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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

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Deputy

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

RESPONDENT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

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

INTRODUCTION

Appellant contends that because he did not enter the jail voluntarily, neither his failure to incriminate himself by disclosing he possessed a controlled substance nor his failure to "disgorge" the drugs before Officer Machado brought him into the county jail satisfy the actus reus or provide the necessary inference of scienter required to show he violated Penal Code section 4573[1/]. (AOBM[2/] 1-2.) Respondent disagrees with appellant's analysis, and further disagrees that he is immune from prosecution because he was under arrest when he brought the controlled substance into the jail.

The key question here is whether appellant committed a voluntary act. Respondent submits appellant's act of hiding the drugs on his person when he was being brought into the jail constituted a voluntary act necessary to violate section 4573.

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

2. "RT" refers to the Reporter's Transcript; "AOBM" refers to Appellant's Opening Brief on the Merits; and "ROBM" refers to Respondent's Opening Brief on the Merits.

ARGUMENT

I.

APPELLANT'S STATUS AS AN ARRESTEE DOES NOT PRECLUDE LIABILITY FOR VIOLATING PENAL CODE SECTION 4573

Appellant argues he committed no voluntary act that violated the law. (AOBM 10-11.) Respondent disagrees. Respondent does not dispute appellant's assertion that he did not enter the jail voluntarily. (AOBM 1.) But the circumstances under which appellant was brought into the jail do not relieve him from liability for knowingly bringing a controlled substance into the jail.

Appellant contends "respondent is really arguing [] that Mr. Gastello's invocation of his Fifth Amendment right to remain silent can be used by the prosecution as substantive evidence of his guilt of the offense of bringing drugs into jail." (AOBM 10.) That is *not* the substance of respondent's argument.[3/] Rather, respondent's argument is based on the fact that appellant voluntarily possessed a controlled substance before his arrest and then continued to voluntarily possess the illegal substance after his arrest. After appellant was arrested, he intentionally and knowingly continued to conceal the substance from the authorities and brought the drugs into the jail, hidden on his person. As respondent explained in the opening brief, section 4573 requires only that appellant knowingly possessed the controlled substance and with that knowledge, he entered the jail. (ROBM 12-13.) Appellant's conduct violated section 4573.

Respondent disagrees with appellant's claim that his action was not voluntary. Appellant's circumstance is not a case of "innocent involuntary

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3. The Fifth Amendment issue is addressed in response to appellant's third argument regarding appellant's "silence" after Officer Machado's section 4573 warning.

movement." In evaluating the voluntariness of appellant's act, the court should not presume appellant did not intend the result of his actions: that is, the court should not presume he did not intend to bring the controlled substance into the jail when he knew that is where Officer Machado was taking him. Here, the police officer did not go into appellant's home, where he was breaking no law, and cause him to violate the law by moving him into a public place where his status of being under the influence of drugs suddenly made him guilty of a crime. (Cf. *Martin v. State* (1944) 17 So.2d 427.) Officer Machado encountered appellant, who was under the influence of a controlled substance, in violation of the law, on a public street. Appellant was brought to the police station under lawful arrest because he broke the law and knowing that he was going to jail, appellant decided to bring the drugs into the jail hidden on his person.

Because section 4573 is not a specific intent crime (see ROBM 12-13), it does not matter that appellant did not specifically intend to bring drugs into the jail. But even if appellant's intent was in issue, his intent can be inferred by circumstantial evidence.[4/] Here, his intent to hide his possession of drugs was evident from his effort to disclaim ownership and his statements that the officer should not touch the clothing because he was infested with fleas. (3 RT 230, 239.) This also supports the inference he wished to smuggle the drugs into the jail without being discovered. Once he did so, he became liable for bringing the drugs into the jail, which is more serious than the simple possession offense he was liable for before entering the jail.

Appellant willfully possessed the drugs and would have been liable for that crime had the officer been successful in finding the drugs before booking

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4. "[I]ntent is rarely susceptible of direct proof," and therefore, intent is often inferred through circumstantial evidence. (*People* v. *Holt* (1997) 15 Cal.4th 619, 669.)

appellant at the county jail. Because he successfully managed to prevent the officer from detecting the drugs before he entered the jail, he should not be rewarded by being liable for only the lesser offense of possession and not the offense of bringing the drugs into the jail.

Appellant claims respondent has raised an "immunity theory." (AOBM 13.) Respondent has made no such suggestion. Neither the facts of appellant's case nor any argument by respondent suggest that Officer Machado offered appellant immunity from prosecution if he handed over any drugs he possessed at the time of his arrest. Respondent's argument is that appellant is not immune from prosecution because he was under arrest when he brought drugs into the jail. (ROBM 7-8.)

