Filed 1/7/20 P. v. Roman CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JUAN FRANCISCO ROMAN, Defendant and Appellant.	2d Crim. No. B293519 (Super. Ct. No. 17CR01232) (Santa Barbara County)

Juan Francisco Roman appeals his conviction, by jury, of possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1))[1], possession of ammunition by a felon (§ 30305, subd. (a)(1)), possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)(1)), possession of heroin (Health & Saf. Code, § 11350, subd. (a)) and possession of drug paraphernalia, a pipe used to smoke methamphetamine. (Health & Saf. Code, § 11364, subd. (a).) The trial court sentenced appellant, as a second strike

[1] All statutory references are to the Penal Code unless otherwise stated.

offender, to a total term in state prison of 8 years.[2] It also imposed a restitution fine and other fees totaling $3,755.

During a traffic stop initiated by a Santa Barbara County deputy sheriff, appellant consented to a search of the taxicab he was driving. Two deputies searched the car and found the handgun, ammunition, illegal drugs and paraphernalia at issue here. Appellant contends the trial court erred when it denied his motion to suppress these items because the search occurred after the deputy unreasonably prolonged the traffic stop. He contends the paraphernalia should have been suppressed because the sheriff's deputies who searched his taxi denied having found it. Appellant further contends he did not knowingly and voluntarily waive his right to a jury trial on the strike prior, that the trial court erred in imposing an upper term sentence, and that the trial court erred in imposing fines and fees without first assessing his ability to pay. Finally, appellant contends that, under recent amendments to section 667.5, his prior prison terms no longer qualify for the one-year sentence enhancements imposed by the trial court. (Stats. 2019, ch. 590, § 1 (SB 136).) We agree and strike the enhancements. In all other respects, the judgment is affirmed.

Facts

Deputy Jeffrey Owen and his partner, Deputy Michael Reynoso, were patrolling during the early morning hours of February 13, 2017 when Owen saw a taxi driving down the

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[2] The trial court imposed the upper term of three years for possession of a firearm by a felon (§ 29800, subd. (a)(1)), doubled to six years due to appellant's status as a second strike offender. It also imposed two one-year sentence enhancement terms based on appellant's prior prison terms. (§ 667.5, subd. (b).)

street and decided to follow it. As he did, Owen noticed the car's lights go off for a brief period and then come on again. He stopped the taxi for traveling without lights.

When Owen contacted appellant, the driver of the taxi, he found appellant's speech to be rapid, disjointed and lacking in focus. Appellant also seemed "fidgety." Owen, who is trained to recognize when a person is under the influence of a drug, suspected that appellant was under the influence. He obtained appellant's driver's license and conducted a records check, which took no more than five minutes. Owen determined appellant had a valid driver's license, was not on probation and had no outstanding warrants.

Owen returned to the taxi and again asked appellant whether he used drugs or controlled substances. Appellant said he did not. Owen asked to search the car. Appellant mumbled something Owen did not understand, so Owen asked again. This time, appellant "indicated that he was going to give [Owen] permission to search his vehicle." Appellant complied with Owen's instruction to step out of the vehicle. At that point, Owen noticed appellant had a knife in his pocket. Owen asked if he could take possession of the knife and appellant agreed. Appellant also submitted to a search of his person. He stood by Owen's patrol car while Owen searched the taxi.

In searching the driver's side floorboard of appellant's taxi, Owen found a Mentos candy container that held three baggies of methamphetamine, a small package of heroin and one hydrocodone pill. Owen returned to his patrol car and placed appellant under arrest. He returned to the taxi and resumed the search. Owen found a 9-millimeter handgun between the driver's seat and the center console. Owen's partner, Deputy Reynoso,

also searched the taxi. He found an ammunition magazine between the driver's seat and the center console.

A pipe used for methamphetamine was also found in the taxi. Owen testified that Reynoso found the pipe. Reynoso testified that he did not. The pipe was included among the items recovered from appellant's vehicle.

