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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ALLEN R. SMITH, Defendant and Appellant.	B271744 (Los Angeles County Super. Ct. No. TA138622)

Appeal from a judgment of the Superior Court of Los Angeles County, John T. Doyle, Judge. Affirmed.

Michele A. Douglass, under appointment of the Court of Appeal for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, David E. Madeo, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Allen Smith of fleeing a pursuing peace officer's motor vehicle while driving recklessly (Veh. Code, § 2800.2[1]) and hit and run driving resulting in property damage (§ 20002, subd. (a)). The trial court found true the allegations that defendant had two prior convictions under the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and served two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). The trial court sentenced defendant to six years in state prison for his section 2800.2 flight conviction and 334 days in county jail for his hit and run conviction.

On appeal, defendant contends the trial court abused its discretion when imposing sentence because the trial court purportedly did not consider whether to sentence defendant for his section 2800.2 flight conviction as a misdemeanor rather than as a felony. We affirm.

BACKGROUND

A. The Offense Conduct and Evidence at Trial

About 4:30 p.m. on August 30, 2015, Los Angeles County Sheriff's Department Deputy Karina Bravo was on patrol in a marked Sheriff's Department car when a blue Chrysler Sebring swerved into her lane. Deputy Bravo slammed on the brakes to avoid a collision. For a few seconds, the Sebring swerved between and straddled the line separating two traffic lanes.

Because the Sebring had "paper plates," Deputy Bravo pulled up next to it to look for a temporary Department of Motor

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1 All further statutory references are to the Vehicle Code, unless otherwise indicated.

Vehicles registration sticker on its windshield. When Deputy Bravo drove alongside the Sebring, she saw the driver's head fall to his chest and raise up abruptly. As Deputy Bravo accelerated, the sound of her engine caused the driver to look in her direction, and she made eye contact with him. Deputy Bravo got a good look at the driver. The driver was wearing a black baseball hat, black clear glasses, and a white shirt. Deputy Bravo identified defendant at trial as the driver.

Deputy Bravo then drove behind the Sebring, turned on her lights and siren, and attempted to make a traffic stop. Defendant decreased his speed, and Deputy Bravo believed he was going to stop. When defendant did not stop, Deputy Bravo told him twice on her loud speaker to pull over. Defendant looked in his rearview mirror and abruptly sped away. As he sped away, defendant crossed the double yellow lines, a Vehicle Code violation.

Deputy Bravo pursued defendant. During the pursuit, defendant exceeded the speed limit, drove on the wrong side of the road, and failed to stop at several stop signs, all Vehicle Code violations. Exceeding the speed limit and driving on the wrong side of the road are violations that are assigned traffic points. Deputy Bravo pursued defendant for 2.3 miles and then lost sight of him. Deputy Bravo terminated the pursuit both because she lost sight of defendant and because the pursuit had become "very dangerous" for the people in the area.

About three or four minutes later, Deputy Bravo again saw the Sebring. The car had collided with a car parked in a driveway. The Sebring's door was open and the engine was running. Defendant was not at the collision site. Two cell phones

and the baseball hat defendant was wearing were on the ground next to the car.

That day, Sarah Holmes, defendant's mother, received a telephone call from a female she assumed was defendant's friend. The female directed Holmes to a location where Holmes went looking for defendant. Holmes went to the location where the Sebring had collided with the parked car. There, Holmes told Deputy Julius Supatyotin that she was looking for her son. Holmes told Deputy Supatyotin that a female contacted her about the presence of her son's vehicle at that location and pointed at the Sebring. Holmes said she was there to pick up the Sebring. Deputy Supatyotin did not release the Sebring to Holmes because it was being held for evidence.

Holmes gave Deputy Supatyotin defendant's full name and birth date. Deputy Supatyotin then obtained defendant's photograph from the Department of Motor Vehicles and showed it to Deputy Bravo. Deputy Bravo identified defendant as the driver who evaded her in the Sebring.

Just prior to trial, Holmes spoke with defendant on the telephone. The conversation was recorded, and the recording was played for the jury at trial. In the conversation, Holmes told defendant that she had received a subpoena to appear at trial and that she was "pleading the Fifth." Defendant responded, "No. Don't even—like I was at home, right? I was at home. You already know that." Defendant said that the car's owner would not be going to court. Defendant then said, "Listen mom. Your credibility is more than what they got." Holmes asked, "So what do I got to say? I'm going to plead the 5th." Defendant responded, "I was over there at your house."

