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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD ERNIE MONTOYA,

Defendant and Appellant.

B232993

(Los Angeles County
Super. Ct. No. KA090168)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Bruce F. Marrs, Judge. Modified and, as modified, affirmed with directions.

Linn Davis, 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, Jaime L. Fuster and Baine P.
Kerr, Deputy Attorneys General, for Plaintiff and Respondent.

Edward Ernie Montoya appeals from the judgment entered following his conviction by jury of second degree robbery (Pen. Code, § 211) with personal firearm use (former Pen. Code, § 12022.53, subd. (b)), and with court findings he suffered two prior felony convictions (Pen. Code, § 667, subd. (d)), two prior serious felony convictions (Pen. Code, § 667, subd. (a), and two prior felony convictions for which he served separate prison terms (Pen. Code, § 667.5, subd. (b)). The court sentenced appellant to prison for 47 years to life. We modify the judgment and, as modified, affirm it with directions.

FACTUAL SUMMARY¹

The information alleged appellant suffered two Penal Code section 667, subdivision (a) prior serious felony convictions based on two 1998 convictions in case No. KA040360, one for first degree burglary (Pen. Code, 459), and the other for dissuading a witness (Pen. Code, § 136.1, subd. (c)(1)). The information also alleged appellant suffered two prior convictions pursuant to “Penal Code section 667.5, [subdivision] (b)” based on his 1998 conviction in case No. KA040360 for first degree burglary, and his 2007 conviction in case No. KA079867 for driving a vehicle without the owner’s consent, a violation of Vehicle Code section 10851, subdivision (a).

In the present case, during the court trial on the prior conviction allegations (priors trial), documentary evidence was presented which established the following. In 1998, appellant committed first degree burglary (Pen. Code, § 459) and dissuading a witness (Pen. Code, § 136.1, subd. (c)(1)), for the benefit of a criminal street gang (former Pen. Code, § 186.22, subd. (b)(1)). In case No. KA040360, a jury, on November 20, 1998, convicted appellant of those offenses and, on December 15, 1998, the court in that case imposed concurrent sentences for those offenses. Moreover, in 2007, appellant committed the offense of driving a vehicle without the owner’s consent, a violation of Vehicle Code section 10851, subdivision (a). On September 28, 2007, in case No. KA079867, appellant pled guilty to that offense and the court sentenced him.

¹ The facts of the present 2010 offense are not pertinent to this appeal.

At the conclusion of the prior trial in the present case, the court found true the “three prior convictions” pursuant to, inter alia, “the prior allegations, and the one-year prior allegation” under “667.5 and 667(a)(1).” The court sentenced appellant to prison for 47 years to life. This consisted of 25 years to life pursuant to the Three Strikes law for the present offense, plus ten years for the former Penal Code section 12022.53, subdivision (b) firearm enhancement, with two consecutive five-year enhancements pursuant to Penal Code section 667, subdivision (a), and two consecutive one-year enhancements pursuant to Penal Code section 667.5, subdivision (b).

ISSUES

Appellant claims the trial court erred by (1) imposing more than one Penal Code section 667, subdivision (a), enhancement and (2) imposing more than one Penal Code section 667.5, subdivision (b), enhancement.

DISCUSSION

1. The Trial Court Erred by Imposing More Than One Penal Code Section 667, Subdivision (a), Enhancement.

Appellant claims the trial court erred by imposing more than one Penal Code section 667, subdivision (a), enhancement. We agree. The requirement in Penal Code section 667, subdivision (a) that predicate charges must have been “brought and tried separately” requires that the underlying proceedings must have been formally distinct from filing to adjudication of guilt. (*In re Harris* (1989) 49 Cal.3d 131, 136.)

The record in the present case adequately demonstrates the two charges in case No. KA040360 were not “brought . . . separately” (*In re Harris, supra*, 49 Cal.3d. at p. 136) because they were alleged in a single information under that case number. They were not “tried separately” (*ibid.*) because a jury convicted him of both charges in case No. KA040360 on November 20, 1998. Respondent concedes the prior convictions in case No. KA040360 were not based on charges “brought and tried separately.” We will accept the concession and strike the Penal Code section 667, subdivision (a) enhancement

which was based on appellant's 1998 conviction in case No. KA040360 for first degree burglary (Pen. Code, § 459).

2. The Trial Court Properly Imposed Two Penal Code Section 667.5, Subdivision (b) Enhancements.

Appellant claims the trial court erred by imposing more than one Penal Code section 667.5, subdivision (b), enhancement. Appellant argues, "In the present case, the trial court imposed a 5-year sentence under section 667.5 [sic], subdivision (a)(1) be [sic] the 1998 prior conviction for violation of section 136.1(c)(2), and a 1-year [sic] enhancement for the same prior under section 667.5, subdivision (b). [¶] Pursuant to [People v.] Jones [(1993)] 5 Cal.4th [1142,] 1133 [sic] the case should be remanded to the trial court with directions to strike the one-year enhancement for his prior conviction for violation of section 136.1(c)(2), which was already enhanced under section 667.5 [sic], subdivision (a)(1)." We reject his claim.

First, notwithstanding appellant's argument to the contrary, Penal Code section 667.5, subdivision (a), was not involved in any component of appellant's sentence, and the court did not impose an enhancement pursuant to that section.

Second, fairly read, the record reflects the court imposed two Penal Code section 667, subdivision (a) enhancements for the two 1998 convictions he suffered in case No. KA040360, i.e., his convictions for first degree burglary (Pen. Code, § 459) and dissuading a witness (Pen. Code, § 136.1, subd. (c)(1)). The record also reflects the court imposed two Penal Code section 667.5, subdivision (b) enhancements, one for his 1998 first degree burglary conviction in case No. KA040360, and the other for his 2007 conviction for a violation of Vehicle Code section 10851, subdivision (a) in case No. KA079867. Notwithstanding appellant's argument to the contrary, the court did not impose a Penal Code section 667.5, subdivision (b) enhancement based on appellant's conviction for dissuading a witness (Pen. Code, § 136.1, subd. (c)(1)).

Third, a court properly may impose a Penal Code section 667, subdivision (a) enhancement based on a qualifying prior conviction and may impose a Penal Code

section 667.5, subdivision (b) enhancement based on another qualifying prior conviction even though the defendant served concurrently his sentences on the two prior convictions. (*People v. Irvin* (1991) 230 Cal.App.3d 180, 189.) Accordingly, the court was entitled to impose a five-year Penal Code section 667, subdivision (a) enhancement based on appellant's 1998 conviction in case No. KA040360 for dissuading a witness, and a one-year Penal Code section 667.5, subdivision (b) enhancement based on appellant's 1998 conviction in case No. KA040360 for first degree burglary. This is true even though the court, in case No. KA040360, imposed concurrent sentences on those two convictions.

There is no dispute appellant served a separate prison term for his 2007 conviction for a violation of Vehicle Code section 10851, subdivision (a) in case No. KA079867; therefore, the court was entitled to impose another Penal Code section 667.5, subdivision (b) enhancement based on that conviction.

DISPOSITION

The judgment is modified by striking the Penal Code section 667, subdivision (a), enhancement which was based on appellant's 1998 conviction in case No. KA040360 for first degree burglary (Pen. Code, § 459) and, as modified, the judgment is affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment reflecting the above modification.

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KITCHING, J.

We concur:

CROSKEY, Acting, P. J.

ALDRICH, J.