Filed 10/26/16 P. v. Howard CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DOMINICK ELIJAH HOWARD, Defendant and Appellant.	B262667 (Los Angeles County Super. Ct. No. VA132212)

APPEAL from a judgment of the Superior Court of Los Angeles County. Brian F. Gasdia, Judge. Reversed in part and affirmed in part with directions.

Jamie Lee Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Dominick Elijah Howard (defendant) appeals from the judgment entered against him upon conviction of grand theft person (count 1) and second degree robbery (count 2). He contends that the conviction of grand theft person must be reversed, as it was a lesser included offense of second degree robbery, and that the court assessments imposed as to count 1 must be stricken. Respondent agrees. Defendant also contends that his second-strike sentence as to count 2 under the "Three Strikes" law was unauthorized. We strike count 1 and assessments, but find no merit to defendant's contention that his second-strike sentence was unauthorized, and thus affirm count 2.

BACKGROUND

Defendant was charged with grand theft person in violation of Penal Code section 487, subdivision (c)[1] (count 1), and second degree robbery in violation of section 211 (count 2). The information alleged that prior to the offense alleged in count 1, defendant had been convicted of making criminal threats in violation of section 422, a serious or violent felony, within the meaning of the Three Strikes law (§ 667, subd. (b)-(j), & § 1170.12, subd. (a)-(d)). The information alleged the same prior conviction as to count 2 for purposes of section 667, subdivision (a)(1), and as to counts 1 and 2 for purposes of sentencing to prison under section 1170, subdivision (h)(3). It was further alleged as to both counts that defendant had served a prior prison term within the meaning of section 667.5, subdivision (b), for a conviction of unlawful firearm possession in violation of former section 12021.

Defendant's first trial ended in a mistrial as the jury was unable to reach a verdict. Upon retrial, the jury found defendant guilty of both counts as charged. Defendant then admitted the allegations of prior convictions. The proceedings were suspended when the trial court declared a doubt as to defendant's mental competence, and recommenced after the trial court found defendant competent to be sentenced. On March 12, 2015, the trial court sentenced defendant on count 2 to 15 years in prison, comprised of the upper term of five years, doubled to 10 years as a second strike, plus five years pursuant to section

---

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

667, subdivision (a)(1). As to count 1, the court imposed the middle term of two years and stayed execution of the sentence under section 654. The court ordered the prior prison term enhancements stayed, imposed various fines and fees, and calculated defendant's presentence custody credit to be a combined total of 550 days.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

On August 19, 2013, Mary Guzman (Guzman) exited a Metro train and was walking on the platform when defendant approached her, placed his hand around her throat, and pulled the chain she wore around her neck until the chain broke. The chain caused an injury to her neck which left a scar. After taking the chain defendant ran away, chased by two men. Sheriff's deputies were called and found defendant. A short time later Guzman identified defendant as her assailant.

The defense presented no evidence.

DISCUSSION

I. Grand theft of a person count must be stricken

Defendant contends that count 1, grand theft of a person, must be vacated, and respondent agrees. Theft is a lesser included offense of robbery. (*People v. Waidla* (2000) 22 Cal.4th 690, 737.) A defendant cannot be convicted of both the greater offense of robbery and the lesser included offense of theft when they occur during the same course of conduct. (*People v. Ortega* (1998) 19 Cal.4th 686, 692.) "If the evidence supports the verdict as to a greater offense, the conviction of that offense is controlling, and the conviction of the lesser offense must be reversed. [Citations.]" (*People v. Moran* (1970) 1 Cal.3d 755, 763.) An appropriate remedy is for this court to affirm the judgment as to the greater offense, and to strike the lesser. (See *People v. Medina* (2007) 41 Cal.4th 685, 703.) We do so here.

II. Second-strike sentence

Defendant contends that the second-strike sentence imposed as to the robbery count under the Three Strikes law was unauthorized, because the information alleged the

qualifying prior serious or violent felony conviction only as to count 1 (grand theft person).

After the allegations of counts 1 and 2, the information alleged "that prior to the commission of that offense or offenses alleged in Count 1, the defendant . . . had been convicted of the following serious and/or violent felony, as defined in Penal Code section 667(d) and Penal Code section 1170.12(b), and is thus subject to sentencing pursuant to the provisions of Penal Code section 667(b)-(j) and Penal Code section 1170.12: [¶] [YA078455, PC422, 09/28/2010, Los Angeles County Superior Court]."

The Three Strikes law provides, in relevant part: "If a defendant has one prior serious and/or violent felony conviction . . . that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction." (§§ 667, subd.(e)(1); 1170.12, subd. (c)(1).) Emphasizing the final phrase, "for the current felony conviction," defendant construes "current felony" as referring to each *count* which alleges a felony. Defendant then contends that under the plain reading of the statutes, the prior serious or violent felony allegation must refer to each specific count for which he could be sentenced under the Three Strikes law.

