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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.

JERRY RAY ESPINOSA,

Defendant and Appellant.

B279346

(Los Angeles County  
Super. Ct. No. GA099010)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jared Moses, Judge. Affirmed.

Linda L. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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Under a negotiated plea agreement, appellant Jerry Ray Espinosa pled guilty to felony possession of tear gas (count 1; Pen. Code, § 22810, subd. (a))<sup>1</sup> and felony receiving stolen property with a value exceeding \$950 (count 2; § 496, subd. (a)). Further, Espinosa admitted he had suffered a prior strike (§§ 667, subd (d); 1170.12, subd. (b)) and four prior felony convictions with a prison term (§ 667.5, subd. (b)). Pursuant to the plea agreement, the trial court reduced count 1 to a misdemeanor (§ 17, subd. (b)), and sentenced Espinosa to serve a total term of 32 months in state prison on count 2, comprised of the low term of 16 months, doubled for the strike. The court recommended a fire camp placement. Espinosa was sentenced to serve 30 days in county jail on the tear gas conviction, with credit for time served. The court ordered regular restitution, fines and assessments. Espinosa's appointed counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). We affirm the judgment.

## FACTS

### *The Crimes*

Because Espinosa pled guilty, our summary of the facts is taken from his preliminary hearing. On June 6, 2016, Los Angeles Sheriff's Department (LASD) Deputy Cesar Huerta and his partner, Deputy Gonzalez, were on duty near the intersection of Pollock Street and Orange Street in Rosemead when they saw a white four-door Honda Accord. Deputy Gonzalez ran a mobile digital computer check on the license plate number which indicated that the Honda was reported stolen from West Covina. The deputies then conducted a felony traffic stop.

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<sup>1</sup> All undesignated section references are to the Penal Code.

A person named Sanchez was driving the Honda, and Espinosa was a passenger. Sanchez stated that Espinosa was an acquaintance, and that he had been complaining of a hernia. Sanchez “punched” the Honda’s ignition to drive Espinosa to a hospital. Deputy Huerta observed that the ignition of the vehicle had been “punched.” During a search of the Honda, Deputy Huerta retrieved a screwdriver from the vehicle, and a small pepper spray canister on the front passenger seat.

Espinosa agreed to waive his *Miranda*<sup>2</sup> rights. When Deputy Huerta asked Espinosa how he acquired the Honda, Espinosa answered, “I can’t tell you that.” Espinosa stated that the pepper spray “came out of the vehicle.” Espinosa said he had a hernia, and that he was going to a hospital. Espinosa showed an “open wound” to Deputy Huerta. An assisting unit transported Espinosa to a hospital to be evaluated. He was later booked at the deputy’s station.

LASD Detective Craig Johnson subsequently contacted an employee at Super Remate de Autos. The employee stated that he had the authority to speak on behalf of the owner of the business and that he was the person who reported the Honda stolen. Further, that no one had permission to drive the vehicle. The detective researched the value of the stolen vehicle through Kelly Bluebook. A white four door Honda in good condition and finely tuned came back with a value of \$1,075.

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<sup>2</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

### ***The Criminal Case***

The People filed an information charging Espinosa with felony use of tear gas (count 1; § 22810, subd. (a)) and felony receiving stolen property, a 1992 Honda Accord, exceeding \$950 in value (count 2; § 496, subd. (a)). Further, the information alleged that Espinosa had four prior felony convictions with a prison term (§§ 1203, subd. (e)(4); 667.5, subd. (b)),<sup>3</sup> and a prior strike (§ 667, subd. (d); 1170.12, subd. (b)).

Espinosa filed a *Romero*<sup>4</sup> motion to dismiss his prior strike on the grounds that his 1998 robbery conviction was “remote in time,” his recent criminal history “lacked violence,” he committed his current alleged offenses because of “unusual circumstances,” and his current offenses were not a violent or serious felony. The trial court denied Espinosa’s *Romero* motion, noting that, in addition to the alleged felony priors, Espinosa had “overall 12 misdemeanor convictions, . . . and five sustained juvenile petitions,” showing a “completely unbroken history of criminal conduct dating [from] preceding the strike conviction . . . to the present time . . . .”

Espinosa filed a motion pursuant to section 995 to set aside the felony possession of tear gas charge alleged in count 1 based on the reporter’s transcript from his preliminary hearing. Espinosa argued that the People had failed to present evidence showing that the pepper spray canister found in the Honda had

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<sup>3</sup> Espinosa’s four one-year prior convictions were for a drug offense in 2014, taking a vehicle in 2005, another drug offense in 2001, and robbery in 1998. The prior strike was the robbery conviction in 1998.

<sup>4</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

been “analyzed.” Accordingly, he argued, the People’s evidence did not show that the canister was capable of being discharged, and did not show that it actually contained tear gas as defined in the Penal Code.

The trial court denied Espinosa’s section 995 motion. In denying the motion, the court found that Espinosa had raised an “interesting point,” but, in the end, found that Officer Huerta’s testimony that he found a “pepper spray canister” was sufficient for the purposes of a preliminary hearing and a 995 motion.

After the court denied his 995 motion, Espinosa agreed to accept a negotiated plea agreement. Espinosa was informed of and waived his Constitutional rights. The court explained the possible consequences of his plea, including the maximum penalty and administrative sanctions and the possible legal effects and penalties incident to subsequent convictions for the same or similar offenses. The court advised Espinosa that, if he was not a citizen, then a conviction of the offense for which he was charged would have the consequences of deportation, exclusion from admission to the U.S., or the denial of naturalization.

Espinosa pled guilty to the count 1 and count 2. Further, Espinosa admitted the alleged prior strike and the four alleged one-year priors. Espinosa’s counsel joined in the waivers and concurred in the plea. The trial court found Espinosa’s waivers were made knowingly, understandingly and explicitly, and that there was a factual basis for his plea, and accepted the plea.

In accord with the plea, the trial court ordered that the information to be amended by interlineations to allege count 1 as a misdemeanor pursuant to section 17, subdivision (b). The court then sentenced Espinosa as noted at the outset of this opinion.

The court struck the punishment on the four one-year priors pursuant to section 1385. The court imposed a series of regular restitution fines and assessments and fees. The court granted Espinosa 140 days of actual credits and 140 local conduct credits for a total of 280 days credit.

Espinosa filed a pro per application for resentencing pursuant to Proposition 47, which was later denied.

Espinosa filed a timely notice of appeal, including a request for certificate of probable cause. The court granted Espinosa's request for certificate of probable cause.

### **DISCUSSION**

We appointed counsel to represent Espinosa on appeal. Appointed counsel filed an opening brief on appeal pursuant to *Wende, supra*, 25 Cal.3d 436, asking our court to review the record independently for any arguable issues. We notified Espinosa by letter that he could submit any arguments or issues that he wished our court to review. Espinosa did not file a response.

### **DISPOSITION**

We have independently reviewed the record on appeal, and find that appointed counsel has fulfilled her duty, and that no arguable issues exist. (*Wende, supra*, 25 Cal.3d 436, *People v. Kelly* (2006) 40 Cal.4th 106.) The judgment is affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

FLIER, J.