

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.
---

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL YACOUB,

Defendant and Appellant.

B279113

(Los Angeles County  
Super. Ct. No. MA056434)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa M. Chung, Judge. Vacated and remanded with directions.

Donna Ford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

---

Daniel Yacoub appeals from the revocation of his probation and the execution of his previously suspended sentence. He contends the original conviction should be reversed based on an amendment to the statute of conviction that should apply to him retroactively. He also contends the trial court abused its discretion in terminating probation and lifting suspension of his sentence. We conclude the statutory amendment does not apply retroactively because the judgment of conviction was final before the amendment became effective. However, we believe the trial court should reconsider its decision to terminate rather than reinstate probation, and will vacate the order terminating probation.

### **BACKGROUND**

In 2012, sheriff's deputies conducted a traffic stop of a vehicle with a driver and three passengers, including Yacoub. According to the probation officer's report, during the stop, Yacoub handed another passenger a baggie containing methamphetamine, which she hid in her pants, and the driver hid a methamphetamine smoking pipe under the driver's seat. Yacoub's cell phone contained text messages asking him if he had methamphetamine for sale.

On October 16, 2013, Yacoub pled no contest to sale/offer to sell/transportation of methamphetamine (Health & Saf. Code, § 11379), and admitted to four prior convictions. The trial court found a factual basis existed for the plea, accepted it, and sentenced Yacoub to the high term of four years, plus one year for each of the prior convictions (Pen. Code, § 667.5, subd. (b)), for a total of eight years. The court suspended execution of sentence and placed Yacoub on formal probation for three years. The terms of probation included, among other things, "do not use or

possess any narcotics, dangerous or restricted drugs . . . except with a valid prescription”; “submit to periodic controlled substance testing when requested by the probation officer . . . .”; “[do] not own, use or possess, any medical marijuana, with or without a doctor’s prescription, for the entire term of probation”; and “cooperate with the probation officer in a plan for substance abuse treatment and counseling.”

More than two years later, a probation officer submitted a report to the court regarding a possible violation of probation. The report stated that Yacoub had failed to report to the probation officer in October 2015, November 2015, and January 2016; he had been ordered to participate in a drug counseling program but had failed to provide evidence of participation; and he had tested positive for marijuana use on several occasions.

In a hearing in March 2016, the court preliminarily revoked probation. Yacoub was not present; he had been at court earlier but left before the matter was called.

A formal probation violation hearing was held on November 4, 2016. Two probation officers testified. The first officer reiterated that Yacoub failed to report to probation at any time during October and November 2015 and January 2016. He testified that Yacoub enrolled in an outpatient drug counseling program in 2015 but did not complete it. Also, he tested positive for marijuana six times between December 2013 and February 2016, and self-reported marijuana use one other time. He had three negative tests for marijuana during that period, and he did not test positive for any other substance.

The second probation officer testified that he interviewed Yacoub after probation was preliminarily revoked in March 2016. The officer reported that Yacoub said he left the courthouse

before that hearing because he believed probation would remain revoked and sentence would be invoked, and said he was under the influence of methamphetamine and marijuana. The officer also testified about a February 2015 arrest for second degree robbery, which Yacoub disclosed to the probation department, and a January 2016 arrest for driving without a license, which he did not disclose.

Yacoub denied failing to report to the probation officer, stating that he reported every month, but in some months he reported later in the month rather than during the first nine days, as the probation officer required.

He testified that he completed nine of 20 classes in a substance-abuse program. He explained that the program required a \$35 payment per class and charged for missed classes. After he accumulated \$200 in penalties he could not pay, the program barred him from attending classes. Although he paid some of the penalties and was readmitted for a period, the program ultimately terminated his enrollment based on his excessive absences and an outstanding balance.

He denied telling a probation officer he was under the influence of drugs on the day of the March 2016 hearing. He explained that he had entered a substance abuse program three to four days before that day but was still “coming off” drugs and had “a little fog” in his head, leading the probation officer to assume he was under the influence.

After hearing evidence, the trial court noted there were a number of potential grounds for finding Yacoub violated probation. The court considered his failure to report to the probation officer within the first nine days of the month in some months to be a minor violation, but his marijuana use was not.

The court noted that at the time of sentencing, the prior judge had specifically advised Yacoub that the order not to possess drugs included marijuana, with or without a medical marijuana card. Based on that, the court found Yacoub in violation of probation because of marijuana possession and use.

