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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Appellant,

v.

JEFFREY SCOTT ALICE,

Defendant and Respondent.

E038046

(Super.Ct.No. FMB006972)

OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster, Judge. Reversed and remanded with directions.

Michael A. Ramos, District Attorney, Mark Vos, Lead Deputy District Attorney, and Tracey Blount and Brent Schultze, Deputy District Attorneys, for Plaintiff and Appellant.

Denise M. Rudasill, under appointment by the Court of Appeal, for Defendant and Respondent.

This is an appeal by the San Bernardino County District Attorney (hereafter referred to as the District Attorney or the People) from an order granting a motion pursuant to Penal Code section 995<sup>1</sup> regarding one count of an information. We agree with the District Attorney that the evidence presented at the preliminary hearing was sufficient to support a violation of Vehicle Code section 23152, subdivision (a), driving under the influence of methamphetamine. Accordingly, we reverse the order granting the section 995 motion as to count 3.

The People further seek to set aside an order placing defendant Jeffrey Scott Alice on drug treatment probation pursuant to Proposition 36. We hold that the defendant is not eligible for such drug treatment probation.

#### PROCEDURAL BACKGROUND

As pertinent to our discussion, defendant was charged in a first amended complaint filed on September 20, 2004, with transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)), possession of methamphetamine for sale (Health & Saf. Code, § 11377, subd. (a)), driving under the influence of drugs (Veh. Code, § 23152, subd. (a)), and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)). On January 5, 2005, following the preliminary hearing, Judge James C. McGuire ordered that defendant be bound over on all counts.

On April 20, 2005, the Judge Bryan Foster granted defendant's motion to set aside count 3 (driving under the influence of drugs) of the information; however, he denied the

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

motion as to the remaining counts. The court then accepted defendant's guilty plea to the remaining counts pursuant to Proposition 36 (section 1210), and ordered that he report immediately to the probation department.

### FACTS

At the preliminary hearing, Officer Andrew Williams testified as an expert for the People. He is a drug recognition expert (DRE). As a DRE, he has been in contact with people under the influence of methamphetamine and received training and experience on the types of physical symptoms that people using methamphetamine exhibit.

Officer Williams testified that on August 5, 2004, he saw defendant driving past him on State Route 62. Thinking that defendant matched the description of a subject the officer was looking for, he made a U-Turn and followed defendant's car. The officer observed defendant veer onto the shoulder and weave back into the traffic lane twice. The road they were traveling on was on a very serpentine hill. After awhile, the officer activated his lights and siren and pulled defendant over. Defendant and his passenger complied with the officer's instructions.

Officer Williams observed that defendant "appeared agitated, nervous, had some tremors, and . . . his lips were burned and chapped, and he was very amped up, agitated and with a high, elevated pulse." Defendant's speech was rapid and his pulse was about 130 beats a minute. Based upon these observations, Officer Williams believed defendant was under the influence of a central nervous system stimulant. When asked, defendant admitted he used methamphetamine the day before.

After arresting defendant, Officer Williams searched defendant's person and found a small baggy containing a white crystal powdery substance. The substance was later tested resulting in a positive test for methamphetamine. The methamphetamine weighed about .09 grams, a usable quantity. The officer conducted a further DRE evaluation after taking defendant to jail. Based on the evaluation, Officer Williams opined that defendant was under the influence of a central nervous system stimulant. After booking, defendant provided a urine sample. Defendant's urine sample was tested on August 16, 2004. It tested positive for amphetamines, a class of drug in which methamphetamine is included.

#### PEOPLE'S RIGHT TO APPEAL

Defendant contends the People's appeal is barred under subdivision (d) of section 1238, which provides: "Nothing contained in this section shall be construed to authorize an appeal from an order granting probation. Instead, the people may seek appellate review of any grant of probation, whether or not the court imposes sentence, by means of a petition for a writ of mandate or prohibition which is filed within 60 days after probation is granted. The review of any grant of probation shall include review of any order underlying the grant of probation." We reject defendant's contention.

"The People have no right of appeal except as provided by statute. [Citation.]" (*People v. Douglas* (1999) 20 Cal.4th 85, 89.) Section 1238 sets forth the circumstances under which the People may appeal. Specifically, subdivision (a)(10) authorizes an appeal from the "imposition of an unlawful sentence." That subdivision provides: "As used in this paragraph, 'unlawful sentence' means the imposition of a sentence not authorized by law or the imposition of a sentence based upon an unlawful order of the

court which strikes or otherwise modifies the effect of an enhancement or prior conviction.”

