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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. JABARI HALEEM MUIED, Defendant and Appellant.	B275406 (Los Angeles County Super. Ct. No. SA091130)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judge Edward B. Moreton, Jr. Sentence reversed in part and remanded. In all other respects, the judgment is affirmed.

Cindy Brines, 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, Assistant Attorney General, and Margaret E. Maxwell and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Jabari Haleem Muied of first degree residential burglary. On appeal, Muied contends the trial court violated his rights by accepting his admission of a prison prior under Penal Code section 667.5(b) without advising him of his rights. We agree. We therefore reverse the one-year enhancement to Muied's sentence and remand the case for the People to decide if they wish to try the enhancement allegation.

FACTUAL AND PROCEDURAL BACKGROUND

In an information filed in October 2015, the People charged Muied with first degree burglary, person present, a felony, as well as resisting a peace officer, a misdemeanor. The People alleged Muied had two prior convictions of a serious felony within the meaning of California's three strikes law: two September 2009 convictions in Washington State for residential burglary. The People further alleged, under Penal Code section 667.5(b), that Muied served a prison term in that case and did not remain free of prison custody for five years before committing the burglary in California. That "prison prior," if admitted or found true, would add one year to Muied's sentence.

In March 2016, Muied's attorney filed a pleading essentially moving to strike the allegation that the Washington convictions constituted strike priors under California law. On April 11, 2016, the People conceded the Washington convictions were not strikes and the court struck that allegation. The case proceeded to jury trial later that month. The jury convicted Muied on both counts and found true the allegation that a person was present in the residence at the time of the burglary. As Muied does not challenge his conviction, we do not discuss the evidence at trial.

Before the jury came back into the courtroom to deliver its verdict, the court asked Muied's counsel, "[I]n the event of guilty verdicts, will the defendant be admitting the priors?" Defense

counsel responded, "Yes. There's one [Penal Code section] 667.5(b) one-year prison prior allegation which would be admitted." The trial court did not take the admission at that point, nor did the court or defense counsel mention any jury trial right on the prison prior. After the jury returned its guilty verdicts and was discharged, the court asked the deputy district attorney if she "wish[ed] to take the admission." The prosecutor then addressed Muied: "Jabari Haleem Muied, it is alleged as to Count 1 that you have suffered the following prior conviction in Case No. 09109441, in violation of . . . [¶] RCW9A.52.025 subsection (2) otherwise known as residential burglary with the conviction date of September 24, 2009, in the county of Whatcom in the Superior Court of the state of Washington; and that a term was served as described in Penal Code section 667.5 for said offense and that the defendant did not remain free of prison custody for and did commit an offense resulting in a felony conviction during a period of five years subsequent to the conclusion of said term. [¶] Mr. Muied, do you admit that prior conviction as to Count 1?" Muied answered, "I'm not guilty of a residential burglary." After speaking with his attorney, Muied then said he had been "handed some stuff" and that was only possession of stolen property. The court said, "The issue is whether you were convicted of a prior." Muied replied, "Yes, I've been found convicted [sic] of two residential burglaries at one time in Washington." Defense counsel then stated, "Just so the record is clear, he has admitted that prior conviction under Penal Code section 667.5(b), one-year prison prior enhancement, not the [three] strikes law." The court responded, "Right. That's my understanding."

On June 2, 2016, the court sentenced Muied to seven years in the state prison, consisting of the upper term of six years for the residential burglary plus one year for the prison prior.

DISCUSSION

A. The trial court violated Muied's statutory right to a trial on his prison prior in this "silent record" case.

Muied contends the trial court was required to advise him of his right to a jury trial before accepting his admission of his prison prior. His contention has merit.

"[T]he federal Constitution's right to a jury trial does not extend to the factual determination of whether a defendant has suffered a prior conviction. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L. Ed. 2d 435, 120 S. Ct. 2348].)" (*People v. Mosby* (2004) 33 Cal.4th 353, 360 (*Mosby*).) "Nor does our state Constitution afford such a right. (*People v. Epps* (2001) 25 Cal.4th 19, 23.)" (*Ibid.*) However, in California a defendant has a statutory right to a jury trial on "the question of whether or not the defendant has suffered the prior conviction." (Pen. Code, § 1025, subd. (b).) Our Supreme Court has said that—even for a trial right that is statutory rather than constitutional—"a defendant's due process trial rights . . . encompass the rights to remain silent and to confront witnesses. (Cal. Const., art. I, § 15.)" (*Mosby, supra*, 33 Cal.4th at p. 360.)

