Filed 8/5/02 P. v. Berry CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. FRANK KING BERRY, Defendant and Appellant.	C034405 (Super. Ct. No. 62-7341)

During a probation search, police officers discovered defendant Frank King Berry in possession of methamphetamine and drug paraphernalia. An amended information charged defendant with possession of methamphetamine for sale (Health & Saf. Code, § 11378); possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)); possession of marijuana for sale (Health & Saf. Code, § 11359); maintaining a place for selling or using controlled substances (Health & Saf. Code, § 11366); possession of more than 28.5 grams of marijuana (Health & Saf. Code, § 11357, subd. (c)); possession of an injection device (Health & Saf. Code, § 11364); and unauthorized possession of a hypodermic needle or syringe (Bus. & Prof. Code, § 4140).

Following a jury trial, the court sentenced defendant to 64 years to life. Defendant appeals, contending: (1) the court erred in admitting evidence of a prior conviction, (2) defendant's conviction for possession of more than one ounce of marijuana is barred as a lesser included offense, (3) the prosecution failed to prove defendant's prior convictions in Oregon constituted strikes under California law, and (4) defendant's sentence constitutes cruel and unusual punishment. We shall conclude defendant's Oregon prior convictions cannot support enhancements for prior serious felonies and therefore reverse and remand with directions that the trial court strike its finding of two prior strikes and resentence defendant accordingly. We also conclude that, pursuant to Penal Code section 654, defendant's conviction for possession of 28.5 grams of marijuana should be stayed. In all other respects, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A neighbor of Michael Jay Douglas noticed a daily stream of visitors, who stopped briefly at the Douglas residence and then drove away in their cars. On March 2, 1999, police officers conducted a probation search of the residence.

The officers knocked on the door and heard whispering inside announcing their arrival. The officers heard footsteps and the sound of furniture being moved inside the residence. Following a second knock, Douglas opened the door, appearing very nervous.

The officers entered the residence and found several individuals, including defendant, inside. During the search, officers found various containers of usable quantities of methamphetamine and approximately 125 grams of marijuana. The officers also uncovered glass "crank" pipes, marijuana pipes, baggies, a scale, Vitablend, "pay/owe" sheets, and syringes.

As the officers searched the premises, three individuals arrived at the residence. One of the arrivals, upon entering the house, possessed a bag containing methamphetamine residue. She admitted purchasing the methamphetamine from defendant earlier that day and that she had returned to purchase more. She identified defendant as "Bud."

The telephone rang many times during the search. Six times, the callers asked for "Bud." One of the officers involved in the search knew defendant as "Bud." Outside the residence, officers found a backyard covered with dozens of shallow holes six to 12 inches in depth.

Defendant admitted ownership of a red box containing methamphetamine, syringes, and plastic baggies containing powdery residue. He told police he was "just crashing" at the residence. Officers had searched the residence within the past three months, when Douglas was the only resident. No contraband was found during the prior search.

An amended information charged defendant with possession of methamphetamine for sale, possession of methamphetamine, possession of marijuana for sale, maintaining a place for selling or using controlled substances, possession of more than

28.5 grams of marijuana, possession of an injection device, and unauthorized possession of a hypodermic needle or syringe. The information also alleged two prior serious felony convictions within the meaning of Penal Code section 667, subdivisions (b) through (i); three prior narcotics convictions within the meaning of Health and Safety Code section 11370.2, subdivision (a); six prior prison terms within the meaning of Penal Code section 667.5, subdivision (b); and that defendant was statutorily ineligible for probation pursuant to Penal Code section 1203, subdivision (e)(4).

A jury trial followed. Defendant admitted the prior prison term and prior conviction allegations. The jury found defendant guilty on all counts and found true the prior felony strike allegations.

The trial court sentenced defendant to 64 years to life: 25 years to life for possession for sale of methamphetamine; a consecutive term of 25 years to life for possession of methamphetamine, stayed pursuant to Penal Code section 654; a consecutive term of 25 years to life for possession of marijuana for sale; a concurrent term of 25 years to life for maintaining a place where drugs were sold or used; concurrent terms of six months each for possession of more than 28.5 grams of marijuana, possession of an injection device, and unauthorized possession of a hypodermic needle or syringe; plus three consecutive three-year enhancements for prior narcotics convictions (Health & Saf. Code, § 11370.2) and five consecutive one-year enhancements for prior prison terms (Pen. Code, § 667.5, subd. (b)). The court

ordered defendant to pay a restitution fine of $10,000 pursuant to Penal Code section 1202.4 and a $10,000 restitution fine pursuant to Penal Code section 1202.45. Defendant filed a timely notice of appeal.

