ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **TOMMY GASTELLO,** Defendant and Appellant.

S153170

SUPREME COURT
FILED

NOV 07 2007

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DEPUTY

Fifth Appellate District, 05CM4995
Kings County Superior Court No. F050325
The Honorable Louis F. Bissig, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

MICHAEL P. FARRELL
Senior Assistant Attorney General

LOUIS M. VASQUEZ
Supervising Deputy Attorney General

JANET NEELEY
Deputy Attorney General

BRIAN ALVAREZ
Deputy Attorney General

KATHLEEN A. MCKENNA
Deputy Attorney General
State Bar No. 202916
2550 Mariposa Mall, Room 5090
Fresno, CA 93721
Telephone: (559) 477-1670
Fax: (559) 445-5106
Email: kathy.mckenna@doj.ca.gov

Attorneys for Respondent

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ISSUE PRESENTED

The Court has asked Respondent to address the following question: Did the defendant violate Penal Code section 4573 by knowingly having methamphetamine in his possession when he was brought into county jail after his arrest on other charges?

INTRODUCTION

Penal Code[1/] section 4573 punishes "any person" who knowingly brings a controlled substance into a state or local penal facility without legal authorization or the custodian's permission. In this case, appellant was arrested for being under the influence of a controlled substance and was brought to the county jail. Before he was brought into the jail, he was warned bringing drugs or weapons into the jail is a felony; however when his clothing was searched after appellant entered the facility, an officer found methamphetamine. We argue appellant violated section 4573 by knowingly bringing methamphetamine into the jail on his person.

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1. All further statutory references are to the Penal Code unless otherwise indicated.

STATEMENT OF THE CASE

On the evening of November 24, 2005, Hanford Police Officer Jennifer Machado stopped appellant after she observed him riding his bicycle without having required lights. (3 RT 217-219.) Appellant was extremely agitated and his pupils were smaller than normal for the lighting conditions. (2RT 221, 228-229.) Appellant made odd spontaneous statements. He said "the pants don't belong to him," though the officer had not asked him any question that should have elicited appellant's statement. (3 RT 230.) Appellant told the officer he had smoked marijuana laced with methamphetamine. (3 RT 232.) Officer Machado placed appellant under arrest for being under the influence of a controlled substance. (3 RT 231, 236-237.)

Before Officer Machado entered the jail's parking lot, she told appellant it was a felony to bring any drugs or weapons into the jail. Appellant acknowledged that he understood the warning. (3 RT 237-238.)

Officer Machado assisted in booking appellant into the jail. She took all of the clothing and property that appellant was not permitted to bring into the secured area of the jail in order to record it on the booking sheet. (3 RT 238.) Appellant told the officer she should not "go through that stuff. I have fleas. I have fleas." This made the officer suspicious. (3 RT 239.) When Officer Machado moved appellant's sweatshirt, she saw a small bindle wrapped in plastic. (3 RT 240.) Appellant immediately said, "You planted that on me." (3 RT 241.)

The substance was tested and confirmed to be methamphetamine. (3 RT 262.) A test on the blood sample taken from appellant disclosed the presence of methamphetamine and an opiate. (3 RT 267, 269-271.)

The Kings County District Attorney charged appellant with unlawful possession of methamphetamine, unlawfully bringing or sending a controlled substance into jail, and being under the influence of a controlled substance.

(CT 21-22.)[2/]

The jury returned a guilty verdict as to all counts, and appellant admitted the prior conviction allegations. (CT 44-51.) He was sentenced to a total term of seven years in prison. (CT 123-125.) Following his conviction, he filed a notice of appeal. (CT 143.)

On April 13, 2007, the Court of Appeal for the Fifth Appellate District issued a published opinion, reversing appellant's conviction for bringing a controlled substance into a jail. (*People v. Gastello* (Apr. 13, 2007, F050325).)

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2. "CT" refers to the Clerk's Transcript On Appeal; "RT" refers to the Reporter's Transcript On Appeal; "AOB" refers to Appellant's Opening Brief.

