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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. JOSHUA RANDALL IMIG, Defendant and Appellant.	2d Crim. No. B289036 (Super. Ct. No. 16F-06037) (San Luis Obispo County)

Joshua Randall Imig appeals the trial court's order denying his request to strike a three-year enhancement imposed under (now former) Health and Safety Code[1] section 11370.2, subdivision (c) (section 11370.2(c)). Appellant made his request based on the recent amendments to section 11370.2(c) that went into effect on January 1, 2018. The court denied the request on the ground that the subject enhancement was imposed as part of an August 2016 judgment that became final before the new law went into effect. Appellant contends the court erred in

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

concluding that that the amendments to section 11370.2(c) do not apply to final judgments. We affirm.

FACTS AND PROCEDURAL HISTORY

In July 2016, appellant pled guilty to selling or transporting a controlled substance (§ 11379, subd. (a)) and evading a peace officer (Veh. Code, § 2800.2, subd. (a)). He also admitted the enhancement allegation that he had suffered a prior conviction for possession for sale of a controlled substance (§ 11378) as provided in former section 11370.2(c). The trial court sentenced appellant to five years and eight months in state prison, consisting of two years for the section 11379 charge, a consecutive eight months for the evading charge, plus a three-year enhancement under former section 11370.2(c). No appeal was filed.

On October 11, 2017, the Governor signed Senate Bill 180, which amended section 11370.2 by removing all but one of the drug offenses that gave rise to a three-year enhancement under the statute. (Stats. 2017, ch. 677, § 1.) As of January 1, 2018, the enhancement applies only to defendants with a prior conviction for using a minor as an agent in the commission of a drug offense (§ 11380). (Stats. 2017, ch. 677, § 1.)

On October 30, 2017, appellant submitted a letter requesting that his sentence be modified by striking the three-year enhancement imposed under former section 11370.2(c). The People opposed the request on the ground that appellant's judgment of conviction became final before the amendments to section 11370.2(c) went into effect. Counsel was appointed to represent appellant. Following a hearing, the court concluded that the subject amendments do not apply to final judgments and accordingly denied appellant's request. Appellant timely appealed.

DISCUSSION

Appellant contends the trial court erred in concluding that the recent amendments to section 11370.2(c) do not apply to judgments, such as his, that were already final when the amendments went into effect on January 1, 2018. The People respond that the appeal should be dismissed because appellant did not obtain a certificate of probable cause, and that in any event the court's ruling was correct.

We reject the People's assertion that the appeal does not lie absent a certificate of probable cause. The People reason that a certificate of probable cause was required because appellant challenges a sentencing enhancement that was part of a negotiated sentence imposed pursuant to a plea bargain. (See *People v. Panizzon* (1996) 13 Cal.4th 68, 76, 78–79 [challenge to a negotiated sentence imposed as part of a plea bargain, regardless of time or manner, "is properly viewed as a challenge to the validity of the plea itself" and therefore requires a certificate of probable cause].)

But the certificate of probable cause requirement set forth in Penal Code section 1237.5 applies only to appeals brought "from a final judgment of conviction" as provided in Penal Code subdivision (a) of section 1237. Appellant's appeal was brought pursuant to subdivision (b) of Penal Code section 1237, which authorizes an appeal "[f]rom any order made after judgment, affecting the substantial rights of the party." As our Supreme Court has recognized, "[t]he Legislature's express requirement that a probable cause certificate be obtained before bringing an appeal under section 1237's subdivision (a), juxtaposed with its omission of such a requirement in section 1237's subdivision (b), indicates the Legislature's intent not to require a certificate of probable cause for appeals brought under subdivision (b). This makes sense, because an appeal from a postjudgment order does

not generally require preparation of a trial record or the appointment of counsel, and thus does not implicate the probable cause certificate's purpose of preserving scarce judicial resources." (*People v. Arriaga* (2014) 58 Cal.4th 950, 960, italics omitted.)