The plain language of the statutes does not support defendant's contention, as the only *express* pleading requirement is that the defendant has one or more prior qualifying felony convictions. (See §§ 667, subd. (e)(1),1170.12, subd. (c)(1).) As respondent notes, section 969 provides: "In charging the fact of a previous conviction of felony, . . . it is sufficient to state, 'That the defendant, before the commission of the offense charged herein, was in (giving the title of the court in which the conviction was had) convicted of a felony . . . .'" Further, sections 667, subdivision (f)(1), and 1170.12, subdivision (d)(1), both provide that, notwithstanding any other law, the statute's provisions shall be applied in *every case* in which a defendant has a prior qualifying felony conviction as defined in the statute. And while both Three Strikes statutes mandate that each qualifying prior conviction shall be pleaded and proven, neither contains any provision which would require count-by-count pleading.

Having found no authority directly supporting his contention, defendant compares the pleading requirement of the Three Strikes law with that of the "One Strike" law. (§ 667.61.)[2] Defendant contends that the California Supreme Court's construction of section 667.61 in *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*), provides support for construing sections 667 and 1170.12 as requiring the specific pleading of each count as to which a strike prior may be applied. We agree with respondent that defendant's reliance on *Mancebo* is misplaced. In *Mancebo*, "the narrow question presented" was whether the fact of gun use, which had already been properly pled and proved as a basis for invoking One Strike sentencing, could be used instead as a sentence enhancement under section 12022.5, subdivision (a), while substituting the proven but not pled fact of multiple victims to invoke One Strike sentencing, all without prior notice. (*Mancebo, supra*, at pp. 738-739, 749; see § 667.61, subd. (e)(3) & (4).) There is no comparable enumeration of factual circumstances in the Three Strikes law, and neither *Mancebo* nor section 667.61 is applicable here, whether directly or by analogy. *Mancebo* is applicable here only for the general principle that a defendant has a due process right to fair notice of the factual allegations that will be invoked to impose a sentence enhancement or otherwise increase the punishment for the charged crimes.[3] (See *Mancebo*, at p. 747.)

Moreover, the circumstances of this case demonstrate that defendant received adequate notice that a second-strike sentence could be imposed upon conviction of either count 1 or count 2. As respondent points out, there was an uncertainty in the information due to the ambiguity caused by the variance between the information summary of the information and the full second-strike allegation on the next page. The summary of

---

[2] Section 667.61 "sets forth an alternative and harsher sentencing scheme for certain enumerated sex crimes" when a defendant commits one of those crimes under specified circumstances. The pleading requirements of section 667.61 are contained in subdivision (f) and former subdivision (i), now (o). (*Mancebo, supra*, 27 Cal.4th at p. 741; see Stats. 1998, ch. 936, § 9.) Section 667.61, subdivisions (d), (e), and (n) set forth a total of 20 factual circumstances under which a shorter or longer sentence would apply.

[3] We rely on *Mancebo* in *People v. Perez* (2015) 240 Cal.App.4th 1218, which is also a One Strike case and therefore inapposite here.

charges, which appears on the first page of the information, lists "PC 1170.12" in the "Special Allegation" column beside both counts 1 and 2. Next to that column is the "Alleg. Effect" column in which the notation, "x 2" appears opposite "PC 1170.12" in both counts 1 and 2. The pleading of the charges begins on the next page. Following count 1, the second strike is alleged to have been the criminal threats conviction in 2010, and is listed with the date of conviction, the court, and the case number. We agree with respondent that in light of the summary page, the failure to mention count 2 in the strike allegation appears to have been a clerical error, and that it created an uncertainty which made the information subject to demurrer. (See §§ 952, 1004, subd. 1.) "The well-established rule is that failure to demur on the ground that a charging allegation is not sufficiently definite waives any objection to the sufficiency of the information. [Citations.]" (*People v. Holt* (1997) 15 Cal.4th 619, 672.)

Defendant counters that he was not required to demur to the information because it was definite and unambiguous in its allegation that the strike prior applied only to count 1. We have concluded that the information was in fact ambiguous; however, even if we were to agree with defendant's assertion, we would affirm the judgment under "the so-called 'informal amendment doctrine,' which constitutes a judicial recognition that an information may be amended without written alterations to it. [Citation.] Generally, the purpose of an accusatory pleading is '"to provide the accused with reasonable notice of the charges."' [Citations.] Nonetheless, the Penal Code permits accusatory pleadings to be amended at any stage of the proceedings 'for any defect or insufficiency' (§ 1009), and bars reversal of a criminal judgment 'by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits' (§ 960). In view of these provisions, '[t]he proceedings in the trial court may constitute an informal amendment of the accusatory pleading, when the defendant's conduct or circumstances created by him amount to an implied consent to the amendment.' [Citation.]" (*People v. Whitmer* (2014) 230 Cal.App.4th 906, 919-920, fn. omitted; see also *People v. Sandoval* (2006) 140 Cal.App.4th 111, 133-134.) "[A] defendant [who] expressly or impliedly consents to have the trier of fact consider a

nonincluded offense . . . 'cannot legitimately claim lack of notice . . . .' [Citations.]" (*People v. Toro* (1989) 47 Cal.3d 966, 973, disapproved on another ground in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.)