DISCUSSION

I. Evidence of Prior Conviction

Defendant contends the court erred in admitting evidence concerning a 1997 arrest for possession of methamphetamine for sale. The evidence was admitted under Evidence Code section 1101, subdivision (b). Defendant also argues the evidence should have been excluded under Evidence Code section 352.

A. Facts

In August 1997 police officers searched defendant in his motel room. The motel room was filled with methamphetamine smoke, and officers found defendant in possession of three ounces of packaged methamphetamine, crank pipes, a scale, packaging materials and a mirror. Officers found pay/owe sheets in a vehicle associated with another occupant of the room, in a bag owned by defendant.

Defendant admitted purchasing one-quarter pound of methamphetamine, selling one ounce, and possessing the remaining three ounces. He also informed officers of cash and additional drugs buried behind the motel although a subsequent search failed to uncover any drugs or cash. Several of the same names were listed on both 1997 and 1999 pay/owe sheets.

Prior to trial in the present case, defendant's counsel objected to the introduction of evidence of defendant's 1997 prior conviction for possession of methamphetamine for sale. Counsel argued the evidence bore no relevance to the current charges and was unduly prejudicial.

The court overruled the objection, finding "[p]rimarily the relevance would be with regard to intent." The court further found the probative value of the prior conviction outweighed any prejudice. The prosecution presented the evidence of the 1997 arrest and conviction.

B. Law

Under Evidence Code section 1101, evidence of uncharged misconduct is inadmissible to prove the criminal disposition of a defendant. However, such evidence *is* admissible to prove some relevant fact such as identity or common design, plan, or scheme. The admission of uncharged misconduct lies within the trial court's discretion. The trial court must weigh the probative value of the evidence against its prejudicial effect. The trial court, in reviewing the admissibility of evidence of other offenses, must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the proffered evidence to prove or disprove the fact, and (3) the existence of any policy or rule requiring exclusion despite relevance. (*People v. Daniels* (1991) 52 Cal.3d 815, 856 (*Daniels*).) We review such evidence under an abuse of discretion standard. (*People v. Memro* (1995) 11 Cal.4th 786, 864 (*Memro*).)

The trial court admitted the evidence of the 1997 arrest to show intent. The court noted that if evidence of defendant's prior crime shed "great light on the defendant's intent at the time he committed that offense, it may lead to a logical inference of his intent at the time he committed the charged offense . . . ." Defendant disputes this assertion and contends "[t]here was no factual dispute whether the methamphetamine found inside the residence was possessed for sale." However, defendant pled *not guilty* to the charge of possessing methamphetamine for sale, putting his intent, an element of the crime, at issue. (*Memro*, *supra*, 11 Cal.4th at p. 864; *Daniels*, *supra*, 52 Cal.3d at pp. 857-858.) The court found the earlier arrest material as to defendant's intent, a determination we cannot fault.

As to the second consideration, the probative value of the evidence to prove the fact, we find the probative value very high. Defendant's prior arrest stemmed from a search that revealed three ounces of methamphetamine, a scale, packaging materials, and crank pipes in his motel room. Officers found pay/owe sheets in a bag belonging to defendant. Several names listed on the 1997 sheets were identical to those found in the 1999 search.

Defendant argues the 1997 evidence was not relevant to prove he possessed for sale the methamphetamine found in the 1999 search. However, in addition to the same customers' names on pay/owe sheets, one of the individuals arrested with defendant in the present case testified she had purchased drugs

from him earlier the same day and had returned to purchase more. The telephone rang frequently, with callers asking for "Bud," a name by which defendant was known. In addition, defendant admitted owning a box containing drugs and packaging materials.

All this evidence, in addition to the duplicate names on the pay/owe sheets, reveals "a direct relationship between the prior offense and an element of the charged offense . . . ." (*Daniels*, *supra*, 52 Cal.3d at p. 857.) The 1997 offense is "logically, naturally, and by reasonable inference relevant to prove" defendant's intent in the current offense. (*Id.* at p. 856.)

