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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. STEVEN JOEL YORK, Defendant and Appellant.	2d Crim. No. B283437 (Super. Ct. No. 15F-06425) (San Luis Obispo County)

Steven Joel York appeals from the judgment after a jury convicted him of possession of heroin for sale (Health & Saf. Code,[1] § 11351) and possession of an injection device (§ 11364, subd. (a)).[2] The trial court found true allegations that York suffered two prior narcotics-related convictions (§ 11370.2, subd.

[1] Unlabeled statutory references are to the Health and Safety Code.

[2] Prior to trial, York pled guilty to possession of methamphetamine (§ 11377, subd. (a)) in this case. Neither that plea nor the sentence imposed is at issue on appeal.

(a)) and served one prior prison term (Pen. Code, § 667.5, subd. (b)). It sentenced him to 10 years in county jail.

York contends the trial court erred when it: (1) denied his motion to suppress evidence, and (2) admitted statements he made to a police officer. He also contends the prosecutor committed misconduct during his rebuttal argument. At oral argument, we requested supplemental briefing on how recent changes to section 11370.2 affect York's sentence. We vacate York's sentence and remand.

FACTUAL AND PROCEDURAL HISTORY

In July 2015, Detective Mark Martin was investigating Jennifer Goins for currency counterfeiting. When Detective Martin contacted Goins, she possessed heroin and other controlled substances. She admitted she used heroin, and said that York sold it to her.

Goins showed Detective Martin text messages she had sent York two days earlier. One message said, "Steve don't pull that you don't care card because you know we did until you pulled that shit. I do care, Steve, but I don't want to be dicked around and that's what you're doing. You asked us to help you. Remember that. And I told you what you owe me, three grams." The other said, "Well, you should keep your word, but since that isn't going to happen, if I had to put a price on your word, I would say three grams."

Detective Martin knew York was on probation with "full search terms." He contacted the probation department, which confirmed that York was subject to a search condition.[3]

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[3] The search condition requires York to "[s]ubmit to a search or seizure of [his] person, possessions, residence, and any vehicle under [his] control, with or without probable cause, at any

When he went to York's residence to search him, he found a baggie of methamphetamine and a cell phone in York's pocket.

On the phone was a Facebook message dated three weeks prior. The message said: "I've got $50. What do you got?" In a message dated one week later, York asked a woman, "Are you bringing the 40?" The woman replied, "I need to trade for N" but "all I have is 20 I think."

Detective Martin searched the remainder of the property while Officer Gene Stuart stood with York. York grew agitated, stood up, and said, "Fuck it. Take me to jail. I'm going to jail." Officer Dale Cullum walked over and told York to sit down. Officer Stuart told him to calm down. York complied.

After he sat down, York told Officer Stuart that there was heroin inside a backpack in his nearby pickup truck. Detective Martin found the backpack in York's truck, searched it, and discovered a 33-gram chunk of heroin—about the size of a golf ball—in the pocket of a pair of jeans inside. Also inside the backpack were a hypodermic needle and a prescription bottle with York's name on it.

Detective Martin read York his *Miranda*[4] rights. York told the detective the heroin weighed one ounce and that he purchased it for $1,000 the day before the search. York refused to identify his supplier.

Early the next morning, Officer Cullum ran a report through the California Law Enforcement Telecommunication

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time of the day or night, by a [p]robation [o]fficer or any law enforcement officer."

[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

System (CLETS). The CLETS report showed that York was on probation, but did not reflect a search condition.

Prior to the preliminary hearing, York moved to suppress the messages found on his cell phone and the heroin and hypodermic needle found in the backpack. He claimed Detective Martin's search of the cell phone violated the Electronic Communications Privacy Act (ECPA). He claimed the detective could not have known of his search condition because the CLETS report did not include it. He raised a *Harvey-Madden*[5] challenge to the detective's testimony, claiming it lacked foundation and reliability.

