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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>OMAR GARCIA,<br><br>Defendant and Appellant. | B262876<br><br>(Los Angeles County Super. Ct. No. VA136224) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Brian F. Gasdia, Judge. Vacated and reversed in part, affirmed in part, and remanded.

James R. Bostwick, Jr., 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, Susan Sullivan Pithey and Andrew S. Pruitt, Deputy Attorneys General, for Plaintiff and Respondent.

Omar Garcia was convicted by jury of one count of driving under the influence of alcohol (DUI) within 10 years of three other DUI offenses. (Veh. Code, §§ 23152, subd. (a), 23550.)[1] Garcia admitted the allegation that he had committed three DUI offenses within ten years of his current offense. (§ 23550.) The jury found true an allegation that Garcia willfully refused a police officer's request to take a chemical test. (§§ 23612, 23577, 23578, 23538, subd. (b)(2).) The trial court sentenced Garcia to a term of two years. Garcia appeals, contending that his admission of the three prior DUI convictions was not knowing and voluntary. Garcia further contends that the enhancement for refusing to take a chemical test should be reversed because the officer failed to inform him of his rights and of the consequences of refusing. Finally, Garcia asks us to conduct an independent review of the *Pitchess* hearing. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) We conclude that the totality of the circumstances does not show that Garcia's admission was knowing and voluntary. We therefore reverse the true finding on the allegation, vacate the sentence and remand for further proceedings. We otherwise affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

*Prosecution Evidence*

On April 20, 2014, around 6:00 p.m., Pablo Galvez was driving on Studebaker Road toward Florence Avenue. In his rearview mirror, he saw a pickup truck approaching him from the left side. The truck came so close to Galvez that Galvez needed to move to the right to avoid an accident. The truck passed Galvez, stopped at the signal at Florence, then turned left on Florence.

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[1] Further unspecified statutory references are to the Vehicle Code.

Galvez also turned left onto Florence. Galvez was driving at approximately 35 to 40 miles per hour and estimated the truck to be going approximately 60 to 65 miles per hour. Galvez saw the truck weave and almost hit cars parked on the right side of the street as it traveled down Florence Avenue.

Around the same time, Lewis Ponce was driving on Florence Avenue approaching Lakewood Avenue. Ponce saw a pickup truck in front of him swerve between lanes and almost hit parked cars. Ponce saw the truck enter a gas station at the intersection of Florence and Lakewood. He reported the truck to the Downey Police Department.

Galvez followed the truck into the gas station. Galvez parked at a gas pump and called 911 to report the truck's erratic driving. Two police cars arrived a few minutes later, and Galvez drove away without speaking to the police.

Downey Police Officer Blanca Reyes arrived at the gas station and saw the pickup truck parked in a handicapped space. Garcia was sitting in the driver's seat with the door open, leaning slightly outside the car. Officer Reyes opened the driver's door, and Garcia vomited on himself.

Officer Reyes asked Garcia to step out of the truck, but Garcia insisted he was fine. Officer Reyes pulled Garcia out of the truck, helped him to the sidewalk, and asked him to sit down. Officer Reyes smelled alcohol and noted that Garcia's eyes were bloodshot and his speech was slurred.

Officer Reyes told Garcia she was going to give him a field sobriety test because she smelled alcohol on him. Garcia did not take the test, but he repeatedly insisted that he was not refusing to take the test. Garcia was argumentative and uncooperative and failed to respond to Officer Reyes' statements. Garcia started speaking Spanish and told Officer Reyes he did not understand what she was saying, so Officer Reyes spoke to him in Spanish. Garcia then spoke in English

and told Officer Reyes that he was not refusing the sobriety test. Garcia refused to perform a test known as the horizontal gaze nystagmus test.

Officer Reyes gave Garcia the option to do either a blood test or a breath test and explained to him that if he refused, his license would be suspended automatically. At trial, she did not recall whether she had advised Garcia that refusing the test would result in a fine or imprisonment. Garcia never performed a chemical test. Based on her observations of Garcia, Officer Reyes believed he had been driving under the influence and therefore placed him under arrest.

*Defense Evidence*

Garcia did not present any evidence.

*Procedural Background*

In October 2014, the district attorney charged Garcia with DUI within 10 years of three other DUI offenses, alleging that Garcia had suffered DUI convictions in 2006, 2008, and 2010. The information further alleged that Garcia willfully refused to submit to a chemical test pursuant to section 23612, within the meaning of sections 23577, 23578, and 23538, subdivision (b)(2).

