Filed 9/16/19 P. v. Perez CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. LINO ISAIAS DAVALOS PEREZ, Defendant and Appellant.	2d Crim. No. B289492 (Super. Ct. No. 2017017574) (Ventura County)

A jury found Lino Isaias Davalos Perez guilty of driving under the influence of alcohol causing injury (count 1; Veh. Code, § 23153, subd. (a)) and driving with a 0.08 percent blood-alcohol level causing injury (count 2; Veh. Code, § 23153, subd. (b)). The jury also found true special allegations of personal infliction of great bodily injury (Pen. Code, § 12022.7, subd. (a)), driving with a blood-alcohol level of 0.15 percent or more (Veh. Code, § 23578), and bodily injury to three persons (Veh. Code, § 23558).

Perez admitted two prior convictions for driving under the influence within the past 10 years (Veh. Code, § 23566); admitted

a prior conviction for carjacking (Pen. Code, § 215, subd. (a)), a serious felony within the meaning of the "Three Strikes" law (Pen. Code, §§ 667, subds. (c)(1) & (e)(1); 1170.12, subds. (a)(1) & (c)(1)); and admitted he was convicted of a serious felony within the meaning of Penal Code section 667, subd. (a)(1).

The trial court sentenced Perez to an aggregate term of 17 years in state prison.

We remand for the trial court to exercise its discretion on whether to strike the prior serious felony conviction enhancement pursuant to Penal Code section 667, subdivision (a). In all other respects, we affirm.

FACTS

Alejandro Mendoza, Armando Balderama, Adan Cruz, and Victor Sanjuan lived together in Oxnard. On April 4, 2016, at about 6:30 a.m., they left for work in the agricultural fields. Balderama, Cruz, and Sanjuan were in a Ford Expedition. Mendoza drove separately. They drove on Telegraph Road. Telegraph Road in Ventura County is a two-lane highway. The eastbound and westbound lanes are separated by a broken yellow line. The posted speed limit is 50 miles per hour.

Mendoza was traveling eastbound on Telegraph Road several cars behind the Expedition. A Sentra driven by Perez crossed over into the eastbound lane. It hit a Chevrolet Trailblazer and the Expedition. The Trailblazer rolled over. The Sentra and Expedition both spun out and came to a stop on opposite sides of the road.

Cruz and Sanjuan got out of the Expedition and lay down on the road. Cruz passed out. Sanjuan bled from his mouth and ears and complained of pain. Mendoza parked his truck on the roadway at an angle to protect Cruz and Sanjuan from oncoming

traffic. Eventually Balderama left the Expedition complaining of pain and lay down on the road.

Perez and his passenger, Lisa Hernandez, were trapped in the severely damaged Sentra. Perez was screaming in pain. Hernandez was unconscious. Firefighters had to cut off the car's door to extract Perez and Hernandez.

Cruz suffered a thoracic compression fracture, his legs were numb, and he needed crutches when he was discharged from the hospital. Sanjuan suffered a fracture of the left distal fibula. Balderama suffered bruised ribs. Perez's passenger, Hernandez, suffered severe brain trauma as well as multiple internal injuries. She was in the hospital for over two months. She continues to suffer from short-term memory loss and persistent pain.

Highway Patrol Officer Frank Paramo arrived at the scene at 6:50 a.m. He did not speak with Perez when he first arrived because the firefighters were working to extricate him from the Sentra.

Paramo went to the Trailblazer. The driver, a man with surname Espinoza, stood outside the car. Because Paramo did not speak Spanish and Espinoza did not speak English, a bystander translated for them. Espinoza said the Sentra was driving the wrong way so he swerved to avoid a head-on collision. But the Sentra sideswiped him and caused his car to roll over and come back to rest on its wheels. The damage to the Trailblazer was consistent with Espinoza's statement.

