SUPREME COURT
FILED

JUL - 7 2016

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Deputy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	) Supreme Court) No. S231826
Plaintiff and Respondent,	))
v.	) Court of Appeal) No. E063107
MARIO MARTINEZ, Defendant and Appellant.	)) Superior Court) No. RIF 136990

APPEAL FROM THE SUPERIOR COURT OF RIVERSIDE COUNTY

Honorable Becky Dugan, Judge

APPELLANT'S REQUEST FOR JUDICIAL NOTICE

APPELLATE DEFENDERS, INC.

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Attorney for Defendant and Petitioner

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	) Supreme Court
	) No. S231826
Plaintiff and Respondent,	)
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MARIO MARTINEZ,	)
Defendant and Appellant.	) Superior Court
	) No. RIF 126990

APPEAL FROM THE SUPERIOR COURT OF RIVERSIDE COUNTY

Honorable Becky Dugan, Judge

APPELLANT'S REQUEST FOR JUDICIAL NOTICE

TO THE HONORABLE TANNI GORRE CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to rules 8.252, 8.366(a), of the California Rules of Court, appellant, and defendant Mario Martinez respectfully requests that this court take judicial notice of the Court of Appeal opinion in *People v. Mario Martinez*, Fourth District Court of Appeal, Division Two, case number

E046651, issued June 22, 2010 (attached as Exhibit A) in appellant's direct appeal from his judgement. (Evid. Code, §§ 452, subd. (d)(1), 453, and 459, subd. (a).)

This request is based upon the present moving papers, the supporting memorandum of points and authorities.

STATEMENT OF FACTS SUPPORTING JUDICIAL NOTICE

Appellant currently has a case pending in this court; the Supreme Court case number is S231826. Appellant has submitted the opening brief on the merits concurrently with the instant motion. The current case is taken from the trial court's denial of appellant's statutory motion for recall and resentencing under Proposition 47, the Safe Neighborhoods and Schools Act of 2014, Penal Code section 1170.18.

In the immediately underlying appeal, the Court of Appeal took judicial notice of its 2010 direct appeal opinion when it considered appellant's arguments. The Court of Appeal opinion in this 2010 direct appeal is part of the record of conviction and exposes the facts elicited at trial. As such, it is an integral part in the eligibility assessment at hand. And it is directly relevant to the resolution of this case and the substantive question whether the trial court correctly ruled when it found appellant ineligible for Proposition 47 recall and resentencing.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JUDICIAL NOTICE

Evidence Code section 459, subdivision (a)(1), specifies that a reviewing court may take judicial notice of any matter set forth in Evidence Code section 452. Section 459, subdivision (a)(2), provides that a reviewing court may take judicial notice of any matter specified in Evidence Code section 452. Section 452, subdivision (d)(1), permits judicial notice of the records of any court of this state.

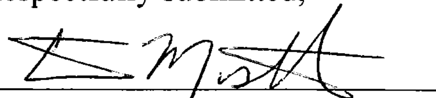
Judicial notice should be taken of the requested Court of Appeal opinion, filed in the direct appeal of the judgement. This filed document is part of the record of conviction. (*People v. Woodell* (1998) 17 Cal.4th 448.) It provides relevant context of the underlying case and needed factual information so that this court can assess the issues presented in appellant's opening brief. Accordingly, judicial notice is appropriate.

CONCLUSION

For the foregoing reasons, appellant requests that his request for judicial notice be granted.

Dated: June 30, 2016

Respectfully submitted,



Cindi B. Mishkin
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Attorney for Defendant and Appellant
Mario Martinez

EXHIBIT A

KeyCite Red Flag - Severe Negative Treatment
Unpublished/noncitable June 22, 2010

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Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Fourth District, Division 2, California.

The PEOPLE, Plaintiff and Respondent,
v.
Mario MARTINEZ, Defendant and Appellant.

No.
E046651
.
|
(Super.Ct.No. RIF136990).
|
June 22, 2010.

APPEAL from the Superior Court of Riverside County. Paul E. Zellerbach, Judge. Affirmed.

Attorneys and Law Firms

Charles R. Khoury, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Peter Quon. Jr., Marvin E. Mizell, and Marissa A. Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

HOLLENHORST, Acting P.J.