Motion to Suppress

Appellant contends his consent to the search of the vehicle was ineffective, and the property removed from it, should have been excluded because Deputy Owen unreasonably prolonged the traffic stop. We are not persuaded.

"'"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search . . . was reasonable under the Fourth Amendment, we exercise our independent judgment."' [Citations.]" (*People v. Suff* (2014) 58 Cal.4th 1013, 1053.)

"An investigatory stop exceeds constitutional bounds when extended beyond what is reasonably necessary under the circumstances that made its initiation permissible. [Citation.] Circumstances which develop during a detention may provide reasonable suspicion to prolong the detention. [Citation.] There is no set time limit for a permissible investigative stop; the question is whether the police diligently pursued a means of investigation reasonably designed to confirm or dispel their suspicions quickly." (*People v. Russell* (2000) 81 Cal.App.4th 96, 101-102.) The officer who initiates a traffic stop may "temporarily detain the offender at the scene for the period of time necessary to discharge the duties that he [or she] incurs by

virtue of the traffic stop." (*People v. McGaughran* (1979) 25 Cal.3d 577, 584.)

Here, Deputy Owen testified that he stopped appellant because the lights on the taxi were not working properly. As soon as he contacted appellant, Owen developed a reasonable suspicion that appellant was under the influence. Appellant's speech was rapid, disjointed and lacking in focus. He also seemed "fidgety" to Owen. Owen completed the records check in a timely manner and then sought appellant's permission to search the vehicle. He did not unreasonably prolong the stop because he obtained appellant's consent to the search promptly after developing the reasonable suspicion that appellant was under the influence. The trial court properly denied appellant's motion to suppress.

Substantial Evidence

Appellant contends there is no substantial evidence he possessed drug paraphernalia because neither sheriff's deputy testified that he found the methamphetamine pipe. As in any substantial evidence case, we review the evidence and draw all reasonable inferences in favor of the judgment to determine whether a rational trier of fact could find beyond a reasonable doubt that appellant possessed the methamphetamine pipe. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Like the trial court, we conclude substantial evidence supports the jury's finding that appellant possessed the methamphetamine pipe. Deputy Owen testified that Deputy Reynoso found the pipe; Deputy Reynoso testified that he did not. The pipe was, however, included with the rest of the property removed from appellant's taxi. Owen testified that he took the pipe, along with the other evidence found in appellant's taxi, back

to the sheriff's station where he "[p]ackaged it and booked it into evidence." The property officer for the sheriff's department testified that the pipe came into her custody at the same time as the other items recovered from appellant's taxi. This evidence is sufficient to allow a reasonable jury to infer that the pipe was in appellant's taxi, and therefore in his possession.

Jury Trial on the Strike Prior

After a relatively brief colloquy with the trial court, appellant waived his right to a jury trial on his prior strike conviction, opting for a court trial on that issue. The trial court asked appellant whether he understood that he had a right to a jury trial on the prior conviction. Appellant said that he understood. The trial court asked, "And sir, do you wish to give up that right so that your prior conviction, in the event you are convicted, would be proved up to the – in a court trial; that is, to the Court, rather than to a jury." Appellant answered, "Yes." Appellant's trial counsel joined in the waiver. Appellant contends the waiver was not knowing and voluntary because the trial court did not explain that the jury would be made up of 12 members of the community, that he and his counsel could participate in selecting the jury, and that all 12 jurors would have to agree unanimously that the prior conviction allegation was true. We conclude the waiver was knowing and voluntary.