Paramo walked back to the Expedition. He interviewed Balderama with a bystander translating. Balderama said he saw the Sentra traveling on the wrong side of the road. He steered to the left to avoid a collision. But the Sentra struck the Expedition

on the right side, causing it to spin out. The debris on the road was consistent with Balderama's statement.

Paramo saw Perez's extrication from the Sentra at about 7:10 a.m. As Perez was being wheeled on a gurney toward an ambulance, Paramo asked him if he had done it on purpose. Perez screamed, "Just kill me," indicating he was in pain. Paramo saw that Perez had red eyes and emitted an odor of alcohol. Paramo saw several 12-ounce cans of beer inside and outside the Sentra.

As Paramo obtained witness statements and other evidence, he delegated some of his duties to Highway Patrol Officer Reginald Heidemann. Heidemann prepared a diagram of the scene and included photographs. The diagram was based on measurements; physical evidence including vehicle damage, skid marks, and debris; and witness statements. Based on the physical evidence and statements made by the people involved, Paramo determined that Perez drove the wrong way on Telegraph Road.

Perez was taken to a hospital. Paramo arrived at the hospital about 30 minutes later at 8:15 a.m. Paramo saw Perez in the emergency room. Perez had red eyes, smelled of alcohol, was in and out of consciousness, and was unresponsive to Paramo's questions. At Paramo's written request, a nurse took a blood sample from Perez at 9:09 a.m.

An analysis of the sample showed a blood-alcohol content of 0.156 percent. In order for a male of Perez's weight to have a blood-alcohol level of 0.156 percent, he would have to consume 13 standard drinks.

DISCUSSION

I.

Perez contends the trial court erred in denying his motion to suppress the results of his warrantless blood draw.

Perez argued in his motion to suppress that Officer Paramo noticed signs of intoxication at the accident scene at 7:10 a.m. and again at the hospital at 8:15 a.m. Perez claims Paramo had sufficient time to obtain a warrant prior to the blood draw at 9:09 a.m.

Paramo testified at the suppression hearing that when Perez was removed from the Sentra he was agitated, crying out in pain, and not cooperative. Paramo noticed Perez emitted an odor of alcohol. Perez was transported to the hospital at about 7:10 a.m. Paramo saw Perez at the hospital at about 8:15 a.m. Perez was in and out of consciousness. When he was conscious, he was crying out in pain. He emitted a slight odor of alcohol. A nurse informed Paramo that Perez had a possible pelvic fracture and would require immediate care and pain medication. Paramo knew that pain medication would dilute the results of a blood-alcohol test. Without waiting for a warrant, Paramo requested a blood draw.

The magistrate found that the combination of a chaotic crime scene involving multiple victims and Perez's need for immediate medical care and pain medication created exigent circumstances that justified proceeding without a warrant.

Perez renewed his motion to suppress in the trial court. The trial court also denied the motion, stating: "And I don't know what the United States Supreme Court thinks officers are supposed to do out in the field or thinks that judges are supposed to be able to do an order to turn around a blood warrant within

20 minutes or 30 minutes. It's highly impractical even when we have the best technology like we do today. [¶] There still is a matter of time that takes place, which – – in which time your client would have undergone medical treatment. It would have had an effect on whatever his blood-alcohol content was. Whether it's alcohol or other things, it wouldn't necessarily be able to tell one was ingested or how it was ingested. Instead of being a .15, he would have been a .15 with morphine or opiates or diazepam. [¶] And I think it was a situation where it required immediate attention, and it justifies the lack of obtaining consent or a warrant, in my opinion, given the defendant's medical condition, certainly not a situation where we would want to suppress evidence to deter police conduct in the future. So motion is denied."