*1 In December 2007 following a jury trial, defendant Mario Martinez was convicted of one count of transportation of methamphetamine (Health & Saf.Code, § 11379, subd. (a)) and one count of possession of methamphetamine (Health & Saf.Code. § 11377, subd. (a)). In a bifurcated trial, the court found true the allegations that defendant served four prior prison terms (Pen.Code § 667.5, subd. (b)) and had two prior strike convictions (Pen.Code § 667, subd. (c)). On July 11, 2008, the trial court granted defendant's motion to strike one of his prior strike convictions. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) Defendant was sentenced to 12 years in state prison. He appeals, challenging the sufficiency of the evidence and the instructions to the jury.

I. FACTS

Around 12:35 p.m. on May 29, 2007, Officer Josh Hiraoka of the Riverside County Sheriff's Department was driving his patrol car southbound on Hunter Street in Glen Avon. The officer saw a red 1987 Toyota parked partially in the street and partially in the dirt pull off area in front of a residence. A man was leaning over the front passenger side window speaking to the passenger. As Officer Hiraoka pulled up, the man saw him, stepped away from the Toyota, and began walking northbound. The car immediately pulled into the street heading south. The officer looked at the license plate and noticed the month sticker was not identifiable. He followed the Toyota.

The passenger, later identified as defendant, leaned forward three or four times in a continuous motion. The Toyota turned right onto Mission Street. Officer Hiraoka activated his overhead lights and notified dispatch that he was making a traffic stop. Both vehicles stopped, and the officer walked up to the front driver's side of the Toyota. The driver was later identified as 23–year–old Candace Eves. The officer informed Eves he had stopped her to check if her license and registration were up to date. He also asked defendant if he had any identification on him. Defendant, who was 47 years old, had no identification but provided his name and date of birth. Eves gave the officer her driver's license and registration, and the officer checked the computer in his patrol car to see if Eves had any warrants for her arrest. He discovered that Eves had a felony warrant for possession of stolen property, and that the registered owner of the car was Julia Martinez, who was later identified as defendant's mother.

Officer Hiraoka informed Eves of her felony warrant and asked her to step out of the car. He arrested Eves and placed her in the backseat of the patrol car. He asked and received Eves's permission to search the Toyota. He walked to the passenger side and asked defendant to step out of the car. As defendant moved his right foot out of the car, the officer saw a small clear plastic bag that had been on the floor mat between defendant's feet. After defendant exited the Toyota, the officer detained him and called for backup. He searched defendant but did not find any contraband. After a backup unit arrived, the officer examined the plastic bag and saw that it was twisted closed on one end and contained a white crystal-like substance, which the parties stipulated was .38 grams of methamphetamine. He searched the car but did not find any other contraband. Neither defendant nor Eves appeared to be under the influence of methamphetamine.

*2 Officer Hiraoka arrested defendant and transported him and Eves to the station. Defendant received and waived his *Miranda*[1] rights. Defendant acknowledged the Toyota was his mother's; however, he claimed the methamphetamine did not belong to him and did not know who it belonged to. Defendant said he had driven the car from his mother's residence and picked up Eves on Dell Street. While parked on Hunter Street, defendant had moved to the passenger seat and Eves took over driving. Defendant did not explain why Eves became the driver. Later on, defendant "guaranteed" Officer Hiraoka that the methamphetamine did not belong to Eves, that she did not use drugs, and that she was never in the passenger seat. Later that day, Julia Martinez retrieved her car.

Eves testified under the grant of immunity. She stated she was currently in custody after being arrested for failure to appear in court and for an outstanding warrant for receiving stolen property and vehicle theft. Both crimes had been charged as felonies, but Eves pled guilty to them as misdemeanors. She then failed to surrender to serve her sentence of six months in jail. Eves met defendant on May 28, 2007, at a motel in Rubidoux. The next day, around 11:00 a.m., defendant used the Toyota to drive her to a friend's house to buy methamphetamine. Eves bought .2 grams of methamphetamine at the house with her own money and placed it in her bra, while defendant stayed in the car. Defendant dropped Eves off at a friend's home with the understanding that he would pick her up later and they would smoke the methamphetamine together.