Garcia filed a *Pitchess* motion, seeking information regarding citizen complaints or disciplinary proceedings as to Officer Reyes. The court granted the motion and conducted an in camera hearing, but found no discoverable items.

Before trial started, Garcia through counsel offered to admit the three prior DUI convictions. The trial court told Garcia the prosecutor would ask him some questions and that Garcia could then ask his attorney and the court some questions. The prosecutor asked Garcia if he admitted being convicted of DUI offenses on November 22, 2006, January 2, 2008, and June 17, 2010. Garcia admitted all

three. The trial court asked Garcia, "Do you understand you have a right to have that decided by me after this trial and I could decide that on my own if you didn't admit; you also have the right to a jury trial separate from me deciding that you could have the same jury that hears the case decide those priors? [¶] Do you understand that?" Garcia said he understood. The court then stated, "You're waiving your rights to do that and you're willing to admit these three priors – yes?" Garcia replied, "Yes, sir." The court asked Garcia, "Do you have any questions of your attorney before we do that?" Garcia conferred off the record with his trial counsel and then told the court he had no questions. The court accepted Garcia's plea as knowing and intelligent. The court did not advise Garcia that he had the right to remain silent and the right to confront adverse witnesses.

The jury convicted Garcia of the charged offense and found true the allegation that he refused to submit to the chemical test. The trial court sentenced Garcia to the midterm of two years, designated him a habitual traffic offender, and revoked his license for four years. Garcia filed a timely notice of appeal.

## DISCUSSION

### I. *Admission of Prior Convictions*

Garcia contends that his admission of three prior DUI convictions was not knowing and voluntary. We conclude that the totality of the circumstances does not establish his admission was knowing and voluntary.

"[B]efore accepting a criminal defendant's admission of a prior conviction, the trial court must advise the defendant and obtain waivers of (1) the right to a trial to determine the fact of the prior conviction, (2) the right to remain silent, and (3) the right to confront adverse witnesses. [Citation.] Proper advisement and waivers of these rights in the record establish a defendant's voluntary and

intelligent admission of the prior conviction. [Citations.]" (*People v. Mosby* (2004) 33 Cal.4th 353, 356 (*Mosby*).) In *People v. Lloyd* (2015) 236 Cal.App.4th 49 (*Lloyd*), the court stressed "the need for trial courts to advise defendants of *all* their *Boykin-Tahl* rights and to obtain express waivers thereof." (*Id.* at p. 53; see *People v. Cross* (2015) 61 Cal.4th 164, 170 (*Cross*) [discussing requirement established by *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122 that the trial court ensure that a guilty plea is knowing and voluntary].) "[I]f the transcript does not reveal complete advisements and waivers, the reviewing court must examine the record of 'the entire proceeding' to assess whether the defendant's admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances. [Citation.]" (*Mosby*, *supra*, 33 Cal.4th at p. 361.)

Garcia's plea to the prior convictions was taken prior to trial. He was advised of his right to have a court trial or a jury trial to decide the prior conviction allegations, but he was not advised of his right to remain silent and his right to confront adverse witnesses. The People acknowledge that Garcia was not advised of all three rights but argue that the totality of the circumstances shows his admission was voluntary and intelligent. We disagree. The circumstances presented here are similar to cases in which courts have found the admission not to be knowing and voluntary and distinguishable from the case on which the People rely.

We rely on three cases with circumstances similar to Garcia's. First, in *Cross*, the defendant stipulated to a prior conviction, and the trial court accepted the stipulation without advising him of his trial rights or the penal consequences of his admission. Our high court concluded there was no indication in the record that the defendant's stipulation to the prior conviction was knowing and voluntary,

stating that, "[a]fter counsel read the stipulation in open court, the trial court immediately accepted it. The court did not ask whether [the defendant] had discussed the stipulation with his lawyer; nor did it ask any questions of [the defendant] personally or in any way inform him of his right to a fair determination of the prior conviction allegation. [Citation.]" (*Cross, supra*, 61 Cal.4th at p. 180.) Moreover, the defense had not yet cross-examined any witnesses, and there was "no information on how the alleged prior conviction was obtained." (*Ibid.*) Because "nothing in the record affirmatively show[ed] that [the defendant] was aware of his right to a fair determination of the truth of the prior conviction allegation," the court set aside the stipulation and reversed the judgment. (*Ibid*.)