However, strong probative value does not end the trial court's inquiry. The trial court must also weigh the probative value of the evidence against its prejudicial impact. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404 (*Ewoldt*); Evid. Code, § 352.) In *Ewoldt*, the Supreme Court noted prejudicial impact increases when other acts do not result in criminal convictions. (*Ewoldt*, *supra*, 7 Cal.4th at p. 405.)

Here, the other act, the 1997 search of defendant's motel room, resulted in defendant's arrest and conviction. Therefore, there could be no question in the jury's mind that the other conduct occurred. Nor was the evidence surrounding the 1997 arrest inflammatory as compared to the 1999 arrest: Both incidents were quite similar. The probative value of the 1997 evidence, as previously discussed, was high. Although defendant decries the evidence as "highly prejudicial," the trial court properly balanced the probative value of the evidence against

its potential prejudicial effect. We find no abuse of discretion in the trial court's conclusion.

II. Lesser Included Offense

Defendant argues his conviction for possession of more than 28.5 grams of marijuana (count five) is precluded as a lesser included offense of his conviction for possession of marijuana for sale (count three). The trial court concluded the charges in question were based on the same quantity of marijuana but declined an instruction that count five was a lesser included offense of count three. The court concluded defendant could be convicted of both offenses, but sentencing on both was barred by Penal Code section 654.

The jury convicted defendant of both possession for sale and possession of marijuana in counts three and five. The court sentenced defendant to a consecutive sentence of 25 years to life for count three and a concurrent term of six months for count five.

Defendant argues this sentence was improper since possession of more than an ounce of marijuana is a lesser included offense of possession for sale. Defendant misconstrues the facts in this case.

"'"The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense."'" (*People v. Ortega* (1998) 19 Cal.4th 686, 692.) Here, the jury convicted defendant of possession of marijuana for sale and possession of more than

28.5 grams of marijuana. Unlike the crime of possession of more than 28.5 grams of marijuana, the crime of possession of marijuana for sale can be established by possession of less than 28.5 grams of marijuana. Therefore, since the crime of possession of marijuana for sale may be committed without necessarily committing the crime of possession of more than 28.5 grams of marijuana, the latter is not a lesser included offense of the former.[1]

However, although we find the convictions for possession of more than 28.5 grams of marijuana and possession of marijuana for sale appropriate, we find Penal Code section 654 prohibits concurrent sentences for both convictions. Penal Code section 654 states, in part: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An

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[1] Defendant argues the prosecution conceded defendant's convictions on counts three and five were based upon possession of the same quantity of marijuana and therefore convictions on both counts were prohibited. Defendant relies on *People v. Saldana* (1984) 157 Cal.App.3d 443, 453-458 (*Saldana*). In *Saldana*, the defendant was charged with possession of heroin for sale (Health & Saf. Code, § 11351), and the court failed to instruct on the lesser included offense of simple possession of heroin. The appellate court reversed, finding a lesser included instruction warranted where the charged offense cannot be committed without necessarily committing another offense. (*Saldana*, *supra*, 157 Cal.App.3d at p. 454.) As discussed above, that is not true in the present case.

acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

Here, the police search uncovered two bags of marijuana containing a total of approximately 125 grams. The court sentenced defendant to a consecutive term of 25 years to life for possession of marijuana for sale and a concurrent term of six months for possession of the same 28.5 grams of marijuana. Under Penal Code section 654, the latter term should be stayed.

III. Oregon Prior Convictions

Defendant contends his Oregon prior convictions for burglary and attempted burglary do not constitute strikes under California law. Under Oregon law, defendant asserts, the burglary convictions do not require the requisite intent to commit theft. Therefore, the prosecution failed to prove the Oregon prior convictions constituted qualifying prior strikes under the California "three strikes" law. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12.)

Penal Code sections 667, subdivision (d)(2) and 1170.12, subdivision (b)(2) provide that, for the purposes of the three strikes law, a prior conviction of a particular felony includes "a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7." Section 1192.7, subdivision (c)(18) includes as a "serious felony" a "[b]urglary of an inhabited dwelling house" or "the inhabited portion of any other building."

The amended information charged defendant with two prior convictions in Oregon: a 1986 violation of Oregon Revised Statutes section 164.225, attempted first degree burglary of an inhabited dwelling, and a 1991 violation of Oregon Revised Statutes section 164.225, first degree burglary of an inhabited dwelling. At trial, the prosecution offered certified copies of the charging documents and the judgments as evidence of the Oregon prior convictions. The trial court found both prior convictions qualified as strikes and imposed consecutive sentences of 25 years to life imprisonment in counts one and three.