SUMMARY OF ARGUMENT

In *People v. Gastello* (Apr. 13, 2007, F050325), the Fifth District Court of Appeal held that appellant, who possessed drugs when he was arrested for being under the influence of a controlled substance, and who brought drugs into the jail after being warned that doing so was a felony, was not guilty of violating section 4573. The court held appellant "did not engage in the voluntary act (actus reus) necessary for the crime of *bringing them into the jail.*" (Slip opn. at p. 2, italics in original.) In the unpublished portion of the opinion, the court further concluded appellant "could not have had the intent to bring drugs into jail where the going in was not pursuant to his intent at all." (Slip opn. at p. 7.)

Respondent contends the appellate court's opinion should be reversed. Section 4573 prohibits knowingly bringing drugs into a jail. It is the knowing act of bringing drugs into the jail that is the crime. Appellant knowingly brought methamphetamine into the jail on his person, regardless of whether the act that brought his person into the jail was the product of his free will. He chose to bring the drugs into the jail, hidden on his person, rather than turn over the drugs or otherwise dispose of them before he arrived at the jail. His decision to bring the drugs into the jail on his person provides the actus reus that brings him within the prohibition of section 4573.

Appellant also possessed the necessary general criminal intent to violate the statute. Because section 4573 is a general intent crime, appellant was not required to have a specific intent to achieve a particular purpose in order to violate the law. He did not have to specifically intend to bring a controlled substance into the jail. The mental state for the offense, like any general intent crime, required only that he consciously perform the act that is prohibited by the law. Here, he knowingly possessed the drugs when he entered the jail. His knowledge that the drugs were on his person combined with his knowledge he

was entering a penal institution satisfied the general criminal intent to violate section 4573.

This Court should reverse the holding of the Court of Appeal finding appellant did not violate section 4573. His conduct demonstrated the required union of act and mental state to violate the law, and his conviction should be affirmed.

ARGUMENT

A PERSON WHO IS ARRESTED AND ENTERS THE JAIL WHILE HIDING DRUGS ON HIS PERSON BRINGS A CONTROLLED SUBSTANCE INTO THE JAIL IN VIOLATION OF SECTION 4573

Respondent contends the Court of Appeal's holding, that appellant did not voluntarily bring drugs into the jail, was reached by failing to distinguish the officer's "act" of bringing appellant into the jail from the appellant's "act" of knowingly bringing drugs into the jail, concealed on his person. In addition, the Court of Appeal's holding that appellant did not have the necessary mental state was reached by erroneously transforming a general intent crime into a specific intent crime. Appellant was guilty of violating section 4573 because, after being warned that it was a felony to bring drugs into the jail, he chose to retain possession of the drugs and smuggle them into the jail. His conviction should be affirmed.

A. Appellant Committed A Voluntary Act By Bringing Methamphetamine Into The Jail

In *People v. Gastello* (Apr. 13, 2007, F050325), the Court of Appeal found appellant did not violate section 4573, finding he "did nothing that can be regarded as the affirmative act of bringing something into a jail." (Slip opn. at p. 5.) Respondent disagrees and argues appellant affirmatively brought drugs, concealed on his person, into the jail.

Criminal liability requires commission of a voluntary act. (1 LeFave, Substantive Criminal Law (2d ed.) § 6.1(c).) "As a minimal requirement of criminal liability, a person must engage in 'conduct.' But it need only be conduct which 'includes' a voluntary act or a voluntary omission." (1 Wharton's Criminal Law (15th ed.) § 25.) "Voluntary conduct 'focuses upon conduct that is within the control of the actor.'" (*Rogers v. State* (2003

Tex.Crim.App.) 105 S.W.3d 630, 638.)

While appellant argues he was compelled to go to the jail, respondent asserts he was not compelled to commit the crime of bringing the drugs into the jail. Where, as here, appellant was warned of the consequences and chose to proceed into the jail with the methamphetamine on his person, it is reasonable to conclude he committed a voluntary, affirmative act of bringing drugs into the jail.

The plain language of section 4573 states the statute is intended to punish "any person who knowingly brings . . . into any county . . . jail . . . any controlled substance, the possession of which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code," without having authorization.

> The first principle of statutory interpretation requires that we turn initially to the words of the statute to ascertain the Legislature's intent. '[I]f "the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. [Citation.] The plain language of the statute establishes what was intended by the Legislature."' [Citation.]

