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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. BRYAN LOCKWOOD SMITH, Defendant and Appellant.	2d Crim. No. B280885 (Super. Ct. No. 1335354) (Santa Barbara County)

On November 8, 2016, the voters passed Proposition 64, the "Control, Regulate and Tax Adult Use of Marijuana Act" (the Act). Before passage of the Act it was, with certain exceptions, illegal to possess marijuana or concentrated cannabis except for medical reasons. (See Health & Saf. Code, § 11362.5, the "Compassionate Use Act of 1996.")[1] Under the Act, all qualifying convictions or prosecutions for included offenses were deemed never to have happened.

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

In 2010, Bryan Lockwood Smith was convicted by plea of possessing concentrated cannabis. (Former § 11357, subd. (a).) In 2012, he moved to have the court reduce the offense to a misdemeanor; in 2015, he sought to have his plea vacated and the case dismissed. (Pen. Code, § § 17, subd. (b)(3), 1203.4.) His motions were granted. In 2016, appellant sought to have his record sealed pursuant to the Act. (§ 11361.8.) If granted, his conviction would become a legal nullity—it would be deemed to have never happened. The trial court found that appellant possessed a disqualifying amount of concentrated cannabis and was not eligible for relief. His motion was denied.

FACTS AND PROCEDURAL HISTORY

On July 31, 2010, Santa Barbara police stopped appellant in his vehicle after he failed to obey a stop sign at an intersection. The officers smelled alcohol inside the vehicle. Appellant had nystagmus and his speech was slurred. His blood alcohol measured .208 percent in a preliminary test. He was arrested for driving under the influence

Appellant's vehicle was searched. Officers found seven containers of marijuana in amounts ranging from 1 to 35 grams, a digital scale, and a marijuana pipe. In total, appellant possessed 7.2 ounces (or 204 grams) of marijuana. Appellant's cell phone contained messages in which it appeared that he was offering to sell or give the drugs to a clinic. His blood was drawn at a hospital; it measured an alcohol content of .21 percent. He was 43 years old at the time of his arrest.

Appellant was initially charged with four crimes arising from possession of marijuana for sale and driving under the influence of alcohol. A fifth count, possession of concentrated

cannabis, was interlineated later. The charges do not specify the amount of marijuana or concentrated cannabis in his possession.

Appellant demurred to the complaint, arguing that he had a physician recommendation to use marijuana for medicinal purposes. The trial court overruled the demurrer. No preliminary hearing was held.

Pursuant to a plea agreement, appellant pled no contest to misdemeanor driving with a blood alcohol level of .08 or higher (count 4) and felony possession of concentrated cannabis (count 5). (Veh. Code, § 23152, subd. (b); former § 11357, subd. (a).) He stated, "On July 31, 2010 I possessed concentrated cannabis and I drove a motor vehicle with a blood alcohol level of .08 or above in Santa Barbara County." The other charges were dismissed. In December 2010, he was placed on supervised felony probation for three years, with 30 days in county jail.

In July 2012, the trial court granted appellant's motion for early termination of probation and reduced the felony conviction in count 5 to a misdemeanor. Three years later, in July 2015, the court on appellant's motion ordered the plea set aside and vacated, entered a plea of not guilty, and dismissed both convictions. (Pen. Code, § 1203.4.)

In 2016, citing the recent Act, appellant applied to have his sentence in count 5 recalled, the conviction dismissed and his record of conviction sealed. He stated that the quantity of concentrated cannabis underlying his conviction was not more than eight grams. The prosecutor objected.

At a hearing, defense counsel conceded that the conviction in count 5 had already been reduced to a misdemeanor, but argued that appellant is entitled to a full dismissal and sealing of his record. Counsel pointed out that the pre-sentence report does

not mention concentrated cannabis. The People replied that appellant admitted possessing cannabis concentrate, and because he possessed 7.2 ounces of marijuana product, he is ineligible for relief. Defense counsel stipulated that appellant possessed more than seven ounces of marijuana.

