Filed 2/25/11 P. v. Pelt CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. EBONY VAN PELT, Defendant and Appellant.	A124906 (San Francisco City & County Super. Ct. No. 205154-02)

Defendant Ebony Van Pelt was caught by police with the drug MDMA (methylenedioxymethamphetamine), commonly known as Ecstasy, and marijuana after a confidential informant arranged for her to sell him drugs. Defendant filed motions to disclose the identity of the informant on the ground he could confirm her testimony that his conduct constituted entrapment. We affirm the trial court's denial of the request, but we remand the matter for a recalculation of conduct credits pursuant to Penal Code amended section 4019.

I. BACKGROUND

In an amended information, filed May 9, 2008, defendant was charged with one count of possession for sale of Ecstasy (Health & Saf. Code, § 11378), one count of transportation of Ecstasy (Health & Saf. Code, § 11379, subd. (a)), and one misdemeanor count of unlawful sale or transportation of marijuana (Health & Saf. Code, § 11360, subd. (b)). Two other persons were charged as codefendants.

On February 5, 2007, San Francisco Police Officer E.R. Balinton phoned a confidential informant who had provided useful information several times in the past.

The informant had a "pretty long" criminal record and was "working off a case" at the time—that is, was providing tips in return for favorable consideration in connection with a pending criminal charge. The informant told Balinton that a Black female was to deliver Ecstasy at a location in San Francisco later that day.

While traveling in an unmarked car to the area, Balinton kept in contact with the informant. Based on the description the informant gave him, Balinton and another officer, Constantine Zachos, focused on a white vehicle containing defendant and two men, who later became her codefendants. The white car turned into the parking lot of a McDonald's restaurant at the delivery site. As the officers watched, defendant left the car and entered the restaurant.

At this point, Balinton phoned the informant and asked him to direct defendant to a Boston Market restaurant across the street from McDonald's. Defendant left McDonald's soon after and walked into the Boston Market. Relying solely on the informant's information, the officers detained defendant as she waited there. She was found to be carrying 15 baggies of marijuana in her purse. A later search revealed that defendant was also carrying nine bags of Ecstasy in her undergarments, each bag containing five pills. The two men who had driven with defendant were detained, and one was found to be carrying a concealed handgun.

Testifying in her own defense, defendant said she was working as an in-home care provider at the time of her arrest. About a month before the arrest, a man struck up a conversation with her at a bus stop. In the following weeks, she spoke with the same man, whom she knew only as "Jay," in the same general area "four or five times," but "[m]ost times were just stop and go." The last time she saw Jay, they smoked marijuana together, and she gave him her cell phone number.

A few days before the arrest, Jay called defendant and asked her whether she knew how he could obtain Ecstasy. Although she declined to help him, over the next few days Jay called several more times, imploring her to find him 20 to 50 Ecstasy pills to give to friends at a planned party. At the same time, Jay suggested the possibility the two could develop a romantic relationship, saying he wanted to date her. Defendant, who was

unattached at the time, was interested in this possibility. She finally relented, offering to call "Steve," the man who supplied her with Ecstasy for her personal use. Defendant said she would not have agreed "to even try to find" Ecstasy for Jay "without the appeals to [her] friendship, sympathy and the hints of romance, . . . without the persistent calls, the repeated calls."

According to defendant, Steve agreed to sell defendant 45 pills, which she arranged to deliver to Jay in San Francisco. On the day of the delivery, defendant, using mass transit, met Steve and purchased the pills, along with some marijuana for her own use. She then boarded a city bus to meet Jay, but the bus broke down on the way. As she began walking, defendant spotted an acquaintance driving a white car. Using her cell phone, she arranged for the friend to give her a ride to McDonald's. With the friend was another man with whom she was not acquainted. When defendant arrived at McDonald's and did not find Jay, she phoned him, and he asked her to come to the Boston Market, where she was arrested.