(*People v. Palacios* (2007) 41 Cal.4th 720, 728, internal quotations omitted.)

Here, appellant's conduct demonstrated a voluntary act, over which he had control, that caused him to knowingly violate the law. The evidence shows he actively concealed his possession of drugs from the authorities both before and after his arrest. First, at the scene of his arrest, he spontaneously told Officer Machado "the pants don't belong to [me]" (3 RT 230), which reasonably appears to be an effort to disclaim anything found in the pants pockets. After reaching the jail, appellant advised the officer should not "go through" his clothing, claiming he had fleas. (3 RT 239.) Again, an effort by appellant to prevent discovery of the controlled substance that was ultimately found among his clothing. Appellant brought the drugs into the jail, hidden from the police, and attempted to continue to keep them concealed after bringing the drugs into

the jail.

Appellant's conduct satisfies the requirement that a defendant must perform an "act" in order to commit a crime. In fact, appellant did the very act prohibited by the statute. He knowingly, personally conveyed a controlled substance into the jail. The fact his arrival at the jail was not of his own choosing or that the police physically compelled him to enter the jail does not alter the fact he chose to bring the controlled substance into the jail hidden on his person. In other words, the police did not bring the drugs into the jail. The police did not know appellant had the drugs hidden on his person. Appellant was the knowing actor who brought drugs into the jail after being warned to do so was a felony.

If it were the mere going into the jail that was criminal, then appellant would have a legitimate argument that he did not voluntarily commit the offense. That is not the case. Bringing the drugs into the jail is the prohibited act, and appellant was the actor. While he did not go to the jail voluntarily, he did commit a voluntary act of hiding drugs on his person and intentionally and voluntarily bringing the drugs into the jail.

B. The Legislature Patently Intended, By The Statute's Terms, To Punish Any Person Who Brings Drugs Into A Penal Institution

In addition, respondent submits appellant's conduct plainly violated the law, based upon the evil the law is designed to prevent. Should this Court find the plain language of the law is ambiguous in terms of defining appellant's liability under the circumstance of this case, or if it is uncertain of the statutory intent, the court,

> may consider "a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." [Citation.] Using these extrinsic aids, we "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than

> defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." [Citation.]

(*People v. Sinohui* (2002) 28 Cal.4th 205, 211-212.)

It does not serve the purpose of Penal Code section 4573 to immunize persons who have hidden drugs on their person, and are brought into penal institutions under arrest. To apply the law as the appellate court has done "would result in absurd consequences which the Legislature did not intend." (*Younger v. Superior Court* (1978) 21 Cal.3d 102,113, internal quotations omitted.)

Section 4573 is a prophylactic law intended to prevent drug use by prisoners by keeping drugs out of penal institutions. "'The obvious purpose of these statutes is "to deter the presence of illicit drugs in custodial institutions; the statutes are deemed necessary to ensure orderly administration and security within such institutions."'" (*People v. Harris* (2006) 145 Cal.App.4th 1456, 1461.) Exempting a large class of persons capable of introducing illegal narcotics into secured facilities would defeat the purpose of the statute.

In the analogous situation prohibiting bringing firearms or explosives into a penal institution, courts have found the purpose behind the law requires strict application of the prohibition, including applying the law against detainees brought into the prison under arrest. In *People v. James* (1969) 1 Cal.App.3d 645, the court held:

> [t]he fact that respondent has no choice about going to jail is irrelevant. He knew he had the gun and he knew he should have turned it over to the jailer when he was booked. . . . "To render a person guilty of crime it is not essential to a conviction that the proof should show such person to have entertained any intent to violate the law. [Citations.] It is sufficient that he intentionally committed the forbidden act."

(*Id.* at p. 650.)

Another case reviewing a conviction under section 4574 also found the purpose of the statute allowed a conviction when the defendant was brought to the jail by police after arrest for another offense. Noting the threat to jail

security, the court held

> [t]otal proscription is necessary if inmates and officers are to be protected . . . [S]ection 4574 is a stringent statute governing prison safety and serves an objective demanding relative inflexibility and relatively strict liability to problems compounded by inmate ingenuity.