In *Mosby*, a jury convicted the defendant of selling cocaine. The People alleged Mosby had a prior narcotics sales conviction under Health & Safety Code section 11370, which would add three years to his sentence. When the judge learned the jury had a verdict, he asked defense counsel if Mosby wanted a jury trial on the prior. Defense counsel told the court Mosby was willing to waive jury on the prior (and admit it). (*Mosby, supra*, 33 Cal.4th at pp. 356–357.) The judge then addressed Mosby: "You are entitled to have this jury, if they should find you guilty, you're entitled to have this jury determine the truth of the allegation that you suffered this prior felony conviction. You're entitled to have the jury hear that and make a decision on whether that's

true or not. Do you understand that?" Mosby answered, "Yes." The court then asked, "Do you waive and give up your right to have this jury make a determination as to whether you suffered a prior conviction?" Mosby answered, "Yes." (*Id.* at p. 358.)

On appeal, Mosby argued his waiver was invalid because the judge did not tell him of, nor did he waive, his "concomitant rights to remain silent and to confront adverse witnesses." (*Mosby*, *supra*, 33 Cal.4th at p. 356.) The Court rejected that contention, stating, "Under the totality of the circumstances," a court could conclude that Mosby "voluntarily and intelligently admitted his prior conviction despite being advised of and having waived only his right to jury trial." (*Id.* at p. 365.) The Court distinguished the "silent record" line of cases: In those cases, even though the defendants had just had a jury trial on a substantive offense, the court had "not told [them] on the record of their right to trial to determine the truth of a prior conviction allegation," "[n]or did they expressly waive their right to trial." (*Id.* at p. 362.) In those "silent record" cases, the Court reaffirmed, "in which the defendant was not advised of the right to have a trial on an alleged prior conviction, we cannot infer that in admitting the prior the defendant has knowingly and intelligently waived that right as well as the associated rights to silence and confrontation of witnesses." (*Ibid.*)

Muied argues this case is a silent record case. He is right. The Attorney General contends the prosecutor told Muied what the prison prior allegation was based on and Muied understood it when he admitted it. But the issue is not whether Muied understood and admitted the allegation that he had gone to prison on the Washington case and failed to stay out of prison for

five years.[1] The issue is whether he was advised he had a statutory right to have the jury determine that issue and waived that right. The Attorney General cites *People v. Thomas* (2001) 91 Cal.App.4th 212 (*Thomas*), a case from this District's Court of Appeal. There, the People charged Thomas with felony evading and alleged he had two prison priors under section 667.5(b). At Thomas's request, the court bifurcated the trial. (*Id*. at pp. 214–215.) After the jury found Thomas guilty and was excused, the court stated, "With reference to the proof of the priors, I believe in chambers we had indicated that there was going to be a jury waiver as far as their proof was concerned." Defense counsel answered, "Yes." (*Id*. at p. 215.) On appeal, the court stated the issue: "[W]hether the Fourteenth Amendment due process clause guarantees an accused the right to a jury trial on section 667.5 prior prison term allegations." (*Id*. at p. 214.) After an extensive analysis of then-recent United States Supreme Court decisions, the court concluded, "No federal constitutional violation occurred

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[1] Muied did not expressly admit he had not remained free of prison custody for five years before his August 2015 crime in this case. The prosecutor read the allegation to Muied who replied he had not committed residential burglary. Muied's lawyer conferred with him. The judge then told Muied, "The issue is whether you were convicted of a prior." Muied admitted he had that conviction. We note the probation officer's report gives a different case number for Muied's 2009 conviction in Washington State (09B29557) than the case number listed in the information (09109441). The report also states Muied "appeared in court on 09-24-2009" and "was sentenced to 12 months and one day in custody." The report notes that no information about parole was available. Muied was arrested in this case on August 21, 2015, nearly six years later. The record contains no information about when Muied was released from prison on his Washington case.

because defense counsel waived defendant's state statutory right to a jury trial." (*Id.* at p. 223.)

