Filed 5/3/12 P. v. Newman CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL NEWMAN, Defendant and Appellant.	B234056 (Los Angeles County Super. Ct. No. GA081715)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael D. Carter, Judge. Affirmed.

Russell S. Babcock, 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, Senior Assistant Attorney General, Scott A. Taryle and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Daniel Newman was convicted, following a jury trial, of one count of possession of methamphetamine for sale in violation of Health and Safety Code section 11378. Appellant admitted that he suffered four prior convictions for which he had served prison terms within the meaning of Penal Code section 667.5, subdivision (b), and that one of those convictions was a conviction within the meaning of Health and Safety Code section 11370.2, subdivision (c). The trial court sentenced appellant to a total of eight years in state prison, consisting of the upper term of three years for the conviction, plus two one-year enhancements pursuant to section 667.5 and a three-year enhancement pursuant to Health and Safety Code section 11370.2.

Appellant appeals from the judgment of conviction, contending that the trial court erred prejudicially in failing to instruct the jury on the lesser included offense of simple possession of methamphetamine. He also contends that there is insufficient evidence to support his conviction. We affirm the judgment of conviction.

Facts

On November 16, 2010, about 10:00 p.m., Los Angeles County Sheriff's Deputies Ulises Urbina and Brant Frederickson were on patrol in Duarte when they conducted a traffic stop of a pick-up truck in the 1300 block of Bloomdale. When the truck pulled over, appellant leaned into the passenger side of the truck, then walked away from it toward a nearby residence. Deputy Urbina saw appellant toss something into the grass. The deputy stopped appellant, put him in the patrol car, returned to the grassy area and found a chewing tobacco tin with a magnet on its back in the area where appellant had just tossed something. The tin contained four baggies of a substance later determined to be methamphetamine.

Appellant did not appear to be under the influence of drugs. The deputies did not find any paraphernalia for ingesting drugs in the nearby area.

At trial, Los Angeles County Sheriff's Detective David Mertens testified as a narcotics expert. He explained that the 15.38 grams of methamphetamine found in the tin was a significant amount because a usable quantity was only .02 grams, which is the

amount needed for an average person to be under the influence. He testified that 15.38 grams was about 769 usable doses and had a street value of about $3,060. Detective Mertens opined that no one would possess that high a quantity unless it was for purposes of sale. Detective Mertens also stated that he had never encountered anyone possessing drugs in a magnetized tin for personal use, but had found such tins numerous times on people who possessed drugs for purposes of sale. He explained that the tins were used to conceal narcotics on a car, in locations such as the wheel wells, engine compartment or steering column. Detective Mertens also testified that two of the bags in the tin appeared to weigh 1.5 grams and that such bags were called "teeners" and sold for $120 each.

Appellant's cousin Jonathan Heightman testified on appellant's behalf that he came out of a house in the 1300 block of Bloomdale in the evening of November 17, saw appellant being arrested, then saw police officers walking around for about 20 minutes with a flashlight apparently looking for something. He went inside for about 20 minutes, then came back outside and saw that police were still searching. He also observed that they were questioning a girl who was sitting on a curb.

Appellant's father, who lived in a house in the 1300 block of Bloomdale, testified that he saw police search the stopped pick-up truck several times. The police searched the area in front of his house and in the street for a couple of hours.

Appellant testified on his own behalf at trial that he walked away from the pick-up truck when he saw police because he was carrying an open container of alcohol. One of the deputies stopped appellant and said to him, "Oh, I got you for open container." The deputy placed appellant in the patrol car. Deputies searched the area for about one to two hours. Deputy Frederickson told appellant that they would let him go if they did not find anything in the truck. Deputies searched the truck and its surroundings for about one to two hours. The deputies did not let appellant go. On the way to the police station, the deputies told appellant that if he became an informant, they would not send him to jail.

Deputy Frederickson testified in rebuttal that he never told appellant that he would let him go if there was nothing in the truck, and did not tell appellant that he could avoid jail time by becoming an informant.

Discussion

1. Lesser included offense

Appellant contends that the trial court erred in failing to instruct the jury on the lesser included offense of simple possession of methamphetamine, and that the error requires reversal. We do not agree.

