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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.

JAMES MICHAEL WAGNER,

Defendant and Appellant.

B276244

(Los Angeles County
Super. Ct. No. PA086022)

APPEAL from a judgment of the Superior Court of Los Angeles County. Cynthia L. Ulfig, Judge. Affirmed in part, vacated in part, and remanded.

James E. Jones, 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, Senior Assistant Attorney General, Victoria B. Wilson and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant, James Wagner, contends that his admission to a prior conviction for auto theft or unlawful driving or taking of a vehicle pursuant to Penal Code section 666.5¹ must be vacated because the trial court failed to admonish him of his constitutional rights pursuant to *Boykin v. Alabama* (1969) 395 U.S. 238, 239 (*Boykin*) and *In re Tahl* (1969) 1 Cal.3d 122, 132. We agree, and therefore vacate the admission and remand the case for either (1) another admission after proper admonitions and waivers or (2) a jury or court trial on the truth of the allegation of the prior conviction.

STATEMENT OF FACTS

In an amended information, the district attorney charged Wagner with unlawful driving or taking of a vehicle (Veh. Code, § 10851) with a prior conviction for auto theft or unlawful driving or taking of a vehicle (§ 666.5). The information further alleged that defendant suffered three prison prior convictions (§ 667.5, subd. (b)) and one prior serious felony or “strike” conviction (§§ 667, subd. (d) & 1170.12, subd. (b)). Prior to trial, Wagner admitted the prior unlawful driving/auto theft conviction that made him eligible for sentencing pursuant to section 666.5. At his request, the trial court bifurcated trial on the remaining prior conviction allegations. After completion of the evidence and submission of the case to the jury, Wagner admitted the remaining prior conviction allegations.

The jury convicted Wagner of the Vehicle Code section 10851 charge. The trial court sentenced Wagner to nine years in the state prison: the high term of four years for the Vehicle Code section 10851 conviction and section 666.5 prior conviction

¹ Unless otherwise noted, all statutory references are to the Penal Code.

allegation, doubled to eight years based upon the prior strike conviction, with an additional one-year consecutive term for one of the three prison prior convictions.

A. The Underlying Offense

Because the facts of the underlying offense are not at issue in this appeal, we discuss them only briefly.

On March 29, 2016, at about 1:50 p.m., victim Ronald Bermudez was working construction at a home in Culver City. He left the keys to his 1998 Ford F-150 inside the truck which he had parked outside the home. While inside the home, Bermudez heard the truck start. He ran outside and saw someone driving away in his truck.

On March 30, 2016, shortly after midnight, Los Angeles Police Department Officer Miguel Zendejas was on patrol in the area of Sheldon Street and Oneida Avenue, on the border of Pacoima and Sun Valley. This location is approximately 20 to 25 miles from the location of the theft in Culver City. Zendejas observed Wagner driving Bermudez's truck. Zendejas ran the plates, determined the car was stolen, eventually stopped the car, and arrested Wagner. Defendant said he got the truck from his uncle.

B. Admission of the Section 666.5 Prior Conviction

Before commencement of jury selection, the trial court inquired whether Wagner wanted to admit the section 666.5 prior conviction so that the People would not have to present evidence of it in front of the jury as an element of the charged offense. Initially, Wagner chose not to do so. The trial court then addressed Wagner directly:

“[The Court]: Sir, I understand you’ve already been convicted of that charge or prior. The facts as your

attorney just explained -- the facts, as your attorney just explained to you, the D.A. -- unless you admit that prior [of] driving without the owner's consent, the D.A. is going to have to produce evidence to the jurors, and the jurors will find out that you have that prior conviction.

"If you admit the prior conviction, I won't tell them that, they won't find out about that. They will just have to determine if you unlawfully drove or took a vehicle on March 30 of this year.

"But that's -- again, you would have to admit that one prior, not your other priors, just that one. If you fail to do so, I will read the charge that you had violated Penal Code section 666.5, a felony, in that you unlawfully drove or took a vehicle with a prior conviction from 2013.

"[Defense Counsel]: Your honor, he has just indicated to me that he will admit to that one prior.

