Filed 3/2/18 P. v. Mompeller CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY ENRIQUE MOMPELLER, Defendant and Appellant.	B278995 (Los Angeles County Super. Ct. No. BA445485)

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie A. Swain, Judge. Affirmed.

Christine M. Aros, 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, Marc A. Kohm and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

Anthony Enrique Mompeller appeals from the judgment entered following a jury trial that resulted in his conviction of driving under the influence (DUI) of alcohol, and driving with a 0.08 percent blood alcohol level. The jury also found true allegations that Mompeller had previously been convicted of a DUI offense, and willfully refused to submit to a chemical test. The trial court sentenced him to a total term of six years in state prison. On appeal, Mompeller contends the trial court erred by denying his request to bifurcate the trial on his prior DUI conviction, and by informing the jury that he was charged with a prior DUI allegation. Mompeller also contends he received ineffective assistance of counsel. We find no prejudicial error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[1]

The People's Evidence

On April 2, 2016, at approximately 10:30 p.m., Jennifer C. was at the Sinclair gas station on the corner of Ditman Avenue and Dennison Street in Los Angeles. She was sitting near the window in the backseat of her family's vehicle when she noticed a black Acura on the other side of the gas pump playing loud music with the doors open. Jennifer C. saw two males sitting inside the Acura, one at the driver's seat and the other at the front passenger seat, both drinking tall cans of beer. The Acura then began moving forward with the passenger door still open.

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[1] Mompeller was also charged, but not convicted of, driving or taking a vehicle without consent. (Veh. Code, § 10851; count 1.) The facts pertinent to count 1 are not relevant to this appeal, and we need not recite them in this opinion.

Jennifer C. called 911 to report a "drunk driver" and provided the location of the gas station and license plate of the Acura.

1. The Investigation

At approximately 10:35 p.m., California Highway Patrol Officers Mark Williams and Jose Guerra received a dispatch call about two males drinking in a black Acura at the Sinclair gas station. When they approached the location, they saw a black Acura, which matched the license plate description from the dispatch call, parked at a gas pump with the driver's door open. Officer Williams observed two males sitting inside the vehicle. As he pulled his vehicle behind the Acura, the driver shut his door, started the ignition, and headed towards the freeway.

Officer Williams followed the Acura onto the northbound 5 onramp. He noticed the vehicle was "weaving from side to side" within its lane and onto the shoulder lane next to it. After about half a mile, Officer Williams turned on his lights and stopped the vehicle. He approached the driver's side window, while Officer Guerra made a "passenger side approach."[2]

Officer Williams advised Mompeller the reason for the stop, and requested his license, registration, and insurance, which he was unable to provide. Mompeller instead gave the officer his California identification card. While speaking with Mompeller, Officer Williams smelled "a very strong odor of alcohol emitting from the vehicle" and noticed Mompeller's eyes were "red and

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[2] Once the vehicle had been stopped, Officer Guerra observed the passenger of the Acura throw a beer can out the driver's side window. Because the passenger did not have any outstanding warrants, Officer Guerra allowed the passenger to leave the location.

watery." At that point, he decided to conduct a DUI investigation.

Officer Williams asked Mompeller if he had anything to drink that night, to which he responded he had one 20 ounce can of beer between 9:50 p.m. and 10:05 p.m. at a friend's house. Officer Williams then asked Mompeller to step out of the vehicle so he could conduct field sobriety tests.

2. The Field Sobriety Tests

Officer Williams first administered the horizontal gaze nystagmus test, which required Mompeller to follow the tip of the officer's finger with his eyes only as it moved in front of his face. Mompeller's eyes did not track the officer's finger smoothly, but instead made jerking motions, which was consistent with someone being under the influence of alcohol.

Next, Officer Williams administered the one leg stand test, which required Mompeller to keep his hands by his side as he raised his foot parallel to the ground for several seconds. During the test, Mompeller swayed side to side, his left hand came up to keep his balance, and he continued to put his foot down when it was supposed to be raised. Mompeller's performance on the test was consistent with someone being under the influence of alcohol.

Officer Williams then asked Mompeller to perform the walk and turn test, which required Mompeller to walk heal to toe in a straight line for nine steps and then turn around and walk back. On the third or fourth step, Mompeller walked off the line, and by the ninth step, he stopped the test on his own, and never turned around to walk back. Mompeller's performance on the test was consistent with someone being under the influence of alcohol.