(*People v. Grayson* (2000) 83 Cal.App.4th 479, 486.)

While the level of danger or harm presented by allowing drugs to be introduced into a penal institution may not be as high as the danger presented by firearms or explosives, controlled substances nevertheless present a harm that the Legislature has sought to prevent by imposing serious punishment for any person who violates section 4573. Drug use by prisoners presents a danger to both prisoners and to prison staff. Smuggling of drugs into penal institutions also introduces other problems associated with bringing contraband into a prison, such as creating a black market for the substances, along with other criminal activity associated with the use and "sale" of illicit drugs in prisons.

There is no reason to imply a limitation to the law that creates an exemption for prisoners or that requires special elements of proof to enforce the law against detainees. Neither the statutory language nor the legislative objective requires that result. Particularly when to do so would immunize the detainee from prosecution where the detainee knowingly possesses drugs and chooses to bring them into the institution.

The Court of Appeal's reliance on *Martin v. State* (Ala.App. 1944) 17 So.2d 427 and on *People v. Newton* (1973) 340 N.Y.S.2d 77 does not alter the conclusion that appellant's actions violated the law. In *Martin,* the defendant was arrested at his home and taken by police officers onto the highway. (*Martin v. State, supra,* 17 So.2d 427.) He was convicted of being in a drunken condition on a public highway. (*Ibid.*) The Alabama appellate court reversed:

> "Under the plain terms of this statute, a voluntary appearance is presupposed. The rule has been declared, and we think it sound, that an accusation of drunkenness in a designated public place cannot be

established by proof that the accused, while in an intoxicated condition, was involuntarily and forcibly carried to that place by the arresting officer." (*Ibid.*)

Martin is distinguishable from the instant case in two ways. First, even before his arrival at the jail, appellant knowingly possessed methamphetamine, a crime. (Health & Saf. Code, § 11377, subd. (a).) On the other hand, there is no indication in *Martin* that the defendant's intoxication was illegal until the police took him to a public place. Second, unlike the defendant in *Martin*, appellant had the ability to preclude liability under the statute he violated. He was not compelled to bring methamphetamine into the jail. He could have avoided liability before entering the facility by discarding the methamphetamine or by notifying Officer Machado that he possessed narcotics. Indeed, appellant was explicitly advised of the consequences of bringing a controlled substance into a correctional facility, the clear import of which was that he was not subject to the penalty if he discarded the controlled substance before entering the facility. By contrast, the defendant in *Martin* could not relieve himself of his own inebriation. (See also *In re David W.* (1981) 116 Cal.App.3d 689, 692 [minor cannot be convicted of being under the influence of drugs in public after officers removed him from his home].) Accordingly, appellant's reliance on the decision addressing public intoxication is unavailing.

In *People v. Newton, supra,* 340 N.Y.S.2d 77, the defendant's flight made an unscheduled deviation from international waters to land in New York. The defendant was convicted of possessing an unlicensed firearm on board the plane. (*Id.* at p. 79.) While intent was not an element of that offense, New York law required "a voluntary act" before the imposition of criminal liability. (*Id.* at pp. 79-80.) Accordingly, the trial court granted a writ of habeas corpus, since the defendant's presence in New York was involuntary. (*Id.* at p. 80.)

Newton was charged with an offense based on his having arrived in a place temporarily "through misfortune or by accident." (*People v. Newton, supra,*

340 N.Y.S.2d at p. 80.) Appellant cannot claim misfortune or accident, since he brought his drugs along knowing that he was entering a jail. And the jail was no unanticipated layover or wrong turn on the way to somewhere else. Accordingly, appellant's reliance on *Newton* is misplaced, and his argument fails.

To prove appellant guilty of violating section 4573, the prosecutor was required to prove, among other elements, that appellant did the guilty act of knowingly bringing a useable amount of a controlled substance into a penal institution. The jury was instructed accordingly. (RT 315; CT 63.) Appellant did the guilty act and his action satisfies the statute's actus reus requirement.