Here, defendant's conduct amounted to an implied consent to the court's treatment of the allegation as relating to both counts 1 and 2. During jury deliberations, defense counsel indicated that defendant was willing to waive a jury trial on the prior conviction allegations. After the trial court advised defendant of his right to have the same jury decide the truth of the prior convictions, the prosecutor informed defendant that his waiver would be effective only if the jury returned a guilty verdict. Defendant indicated that he understood, and the following colloquy ensued:

> "[The prosecutor]: And that you would also be waiving your right to have the court make that determination and would be, you intend, if there is a conviction as to either count, to admit to the prior -- well, it's two prior allegations alleged within the meaning of two different statutes; is that also correct, sir?
>
> "The defendant: Yes, sir.
>
> [The prosecutor]: Okay. Basically it's to the 422, criminal threats in YA078455 from September 20th 2010 within the meaning of the Strike Law, 1170.12(b) as well as that it's a serious felony within the meaning of Penal Code section 667(a) and that the other charge, the carrying a loaded concealed weapon, within the meaning of Penal Code section 12021 in case No. YA080873, conviction in August 2011 that, also is a prior under 667.5(b). What you are indicating is that, should there be a conviction that you would be or that you rather are admitting those for the purpose of sentencing, if there is a conviction in the other [*sic*] count; is that what you want to do, sir?"

Defendant then conferred with his counsel, who asked the prosecutor to repeat the question. Contrary to defendant's claim here that the prosecutor never clarified that the strike prior would apply to both counts, the prosecutor then asked: "What you are saying is if there is a conviction to either count, that you are admitting those strikes for that purpose; is that correct?" Defendant replied: "Yes, sir." Defendant then expressly waived his right to a jury trial on the prior conviction allegations. At a postverdict hearing, the prosecutor informed defendant that the prior criminal threats conviction was

alleged "within the meaning of 667b and 1170.12 provided in the Strike law and well as 667a, a serious felony."

At sentencing nine months later, the trial court noted the prosecutor's recommendation that the base term should be the high term for robbery in count 2. Defense counsel asked the court to instead "strike the strike and his priors and give him low term plus the five-year prior," or in the alternative, to "grant him a base term of the low term, double it for four plus the five and give him nine years." The trial court denied defendant's request to strike the prior conviction, and sentenced defendant to a second-strike term under section 1170.12, plus the five-year serious felony enhancement.

From such circumstances, we conclude that defendant and his counsel were at all times aware that the prosecution was seeking a second-strike sentence on both counts, and that defendant impliedly consented to the prosecutor's oral statement applying the strike prior to both counts. Defendant thus "'cannot legitimately claim lack of notice . . . .' [Citations.]" (*People v. Toro, supra*, 47 Cal.3d at p. 973.)

Defendant contends that if waiver or forfeiture is found to have occurred here, his trial counsel rendered ineffective assistance by failing to object. To prevail on such a claim, defendant must show both deficient performance by counsel and prejudice, that is, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.) If the defendant fails to show prejudice, we need not consider whether counsel's performance was deficient. (*Ibid*.; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) Defendant argues that because it was obvious that the prior strike conviction had not been alleged as to count 2, counsel should have objected at the time of sentencing, when it would have been too late to amend the information. He concludes that he suffered prejudice because his sentence increased by five years.

It would not have been too late to amend the information at sentencing. Unless there has been a waiver or forfeiture, a postverdict amendment to an information to add previously unpled prior conviction allegations is permissible only before the jury has been discharged. (*People v. Tindall* (2000) 24 Cal.4th 767, 769-770.) Here, as the

correction of the prior strike conviction merely clarified the ambiguity in the information, it did not allege a previously unpled prior conviction. (Cf. *People v. McQuiston* (1968) 264 Cal.App.2d 410, 417-418 [amendment to correct prior conviction allegation as to date and name of court "did not change the nature of the offense charged"].) Further, the jury had not yet been discharged when defendant agreed to waive a trial and "if there is a conviction to either count, . . . admit[] those strikes for that purpose . . . ." Thus, if counsel had objected at the time of sentencing, there is no reasonable probability that the result would have been different because the information had already been implicitly amended when defendant admitted the prior conviction as to both counts. As defendant has not met his burden to demonstrate prejudice, his ineffective assistance claim fails.

III. Court assessments imposed as to count 1

The trial court imposed a $40 court operations assessment (§ 1465.8, subd. (a)(1)) and a $30 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)) as to each count. Defendant contends that upon reversal of count 1, the court operations assessment and the court facilities assessment imposed as to that count must be stricken, and respondent agrees. The court operations assessment and the court facilities assessment must be imposed as to each count of which a defendant is convicted. (*People v. Sencion* (2012) 211 Cal.App.4th 480, 483.) As defendant will no longer stand convicted of count 1, assessments relating solely to that count will also be stricken.

DISPOSITION

The judgment as to count 1, including the court assessments, is reversed and stricken, and the judgment on count 2 is affirmed. The superior court is directed to prepare an amended abstract of judgment and to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
HOFFSTADT