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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JASON LOUIS MCCALLUM,<br><br>Defendant and Appellant. | B237735<br><br>(Los Angeles County<br>Super. Ct. No. TA118700) |

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

William C. Hsu, 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 Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

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## SUMMARY

Defendant Jason McCallum appeals from a judgment entered after a no contest plea to one count of possession of child pornography. (Pen. Code, § 311.11, subd. (a).)[1] McCallum appeals from the trial court's denial of his motion to dismiss brought pursuant to section 654, subdivision (a), barring multiple prosecutions, and *Kellett v. Superior Court* (1966) 63 Cal.2d 822 (*Kellett*) based on drug possession charges filed against him in a separate case.

## FACTUAL AND PROCEDURAL BACKGROUND

On July 12, 2010, the FBI Sexual Assault Felony Enforcement (SAFE) task force served and executed a search warrant for McCallum's residence and any computers owned or controlled by him. Probable cause for the search warrant was based on information from two Cyber Tipline reports regarding suspected distribution and possession of child pornography and follow-up investigation. During the search, the SAFE task force found seven computers as well as a yellow bottle containing a clear liquid "resembling gamma hydroxybutrate (GHB)," an amber bottle containing a clear liquid "resembling alkyl nitrate," a syringe and a plastic baggie containing a crystal-like substance resembling methamphetamine.

As part of the search, two FBI special agents interviewed McCallum at his residence. During this interview, he claimed that other people had stayed at the address and that the email account in question was "used by a lot of other people." McCallum admitted to watching child pornography and receiving images as recently as a week earlier, but stated that he only "looked at them and deleted them" and had never personally downloaded child pornography, stating that he was not "into" child pornography. When asked if there were any images of child pornography on his computers, McCallum stated, "I would hope not."

After McCallum's initial interview, Department of Homeland Security Secret Service Agent Charles Pankenier and Los Angeles Sheriff's Department Detective

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[1] Statutory references are to the Penal Code unless otherwise indicated.

Bernell E. Trapp interviewed McCallum at his residence. During this second interview, McCallum again admitted viewing images of child pornography but claimed he deleted the images. McCallum stated that he first saw child pornography "about three years ago on a computer slide show at someone's house." He also stated that he was under the influence of "crystal meth and cocaine[] during the period he first began to acquire images of child pornography." McCallum said that he had saved about 50 or 60 images or videos of child pornography over the years but that he had recently discarded a disk containing child pornography because he "was recently in jail and realized he had a lot of stuff to get rid of." When asked if it was fair to say that during the last two years McCallum had searched for and traded images of child pornography, McCallum responded, "To an extent, Yea." McCallum identified three computers as the ones that should be focused on for forensic examination.

McCallum also told Detective Trapp that the clear liquid in the yellow bottle was GHB, and that the GHB, the Amsterdam Popper (the clear liquid in the amber bottle), the baggy of crystal-like substance resembling methamphetamine and syringe were his. McCallum was arrested for possession of a controlled substance (GHB and methamphetamine) and taken to the sheriff station. While he was being booked, McCallum stated that he used the syringe to inject methamphetamine and that he inhaled the fumes of the Amsterdam Popper with the intent of getting high. Based on these statements, McCallum was also booked for possession of drug paraphernalia and possession of an inhalant.

Two days later, on July 14, 2010, McCallum was charged with two counts of possession of a controlled substance in violation of Health and Safety Code section 11377, subdivision (a). On July 20, 2010, McCallum pleaded no contest and was convicted pursuant to a plea agreement of one count of possession of a controlled substance in violation of Health and Safety Code section 11377, subdivision (a). McCallum was sentenced under Proposition 36 and placed into a drug treatment program, which he enrolled in and completed.

Approximately two months later, in September 2010, Secret Service Agent (SSA) Pankenier met with an FBI special agent and reviewed the contents of the three computers identified by McCallum as the focus for forensic examination. According to SSA Pankenier's report, the analysis found "several images of child pornography."

In March 2011, SSA Pankenier met with an FBI special agent at the FBI's Regional Computer Forensics Laboratory and reviewed three of the computers locating "numerous images of child pornography." The special agent informed SSA Pankenier that he would be "notified when the forensic analysis report was completed." Two months later, in May 2011, SSA Pankenier received from the FBI "a digital copy of the FBI forensic analysis of three of the computers seized" from McCallum's residence with a total of 33 images of child pornography.

On June 23, 2011, the Los Angeles County District Attorney filed a complaint against McCallum charging possession of child pornography and McCallum was arrested. An information in the instant case was filed on September 22, 2011, charging McCallum with one count of possession of child pornography in violation of section 311.11, subdivision (a).

On October 3, 2011, McCallum moved to dismiss the case pursuant to section 654 and *Kellett*. After opposition, the motion was heard and denied on October 26, 2011. In denying the motion, the court reasoned that "First of all, I think that there are apples an[d] oranges, as far as some of the arguments that [defense counsel] has put forward. The *Kellett* case itself speaks about whether or not it's a singular course of conduct, indistinguishable. And this is definitely a case that it's not a single course of conduct. The possession of drugs has nothing to do with the possession of pornography, and vice versa. Just because they're simultaneous doesn't mean they're a singular course of conduct." The court noted that while the police found the items during the same search and it was therefore the "same course of conduct as far as what the actions were of law enforcement," it was not a "singular course of conduct by the defendant." The trial court also found there was not any prejudice as the delay in prosecution was less than a year.