The last test Officer Williams administered was the modified Romberg test, which required Mompeller to tilt his head back and close his eyes for 30 seconds, and then open his eyes and tilt his head forward until he was told to stop. For this test, Mompeller closed his eyes and began to sway left and right; when Officer Williams instructed him to stop after 30 seconds, he continued to close his eyes until he said "stop" after 45 seconds, at which point he ended the test. Mompeller's performance on the test was consistent with someone being under the influence of alcohol.

3. The Preliminary Alcohol Screening Test

Officer Williams then read his "202 form"[3] to Mompeller and requested he take a preliminary alcohol screening (PAS) test, to which Mompeller agreed. A PAS device is generally accepted in the law enforcement community as an "accurate and reliable device" for measuring alcohol concentrate in an individual's breath sample. The individual is required to take a deep breath and blow into a mouthpiece which captures a sample of breath. At approximately 11:13 p.m., Mompeller blew into the PAS device, which returned a blood alcohol reading of 0.106. At approximately 11:16 p.m., Mompeller again blew into the PAS device, which returned a blood alcohol reading of 0.13. Both results were over the legal limit of 0.08. Because the difference

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[3] The "202 form" provides: "I'm requesting that you take a preliminary alcohol screening test to further assist in determining whether you are under the influence of alcohol. You may refuse to take this test; however, this is not an implied consent test and if arrested, you would be required to give a sample of your blood or breath for the purpose of determining the actual alcohol and drug content of your blood."

in the readings was greater than 0.02, Officer Williams requested a third sample; however, Mompeller refused to blow into the PAS device a third time.[4]

4. The Arrest

Based on Mompeller's driving, his physical appearance and demeanor, his performance on the field sobriety tests, and the results of the PAS device, Officer Williams formed the opinion that Mompeller had been driving under the influence of alcohol and arrested him.

Following Mompeller's arrest, Officer Williams advised Mompeller he was required by state law to submit to a chemical test to determine the alcohol content of his blood. He further advised Mompeller, "Refusal or failure to complete a test may be used against you in court. Refusal or failure to complete a test will also result in a fine and imprisonment if this arrest results in a conviction of driving under the influence." Mompeller refused to take the test.

The Defense Evidence

Mompeller called one witness, Mike Rodriguez, who testified he saw Mompeller drink a tall can of beer around 10:00 p.m. before driving off in a vehicle.

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[4] Officer Williams testified it was "standard CHP procedure" to obtain a third sample if "there's a gap of 0.02 difference between" the two readings in order to obtain "the most accurate reading or results consistent."

The Verdict and Sentencing

The jury convicted Mompeller of driving under the influence of alcohol (Veh. Code, § 23152, subd. (a); count 2),[5] and driving with a 0.08 percent blood alcohol level (§ 23152, subd. (b); count 3). The jury also found true allegations that Mompeller had previously been convicted of a DUI offense (§ 23550.5, subd. (a); counts 2 & 3), and willfully refused to submit to a chemical test (§ 23612).

Following a bifurcated court trial on Mompeller's prior prison terms, the trial court sentenced Mompeller to a total term of six years in state prison, comprised of the high term of three years on count 3, and an additional three years under Penal Code section 667.5, subdivision (b) for his prior convictions. The trial court imposed and stayed sentencing on count 2 under Penal Code section 654.

Mompeller filed a timely notice of appeal.

DISCUSSION

There Was No Prejudicial Error With Regard to the Prior Felony DUI Conviction

1. Introduction

At various stages of trial, the jury learned that Mompeller was charged with the allegation that he had previously been convicted of a DUI, and also that he had been convicted of that prior. First, during voir dire, while reading the charges to the jury panel, the trial court stated: "And count 3 charges that on the same date and time the defendant was driving with a blood alcohol content of 0.08 percent or higher within 10 years after he

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[5] All further statutory references are to the Vehicle Code unless otherwise stated.

had a previous felony DUI." Second, at the conclusion of the People's case in chief, the People read the parties' stipulation to the jury, which stated, "The defendant, Anthony Mompeller, admits that on August 25, 2015, he was convicted of the following felony offense in Los Angeles Superior Court: In case number BA432917, driving under the influence of a drug within 10 years of three other DUI offenses, in violation of Vehicle Code section 23152 subsection (e)." Third, during closing arguments, the People reminded the jury of the stipulation, stating, "And the stipulation is that the defendant admits that he had been convicted in the past, last year in August of driving under the influence of a drug within 10 years of three other DUI offenses."