Here, defense counsel did not expressly waive Muied's state statutory right to have the jury decide his prison prior, either in chambers or in open court. At no time did the court, or the prosecutor, or defense counsel, ever mention the words, "jury," "jury trial," or—for that matter—"court trial," in connection with Muied's prison prior. In *Thomas*, by contrast, the defendant presumably heard his attorney—on the record in open court—confirm he had (through counsel in chambers) waived his jury trial right on his priors. Moreover, *Thomas* was decided before our Supreme Court's decision in *Mosby*. The *Mosby* Court both "assume[d] for the purpose of [its] discussion" that the defendant's statutory jury trial right encompassed some due process constitutional rights and reconfirmed the continuing validity of the silent record cases. (*Mosby*, *supra*, 33 Cal.4th at pp. 360−362.)

The silent record cases the Supreme Court cited in *Mosby* control here. For example, in *People v. Johnson* (1993) 15 Cal.App.4th 169 (*Johnson*), a jury had convicted the defendant of second degree murder and other crimes. (*Id.* at p. 172.) The court had bifurcated the trial of Johnson's felony priors and prison prior. (*Id.* at p. 177, fn. 2.) Before the jury was discharged, the judge asked Johnson if he "admit[ted] those prior convictions." Johnson appeared confused. The judge then said, "All I want to know is whether you were convicted or whether or not you want a jury trial; were you convicted?" Johnson admitted he had been convicted of the prior offenses. (*Id.* at p. 177.) In reversing the true findings on Johnson's priors and remanding for further proceedings, the court of appeal stated, "We have no doubt that Johnson was in fact aware of his right to a jury trial, his right to confront witnesses, and his right to remain silent, all

of which he had just exercised in trial. What is impossible to determine from this silent record is whether Johnson not only was aware of these rights, but was also prepared to waive them as a condition to admitting his prior offenses." (*Id*. at p. 178.) In *Johnson*, the court at least mentioned "a jury trial." Here, there was no mention of a trial at all, jury or court. (See also *People v. Campbell* (1999) 76 Cal.App.4th 305, 309–311 [reversing prison prior enhancements where court asked defense counsel if there would "be an admission," counsel said defendant was "willing to admit," and prosecutor then read allegations of priors to defendant, who admitted them; court of appeal noted "*there were no admonitions*" regarding defendant's trial rights on the priors]; *People v. Stills* (1994) 29 Cal.App.4th 1766, 1769, 1771 [reversing strike prior where "there were *no admonitions or waivers whatsoever*"; defense counsel said defendant was prepared to admit allegation of prior strike; court then asked defendant if he had pled guilty to that prior felony and defendant said yes]; *People v. Moore* (1992) 8 Cal.App.4th 411, 417 [reversing prison prior admission where "there were no admonitions at all" as to defendant's trial rights on the prior; Justice Epstein noted that, if counsel's statement that defendant wanted to admit prior "were sufficient, it is difficult to discern what would not be"; court concluded it was "the classic 'silent record' condemned in *Boykin* [*v. Alabama* (1969)] 395 U.S. [238,] 243 [23 L.Ed.2d [274,] 279–280]"].)

A silent record case with facts similar to ours is *People v. Sifuentes* (2011) 195 Cal.App.4th 1410 (*Sifuentes*). Sifuentes was charged with being a felon in possession of a firearm and active gang participation. (*Id.* at p. 1413.) The People alleged Sifuentes had a prior strike and two prison priors. Before trial, the court granted defense counsel's motion to bifurcate the trial of Sifuentes's priors. Counsel said Sifuentes planned to admit the

priors. The trial court took no waiver of Sifuentes's rights. (*Id.* at p. 1420.) After the jury returned its verdict and was discharged, the court read Sifuentes the allegations of the priors and Sifuentes admitted them. (*Id.* at p. 1420 & fn. 8.) Citing *Mosby* and *Johnson*, the court of appeal noted a trial court, before accepting a defendant's admission of a prior conviction, must advise him of his rights and of the penal consequences of admitting the prior. (*Id.* at pp. 1420–1421.) The court's failure so to advise Sifuentes "compel[led] reversal of the prior conviction findings." (*Id.* at p. 1421.) The result here must be the same.