"[¶][¶]

"[The Court:] Mr. Wagner, it's alleged in count 1, that on or about December 19, 2013, in Case [No.] SA083143, that you had been convicted of the unlawful driving or taking of a vehicle with a prior, a violation of Penal Code section 666.5.

"Do you admit that you were convicted of that charge in 2013?

"[Wagner:] I do.

"[The Court:] Counsel join in that waiver and stipulation?"

"[Defense Counsel:] I do.

"[The Court:] Okay. The Court will accept the admission of that prior, and that is, again, only as to that one prior. The remainder of the priors will be bifurcated as previously indicated."

DISCUSSION

The Trial Court's Failure to Admonish Wagner of his Rights and Obtain Appropriate Waivers Requires a Remand

Wagner claims his admission to the prior conviction for auto theft or unlawful driving or taking of a vehicle pursuant to section 666.5 must be vacated because the trial court failed to admonish him of his constitutional rights. We agree.

When a criminal defendant enters a plea of guilty, the trial court is required to ensure that the plea is knowing and voluntary. (*People v. Cross* (2015) 61 Cal.4th 164, 170 (*Cross*); see *Boykin, supra*, 395 U.S. at pp. 243-244.) In order to be satisfied that a plea is indeed knowing and voluntary, the trial court typically must advise the defendant of three constitutional rights -- the right to a jury trial, the right against self-incrimination, and the right to confront and cross-examine witnesses -- as well as obtain a waiver of each. (*Cross, supra*, at p. 170.)

The same requirements of advisement and waiver apply when a defendant admits the truth of a prior conviction allegation that subjects him to increased punishment. (*In re Yurko* (1974) 10 Cal.3d 857, 863 (*Yurko*); accord *Cross, supra*, at p. 170.) Additionally, in such a situation, the defendant must be advised of the full penal consequences of a truthful finding of the prior conviction allegation. (*Yurko, supra*, at p. 865; *Cross, supra*, 60 Cal.4th at p. 170.)

The prior conviction in this case is not a prior conviction enhancement, but a prior conviction that is an element of the charged offense and which subjects defendant, upon conviction of the charged offense, to an increased punishment through an

alternative sentencing scheme. (See *Cross, supra*, 61 Cal.4th at p. 176 [construing section 273.5, subd. (f)(1)].) Nevertheless, the same requirements of advisement and waiver apply, since there is not “a meaningful distinction between an ‘enhancement’ and an ‘alternative sentencing scheme’ in this context.” (*Id.* at p. 175.)

The Attorney General does not argue that the plea colloquy was sufficient. Instead, he points out that failure to provide the proper advisements and obtain waivers is not reversible per se, but subject to a harmless error analysis: “[t]he failure to properly advise a defendant of his or her trial rights is not reversible ‘if the record affirmatively shows that [the admission] is voluntary and intelligent under the totality of the circumstances.’ [Citation.]” (*Cross, supra*, 61 Cal.4th at p. 179.)

Here, the trial court did tell Wagner, prior to taking the admission, that without the admission, the prosecutor would have “to produce evidence [of the conviction] to the jurors[.]” But this advisement was made completely in the context of what the jurors would learn and an implicit warning about the possible prejudicial effect of the information, not in the context of the prosecutor’s burden of proof. Further, at no point during this colloquy did the trial court admonish Wagner about his right to a jury trial or court trial on this element of the charged crime, nor his rights to confront and cross examine witnesses or against self incrimination with respect to this element of the charged crime. Neither did the trial court advise Wagner of the possible increased penal consequences of his admission. The trial court simply took the admission without further admonitions or waivers after being advised by defense counsel that Wagner was willing to admit. On this record, we cannot find that the totality

of the circumstances demonstrate that the admission was voluntary and intelligent.

DISPOSITION

Both defendant's admission of the section 666.5 prior conviction and his sentence are vacated. The case is remanded so that either the trial court may take a proper admission of the prior conviction or defendant can assert his right to a jury or court trial on that element of the charge. In either case, the trial court must resentence the defendant upon resolution of the prior conviction issue.

In all other respects, the judgment is affirmed.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.