When defendant returned to pick up Eves, she drove the Toyota because she had a license and defendant did not. While driving, Eves saw some old neighborhood friends on the side of the street and pulled over to speak with them. She saw the officer pull his patrol car behind her and she started driving. She was concerned because she had the drugs in her bra. Eves told defendant to "stop moving around" or they would get in trouble. The police car followed them, and Eves tried to throw the drugs into an air conditioner vent to the right of the steering wheel. She missed the vent, and the drugs

fell onto the floor next to defendant's feet. She did not know whether defendant saw the drugs. They were pulled over by Officer Hiraoka. When Eves was interviewed by the officer, she denied the drugs were hers.

Julia Martinez testified for the defense. She stated that when she met Eves just before trial, Eves said, "I'm sorry. The stuff was mine."

II. SUFFICIENCY OF EVIDENCE

Defendant contends his convictions for possession and transportation of methamphetamine must be reversed for insufficient evidence, because they are based solely on the uncorroborated testimony of Eves.

A. Standard of Review

The standard of review for determining the sufficiency of evidence to support a conviction is well settled. We view the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime true beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576–577.) The same standard of review applies when the prosecution relies primarily on circumstantial evidence. (*People v. Sanchez* (1995) 12 Cal.4th 1, 32, overruled on other grounds as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Furthermore, a conviction cannot be had upon the testimony of an accomplice unless it is sufficiently corroborated. (Pen.Code, § 1111.) The corroborating evidence must tend to connect the defendant to the commission of the offense, and must be independent of the accomplice's testimony. (*People v. Avila* (2006) 38 Cal.4th 491, 562–563.)

B. Analysis

***3** Penal Code section 1111 provides: "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

Here, even if we assume Eves was an accomplice to defendant in the charged offenses, evidence wholly independent of her testimony shows that defendant possessed and transported the methamphetamine. Specifically, Officer Hiraoka observed the Toyota. He testified that he saw the car drive a short distance, saw defendant's body lean forward three or four times, and, after stopping the car, saw the methamphetamine between defendant's feet in the car. The officer further testified that, while defendant denied ownership and knowledge of the methamphetamine, he guaranteed the deputy that it did not belong to Eves, that she did not use drugs, and that she was never in the passenger seat. Defendant admitted the Toyota belonged to his mother; however, he had no idea how the methamphetamine got in the car. Given the officer's testimony, the evidence showed that defendant possessed and transported the methamphetamine. Contrary to defendant's argument, none of this evidence required interpretation or direction from Eves's testimony. (Cf. *People v. Reingold* (1948) 87 Cal.App.2d 382, 393 ["corroboration is not sufficient if it *requires interpretation and direction* to be furnished by the accomplice's testimony to give it value"].)

III. JURY INSTRUCTIONS

Defendant contends reversal of his convictions is required because the trial court did not instruct the jury with CALCRIM No. 335,[2] that Eves was an accomplice as a matter of law.

A. Applicable Law

Penal Code section 1111 provides that the testimony of an accomplice cannot support a conviction, "unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense...." An "accomplice" is defined in that section as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Pen.Code, § 1111.) This provision "serves to ensure that a defendant will not be convicted solely upon the testimony of an accomplice because an accomplice is likely to have self-serving motives." (*People v. Davis* (2005) 36 Cal.4th 510, 547.) In order to be charged with the identical offense, the witness must be a principal in the crime the defendant is charged with committing. (*People v. Horton* (1995) 11 Cal.4th 1068, 1113–1114.) "Principals" include "[a]ll persons concerned in the commission of a crime ... whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission...." (Pen.Code, § 31.)

***4** The trial court has a duty to instruct the jury, sua sponte, to determine whether a witness was an accomplice in the charged offense. " ' "[w]henever the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice." ' " (*People v. Snyder* (2003) 112 Cal.App.4th 1200, 1218.) The pattern jury instruction to be given when the accomplice status of a witness is in dispute is CALCRIM No. 334 [Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice]. Alternatively, if the evidence establishes as a matter of law that a witness was an accomplice, the jury must be so instructed, and the applicable jury instruction is CALCRIM No. 335 [Accomplice Testimony: No Dispute Whether Witness Is Accomplice]. (*People v. Zapien* (1993) 4 Cal.4th 929, 982.) In either event, the trial court must also instruct the jury, sua sponte, " '(1) that the testimony of the accomplice witness is to be viewed with distrust [citations], and (2) that the defendant cannot be convicted on the basis of the accomplice's testimony unless it is corroborated....' " (*Ibid.*, quoting *People v. Gordon* (1973) 10 Cal.3d 460, 466, fn. 3.)

