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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ROBERT LEE HULETT, Defendant and Appellant.	B291861 (Los Angeles County Super. Ct. No. TA145138)

APPEAL from the judgment of the Superior Court of Los Angeles County. Allen J. Webster, Jr., Judge. Affirmed and remanded for resentencing.

Stephane Quinn, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Robert Lee Hulett was charged by information with one count of violating Health and Safety Code section 11379.5, subdivision (a) (sale of phencyclidine). It was further alleged defendant had suffered three prison priors within the meaning of Penal Code section 667.5, subdivision (b).

The case proceeded to a jury trial. Defendant testified in his own defense, against the advice of his counsel, and was impeached by his admissions on both direct and cross-examination of four prior felony convictions of moral turpitude. After the jury convicted him, the court ordered the jury back to the jury room while defendant decided whether to proceed with the bifurcated trial of the priors, or to admit them. Defendant admitted to the court three prison priors, two that he had already admitted to the jury and a third one he had not previously admitted.

The court sentenced defendant to a state prison term of five years, consisting of a four-year midterm for the substantive offense, plus a consecutive one-year term for one of the prison priors. The court ordered the terms on the other two prison priors to run concurrently.

Defendant was awarded 338 days of presentence custody credits. The court imposed various fines and fees, including a $300 restitution fine (Pen. Code, § 1202.4).

DISCUSSION

Defendant raises two challenges on appeal. He contends the court's true findings on the prior conviction allegations must be reversed because his admissions were taken without a knowing and voluntary waiver of his constitutional rights. Defendant further contends the court failed to determine his

ability to pay the $300 restitution fine and that the fine should therefore be stayed.

Both contentions are without merit.

1. Failure to Advise on Waiver of Constitutional Rights

In *Boykin v. Alabama* (1969) 395 U.S. 238 (*Boykin*), the high court held it was error to accept a guilty plea "without an affirmative showing that it was intelligent and voluntary." (*Id*. at p. 242.) Under *Boykin*, for a plea to be intelligent and voluntary, defendant must waive the constitutional rights to a jury trial, to confront witnesses and to remain silent. (*Id*. at p. 243.)

In *In re Tahl* (1969) 1 Cal.3d 122 (*Tahl*), our own Supreme Court held that "each of the three rights mentioned – self-incrimination, confrontation, and jury trial – must be specifically and expressly enumerated for the benefit of and waived by the accused prior to acceptance of his guilty plea." (*Id.* at p. 132.)

In *In re Yurko* (1974) 10 Cal.3d 857, the court held that the decisions in *Boykin* and *Tahl* applied to an accused's admission of prior felony convictions. (*Yurko,* at p. 863.)

In *People v. Howard* (1992) 1 Cal.4th 1132, the court recognized that, contrary to its holding in *Tahl*, "the high court has never read *Boykin* as requiring explicit admonitions on each of the three constitutional rights." (*Howard,* at p. 1177.) In *Howard*, the court "adopt[ed] the federal test in place of the rule that the absence of express admonitions and waivers requires reversal regardless of prejudice." (*Id*. at p. 1178.) Thus, "a plea is valid if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances." (*Id.* at p. 1175; *id.* at p. 1180 ["[o]n this record, . . . defendant's admission of the prior conviction was voluntary and intelligent despite the absence of an explicit admonition on the privilege against self-incrimination"].)

Finally, in *People v. Mosby* (2004) 33 Cal.4th 353, the court addressed a circumstance similar to this case: "When, immediately after a jury verdict of guilty, a defendant admits a prior conviction after being advised of and waiving only the right to trial, can that admission be voluntary and intelligent even though the defendant was not told of, and thus did not expressly waive, the concomitant rights to remain silent and to confront adverse witnesses? The answer is 'yes,' if the totality of circumstances surrounding the admission supports such a conclusion." (*Id.* at p. 356.) *Mosby* tells us that "[n]ow, if the transcript does not reveal complete advisements and waivers, the reviewing court must examine the record of 'the entire proceeding' to assess whether the defendant's admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances." (*Id.* at p. 361.)

Most recently, our Supreme Court held that "the *Howard* totality of the circumstances test applies in *all* circumstances where the court fails, either partially or completely, to advise and take waivers of the defendant's trial rights before accepting a guilty plea." (*People v. Farwell* (2018) 5 Cal.5th 295, 303 (*Farwell*).) "The United States Supreme Court 'has never read *Boykin* as requiring explicit admonitions on each of the three constitutional rights.' [Citation.] Instead, under the federal Constitution, 'a plea is valid if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances.' " (*Farwell*, at p. 301.)

Applying the totality of circumstances test here, we find defendant made an intelligent and voluntary waiver in admitting his three prior convictions.

