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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN LEE CULVER,

Defendant and Appellant.

B276555

(Los Angeles County
Super. Ct. No. MA067724)

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

Erick Victor Munoz, 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, Margaret E. Maxwell and Gergory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Defendant John Lee Culver appeals from his conviction for assault with a deadly weapon. We affirm the judgment.

PROCEDURAL BACKGROUND¹

Defendant was charged in an information with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))² and attempted murder (§§ 187, subd. (a), 664).³ The information alleged two prior convictions for serious and/or violent felonies under sections 667, subdivision (d) and 1170.12, subdivision (b), which would subject defendant to sentencing under California’s “Three Strikes” law. (§§ 667, subds. (a)-(j), 1170.12; see *People v. Acosta* (2002) 29 Cal.4th 105, 108.) One prior conviction was for first degree burglary (§§ 459, 460), the other for criminal threats (§ 422, subd. (a)).

The case proceeded to trial. At defense counsel’s request, the court bifurcated the trial on the prior convictions from the trial on the merits. The jury convicted defendant of assault and acquitted him of attempted murder and the lesser included offense of attempted voluntary manslaughter. Following the verdict, defendant waived jury trial on the proof of his prior

¹ Defendant does not contest his underlying conviction for assault, and thus we omit discussion of those facts.

² Further undesignated statutory references are to the Penal Code.

³ The information also alleged a violation of section 273.5, subdivision (a) for infliction of injury on “someone with whom the defendant had a dating relationship,” and four prior convictions subjecting defendant to an increased penalty under section 667.5, subdivision (b). These allegations were all dismissed or struck and are not at issue in this appeal.

convictions. The court discharged the jury and scheduled a court trial on the prior convictions.

At the start of the court trial the prosecution moved to amend the information to include an allegation that the two prior strike convictions also constituted serious felonies under section 667, subdivision (a)(1), which would increase defendant's sentence by five years for each prior conviction. Defense counsel objected. The court permitted the amendment.

After the court trial, the court found that defendant had suffered the two prior convictions constituting strikes under sections 667, subdivision (d), and 1170.12 as well as serious felonies under section 667, subdivision (a)(1). The court imposed a sentence of 35 years to life: 25 years to life based on the two prior strikes plus 10 additional years under section 667, subdivision (a)(1). The court awarded credits and imposed fines and fees.

Defendant timely appealed.

DISCUSSION

Defendant argues that his waiver of jury trial did not extend to the later-added allegations under section 667, subdivision (a)(1), and thus it was error for the court to decide the truth of those allegations. We disagree.

A defendant's right to a jury trial on prior convictions arises from statute. (*People v. Epps* (2001) 25 Cal.4th 19, 23 (*Epps*).) As relevant here, section 1025, subdivision (b), reads: "the question of whether or not the defendant has suffered the

prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty . . . or by the court if a jury is waived.”⁴

But the right to a jury trial under section 1025 extends to having the jury “‘determine only whether [the defendant] “suffered” the alleged prior conviction’ ” (*Epps, supra*, 25 Cal.4th at p. 23), not the legal effect of that conviction, such as whether the prior conviction constituted a strike (*People v. Kelii* (1999) 21 Cal.4th 452, 455-456) or whether the prior conviction is subject to the five-year enhancement under section 667, subdivision (a) (*People v. Williams* (2002) 99 Cal.App.4th 696, 700-701). These legal questions “are matters to be determined by the court.” (*Ibid.*)

Here, defendant waived his right to have a jury determine whether he suffered the prior convictions for burglary and criminal threats. The information was then amended to allege additional legal consequences stemming from those prior convictions. These issues were properly for the court to decide, and it was not error for the court to allow the amendment after defendant had waived his right to a jury trial on the truth of the previously alleged convictions. It was immaterial that defendant did not waive his right to a jury trial as to whether his prior convictions fell under section 667, subdivision (a)(1), because he had no right to a jury trial on that question in the first place.

