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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBERT ANTHONY PEREZ, Defendant and Appellant.	F051537 (Super. Ct. No. 04CM3942) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kings County. Louis F. Bissig, Judge.

William Davies, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Charles A. French, Deputy Attorney General, for Plaintiff and Respondent.

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[*] Before Vartabedian, Acting P.J., Harris, J. and Levy, J.

STATEMENT OF THE CASE

On November 19, 2004, the Kings County District Attorney filed an information in superior court charging appellant as follows:

Count I—unlawful transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a));

Count II—possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a));

Count III—being under the influence of a controlled substance, a misdemeanor (Health & Saf. Code, § 11550, subd. (a));

Count IV—misdemeanor resisting a peace officer (Pen. Code, § 148, subd. (a)(1)); and

Count V—misdemeanor possession of narcotics paraphernalia (Health & Saf. Code, § 11364).

As to counts I and II, the district attorney specially alleged appellant had served two prior prison terms (Pen. Code, § 667.5, subd. (b)).

On November 23, 2004, appellant was arraigned, pleaded not guilty to the substantive counts, and denied the special allegations.

On February 22, 2005, the trial court denied appellant's request for substitution of defense counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118.

On March 8, 2005, jury trial commenced.

On March 9, 2005, the court amended the information by striking a prior prison term allegation and appellant admitted the truth of the remaining special allegation (Pen. Code, § 667.5, subd. (b)).

On the same date, the jury returned verdicts finding appellant guilty as charged of counts III, IV, and V. The court declared a mistrial as to counts I and II after the jury informed the court they were deadlocked as to those counts (Pen. Code, § 1140).

On April 28, 2005, the court dismissed count I and the associated prior prison term allegation on motion of the district attorney.

On May 27, 2005, appellant pleaded guilty to count II and the court dismissed the related special allegation (Pen. Code, § 667.5, subd. (b)) on motion of the district attorney.

On the same date, the court placed appellant on formal probation for a period of five years subject to service of 333 days in county jail. The court ordered appellant to pay a $460 fine and penalty assessment, imposed a $200 restitution fine (§ 1202.4, subd. (b)), imposed and suspended a second such fine pending successful completion of parole, (§ 1202.44), and imposed a $20 court security fee (§ 1465.8). The court ordered appellant to provide samples of bodily fluids (§ 298.1) and to submit to DNA testing (§ 296, subd. (a)(1)).

On January 19, 2006, the court issued a bench warrant for appellant's arrest for violation of probation.

On May 22, 2006, the court set aside the bench warrant and reinstated appellant's bail bond.

On June 9, 2006, the court conducted a hearing on appellant's violation of probation. Appellant admitted the violation and the court referred the matter to the probation department for a supplemental report.

On July 10, 2006, the court declared a forfeiture of appellant's bail bond and issued a bench warrant due to his failure to appear in court.

On or about September 12, 2006, a bondsman surrendered appellant to Kings County law enforcement.

On September 28, 2006, the court conducted a hearing on the report of the probation officer, denied appellant probation, and sentenced him to state prison for a total term of three years. The court imposed the upper term of three years on count II with concurrent terms of 90 days, 365 days, and 180 days on counts III, IV, and V,

respectively. The court imposed a $200 restitution fine (Pen. Code, § 1202.4, subd. (b)), imposed and suspended a second such fine pending successful completion of parole (§ 1202.45), imposed a $20 court security fee (§ 1465.8), and imposed a $165 laboratory fee (Health & Saf. Code, § 11372.5, subd. (a)). The court ordered appellant to submit to DNA testing (§ 296, subd. (a)(1)) and awarded 368 days of custody credits.

On October 26, 2006, appellant filed a timely notice of appeal "based on the sentence or other matters occurring after the plea."

