conviction for simple possession is a lesser included offense of possession for sale. "A defendant . . . cannot be convicted of both an offense and a lesser offense necessarily included within that offense, based upon his or her commission of the identical act. [Citation.]" (*People v. Sanchez* (2001) 24 Cal.4th 983, 987.)

The Attorney General argues that the convictions are not based on the same marijuana. The crime of possessing marijuana for sale can be committed by possessing less than 28.5 grams of marijuana. (§§ 11358, subd. (c); 11359.) When appellant reached into the bag and handed Wright the 2.47 gram baggie, it was "different" marijuana.

We reject the argument because the 2.47 grams of marijuana came from the same black bag and was part of appellant's stock in trade. The trial court instructed that possession of more than 28.5 grams of marijuana (i.e., all the marijuana in black bag) was a lesser offense to count 2 for possession for sale.

The prosecution told the jury that "the lesser included offense is simple possession of marijuana. . . . [¶] So when you analyze whether he sold the marijuana, if you conclude beyond a reasonable doubt that he did, then you vote guilty. If you conclude -- if you cannot conclude beyond a reasonable doubt that he did that, then you consider the lesser included offense. [¶] *Same thing goes for count 2.* You start with the charges as they are charged currently. . . . [¶] . . . What was observed was a hand-to-hand transaction. That's what makes it a sale; the money for the dope. . . . If you can conclude in terms of count 1 that he had that marijuana and he sold it to the buyer, then you find him guilty of the sale, not the lesser included offense. *The lesser included offense applies as to count 2 only.*" (Emphasis added.)

In *People v. Magana*, *supra*, 218 Cal.App.3d 951, defendant was convicted of possession of drugs and possession for sale. On appeal, defendant argued that "simple possession is a necessarily lesser included offense of possession for sale. Since [defendant] was convicted of possession for sale based on possession of the same contraband supporting the conviction for simple possession, the conviction for the lesser offense must be reversed. [Citation.] [¶] The Attorney General suggests reversal is not necessary since conviction for the offense of simple possession could have been based on possession of some of the contraband while conviction of possession for sale could have been based on the possession of the remaining drugs. [¶] While perhaps theoretically true, a serious defect in the People's argument is that the jury was never alerted to the possibility of such a subtle division of the contraband. Consequently we can only presume the convictions for possession for sale and the conviction for simple possession were based on the same evidence." (*Id.*, at p. 954.)

The same analysis applies here. The charging documents and jury instructions do not distinguish the 2.47 grams of marijuana from the 40.40 grams in the

black bag. The alleged act of selling some marijuana (2.47 grams) and holding the rest in black bag (40.40 grams) does not support a conviction for both simple possession and possession for sale. To hold otherwise, would tear the fabric of space and time.

Our courts have "long held that multiple convictions may *not* be based on necessarily included offenses. [Citations.]" (*People v. Pearson* (1986) 42 Cal.3d 351, 355.) Here the black bag of marijuana (appellant's stock in trade) was incidental to the alleged sale. "It is well established that where the only possession shown is necessarily incidental to its sale or furnishing[,] separate convictions for sale and possession cannot be had. [Citations.]" (*People v. Sheldon* (1967) 254 Cal.App.2d 174, 182.)

Pitchess Motion

Pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, appellant sought discovery of the officer's personnel records. The trial court conducted an in camera review of the records and found no responsive complaints. At appellant's request, we have reviewed the sealed transcript of the proceeding and conclude that the trial court did not abuse its discretion in denying discovery. (*People v. Hughes* (2002) 27 Cal.4th 287, 330; *People v. Mooc* (2001) 26 Cal4th 1216, 1232.)

The conviction on count 1 for possession of more than 28.5 grams of marijuana is reversed. The sentence remains the same: four years state prison.

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YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Victor Greenber, Judge
Superior Court County of Los Angeles

Jeffrey Thoma, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Jamie William Bilderback, II, Supervising Deputy Attorney General, Lawrence M. Daniels, Deputy Attorney General, for Plaintiff and Respondent.