B. Muied Has Not Forfeited his Challenge to his Unwarned Admission of his Prison Prior.

The Attorney General also argues Muied forfeited his challenge to the imposition of the prison prior "by failing to object below." The Attorney General cites *People v. Vera* (1997) 15 Cal.4th 269 (*Vera*). Vera was convicted of multiple counts of robbery and kidnapping. At Vera's request, the trial court had bifurcated the trial of Vera's prison priors. (*Id.* at pp. 272–273.) When the court granted that motion, Vera's lawyer told the judge Vera was "going to waive the right to a jury trial on the prior convictions" and "allow the court to hear those as a court trial." (*Id.* at p. 273.) The court discharged the jury after taking the verdicts and—with Vera's agreement—continued the court trial on the prison priors to another date. At the court trial, Vera again raised no objection to the court deciding his priors. Based on documents the prosecution submitted, the court found Vera's prison priors true. (*Ibid.*)

On appeal, Vera argued the trial court erred in not taking his express, personal waiver of his statutory right to a jury trial on the priors. (*Vera*, *supra*, 15 Cal.4th at pp. 273–274.) The Court rejected that argument, noting the trial court had "discharged the jury after receipt of the verdicts on the

substantive crimes because it understood, based on representations by defense counsel, that the defendant wished to waive jury on the bifurcated prior conviction allegations." (*Id.* at p. 276.) The Court continued, "If defendant wished jury trial rather than court trial of the sentencing allegations, he could have pointed out the trial court's misunderstanding before the court rendered its findings on the truth of the prior conviction allegations. The prior conviction allegations could have been properly tried to a jury impaneled for that purpose." (*Ibid.*) Here, by contrast, as noted, Muied's attorney did not tell the court that Muied wished to waive his statutory jury trial right. There was no mention at all of any trial right, jury or bench, as to Muied's prison prior. Nor did Muied have a court trial on his prior.

Moreover, as our Supreme Court explained nearly 20 years after *Vera* was decided, that holding is not as sweeping as the Attorney General contends. In *People v. Cross* (2015) 61 Cal.4th 164, the defendant was charged with felony domestic violence with a prior conviction for the same crime. "At trial, Cross stipulated to the prior conviction, and the trial court accepted the stipulation without advising Cross of any trial rights or eliciting his waiver of those rights." (*Id.* at p. 168.) On appeal, Cross argued that, "because his unwarned stipulation to the prior conviction had the direct consequence of subjecting him to a longer prison term, the stipulation was invalid under *In re Yurko* (1974) 10 Cal.3d 857." The Court agreed. (*Ibid.*) The Court rejected the Attorney General's contention, based on *Vera*, that Cross had forfeited his argument. The Court distinguished *Vera*—where the defendant had only "waived his statutory right to a jury trial in favor of a bench trial"—from Cross's situation. (*Id.* at p. 172.) The Court said, "[T]he defendant in *Vera* did not admit the truth of a prior conviction allegation. . . . Thus, the

forfeiture in *Vera* arose from the defendant's acquiescence to a bench trial instead of a jury trial, not from his acquiescence to no trial at all." (*Ibid.*)[2]

C. Remand is Appropriate, and the Abstract of Judgment Must Be Corrected.

Where, as here, a defendant's admission of a prior conviction is invalid, the appropriate remedy is to remand the case to the trial court to allow the prosecution, if it wishes, to retry the prison prior allegation. (*Sifuentes, supra,* 195 Cal.App.4th at pp. 1421−1422.) Accordingly, we vacate the one-year enhancement to Muied's sentence imposed under Penal Code section 667.5(b) and remand the case to the trial court. The Attorney General also notes the abstract of judgment indicates—incorrectly—that Muied was convicted by plea rather than jury verdict. Following the further sentencing proceedings, we order the abstract of judgment to be corrected and the amended abstract to be forwarded to the California Department of Corrections and Rehabilitation.

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[2] The Attorney General also cites *People v. Grimes* (2016) 1 Cal.5th 698. In that capital case, before trial began, defense counsel moved to bifurcate the trial of the defendant's strike and prison priors and offered to waive jury trial on those allegations. (*Id.* at p. 737.) Grimes waived jury on the priors and the court later conducted a bench trial. On appeal, Grimes claimed he had been pressured and so his waiver was invalid. (*Ibid.*) The Court rejected that contention, quoting from the transcript the court's explanation to Grimes that he had a right to have the jury decide the issue. (*Id.* at p. 738.) Again, here, Muied never was advised of, nor asked if he wished to waive, any trial right of any sort on his prison prior.

DISPOSITION

The true finding on the one-year enhancement to Muied's sentence is reversed. We remand to the trial court for retrial of the prison prior allegation. The trial court shall correct the abstract of judgment and forward the amended abstract to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.*

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