The information alleged the three prior convictions that defendant admitted in his bifurcated bench trial and included the statutory language that defendant had not remained free of

prison custody for five years prior to the commission of the current offense. "Generally, an admission of prior convictions where the charging information specifically alleges the convictions resulted in prior separate prison terms is deemed an admission such prison terms were separately served." (*People v. Cardenas* (1987) 192 Cal.App.3d 51, 61.)

On the second day of testimony in this trial, defendant made the decision to testify in his own defense against the advice of his counsel and the admonitions of the court. The record includes a lengthy colloquy among defendant, defense counsel, and the court, including a *Marsden* hearing (*People v. Marsden* (1970) 2 Cal.3d 118). Throughout the lengthy discussion, counsel told the court defendant wanted to testify, against counsel's advice, and the court cautioned defendant repeatedly that he would be impeached by his numerous past crimes of moral turpitude, the court would instruct the jury how it could consider these past crimes, and defendant should listen to his lawyer. The court observed defendant had "a lot of" priors, 18 listed in the probation report, and the prosecutor could "have a field day" with his rap sheet. The court concluded by telling defendant he was a grown man who was entitled to decide for himself whether to testify, but if he took the witness stand, he would be impeached and "if you go down, you['re] going to jail."

After defendant testified on the morning of the second day of testimony, the jury was excused for lunch. After lunch, the court instructed the jury and counsel gave closing arguments. The jury returned its guilty verdict that afternoon. The court told the clerk to record the verdict and ordered the jury to wait in the jury room. Outside the presence of the jury, the court asked if defendant wanted to admit the priors or have a priors trial, observing that although defendant had already testified to his

priors, he was still entitled to a separate trial of the prison prior allegations. Defendant decided to admit his priors to the court and did so shortly after the clerk recorded the verdict. The court then released the jurors and set a date for sentencing. Less than four hours passed between the time the court extensively admonished defendant about his constitutional rights and his admission to the court of the prior convictions he had admitted to the jury that morning.

Farwell instructs that " ' "previous experience in the criminal justice system is relevant to a recidivist's ' "knowledge and sophistication regarding his [legal] rights." ' " ' " (*Farwell*, *supra*, 5 Cal.5th at p. 302.) Defendant had extensive experience in the criminal justice system dating back to 1996. As the court put it, "seems like every year he's got a case."

Given his extensive experience in the criminal justice system, and the court's lengthy admonitions before defendant testified to the jury in this case, the inescapable conclusion is that defendant understood his constitutional rights both before he took the witness stand to testify to the jury and that same afternoon, when he again admitted his priors in the bifurcated court trial.

2. Defendant forfeited his contention regarding the restitution fine.

Relying primarily on *People v. Dueñas* (2019) 30 Cal.App.5th 1157, defendant argues it was a violation of his rights to due process and equal protection for the trial court to impose the $300 restitution fine without a showing by the People of his ability to pay. Defendant concedes he did not object on these, or any, grounds in the trial court. The contention has therefore been forfeited. (*People v. Frandsen* (2019)

33 Cal.App.5th 1126, 1153-1155 (*Frandsen*) [finding forfeiture where no objection raised in trial court to imposition of court operation assessment, criminal conviction assessment and restitution fine]; see also *People v. Avila* (2009) 46 Cal.4th 680, 729 [finding forfeiture where the defendant failed to object to imposition of restitution fine under Pen. Code, former § 1202.4 based on inability to pay].)

We reject defendant's contention his forfeiture should be excused for the same reasons articulated in *Frandsen*.

Even if we excused defendant's forfeiture, we would reject his claim. Nothing in the record supports his contention the imposition of the $300 restitution fine (the statutory *minimum* amount for a felony) was fundamentally unfair to defendant or violated his constitutional rights. The facts here bear no similarity to the unique factual circumstances presented in *Dueñas*.

3. Remand to Correct Sentencing Error

The trial court erred in imposing concurrent one-year terms on two of the prison priors. Once a prison prior allegation is found true, the court must impose a *consecutive* one-year enhancement, unless the court exercises its discretion to strike the term in accordance with Penal Code section 1385. (§ 667.5, subd. (b) ["in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term"]; see also *People v. Langston* (2004) 33 Cal.4th 1237, 1241 ["Once the prior prison term is found true within the meaning of section 667.5(b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken."].)

The concurrent terms are not authorized by law and we may therefore correct the error on appeal. (*People v. Bradley* (1998) 64 Cal.App.4th 386, 390-391.) We reverse the two 1-year concurrent terms and remand the case for the limited purpose of allowing the trial court the opportunity to consider striking one or both enhancements or imposing consecutive one-year terms. We express no opinion on how the trial court should exercise its discretion.

DISPOSITION

The judgment is affirmed. The matter is remanded with directions to the trial court to exercise its discretion to strike the term for one or both prison priors, or to impose a consecutive one-year term for one or both priors pursuant to Penal Code section 667.5, subdivision (b). At the resentencing hearing, defendant has the right to the assistance of counsel, and unless he chooses to forgo it, the right to be present. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 258–260.)

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

STRATTON, J.