"Nonetheless, 'the failure to instruct on accomplice testimony pursuant to [Penal Code,] section 1111 is harmless where there is sufficient corroborating evidence in the record. [Citations.] The requisite corroboration may be established entirely by circumstantial evidence. [Citations.] Such evidence "may be slight and entitled to little consideration when standing alone. [Citations.]" ' [Citation.] 'Corroborating evidence "must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged." [Citation.]' [Citation.]" (*People v. Zapien, supra,* 4 Cal.4th at p. 982.) The corroborating evidence must also be independent of the accomplice's testimony. (*People v. Avila, supra,* 38 Cal.4th at p. 562.)

B. Analysis

Here, Eves testified that she was the one who purchased the methamphetamine, she used her own money, she was the one who possessed it in the car, she was the one who was trying to hide it in the vent when she saw the officer, and that she did not know whether defendant saw the drugs. However, she also testified that defendant was the one who drove her to the house to purchase the drugs and that they had planned to use them together. To the extent that her testimony implicated defendant in the crimes, it was corroborated by ample, independent evidence of Officer Hiraoka, as noted above.

While discussing jury instructions, the trial court stated it would give CALCRIM Nos. 334[3] and 335. However, CALCRIM No. 335 was omitted. There was no discussion, agreement, or finding that Eves was an accomplice as a matter of law. Nevertheless, any error in failing to include CALCRIM No. 335 did not prejudice any of defendant's convictions. In view of the instructions and the evidence as a whole, it is not reasonably probable that the jury convicted defendant of the charged crimes based solely on Eves's testimony. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

***5** First, as previously discussed, independent evidence corroborated Eves's testimony and linked defendant to the crimes for which he was convicted. Second, during closing argument, the prosecutor argued there are two theories of

how the drugs got between defendant's feet: "The first theory in the case is that the dope is really [defendant's].... And [Eves] came in and lied to you to take the rap for the methamphetamine." The prosecutor then pointed out the evidence to support this theory, namely, Officer Hiraoka's testimony and the fact that the drugs were found at defendant's feet. More importantly, upon being stopped, defendant "guaranteed" that the methamphetamine did not belong to Eves. The other theory is that "Eves is actually telling the truth, and that the [drugs] really did belong to her." The only evidence to support this theory is Eves's testimony itself, which the jury had to believe. Under either theory, the prosecutor argued that defendant is guilty.

In response, defense counsel argued, "If you can't believe the messenger, you can't believe the message." On the one hand, counsel argued that Eves's testimony supported a finding that defendant was ignorant of her purchase and possession of the drugs. However, on the other hand, counsel asserted that Eves is an accomplice. "I think it clearly defines her as an accomplice. If there is any doubt, please go through those jury instructions. And I ask you to follow these instruction[s]. If you decide that [Eves] was an accomplice, then you may not convict the defendant of the charges based upon her statement alone. You may use the testimony of an accomplice to convict the defendant, only if 1, the accomplice's statement is supported by other evidence that you believe. Ask yourself is there other evidence that [defendant] knew of the drugs? [¶] Secondly, and in addition, that supporting evidence is independent of the accomplice's testimony. Is there anything independent, apart from what she said, as an accomplice to the crime, that gives you reason to believe that [defendant] knew? [¶] And finally, all three of these must be met. The supporting evidence tends to connect the defendant to the commission of the crime. What evidence do you have, apart from her testimony under a grant of immunity, this is the case."

In rebuttal, the prosecutor agreed that, if the jury found Eves was an accomplice, then her testimony must be corroborated. The prosecutor offered Officer Hiraoka's testimony as the necessary corroborating evidence. Also, the last paragraph of CALCRIM No. 334 told the jury that it should view Eves's testimony with caution.

Moreover, the jury was instructed to consider the instructions as a whole, and not to single out any particular sentence and ignore the others. CALCRIM No. 334 instructed the jury on how to evaluate the status of Eves and how to treat her testimony if it concluded she was an accomplice. Absent evidence to the contrary, the jury is presumed to have followed the instructions. (*People v. Mendoza* (2007) 42 Cal.4th 686, 699.) Here, there is no evidence that the jury did not follow the instructions.

