Filed 7/20/12 P. v. Buentiempo CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. EDWARD BUENTIEMPO, Defendant and Appellant.	B232995 (Los Angeles County Super. Ct. No. KA086314)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed.

Heather J. Manolakas, 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, Senior Assistant Attorney General, Lawrence M. Daniels and Michael R. Johnsen, Deputy Attorneys General, for Plaintiff and Respondent.

_____

Appellant Edward Buentiempo was convicted, following a jury trial, of two counts of second degree robbery in violation of Penal Code section 211.[1] The trial court found true the allegations that appellant had suffered five prior serious felony convictions within the meaning of section 667, subdivision (a) and the "Three Strikes" law (§§ 667, subds. (b)-(i), and 1170.12) and had served four prison terms within the meaning of section 667.5, subdivision (b). The court sentenced appellant to a total term of 47 years to life in state prison, consisting of a 25 year to life term for one robbery conviction pursuant to the Three Strikes law, plus four five-year enhancement terms pursuant to section 667, subdivision (a), plus two one-year enhancement terms pursuant to section 667.5, subdivision (b). The court stayed imposition of sentence on the second robbery conviction pursuant to section 654.

Appellant appeals from the judgment of conviction, contending that the trial court erred in finding that his prior conviction for burglary qualified as a serious felony within the meaning of the Three Strikes law.[2] We affirm the judgment of conviction.

Facts

The facts of the underlying offenses are not necessary to the resolution of any issue on appeal and so are omitted.

Discussion

Appellant contends that his 1978 conviction for burglary does not qualify as a conviction under the Three Strikes law, and the trial court erred in finding to the contrary. We do not agree.

---

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

[2] Appellant initially challenged the court's ruling that a prior federal bank robbery conviction qualified as a serious felony within the meaning of the Three Strikes law. In his reply brief, appellant withdrew this claim, explaining that it was based on what he later learned was an incomplete copy of Exhibit No. 16.

A prior conviction is a conviction within the meaning of the Three Strikes law if that conviction is a serious felony within the meaning of section 1192.7, subdivision (c) or a violent felony within the meaning of section 667.5, subdivision (c). (§§ 667, subd. (d)(1); 1170.12, subd. (b)(1).)

Among the serious felonies listed in section 1192.7, is "any burglary of the first degree." (§ 1192.7, subd. (c)(18).) It is the meaning of that phrase which is at issue here.

Appellant's 1978 conviction was for second degree burglary. Under the definition of burglary in effect in 1978, second degree burglary included the daytime burglary of a residence.[3] First degree burglary was limited to the nighttime burglary of a residence. It is not disputed that appellant's burglary involved a residence.

Since 1978, the definition of first degree burglary has changed. In 2011, when appellant was convicted in this case, section 460 defined first degree burglary as the burglary of a residence at any time. Second degree burglary was defined as any other burglary.

Over time, the language of section 1192.7, subdivision (c) listing serious felonies has also changed. In 1998, section 1192.7 listed "[b]urglary of an inhabited dwelling house, vessel, as defined in the Harbors and Navigation Code, which is inhabited and designed for habitation, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, trailer coach, as defined by the Vehicle Code, or the inhabited portion of any other building." This language was identical to the language of section 460, subdivision (a), defining first degree burglary.

In 2000, section 1192.7 was amended by Proposition 21. As part of that amendment, section 1192.7 was changed to read "any burglary of the first degree."

---

[3] In fact, the burglary statute has long included vessels, trailer coaches and the inhabited portion of any building, along with dwelling houses in its definition of first degree burglary. The precise nature of the location burgled by appellant in 1978 is not at issue in this case, and for simplicity's sake, we use the term residence to encompass the other above-mentioned structures.

(§ 1192.7, subd. (c)(18).) Section 460, subdivision (a), defining burglary was not changed by this amendment. It continued to define first degree burglary as "burglary of an inhabited dwelling house, vessel, as defined in the Harbors and Navigation Code, which is inhabited and designed for habitation, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, trailer coach, as defined by the Vehicle Code, or the inhabited portion of any other building."

Appellant contends that before Proposition 21, section 1192.7, subdivision (c), listed the *conduct* which would make a burglary a serious felony, but Proposition 21 changed section 1192.7 to refer to the specific *crime* of first degree burglary. He concludes that after Proposition 21 only burglary convictions which state that they are for "first degree" burglary are serious felonies, regardless of the definition of burglary degrees in effect at the time of the conviction. He further contends that the court in this case erred in "going behind" the fact of his 1978 conviction and considering whether the *conduct* involved in that conviction would meet the current definition of first degree burglary.

Appellant acknowledges that the Sixth District Court of Appeal has held to the contrary in *People v. Garrett* (2001) 92 Cal.App.4th 1417, but argues that *Garrett* is wrongly decided. Appellant contends that the Court of Appeal in *Garrett* erred in finding a latent ambiguity in section 1192.7. He further contends that without such ambiguity the Court was not justified in considering Legislative and electoral intent and concluding that section 1192.7 still describes conduct.

We agree with the Court in *Garrett, supra,* that the current reference to burglary in section 1192.7 contains a latent ambiguity because it is not specifically tied to the first degree burglary statute, section 460. We also agree with the phrase "any burglary of the first degree" is simply a short hand way of referring to the *conduct* required for a burglary to qualify as a serious felony. We further agree that the purpose of Proposition 21 was to expand the list of crimes which are treated as serious felonies. The pre-Proposition version of section 1192.7 referred to the conduct involved in the burglary, and thus encompassed all residential burglaries. An interpretation which limited section 1192.7 to

burglaries which met the definition of first degree burglary at the time of their commission would exclude some residential burglaries, such as daytime residential burglaries committed in 1978. It would thus narrow the crimes which qualified as serious felonies.

Appellant is correct that there is language in *People v. Maestas* (2006) 143 Cal.App.4th 247 which appears to contradict the reasoning of *People v. Garrett*, *supra*. This language appears to be unnecessary to the decision in that case however. The prior burglary conviction at issue in *Maestas* was not a residential burglary, and so would not be a serious felony under either of the two definitions at issue.[4] Thus, it would appear that the discussion appellant relies on is mere dicta, not of precedential force. (See *Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1168 [non-precedential dictum consists of arguments and general observations unnecessary to the decision].) Precedential or not, we do not find the Court of Appeal's comments in *Maestas* to be persuasive.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

We concur:

TURNER, P. J. KRIEGLER, J.

---

[4] The defendant in *Maestas, supra,* pled guilty to second degree burglary in 1992. At that time, section 460 defined first degree burglary as "every" residential burglary and second degree burglary as "all other kinds of burglary." (*Id.* at p. 252.) Thus, the defendant's second degree burglary was nonresidential.