Defendant claims that *People v. Tindall* (2000) 24 Cal.4th 767 (*Tindall*) and *People v. Gutierrez* (2001) 93 Cal.App.4th 15

⁴ Section 1025, subdivision (b) is limited by subdivision (c), which states that “the question of whether the defendant is the person who has suffered the prior conviction shall be tried by the court without a jury.” Subdivision (c) is not at issue in this appeal.

(*Gutierrez*) support his position, but they are distinguishable. In *Tindall*, the original information alleged that the defendant had suffered two prior convictions for drug possession. (*Tindall, supra*, at p. 770.) After the jury had found the defendant guilty and been discharged, the court allowed the prosecution to amend the information to allege three additional prior convictions for felony bank robbery. (*Id.* at pp. 770-771.) Our Supreme Court held that this was error: “Because a jury cannot determine the truth of the prior conviction allegations once it has been discharged [citation], it follows that the information may not be amended to add prior conviction allegations after the jury has been discharged.” (*Id.* at p. 782.) *Gutierrez*, following *Tindall*, similarly reversed portions of a sentence based on allegations of a prior conviction added to the information after the jury had been discharged. (*Gutierrez, supra*, at p. 24.)

Tindall and *Gutierrez* involved the postverdict addition of entirely new factual allegations that under section 1025, subdivision (b) were properly within the province of a jury (absent a valid waiver). Here, in contrast, the amendment added no factual allegations, but merely alleged additional legal consequences of previously alleged prior convictions. Again, as the determination of legal consequences is a matter for the court, not the jury, the added allegations in this case did not implicate defendant’s rights under section 1025, subdivision (b).

Defendant also cites *People v. Haskin* (1992) 4 Cal.App.4th 1434 (*Haskin*), but it is unavailing. In *Haskin*, the defendant admitted to a prior burglary conviction subjecting him to a one-year sentence enhancement under section 667.5, subdivision (b). (*Haskin, supra*, at p. 1437.) The trial court then took judicial notice of court records indicating the burglary was residential,

and on that basis imposed a five-year enhancement, presumably under section 667, rather than the lesser one-year enhancement. (*Haskin*, at pp. 1437-1438.)

The Court of Appeal reversed, holding “that a court cannot accept a[n] . . . admission from a defendant, and thereafter accept evidence or make findings that change the character of the crime or enhancement admitted so as to increase the authorized punishment therefor.” (*Haskin, supra*, 4 Cal.App.4th at p. 1440.) Thus, “[b]ecause appellant was neither statutorily nor factually charged with, nor consented to, a substituted section 667 enhancement . . . , the trial court was without authority to impose a sentence greater than that authorized by section 667.5, subdivision (b), the charging statute which appellant admitted.” (*Ibid.*)

Here, defendant argues that just as the admission of a prior conviction could not be “imputed as a universal admission of that conviction for any plausible enhancement stemming therefrom, [defendant’s] limited waiver of his right to jury trial on the question of whether the charged prior convictions were strikes cannot be imputed as a universal waiver of jury trial rights as to any other uncharged enhancement that could arise from these same convictions.” Accepting for the sake of argument that admissions and jury waivers are analogous under these circumstances, *Haskin* nonetheless is distinguishable in that it involved the addition of new factual allegations, namely that the burglary to which the defendant had admitted was residential. Because the defendant had only admitted to committing a burglary, without specification as to whether it was residential, the trial court erred in imposing an enhanced sentence based on facts to which the defendant did not admit.

Here, as discussed, there were no additional factual allegations after defendant had waived his right to a jury trial. The court sentenced defendant based on the same factual allegations that had been included in the original information, specifically that defendant had been convicted of burglary and criminal threats. Defendant waived jury trial as to the truth of those allegations, and the court imposed a proper sentence based on the statutory consequences of those prior convictions. There was no error.

DISPOSITION

The judgment is affirmed.

HALL, J.*

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.

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