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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Trinity)

THE PEOPLE, Plaintiff and Respondent, v. MELINDA RUTH CHAMBERS, Defendant and Appellant.	C062457 (Super. Ct. No. 08F112)

A jury found defendant Melinda Ruth Chambers guilty of two counts of transportation or sale of methamphetamine (Health & Saf. Code, § 11379, subd. (a) (counts one and four); subsequent undesignated statutory references are to the Health and Safety Code), three counts of possession of methamphetamine for sale (§ 11378 (counts two, five, and eight)), and four counts of maintaining a place for purposes of selling methamphetamine (§ 11366 (counts three, six, seven, and nine)). The court imposed a sentence of five years and four months in prison.

On appeal, defendant contends she could only be convicted of one count of the continuous offense of maintaining a place for selling methamphetamine, there is insufficient evidence to support her convictions in counts one, two, four, and five, and an error in the abstract. We shall modify the judgment and affirm the judgment as modified.

FACTS

Defendant lived at a residence on Five Cent Gulch in the summer and fall of 2008. Codie Bickle knew defendant from school and often had purchased methamphetamine from her at the Five Cent Gulch residence. Bickle agreed to become a confidential informant for Trinity County sheriffs' deputies in exchange for consideration in a pending criminal case.

On July 4, 2008, Trinity County Sheriff's Sergeant Michael Rist and Corporal Omar Brown placed a transponder on Bickle, searched him, and followed him to appellant's residence, where they monitored Bickle purchasing narcotics from a woman named Yolanda Pease. Bickle then presented them with a package containing .3 grams of what appeared to be methamphetamine.

Bickle made two similar "controlled buy" purchases from defendant at her residence on July 18 and July 25, 2008. After each of the purchases from defendant, Bickle provided the officers with single bindles weighing .3 grams. Corporal Brown field tested the substances in the two bindles, which both tested presumptive positive for methamphetamine. Bickle had used methamphetamine before, and testified that the bindle he purchased on July 18 "looks like meth[] to me."

On September 9, 2008, officers executed a search warrant on the Five Cent Gulch residence. A search of defendant found six .3 gram bindles of suspected methamphetamine and two digital scales. The bindles seized in the search were sent to the Department of Justice crime laboratory for testing. The criminalist tested three of the six bindles taken from defendant in the September 9, 2008, search. All three tested positive for methamphetamine.

Testifying, defendant denied selling Bickle the methamphetamine during the monitored sales. She used methamphetamine, and the six bindles of methamphetamine seized from her were for her "personal use."

DISCUSSION

I

Defendant was convicted on four counts of maintaining a place for purposes of selling methamphetamine (§ 11366 (counts three, six, seven, and nine)) -- one count for each of the three controlled substance purchases by Bickle and another count for the methamphetamine found in defendant's possession on the day her residence was searched. Both parties contend that section 11366.5 describes a continuing crime and the evidence supports only a single conviction under this provision. We agree.

Section 11366 applies to "[e]very person who opens or maintains any place for the purpose of unlawfully selling, giving away, or using any controlled substance" including methamphetamine. The statute is "aimed at places intended for a continuing course of use or distribution" of controlled

substances; therefore, a single or isolated instance of such unlawful activity is insufficient to establish a violation of the statute. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 490.) This describes a continuing offense. Since defendant sold methamphetamine only out of a single residence, she can only be convicted of one count of violating section 11366.

The court imposed a consecutive eight-month term in count seven and concurrent two-year terms in counts three, six, and nine. We shall modify the judgment to strike the convictions in counts three, six, and nine.

II

Defendant asserts there is insufficient evidence to support her convictions for transportation or sale of methamphetamine in counts two and four and for possession of methamphetamine for sale in counts one and five. She is mistaken.

"In reviewing the sufficiency of the evidence, we 'draw all inferences in support of the verdict that reasonably can be deduced and must uphold the judgment if, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.'" (*People v. Singh* (2004) 119 Cal.App.4th 905, 911.)

While three of the bindles seized from defendant were tested by a laboratory, the bindles obtained in the two controlled buys from defendant were given only a field test by Corporal Brown. There was no evidence regarding the method employed by Corporal Brown in the field tests, so defendant

argues the results of the two field tests are unreliable. Since the convictions in counts one, two, four and five relied on the bindles in the controlled purchases having contained methamphetamine, defendant argues these counts must be reversed for insufficient evidence.

"'It is settled law that incompetent testimony, such as hearsay or conclusion, if received without objection takes on the attributes of competent proof when considered upon the question of sufficiency of the evidence to support a finding. [Citations.] "Evidence technically incompetent admitted without objection must be given as much weight in the reviewing court in reviewing the sufficiency of the evidence as if it were competent. [Citations.]"'" (*People v. Bailey* (1991) 1 Cal.App.4th 459, 463 [officer testifying without foundation that rock cocaine was cocaine base].) Defendant never objected to Corporal Brown's testimony that the bindles purchased from her tested presumptive positive for cocaine. We may therefore consider it competent testimony establishing that the items purchased from defendant were in fact methamphetamine.

Additional evidence supports the finding that Bickle purchased methamphetamine from defendant. Circumstantial evidence or inference may also be used to establish the narcotic nature of a substance. (*People v. Galfund* (1968) 267 Cal.App.2d 317, 320.) Bickle, an admitted former user of methamphetamine, testified that People's Exhibit One, the bindle purchased from defendant on July 18, 2008, looked like methamphetamine to him. He also testified to purchasing methamphetamine from defendant

at her residence many times before the controlled buys. Defendant admitted that the bindles found in her possession were methamphetamine and that she used the drug, supporting an inference that the items she sold to Bickle contained the same substance. The positive methamphetamine tests for three of the bindles seized from defendant strengthens the inference.

Together, this is substantial evidence for the jury to infer that the substance defendant sold to Bickle in the two controlled buys was methamphetamine.

III

Defendant identifies a typographical error in the abstract. The abstract incorrectly refers to defendant as being convicted of section 11387 in count two, when she was in fact convicted of violating section 11378.

We will direct the trial court to correct the abstract of judgment accordingly. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

IV

Pursuant to this court's miscellaneous order number 2010-002, filed March 16, 2010, we deem defendant to have raised the issue (without additional briefing) of whether amendments to Penal Code section 4019, effective January 25, 2010, apply retroactively to his pending appeal and entitled him to additional presentence credits. We conclude that the amendments do apply to all appeals pending as of January 25, 2010. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 [amendment to statute lessening punishment for crime applies "to acts committed before

its passage provided the judgment convicting the defendant of the act is not final"]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [applying the rule of Estrada to amendment of section 2900.5 allowing award of custody credits]; *People v. Doganiere* (1978) 86 Cal.App.3d 237 [applying Estrada to amendment involving conduct credits].) Defendant is not among the prisoners excepted from the additional accrual of credit. (§ 4019, subds. (b) and (c); Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50.) Consequently, defendant having served 41 days of presentence custody, is entitled to 40 days of conduct credits.

DISPOSITION

The judgment is modified to strike defendant's convictions for section 11366.5, subdivision (a) in counts three, six, and nine, and to award 40 days of presentence conduct credit for a total of 81 days' of presentence credit. As modified, the judgment is affirmed. The court is directed to prepare an amended abstract reflecting the modified judgment and the correction to the abstract identified in this opinion and to forward a certified copy to the Department of Corrections and Rehabilitation.

BLEASE, Acting P. J.

We concur:

SIMS, J.

HULL, J.