The second case is *Lloyd*. Before the defendant admitted five state prison priors, the trial court advised him of his right to trial, but not of his rights to confront adverse witnesses and to remain silent. As here, the defendant's admission "did not immediately follow his trial."[2] (*Lloyd, supra*, 236 Cal.App.4th at p. 59.) Also like this case, "the appellate record in [*Lloyd* did] not include information about how defendant was convicted on any of the five felony cases resulting in state prison commitment." (*Id.* at pp. 59-60.) The appellate court held that the failure to advise the defendant of the right of confrontation and the right to silence was prejudicial error and therefore reversed his admission of the prison priors. (*Id.* at pp. 53, 60.)

Third, in *People v. Christian* (2005) 125 Cal.App.4th 688 (*Christian*), the trial court failed to advise the defendant of his rights to confront witnesses and against self-incrimination when the defendant entered a plea and admitted to prior

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[2] The admission in *Lloyd* was obtained seven months after trial in a bifurcated proceeding.

felony allegations.[3] Like Garcia, the appellant in *Christian* "had *not* just participated in a trial at which he would have exercised his right to confront witnesses, nor had he just taken advantage of nor waived this right against self-incrimination." (*Id.* at p. 697.) Similar to the record here, there was no evidence in *Christian* to indicate whether the prior convictions were obtained by plea or trial. The court thus held that the totality of the circumstances did not indicate that the appellant understandingly and voluntarily entered his plea and admission. (*Id.* at p. 698.)

This case is unlike *Mosby*, on which the People rely. *Mosby* concluded that the totality of the circumstances indicated that the defendant voluntarily and intelligently admitted his prior conviction, despite the trial court's failure to advise him of his rights. (*Mosby, supra*, 33 Cal.4th at pp. 364-365.) The court relied on the fact that the defendant admitted the prior conviction of possessing cocaine "immediately after a jury found him guilty of selling cocaine." (*Id.* at p. 364.) The court reasoned that the "defendant, who was represented by counsel, had *just* undergone a jury trial at which he did not testify, although his codefendant did. Thus, he not only would have known of, but had just exercised, his right to remain silent at trial, forcing the prosecution to prove he had sold cocaine. And, because he had, through counsel, confronted witnesses at that immediately concluded trial, he would have understood that at a trial he had the right of confrontation." (*Ibid.*) Moreover, "defendant's prior conviction was based on a plea of guilty, at which he would have received *Boykin-Tahl* advisements." (*Id.* at p. 365.)

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[3] Although *Christian* differs slightly from the instant case because it involved a plea to the substantive offense in addition to an admission to prior conviction allegations, the court's reasoning applies here.

Unlike *Mosby*, Garcia's admission was taken prior to trial. He had not just undergone a jury trial at which he could have exercised his right to remain silent and to confront adverse witnesses. Nor is there any evidence in the record that Garcia's prior offenses were based on guilty pleas.

The People argue that the totality of the circumstances shows that Garcia's admission was knowing and voluntary. To support their argument, they first rely on a comment by the trial court that Garcia's prior convictions could be used for impeachment if Garcia chose to testify. The People also cite a comment the court made to Garcia after accepting his admission, informing him that if he decided to testify, the court would consider admitting the evidence of the prior convictions. Finally, the People point to the trial court's statement later in the hearing that Garcia had a constitutional right to testify or not to testify.

Even if these comments indicate that Garcia was aware of his right to remain silent, this does not establish that he waived this right. (See *People v. Johnson* (1993) 15 Cal.App.4th 169, 178 (*Johnson*) [where the defendant had just exercised his rights in trial, but the trial court only informed him of his right to a jury trial when he admitted prior convictions, the appellate court held it was "impossible to determine from this silent record whether [the defendant] not only was aware of [his *Boykin-Tahl*] rights, but was also prepared to waive them as a condition to admitting his prior offenses."].) Moreover, even assuming the comments indicate Garcia's awareness of his right to remain silent, none of the statements establish that he was aware of and waived his right to confront adverse witnesses.