The trial court reduced appellant's drug offense to a misdemeanor, but denied his petition to dismiss and seal the conviction because "the quantity of the marijuana substance constituting the basis of the crime(s) makes [appellant] ineligible for the requested relief." The court relieved appellant from having to register as a narcotics offender.

DISCUSSION

The voters' passage of the Act in 2016 largely legalized recreational cannabis use. (*City of Vallejo v. NCORP4, Inc.* (2017) 15 Cal.App.5th 1078, 1081.) The Act allows a person who has completed a sentence for a former section 11357 conviction, whether by trial or by plea, to apply "to have the conviction dismissed and sealed because the prior conviction is now legally invalid or redesignated as a misdemeanor or infraction." (§ 11361.8, subd. (e).)

1. Appellant's Proposition 64 Application Is Not Moot

The dismissal of appellant's conviction in 2015 did not moot the issue of whether he is entitled to a dismissal and sealing of his records under section 11361.8. The 2015 dismissal did not make the conviction a legal nullity; in any prosecution for a later offense, the conviction could be pleaded and proved as if it had not been dismissed. (Pen. Code, § 1203.4, subd. (a)(1); *People v. Tidwell* (2016) 246 Cal.App.4th 212, 216-217.) By contrast, relief under the Act makes the conviction invalid, releasing appellant

from all of its legal consequences. The Attorney General concedes that appellant's claim is not moot.

2. Material Outside the Record of Conviction May Be Used

Appellant argues that courts may consider only the "record of conviction" while conducting an analysis under the Act. In his view, the criminal pleading and his plea agreement may be considered, but here, neither document discloses the amount of drugs he possessed. He asserts that the probation department report is not part of the record of conviction and cannot be used to determine the existence of disqualifying factors.

Appellant forfeited this contention by failing to raise it below. Defense counsel urged the trial court to look at material outside the record of conviction, saying "it's clear from the information that the Court is allowed to consider such as a police report that there was no concentrate at all." The court observed that a probation report, not a police report, showed appellant had 7.2 ounces of marijuana. Counsel conceded the amount and did not object to the court's use of the probation report. After inviting the trial court to consider material outside the record of conviction, appellant cannot complain on appeal that the court erred in doing so.

Even if the issue had been preserved, appellant would not succeed. Relief under the Act is not automatic, but is subject to judicial evaluation of its impact on public safety. (*People v. Rascon* (2017) 10 Cal.App.5th 388, 394-395.) The statute allowing applications to dismiss a conviction incorporates Penal Code section 1170.18, subdivision (b), authorizing the court to consider the petitioner's criminal history, disciplinary record, record of rehabilitation, and any other relevant evidence. (§ 11361.8, subd. (b)(1).) An examination of material outside the

record of conviction—such as a probation department report—is built into the Act. (See also *People v. Sledge* (2017) 7 Cal.App.5th 1089, 1095 [allowing use of a probation report at an evidentiary hearing to determine factual eligibility for resentencing under Proposition 47].) The trial court did not err by considering the probation report.

3. Appellant's Ineligibility

The Act states that the trial court "shall presume the petitioner satisfies the criteria [for recall or dismissal] unless the party opposing the petition proves by clear and convincing evidence that the petitioner does not satisfy the criteria. If the petitioner satisfies the criteria . . . the court shall grant the petition to recall the sentence or dismiss the sentence because it is legally invalid unless the court determines that granting the petition would pose an unreasonable risk of danger to public safety." (§ 11361.8, subd. (b).)

Appellant contends that the drug charge and his plea are ambiguous. He was charged with—and admitted to—possessing concentrated cannabis, with no amount specified. In 2010, possessing *any* amount of concentrated cannabis was unlawful; consequently, there was no need to charge a specific amount. (Former § 11357, subd. (a).) This is no longer true. Since the passage of the Act, it is not a crime for a person over age 21 to possess four or less grams of concentrated cannabis. (§ 11357, subds. (a), (b)(2).)[2]

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[2] The year after appellant's petition, an amendment to section 11357 doubled the allowable amount of concentrated cannabis, from four to eight grams, and all references to "marijuana" in the code were changed to "cannabis." (Stats.2017,

Appellant's possession of concentrated cannabis is conclusively established by his no contest plea. (*People v. Maultsby* (2012) 53 Cal.4th 296, 302.) He argues that no evidence supports a conclusion that he possessed more than four grams of concentrated cannabis and "possessing an unknown amount of concentrated cannabis" is not a crime after the passage of the Act. It is true that neither the complaint nor appellant's plea agreement mention the amount of concentrated cannabis. The pre-sentence report acknowledges appellant's conviction for possessing concentrated cannabis, and states that he possessed 7.2 ounces of "marijuana."