In discussing sentencing, defense counsel informed the court that a space was available for Yacoub to participate in a 90-day residential drug treatment program and requested that the court order him into that program and have him report to court regularly. Defense counsel also questioned the original eight-year sentence (with execution suspended), which could now be served in the county jail. Counsel stated, “I don’t know what good it does for us to lock him away in that sort of facility where there is really not any kind of anything to make the situation better.”

The court addressed counsel’s concern about the execution-suspended sentence, stating, “I don’t think there is—that’s necessarily inherently unfair or coercive in his case in the sense that he had alcohol or drug problems beginning back on January 17th, 2000, where he was arrested for drug and alcohol. It is interspersed with . . . crimes, which may possibly have been motivated by drugs.” The court referred to a burglary conviction in 2002, misdemeanor drug offenses, and two offenses for receiving stolen property. The court characterized Yacoub’s record as “pretty much consistent criminal conduct both drug related and theft related.”

The court next expressed concern about returning Yacoub to probation based on his having failed to appear for the hearing in March because he was on drugs and did not want his probation revoked. The court stated it was “not confident of reinstating

him on probation even if it is being placed in a residential drug treatment program,” and declined to reinstate probation. The court lifted suspension of the eight-year sentence originally imposed, noting that under realignment, the term could now be served in county jail. The court granted 213 days of custody credit.

Yacoub appealed.

## **DISCUSSION**

### **I. Applicability of Change in Law**

Yacoub contends his conviction should be reversed because Health and Safety Code section 11379 (section 11379) has been amended, and transportation of methamphetamine for personal use no longer violates the statute. He asserts the amendment should apply retroactively to his conviction.

At the time of Yacoub’s no contest plea, section 11379, subdivision (a) provided that any person who “transports” specified controlled substances, including methamphetamine, shall be punished by imprisonment. (Health & Saf. Code, § 11379; Stats. 2011, ch. 15, § 174.) The word “transports” was interpreted to include transportation for personal use. (*People v. Eagle* (2016) 246 Cal.App.4th 275, 278 (*Eagle*).)

Effective January 1, 2014, two and one-half months after Yacoub’s conviction, section 11379 was amended to define “transports” as “to transport for sale.” (Health & Saf. Code, § 11379, subd. (c); Stats. 2013, ch. 504, § 2.) “The amendment explicitly intended to criminalize the transportation of drugs for the purpose of sale and not the transportation of drugs for nonsales purposes such as personal use.” (*Eagle, supra*, 246 Cal.App.4th at p. 278.)

When a statutory amendment reduces the penalty for a crime, but is silent as to whether the amendment should operate only prospectively or retroactively, it will operate retroactively. (*In re Estrada* (1965) 63 Cal.2d 740, 744-745.) The Court so held based on the “inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply.” (*Id.* at p. 745.) “The key date is the date of final judgment”: A statute will operate retroactively if the amendment “becomes effective prior to the date the judgment of conviction becomes final.” (*Id.* at p. 744.)

“State convictions are final “for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for writ of certiorari has elapsed or a timely filed petition has been finally denied.”” (*People v. Superior Court (Rodas)* (2017) 10 Cal.App.5th 1316, 1325 [217 Cal.Rptr.3d 308, 314].) A defendant may appeal from a final judgment, including an order granting probation, within 60 days of entry of judgment. (Pen. Code, § 1237; Cal. Rules of Court, rule 8.308(a).) After that time has lapsed, if the defendant has not filed a notice of appeal, the opportunity for direct appeal is foreclosed. (See *In re Richardson* (2011) 196 Cal.App.4th 647, 664.)

Yacoub did not appeal his conviction. It therefore became final on December 16, 2013, when the time to appeal elapsed. (See Cal. Rules of Court, rule 1.10(a) [computation of time].) Because Yacoub’s judgment was final before January 1, 2014, the effective date of the amendment to section 11379, he cannot benefit from the amendment. (See *In re Estrada*, *supra*, 63 Cal.2d at p. 744 [amended statute applies retroactively if

amendment effective before date judgment of conviction becomes final].)

*Eagle, supra*, 246 Cal.App.4th 275, on which he relies, is not to the contrary. In *Eagle*, the defendant pled no contest to transporting methamphetamine, and the trial court suspended imposition of sentence, placing the defendant on probation. (*Id.* at p. 278.) More than a year later, after section 11379 was amended, the defendant moved to vacate his conviction and replace it with a conviction for misdemeanor methamphetamine possession. (*Ibid.*) The People conceded—and the Court of Appeal agreed—that the defendant’s conviction never became final because the trial court had suspended imposition of sentence, and he was therefore entitled to benefit from the amendment to section 11379. (*Id.* at p. 279.)