During trial, on the day of but prior to Holmes's testimony, defendant, apparently while in custody, had a telephone conversation with his brother Cory Smith that was recorded and also played for the jury. In the conversation, defendant said to Smith, "Mama is just the main witness. She's the main [unintelligible] because she went down there and said that—you know what I'm saying—that the detective—but I but that don't make me driving the car. You know what I'm saying. Someone called mama and told her I think your son was down here. You know what I'm saying or in the car. But that don't mean—she's doing what a mother is supposed to be doing. Come down here and look. You feel me?" Smith responded, "Yeah." Defendant said, "You know what I'm saying? And you know already that mama saying when she seen me in the car she seen me with [unintelligible]—I was with Baby Crease, you feel me?" Smith responded, "So mama know already, though?" Defendant said, "No—that's why I'm talking to you." Smith responded, "I'm about to call her right now and tell her so she get crossed up." Defendant responded, "Alright."

In a second telephone conversation on the same day, also prior to Holmes's testimony, defendant spoke with Smith and his other brother Tamar Hill. That conversation was also recorded and played for the jury. In that conversation, defendant asked, "Did you talk to mama?" Smith responded, "Hey mama said you want her to go on the stand and say what she's supposed to say or say she plead the 5th." Defendant said, "Say what she's supposed to say." One of defendant's brothers[2] said, "Okay. You told her to plead the 5th." Defendant said, "Say what she's supposed to

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[2] The transcript of the telephone conversation does not identify which brother was speaking.

say." Smith said, "I told her she can't—" Defendant said, "Yeah yeah—keep it 100. You feel me? Because she didn't say nothing. She just being a mama. Somebody called her, you feel me? That doesn't mean I was in the car." Later, after Hill said that Holmes had been told to "come up there at 2 o'clock," Smith said, "Call her cause I don't want mama pleading the 5th so basically tell her—like this—Poo, see you're fucking up because you're telling mama to plead the 5th and then you tell her to say what she's going to have to say what happened." Defendant responded, "No. Yeah. But she didn't say nothing wrong so. She ain't got to plead the 5th. You feel me?" Smith said, "I told her earlier. Poo said plead the 5th." Defendant said, "Cause Corey [*sic*]—she already made a statement to the detective when he came to her house. The DA detective. You feel me? Hello?" Smith responded, "Yeah I heard you."

The jury ultimately convicted defendant on all counts.

B. Defendant's Sentence

At the sentencing hearing, the trial court noted that defendant faced a maximum term of eight years in state prison for defendant's section 2800.2 flight conviction. The trial court then selected the three-year upper term for that conviction, which it doubled to six years under the Three Strikes law, and struck the two one-year Penal Code section 667.5, subdivision (b) enhancements.

When imposing sentence, the trial court noted that, in terms of criminal history, defendant had some "pretty serious

priors, strike prior, from '97, 2006."[3] The trial court also explained why it chose to impose the six-year term of imprisonment, stating: "You had a real chance of getting a hung jury or a not guilty at trial, but you made the very stupid mistake of getting on the telephone calling your momma trying to talk to your brothers to try to manipulate the testimony, and that's distressing to a bench officer when you try to manipulate witnesses to your benefit. . . . [¶]-[¶] So that's why I'm giving you the six years. You tried to manipulate the system and that cannot be tolerated."

DISCUSSION

Defendant argues that the trial court abused its sentencing discretion because it "did not consider imposing a misdemeanor as one of its sentencing alternatives" for defendant's section 2800.2 flight conviction.[4] We disagree.

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3 At the outset of the hearing, the trial court also indicated to defendant that it was familiar with defendant's past, stating: "[Y]ou've been to prison, jail, so many times . . . you got convicted of 2800.2 [felony evading] in 2002."

4 Section 2800.2 provides that a violation "shall be punished by imprisonment in the state prison, or by confinement in the county jail for not less than six months nor more than one year." (§ 2800.2, subd. (a).) Because section 2800.2 provides for punishment as either a felony or misdemeanor, it is known as a "wobbler," which means a violation will be deemed a felony unless charged as a misdemeanor by the People or reduced to a misdemeanor by the sentencing court under Penal Code section 17, subdivision (b). (*People v. Statum* (2002) 28 Cal.4th 682, 685.)

"Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations] Defendants are entitled to 'sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court,' and a court that is unaware of its discretionary authority cannot exercise its informed discretion. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8 [193 Cal.Rptr. 882, 667 P.2d 686].) [¶] Remand for resentencing is not required, however, if the record demonstrates the trial court was aware of its sentencing discretion. ([*Ibid.*]; *People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1523 [56 Cal.Rptr.2d 749].) Further, remand is unnecessary if the record is silent concerning whether the trial court misunderstood its sentencing discretion. Error may not be presumed from a silent record. (*People v. White Eagle, supra,* 48 Cal.App.4th at p. 1523.) '"[A] trial court is presumed to have been aware of and followed the applicable law." [Citation].'" (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228-1229.)

