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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. BENNIE LEE WILLIAMS III, Defendant and Appellant.	B230495 (Los Angeles County Super. Ct. No. NA085541)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Reversed and remanded with directions.

Rachel Lederman, 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, Stephanie A. Miyoshi and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Bennie Lee Williams III, was charged with three felonies and a misdemeanor arising out of a domestic violence incident. The information further alleged, inter alia, that defendant had incurred a prior serious felony conviction within the meaning of Penal Code[1] section 667, subdivision (a)(1). Defendant argued unsuccessfully that his prior offense was deemed a misdemeanor under section 17, subdivision (b)(3), therefore it did not qualify as a section 667, subdivision (a)(1) serious felony conviction. Defendant subsequently pleaded no contest to the charged offenses and admitted the prior serious felony conviction allegation. As part of the plea bargain, the trial court promised to issue a certificate of probable cause as to the prior felony conviction question. We conclude: defendant's admission concerning the prior serious felony conviction foreclosed his argument, which is reasserted on appeal; defendant's plea was improperly induced by an unenforceable promise the issue as to his prior conviction would be preserved for appeal; and as a result, defendant must be given an opportunity to withdraw his no contest plea. We reverse the judgment and remand with directions to grant defendant an opportunity to withdraw his plea. We further direct that in the event defendant elects not to withdraw his plea, the reinstated judgment must be modified to impose certain fees and clarified as to restitution.

II. PROCEDURAL BACKGROUND

Defendant was charged by information with: deadly weapon assault (§ 245, subd. (a)(1)) and great bodily injury infliction (§ 12022.7, subd. (e)) (count 1); false imprisonment by violence (§ 236) (count 2); battery (§ 243, subd. (e)(1)) (count 3); and criminal threats (§ 422) (count 5). It was alleged defendant had a prior serious felony

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[1] All further statutory references are to the Penal Code except where otherwise noted.

conviction (Sup. Ct. case No. A903263) as to counts 1, 2 and 5, within the meaning of sections 667, subdivisions (b) through (i) and 1170.12; and as to counts 1 and 5, within the meaning of section 667, subdivision (a)(1).

Defendant argued in the trial court that his prior conviction did not qualify as a serious felony. Defendant reasoned the prior felony had been reduced to a misdemeanor pursuant to section 17, subdivision (b)(3). The trial court disagreed. The trial court informed defendant he was facing a potential maximum sentence of 21 years, 4 months. The trial court then offered defendant a plea arrangement whereby it would impose "the lowest statutory sentence": "The Court: I indicated to counsel that if you wanted to plead, it has to be an open plea and you have to plead to every count, I'll strike the strike and sentence you to seven years. [¶] . . . [¶] . . . There are some issues regarding the [section] 667[, subdivision (a)(1)] prior that we spent the morning going over. [¶] Should [defendant] plead, I have no objection . . . [¶] . . . [¶] . . . .of signing [a certificate of probable cause] so he could appeal this issue."

Defendant accepted the trial court's offer. Deputy District Attorney Robert Hight inquired as to defendant's understanding of the offer including the following: "Mr. Hight: Has anyone threatened you or made any other promises to you other than what's said here in open court to get you to enter this plea? [¶] The defendant: No. [¶] Mr. Hight: Are you pleading freely - - [¶] [Defendant's attorney, Robert D.] Coppola: Excuse me, may I just interrupt for one second? [¶] Mr. Hight: Sure. [¶] Mr. Coppola: Other than the indication from the court regarding the certificate of probable cause. [¶] The Court: Yes. [¶] Mr. Hight: And just for the record, that's because we don't know if there has ever been a case that's taken the [section] 667[,subdivision (a)(1)] five-year prior up that is post being 17.b'd as to whether that affects its implementation in the case. [¶] The Court: Absolutely Mr. Hight."

Defendant subsequently pled no contest to counts 1 through 3 and 5. He admitted the prior conviction allegation was true: "Mr. Hight: As to counts 1 and 5, which are also strike offenses like your prior offense, you are alleged under [section] 667[, subdivision (a)(1)] that you were convicted of this same offense in case A903263 of

the same 245 violation occurring in June 24, 1983 in Los Angeles Superior Court, pursuant to that section do you admit or deny? [¶] The defendant: Admit it."

The trial court struck the sections 667, subdivisions (b) through (i) and 1170.12 prior and the section 12022.7, subdivision (e) great bodily injury allegation. Defendant was sentenced as follows: two years in state prison on count 1 plus a consecutive five years pursuant to section 667, subdivision (a)(1); concurrent 16-month terms on each of counts 2 and 5; and 180 days in the county jail with credit for 180 days on count 3. The trial court issued a probable cause certificate as to the question whether defendant's 1983 offense was a serious felony conviction with the meaning of section 667, subd. (a)(1).