***6** Notwithstanding the above, even if we were to assume the trial court erred in failing to instruct the jury, sua sponte, with CALCRIM No. 335, we find the error was harmless because defendant was not prejudiced. As we have previously stated, there was sufficient corroborating evidence from Officer Hiraoka's testimony and defendant's statements at the time the Toyota was stopped. (*People v. Williams* (1997) 16 Cal.4th 635, 680–681.)

IV. DISPOSITION

The judgment is affirmed.

We concur: McKINSTER and MILLER, JJ.

All Citations

Not Reported in Cal.Rptr.3d, 2010 WL 2505895

Footnotes

1 *Miranda v. Arizona* (1966) 384 U.S. 436.

2 CALCRIM No. 335, in relevant part, provides: "If the crime[s] of [possession and transportation of methamphetamine were] committed, then [Eves was an accomplice] to [those crimes].

"You may not convict the defendant of [those crimes] based on the [testimony] of an accomplice alone. You may use the [testimony] of an accomplice to convict the defendant only if:

"1. The accomplice's [testimony] is supported by other evidence that you believe;

"2. That supporting evidence is independent of the accomplice's [testimony];

"AND

"3. That supporting evidence tends to connect the defendant to the commission of the crimes." (CALCRIM No. 335.)

3 As given to the jury, CALCRIM No. 334, in relevant part provides: "Before you may consider the testimony of [Eves] as evidence against the defendant, you must decide whether [Eves] was an accomplice to the commission of those crimes.

"A person is an accomplice if she is subject to prosecution for the identical crime charged against the defendant....

"The burden is on the defendant to prove that it is more likely than not that [Eves], was an accomplice.... A person maybe [*sic*] an accomplice even if she is not actually prosecuted for the crime. If you decide that the witness was not an accomplice then supporting evidence is not required, and you should evaluate her testimony as you would any other witness. If you decide that a witness was an accomplice, then you may not convict the defendant for the crimes charged in Counts 1[ ], and 2 based on her testimony alone. You may use the testimony of an accomplice to convict defendant only if:

"1, the accomplice's testimony is supported by other evidence that you believe;

"2, the supporting evidence is independent of the accomplice's testimony:

"And 3, the supporting evidence tends to connect the defendant to the commission of the crimes;

"Supporting evidence, however, may be slight. It does not need to be enough by itself to prove that the defendant is guilty of the charged crimes, and it does not need to support every fact about which the accomplice testified.

"On the other hand, it is not enough if the supporting evidence merely shows a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

"Any testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that testimony the weight you think it deserves after examining it with care and caution and in light of all the other evidence presented. If you determine there's a conflict in the evidence, you must decide what evidence, if any, to believe."

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PROOF OF SERVICE BY MAIL

Case: People v. Mario Martinez

Supreme Court No. S231826
Court of Appeal No. E063107
Superior Court No. RIF136990

I declare:

I am employed in the County of San Diego, California. I am over 18 years of age and not a party to the within entitled cause; my business address is 555 West Beech Street, Suite 300, San Diego, California 92101-2939.

On July 1, 2016, I served the attached

APELLANT'S REQUEST FOR JUDICIAL NOTICE

of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Attorney General
(eservice only
to adieservice@doj.ca.gov)

Clerk, Riverside County Superior Court
Attn: Appeals Division
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4100 Main Street
Riverside, CA 92501

Riverside County District Attorney
Attn: Appeals Division
3960 Orange Street
Riverside, CA 92501

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SYLVIA W. BECKHAM
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I then sealed each envelope and, with the postage thereon fully prepaid, I placed each for deposit in the United States Postal Service, this same day, at my business address shown above, following ordinary business practices.

PROOF OF SERVICE BY ELECTRONIC SERVICE
(Cal. Rules of Court, rule 2.260(f)(1)(A)-(D).)

Furthermore, I, Will Bookout, declare I electronically served from my electronic notification address of wrb@adi-sandiego.com, the same referenced above document on July 1, 2016, at 11:42 am to the following entity and electronic notification address: ADIEService@doj.ca.gov.

I declare that I electronically submitted a copy of this document to the United States Supreme Court on its website at http://www.courts.ca.gov/24590.htm in compliance with the court's Terms of Use.

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at San Diego, California, on July 1, 2016, at 11:42 am.

Will Bookout	Will Bookout
(Typed Name)	(Signature)