Prior to trial, defendant had tried repeatedly and unsuccessfully to persuade the trial court to order the prosecution to reveal the identity of the confidential informant. In her initial attempt, defendant argued the confidential informant might have witnessed her arrest and therefore become a material witness. Following the preliminary hearing, defendant filed essentially the same motion, adding to her argument without further explanation that the informant could "[t]estify how [he] entrapped and improperly encouraged defendant to sell [him Ecstasy]." In an in limine motion filed prior to trial, defendant for the first time submitted a declaration in which she outlined the circumstances that later formed her testimony at trial, arguing the informant was a witness to her entrapment. The trial court held an in camera hearing with respect to this motion (Evid. Code, § 1042, subd. (d)), ultimately denying it. While recognizing that if defendant made out a defense of entrapment "the motion to disclose the identity of the informant certainly becomes stronger," the court concluded defendant's declaration was not sufficiently detailed to support a conclusion she had been entrapped. Defendant renewed the motion after her trial testimony. This time, the trial court denied the motion

on the ground defendant had not made a sufficient attempt to find the informant on her own prior to seeking disclosure of his identity.[1]

Defendant was convicted on all three counts and placed on probation. Following her conviction, defendant again raised the issue of the informant's identity by way of a motion for a new trial. That motion, too, was denied "for the reasons that were set out before."

II. DISCUSSION

Defendant contends the court erred in refusing to order the prosecution to reveal the identity of the confidential informant, challenging in particular the trial court's denial of the pretrial in limine motion seeking the identity and request made after defendant's testimony. She also argues she is entitled to additional custody credits.

A. *The Confidential Informant*

1. *Disclosure of a Confidential Informant*

" ' "The common-law privilege of nondisclosure [of the identity of an informer] is based on public policy. 'The purpose of the privilege is the furtherance and protection of the public interest in ineffective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.' [Citation.] The informer is thus assured of some protection against reprisals. The use of informers is particularly effective in the enforcement of sumptuary laws such as those directed against gambling, prostitution, or the sale and use of liquor and narcotics." ' " (*People v. Otte* (1989) 214 Cal.App.3d 1522, 1529.)

Nonetheless, "the prosecution must disclose the name of an informant who is a material witness in a criminal case or suffer dismissal of the charges against the

[1] We agree with defendant the trial court was wrong in denying defendant's motion on the ground she had not made diligent efforts to identify the informant on her own. (See *Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 365 ["the duty to disclose arises irrespective of the defendant's ability to obtain the information through his own efforts"].) As discussed below, we affirm on other grounds.

defendant. [Citation.] An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant. [Citation.] The defendant bears the burden of adducing ' " 'some evidence' " ' on this score." (*People v. Lawley* (2002) 27 Cal.4th 102, 159.) In demonstrating the witness is a "material witness," thereby mandating disclosure, it is not enough for the defendant to show the confidential informant was a percipient witness to the events underlying the criminal charge. "Rather, disclosure occurs only if the defendant makes an adequate showing that the informant can give exculpatory evidence." (*Davis v. Superior Court* (2010) 186 Cal.App.4th 1272, 1277.)

Whether there is a reasonable possibility the confidential informant can provide exculpatory testimony is an issue of law. (*People v. Otte, supra,* 214 Cal.App.3d at p. 1535.) We therefore review the trial court's determination de novo. (See *People v. Gordon* (1990) 50 Cal.3d 1223, 1245–1246, overruled on another point in *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

2. *Disclosure on the Basis of the Defense of Entrapment*

A confidential informant ordinarily must possess information that might "exonerate" the defendant to justify disclosure. Defendant does not claim this informant could have provided evidence suggesting she did not commit the crimes for which she was convicted. On the contrary, in the course of her testimony defendant effectively admitted that she transported the Ecstasy for the purpose of selling it to Jay.[2] Instead, defendant contends the confidential informant could have provided testimony to bolster her claim of entrapment. Responding to this contention, the Attorney General argues that

[2] During her early motions, defendant contended the confidential informant might have been a percipient witness to the drug delivery and therefore might be able to provide exculpatory evidence. Defendant does not raise the argument on appeal. In any event, based on the in camera transcripts we conclude there is no reasonable possibility the confidential informant could provide evidence that is exculpatory for this reason.

defendant was not entitled to disclosure because "entrapment is a collateral defense and the informant had no information material to [defendant's] guilt."