The Oregon burglary statutes provide, in pertinent part: "(1) A person commits the crime of burglary in the second degree if the person enters or remains unlawfully in a building with intent to commit a crime therein." (Or. Rev. Stat. § 164.215.) "(1) A person commits the crime of burglary in the first degree if the person violates ORS 164.215 and the building is a dwelling, or if in effecting entry or while in a building or in immediate flight therefrom the person: [¶] (a) Is armed with a burglar's tool as defined in ORS 164.235 or a deadly weapon; or [¶] (b) Causes or attempts to cause physical injury to any person; or [¶] (c) Uses or threatens to use a dangerous weapon." (Or. Rev. Stat. § 164.225.)

In determining whether an out-of-state prior is a serious felony, "the trier of fact may consider the entire record of the proceedings leading to imposition of judgment on the prior conviction to determine whether the offense of which the

defendant was previously convicted involved conduct which satisfies all of the elements of the comparable California serious felony offense." (*People v. Myers* (1993) 5 Cal.4th 1193, 1195.) "'[W]hen the record does not disclose any of the facts of the offense actually committed' [citation], a presumption arises that the prior conviction was for the least offense punishable." *(People v. Johnson* (1991) 233 Cal.App.3d 1541, 1548.)

Penal Code section 459 defines burglary as an entry "with intent to commit grand or petit larceny or any felony . . . ." Section 460 defines first degree burglary as the burglary "of an inhabited dwelling . . . ."

In *People v. Marquez* (1993) 16 Cal.App.4th 115 (*Marquez*), the appellate court considered whether an Oregon first degree burglary conviction meets the California criteria to qualify as a strike. The *Marquez* court reasoned: "The Oregon statutory definition of first degree burglary does not necessarily support enhancement of defendant's sentence pursuant to Penal Code section 667 because a first degree burglary conviction can be obtained in Oregon without a finding that the perpetrator intended to commit grand larceny, petit larceny or a felony at the time of the entry. [Citations.] Since the statutory elements are insufficient to support findings that the offenses were serious felonies, the findings can only be upheld if the records of the prior convictions establish that defendant had at least the specific intent to commit larceny under California law." (*Marquez*, *supra*, 16 Cal.App.4th at p. 123.)

The *Marquez* court then looked to the records of the defendant's Oregon convictions and found: "The Oregon indictments charged that defendant entered the dwellings 'with the intent to commit the crime of theft therein . . . .' If the statutory definition of theft under Oregon law were the same as the California statutory definition of theft, the indictments would establish that defendant had been convicted of serious felonies." (*Marquez*, *supra*, 16 Cal.App.4th at p. 123.) However, the court pointed out the two states' statutory definitions of theft differ. Under California law, the mens rea of theft is the specific intent to permanently deprive the owner of his or her property. (Pen. Code, § 484; *People v. Jaso* (1970) 4 Cal.App.3d 767, 771.) Under Oregon law, the mens rea of theft is the intent "to deprive another of property or to appropriate property [of another's] . . . ." (Or. Rev. Stat. § 164.015.) Oregon law defines "deprive another of property" as "Withhold property of another or cause property of another to be withheld from that person permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to that person . . . ." (Or. Rev. Stat. § 164.005(2)(a).)

The court in *Marquez* concluded: "The intent to acquire, or deprive an owner of, 'the major portion of the economic value or benefit' of his or her property is not equivalent to the intent to permanently deprive an owner of his or her property. A person who intends only to *temporarily* deprive an owner of property, albeit while acquiring or depriving the owner of the

main *value* of the property, does not intend to *permanently* deprive the owner of the property and therefore does not have the intent to commit theft, as that crime is defined under California law. Since such an intent would constitute 'the intent to commit the crime of theft' under Oregon law but not under California law, the records of defendant's Oregon convictions do not establish that those convictions were serious felonies within the meaning of Penal Code section 1192.7, subdivision (c)(18)." (*Marquez*, *supra*, 16 Cal.App.4th at p. 123.)

In the present case, the Attorney General, confronted by *Marquez*, states merely he "respectfully disagrees with that court's reasoning. Indeed, a defendant's intent to acquire or deprive an owner of the 'major portion of the economic value or benefit' of his or her property essentially amounts to a *permanent* deprivation of that person's property. In the instant case, there was no evidence that [defendant] can point to which shows that [defendant's] prior burglary convictions were based upon an intent to only temporarily deprive someone of their property." The Attorney General cites *People v. Riel* (2000) 22 Cal.4th 1153, 1205-1206 (*Riel*).)