In *People v. Sivongxxay* (2017) 3 Cal.5th 151 (*Sivongxxay*), our Supreme Court recommended that the trial court should "advise a defendant of the basic mechanics of a jury trial in a waiver colloquy, including but not necessarily limited to the facts that (1) a jury is made up of 12 members of the community; (2) a defendant through his or her counsel may participate in jury selection; (3) all 12 jurors must unanimously

agree in order to render a verdict; and (4) if a defendant waives the right to a jury trial, a judge alone will decide his or her guilt or innocence." (*Id.* at p. 169.) The Court also emphasized, however, that its guidance was "advisory" and "not intended to limit trial courts to a narrow or rigid colloquy." (*Id.* at p. 170.) "[A] trial court's adaptation of or departure from the recommended colloquy in an individual case will not necessarily render an ensuing jury waiver invalid. [Citations.] Reviewing courts must continue to consider all relevant circumstances in determining whether a jury trial waiver was knowing, intelligent, and voluntary." (*Ibid.*, fn. omitted.) A criminal defendant's "'prior experience with the criminal justice system'" is "'relevant to the question [of] whether he knowingly waived constitutional rights.'" (*People v. Mosby* (2004) 33 Cal.4th 353, 365.)

Here, appellant waived his right to a jury trial on the prior strike immediately before jury selection on the substantive offenses began. But the trial court did not advise appellant of the "mechanics" of jury waiver. This is not fatal to the waiver. Appellant had been in a trial court before; he has nine prior felony convictions, including at least one resulting after a jury trial, in 2007. Before accepting the waiver, the trial court confirmed that appellant understood his right to have a jury decide whether the prior conviction occurred. His attorney agreed with the waiver. This, coupled with his exercise of the right to jury trial on the substantive charges, leads us to conclude, based on the totality of the circumstances, that appellant understood "the basic mechanics of a jury trial," (*Sivongxxay, supra*, 3 Cal.5th at p. 169).

Sentencing Error

The trial court imposed the upper term sentence for appellant's convictions of possession of a firearm by a felon (§ 29800, subd. (a)(1)), and possession of ammunition by a felon. (§ 30305, subd. (a)(1).) In doing so, it relied on three aggravating factors: (1) appellant was armed; (2) appellant had served prior prison terms; and (3) appellant's prior convictions were numerous and increasing in seriousness. Appellant contends the trial court erred in using the fact that appellant was armed as an aggravating factor because it is also an element of possession of a firearm by a felon. (*People v. Garfield* (1979) 92 Cal.App.3d 475, 479.) He contends the trial court erred in relying on his prior prison terms because they were also used to impose a sentence enhancement. (*People v. McFearson* (2008) 168 Cal.App.4th 388.)

The trial court erred when it used an element of the offense as an aggravating factor and when it made it dual use of prior convictions. The error was not, however, prejudicial. "'Improper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if "[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error."' [Citation.] Only a single aggravating factor is required to impose the upper term [citation] . . . ." (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.) Here, the trial court could have imposed the upper term by relying solely on the aggravating factor that appellant's "prior convictions as an adult . . . are numerous . . . ." (Cal. Rules of Court, rule 4.421, subd. (b)(2).) There is no reasonable probability the trial court would

have imposed a more lenient sentence had it not mentioned the improper aggravating factors. Resentencing is not required.

Ability to Pay Fines and Fees

Appellant contends the restitution fine and other fees assessed against him should be stayed until he is afforded a hearing at which the trial court determines that he has the ability to pay those amounts. He asserts the failure to hold such a hearing violates his right to due process of law.

Appellant relies on *People v. Dueñas* (2019) 30 Cal.App.5th 1157. In *Dueñas*, the court held that imposing assessments for court operations and court facilities funding (§ 1465.8, subd. (a); Gov. Code, § 70373) without a hearing on the defendant's ability to pay violates due process of law under both the federal and state constitutions. (*Dueñas*, at p. 1168.) Neither statute expressly prohibits the trial court from considering the defendant's ability to pay. By contrast, section 1202.4, subdivisions (b)(1) and (c) expressly prohibit the trial court from considering a defendant's ability to pay a restitution fine unless the fine imposed exceeds $300. *Dueñas* held the court must stay execution of the restitution fine unless or until the prosecutor demonstrates the defendant's ability to pay. (*Dueñas*, at p. 1172.)