*Eagle* is distinguishable because there, the trial court suspended imposition of sentence, whereas here, the court imposed sentence, and suspended its *execution*. A probation order is not considered a final judgment, except for the limited purpose of appeal, when imposition of sentence is suspended. (*People v. Howard* (1997) 16 Cal.4th 1081, 1087.) When execution is suspended instead, a probation order is a final judgment, and later statutory amendments cannot apply retroactively. (See *In re Estrada, supra*, 63 Cal.2d at p. 745 [“The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final”].)

Yacoub argues that pursuant to Penal Code section 1018, when a trial court orders probation after a no contest plea, a defendant has six months to appeal, rather than 60 days. He is incorrect. Penal Code section 1018 permits a guilty plea to be



withdrawn up to six months after probation is granted if entry of judgment is suspended. Here, entry of judgment was not suspended, and Yacoub did not move to withdraw his plea. Therefore, that six-month time limit does not apply.

Yacoub next argues that when a defendant appeals after a guilty plea, the defendant has 80 days to appeal, not 60 days, because an additional 20 days are added to permit a certificate of probable cause to be obtained. He is incorrect. When a defendant files a statement seeking a certificate of probable cause, the superior court must issue or deny the certificate within 20 days. (Cal. Rules of Court, rule 8.304(b).) But that does not extend the time to appeal. (Cal. Rules of Court, rule 8.308(a).)

Yacoub argues that a judgment is not final until after the time to file a petition for a writ of certiorari has passed. He is incorrect. A judgment is final after appeal has been exhausted *and* the time to file a petition has elapsed. Here, the appeal was not exhausted.

Finally, Yacoub argues that it would violate his equal protection and due process rights under the federal and California constitutions not to apply the amendment of section 11379 to him the same as it is applied to similarly situated defendants. He is correct, but he is not similarly situated to other defendants to whom the amendment applies.

For the foregoing reasons, we conclude Yacoub cannot benefit from retroactive application of the amendment to section 11379.

## **II. Decision to Terminate Probation**

Yacoub argues the trial court abused its discretion in revoking probation.

A trial court may revoke probation “if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation . . . officer or otherwise that the person has violated any of the conditions of his or her supervision . . . .” (Pen. Code, § 1203.2.) To revoke probation, the trial court must find the violation to be willful. (*People v. Gonzalez* (2017) 7 Cal.App.5th 370, 381; *People v. Galvan* (2007) 155 Cal.App.4th 978, 982.) Once the court decides to revoke probation, it may reinstate the defendant to probation or may terminate probation and impose sentence. (*People v. Medina* (2001) 89 Cal.App.4th 318, 323.)

“An order revoking probation is reviewed under the abuse of discretion standard. [Citations.] The trial court’s factual findings are reviewed for substantial evidence.” (*People v. Gonzalez, supra*, 7 Cal.App.5th at p. 381.) The trial court’s decision whether to reinstate probation or order the suspended sentence executed is also reviewed for abuse of discretion. (*People v. Downey* (2000) 82 Cal.App.4th 899, 909.)

“A court abuses its discretion ‘whenever the court exceeds the bounds of reason, all of the circumstances being considered.’ [Citation.] We will not interfere with the trial court’s exercise of discretion ‘when it has considered all facts bearing on the offense and the defendant to be sentenced.’” (*People v. Downey, supra*, 82 Cal.App.4th at pp. 909-910.)

Here, the trial court found Yacoub violated probation by possessing and using marijuana. In deciding not to reinstate probation, the court thoughtfully considered various factors, such as Yacoub’s criminal record and his failure to appear at the March hearing. However, additional factors should be taken into account in deciding the proper disposition.

It is not clear from the record whether the trial court took into consideration the timeline discussed above. Yacoub's conviction on his plea became final on December 16, 2013, only 16 days before the statute of conviction was amended so as potentially to decriminalize his offense. Because Yacoub did not admit he transported methamphetamine for sale, it is possible his conduct would not have violated the statute as amended. The trial court should consider whether, in light of the amendment, the interests of justice require execution of the sentence.

The "discretion that the trial court is empowered to use is predicated upon reason and law but is primarily directed to the necessary end of justice." (*People v. Zaring* (1992) 8 Cal.App.4th 362, 379.) We believe that in the interest of justice, the trial court should reconsider whether Yacoub should be reinstated to probation under conditions requiring him to participate in substance abuse treatment and rehabilitation.

#### **DISPOSITION**

The order revoking probation is vacated. The matter is remanded for the trial court to redetermine the appropriate disposition, taking into account the considerations expressed in this opinion.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.