The Fourth Amendment to the United States Constitution prohibits unreasonable searches. A warrantless search is reasonable only if it falls within a recognized exception. (*Missouri v. McNeely* (2013) 569 U.S. 141, 148 (*McNeely*).) One recognized exception is where exigent circumstances make the needs of law enforcement so compelling that a warrantless search is objectively reasonable. (*Id*. at pp. 148-149.) Under some circumstances, the need to preserve evidence may make a warrantless search reasonable. (*Id*. at p. 149.) Although the natural dissipation of alcohol in the blood may support a finding of exigency in a particular case, it does not do so categorically. (*Id*. at p. 156.) Instead, the court must look to the totality of the circumstances to determine whether law enforcement was justified in acting without a warrant. (*Id*. at p. 149.)

McNeely involved a routine arrest for driving under the influence (DUI). The police officer stopped the defendant for

speeding and crossing the center line. The officer noticed that the defendant exhibited signs of alcohol intoxication. The defendant refused a blood test. The officer ordered a blood test without trying to obtain a warrant. The state argued that the evanescent nature of blood-alcohol was per se an exigent circumstance that created an exception to the warrant requirement. The Supreme Court rejected the state's per se argument in favor of the totality of the circumstances test. In so holding, the court pointed to *Schmerber v. California* (1966) 384 U.S. 757 (*Schmerber*), as a case where the totality of the circumstances demonstrated the existence of an exigency sufficient to justify a warrantless search.

In *Schmerber*, the defendant and a companion were injured in an automobile accident in which the defendant was driving. The officer at the scene noticed that the defendant showed signs that he had been drinking. Two hours later the officer saw defendant at the hospital. The officer again noticed signs that defendant had been drinking. The officer ordered a blood test without having obtained a warrant. In determining that the warrantless search was valid, the Supreme Court stated: "The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence' [citations]. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts,

we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest." (*Id*. at p. 770-771.)

The facts of this case go far beyond the routine traffic stop in *McNeely*, *supra*, 569 U.S. 141. Here, at the scene of the accident, Officer Paramo was confronted with two badly injured people trapped in a car and three people lying on the roadway. As in *Schmerber*, time had to be taken to bring the accused and injured to the hospital and investigate the accident. At the hospital, a nurse told Paramo that Perez needed immediate medical care including pain medication. The trial court found that in spite of the best technology, Paramo would not have had time to obtain a warrant. Exigent circumstances existed that justified the warrantless blood draw.

Perez's reliance on *People v. Meza* (2018) 23 Cal.App.5th 604 (*Meza*) is misplaced. In *Meza*, the defendant was driving with his girlfriend as a passenger when he ran off the road and down an embankment. Four officers responded to the accident scene. The defendant got out of the car on his own and helped an officer move his girlfriend from the car and away from a grass fire that had started. An officer noticed that the defendant smelled of alcohol at the scene. At the hospital, the officer communicated with the family of the defendant's girlfriend, filled out paperwork, and engaged in casual conversation with the defendant. The officer obtained a blood sample without attempting to obtain a warrant. The People offered no evidence to explain why the officer could not have sought a warrant during any of that time. The Court of Appeal held that exigent circumstances did not excuse the police from obtaining a warrant.

Meza is easily distinguished. In *Meza*, there were four officers for an incident involving a single vehicle and two injured people. Here, there were two officers for a much larger incident involving three vehicles and five injured people. When Officer Paramo arrived at the hospital, he did not stop to talk to the family of a victim, do paperwork, or engage the defendant in casual conversation. Most significantly, in *Meza*, the officer presented no reason why she could not have obtained a warrant. Here, a nurse told Officer Paramo that Perez needed immediate medical treatment including pain medication. The trial court found that Paramo would not have had time to obtain a warrant.

II.

Perez contends that there is no substantial evidence that his act of driving while intoxicated caused the accident.

In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We discard evidence that does not support the judgment as having been rejected by the trier of fact for lack of sufficient verity. (*People v. Ryan* (1999) 76 Cal.App.4th 1304, 1316.) On appeal, we do not reweigh the evidence or judge the credibility of witnesses. (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790.) We must affirm if we determine that any rational trier of fact could find the elements of the crime beyond a reasonable doubt. (*Johnson*, at p. 578.)

