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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. CALVIN CHARLES LYNCH, Defendant and Appellant.	B280092 (Los Angeles County Super. Ct. No. PA085542)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cynthia L. Ulfig, Judge. Affirmed.

William G. Holzer, 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, Assistant Attorney General, Paul M. Roadarmel, Jr., and John R. Prosser, Deputy Attorneys General, for Plaintiff and Respondent.

Calvin Charles Lynch (Lynch) chose to represent himself in a criminal trial after the Los Angeles County District Attorney's office charged him with multiple counts related to assaults on peace officers, false imprisonment, and child abuse, in which he allegedly inflicted great bodily injury on one of his victims and used a dangerous or deadly weapon to effectuate his crimes. On the day of sentencing, he sought to revoke his propria persona status. The trial court denied the request. The trial court subsequently found Lynch had suffered a prior strike conviction and sentenced him to an aggregate term of 27 years in prison in accordance with the "Three Strikes" law.

On appeal, Lynch argues the trial court abused its discretion in denying his request for counsel at sentencing, and that substantial evidence does not support the trial court's finding that he suffered a prior strike conviction. As both contentions are without merit, we affirm.

BACKGROUND[1]

On September 21, 2016, the Los Angeles County District Attorney's Office charged Lynch via amended information with assaulting a peace officer with a deadly weapon or by means of force likely to inflict great bodily injury (Pen. Code,[2] § 245, subd. (c); counts 1, 2, 3, & 8), with false imprisonment of a hostage (§ 210.5; counts 4 & 5), and with child abuse (§ 273a, subd. (a); counts 9 & 10). The information alleged Lynch personally

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[1] Lynch does not raise any issues with respect to his trial or convictions on appeal. His appeal focuses entirely on his request for counsel at sentencing and the strike prior. We therefore do not discuss the facts of the crimes for which Lynch was convicted.

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

inflicted great bodily injury (12022.7, subd. (a)) as to count 1; and personally used a dangerous or deadly weapon (§ 12022, subd. (b)(1)) as to counts 4, 5, 9, and 10. The information further alleged that in 2003 Lynch had been convicted of assault on a peace officer (§ 245, subd. (c)), which is a serious and/or violent felony within the meaning of the Three Strikes law and subjected Lynch to enhanced sentencing as a second-striker. Lynch pleaded not guilty to all counts and denied the bodily injury and deadly weapon allegations.

After jury selection, Lynch chose to proceed in propria persona. On October 3, 2016, the jury found Lynch guilty on counts 1, 2, 3, 8, 9, and 10, and found true the bodily injury and deadly weapon allegations. The jury found Lynch not guilty on counts 4 and 5. The trial court scheduled the sentencing hearing for November 16, 2016.

On November 16, 2016, the court sentenced Lynch after conducting a brief bench trial on the prior strike allegation, which had been bifurcated from the jury trial. After the prosecutor had presented its evidence on the prior, Lynch requested that the court appoint an attorney for him. When the court denied the request, Lynch proceeded pro se in his arguments on the prior strike issue. Ultimately, the court found the prior strike allegation to be true. After the trial court ruled on the strike prior, and before proceeding to sentencing, Lynch again requested the appointment of counsel. The People opposed and the trial court denied the request. The trial court sentenced Lynch to a total of 27 years in state prison.

DISCUSSION

On appeal, Lynch contends the trial court abused its discretion in denying his request for counsel at sentencing, and erroneously found that the 2003 conviction constitutes a strike.

