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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.

IRVING BARAHONA,

Defendant and Appellant.

B280067

(Los Angeles County
Super. Ct. No. PA084062)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hilleri G. Merritt, Judge. Affirmed.

Brad Kaiserman, 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, Susan Sullivan Pithey, Supervising Deputy Attorney General, Heather B.

Arambarri, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant and appellant Irving Barahona guilty in count 1 of attempted willful, deliberate and premeditated murder (Pen. Code, §§ 664, 187, subd. (a)),¹ and found true the allegations that a principal personally used and discharged a firearm (§ 12022.53, subds. (b) & (c)). The jury also found defendant guilty of receiving stolen property in count 3 (§ 496, subd. (a)) and driving or taking a vehicle without consent in count 4 (Veh. Code, § 10851, subd. (a)).²

It was alleged that defendant had served three prior prison terms within the meaning of section 667.5. Defendant waived his right to a jury trial on the allegations during trial on the substantive charges. A sentencing hearing was scheduled approximately a month and a half after the date of conviction. Prior to sentencing, the trial court advised defendant of his right to a court trial on the prior prison term allegations. Defendant waived his right to a court trial and admitted the prior convictions. The trial court failed to advise defendant of his right to remain silent,

¹ All future statutory references are to the Penal Code unless otherwise indicated.

² Defendant was found not guilty of shooting at an inhabited dwelling (§ 246) in count 2.

his right to confront witnesses, or the penal consequences of his admissions of the prior prison terms.

Defendant was sentenced to life in prison in count 1, plus a consecutive term of three years in count 3. The court imposed and stayed sentence in count 4 pursuant to section 654. Defendant received an additional two years in prison for the prior prison term enhancements pursuant to section 667.5.³

Defendant contends that the trial court's failure to advise him of his right to remain silent, his right to confront witnesses, and the penal consequences of admitting the prior convictions requires reversal of the prior conviction findings. We affirm the judgment.

³ Although defendant admitted serving three prior prison terms, the trial court imposed only two one-year sentences, stating that two priors had been admitted. Two of the *convictions*—driving or taking a vehicle without consent (Veh. Code, § 10851, subd. (a)) and vandalism (§ 594)—were suffered on the same date under separate case numbers. The imposition of two, rather than three prior prison terms appears correct, as section 667.5 “requires that, in order to qualify for the enhancement, the prior prison terms must have been served separately.” (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.)

DISCUSSION

Advisement of Constitutional Rights

“[A] defendant seeking to *plead guilty* is denied due process under the federal Constitution unless the plea is voluntary and knowing. ‘Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination. . . . [Citation.] Second, is the right to trial by jury. [Citation.] Third, is the right to confront one’s accusers.’ [Citation.]” (*People v. Mosby* (2004) 33 Cal.4th 353, 359 (*Mosby*).) The United States Supreme Court has held that where a trial court has failed to advise the defendant of these rights, it will not be presumed that his guilty plea was given voluntarily and willingly. (*Boykin v. Alabama* (1969) 395 U.S. 238, 243, fn. 5.)

In *In re Yurko* (1974) 10 Cal.3d 857, 863, the California Supreme Court “adopted as a judicial rule of criminal procedure the requirement that the[se] three [] admonitions must also be given ‘before a court accepts an accused’s admission that he has suffered *prior felony convictions*.’ [Citation.]” (*Mosby, supra*, 33 Cal.4th at p. 360.) A defendant’s right to a factual determination of whether he has suffered a prior conviction is of statutory origin. (*Ibid.*) “When trial is required by statute, [it is assumed] that a defendant’s due process trial rights, at least

under our state Constitution, encompass the rights to remain silent and to confront witnesses. (Cal. Const., art. I, § 15.)” (*Ibid.*) Where, as here, “[a] defendant [has been] advised only of his right to trial, which he waived before admitting the prior conviction . . . we must decide whether, under the totality of the circumstances, [the] defendant’s admission was voluntary and intelligent despite the trial court’s failure to advise [the] defendant of the rights to remain silent and to confront witnesses.” (*Ibid.*) The focus of the inquiry is not “whether the defendant received express rights advisements, and expressly waived them, [but rather] whether the defendant’s admission was intelligent and voluntary because it was given with an understanding of the rights waived.” (*Id.* at p. 361.)

In *Mosby*, the trial court advised the defendant of his right to a jury trial with respect to the truth of his prior conviction after learning that the jury had reached a verdict. The court also advised Mosby that he would be ineligible for probation if the prior conviction allegation was true. (*Mosby, supra*, 33 Cal.4th at p. 357.) Mosby waived his right to jury trial. (*Id.* at pp. 357–358.) After the jury returned a guilty verdict, the court asked if Mosby planned to admit the prior conviction or to be heard on the matter. The court did not advise Mosby of his right to remain silent or his right to confront witnesses. Mosby admitted the prior conviction, and was sentenced to a term of three years eight months in prison. (*Id.* at pp. 358–359.) Mosby contended on appeal that his admission of the prior conviction was invalid

because the trial court's advisements were incomplete. (*Id.* at p. 359.) "The Court of Appeal disagreed[, stating]: 'It would frankly be absurd for this court to find that the defendant's admission of his prior conviction—a prior plea of guilty—was not voluntary and intelligent when he knew he did not have to admit but could have had a jury or court trial, had just participated in a jury trial where he had confronted witnesses and remained silent, and had experience in pleading guilty in the past, namely, the very conviction that he was now admitting.'" (*Ibid.*) The Supreme Court agreed with the Court of Appeal's conclusion and reasoning, adding that "previous experience in the criminal justice system is relevant to a recidivist's "knowledge and sophistication regarding his [legal] rights.'" [Citations.]" (*Id.* at p. 365, fn. omitted.)