STATEMENT OF FACTS

The following facts are taken from the probation officer's report filed July 6, 2006:

> "On October 16, 2004, at 2242 hours, Hanford Police Officer Pereira was northbound on Irwin Street approaching Second Street in a marked patrol unit. He saw a male riding a bicycle without lights, on the wrong side of the road in front of him. Officer Pereira turned on his overhead lights and attempted to stop the male; however, the male turned westbound on Second Street and sped up. The male continued to ride, making a northbound turn onto Redington and then east on Third Street. The male crashed his bicycle into the south side of the curb and fell off the bike. Officer [Pereira] quickly exited his vehicle and as the male stood up he tried to flee. Officer [Pereira] told the male to get on the ground, but the male tried to run. Officer Pereira struck the male on his right leg with his expandable baton but the suspect still did not comply. Officer Pereira hit the male three more times on his right leg and the male finally went down to the ground, at which time he was handcuffed. As the defendant stood up the officer observed a small plastic bag with .4 grams of methamphetamine on the sidewalk where the defendant was laying when he was arrested. Officer Pereira searched the defendant and found another plastic bag with .4 grams of methamphetamine in his jacket. The defendant had a syringe and methamphetamine pipe in his left pant pocket.
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> "As Officer Pereira placed the defendant in his patrol vehicle, he noticed the defendant's speech was rapid and that he was sweating profusely. The defendant was transported to the Kings County Jail where he submitted a urine test, which returned positive for methamphetamine. The male identified himself as Ronald Perez; however, later was positively identified as the defendant, Robert Anthony Perez."

DISCUSSION

Appellant's appointed counsel has filed an opening brief which adequately summarizes the facts and adequately cites to the record, which raises no issues, and asks this court to independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) By letter dated January 17, 2007, this court invited appellant to submit additional briefing and state any grounds of appeal he may wish this court to consider. On February 7, 2007, appellant filed a supplemental letter brief stating:

> "On October 16, 2004 Hanford Police Officer Pereira made out an narrative report based on this matter 11377(a) along with other … matters. My #1 issue will be that I never possessed .4 grams of meth[.] [T]hat was found on the sidewalk where Officer placed me at after handcuffing me[,] putting me in patrol car[,] and then placing me where he found a plastic baggie. #2 The agent found on by possision [*sic*] was tested at a later time and found to be an non-narcodic drug. #3 On May 27, 2005 when I was having my trial, the jury was deadlocked and could not come to a verdict. The judge ordered them to go to lunch and try once again once they got back from lunch. I was tried twice in one day by the same Judge, D.A., and jury and still no verdict. I fill my rights have been violated by being tried twice in one day. #4 I'm concerned as to why my attorney never filed a motion to dismiss count 1 and 2 after the mistrial. Is that not my right as a citizen of the U.S.[?] #5. On 9-28-2006 I never stated I possessed thirteen one-hundredth of a gram of meth. I will admit[] to the other agent for that is true. #6. On the 11550 I myself ask to have these charges drop[ped], based on no evidence at the time of hearing because my attorney didn't want to do this for me, and again I have been denied my right as a citizen of the U.S. #7 Officer Pereira stated true that the drug found could have been there prior to me being placed there due to this area being known as a well drug area. #8 I'm asking that my trial paper work be looked at so that you may get a better understanding in this case of mine. I will now respectfully excuse myself and at the same time thank you for all your time and work."

We briefly address appellant's seven contentions.

Substantial Evidence

Contentions 1, 2, 5, 6, and 7 go to the sufficiency of the evidence. In order to succeed in a challenge on appeal to the sufficiency of the evidence, an appellant must

establish that no rational jury could have concluded as it did. The rules of appellate review require us to evaluate the evidence in the light most favorable to the respondent and presume in support of the judgment every fact a jury could have reasonably deduced from the evidence. (*People v. Millwee* (1998) 18 Cal.4th 96, 132; *People v. Stanley* (1995) 10 Cal.4th 764, 792-793.) We may not weigh the evidence or make findings of credibility, for these are within the province of the jury. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We must only decide whether substantial evidence exists to support the inference of guilt drawn by the trier of fact. Substantial evidence includes circumstantial evidence and the reasonable inferences this evidence allows. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) The test is not whether the evidence proves guilt beyond a reasonable doubt, but whether substantial evidence, of credible and solid value, supports the jury's conclusions. (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1161-1162.)