“[A] sentence is generally ‘unauthorized’ where it could not lawfully be imposed under any circumstance in the particular case.” (*People v. Scott* (1994) 9 Cal.4th 331, 354.) A legally unauthorized sentence presents “‘pure questions of law’” and is “‘clear and correctable’” independent of any factual issues presented by the record at sentencing.” (*People v. Smith* (2001) 24 Cal.4th 849, 852.) The “trigger for the application of [section 1238,] subdivision (a)(10) is the . . . suspension of execution of, a state prison term.” (*People v. Bailey* (1996) 45 Cal. App.4th 926, 931.)

As discussed below, the trial court’s suspension of the execution of sentence and grant of probation was an illegal sentence resulting from the erroneous grant of defendant’s section 995 motion. Because the People have directly appealed from the order granting defendant’s section 995 motion, section 1238, subdivision (d), is inapplicable. If the People were solely attacking the trial court’s probation order, section 1238, subdivision (d), would bar the appeal. (*People v. Douglas, supra*, 20 Cal.4th 85, 95.) However, they are not. Instead, the People appeal from the trial court’s order granting defendant’s section 995 motion which resulted in an unlawful sentence. Under such circumstances, i.e., the imposition of an unlawful sentence, this appeal is authorized under section 1238, subdivision (a)(10), and is not made nonappealable by the sentencing court’s subsequent suspension of execution and grant of probation. (*People v. Douglas, supra*, 20 Cal.4th 85, 95-96.) “[N]either the language of section 1238, subdivision (d) nor its purpose requires that the appeal in this case be barred. The People did not

explicitly appeal from ‘an order granting probation,’ the only type of appeal barred by the statute’s plain language, but from a formally and legally separate order [setting aside one count of the information].” (*People v. Douglas, supra*, 20 Cal.4th 85, 96.) Accordingly, the People can appeal in this matter.

### STANDARD OF REVIEW

On review of an order granting a section 995 motion, we examine the record to determine if the evidence is sufficient to support the offense charged in the information. (*People v. Superior Court (Jurado)* (1992) 4 Cal.App.4th 1217, 1225.) Neither the judge hearing the section 995 motion nor the appellate court may reweigh the evidence or determine the credibility of witnesses. If some evidence supports the offense charged in the information, the reviewing court will not look into its sufficiency. An information should be set aside only when there is a complete lack of evidence to support a necessary element of the offense charged. The prosecution of the charge will not be prohibited “““ . . . if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it.”” [Citation.] [¶] We review the evidence in support of the information to determine whether as a matter of law it is sufficient, not whether the trial court’s ruling was reasonable. [Citations.]” (*Id.* at p. 1226.)

### SECTION 995 MOTION

On April 20, 2005, defense counsel argued that the People did not present enough evidence at the preliminary hearing to hold defendant to answer on all charges, more specifically, count 3: driving under the influence. Because of count 3, defendant was not

eligible for probation under Proposition 36. Although the trial court's initial decision was to deny the section 995 motion, after hearing argument of counsel, the court granted the motion as to count 3 only. In reaching this decision, the court stated: "I believe that [defense counsel] is correct in terms of the proof regarding the [Vehicle Code section] 23152 [violation]. The evidence in this matter so far that has been presented is that the officer observed some erratic driving. There was evidence of the defendant having some amphetamines in his system. The quantification of those amphetamines was not indicated, nor was there any opinion registered by anyone that the amount of amphetamines would have affected his ability to drive. Therefore, I don't believe the connection can be made between the erratic driving and the amphetamines, based on the evidence as submitted."

"The People may prosecute . . . by information . . . . [However,] [b]efore an information is filed there must be a preliminary examination and an order holding the defendant to answer. The proceeding for a preliminary examination is commenced by a complaint. [Citation.] [¶] If it appears from the evidence at the preliminary examination that a public offense has been committed and there is sufficient cause to believe the defendant is guilty, the magistrate shall order the defendant held to answer. [Citation.] [¶] If, on the other hand, it appears from the evidence at the preliminary hearing that no public offense has been committed or that there is no *sufficient cause* to believe the defendant guilty, the magistrate shall order the complaint dismissed and the defendant discharged. [Citation.]" (*People v. Superior Court (Martinez)* (1993) 19 Cal.App.4th 738, 744, italics added.) "The standard of proof is 'sufficient cause,' which 'is generally

equivalent to that “reasonable or probable cause” required to justify an arrest’ but which ‘need not be sufficient to support a conviction.’ [Citation.]” (*People v. Casillas* (2001) 92 Cal.App.4th 171, 178.)