Simple possession of a controlled substance is a lesser included offense of possession of a controlled substance for sale. (*People v. Saldana* (1984) 157 Cal.App.3d 443, 454-455.)

The duty to instruct on a lesser included offense arises if there is substantial evidence that the defendant is guilty of the lesser offense, but not the charged offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "Substantial evidence" in this context is evidence from which a reasonable jury could conclude that the lesser offense, but not the greater, was committed. (*Ibid.*)

The crime of simple possession requires the prosecution to prove that a defendant knowingly possessed a usable amount of a controlled substance. (Health & Saf. Code, § 11350, subd. (a); CALCRIM No. 2304.) The crime of possession for sale of a controlled substance requires the prosecution to prove that a defendant knowingly possessed a usable amount of a controlled substance with the intent to sell it. (Health & Saf. Code, § 11351.5; CALCRIM No. 2302.) The difference between the two offenses is that, in order to convict appellant under Health and Safety Code section 11351.5, the prosecution must also prove that appellant had an amount of methamphetamine sufficient to be used for sale and that appellant had the specific intent to sell the possessed methamphetamine.

Here, there was no evidence that appellant possessed the methamphetamine for any reason other than sale. There was no evidence that he possessed it for personal use. He did not appear under the influence when he was arrested and no paraphernalia for ingesting the methamphetamine was found on him. Detective Mertens testified that 15.38 grams was a "significant" amount which equated to 769 doses worth about $3,060. Such a large quantity of drugs is not consistent with personal use.

In contrast, there was substantial evidence that appellant did possess the methamphetamine for sale. The large number of doses and high street value of the drug alone support an inference of intent to sell. The placement of the methamphetamine in the magnetized tin also supported an inference that appellant possessed the drug for sale. Detective Mertens also testified that he had found such tins in the possession of drug sellers numerous times, but never in the possession of personal users. He explained that the tins were commonly used to conceal drugs in various areas of vehicles such as underneath a car or in wheel wells.

Appellant contends that Detective Mertens's testimony alone is insufficient evidence to support an intent to sell. He points out that he did not admit an intent to sell, was not observed selling, and did not have large amounts of cash or pay/owe sheets. Appellant contends that a binge user would use five grams of methamphetamine per day, making the 15 grams about a three-day supply, and a reasonable jury could have concluded that he was a heavy methamphetamine user who purchased the drug from different sources and in different amounts.

We find the testimony of Detective Mertens, together with evidence of the amount of the drug possessed by appellant, is sufficient evidence to support an inference of intent to sell. There is no requirement for additional evidence such as pay/owe sheets, let alone a direct admission of such intent.

Further, as we mention, *ante*, there was no evidence that appellant was a drug user at all, let alone a heavy or binge user. In addition, there is no evidence in the record that a heavy or binge user would use five grams of methamphetamine a day.[1] The only evidence of usage amounts was Detective Mertens's testimony that .02 grams was a usable dose and that 15.8 grams would provide 769 such doses. It is not reasonable to infer personal use based on such a large number of doses.

---

[1] Appellant bases his claim that binge users consume five grams of methamphetamine a day on data from the National Highway Traffic and Safety Administration. No such evidence was offered at trial.

2. Sufficiency of the evidence

Appellant separately contends that there is insufficient evidence to support his conviction because there is insufficient evidence that he had an intent to sell. We do not agree.

"'In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]'" (*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

As we discuss in section 1, *ante*, Detective Mertens's testimony was sufficient to support an inference of an intent to sell. While there were some slight inconsistencies in the detective's testimony,[2] it was for the jury to decide whether to believe all, part or none of that testimony. "'The testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions. [Citations.]'" (*In re Robert V.* (1982) 132 Cal.App.3d 815, 821.)

---

[2] For example, at one point Detective Mertens testified that the 15.38 grams of methamphetamine constituted 769 usable doses of .02 grams each and had a street value of about $3,060. At another point, he testified that methamphetamine was commonly sold in 1.5 gram bags called "teeners" for about $120 per bag. Fifteen grams of methamphetamine would produce 10 "teener" bags of 1.5 grams each, and at the price of $120 a bag would result in a street value of $1,200.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.