Filed 4/24/17 P. v. Hernandez CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ERIC HERNANDEZ, Defendant and Appellant.	B271010 (Los Angeles County Super. Ct. No. SA090789)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kathryn A. Solorzano, Judge. Affirmed.

Lise M. Breakey, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * * *

Defendant and appellant Eric Hernandez, also known as Rodney Hernandez, was convicted, following a plea of no contest, of one count of attempted unlawful taking or driving of a vehicle. Defendant admitted he had suffered a prior conviction within the meaning of Penal Code section 667.5, subdivision (b). The court sentenced defendant to 30 months in state prison.

Defendant contends there is insufficient evidence his 2009 assault conviction qualified as a prior strike and he was therefore entitled to a county jail commitment.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2015, defendant was charged by information with one count of attempted carjacking. (Pen. Code, §§ 664, 215, subd. (a).) The information was amended by interlineation to add a second count for the attempted unlawful taking or driving of a vehicle. (Pen. Code, § 664; Veh. Code, § 10851, subd. (a).) It was further alleged defendant had suffered a 2009 conviction that qualified as a serious or violent felony within the meaning of the "Three Strikes law," and as a "prison" prior within the meaning of Penal Code section 667.5, subdivision (b).

In January 2016, defendant, pursuant to a plea agreement, pled no contest to count 2 (attempted unlawful taking or driving of a vehicle), and count 1 was dismissed. During the course of the plea colloquy, the court explained that the maximum term is "18 months . . . county imprisonment, but because the defendant has been convicted of a strike previously, he's precluded from housing in the county jail on this offense." The court asked defendant if he understood that he would "be referred to the Department of Corrections and you will be – you will serve your time there rather than county imprisonment." Defendant

answered, "Yes, I understand." The court further explained that because of the "prison" prior allegation, he was subject to an additional year in prison. Defendant said he understood.

The court inquired of counsel whether the plea agreement called for defendant to admit that his 2009 assault conviction was a strike. Defense counsel said no, but noted he had a related issue he wanted to make clear on the record. In relevant part, the following colloquy occurred.

"[DEFENSE COUNSEL]: I'm a little concerned . . . . I haven't discussed this with anybody, but at this point I haven't seen any evidence that that particular 245 (A)(1) is even a strike because in 2009, it was either weapons or were not [*sic*] force to produce great bodily injury.

"[PROSECUTOR]: I have his packet here.

"[DEFENSE COUNSEL]: I reviewed what priors packet was given to me. There's still no indication there. [¶] . . . [¶] I'm not trying to make a big deal out of that. I'm just – I don't want there to be confusion that he's admitting a strike when he's not. He's pleading to the 667.5 (B) that he went to prison . . . .

"THE COURT: Yeah, but what I think what the People are about to say is that it's a 245 with a deadly weapon . . . . [I]t's listed in the probation report as an A.D.W., not assault with force likely to commit great bodily injury."

After some additional discussion, the court asked to see the priors packet, and the colloquy continued.

"[DEFENSE COUNSEL]: I don't – [¶] Again, this, again, is, not to make a big deal out of it, I just want to make sure the record is clear that he's not admitting the strike . . . . [I]t's 667.5 (B) that he's admitting." The parties continued to discuss

that the priors packet referenced an assault with a deadly weapon other than a firearm with great bodily injury.

"[DEFENSE COUNSEL]: . . . [A]t that time it was still 245 (A)(1), was either/or. . . . [¶] . . . [¶] It could just be an abbreviation to try to fit it in there. Doesn't mean --

"THE COURT: So what's your point? [¶] I'm sending him to the C.D.C.

"[DEFENSE COUNSEL]: No, I have no trouble.
[¶] . . . [¶]

"THE COURT: . . . [A]s far as I'm concerned, I believe that he has a strike . . . . [¶] . . . [¶] . . . I believe it precludes him from county jail imprisonment. [¶] Are you going to fight that?

"[DEFENSE COUNSEL]: That's – no, no, no, no, no."

Defense counsel then reiterated that he just wanted to make a clear record that defendant was only admitting the Penal Code section 667.5 allegation. "And he's entitled to half time. That's part of the agreement."

The court confirmed defendant was entitled to half-time credit, explaining that no one was "saying otherwise." The court went on to say, "I also want to make a clear record that the expectation is he's going to serve his time in prison." Defense counsel responded: "Great. Agreed. I'm not contesting that."