Officer Paramo testified without objection that two witnesses told him the Sentra was traveling westbound when it crossed over into the eastbound lane, sideswiping a Trailblazer causing it to roll over and then hitting an Expedition, causing it to spin out. The witnesses' statements were consistent with the physical evidence, including skid marks and gouges in the

pavement, debris, and damage to the vehicles. That is sufficient evidence to support the jury's verdict.

Perez claims that the evidence of his role in causing the collision is not substantial evidence because it is based on hearsay. But Perez raised no hearsay objection in the trial court. Where there is no objection in the trial court, the evidence cannot be attacked as hearsay on appeal, and can constitute substantial evidence in support of the judgment. (*People v. Stepp* (1947) 82 Cal.App.2d 49, 51.)

Perez argues that the witnesses' statements were self-serving in that they were drivers involved in the accident. But Perez cites no authority for the proposition that self-serving statements cannot constitute substantial evidence. Paramo interviewed both witnesses separately and they both told him Perez crossed over the center line into their lane. Moreover, the witnesses' statements did not stand alone. Paramo testified that the witnesses' statements were consistent with the physical evidence at the scene.

Perez also claims that Officer Paramo's opinion that Perez caused the accident is without proper foundation. Perez argues that Paramo is not an accident reconstruction expert because he lacked engineering and physics training. But Perez cites no authority that any specific training is required to be an expert. Officer Paramo has been with the California Highway Patrol for 21 years, has received training in DUI and traffic collision investigation, and has investigated approximately 2,000 traffic accidents. Had Paramo's expert testimony been challenged, the trial court may well have found him to be an expert. (See *People v. Haeussler* (1953) 41 Cal.2d 252, 260, ["'[A] traffic officer who has spent years investigating accidents in which he has been

required to render official reports not only as to the facts of the accidents but also as to his opinion as to their causes, including his opinion, when necessary, as to the point of impact, is an expert. Necessarily, in this field, much must be left to the common sense and discretion of the trial court'"], quoting *Zelayeta v. Pacific Greyhound Lines* (1951) 104 Cal.App.2d 716, 727.)

III.

Perez contends the trial court abused its discretion when it denied his motion to dismiss his prior serious felony conviction.

In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, our Supreme Court held that the trial court has the discretion to dismiss a prior felony conviction alleged under the Three Strikes law in the interest of justice. (Pen. Code, §§ 667, subds. (b)-(i); 1170.12.) The Three Strikes law establishes a sentencing norm and creates a strong presumption that any sentence that conforms to the norm is rational and proper. (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) It is only in the extraordinary case that defendant may be deemed outside the spirit of the Three Strikes law. (*Ibid*.) In assessing whether the defendant is outside the spirit of the Three Strikes law, such factors such as the nature and circumstances of the present felony, and the prior serious or violent felony conviction, and the particulars of the defendant's background, character, and prospects are relevant. (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Here, Perez argued that his prior felony, carjacking, was committed in 2000, 18 years ago; he has an otherwise nonviolent criminal history; he has maintained a career as a certified welder; and his current DUI was not committed on purpose, but was the result of his ongoing struggle with alcohol. Perez also

pointed out that he has had no "write-ups" in jail, and has earned certificates for completing programs in substance abuse and anger management.

Although Perez has not had a serious or violent felony conviction since 2000, he has had numerous misdemeanor convictions. The misdemeanor convictions include batteries, driving under the influence of alcohol, and disorderly conduct. Moreover, Perez's statements to a probation officer show that he has refused to accept responsibility for his current offense. He said he did not believe he is guilty; he accused the prosecutor of introducing false witnesses; he accused the district attorney's office of being corrupt and Hernandez of exaggerating her injuries; and he accused the trial court of being biased against him. Perez also portrayed himself as a victim. He wanted the trial court to consider that he had endured a 10 hour surgery and needed months to recuperate.