Although the appeal lies, appellant's claim fails on the merits. At the time of his sentencing, section 11370.2 provided sentencing enhancements for certain drug-related offenses if a defendant had a prior conviction for specified drug-related crimes. Specifically, former section 11370.2(c) mandated a three-year consecutive sentence for a defendant convicted of selling or transporting a controlled substance (§ 11379) if the defendant had a prior conviction for possessing a controlled substance for sale (§ 11378). Appellant had a current conviction for violating section 11379 and a prior conviction for violating section 11378, so the court imposed a three-year enhancement under the then-existing version of section 11370.2(c).

After appellant was sentenced and his judgment of conviction became final,[2] Senate Bill 180 was enacted. As relevant here, the bill removed prior convictions for possessing a controlled substance for sale (§ 11378) from the list of offenses giving rise to a sentencing enhancement under section 11370.2 (c).[3]

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[2] Appellant's judgment of conviction was entered on August 10, 2016. Because he did not file a notice of appeal, the judgment became final 60 days later, on October 9, 2016. (See *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465.)

[3] Section 11370.2(c) now provides: "Any person convicted of a violation of, or of a conspiracy to violate, Section 11378 or 11379 with respect to any substance containing a controlled substance specified in paragraph (1) or (2) of subdivision (d) of Section

Because the amended statute mitigates punishment and contains no savings clause, "'the rule is that the amendment will operate retroactively so that the lighter punishment is imposed' [citation] if the amended statute takes effect before the judgment of conviction becomes final. . . . 'This rule rests on an inference that when the Legislature has reduced the punishment for an offense, it has determined the "former penalty was too severe" [citation] and therefore "must have intended that the new statute imposing the new lighter penalty . . . should apply to every case to which it constitutionally could apply" [citation].' [Citation.]" *People v. McKenzie* (2018) 25 Cal.App.5th 1207, 1213.)

Other courts have recognized that the amendments to section 11370.2(c) apply retroactively to judgments that were not yet final when the amendments went into effect on January 1, 2018. (*People v. Millan* (2018) 20 Cal.App.5th 450, 455-456; *People v. McKenzie*, *supra*, 25 Cal.App.5th at p. 213.) Although these same cases also effectively recognize that the amendments do *not* apply to final judgments, appellant urges us to conclude otherwise. In support of his claim, he refers us to legislative materials purporting to demonstrate, among other things, the Legislature's intent "to not only pass ameliorative legislation but cost-saving legislation."

But the general rules of retroactivity cannot be so easily overcome. Although recent statutory changes enacted by the electorate pursuant to Propositions 47 and 64 expressly provide for the modification of final judgments (Pen Code, § 1170.18,

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11055 shall receive, in addition to any other punishment authorized by law, including Section 667.5 of the Penal Code, a full, separate, and consecutive three-year term for each prior felony conviction of, or for each prior felony conviction of conspiracy to violate, Section 11380, whether or not the prior conviction resulted in a term of imprisonment."

§ 11361.8), Senate Bill 180 contains no such provision. This omission strongly suggests that the Legislature did not intend for the amendments to section 11370.2(c) to apply to final judgments. (See *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209-1210.)

Contrary to appellant's claim, the ameliorative and cost-saving purposes of the amendments to section 11370.2(c) do not dictate a conclusion that those amendments were intended to apply to both final and nonfinal judgments. "Most statutory changes are, of course, intended to improve a preexisting situation and to bring about a fairer state of affairs, and if such an objective were itself sufficient to demonstrate a clear legislative intent to apply a statute retroactively, almost all statutory provisions and initiative measures would apply retroactively rather than prospectively." (*Evangelatos v. Superior Court*, *supra*, 44 Cal.3d at p. 1213.) None of the sources cited by appellant reflect a clear indication that the Legislature intended for the subject amendments to apply retroactively to final judgments. (*People v. Whaley* (2008) 160 Cal.App.4th 779, 793-794.)

DISPOSITION

The judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Jacquelyn H. Duffy, Judge
Superior Court County of San Luis Obispo

Wayne C. Tobin, 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, Senior Assistant Attorney General, Michael C. Keller, Margaret E. Maxwell, Supervising Deputy Attorneys General, for Plaintiff and Respondent.