As to contention 1, Officer Pereira testified that appellant attempted to flee the scene of his bicycle crash. Pereira struggled to restrain appellant and eventually wrestled him to the ground to place him under arrest. Pereira said he then handcuffed appellant, picked him up off the ground, and took him to a patrol vehicle. As Pereira stood appellant up, the officer noticed a plastic bindle at the spot where appellant had been located. Pereira said the bindle was "directly about his chest level on the ground" and was directly underneath appellant's body. The direct evidence of a single witness entitled to full credit is sufficient for proof of any fact. (Evid. Code, § 411.) Substantial evidence supported the verdicts of guilt.

As to contention 2, Officer Pereira said he located a clear plastic bag in appellant's front left pants pocket. The bag was larger than the one Pereira found on the sidewalk and contained a white substance. Steven H. Patton, senior criminalist with the California Department of Justice Crime Laboratory, testified he analyzed the two bindles seized from appellant. The larger bindle weighed 3.57 grams and did not contain controlled

substances. Thus, appellant's contention is correct as to this bindle. However, the smaller bindle weighed .13 grams, screened positive for the possible presence of methamphetamine, and constituted a usable quantity. Bill Posey, director of Central Valley Toxicology, testified he analyzed a sample of appellant's urine on December 16, 2004, and the sample tested positive for methamphetamine and opiates. This result suggested appellant had been "speed balling." Posey explained that term referred to "users who mix the stimulant effect of either methamphetamine or cocaine with a depressant effect of heroin." Again, the direct evidence of a single witness entitled to full credit is sufficient for proof of any fact. (Evid. Code, § 411.) Substantial evidence supported the verdicts of guilt.

In contention 5, appellant claims he never admitted the possession of 13/100 gram of methamphetamine on September 28, 2006. A review of the reporter's transcript of that sentencing hearing reveals that statement is correct.[1] However, on May 27, 2005, appellant did plead guilty to count II, felony possession of methamphetamine in violation of Health and Safety Code section 11377, subdivision (a). Appellant's claim of error does not affect his substantial rights and may be rejected. (Pen. Code, § 1258.)

In contention 6, appellant claims he asked for dismissal of count III due to lack of evidence at the time of the hearing. Count III charged misdemeanor use and being under

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1 At a September 28, 2006 in camera hearing under *People v. Marsden, supra,* 2 Cal.3d 118, appellant's trial counsel explained that his client had previously received a grant of probation pursuant to a negotiated plea despite three felony convictions. Counsel advised the court:

> "… So he did receive significant concessions in that plea agreement, and there was an actual tested substance involved. I would state that it was a very minimal amount. I believe the actual net weight of the substance, if memory serves, was one hundred to two hundredths of a gram. But there was testimony that the jury heard that it was a usable amount -- or it was thirteen hundredths of a gram. Mr. Perez's memory is a little better than mine. It was quite a small amount."

the influence of a controlled substance. As noted above, Bill Posey testified he analyzed a sample of appellant's urine on December 16, 2004, and the sample tested positive for methamphetamine and opiates. This result suggested appellant had been "speed balling." Officer Pereira said he observed in appellant some objective symptoms of intoxication or being under the influence at the time of appellant's detention. The testimony of these witnesses supported the verdict on count III.

In contention 7, appellant notes that Officer Pereira admitted the bindle on the sidewalk could have been placed there prior to appellant's detention. On cross-examination, Pereira specifically said he did not know whether there was anything on the ground before he got to the point of detention. Pereira later testified he first noticed the small bindle on the ground after he struggled with appellant and then stood him up. On appeal, we presume in support of the judgment every fact a jury could have reasonably deduced from the evidence. (*People v. Millwee, supra,* 18 Cal.4th at p. 132; *People v. Stanley, supra,*10 Cal.4th at pp. 792-793.) We may not reweigh the evidence or make findings of credibility, for these are within the province of the jury. (*People v. Ochoa, supra,* 6 Cal.4th at p. 1206.) The jury determined that appellant possessed the small bindle found on the sidewalk and we may not reweigh the evidence underlying that verdict.