The People also argue that Garcia's conversation with his trial counsel is evidence that trial counsel advised Garcia of his rights. We disagree. "[W]e are not privy to the conversation [Garcia] had with his counsel about the plea offer, only that the conversation took place. It is necessary to have an adequate record

for review [citation] as this ensures defendants know and understand the significance of the constitutional rights they are waiving. [Citation.]" (*Christian, supra*, 125 Cal.App.4th at p. 698.) The trial court did not ask Garcia if his counsel discussed the rights he was waiving or explained the penal consequences of the admission. The record indicates only that the court asked Garcia if he had any questions for his attorney. "In the same way that the presence of an attorney alone does not satisfy the *Boykin-Tahl* requirements [citation], we will not presume [Garcia] was informed of his *Boykin-Tahl* rights in [his] conversation with his counsel." (*Ibid.*)

The People further argue that Garcia's awareness of his rights is demonstrated by his prior experience with the criminal justice system. However, as in *Christian*, *Cross*, and *Lloyd*, "we have no facts with regard to the circumstances of appellant's prior convictions. We do not know if they were by plea or trial and we cannot infer that he would have received advisements in his prior cases." (*Christian, supra*, 125 Cal.App.4th at p. 697; see *Cross, supra*, 61 Cal.4th at p. 180 ["we have no information on how the alleged prior conviction was obtained. [Citation.]"]; *Lloyd, supra*, 236 Cal.App.4th at p. 60 [where the record did not indicate whether prior convictions "were the result of trials or guilty pleas," the court concluded the "defendant's experience in the criminal justice system does not permit a reasonable inference he was aware of and intended to waive his right to silence and confrontation by admitting the state prison priors"].) Moreover, Garcia's prior DUI convictions occurred eight, six, and four years prior to the present offense. (See *Christian, supra*, 125 Cal.App.4th at pp. 697-698 ["Given the lack of information regarding appellant's prior convictions, the significant gap [between his prior convictions and the charges at issue], and the lack of other facts demonstrating an awareness and comprehension of his

constitutional rights, we cannot infer that appellant's prior experience in the criminal justice system demonstrated his present knowledge and understanding of his rights. [Citations.]"].) Garcia's prior convictions do not indicate that he was aware of the rights he was waiving and the potential consequences of his admission to the allegations. (See *Cross, supra*, 61 Cal.4th at pp. 170-171 ["[A]n accused, before admitting a prior conviction allegation, must be advised of the precise increase in the prison term that might be imposed, the effect on parole eligibility, and the possibility of being adjudged a habitual criminal. [Citation.]"].)

Thus, the totality of the circumstances does not demonstrate Garcia knowingly and intelligently waived his rights, and his admission of his priors must be reversed. (*Lloyd, supra*, 236 Cal.App.4th at p. 53 [reversing and remanding for retrial where record did not demonstrate the defendant's admission was knowing and voluntary]; *Johnson, supra*, 15 Cal.App.4th at p. 178 [reversing judgment finding true the defendant's admission of prior convictions where the record did not show he was prepared to waive his *Boykin-Tahl* rights "as a condition to admitting his prior offenses"].)

II. *Refusal to Take Chemical Test*

Garcia's second contention is that the enhancement for refusing to take a chemical test should be reversed because the officer failed to advise him of his rights and of the consequences of refusing to take the test as required by section 23612.[4] He contends that the true finding on the enhancement is not supported by

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[4] Section 23612 "is part of California's implied consent law. [Citation.] The immediate purposes of the implied consent law are (1) '"to obtain the *best* evidence of blood alcohol content at the time of the arrest of a person who is reasonably believed to be driving while intoxicated"' before the evidence becomes unavailable due to the passage of time [citation] and (2) to provide incentive for voluntary submission to

substantial evidence because of Officer Reyes' failure to advise him of the consequences of refusal. We find that the enhancement is supported by substantial evidence.

"When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' [Citation.] Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 585.)

The jury found Garcia guilty of DUI (§ 23152, subd. (a)) and found true the allegation that he refused the officer's request to submit to a chemical test pursuant to section 23612. Section 23612 provides that "[a] person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcoholic content of his or her blood, if lawfully arrested for an offense allegedly committed in violation of Section 23140, 23152, or 23153." (§ 23612, subd. (a)(1)(A).) "The arrested or detained person must be told that failure to submit to, or complete, a required test will result in suspension or revocation of his or her license for specified periods. [Citations.] An arrested person must also be told that he or she is subject to a fine

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chemical tests thereby eliminating the potential for violence inherent in forcible testing [citation]." (*Molenda v. Department of Motor Vehicles* (2009) 172 Cal.App.4th 974, 993.)

and mandatory imprisonment if convicted of a violation of [section] 23152 or 23153. [Citation.]" (2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 297, p. 1034; see § 23612, subd. (a)(1)(D) ["The person shall be told that his or her failure to submit to, or the failure to complete, the required chemical testing will result in a fine [and] mandatory imprisonment if the person is convicted of a violation of Section 23152 or 23153 . . . ."].)

