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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JEROME C. WALLACE, Defendant and Appellant.	B234862 (Los Angeles County Super. Ct. No. YA079477)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark S. Arnold, Judge. Affirmed as modified.

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Susan Morrow Maxwell, 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, Scott A. Taryle, and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

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Jerome Wallace challenges the sentence imposed for his convictions on three theft charges. We conclude that one of the sentence enhancements must be stricken and that the abstract of judgment contains a clerical error, but we otherwise affirm.

BACKGROUND

The amended information charged Wallace with two counts of petty theft with three prior theft-related offenses in violation of subdivision (a) of Penal Code section 666 (counts 1 and 3) and one count of grand theft of personal property in violation of subdivision (a) of Penal Code section 487 (count 5).[1] It further alleged as to each count that Wallace had served 11 prior prison terms within the meaning of section 667.5, subdivision (b).

Wallace pleaded not guilty and denied the allegations. A jury found him guilty as to counts 1 and 3 and not guilty of grand theft but guilty of the lesser included offense of petty theft as to count 5.

Wallace waived jury trial on the prior prison term allegations, choosing to have them tried to the court. The prosecution elected to proceed on only seven of the 11 alleged prison priors. The court found six of the seven prior prison term allegations true and found one not true.

The court sentenced Wallace to eight years and eight months in prison, calculated as follows: the upper term of three years as to count 1, plus a consecutive sentence of eight months (one-third of the middle term) as to count 3, plus five consecutive one-year enhancements for five of the prior prison terms; the court dismissed the sixth prison prior that it had found true. The court also imposed a consecutive 180-day sentence as to count 5, to be served in any penal institution. The court additionally imposed various statutory fines and fees and credited Wallace with 530 days of presentence custody (265 days actual time and 265 days good time/work time).

Wallace timely appealed. On appeal, he raises only sentencing issues, so we need not describe the facts underlying his present convictions.

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[1] All subsequent statutory references are to the Penal Code.

DISCUSSION

I. Prior Prison Term "Washout Period"

Wallace argues that the prosecution presented insufficient evidence to support imposition of sentence enhancements for prison terms served before 2002. We disagree.

As it existed at the time of Wallace's current offenses, subdivision (b) of section 667.5 provided that "where the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison term therefor, the court shall impose a one-year term for each prior separate prison term served for any felony; provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction." "The last phrase is commonly referred to as the 'washout rule' where a prior felony conviction and prison term can be 'washed out' or nullified for the purposes of section 667.5. [¶] According to the 'washout' rule, if a defendant is free from both prison custody *and* the commission of a new felony for *any* five-year period following discharge from custody or release on parole, the enhancement does not apply." (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1229.)

The conviction dates for the prior prison terms for which the trial court imposed enhancements were 1982 (case numbers A447025 and A373493), 1989 (A988251), 2002 (YA051195), and 2006 (YA063718). Wallace argues that the prosecution presented insufficient evidence to show that the pre-2002 prison terms were not "washed out." We disagree.

The evidence admitted at trial showed the following facts: On September 25, 1990, Wallace was in prison custody for his 1989 offense, following revocation of his parole. Less than five years later, by information filed July 3, 1995, Wallace was charged with another felony theft, to which he ultimately pleaded no contest. On August 21, 1995, the court sentenced him to three years in prison and credited him with 123 days of presentence custody (82 days actual time and 41 days good time/work time). But execution of the sentence was suspended, and the court's minute order of

December 6, 1995, reflects that Wallace was accepted into the California Rehabilitation Center. Two and one-half years later, the court's minute order dated June 16, 1998, states that the court "has read and considered the letter dated January 23, 1998 from the California Rehabilitation Center finding Jerome Wallace not suitable for this program." By the same minute order, the court imposed the previously suspended three-year sentence, crediting Wallace with the 123 days of presentence custody as of August 21, 1995, plus 600 days "while in the confinement jurisdiction of the California Rehabilitation Center." The minute order reflects that it was sent "to the Classification and Parole Representative at the California Rehabilitation Center and to the defendant by U.S. mail." Wallace committed his next felony less than five years later, in 2002.

Wallace argues that the evidence is insufficient to prove that he was returned to prison custody in June 1998, when he was found not suitable for the California Rehabilitation Center program. We disagree.