C. Appellant's Knowledge That He Was Bringing Drugs Into The Jail On His Person, After Being Warned To Do So Was A Felony, Satisfies The Mens Rea Requirement For General Criminal Intent

In addition to finding appellant did not commit an act necessary to violate section 4573, the Court of Appeal also found he lacked the necessary mental state to be guilty of the offense. The court stated "[t]he offender must intend to bring a controlled substance into a jail." (Slip opn. at p. 7.) Respondent submits the court's finding is erroneous because its statement describes specific criminal intent; however, section 4573 is a general intent crime.

The Court of Appeal held the knowledge requirement of section 4573 "does not replace the usual requirement of proof of general criminal intent." (Slip opn. at p. 7.) The court then stated appellant was required "to have an intent to bring drugs into jail" in order to violate the statute. (*Ibid.*) This statement describes not a general intent but a specific intent.

Commission of a crime requires the union of act and intent. (*In re Jennings* (2004) 34 Cal.4th 254, 267.) To convict a defendant, "the prosecution must prove some form of guilty intent, knowledge, or criminal negligence . . .." (*Ibid.*) "If a specific intent is not made an ingredient of the statutory offense, it is not necessary to prove such specific intent in order to justify a conviction.

it is not necessary to prove such specific intent in order to justify a conviction. [Citation.]" (*People v. Gory* (1946) 28 Cal.2d 450, 453.) General criminal intent requires no further mental state beyond willing commission of the act proscribed by law. (*People v. Sargent* (1999) 19 Cal.4th 1206, 1215.)

Here, appellant's act of bringing the concealed drugs into the penal facility, knowing the drugs were on his person and knowing he was going into the jail, satisfied the mens rea for the crime. The general intent necessary to violate section 4573 requires only knowledge of the controlled substance's presence on one's person, and willingness to bring the substance into the jail. (See *People v. Gory, supra,* 28 Cal.2d at p. 455; *People v. Sargent, supra,* 19 Cal.4th at p. 1215.)

As respondent has noted in discussing the voluntariness of appellant's act, his guilty intent is evidenced by his efforts to avoid detection of the drugs. His knowledge and intent to bring the drugs into the jail is shown by his denial that the pants he was wearing belonged to him, and by his claim that he had fleas.

Appellant was not required to specifically intend to bring methamphetamine into the jail to violate section 4573. He was required only to willingly bring the drugs, which he knowingly possessed, into the facility. He had the necessary mental state to commit the offense. As respondent has noted, the officer did not know appellant had the controlled substance and so the officer's act does not relieve appellant of his liability for knowingly bringing a controlled substance into the jail.

CONCLUSION

Respondent respectfully requests this Court reverse the Court of Appeal's judgment and affirm appellant's conviction.

Dated: November 7, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

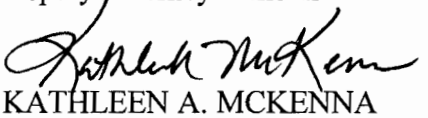
DANE R. GILLETTE
Chief Assistant Attorney General

MICHAEL P. FARRELL
Senior Assistant Attorney General

LOUIS M. VASQUEZ
Supervising Deputy Attorney General

JANET NEELEY
Deputy Attorney General

BRIAN ALVAREZ
Deputy Attorney General



KATHLEEN A. MCKENNA
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 3540 words.

Dated: November 7, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

KATHLEEN A. MCKENNA
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Gastello*** No.: **F050325 / S153170**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On November 7, 2007, I served the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 2550 Mariposa Mall, Room 5090, Fresno, CA 93721, addressed as follows:

Janice Wellborn, Attorney at Law
4104 24th Street, No. 411
San Francisco, CA 94114
Representing appellant, GASTELLO

The Hon. Ronald L. Calhoun, D.A.
Kings County District Attorney's Office
1400 W. Lacey Boulevard
Hanford, CA 93230

Kings County Superior Court
Hanford Courthouse
1426 South Drive
Hanford, CA 93230-5997

CCAP
Central California Appellate Program
2407 J Street, Suite 301
Sacramento, CA 95816
FR2006301870 (By Overnight Courier)

Court of Appeal of the State of California
Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 7, 2007, at Fresno, California.

Sandra Olmos-Schwab
Declarant

Signature

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