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CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ARTEMIS WHALUM, Defendant and Appellant.	D076384 (Super. Ct. No. JCF33890)

APPEAL from a judgment of the Superior Court of Imperial County, Poli Flores, Judge. Remanded with instructions to correct abstract of judgment, and in all other respects affirmed.

Kenneth J. Vandevelde, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

Artemis Whalum, who is serving a prison sentence for possessing cannabis in a correctional institution in violation of Penal Code section 4573.8, appeals from the trial court's denial of his petition to dismiss and recall his sentence. Whalum's petition was based on the fact that, after his conviction, the voters adopted Proposition 64, making it legal for persons at least 21 years of age to possess up to 28.5 grams of cannabis except in specifically identified circumstances, and giving persons currently serving a sentence for a cannabis-related crime that is no longer an offense after Proposition 64, the ability to petition for relief in the form of recall or dismissal of their sentence. (Prop. 64, § 4.4, approved Nov. 8, 2016; Health & Saf. Code, § 11361.8, subd. (a).)[1]

We conclude that the crime of possessing unauthorized cannabis in prison in violation of Penal Code section 4573.8 was not affected by Proposition 64. Accordingly, the trial court properly determined that Whalum was not entitled to relief. We therefore affirm the order denying Whalum's petition.

In reviewing the record we noted a clerical error in the abstract of judgment, which erroneously states that Whalum's sentence for his conviction under Penal Code section 4573.8 is to run *concurrently with,* rather than *consecutively to*, the sentence he was already serving. We therefore remand with instructions that the trial court correct

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1 Unless otherwise indicated, all further statutory references are to the Health and Safety Code.

In 2017, the Legislature replaced all references to "marijuana" in the Health and Safety Code with the term "cannabis." (Stats. 2017, ch. 27, §§ 113-160.) Thus, although Proposition 64 used the term "marijuana," we refer to the amended terminology "cannabis" throughout this opinion for all purposes.

the error and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On October 3, 2014, an indictment accused Whalum of possessing an illegal substance in prison in violation of Penal Code section 4573.6, along with alleging prior convictions, including one prior strike. The indictment was based on Whalum's possession of 0.4 grams of cannabis in his prison cell in Centinela State Prison on September 18, 2013.

On August 11, 2015, Whalum pled no contest to unauthorized possession of drugs in prison in violation of Penal Code section 4573.8 and admitted a prior strike. The trial court imposed a sentence of two years, eight months, to run consecutive to the time he was currently serving in prison.[2]

On July 19, 2019, the public defender, on behalf of Whalum, filed a petition to dismiss and recall Whalum's sentence based on the electorate's adoption of Proposition 64 in 2016, which enacted laws legalizing the possession of up to 28.5 grams of adult cannabis except in specifically identified circumstances. Whalum's petition relied on section 11361.8, subdivision (a), which states that "[a] person currently serving

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2 The abstract of judgment states that the sentence would be served concurrently to the time already being served in prison. At the oral pronouncement of sentence, the trial court imposed a consecutive sentence, and a consecutive sentence was also agreed to in the plea agreement.

a sentence for a conviction, whether by trial or by open or negotiated plea, who would not have been guilty of an offense, or who would have been guilty of a lesser offense under [the law enacted by Proposition 64] had that act been in effect at the time of the offense may petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing or dismissal . . . ."

At a hearing held August 20, 2019, the trial court denied the petition, concluding that it was persuaded by the First District's opinion in *People v. Perry* (2019) 32 Cal.App.5th 885 (*Perry*). *Perry* held that in enacting Proposition 64 the voters did not intend to affect statutes making it a felony to possess cannabis in a correctional institution. (*Id*. at p. 890 ["Proposition 64 did not affect existing prohibitions against the possession of [cannabis] *in prison*."].)

The trial court granted Whalum's request for a certificate of probable cause, and Whalum filed an appeal from the order denying his petition.

II.

DISCUSSION

The issue of whether Proposition 64 affected the existing prohibitions against the possession of cannabis in a correctional institution is currently pending before our Supreme Court. Specifically based on a disagreement between the First District in *Perry*, *supra*, 32 Cal.App.5th 885 and the Third District in *People v. Raybon* (2019) 36 Cal.App.5th 111 (*Raybon*), our Supreme Court granted review in *Raybon* to resolve the issue. (*People v. Raybon*, review granted Aug. 21, 2019, S256978.) As we will explain,

we agree with *Perry* that Proposition 64 did not affect laws specifically directed at criminalizing the possession of cannabis as contraband in a correctional institution.

A. *Relevant Statutory Provisions*

We begin with the relevant statutory provisions.

1. *Statutes Criminalizing Cannabis Possession in Correctional Institutions*

Two different statutes make it illegal to possess cannabis in a correctional institution, with the difference being that one of the statutes applies to *all* drugs and alcohol (Pen. Code, § 4573.8) and the other applies only to controlled substances, the possession of which is prohibited under Division 10 of the Health and Safety Code (Pen. Code, § 4573.6). As cannabis is a drug *and* a controlled substance regulated in Division 10 of the Health and Safety Code (§§ 11007, 11054, subd. (d)(13), 11357), both statutes have been used to convict prisoners who possesses cannabis.

Specifically, Penal Code section 4573.6, subdivision (a), which applies only to controlled substances, provides in pertinent part: "Any person who knowingly has in his or her possession in any state prison . . . any controlled substances, the possession of which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code, . . . without being authorized to so possess the same by the rules of the Department of Corrections, rules of the prison . . . or by the specific authorization of the warden, superintendent, jailer, or other person in charge of the prison . . . is guilty of a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years." The defendants in *Raybon* and *Perry* were convicted under this statute (*Perry*, *supra*, 32 Cal.App.5th at p. 888; *Raybon*, *supra*, 36 Cal.App.5th at p. 113),

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