I. Denial of request for counsel at sentencing

We review the court's denial of Lynch's request for counsel at sentencing for abuse of discretion. (*People v. Lawrence* (2009) 46 Cal.4th 186, 188.) Once a court grants a criminal defendant propria persona status, it is "within the sound discretion of the trial court to determine whether such defendant may give up his right of self-representation and have counsel appointed." (*People v. Elliott* (1977) 70 Cal.App.3d 984, 993.) In making this determination, the trial court looks to the totality of the circumstances. (*People. v. Gallego* (1990) 52 Cal.3d 115, 164.) Trial courts should consider, along with any other relevant circumstances, the following factors: " '(1) defendant's prior history in the substitution of counsel and . . . the desire to change from self-representation to counsel-representation, (2) the reasons . . . for the request, (3) the length and stage of the trial proceedings, (4) [any] disruption or delay which reasonably might be expected to ensue from . . . granting [the] motion, and (5) the likelihood of [the] defendant's effectiveness in defending against the charges' " if the motion is denied. (*Lawrence*, at pp. 1066–1067, quoting *Elliott*, at pp. 993–994.)

With respect to the second factor, Lynch did not give a reason for his request to have counsel appointed other than to say, "I was under the impression a different statute in the law that I could have some type of counsel when I'm in this . . . stage of the proceedings . . . and during this judgment I'm allowed a lawyer or to talk to . . . some type of counsel." It was clear from

the outset, however, that proceeding in propria persona, Lynch would be representing himself throughout all the proceedings in his case. First, the *Faretta*[3] waiver Lynch signed on September 22, 2016 explicitly provides: "I understand that if I act as my own attorney, it will be necessary for me WITHOUT THE ASSISTANCE OF A PROFESSIONAL ATTORNEY, to conduct my own trial . . . and, in the event of a conviction, making appropriate motions after trial and representing myself at the time of any probation or sentencing hearing." Lynch signed his initials in the box next to this provision. Lynch also signed his initials next to the following provision: "I understand that depending on the stage of my case, if I change my mind and request an attorney to handle my case, the Court may deny this request and that I may have to proceed with the trial without an attorney." In addition, before the trial court granted Lynch's request to represent himself, it specifically admonished him that it was "the court's *option* to have [standby counsel] come back in" (italics added) as Lynch's attorney and that Lynch could not "choose to go back and forth." Lynch was clearly on notice that his waiver of counsel would remain in effect throughout the proceedings—including at sentencing—and that the court had the authority to deny any such request at any time.

With respect to the third factor, Lynch did not request re-appointment of counsel for sentencing until November 16, 2016—the very day of the sentencing hearing. In denying his request, the court noted that Lynch had six weeks "to either contact the court or contact counsel" and "made no effort until the time of sentencing" to request counsel. In addition, the court had

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[3] *Faretta v. California* (1975) 422 U.S. 806

already told Lynch at the end of trial on October 3, 2016 to submit any motions or other documents "at least five days in advance," and stated unequivocally: "I do plan on sentencing you on November 16th." Lynch did not explain to the court why he waited until the day of sentencing to make his request, thereby failing to provide the court with any good cause to delay the proceedings in order for him to obtain counsel.

With respect to the fifth factor, Lynch had already shown himself to be a capable advocate on his own behalf. Lynch secured acquittals on the two false imprisonment charges, which exposed him to the highest term of incarceration—eight years. The maximum exposure for the remaining counts was six years for the child abuse charges.

Lynch did not give the court a satisfactory reason for waiting until the day of sentencing to request counsel. He was well aware that his waiver of counsel extended through sentencing. And, Lynch had already demonstrated that he could effectively represent himself throughout the course of the proceedings. We therefore conclude the court did not abuse its discretion in denying Lynch's request to revoke his in propria persona status at sentencing.

II. Prior strike offense

We review the imposition of a sentencing enhancement for substantial evidence. In doing so, we "examine the record in the light most favorable to the judgment" to "determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt." (*People v. Delgado* (2008) 43 Cal.4th 1059, 1067.)

Here, Lynch argues that his prior conviction does not constitute a strike because an assault on a police officer only subjects a defendant to enhanced sentencing under the Three Strikes law if committed with a deadly weapon or instrument. Lynch admitted to the prior offense during the trial, and does not challenge the conviction here. Rather, he argues that the prosecution failed to prove that he committed the offense with a deadly weapon or instrument.