Double Jeopardy

In contention 3, appellant maintains the trial court violated his constitutional right to not be put in jeopardy twice for the same offense when it instructed his deadlocked jury to go to lunch on March 9, 2005,[2] and then return for further deliberations after the meal. Under the United States and California Constitutions, criminal defendants may not

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[2] In his supplemental letter brief on appeal, appellant contends the jury deadlock occurred on May 27, 2005. A review of the record reveals the impasse occurred on March 9, 2005, and May 27, 2005, was the date of sentencing.

be twice put in jeopardy for the same offense. (U.S. Const, 4th & 5th Amends.; Cal. Const., art. I, § 15.) In the context of acquittal or mistrial, double jeopardy protection serves two primary interests. First, a criminal defendant has a protected interest in the finality of an acquittal. Second, a defendant has a more limited interest in having his or her trial completed by the particular jury impaneled to hear his or her case. (*Sons v. Superior Court* (2004) 125 Cal.App.4th 110, 117-118.) Disagreement of the jury does not preclude a new trial for the same offenses. (*People v. Greer* (1947) 30 Cal.2d 589, 596, disapproved on another point in *People v. Fields* (1996) 13 Cal.4th 289, 308, fn. 6.) Thus, double jeopardy considerations did not arise from the fact that appellant's jury was apparently deadlocked, was excused to go to lunch, and then returned to deliberate on the afternoon of March 9, 2005.

Motion to Dismiss after Mistrial

In contention 4, appellant expresses concern "as to why my attorney never filed a motion to dismiss count 1 and 2 after the mistrial." On April 28, 2005, the court dismissed count I and the associated prior prison term allegation on motion of the district attorney. With respect to count I, a criminal defendant cannot complain where the determination of the case is favorable to his or her position. (*People v. James* (1937) 20 Cal.App.2d 88, 90.)

As to count II, unlawful possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), appellant essentially contends his trial counsel was ineffective by failing to move to dismiss the charge. To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Waidla* (2000) 22 Cal.4th 690, 718.) When considering a trial counsel's

performance in an ineffective assistance claim, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland v. Washington, supra*, 466 U.S. at p. 689.)

Moreover, while judging counsel's performance, we must keep in mind the circumstances he or she faced. In the instant case, Officer Pereira detained appellant and found a suspicious bindle on the sidewalk at the point of detention and a second, larger bindle in appellant's pant pocket. The bindle in the pocket did not contain a controlled substance but the bindle on the sidewalk tested positive for presence of methamphetamine. Moreover, a contemporaneous urine test revealed that appellant had methamphetamine and opiates in his system. These circumstances did not bode well for a successful defense and may have justified counsel's tactical decision not to proffer a dismissal motion. Where the appellate record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal. (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.) At the April 28, 2005, in camera hearing under *People v. Marsden, supra,* 2 Cal.3d 118, appellant's trial counsel did offer an explanation to the court:

> "Your Honor, we went through this in a previous Marsden motion. I had stated that I did not see any colorable reason for filing either motion [to suppress evidence under Penal Code section 1538.5 or to dismiss the information under Penal Code section 995]. In my opinion it would be essentially frivolous and they did not have a basis in fact, and that is still my opinion."

Attorneys are not expected to engage in tactics or to file motions which are futile. (*People v. Maury* (2003) 30 Cal.4th 342, 389-390; *In re Lower* (1979) 100 Cal.App.3d 144, 149, fn. 3.) Defense counsel did not render ineffective assistance given his careful assessment of the potential merits of a motion to dismiss count II.

Our independent review discloses no other reasonably arguable appellate issues.[3] "[A]n arguable issue on appeal consists of two elements. First, the issue must be one which, in counsel's professional opinion, is meritorious. That is not to say that the contention must necessarily achieve success. Rather, it must have a reasonable potential for success. Second, if successful, the issue must be such that, if resolved favorably to the appellant, the result will either be a reversal or a modification of the judgment." (*People v. Johnson* (1981) 123 Cal.App.3d 106, 109.)

DISPOSITION

The judgment is affirmed.

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[3] In conducting this independent review, we have fulfilled appellant's contention 8, i.e., "that my trial paper work be looked at so that you may get a better understanding in this case of mine."