Entrapment is a defense to a criminal charge. (*People v. Watson* (2000) 22 Cal.4th 220, 222.) However, it is " 'not based on the defendant's innocence. The courts have created the defense as a control on illegal police conduct "out of regard for [the court's] own dignity, and in the exercise of its power and the performance of its duty to formulate and apply proper standards for judicial enforcement of the criminal law." ' [Citation.] Such defenses are collateral to the defendant's guilt or innocence *because they are collateral to any element of the crime in question*." (*People v. Mower* (2002) 28 Cal.4th 457, 480.) As a result, the defendant has the burden of proof on entrapment. (*Ibid.*)

While a defendant who demonstrates he or she has been entrapped is not required to negate one of the elements of the crime, and therefore may not be "innocent" of the crime, the defense of entrapment is exculpatory to the same degree as any other defense. If a jury finds that a crime has been committed as a result of entrapment, the defendant must be acquitted of the criminal charge. (See generally *Sherman v. United States* (1958) 356 U.S. 369, 373 [indictment must be dismissed when entrapment proven as a matter of law].) Further, the policy underlying informant disclosure does not depend on the technical innocence of the defendant. Rather, disclosure is required to satisfy defendants' due process right to know the identity of a witness whose testimony is "critical" to their defense, regardless of the nature of that defense. (*California v. Trombetta* (1984) 467 U.S. 479, 485.) For both these reasons, the prosecution was required to reveal the name of the confidential informant if there was a reasonable possibility he could provide evidence supporting a defense of entrapment. (See *Twiggs v. Superior Court, supra,* 34 Cal.3d at pp. 364, 365 [disclosure of informant's identity ordered when informant could testify regarding entrapment].)[3]

[3] The Attorney General also argues the informant's conduct cannot be considered entrapment because he was not an agent of the government. The argument is conclusively refuted by *Sherman v. United States, supra,* 356 U.S. 369, in which an

3. *Defendant's Evidence of Entrapment*

Defendant argues there was a reasonable possibility the informant could provide exonerating evidence because he would have given testimony similar to hers regarding his inducement of the crime. The Attorney General argues such testimony would not tend to exonerate defendant because, even assuming evidence of entrapment was sufficient, her testimony did not demonstrate entrapment. As discussed below, we agree that defendant's testimony failed to support a finding of entrapment as a matter of law.

"In California, the test for entrapment focuses on the police conduct and is objective. Entrapment is established if the law enforcement conduct is likely to induce a *normally law-abiding person* to commit the offense. [Citation.] '[S]uch a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect—for example, a decoy program—is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime.' " (*People v. Watson*, *supra*, 22 Cal.4th at p. 223.)

"Although the determination of what police conduct is impermissible must to some extent proceed on an ad hoc basis, guidance will generally be found in the application of one or both of two principles. First, if the actions of the law enforcement agent would generate in a normally law-abiding person a motive for the crime other than ordinary criminal intent, entrapment will be established. An example of such conduct would be an appeal by the police that would induce such a person to commit the act because of friendship or sympathy, instead of a desire for personal gain or other typical criminal purpose. Second, affirmative police conduct that would make commission of the crime unusually attractive to a normally law-abiding person will likewise constitute

---

informant whose circumstances were indistinguishable from those of the informant in this case was found to be a government agent for purposes of entrapment. (*Id.* at p. 373.)

entrapment. Such conduct would include, for example, a guarantee that the act is not illegal or the offense will go undetected, an offer of exorbitant consideration, or any similar enticement." (*People v. Barraza* (1979) 23 Cal.3d 675, 690, fn. omitted (*Barraza*).)

Defendant testified the informant called her 7 to 10 times asking her to obtain Ecstasy for him, repeatedly saying, "Oh, could you just do this for me this time? Please. I thought you were my friend." He also told defendant he wanted to date her. While this conduct falls within the general *Barraza* categories of "badgering, cajoling, importuning" and "an appeal . . . that would induce such a person to commit the act because of friendship or sympathy, instead of a desire for personal gain or other typical criminal purpose" (*Barraza, supra,* 23 Cal.3d at p. 690), a defendant is not necessarily entrapped merely because a government agent asks repeatedly or mentions friendship. This type of conduct constitutes entrapment only if the " 'badgering or importuning takes place to an extent and degree that is likely to induce an otherwise law-abiding person to commit a crime.' " (*Provigo Corp. v. Alcoholic Beverage Control Appeals Bd.* (1994) 7 Cal.4th 561, 569.) That is, the informant must " 'pressure the suspect by overbearing conduct.' " (*People v. Watson, supra,* 22 Cal.4th at p. 223.)