The trial court denied York's motion because Detective Martin knew York was on probation with a search condition without reference to the CLETS report. The *Harvey-Madden* rule was inapplicable because the issue was not whether York was subject to search but whether Detective Martin had knowledge of that condition. The court did not rule on York's ECPA challenge.

At the beginning of trial, the prosecutor moved in limine to permit Officer Stuart to testify to the statements York made during the search. York objected that use of the statements would violate *Miranda*. The trial court disagreed. It granted the prosecutor's motion because the statements were spontaneous and not in response to interrogation.

The jury convicted York of possession of heroin for sale and possession of an injection device. The trial court found true allegations that York suffered two prior narcotics-related convictions—neither of which was for a violation of section

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[5] *People v. Madden* (1970) 2 Cal.3d 1017; *People v. Harvey* (1958) 156 Cal.App.2d 516.

11380—and served one prior prison term. It sentenced him to 10 years in county jail: the midterm of three years on the heroin conviction, a consecutive six years on the two prior convictions, and a consecutive one year on the prison prior. The court imposed and stayed 180-day sentences on York's methamphetamine and injection device convictions.

DISCUSSION

Motion to suppress

"The standard of appellate review of a . . . ruling on a motion to suppress is well established." (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) "We defer to the trial court's factual findings, express or implied, where supported by substantial evidence." (*Ibid.*) "In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*Ibid.*)

1. Knowledge of search condition

York contends the trial court erroneously denied his motion to suppress evidence because Detective Martin did not have personal knowledge of his probation search condition. (See *In re Jaime P.* (2006) 40 Cal.4th 128, 138 [law enforcement officers must have knowledge of a person's probation search condition before they conduct a warrantless search].) But Detective Martin testified that he was familiar with York, and had personal knowledge of the existence and extent of his search condition without reference to the CLETS report. He then verified that information with the probation department. The court found the detective's testimony credible. We will not disturb that finding on appeal. (*People v. Laiwa* (1983) 34 Cal.3d 711, 718, superseded by statute on another ground as stated in *People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1223-1224.)

2. ECPA

York next contends that, even if Detective Martin knew of his search condition, the ECPA barred the search of his cell phone. But the ECPA (Pen. Code, § 1546 et seq.) went into effect on January 1, 2016. (*People v. Sandee* (2017) 15 Cal.App.5th 294, 304 (*Sandee*).) Detective Martin searched York's phone six months before the ECPA's effective date. "[A] reasonable, objective person at the time of the search would not have understood the ECPA to restrict the scope of the search permitted by [York's] probation [condition]." (*Id.* at p. 305.)

3. Fourth Amendment

York contends that a probation search condition does not permit the warrantless search of a cell phone. (See *Riley v. California* (2014) 573 U.S. __, __ [134 S.Ct. 2473, 2488-2493] [warrantless search of cell phone not permitted as a search incident to arrest].) *Riley* did not resolve that question (see *id.* at pp. 2494-2495), and courts are split on the issue (see, e.g., *Sandee*, *supra*, 15 Cal.App.5th at pp. 300-302 [search of electronic data within scope of search condition when condition imposed pre-ECPA]; *In re I.V.* (2017) 11 Cal.App.5th 249, 261-262 [search condition did not encompass electronic data when condition imposed post-ECPA]; *United States v. Lara* (9th Cir. 2016) 815 F.3d 605, 610-612 [search condition did not encompass electronic data]). But even if the search of York's cell phone violated the principles set forth in *Riley*, admission of the two Facebook messages was harmless beyond a reasonable doubt. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 972; see *Chapman v. California* (1967) 386 U.S. 18, 24.)