Defendant first attempts to distinguish his case from *Mosby* on the basis that he admitted his prior convictions approximately a month and a half after waiving his right to a trial on the allegations. There is no reason to conclude that the passage of weeks was sufficient to expunge defendant's understanding of the criminal justice system and the rights afforded him. Certainly defendant's recent jury trial, and its attendant rights, along with defendant's significant criminal history, support a finding that the admissions were voluntary and intelligent.

Defendant argues that *Mosby* is distinguishable because *Mosby* had been advised that he would not be eligible for probation, whereas in this case defendant was

not advised of the penal consequences of his admissions. The decision in *Mosby* did not turn on this factor, nor does it weigh heavily here. The lack of advisement that the prior prison term allegations would potentially each add a year to defendant's sentence does not render defendant's waiver invalid considering the circumstances of this case.

Unlike advisements on confrontation and the right to remain silent, the obligation to advise a defendant of the penal consequences of admitting his prior convictions is a judicially declared rule of criminal procedure that is not constitutionally mandated, and therefore subject to forfeiture if not raised at or before the time of sentencing. (*People v. Wrice* (1995) 38 Cal.App.4th 767, 770–771.) Defendant had ample opportunity to object. He was put on notice that his sentence could be increased before the sentencing hearing. The probation report listed defendant's prior convictions as an aggravating factor warranting a high base term, and the People's sentencing memorandum, filed prior to sentencing, specifically recommended that the court impose two one-year enhancements for the prior convictions. We agree with the Attorney General that defendant forfeited his contention by failing to timely object. Regardless, even if defendant preserved the issue of the trial court's failure to advise him of the penal consequences of his admissions, we conclude that defendant was on notice of the consequences for the reasons stated above.

We also reject defendant's alternative argument that any forfeiture was the result of counsel's ineffective

assistance. To demonstrate ineffective assistance of counsel, defendant must establish that counsel was deficient and that defendant was prejudiced by the deficiency. (*People v. Vines* (2011) 51 Cal.4th 830, 875.) “““Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.” [Citation.]’ [Citation.]” (*Id.* at p. 876.) “““Prejudice is shown when there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”” [Citation.]” (*Ibid.*)

Defendant primarily relies on the recent Supreme Court decision in *Lee v. United States* (2017) 137 S.Ct. 1958 (*Lee*), to support his argument that counsel was constitutionally ineffective. We are not persuaded. In *Lee*, a lawful permanent resident pleaded guilty to a drug offense after counsel erroneously assured him numerous times that he would not be deported due to the plea and conviction. (*Id.* at pp. 1962–1963.) Counsel was aware that the issue of deportation was “*the* determinative factor” in Lee’s decision. (*Id.* at p. 1967.) In the plea colloquy, the court advised Lee that he could be deported, and asked if that would affect his decision, and if so, how. Lee responded that the possibility of deportation would affect his decision, but stated he did not understand the court’s question about how his decision would be affected. Lee consulted with his attorney, who dismissed the court’s advisement as a “standard warning.” Lee then pleaded guilty. (*Id.* at p. 1968.)

After sentencing, Lee learned that deportation was mandatory in his case because the crime was an aggravated felony under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B). (*Lee, supra*, 137 S.Ct. at p. 1963.) He moved to vacate his conviction and sentence, claiming ineffective assistance of counsel. (*Id.* at pp. 1963–1964.) The District Court denied relief, and the Sixth Circuit Court of Appeals affirmed. (*Id.* at p. 1964.)

On appeal to the Supreme Court, the government conceded that counsel’s performance had been deficient, arguing instead that Lee could not establish prejudice under *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*), in light of the overwhelming evidence of his guilt. (*Lee, supra*, 37 S.Ct. at p. 1964.) The Supreme Court reversed, holding that the proper standard for prejudice was not whether Lee was likely to be successful at trial, but whether “the defendant can show prejudice by demonstrating a ‘reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.’” ([*Hill v. Lockhart* (1985)] 474 U.S. [52,] 59.)” (*Id.* at p. 1965.) The court emphasized that “[s]urmounting *Strickland*’s high bar is never an easy task,” [citation], and the strong societal interest in finality has ‘special force with respect to convictions based on guilty pleas.’ [Citation.] Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney’s deficiencies. Judges should instead look to contemporaneous evidence to substantiate a

defendant's expressed preferences." (*Id.* at p. 1967.) In Lee's case there was "substantial and uncontroverted evidence" that if counsel had not misadvised him, Lee would have insisted on going to trial. (*Id.* at p. 1969.) The record unequivocally showed that "deportation was *the* determinative issue" in Lee's decision. (*Id.* at p. 1967.) The Supreme Court concluded that under "the unusual circumstances of this case, . . . Lee [] adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation." (*Ibid.*)

As defendant acknowledges, *Lee* is "certainly distinguishable" from this case. This is correct—the two cases have little in common. The record in *Lee* demonstrated that defense counsel provided erroneous advice on the immigration consequences of his plea. There is nothing in the appellate record to show that defendant was misadvised by counsel. The defendant in *Lee* affirmatively stated he would not plead if it subjected him to deportation. Nothing in the colloquy contemporaneous with defendant's admission of the prior prison terms suggests he would not admit the allegations if was expressly advised that each prior prison term potentially added one year to what was mandated to be an otherwise lengthy sentence of life in prison. Defendant has failed to establish deficient representation or prejudice under *Strickland*.

DISPOSITION

The judgment is affirmed.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

DUNNING, J.*

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