While the appeals of a genuine friend might be sufficiently overbearing to induce an otherwise law-abiding person to commit a crime (see *People v. McIntire* (1979) 23 Cal.3d 742, 747–748 [brother's importuning of his sister can constitute entrapment]), that is not the situation here. The informant referred to defendant as his friend, but there was no evidence to suggest they actually had formed a friendship. On the contrary, according to defendant's testimony the two had only spoken casually on the street "four or five times," and "[m]ost times were just stop and go." Defendant did not know the informant's full name, and they had not dated or visited each other's residences. The type of conduct described by defendant could therefore not be considered an appeal to friendship or an attempt to take advantage of a personal attachment. On the contrary, it was merely pestering from a casual acquaintance. Given the substantial risks of trading in illegal drugs, pestering by a casual acquaintance is not the type of conduct that would

induce an otherwise law-abiding person to attempt to obtain them. Even repeated requests from someone known so superficially, who had little connection to defendant and posed no particular threat to her, could not have constituted the type of overbearing pressure necessary to constitute entrapment.

Nor was defendant's statement that the informant wanted to date her "conduct that would make commission of the crime unusually attractive to a normally law-abiding person," such as "an offer of exorbitant consideration, or any similar enticement." (*Barraza, supra,* 23 Cal.3d at p. 690, fn. omitted.) Even assuming it would have constituted entrapment for the informant to promise to date defendant if she obtained the ecstasy, no such promise was made. The informant merely expressed the abstract desire to date defendant, as part of his wheedling. The mere possibility of a personal relationship with the informant was not sufficient enticement to make the crime "unusually attractive to a normally law-abiding person."

Accordingly, if the informant's testimony did no more than confirm defendant's own testimony—and there is no evidence it would have done more—there was no reasonable possibility the testimony would have exonerated her by supporting a defense of entrapment. There was no error in the trial court's refusal to order the disclosure of the informant's identity.

B. *Penal Code Amended Section 4019*

Penal Code section 4019 provides the method for calculating the credit to which a criminal defendant is entitled against his or her term of imprisonment for good behavior and work performance while in local custody prior to imposition of sentence. In 2009, the Legislature doubled these credits in an effort to reduce the state's expenses of incarceration. (Stats. 2009–2010, 3d Ex. Sess., ch. 28, § 50, pp. 5270–5271.) The court sentenced defendant on May 8, 2009. Penal Code amended section 4019 took effect January 25, 2010. (Pen. Code, § 4019.) Because the legislation had not taken effect at the time of her sentencing, defendant was not afforded the benefit of the amended provision when judgment was entered.

There is no dispute, however, defendant is entitled to a doubling of her work and conduct credits if the amendments to Penal Code section 4019 are retroactive, as she contends they are, because her conviction was not final at the time the amendments became effective. Whether the amendments apply retroactively has been the subject of a number of conflicting published decisions from the Courts of Appeal, and the issue is now before our Supreme Court. At least two divisions of our own district have recently held the amendments should be applied retroactively, reasoning section 4019, as amended, is an amendatory statute that mitigates punishment and therefore must be given retroactive effect under *In re Estrada* (1965) 63 Cal.2d 740, unless the Legislature has clearly indicated otherwise. While we cannot cite those decisions because they have been accepted for review, we find their reasoning persuasive. Accordingly, we hold that Penal Code amended section 4019 applies to the calculation of defendant's presentence custody credits, entitling her to two days of work and conduct credits for every two days she spent in local custody.

III. DISPOSITION

The matter is remanded to the trial court to (1) amend the abstract of judgment to reflect presentence custody credits calculated pursuant to Penal Code section 4019, as amended effective January 25, 2010; and (2) forward a certified copy of the abstract of judgment as so amended to the Department of Corrections and Rehabilitation. In all other respects, we affirm the judgment.

_____
Margulies, J.

We concur:

_____
Marchiano, P.J.

_____
Dondero, J.

A124906