The record reflects that the trial court imposed a six-year prison sentence that fell well within its broad discretion. The trial court noted that defendant had been to prison or jail "so many times" previously, that defendant sustained a conviction in 2002 for the exact same offense of section 2800.2 flight from an officer, and that defendant also had some "pretty serious priors" that qualified as strikes. Moreover, the trial court explained it found "distressing" defendant's attempt to manipulate witness testimony at trial and made clear it chose a sentence to deliver the message that any such efforts to manipulate the system

"cannot be tolerated." Indeed, defendant does not contest on appeal that the trial court's imposition of a six-year prison sentence was well-justified for these reasons.

Instead, from a silent record, defendant argues that we should conclude the trial court was not aware that it had discretion to sentence defendant's section 2800.2 flight conviction as a misdemeanor. The law is clear, however, that where, as here, the record is silent as to whether the trial court was aware it could impose a misdemeanor sentence, we shall not presume error and will affirm the sentence. (See *People v. Brown*, *supra,* 147 Cal.App.4th at p. 1229; *People v. White Eagle, supra,* 48 Cal.App.4th at p. 1523.)

In so doing, we reject defendant's suggestion that a prior statement the trial court made at trial concerning jury instructions casts any doubt upon the sentence it later imposed. At trial, before the parties gave closing arguments, the trial court asked: "The defense is requesting a misdemeanor evading [instruction]?" When defense counsel responded "Yes," the trial court stated: "I'll deny that, the reason being is because the difference between the felony and the misdemeanor is the points and/or the property damage. So that's two different bases." From this, defendant contends we must conclude the trial court misunderstood its sentencing discretion with respect to section 2800.2. Specifically, defendant argues as follows: "Nothing on the face of the statute and nothing implied in its terms supports a conclusion that the difference between a felony and a misdemeanor is, as the court put it, 'the points and/or the property damage.' . . . There is only one crime defined, so the distinction between the felony and misdemeanor versions can only be one of degree. . . . The misdemeanor driving must

demonstrate a willful or wanton disregard for the safety of persons or property, just as the felony driving must." Therefore, because the trial court supposedly misunderstood the difference between a misdemeanor and a felony under section 2800.2, defendant argues the trial court also must have misunderstood it could impose a misdemeanor sentence for defendant's section 2800.2 conviction.

Defendant's argument misconstrues the meaning of the trial court's statement at trial. Defendant was charged with flight from a police officer in violation of section 2800.2. After the close of evidence, the defense sought a jury instruction on the lesser included offense of misdemeanor flight, in violation of section 2800.1. (See *People v. Springfield* (1993) 13 Cal.App.4th 1674, 1679-1680 [noting that misdemeanor flight under section 2800.1 is a lesser included offense of felony flight under section 2800.2].) The trial court found such an instruction unwarranted, stating that what distinguishes a section 2800.1 misdemeanor from a section 2800.2 felony are "points" and/or "property damage." The court's statement was both legally and factually correct. As a legal matter, a defendant who commits misdemeanor flight from a police officer in violation of section 2800.1 is guilty of a felony under section 2800.2 if he does so by driving in a "willful or wanton disregard for the safety of persons or property." (§ 2800.2, subd. (a).) Such "willful and wanton disregard" may be proven by showing that during flight the defendant committed "three or more traffic violations that are assigned a traffic violation point" or that "damage to property occur[red]." (§ 2800.2, subd. (b).) As a factual matter, there is no dispute that at trial the People adduced evidence that defendant crossed the double yellow lines, exceeded the speed limit, drove

on the wrong side of the street, and failed to stop at several stop signs—all traffic violations. Moreover, defendant's car was finally found after it had collided with a parked car.

More to the point, the trial court's true statement regarding the difference between a section 2800.1 misdemeanor and a section 2800.2 felony has no relation to a trial court's discretion to sentence a violation of section 2800.2 as a misdemeanor. We do not ascribe to the trial court's statement the meaning defendant advances here, and we do not conclude that it reflects any misunderstanding by the trial court of its sentencing discretion. Accordingly, we hold the trial court did not abuse its discretion when sentencing defendant.

DISPOSITION

The judgment is affirmed.

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KIN, J.*

We concur:

TURNER, P. J.

KRIEGLER, J.

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* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.