Here, the trial court imposed total fines and fees of $3,755, including a $2,400 restitution fine under section 1202.4, a lab fee of $615 (Health & Saf. Code, § 11372.5, subd. (a)), a drug program fee of $600 (Health & Saf. Code, § 11372.7, subd. (a)), a court operations fee of $80 (§ 1465.8) and a conviction assessment of $60 (Gov. Code, § 70373).

Whenever the trial court imposes a restitution fine above the $300 statutory minimum, it may consider the

defendant's ability to pay. (§ 1202.4, subd. (c).) Here, the trial court set appellant's fine at $2,400. Appellant had the opportunity to bring to the court's attention any factors relevant to his ability to pay. (*People v. Avila* (2009) 46 Cal.4th 680, 729; see § 1202.4, subd. (d).) He did not do so. He accordingly forfeited his challenges to the restitution fine. (*Avila*, at p. 729.)

Appellant likewise did not object to the imposition of the other fees and assessments. We need not decide whether he forfeited those claims because under the circumstances present here, where appellant did not object to the $2,400 restitution fine, "he surely would not complain on similar grounds regarding an additional" $1,355 in fees. (*People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033.) Remand would be an idle act.

Senate Bill No. 136

At the time of appellant's conviction, section 667.5, subdivision (b) mandated that a one-year sentence enhancement term be imposed for each prior prison or county jail term he had served. Senate Bill No. 136 (2019-2020 Reg.Sess.); amends section 667.5, subdivision (b) to provide that the sentence enhancement shall be imposed only where the defendant has a prior conviction of "a sexually violent offense . . . ." (Stats. 2019, ch. 590, § 1.) The amendment, which was signed by the Governor and enrolled by the Secretary of State on October 8, 2019, will take effect on January 1, 2020. Appellant's judgment will not be final before the effective date. He contends the amendment should apply retroactively to him, and that the enhancement terms imposed should be vacated because his prior convictions are not for sexually violent offenses. Respondent correctly concedes the point.

"When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*In re Estrada* (1965) 63 Cal.2d 740, 745.)

The effect of Senate Bill No. 136 is to reduce the punishment imposed where the defendant in a criminal case has served a prior prison or county jail term for an offense that is not a sexually violent offense. Nothing in the amendment indicates the Legislature intended it to apply only prospectively. Under these circumstances, we conclude *Estrada*'s inference of retroactivity applies. (See, e.g., *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308-309.) Appellant is entitled to the benefit of Senate Bill No. 136.

Under the newly amended section 667.5, the one-year prior prison term enhancement may be imposed only "for each prior separate prison term for a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code . . . ." (Stats. 2019, ch. 590, § 1.) Appellant has never been convicted of a sexually violent offense. His prior convictions are for possession of a controlled substance (Health & Saf. Code, § 11370.1) and evading an officer. (Veh. Code,

§ 2800.2.) As a consequence, appellant's prior prison terms no longer qualify as predicates for the enhancement.

Remand for resentencing is unnecessary because the trial court has already imposed the maximum possible sentence for the substantive offense and because Senate Bill No. 136 does not depend on the exercise of sentencing discretion by the trial court. (*People v. Buycks* (2018) 5 Cal.5th 857, 896, fn. 15.) Accordingly, we strike the section 667.5 enhancements and direct the trial court to cause to be prepared an amended abstract of judgment reflecting this modification and reducing appellant's prison sentence accordingly.

Disposition

The judgment is modified as follows. The two one-year enhancements imposed pursuant to section 667.5, subdivision (b), are stricken. The trial court is directed to cause to be prepared an amended abstract of judgment reflecting this modification and reducing appellant's resulting total prison sentence to six years and forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. In all respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

John McGregor, Judge

Superior Court County of Santa Barbara

Robert L. Hernandez, under appointment by the Court of Appeal for Defendant and Appellant.

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