Mompeller lays the blame for the error on both the trial court and his counsel. He claims the trial court erred in failing to bifurcate the trial. He also argues that his counsel was ineffective for failing to object when the trial court informed the jury that his DUI charge included the allegation that he had previously been convicted of the same offense within 10 years, when the People read the stipulation to the prior in front of the jury, and when the People reiterated the stipulation in closing argument.

The People do not dispute that the prior DUI conviction alleged pursuant to section 23550.5, subdivision (a), is a sentencing enhancement, not an element of the underlying offense, and that under the progeny of *People v. Bouzas* (1991) 53 Cal.3d 467 (*Bouzas*), Mompeller should have been allowed to stipulate to the prior outside the presence of the jury and thus preclude the jury from learning of it. They argue, however, that Mompeller forfeited any objection to the trial court's failure to bifurcate because he failed to press the court for a final ruling on

the issue. Further, the People contend the error in failing to bifurcate was harmless, which also precludes reversal for the claim of ineffective assistance of counsel.

We find it was error, every step of the way, for the jury to have learned about the prior DUI allegation, but that it was harmless.

2. Background

Prior to jury selection, the People sought to introduce evidence of Mompeller's three prior convictions for driving a stolen vehicle pursuant to Evidence Code section 1101, subdivision (b), one of which also included a prior DUI conviction, on the grounds that the underlying conduct of Mompeller's prior convictions was relevant to show intent. Defense counsel opposed the motion, and also made an oral motion to bifurcate the trial on Mompeller's prior DUI conviction.[6] The trial court stated: "It does appear that it's within the court's discretion to bifurcate the trial on the DUI prior. I believe that since the people are seeking to introduce evidence under [Evidence Code section] 1101(b) of the prior convictions for [Vehicle Code section] 10851 are -- or not the convictions, but the underlying conduct. If there's not a stipulation to that, I would -- it would likely include testimony about the defendant's inebriation and so, I think for a variety of reasons related to judicial economy and having the jurors remain to hear evidence in a separate trial, that I will deny the motion to bifurcate the prior DUI."

After the jury had been selected but prior to opening statements, the People notified the trial court that they would not be submitting any proof of Mompeller's underlying conduct

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[6] Mompeller's initial motion to bifurcate the trial was made off the record.

pursuant to Evidence Code section 1101, subdivision (b). Although the People argued the convictions themselves should still be admissible, the trial court disagreed, explaining, "I believe that the fact of the conviction is not in and of itself admissible under [Evidence Code section] 1101(b). I think you have to prove the underlying conduct."[7]

Defense counsel then renewed Mompeller's motion to bifurcate, and the following colloquy ensued:

> "[Defense counsel]: Just to understand, the defense initially moved to bifurcate those priors and are ready to admit them so they are not heard in front of the jury, apart from the fact that your honor had previously ruled that the priors could come in for [Evidence Code section] 1101(b). So, if they're not coming in under [Evidence Code section] 1101(b), then we would like to move again [to] bifurcate them.
> [Court]: Well, that would be the only reason they were coming in.
> [Defense counsel]: Yes.
> [Court]: Are you saying that you would stipulate to them as oppose to having the People prove them up?
> [Defense counsel]: No. I just wanted to make it clear. When he said 'prove them up,' I was meaning prove them up was for priors and not for [Evidence Code section] 1101(b).

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[7] The trial court initially took the matter under submission; however, in a separate proceeding, after hearing further argument from the People, the trial court held, "So, unless you can call witnesses on those prior acts, I'm going to have to move that the convictions alone are not admissible to prove the prior conduct under [Evidence Code section] 1101(b) . . . ."

[Court]: No. We're not doing a priors trial --
[Defense counsel]: Okay.
[Court]: Okay? In terms of [Penal Code section] 667(b), okay, yes. No. We're not doing that. I'll bifurcate the priors for that purpose --.
[Defense counsel]: Okay."