In *Riel*, *supra*, 22 Cal.4th 1153, a defendant challenged two prior prison term enhancements (Pen. Code, § 667.5) based on two Washington convictions for burglary. (*Riel*, *supra*, 22 Cal.4th at p. 1203.) The defendant argued it was possible to commit burglary under Washington law without committing a burglary, or any felony, in California. (*Ibid.*) The appellate court agreed

but found the prosecution presented sufficient evidence regarding the nature of the Washington burglaries to prove the defendant's actual Washington crimes constituted burglary under California law. This evidence included the defendant's statements made as part of his guilty pleas. The court observed: "These statements clearly show that the burglary convictions were based on the intent to commit theft rather than some other, nonfelonious, crime." (*Id.* at p. 1205.) In the present case, we have only certified copies of the charging documents and judgments; the prosecution offered no evidence sufficient to establish defendant's intent to permanently deprive his victims of their property.

Because neither the statutory definition of the Oregon offenses nor the underlying facts of the offenses establish that they correspond to any serious or violent felony under California law, the trial court's finding that the offenses qualify as strikes was erroneous.

IV. Cruel and Unusual Punishment

Finally, defendant contends his prison term of 64 years to life constitutes cruel and unusual punishment. This contention must also fail.

Defendant did not raise this issue in the trial court. Accordingly, it is waived. (*People v. Scott* (1994) 9 Cal.4th 331, 354; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583.) Nonetheless, to forestall an ineffective assistance of counsel claim, we shall address this issue on its merits.

The Eighth Amendment to the federal Constitution "'forbids only extreme sentences that are "grossly disproportionate" to the crime.'" (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1135.) A punishment may violate the California Constitution if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*).)

Under *Lynch*, the court must examine the nature of the offense and the offender, compare the challenged penalty to that proscribed in California for more serious crimes, and compare the penalty with the punishment in other jurisdictions for the same offense. (*Lynch*, *supra*, 8 Cal.3d at pp. 425-428.)

In his argument, defendant addresses none of the factors enumerated in *Lynch*; instead, defendant simply quotes dicta from several cases discussing the possibility of a sentence constituting cruel and unusual punishment. Defendant appears to base his argument solely on the length of his sentence. However, as the People point out, defendant is not being punished merely on the basis of this current offense but on the basis of his recidivist behavior.

California statutes imposing more severe punishment on habitual criminals have long withstood constitutional challenge. (See *People v. Weaver* (1984) 161 Cal.App.3d 119, 125-126.) It is a well-settled principle that the Legislature may properly punish recidivists, even those who have not committed the very worst offenses, more harshly than first-time offenders. (*Ibid.*)

"Recidivism justifies the imposition of longer sentences for subsequent offenses." (*People v. Cooper* (1996) 43 Cal.App.4th 815, 825.)

Defendant is just such a recidivist. His adult criminal history extends back to 1974, when he was not quite 20 years old and was convicted of cultivating marijuana. (Health & Saf. Code, § 11358.) His criminal activities continued with a conviction in 1975 for burglary. (Pen. Code, § 459.) Later, in 1980, he sustained a conviction in Arizona for offering to sell dangerous drugs. In 1986 he suffered a conviction for first degree theft. (Or. Rev. Stat. § 164.055.) In 1989 and 1990 he was convicted of attempted burglary and theft. (Or. Rev. Stat. § 144.350.) In 1991 he sustained a conviction for first degree burglary. (Or. Rev. Stat. § 164.225.) In 1994 and 1997 he was convicted of possession for sale of a controlled substance. (Health & Saf. Code, § 11378.)

Defendant's punishment is based on the fact that he is a repeat offender of serious felonies who has continued to commit crimes. Given the circumstances of defendant's past criminality and the current serious offenses, the sentence imposed is neither grossly disproportionate to the crimes committed nor does it "shock[] the conscience and offend[] fundamental notions of human dignity." (*Lynch*, *supra*, 8 Cal.3d at p. 424.)

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded to the trial court with directions to strike its finding that the Oregon offenses constitute "strikes" and to

recalculate defendant's sentence accordingly. The court shall also stay the sentence for possession of 28.5 grams of marijuana.

RAYE, J.

We concur:

NICHOLSON, Acting P.J.

HULL, J.