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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUDY L. SANDERS,

Defendant and Appellant.

B239250

(Los Angeles County
Super. Ct. No. KA096048)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Wade D. Olson, Temporary Judge. Reversed and remanded with directions.

James Koester, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to stipulation, a felony complaint dated November 10, 2011 served as an information charging Judy L. Sanders with one count of grand theft of an automobile (Pen. Code, § 487, subd. (d)(1)¹) and specially alleging that she had a prior felony conviction for violation of section 245, subdivision (a)(1), that qualified as a strike under the “Three Strikes” law. On November 14, Sanders pleaded no contest to the grand theft charge and admitted that she had a prior strike conviction. In obtaining the plea and admission, the prosecutor informed Sanders, “As a consequence of your plea you’ll be sentenced to 32 months in state prison if the strike prior against you can be proven. If it cannot, then you’ll be sentenced to 16 months in county jail.” The trial court confirmed that Sanders would receive a “maximum [sentence] of 16 months if the strike is not any good.” The court accepted Sanders’s plea and admission, finding the prior strike conviction to be true “at this time,” and continued the matter to December 8 for sentencing so that the prosecutor could “check [Sanders’s] prior.” The court noted that by December 8 the People “should have your strike and we can do the sentencing.” The Felony Advisement of Rights, Waiver and Plea Form indicates, “If the strike allegation is true, [Sanders] will receive 32 months prison; if not true [Sanders] to receive 16 months prison at 50%.”

On December 8, the trial court stated, “This was a disposition where you were going to receive 32 months if the strike was valid and 16 months if it was not. Your strike turns out to be valid. So you’re looking at your 32-month sentence now.” After denying a motion by Sanders to withdraw her plea, the court sentenced Sanders to a state prison term of 32 months, consisting of the low term of 16 months for the grand theft charge, doubled pursuant to the Three Strikes law.

Sanders filed a notice of appeal, representing that her appeal challenges the validity of the plea or admission and is based on the sentence or matters occurring after the plea. She requested a certificate of probable cause, stating, “I was sentenced under a non valid strike and should have received fifty percent and I never was informed of

¹ Statutory references are to the Penal Code.

another strike pertaining to my case. My attorney deliberately misrepresented me to get the no contest plea in order to get a[n] unreasonable sentence[. My strike from 1999 is not valid.” The trial court denied Sanders’s request for a certificate of probable cause.²

According to Sanders, although some convictions under section 245, subdivision (a)(1), constitute strikes, such as when the defendant uses a deadly weapon in committing the offense, the crime is not a strike when committed by means of force likely to produce great bodily injury. Sanders contends that no admissible evidence supports the determination that her prior conviction under section 245, subdivision (a)(1), is a strike. She requests that we vacate the true finding on the prior strike allegation and remand the matter for the People to prove whether her prior conviction constitutes a strike.

As Sanders points out, the section 245, subdivision (a)(1), conviction may be a strike, for example, if she personally inflicted great bodily injury on the victim (see § 1192.7, subd. (c)(8)) or if she used a deadly weapon in committing the offense (see § 1192.7, subd. (c)(23)). But an assault under section 245, subdivision (a)(1), is not automatically a strike, such as when committed merely by means of force likely to produce great bodily injury. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065 [assault with a deadly weapon and assault in which the defendant personally inflicts great bodily injury are serious felonies, but “assault merely by *means likely to produce* [great bodily injury], without the additional element of personal infliction, is not included in the list of serious felonies” and thus “a conviction under the deadly weapon prong of section 245(a)(1), is a serious felony, but a conviction under the [likely to produce great

² The People moved to dismiss the appeal based on the trial court’s denial of Sanders’s request for a certificate of probable cause. Sanders opposed the motion on the ground that her appeal raises only sentencing matters occurring after the plea and thus no certificate of probable cause is necessary. We denied the motion to dismiss. Although the People reiterate in their brief that the appeal should be dismissed for failure to obtain a certificate of probable cause, they present no further argument on the issue that warrants a change to our denial of the motion to dismiss.

bodily injury] prong is not”].)³ Although the trial court at the sentencing hearing stated that Sanders’s prior strike conviction “turns out to be valid,” no admissible evidence supports that determination. The People introduced no evidence at the sentencing hearing to prove the section 245, subdivision (a)(1), offense constitutes a strike, and the record contains no admissible evidence establishing a strike. (*Ibid.* [prosecution’s burden to prove each element of a sentence enhancement, including a prior strike allegation, beyond a reasonable doubt].)

The People contend that Sanders’s admission of a prior strike conviction in connection with her plea is evidence that her section 245, subdivision (a)(1), offense is a strike. That admission, however, expressly was conditioned on the People’s proof at the sentencing hearing that the offense constitutes a strike. It, therefore, cannot serve as evidence of a strike. The People also rely on notations in the probation report in this matter that Sanders’s criminal history includes “two prior felony convictions, one for a serious offense,” and that she has a conviction for “ADW W/O FIREARM/GBI” to claim that the section 245, subdivision (a)(1), offense involved a deadly weapon and thus constitutes a strike. But the probation report in this matter is not part of the record of the section 245, subdivision (a)(1), conviction to establish the offense qualifies as a strike. (See *People v. Delgado*, *supra*, 43 Cal.4th at p. 1065 [when “the mere fact that a prior conviction occurred under a specified statute does not prove the serious felony allegation, otherwise admissible evidence from the entire record of the conviction may be examined to resolve the issue”]; *People v. Monge* (1997) 16 Cal.4th 826, 838-839 [prosecution must prove “factual point relating to the prior crime” based on “evidence from the *record* of the prior conviction”].)

Absent evidence that the section 245, subdivision (a)(1), offense constitutes a strike, we vacate the true finding on the strike allegation. (See *People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262 [least adjudicated elements of alleged prior conviction control absent proof by the People of a qualifying strike under § 245, subd. (a)(1)]; see

³ The crime of assault by means of force likely to produce great bodily injury is now identified in section 245, subdivision (a)(4). (See Stats. 2011, c. 183 (A.B. 1026), § 1.)

also *People v. Miles* (2008) 43 Cal.4th 1074, 1083 [“if the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense”; “if the serious felony nature of the prior conviction depends upon the particular conduct that gave rise to the conviction, the record is insufficient to establish that a serious felony conviction occurred”].) We remand the matter for a retrial on the strike allegation. (*People v. Monge, supra*, 16 Cal.4th at p. 839 [“prior conviction trial merely determines a question of the defendant’s continuing status, irrespective of the present offense, and the prosecution may reallege and retry that status in as many successive cases as it is relevant”].)

DISPOSITION

The judgment is reversed, and the matter is remanded to permit the People an opportunity to prove that Sanders’s prior conviction under section 245, subdivision (a)(1), constitutes a strike. If the People exercise that opportunity, and the trial court finds the strike allegation true, the 32-month state prison term shall be reinstated. If the court finds the strike allegation not true, or if the People elect not to proceed, Sanders shall be sentenced to 16 months in accordance with her plea.

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ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.