The People acknowledge that Officer Reyes did not give Garcia the admonitions required by section 23612. Officer Reyes advised Garcia that his license would be suspended automatically if he refused to submit to the chemical test. She did not advise him that a refusal could be used against him in court, and she did not recall if she told him that a refusal would result in a fine or imprisonment.

Despite the fact that Officer Reyes did not give Garcia the requisite admonitions under section 23612, the remedy is not necessarily to reverse the enhancement, as Garcia requests. In *People v. Superior Court* (*Maria*) (1992) 11 Cal.App.4th 134, the court noted that section 23612's predecessor statute, section 23157, "is silent regarding a remedy for a violation thereof." (*Id.* at p. 144.) The court concluded that the remedy of the dismissal of criminal charges was not appropriate in the absence of a constitutional violation. (*Ibid.*; see also *Ritschel v. City of Fountain Valley* (2006) 137 Cal.App.4th 107, 119 ["case law has rejected contentions that a failure to *advise* an arrestee of the tests available or to *honor* the arrestee's choice of a particular test amounts to a constitutional violation. [Citations.]"].) The statute in its current version still does not contain a remedy for a police officer's failure to give an arrestee the complete advisement required under section 23612. (See § 23612.)

Further, we disagree with Garcia that the enhancement must be reversed for insufficient evidence. Officer Reyes testified that Garcia was very argumentative and abusive, did not listen to her and did not acknowledge her statements. Although Garcia repeatedly told her that he was not refusing the test, he never acknowledged her request to take the test and never made any effort to take the test. He did not comply with any of the officer's questions or demands. He tried speaking in Spanish to claim that he did not understand what Officer Reyes was saying, then switched back to English when she spoke to him in Spanish. Garcia also refused to perform the horizontal gaze nystagmus test that Officer Reyes asked him to take. Because Garcia was so belligerent and uncooperative, Officer Reyes concluded that he was refusing to take a test. The evidence of Garcia's belligerence and failure to respond to Officer Reyes' requests to take the test is sufficient to sustain the finding that Garcia refused to submit to a chemical test. (Cf. *Morphew v. Department of Motor Vehicles* (1982) 137 Cal.App.3d 738, 743 [under predecessor statute to § 23612, arresting officer was not required to persist in attempts to give the requisite admonishments to the arrestee, "regardless of his interruptions and obstreperous behavior, until [the arrestee] was ready to listen."].)

III. *Pitchess Hearing*

The trial court granted Garcia's *Pitchess* motion and conducted an in camera hearing. The court concluded that there were no discoverable items. Garcia requests that we independently review the sealed transcript of the in camera proceedings to determine whether the trial court's decision was correct.

The trial court's decision regarding the discoverability of material in police personnel files is reviewed under the abuse of discretion standard. (*People v. Cruz* (2008) 44 Cal.4th 636, 670.) "A trial court abuses its discretion when its ruling

'fall[s] "outside the bounds of reason."' [Citation.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 714.)

We have examined the record of the trial court's in camera review of Officer Reyes' personnel files. The transcript indicates that the trial court complied with the procedural requirements of a *Pitchess* hearing. There was a court reporter present, and the custodian of records was sworn prior to testifying. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229, fn. 4; *People v. Yearwood* (2013) 213 Cal.App.4th 161, 180.) The custodian of records complied with the requirement to bring all the records and submit them for the court to review and determine which documents were relevant. (*People v. Wycoff* (2008) 164 Cal.App.4th 410, 414-415.) The record on appeal therefore is adequate to permit meaningful appellate review. Having reviewed the sealed reporter's transcript of the in camera proceeding, we find no error or abuse of discretion.

## DISPOSITION

The true finding on the allegation that Garcia had committed three DUI offenses within 10 years of his current offense is reversed and the sentence imposed is vacated. The matter is remanded for further proceedings on that allegation. In all other respects, the judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.