Put another way, appellant's arrest does not justify or excuse the fact he brought a controlled substance into the jail. In effect, his claim that he was forced to bring the drugs into the jail and that he committed no voluntary act is a defense that he can raise. (See *Frasher v. State* (1970) 260 A.2d. 656; also see § 26.) But, it does not prevent him from being charged with or convicted of the offense.

Appellant's conduct presents a factual question that should be decided by the jury. Instead, he could argue at trial that he is innocent because he did not intend to bring drugs into the jail.

Appellant argues respondent's citation of *People v. James* (1969) 1 Cal.App.3d 645, and the comparison of section 4573 to section 4574, prohibiting bringing weapons or explosive into a jail, is inapt because, he claims, section 4574 is not analogous to section 4573.[5/] Respondent disagrees.

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5. Appellant states, without citing statutory history, that at the time the court decided *People v. James* (1969) 1 Cal.App.3d 645, section 4574 prohibited only possession of weapons in the jail, not the bringing of weapons into a jail. (AOBM 19-20.) Respondent does not find this claim to be supported by the statute's history. (See Historical and Statutory Notes, 51C

Strong policy reasons require that, just as firearms and explosives should not be permitted into a jail, drugs should not be permitted within the facility. Section 4573 punishes "any person who knowingly brings or sends into" the jail any controlled substance. Appellant should not be exempted from the statute's reach. (See ROBM 9.)

II.

THE LEGISLATIVE HISTORY OF SECTION 4573 DOES NOT SUPPORT APPELLANT'S ARGUMENT THAT THE LAW APPLIES ONLY TO PERSONS NOT IN CUSTODY

Appellant argues the legislative history of section 4573 shows the statute does not apply to someone who is in custody, and particularly not to a person recently arrested and being booked into a local jail. (AOBM 32.) This argument is not supported by the plain language of the statute, by the principle of in pari materia, or by the argument that he is neither an outsider nor a prisoner.

Section 4573'slanguage is not ambiguous. (See ROBM 8-9.) The court's fundamental task in interpreting a statute is to "determine the Legislature's intent so as to effectuate the law's purpose. [Citation.] We begin by examining the statute's words, giving them a plain and commonsense meaning." (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) Here, the statute, by its own terms, applies to "any person" and "any person" does not mean any person except one who is being booked into the jail.

Section 4573.9, discussed by appellant, addresses selling, furnishing or administering controlled substances to a person in custody. This statute was added to Chapter 3 of Title 5, "Offenses Relating to Prisons and Prisoners," in 1990. (Sen. Bill No. 2863 (1990 Reg. Sess.) § 6.) The newly-enacted statute, in contrast to the earlier statutes already present in Chapter 3, expressly limited

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West's Ann. Pen. Code (2000 ed.) foll. § 4574, p. 140.)

its application to "any person, other than a person held in custody . . .." "The Legislature is deemed to be aware of existing statutes, and we assume that it amends a statute in light of those preexisting statutes." *(Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 212.)

Applying this principle, the Legislature was aware the other statutes in the chapter used language stating they applied to "any person." But in enacting the new statute, the Legislature chose to add the limiting language that section 4573.9 would apply to any person other than a person in custody.

In the same bill that added section 4573.9, the Legislature amended section 4573 to increase the penalties for bringing a controlled substance into a prison, jail, etc. Notably, however, the Legislature did not change the language in section 4573 concerning who is subject to punishment for violating the statute: the statute continued to apply to "any person." (Sen. Bill No. 2863 (1990 Reg. Sess.) § 2.) This shows the Legislature did not intend to alter the application of section 4573. Section 4573 applies to "any person," not "any person, other than a person held in custody."

While appellant asserts section 4573 targets "outsiders" and not persons in custody, his argument and citation to *People v. Buese* (1963) 220 Cal.App.2d 802, 807, does not support his argument. (AOBM 38.) In *Buese*, the court reversed the trial court's dismissal of the charge of bringing drugs into jail in violation of section 4573.5. (*Id.* at p. 809.) The defendant in *Buese* brought drugs into the jail, secreted under her armpits. The drugs were discovered when the defendant changed into jail garb. (*Id.* at p. 804.) The case does not reveal whether appellant came into jail freely or was brought into the jail under arrest. Nor does the case discuss or distinguish between the law's application to visitors or outsiders versus persons in custody.

The more detailed legislative history of Senate Bill 2863 discussed by appellant (AOBM 42-43) also fails to support appellant's argument. In fact, the

emphasis of the discussion about visitors, vendors and the like further underscores the contrast between the newly-enacted law, section 4573.9, which applies to visitors, vendors and other persons not in custody. The distinct focus of the bill on adding the statute that applies to the persons not in custody only serves to undermine appellant's argument.