The evidence of York's intent to sell heroin was overwhelming. Detective Martin found a 33-gram chunk of

heroin in a backpack in York's pickup truck. An expert testified, without objection, that a person who possessed that much heroin—more than 300 times the typical amount used—possessed it for sales purposes. Goins testified that she bought heroin from York on the day of the search. And she showed Detective Martin text messages related to how much heroin York "owed" her. In light of this evidence, we are confident beyond a reasonable doubt that any error in admitting the Facebook messages found on York's cell phone did not contribute to the jury's verdict. (*People v. Jasmin* (2008) 167 Cal.App.4th 98, 114; see *People v. Hunt* (1971) 4 Cal.3d 231, 237 [expert may opine that heroin possessed for sale based on quantity and individual's normal use].)

Alleged Miranda *violation*

York contends the trial court erroneously admitted the pre-*Miranda* statements he made to Officer Stuart because he made those statements during a custodial interrogation. To evaluate this contention, we "'accept the trial court's resolution of disputed facts and inferences'" if supported by substantial evidence, and "'independently determine . . . whether the challenged statement was illegally obtained.' [Citations.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033.) Here, York's statements to Officer Stuart—that he was going to jail and that there was heroin in a backpack inside his pickup truck—were made spontaneously, not in response to any questioning. There was thus no interrogation, and no *Miranda* violation. (*People v. Ireland* (1969) 70 Cal.2d 522, 536-537.)

Prosecutorial misconduct

York contends the prosecutor committed prejudicial misconduct when, during rebuttal, he said that a defense witness

lied during his testimony. (See, e.g., *People v. Ellis* (1966) 65 Cal.2d 529, 539-540 [calling a witness a "liar" or "perjurer" may be misconduct]; *People v. Johnson* (1981) 121 Cal.App.3d 94, 102-105 [saying a witness told an "outright lie" may be misconduct].) But York neither objected to the prosecutor's statements nor requested a curative admonition. And he does not show that an objection would not have been futile or an admonition ineffective simply because the alleged misconduct occurred during rebuttal. (*People v. Christensen* (2014) 229 Cal.App.4th 781, 802-803 [rejecting claim that objection during prosecutor's rebuttal would have been futile].) Nor does he show that this case was so closely balanced that the alleged misconduct "contributed materially to the verdict." (*People v. Heideman* (1976) 58 Cal.App.3d 321, 337.) His contention is forfeited. (*People v. Stanley* (2006) 39 Cal.4th 913, 952.)

Sentencing remand

York contends, and the Attorney General concedes, that the Legislature's January 2018 modification of section 11370.2, subdivision (a), entitles him to the dismissal of the two enhancements the trial court imposed for his prior narcotics convictions. We agree. (*People v. Millan* (2018) 20 Cal.App.5th 450, 454-456.)

York claims we should modify his sentence to four years by striking the unauthorized enhancements. (See Pen. Code, § 1260 [appellate court may modify a defendant's sentence].) But York has no right to a lesser sentence; his only entitlement is to a sentence that does not include the enhancements. His "attempt to reduce [his] aggregate prison term inappropriately treats sentencing as a technical game in which a wrong move by the judge would necessitate [his]

premature release into society." (*People v. Stevens* (1988) 205 Cal.App.3d 1452, 1458.)

Here, the trial court made several discretionary decisions to reach a 10-year aggregate sentence: It chose the midterm of three years on York's heroin conviction, and stayed the sentences on his methamphetamine and injection device convictions. Because the court exercised its discretion when it fashioned York's sentence, we can only speculate as to the sentence it would have imposed were the narcotics enhancements unauthorized at the time of sentencing. A remand for resentencing is therefore required. (*People v. Calderon* (1993) 20 Cal.App.4th 82, 88.)

DISPOSITION

York's sentence is vacated, and the case is remanded to the trial court with directions to strike the enhancements imposed pursuant to section 11370.2, subdivision (a), and to resentence York. The clerk of the court shall prepare an amended abstract of judgment to reflect the stricken enhancements and any additional changes made at resentencing, and forward it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Jacquelyn H. Duffy, Judge

Superior Court County of San Luis Obispo

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