3. Analysis

The trial court's final ruling on bifurcation—which included both a "yes" and a "no" and referred to proving up three different types of priors (under Evidence Code section 1101, subdivision (b), under Penal Code section 667, subdivision (b) and under section 23550.5, subdivision (a)) — is not a model of clarity. However, as we read the record, the trial court made three separate and final rulings: it (1) denied the People's request to admit the priors absent proof of Mompeller's underlying conduct, (2) granted Mompeller's request to bifurcate the prison priors, and (3) denied Mompeller's request to bifurcate the DUI allegation. The latter ruling was made under the mistaken impression that the prior DUI allegation could properly be proved as part of the People's case-in-chief. We therefore disagree with the People's contention that the error is forfeited because Mompeller's counsel failed to seek a final ruling on the issue.

The People acknowledge that a steady line of cases following *Bouzas* categorize section 23550.5, subdivision (a), as a sentencing enhancement, and not an element of the underlying offense, citing *People v. Profitt* (2017) 8 Cal.App.5th 1255, 1259, 1269; *People v. Baez* (2008) 167 Cal.App.4th 197, 199; and *People v. Camarillo* (2000) 84 Cal.App.4th 1386, 1392. Under this authority, the People agree that Mompeller had a right to stipulate to the prior and preclude the jury from hearing about it.

We agree and find the trial court erred in failing to bifurcate the trial on this issue.

Given the state of the law, Mompeller is also correct that his trial counsel should have objected when the trial court read the allegation to the jury, when the People entered the stipulation into evidence, and when the People mentioned it in closing argument. By failing to do so, his counsel's performance fell below an objective standard of reasonableness. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.)

So, we are left with the undeniable fact that, on multiple occasions, the jury was improperly educated about the prior DUI conviction. Because these errors all resulted in the same harm, and considering the overwhelming evidence of Mompeller's guilt, we find no prejudice under any harmless error standard of review. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956*)* 46 Cal.2d 818, 836.)

The evidence in support of Mompeller's guilt was crushing. Although the PAS samples taken from Mompeller differed by 0.02, Officer Williams testified that the margin of error for the device was 0.01, establishing that both of his PAS samples still exceeded the legal limit of 0.08.[8] Officer Williams also testified to Mompeller's erratic driving, and that he observed the vehicle "weaving from side to side" on the freeway. He smelled "a very strong" odor of alcohol emanating from the vehicle, and noticed

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[8] Applying the margin of error to Mompeller's PAS samples, his first blow, which returned a blood alcohol reading of 0.106, could have been 0.09, and his second blow, which returned a blood alcohol reading of 0.13, could have been 0.12.

Mompeller's eyes were "red and watery." He also described how Mompeller displayed multiple indicators of impairment on every field sobriety test administered to him. For example, when performing the one leg stand test, Mompeller's gait was unsteady, and he swayed side to side, continuing to put his foot down when it was supposed to be raised. He also performed consistent with someone being under the influence of alcohol on the horizontal gaze nystagmus test, the walk and turn test, and the modified Romberg test.

Further, Mompeller admitted to drinking a can of beer before driving the vehicle, which was confirmed by his sole witness. He was also seen drinking alcohol at the gas station and drove with the passenger door open, causing another patron at the gas station to call 911 because she was concerned about a "drunk driver." Once arrested, Mompeller refused to take a blood or chemical test at the police station, as required by law, which is an indication of his consciousness of guilt that the jury was allowed to consider.[9]

Finally, the trial court emphasized the limited purpose of the admission in evidence of the prior conviction, expressly cautioning the jury to "[c]onsider the evidence presented on this allegation only when deciding whether the defendant was previously convicted of the crime alleged. Do not consider this evidence for any other purpose." We presume the jury understood and followed the trial court's instruction. (*People v.*

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[9] The trial court read CALCRIM No. 2130 to the jury, which provides in pertinent part: "If the defendant refused to submit to such a [chemical] test after a peace officer asked him to do so and explained the test's nature to the defendant, then the defendant's conduct may show that he was aware of his guilt."

Sanchez (2001) 26 Cal.4th 834, 852 ["Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions."].)

Accordingly, we conclude it is not reasonably probable that absent the admission of his prior DUI conviction, Mompeller would have obtained a more favorable verdict. Mompeller's convictions must be affirmed.

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

We Concur:

RUBIN, J.

GRIMES, J.