Finally, appellant contends the law does not apply to him because as a recent arrestee who had not completed the booking process, he is neither a prisoner nor an outsider. (AOBM 43-46.) His argument is meritless. Respondent reiterates the statute applies to any person. Appellant's status as an arrestee makes him "any person" within the meaning of section 4573.

III.

LIABILITY UNDER SECTION 4573 IS NOT DERIVED FROM AN UNCONSTITUTIONAL SELF-INCRIMINATION REQUIREMENT

Appellant claims that his silence, in the form of his failure to report he possessed drugs, does not satisfy the voluntary act requirement and cannot form the basis of his liability for violating section 4573. (AOBM 47.) Respondent does not argue that appellant's guilt derives from his failure to incriminate himself or that he may be compelled to disclose that he is carrying a controlled substance on his person. We argue only that appellant cannot cry foul when he is subject to punishment for knowingly smuggling drugs into the jail.

Officer Machado did not *Mirandize*[6] or advise appellant of his right to remain silent, though he was warned that it is a felony to bring narcotics, drugs or weapons into the jail, and he acknowledged that he understood the warning. (3 RT 237-238, 251.) In any case, respondent does not argue appellant's guilt derives from his failure to incriminate himself. We argue appellant's guilt derives from his act of knowingly bringing the controlled substance into the jail.

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

Appellant compares his situation to that of the defendant in *Marchetti v. United States* (1968) 390 U.S. 39. Respondent submits *Marchetti* presents a different legal issue. In *Marchetti*, the court examined a provision of federal law that affirmatively required the defendant to incriminate himself by requiring a person conducting wagering to satisfy Internal Revenue Service reporting requirements, including reporting "their residence and business addresses" and "indicat[ing] whether they are engaged in the business of accepting wagers." (*Id.* at p. 42.) As the court noted, because appellant's activities were unlawful in Connecticut, "Every aspect of petitioner's wagering activities thus subjected him to possible state or federal prosecution." (*Id.* at p. 47.) The court noted, "In these circumstances, it can scarcely be denied that the obligations to register and to pay the occupational tax created for petitioner 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination." (*Id.* at p. 48.)

Appellant's circumstance is different. Section 4573 does not, by its terms, require a person entering a jail to report that he or she is bringing a controlled substance into the facility. Appellant is guilty of violating section 4573 because he knowingly brought a controlled substance into the jail, not because he did not tell the officer he was bringing the controlled substance into the jail. It is not appellant's silence that is used as evidence of his guilt. It is his conduct.

IV.

A PERSON WHO KNOWINGLY BRINGS A CONTROLLED SUBSTANCE INTO A JAIL VIOLATES SECTION 4573

Respondent submits policy considerations support punishing appellant more severely for bringing drugs into jail than for simple possession. The law should be applied to him in this instance.

Appellant suggests "law enforcement personnel are able, during the booking

process, to thoroughly search an arrestee, and to confiscate any contraband the arrestee might have on his person." (AOBM 59.) Respondent submits this is not necessarily true, and misses the mark concerning the policy behind section 4573. An arrestee should be subject to more severe punishment for knowingly bringing drugs into jail and violating the law. He should not avoid punishment for being resourceful enough to hide drugs in such a way that the drugs are not found until a thorough booking search, or be rewarded for hiding them so well that they escape detection entirely and he succeeds in getting the drugs into the jail.

Furthermore, applying appellant's reasoning concerning why he may not be punished for bringing a controlled substance into the jail under section 4573, he also would avoid punishment for possessing the drugs in the jail if he successfully brought them into the jail, and then was charged with possessing them in jail under section 4573.6. According to appellant, he did not bring the drugs into the jail voluntarily. By parity of reasoning, he also would not possess the controlled substance in the jail voluntarily. The only reason he would possess the substance in jail, as opposed to outside the jail, is because the police brought him into the jail against his will. Thus, he would also escape prosecution for possessing the controlled substance while in jail. Once again, he would avoid the harsher punishment the Legislature intended for those who bring and possess controlled substances in the prison or jail setting.

CONCLUSION

It is reasonable that a person who enters the jail, whether by choice or under arrest, should face stronger punishment for bringing controlled substances into the facility than for simple possession of the controlled substance outside the jail setting. Respondent respectfully submits this Court should hold that a person who hides drugs on his person when entering a jail is guilty of violating section 4573.

Dated: February 4, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S REPLY BRIEF uses a 13 point Times New Roman font and contains 2622 words.

Dated: February 4, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Gastello**

No.: **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 February 4, 2008, I served the attached **RESPONDENT'S REPLY BRIEF** 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:

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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 February 4, 2008, at Fresno, California.

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Declarant

Signature

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