The court then accepted defendant's waivers and plea. The court imposed the agreed-upon sentence on count 2 of 18 months in state prison, plus one year for the prison prior allegation for an aggregate term of 30 months. Defendant was awarded 368 days of custody credits. Fire camp was recommended at the request of defendant.

Defendant obtained a certificate of probable cause and this appeal followed. The priors packet relied upon by the court at

sentencing was not included in the record on appeal. On February 3, 2017, we ordered the record augmented, but received a certification from the court clerk that it did not appear in the superior court's file. We then sent a letter to counsel directing that the priors packet be provided to the superior court for transmission to this court. On March 8, 2017, we received the augmented clerk's transcript.

The priors packet included several documents, two of which reference the nature of defendant's prior conviction: the abstract of judgment and an administrative form for the Department of Justice, Criminal Justice Information Services Division. The abstract of judgment filed in San Mateo County Superior Court on April 22, 2009, identifies defendant's conviction as "PC 245(A)(1) ASLT DDLY WPN OTHR FRM/GBI." The administrative form describes the charge as "245(A) (1) PC (F) FORCE/ADW NOT FIREARM:GBI."

The probation report, referenced by the parties during the sentencing hearing, provides that defendant was charged in September 2008 with multiple charges, including violations of Penal Code section 273.5 (inflicting corporal injury), section "245(A)(1) PC (ADW)," and section 417, subdivision (a)(1) (exhibiting deadly weapon other than a firearm). It then identifies a conviction in San Mateo Superior Court, case No. SC067506, for "245(A)(1) PC (ADW) FELONY, 2 YEARS STATE PRISON."

The parties waived oral argument.

DISCUSSION

The Criminal Justice Realignment Act of 2011 (stats. 2011, ch. 15, § 1; hereafter the Act), amended a number of statutes concerning where a defendant will serve his sentence. Subject to

specified exceptions, defendants sentenced under the Act now serve their time in county jail instead of state prison. Penal Code section 1170, subdivision (h) provides that where a penal statute specifies that a defendant shall be punished by imprisonment pursuant to subdivision (h) of Penal Code section 1170, that defendant is required to serve his term in county jail. Attempted unlawful driving or taking of a vehicle has such a designation. (Veh. Code, § 10851, subd. (a).) However, the Act also provides that when a defendant has a prior serious or violent felony conviction, he is disqualified from serving his time in county jail and instead must be sentenced to state prison. (Pen. Code, § 1170, subd. (h)(3).)

Defendant contends his plea to unlawful taking or driving a vehicle warranted a county jail commitment because the record failed to demonstrate he had suffered a strike that disqualified him from a jail commitment. In 2009, only the first prong of Penal Code section 245, subdivision (a)(1), i.e., assault by means of a deadly weapon not a firearm, qualified as a serious or violent felony. The great bodily injury prong of the statute (assault by means likely to produce great bodily injury) only qualified if there was evidence the defendant personally inflicted great bodily injury on the victim. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065.) Defendant maintains the record is insufficient to demonstrate his 2009 conviction was for an assault with a deadly weapon, which is a disqualifying offense, rather than an assault by means likely to cause great bodily injury, which is not.

Respondent contends defendant's appeal is moot since he has already completed his prison term. Respondent further argues that defendant expressly consented to serve his term in state prison and has therefore forfeited the argument on appeal,

and that in any event, substantial evidence supports the trial court's use of defendant's 2009 conviction as a sentencing factor.

Defendant maintains his appeal is not moot because he remains subject to parole supervision in light of having served a state prison sentence; and, that he did not forfeit the issue because a legally unauthorized sentence may be challenged at any time.

Assuming without deciding the appeal is not moot, we conclude the record supports the court's sentencing choices. The exclusions under Penal Code section 1170, subdivision (h)(3) are "sentencing factors" and do not require pleading and proof. (*People v. Griffis* (2013) 212 Cal.App.4th 956, 962-965; see also *People v. Lara* (2012) 54 Cal.4th 896, 906-907 [finding no pleading and proof requirement for determining presentence credits and affirming trial court's reliance on probation report as to existence of prior conviction].)

Here, during the plea colloquy, the court concluded defendant's 2009 conviction was a strike for sentencing purposes under the Act and indicated its intent to impose a state prison sentence. In response, defendant expressly stated he did not contest that point. The record adequately supports the court's imposition of sentence.

DISPOSITION

The judgment of conviction is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J. FLIER, J.