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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. SAMUEL P. PLUNKETT, Defendant and Appellant.	2d Crim. No. B232502 (Super. Ct. No. 2008043198) (Ventura County)

Samuel P. Plunkett appeals from judgment after conviction by jury of transportation of a controlled substance (Health & Saf. Code, § 11379, subd. (a));[1] possession of a controlled substance (§ 11377, subd. (a)); and being under the influence of a controlled substance, a misdemeanor (§ 11550, subd. (a)). The trial court suspended imposition of sentence and placed Plunkett on formal probation.

Plunkett contends the court erred when it allowed the prosecutor to amend the information to add the transportation charge because a magistrate found that "no one saw the defendant driving." We affirm.

FACTUAL BACKGROUND

The criminal complaint initially charged Plunkett with possession of a controlled substance and being under the influence of a controlled substance, but did not

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

charge transportation. At the preliminary hearing, Ventura County Sheriff's Deputy Odilon Malagon testified that he drove into a convenience store parking lot at about 3:00 a.m. to get a cup of coffee. He saw a gray Audi "already parked" there. He saw Plunkett "sitting in the driver's seat" of the Audi. Plunkett got out of the Audi and walked toward Malagon's patrol car. Malagon asked Plunkett if he needed help.

Plunkett said he had been followed "from Santa Monica by several vehicles and that Armenians were . . . trying to kill him." Plunkett seemed to be hallucinating. He acknowledged that he was under the influence of methamphetamine and marijuana, and this was later confirmed by a urine test.

A deputy searched Plunkett's Audi and found "a black eyeglass carrying case on the floorboard behind the driver's seat." Inside it was a baggie that held .14 grams of methamphetamine. Plunkett said the Audi and the methamphetamine were his.

Plunkett said he bought the methamphetamine in "the Valley." He said he had been on a "partying binge" for several days, during which he had spent $400 on methamphetamine.

Malagon did not investigate how long Plunkett had been at the parking lot. He did not observe Plunkett drive and he had not been told by anyone that Plunkett had "driven poorly" prior to parking.

At the close of the preliminary hearing, defense counsel asked the magistrate to make a factual finding "that there's been no evidence presented to the Court today that my client was driving under the influence of alcohol or under any drug."

The magistrate said, "Well, in terms of special findings, I'm not going to do that. But my interpretation of the evidence is that no one saw the defendant driving. The vehicle was already parked at the time he contacted the deputy." The magistrate held Plunkett to answer.

Trial began about two years later. The trial date had been continued 23 times at Plunkett's request, 8 times at the prosecutor's request, 3 times by the court, and once when Plunkett failed to appear.

One day before trial began, the prosecutor moved for leave to amend the information to add the transportation count. Plunkett's counsel objected on the ground that the proposed amendment was untimely and was not supported by any evidence at the preliminary hearing "of moving vehicles." The trial court granted leave to amend. The court also denied a defense motion to dismiss the transportation count pursuant to Penal Code section 995. Plunkett did not ask to continue trial.

DISCUSSION

Plunkett contends the trial court erred by allowing the amendment, because there was no evidence of the corpus delicti of "transportation" at the preliminary hearing independent of his own statements. (*People v. Miranda* (2008) 161 Cal.App.4th 98, 107.) He contends the magistrate's finding is fatal to the amendment because a person may not be held to answer for transporting a controlled substance by vehicle if "no one saw the defendant driving." He also contends the amendment was untimely.

The trial court may permit amendment of an information, "at any stage of the proceedings." (Pen. Code, § 1009.) But an information may not be amended "so as to charge an offense not shown by the evidence taken at the preliminary examination." (*Ibid.*) We will not disturb an order permitting amendment absent a clear showing of abuse of discretion. (*People v. Bolden* (1996) 44 Cal.App.4th 707, 716.)

The amendment was timely. An amendment may be made even after conclusion of trial if there is no prejudice to the defendant. (*People v. Williams* (1982) 128 Cal.App.3d 981, 989.) Plunkett did not ask to continue trial and has not established that the timing of the amendment impaired his ability to defend against the transportation charge. He rebutted the charge with a witness who testified that she borrowed his car and hid the methamphetamine in his eyeglass case without telling him.

The magistrate's observation that "no one saw defendant driving" was not fatal to the amendment. It is true that an offense may not be included in the information if the magistrate makes factual findings that are fatal to a conclusion that the offense was committed. (*Walker v. Superior Court* (1980) 107 Cal.App.3d 884, 889.) And the crux of the crime of transporting a controlled substance is movement. (*People v. Kilborn*

(1970) 7 Cal.App.3d 998, 1003.) But the magistrate did not find that Plunkett was not "driving." The magistrate said, "I'm not going to do that." Instead, the magistrate said no one "saw" Plunkett driving. Circumstantial evidence supported an inference that Plunkett had been driving, and he admitted he had just driven from Sana Monica.

The corpus delicti of the crime must be established independently from Plunkett's extrajudicial admissions, to assure that he did not confess to a crime that did not occur. (*People v. Jones* (1998) 17 Cal.4th 279, 301.) The corpus delicti of a violation of section 11379, subdivision (a) is established by proof that someone transported a controlled substance. (*People v. Miranda, supra,* 161 Cal.App.4th at p. 107.)

Here, no one saw Plunkett drive and evidence of possession alone would not be sufficient to establish transportation. (*People v. Kilborn, supra,* 7 Cal.App.3d at p. 1002 [possession of LSD in a suitcase in motel room did not prove that defendant carried or conveyed the LSD].) But proof of the corpus delicti may be by circumstantial evidence and need not be beyond a reasonable doubt. (*People v.* Jones, *supra*, 17 Cal.4th at p. 301.) Only a slight prima facie showing is necessary. (*People v. Mehaffey (*1948) 32 Cal.2d 535, 545.) The independent proof of the corpus delicti "is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1171.) The inference need not be the only inference nor even the most compelling inference. (*Jones*, at p. 301.)

Circumstantial evidence at the preliminary hearing permitted an inference that the crime of transporting methamphetamine was committed. Deputy Malagon saw Plunkett in the driver's seat of a car that was parked in a convenience store parking lot, a temporary location. There was methamphetamine hidden in a case on the floorboard.

This case is unlike *People v. Kilborn, supra*, 7 Cal.App.3d 998, because *Kilborn* examined the sufficiency of evidence to support a conviction for transporting a controlled substance, not the quantum of proof to establish the corpus delicti. Officers found LSD in Kilborn's motel, in a suitcase, but he did not admit that it was his or that he had moved it. There was insufficient circumstantial evidence to prove movement

because Kilborn had been away from his motel room half the day before deputies drove him back there and searched his room. The LSD had necessarily been moved to the motel room at some point, but that is true in every instance of possession, and prosecution for transportation in the circumstances was not consistent with "the purpose or intent of the statute forbidding [transportation] of drugs." (*Id.* at p. 1003.)

The purpose of the statute was served here. "The increased penalty provided for transportation is intended to discourage sales and purchases; to reduce the incidents of traffic accidents caused by those who might use and be impaired by a controlled substance during its transportation; and to inhibit the use of controlled substances in general by making it difficult to distribute and obtain them." (*People v. Emmal* (1998) 68 Cal.App.4th 1313, 1317.) Plunkett purchased $400 worth of methamphetamine on a multi-day binge during which he admittedly drove methamphetamine across county lines while hallucinating. Circumstantial evidence independent of his admissions supported an inference that he drove, and the trial court did not abuse its discretion when it allowed the prosecution to add the transportation charge.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Jeffrey G. Bennett, Judge

Superior Court County of Ventura

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