On December 6, 2011, McCallum pled no contest to the charge, was found guilty by the trial court, and was sentenced to the midterm of two years in state prison with credit for 202 days of presentence custody and the imposition of various applicable fines, penalties and assessments. McCallum was also ordered to register as a convicted sex offender.

That same day, McCallum filed a notice of appeal.

**DISCUSSION**

McCallum argues that section 654 and *Kellett* bar the instant prosecution of one count of possession of child pornography based on his prior conviction of one count of possession of a controlled substance, and the trial court erred in denying his motion to dismiss.

On appeal, "we review factual determinations under the deferential substantial evidence test, viewing the evidence in the light most favorable to the [prosecution]." (*People v. Valli* (2010) 187 Cal.App.4th 786, 794.) "We review de novo the legal question of whether section 654 applies." (*Id*. at 794.)

Section 654 provides in pertinent part: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." (§ 654, subd. (a).) Section 654 "thus bars multiple prosecutions for the same act or omission where the defendant has already been tried and acquitted, or convicted and sentenced. (*People v. Davis* (2005) 36 Cal.4th 510, 557.)

In *Kellett*, *supra*, 63 Cal.2d 822, the Supreme Court held that "When, as here, the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and

sentence." (*Id*. at p. 827.) The *Kellett* rule is a procedural one that is designed to prevent harassment and to save unnecessary use of the state's and defendants' time and resources. (*In re Dennis B.* (1976) 18 Cal.3d 687, 692, 694.)

Whether the *Kellett* rule applies "must be determined on a case-by-case basis." (*People v. Britt* (2004) 32 Cal.4th 944, 955.) "What matters . . . is the totality of the facts, examined in light of the legislative goals of sections 654 and 954, as explained in *Kellett*."[2] (*People v. Flint* (1975) 51 Cal.App.3d 333, 336.)

In *Kellett*, the defendant was arrested for standing on a public sidewalk with a pistol in his hand. He was first charged in municipal court with a misdemeanor violation of section 417 (exhibiting a firearm in a threatening manner). After a preliminary hearing revealed that the defendant had previously been convicted of a felony, he was charged in superior court with felony possession of a concealable weapon in violation of section 12021. The defendant pleaded guilty to the misdemeanor and moved to dismiss the felony information on the ground it was barred by section 654. (*Kellett, supra,* 63 Cal.2d at p. 824.) The motion was denied and the defendant sought and obtained a peremptory writ of prohibition to prevent his trial. (*Id.* at pp. 824, 829.) The Supreme Court reasoned: "If only a single act or an indivisible course of criminal conduct is charged as the basis of a conviction, the defendant can be punished only once although he may have violated more than one statute. Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. [Citation.]" (*Id.* at pp. 824-825.)

Thus, in *Kellett* the two prosecutions involved possession of the same gun. In contrast, here, McCallum's prosecutions involve possession of two separate and distinct

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[2] Section 954 provides for joinder of offenses connected together in their commission or offenses of the same class. Specifically, it provides in pertinent part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. . . ."

prohibited items: child pornography and controlled substances. Thus, McCallum's situation is distinguishable from *Kellett* and other cases where courts have found a single course of conduct. (See, e.g., *People v. Flint, supra,* 51 Cal.App.3d at pp. 335-336 [same incident furnished evidence that defendant drove under the influence a vehicle he was charged with having stolen]; *Sanders v. Superior Court* (1999) 76 Cal.App.4th 609, 612, 615 [thefts were committed at the same time]; *In re Benny G.* (1972) 24 Cal.App.3d 371, 374-375 [defendant committed and aided and abetted the same robbery].)

McCallum attempts to characterize the possession of child pornography and the possession of drugs as being "link[ed]" and part of a "single related course of conduct, namely, viewing and possessing child pornography while using and under the influence of drugs." However, the only evidence of this link is McCallum's statement to SSA Pankenier that "during the time period he first began to acquire images of child pornography" he was "under the influence of drugs, namely crystal meth and cocaine." Without more, this statement does not, as McCallum attempts to suggest, show that two years later when the search warrant was executed a "single related course of conduct" existed to view child pornography while under the influence of drugs.

Similarly, McCallum argues that the search warrant's express inclusion of drugs shows that it was "actually and reasonably anticipated that the search of [McCallum's] residence would uncover both drugs and child pornography." The search warrant included among the property to be seized "Alcohol, drugs, prescription or not, narcotics, and adult pornographic material which may have been used by the suspect to lower the minors[']inhibitions." Thus, by its terms the search warrant did not anticipate a single course of conduct to view child pornography while under the influence of drugs.

Because we agree with the trial court's determination that McCallum's possession of child pornography and possession of controlled substances were not part of a single course of conduct, section 654's bar does not apply.[3] Accordingly, we affirm.

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[3] Because we hold that section 654's bar does not apply, we do not reach McCallum's arguments that the exceptions to section 654's bar are inapplicable to his case.

## DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.