"The prosecution has the burden of proving beyond a reasonable doubt each element of the section 667.5, subdivision (b) sentence enhancement, including the fact of no five-year 'washout' period. [Citation.] When, as here, a defendant challenges on appeal the sufficiency of the evidence to sustain the trial court's finding that the prosecution has proven all elements of the enhancement, we must determine whether substantial evidence supports that finding. The test on appeal is simply whether a reasonable trier of fact could have found that the prosecution sustained its burden of proving the enhancement beyond a reasonable doubt. In that regard, in conformity with the traditional rule governing appellate review, we must review the record in the light most favorable to the trial court's finding(s). [Citation.]" (*People v. Fielder*, *supra*, 114 Cal.App.4th at p. 1232.)

The evidence showed that in June 1998, when the trial court imposed the suspended three-year sentence from the 1995 conviction, the court credited Wallace with just under two years of custody (723 days). The court in the present case could reasonably infer that Wallace then began serving the remainder of his prison sentence, because the Department of Corrections and Rehabilitation is not in the habit of releasing

prisoners who have been sentenced to three years in prison and credited with less than two years of custody. Because the evidence was sufficient to support the court's implied finding that Wallace was returned to prison custody in June 1998, it was sufficient to support the court's finding that the pre-2002 prison terms were not "washed out."

II. Multiple Enhancements for Concurrent Prison Terms

Wallace argues that the trial court erred by imposing two 1-year enhancements for two prior prison terms that were served concurrently. We agree.

For each of Wallace's convictions in case numbers A373493 and A447025, the court imposed one-year enhancements pursuant to section 667.5, subdivision (b). But the prosecution conceded at trial, and respondent concedes on appeal, that the court could not impose separate enhancements for those two cases, because Wallace served the sentences imposed in those cases concurrently. We agree. (See *People v. Cardenas* (1987) 192 Cal.App.3d 51, 56 ["multiple prior convictions served concurrently constitute one separate prison term for which only one sentence enhancement can be imposed"].) We therefore strike the one-year enhancement imposed for case number A447025.

Respondent, while conceding that the trial court erred by imposing two 1-year enhancements for the prison terms imposed in those cases, argues that the trial court merely misspoke and that we should correct the trial court's error by striking one enhancement but imposing in its place an enhancement for the prior prison term allegation that the trial court found true but dismissed. That is not possible. "Under no circumstance" may an enhancement based on a dismissed prior "be resurrected and imposed at some future point in time." (*People v. Santana* (1986) 182 Cal.App.3d 185, 191; see also *People v. Garcia* (1999) 20 Cal.4th 490, 502.)

III. Clerical Error in the Abstract of Judgment

Respondent points out that the abstract of judgment incorrectly states that the 180-day sentence as to count 5 is to run concurrently with the sentence imposed as to count 1. We agree. The reporter's transcript reflects that the court stated that the 180-day term was intended to be "consecutive."

Wallace argues that the reporter's transcript is ambiguous because the trial court mistakenly stated that the sentence would be "eight years, four months." Wallace argues that the total should be either eight years and eight months if the 180-day sentence as to count 5 was meant to be concurrent or nine years and two months if it was meant to be consecutive. Thus, according to Wallace, the court clearly misspoke when it said "eight years, four months," and we cannot determine from the record what the intended sentence was supposed to be.

We disagree. The trial court did misspeak, but the court said "eight years, four months *in the state prison*." (Italics added.) Having sentenced Wallace to "the high term of three years for count 1," "one-third the middle term [as to count 3] consecutive which is eight months," and "[f]ive additional years . . . because of the five priors," the court should have announced the total prison sentence to be eight years and eight months. But the phrase "in the state prison" shows unambiguously that the court was not including the 180-day sentence as to count 5, which the court said "can be served in any penal institution." Read as a whole and in context, the court's imposition of sentence clearly reflects the court's intention to sentence Wallace to eight years and eight months in state prison, plus a consecutive sentence of 180 days in any penal institution.

Accordingly, we agree with respondent that the abstract of judgment should be corrected to reflect that the sentence as to count 5 is to run consecutively, not concurrently.

DISPOSITION

The one-year sentence enhancement imposed for the prior prison term in case number A447025 is stricken. The judgment is in all other respects affirmed. The trial court is directed to prepare a new abstract of judgment, reflecting the stricken enhancement and also correctly stating that the sentence as to count 5 is consecutive to the sentence as to count 3. The trial court is further directed to send a copy of the new abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.