Although Perez's prior felony offense occurred 18 years ago, he is not someone who has accepted responsibility and has made a successful effort to reform. Instead, between his prior and present felonies, his record reflects an unbroken chain of misdemeanors. He denies he is guilty of his current offenses and places the blame for his conviction on others. This is not the extraordinary case of a person who has shown himself to be outside the spirit of the Three Strikes law. The trial court did not abuse its discretion in denying his motion.

IV.

Perez contends the trial court erred by sentencing him to the middle term of three years instead of two years.

In count 1, Perez was found guilty of driving under the influence of alcohol causing bodily injury (Veh. Code, § 23153,

subd. (a)) with prior convictions for driving under the influence of alcohol in 2009 and 2010.

Perez argues Penal Code section 18, subdivision (a) applies. That subdivision provides in part: "Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony is punishable by imprisonment for 16 months, or two or three years in the state prison . . . ." Perez claims because the trial court selected the middle term, it should be two years, not three.

But Penal Code section 18, subdivision (a) applies only in cases where a different punishment is not prescribed. Vehicle Code section 23566 prescribes a different punishment.

Vehicle Code section 23566, subdivision (a) provides in part: "If a person is convicted of a violation of Section 23153 and the offense occurred within 10 years of two or more separate violations of Section 23103, as specified in Section 23103.5, or Section 23152 or 23153, or any combination of these violations, that resulted in convictions, that person shall be punished by imprisonment in the state prison for a term of two, three, or four years . . . ." Because Vehicle Code section 23566 applies, the trial court chose the proper middle term of three years.

V.

The People concede that remand is appropriate for the trial court's exercise of discretion on whether to strike the serious felony enhancement.

At the time Perez was sentenced, the imposition of a five-year enhancement pursuant to Penal Code section 667, subdivision (a)(1) for a prior serious felony conviction was mandatory. (*People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045.) While this appeal was pending, the Legislature removed

the prohibition on striking the enhancement. (Sen. Bill 1393 (2017-2018 Reg. Sess.) §2.) Because the judgment is not final, the new law applies retroactively. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.)

VI.

We requested further briefing on the question whether Penal Code section 654 (section 654) prohibited the trial court from imposing enhancements under both Vehicle Code section 23558 and Penal Code section 12022.7.

Penal Code section 12022.7 imposes a sentence enhancement for the infliction of great bodily injury during the commission of a felony. Vehicle Code section 23558 imposes an enhancement for each victim who suffers bodily injury in the commission of a violation of driving under the influence.

People v. Elder (2017) 11 Cal.App.5th 123, 141 held that imposing a multiple victim enhancement and a great bodily injury enhancement "for the same victims" violates section 654. But here the trial court did not impose both enhancements for the same victims. The court imposed the great bodily injury enhancement for Perez's passenger, Hernandez, and the multiple victim enhancements for three other injured victims.

Perez relies on *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345 for the proposition that section 654 applies to a single act of driving under the influence that produces multiple victims. But Perez's argument was rejected in *People v. Arndt* (1999) 76 Cal.App.4th 387, 396-397. *Wilkoff* limited the number of substantive offenses, but recognized enhancements could be used to increase the punishment where a single act injures more than one person. The trial court did not err in imposing both enhancements.

DISPOSITION

The case is remanded with directions to the trial court to decide, at a hearing at which Perez has the right to be present with counsel, whether it will exercise its discretion to strike the prior serious felony conviction enhancement imposed pursuant to Penal Code section 667, subdivision (a). If the court decides to strike the enhancement, Perez shall be resentenced and the abstract of judgment amended accordingly and forwarded to the Department of Corrections and Rehabilitation. If the court decides not to strike the enhancement, Perez's original sentence shall remain in effect. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Ryan J. Wright, Judge

Superior Court County of Ventura

Heather E. Shallenberger, 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, Paul M. Roadarmel, Jr. and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.