Concentrated cannabis is "the separated resin, whether crude or purified, obtained from marijuana." (§ 11006.5.) This intersects with the definition of "marijuana," meaning "all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; *the resin extracted from any part of the plant*; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin." (§ 11018, italics added.)[3] Concentrated cannabis falls within the broad definition of marijuana. Contrary to appellant's view, use of the word "marijuana" in the probation report did not necessarily mean only "natural" matter and exclude resin. In his plea agreement, appellant admitted to possessing resin, and nothing else.

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ch. 253, § 15, eff. Sept. 17, 2017.) We apply the 2016 version of the applicable statutes, as did the trial court.

[3] The Act retained the same definition of "marijuana," but added "'[m]arijuana products,'" meaning "marijuana that has undergone a process whereby the plant material has been transformed into a concentrate, including, but not limited to, concentrated cannabis . . . ." (§§ 11018, 11018.1.)

On his petition, appellant checked a box stating that the substance resulting in his conviction was "not more than 8 grams of marijuana in the form of concentrated cannabis." He did *not* check a box stating that the amount was "not more than 4 grams" of concentrated cannabis. From appellant's petition, the trial court could conclude that appellant possessed more than four but less than eight grams of concentrated cannabis. This is more than the amount allowed, based on the law in effect at the time the trial court ruled on the petition. (See fn. 2, *ante*.)

The court could construe "marijuana," as used in the probation report, as encompassing concentrated cannabis, based on the intersecting statutory definitions of the two terms. It could infer that appellant's seven containers, with as much as 35 grams of substance inside and totaling 204 grams, comprised more than four grams of concentrated cannabis. Appellant did not declare otherwise. His only statement, in his petition, was that he possessed "not more than 8 grams of marijuana in the form of concentrated cannabis." Based on these factors, the court's decision to deny appellant's petition is supported by substantial evidence. (*People v. Sledge*, *supra*, 7 Cal.App.5th at p. 1095 [court's resolution of disputed facts is reviewed for sufficiency].)

4. Appellant's Medical Marijuana Claim

Appellant demurred to the original complaint, arguing that he did not commit a public offense, or there was a legal bar to prosecution, or a legal justification or excuse for possessing marijuana, owing to his medical marijuana permit. (§ 11362.5, subd. (b)(1)(B) [patients using medicinal marijuana "are not subject to criminal prosecution or sanction"]; Pen. Code, § 1004

[demurrer to criminal pleading].) His demurrer was denied and he entered a plea.

Appellant's plea supersedes any defense to the charges that could have been litigated at trial. Appellant agreed to give up both his right to trial and his right to appeal the denial of all motions. Even assuming he could have appealed the denial of his demurrer, despite his no contest plea, he did not do so. (See *People v. Maultsby*, *supra*, 53 Cal.4th at p. 302; *People v. Hoffard* (1995) 10 Cal.4th 1170, 1177-1178 [after a guilty plea, appeal may be taken to contest jurisdiction or the legality of the proceedings].) Appellant cannot raise his medical marijuana claim now, when the record is devoid of admissible evidence supporting that claim, such as a valid identification card to use medical marijuana issued by a licensed physician. (See, e.g., § § 11362.7, subds. (a), (c), 11362.71, 11362.712, 11362.735 [all addressing medical marijuana identification cards].)

DISPOSITION

The post-judgment order denying appellant's petition to dismiss and seal his 2010 conviction is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Jean M. Dandona, Judge

Superior Court County of Santa Barbara

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, Shawn McGahey Webb, Supervising Deputy Attorney General, and Blythe J. Leskay, Deputy Attorney General, for Plaintiff and Respondent.