III. DISCUSSION

A. The Prior Conviction

As discussed above, defendant admitted he had a prior serious felony conviction within the meaning of section 667, subdivision (a)(1). That admission was binding. (*People v. Thomas* (1986) 41 Cal.3d 837, 842-843, 844-845; *People v. Jackson* (1985) 37 Cal.3d 826, 835-836 [plur. opn.], disapproved on another point in *People v. Guerrero* (1988) 44 Cal.3d 343, 355; *People v. Richard* (1987) 189 Cal.App.3d 1159, 1162; see *People v. French* (2008) 43 Cal.4th 36, 44-50.) Defendant's admission conceded the point that the prior conviction qualified as a prior serious felony within the meaning of section 667, subdivision (a)(1). Defendant's admission foreclosed any argument on appeal to the contrary. (*People v. Cortez* (1999) 73 Cal.App.4th 276, 281; *People v. Bowie* (1992) 11 Cal.App.4th 1263, 1266.) Further, defendant's admission was binding notwithstanding the trial court's plea-inducing promise the issue would be preserved for appeal. (*People v. Thurman* (2007) 157 Cal.App.4th 36, 41-43; *People v. Hollins* (1993) 15 Cal.App.4th 567, 573-575; *People v. Coleman* (1977) 72 Cal.App.3d 287, 291-293.) Moreover, because the trial court's issue preservation promise was illusory, defendant must be given an opportunity to withdraw his plea. (*People v. DeVaughn* (1977) 18

Cal.3d 889, 896; *People v. Thurman, supra,* 157 Cal.App.4th at pp. 42-43; *Ricki J. v. Superior Court* (2005) 128 Cal.App.4th 783, 792; *People v. Hollins, supra,* 15 Cal.App.4th at pp. 574-575; *People v. Bonwit* (1985) 173 Cal.App.3d 828, 833; *People v. Geitner* (1982) 139 Cal.App.3d 252, 255; *People v. Coleman, supra,* 72 Cal.App.3d at pp. 292-293.) If defendant elects to withdraw his plea, the section 667, subdivision (b) through (i), 1170.12, and 12022.7, subdivision (e) allegations are to be reinstated. (*People v. Hill* (1974) 12 Cal.3d 731, 769, overruled on another point in *People v. DeVaughn, supra,* 18 Cal.3d at p. 896, fn. 5; *People v. Aragon* (1992) 11 Cal.App.4th 749, 757.)

B. Sentencing Issues

The trial court orally imposed a single $30 court facilities assessment, which is reflected in the abstract of judgment. (Gov. Code, § 70373, subd. (a)(1).) However, the trial court was required to impose a $30 court facilities assessment as to *each count*. (*People v. Castillo* (2010) 182 Cal.App.4th 1410, 1415, fn. 3; cf. *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866.) The trial court neglected to orally impose any court security fee, although a $30 fee is recorded in the abstract. (§ 1465.8, subd. (a)(1).) The trial court was required to impose a *$40* court security fee (§ 1465.8, subd. (a)(1), as amended by Stats. 2010 (2009-2010 Reg. Sess.) ch. 720, § 33) on every count. (*People v. Roa* (2009) 171 Cal.App.4th 1175, 1181; *People v. Schoeb, supra,* 132 Cal.App.4th at pp. 865-866; see *People v. Alford* (2007) 42 Cal.4th 749, 758, fn. 6.)

The trial court's section 1202.4, subdivision (b)(1) and (2) and section 1202.45 restitution fine orders are unclear. (See *People v. Jones* (2010) 187 Cal.App.4th 418, 420; *People v. Waldie* (2009) 173 Cal.App.4th 358, 367-368.) The oral pronouncement of judgment is as follows: "You're to pay a mandatory $200 restitution fine per year. [¶] You're to pay [a] mandatory $200 restitution fine." No mandatory section 1202.45 parole restitution fine was imposed.

There are two ways to calculate the restitution fine for a person whose crime was committed on May 2, 2010. The first way is to select a figure between $200 and $10,000 as specified in former section 1202.4, subdivision (b)(1), "The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars ($200), and not more than ten thousand dollars ($10,000) . . . ." (Stats. 2009, ch. 454, § 1.) The second option for selecting the restitution fine was set forth in former section 1202.4, subdivision (b)(2), "In setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." (Stats. 2009, ch. 454, § 1.) At one point, the trial court indicated the restitution fine was only $200 as permitted by former section 1202.4, subdivision (b)(1). This is the second option for imposing the restitution fine. If the trial court intended to impose a restitution fine under former section 1202.4, subdivision (b)(2), the formula is the product of $200 multiplied the *number of years* of imprisonment imposed on the defendant. This figure is then multiplied by the *number of felony counts* of which the defendant was convicted. (Stats. 2009, ch. 454, § 1.) This would total $4,200 ($200 x 7 x 3), not $1,400 as inaccurately stated in the abstract of judgment.

Upon remittitur issuance, if defendant opts not to set aside his plea and admission, the trial court is to specify its intended restitution fine order. And once a restitution fine is selected, the trial court is to impose the mandatory section 1202.45 parole restitution fine if defendant is sentenced to prison. (*People v. Mitchell* (2001) 26 Cal.4th 181, 187-188; see *People v. Soria* (2010) 48 Cal.4th 58, 65-66.)

III. DISPOSITION

The judgment is reversed and the cause is remanded to the trial court with directions to afford defendant an opportunity to withdraw his no contest plea. If defendant moves to withdraw his no contest plea within 60 days after remittitur issuance,

the trial court is directed to vacate the plea and reinstate the information for further proceedings. If defendant's plea is set aside, all dismissed special allegations are to be reinstated. Should defendant not move to withdraw his plea within the 60-day period, the trial court is directed to reinstate the judgment. The reinstated judgment is to be modified to reflect $120 in court facilities assessments (Gov. Code, §70373, subd. (a)(1)) and $160 in court security fees (Pen. Code, § 1465.8, subd. (a)(1)). In addition, upon reinstating the judgment, the trial court is to clarify its restitution fine orders.

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TURNER, P.J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.