“[A] magistrate’s authority in determining whether to dismiss criminal charges is ‘limited to determining whether sufficient or probable cause exists to hold the defendant for trial.’ [Citation.] In [*People v. Uhlemann* (1973) 9 Cal.3d 662, 664, our state Supreme Court] distinguished the probable cause test from the test used by a jury in determining guilt or innocence, namely, the ‘beyond a reasonable doubt’ construction. [The court] stated: “‘Of course, the probable cause test is not identical with the test which controls a [trial] jury. . . . The jury must be convinced to a moral certainty and beyond a reasonable doubt of the existence of the crime charged in the information and of every essential element of that crime. But a magistrate conducting a preliminary examination must be convinced of only such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused. [Citations.] In other words, ‘Evidence that will justify a prosecution need not be sufficient to support a conviction. . . . An information will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it. [Citations.]’” [Citations.]” (*Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1027.)

With the above in mind, we consider whether the trial court erred in granting defendant’s section 995 motion as to count 3, driving under the influence of a controlled substance.



In support of its decision to grant the section 995 motion as to count 3, the trial court found that there was no opinion that the amount of amphetamines in defendant's body would have affected his ability to drive. Furthermore, no connection can be made between the erratic driving and the amphetamines. Vehicle Code section 23152, subdivision (a), defines the crime of driving under the influence of a controlled substance. In relevant part, it provides: "It is unlawful for any person who is under the influence of any . . . drug . . . to drive a vehicle." A violation of Vehicle Code section 23152, subdivision (a), occurs when (1) a person drives a motor vehicle, (2) while under the influence of any drug. (*People v. Enriquez* (1996) 42 Cal.App.4th 661, 664.) "[I]t is evident that Vehicle Code section 23152, subdivision (a) . . . is a drug related offense. Being under the influence of 'any drug' is one of its essential elements . . . ." (*People v. Duncan* (1990) 216 Cal.App.3d 1621, 1627.) For purposes of Vehicle Code, section 23152, subdivision (a), to be "under the influence" means that the "drug(s) must have so far affected the nervous system, the brain, or muscles as to impair to an appreciable degree the ability to operate a vehicle in a manner like that of an ordinarily prudent and cautious person in full possession of his faculties. [Citations.]" (*Byrd v. Municipal Court* (1981) 125 Cal.App.3d 1054, 1058, italics omitted.)

The record shows that Officer Williams was the only person to testify at the preliminary hearing. He testified as a trained drug recognition evaluator. The officer did not conclude that defendant was under the influence by just witnessing him swerve onto the shoulder two times, pulling him over, arresting him, and finding methamphetamine on his person. Instead, Officer Williams observed defendant's erratic driving, observed

his physical symptoms which were consistent with someone using central nervous system stimulants, took defendant's pulse, and asked defendant whether he had used methamphetamine. While defense counsel argues that erratic driving does not equate to driving under the influence, it does justify "the stop to determine whether the driver was intoxicated." (*People v. Russell* (2000) 81 Cal.App.4th 96, 102; *People v. Beal* (1974) 44 Cal.App.3d 216, 219.) Having stopped defendant, Officer Williams made other observations which supported his conclusion that defendant was under the influence of a drug.

Nonetheless, defendant maintains that there was no evidence presented at the preliminary hearing which supported a finding that his driving ability was impaired. He points to the fact that Officer Williams never conducted any field sobriety tests, nor did he testify that defendant's ability to drive a vehicle was impaired by the amphetamines in his system. While this evidence is absent in the record, the fact remains that the officer testified that defendant was driving a vehicle, that he exhibited outward signs of having used amphetamines, and that his urine tested positive for amphetamines. While this evidence may not be sufficient to support a conviction, it is sufficient to convince "a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused." (*Cummiskey v. Superior Court, supra*, 3 Cal.4th 1018, 1027.)

Given the above, there is sufficient evidence in this record to raise an inference that a violation of Vehicle Code, section 23152, subdivision (a), was committed. Nothing more is required to survive a section 995 motion. (*People v. Superior Court (Jurado)*,

*supra*, 4 Cal.App.4th at p. 1229.) Therefore, we find that the trial court erred in dismissing count 3 of the complaint.

DISPOSITION

The judgment is reversed and the cause is remanded to the trial court. On remand the trial court is directed to vacate its order placing defendant on drug treatment probation pursuant to Proposition 36. The court is further directed to vacate its order granting defendant's section 995 motion to dismiss count 3 and enter a new order denying the motion in its entirety.

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HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

GAUT

J.