The Three Strikes law provides for enhanced sentencing if a criminal defendant has previously been convicted of a serious or violent felony. (§§ 667, subds. (b)-(j), 1170.12.) Serious felonies are those listed in section 1192.7, subdivision (c), and violent felonies are those listed in section 667.5, subdivision (c). (§ 1170.12, subd. (b)(1).) Lynch points out that section 1192.7, subdivision (c)(11) lists "assault with a deadly weapon or instrument on a peace officer" as a serious felony. Because Lynch did not commit his prior offense with a deadly weapon or instrument, he argues the Three Strikes law does not apply to his 2003 conviction.

However, section 1192.7, subdivision (c)(31) lists "assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245" as a serious felony. Thus, *any* assault on a peace officer—with or without a weapon—is a serious felony, which constitutes a strike within the meaning of the Three Strikes law.

Lynch urges us to apply the principle of statutory instruction that " 'interpretations which render any part of a statute superfluous are to be avoided.' " According to Lynch, section 1192.7, subdivision (c)(31), which designates any assault

on a police officer as a serious felony, renders section 1192.7, subdivision (c)(11) superfluous. Were we to follow Lynch's reasoning here, we would have to ignore section 1192.7, subdivision (c)(31) entirely, which we will not do. Instead, we follow the fundamental principle that we "*begin* by examining the statutory language, giving the words their usual and ordinary meaning." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272, italics added.) If the statutory terms are unambiguous, "then we presume the lawmakers meant what they said, and the plain meaning of the language governs." (*Ibid.*) We find no ambiguity in the list of offenses the legislature has designated as serious felonies, particularly those, such as section 1192,7, subdivision (c)(31), that are enumerated offenses. The language here could be no more clear: *any* assault on a peace officer in violation of section 245 is a serious offense.

Lynch also urges us to view subdivisions (c)(11) and (c)(31) in light of section 1859 of the Code of Civil Procedure, which provides that "when a general and particular provision are inconsistent, the latter is paramount to the former." According to Lynch, "the more specific reference to assault on a peace officer with a deadly weapon (§ 1192.7, subd. (c)(11)) should control the more general reference to any assault on a peace officer (§ 1192,7, subd. (c)(31))." First, it is not definitive that subdivision (c)(11) is more specific than subdivision (c)(31). In fact, it is reasonably arguable that the latter is more specific because it designates a specific Penal Code section as a serious felony, whereas the former merely refers to criminal conduct without pointing to any specific statute for guidance. Second, it is "well established that a statute enacted later in time controls over an earlier-enacted statute." (*Cross v. Superior Court* (2017) 11 Cal.App.5th 305,

322.) Subdivision (c)(31) was added to the list of serious felonies on March 7, 2000. (Prop. 21, § 17, effective March 8, 2000.) The purpose of the initiative was, in part, to implement "dramatic changes" to address gang violence in order to create "a safer California." (*Ibid.*) Clearly, the legislature intended to increase punishment for repeat offenders who were previously convicted of assaulting police officers in any manner.

Finally, the Third Appellate District has already firmly held that "an assault on a peace officer in violation of section 245(c) is a serious felony under the three strikes law regardless of whether a deadly weapon was used." (*People v. Semien* (2008) 162 Cal.App.4th 701, 710.)[4]

For the above reasons, we conclude there is substantial evidence to support the trial court's finding that Lynch suffered a prior strike offense.

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[4] Inexplicably, Lynch contends this statement is dicta because the appellate court in *People v. Semien*, *supra*, 162 Cal.App.4th 701 found that the assault was committed with a deadly weapon. Lynch ignores entirely the second sentence of the opinion, which states, "We . . . *hold* that conviction for violation of Penal Code section 245, subdivision (c) (assault on peace officer), constitutes a 'strike' even though the assault was not with a deadly weapon." (*Id.* at p. 703, italics added.) Dicta are "arguments and general observations, unnecessary to the decision." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 509, pp. 572–573.) One can hardly maintain a good faith argument that a statement the Court of Appeal expressly designates as its holding is merely dicta.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

BENDIX, J.