

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)
)
Plaintiff and Respondent,)
)
vs.)
)
JOSHUA CROSS,)
)
Defendant and Appellant.)
_____)

S212157



SUPREME COURT
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Sacramento Superior Court, Nos. 09F06395, 11F03888
Honorable Greta C. Fall, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

APPELLANT’S REPLY BRIEF.....1

I. THE TRIAL COURT WAS REQUIRED TO ADVISE MR. CROSS IN ACCORDANCE WITH *IN RE YURKO*, BEFORE ACCEPTING A DEFENSE STIPULATION TO A PRIOR CONVICTION.....2

 A. Mr. Cross’ Claim Is Not Forfeited, Even as Clearly Explained in the *Vera* Opinion.....3

 B. There Is No Meaningful Distinction Between *Yurko* and This Case.....6

 C. Respondent Does Not Acknowledge the *Shippey* Case.....8

Conclusion.....10

Certificate of Word Count.....11

TABLE OF AUTHORITIES

FEDERAL CASES

Boykin v. Alabama (1969) 395 U.S. 238.....2

CALIFORNIA CASES

In re Tahl (1969) 1 Cal.3d 122.....2

In re Yurko (1974) 10 Cal.3d 857.....2

People v. Adams (1993) 6 Cal.4th 570.....7

People v. Berutko (1969) 71 Cal.2d 84.....5

People v. Little (2004) 115 Cal.App.4th 766.....7

People v. Newman (1999) 21 Cal.App.4th 413.....7

People v. Saunders (1993) 5 Cal.4th 580.....4

People v. Shippey (1985) 168 Cal.App.3d 879.....8

People v. Vera (1997) 15 Cal.4th 269.....2

People v. Ysabel (1938) 28 Cal.App.2d 259.....5

People v. Zavaleta (1960) 182 Cal.App.2d 422.....5

STATE STATUTES

Health & Saf. Code § 11550(a).....7

Penal Code § 273.5(a).....5

Penal Code § 273.5(e)(1).....1

Penal Code § 666.....8

Penal Code § 1025.....4

Veh. Code, § 10851.....3

MISCELLANEOUS

California Constitution, Article I, section 7.....2

United States Const., Amendment V.....2

United States Const., Amendment XIV.....2

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APPELLANT’S REPLY BRIEF ON THE MERITS

This reply brief on the merits is designed solely to respond to the Attorney General’s contentions which require further discussion for proper determination of the issue on review. This brief does not respond to those issues that petitioner believes were adequately discussed in the Opening Brief on the Merits, and petitioner intends no waiver of those issues by not expressly reiterating them in this reply brief.

ARGUMENT

I

THE TRIAL COURT WAS REQUIRED TO ADVISE MR. CROSS IN ACCORDANCE WITH *IN RE YURKO* BEFORE ACCEPTING THE DEFENSE STIPULATION TO A PRIOR CONVICTION

As explained in the Appellant's Opening Brief on the Merits (OBM), under *In re Yurko* (1974) 10 Cal.3d 857 ("*Yurko*"), the trial court was required to advise Mr. Cross of his "*Boykin-Tahl*"¹ rights, prior to accepting a defense stipulation that he had a prior conviction under Penal Code² section 273.5, subdivision (e)(1). This error violated due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 7 of the California constitution. (OBM 8-11.)

Respondent argues that 1) Mr. Cross forfeited his claim under *People v. Vera* (1997) 15 Cal.4th 269 ("*Vera*"), and that 2) even were *Vera* not dispositive, advisements were not required because *Yurko* does not apply to this case. (Respondent's Answering Brief on the Merits (ABM), pp. 11-12.) This Court should reject respondent's contentions.

¹

Under *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122, when a trial court accepts a guilty plea the record must contain on its face direct evidence that the accused was aware, or made aware, of his right to confrontation, to a jury trial, and against self-incrimination. (*Boykin, supra*, 395 U.S. at p. 242; *Tahl, supra*, 1 Cal.3d at p. 132.)

² All statutory references are to the Penal Code unless otherwise stated.

A. Mr. Cross' Claim Is Not Forfeited, Even As Clearly Explained in the *Vera* Opinion

Vera is readily distinguishable, and this Court's opinion in that case even specifically addressed this situation as requiring a different result.

In *Vera*, the trial court granted the defendant's request to bifurcate the trial of prior prison term allegations from the trial on various substantive crimes (including robbery, kidnaping, and grand theft auto, with knife use allegations). The substantive crimes were tried by the jury. Although the defendant did not personally waive his right to a jury trial on the prior prison term allegations, at the time of the bifurcation motion defense counsel said to the court, "[I] have discussed with [defendant] his option of having a jury or nonjury trial on those prior convictions, and he indicates to me that he is in fact going to waive the right to a jury trial on the prior convictions in the event that he is convicted on the case in chief" and would "allow the court to hear those as a court trial." (*People v. Vera, supra*, 15 Cal.4th at p. 273.)

The jury convicted Vera on all counts except grand theft auto, finding him guilty of the lesser included offense of driving and taking a vehicle (Veh. Code, § 10851). The jury also found true the knife use allegations. On the date scheduled for sentencing, the prior prison terms were tried to the court. Vera did not object to the commencement of a court

trial, and both sides waived argument. After reviewing the prosecution's documentary exhibits relating to Vera's prior convictions and prison terms, the trial court found the allegations true and imposed sentence. (*People v. Vera, supra*, 15 Cal.4th at p. 273.)

This Court rejected Vera's claim that the trial court erred in conducting a court trial on the prior prison term allegations without first obtaining an express, personal waiver of his right to jury trial. This Court noted that Vera's claim of an ineffectual waiver of the right to jury trial asserted a violation of section 1025—the source of the right to jury trial of prior conviction allegations relating to sentencing. (*People v. Vera, supra*, 15 Cal.4th at p. 276.)

The opinion compared Vera's claim to the defendant's claim in *People v. Saunders* (1993) 5 Cal.4th 580 (involving denial of the right to the same jury), noting that both involved a violation of section 1025, and that in both cases, "the trial court discharged the jury after receipt of the verdicts on the substantive crimes because it understood, *based on the representations by defense counsel*, that the defendant wished to waive jury trial on the bifurcated prior conviction allegations." (*Ibid.*, citing *People v. Saunders, supra*, 15 Cal.4th at p. 586, emphasis on original.) Under these circumstances, this Court concluded that Vera's claim was prohibited in the absence of a timely objection in the trial court. (*Ibid.*)

Significantly, this Court distinguished the facts in *Vera* from the situation where a defendant *does not* request bifurcation of the prior conviction allegations and the substantive offenses and priors are tried in a unitary proceeding. According to this Court:

Where the whole cause—substantive offenses and sentencing allegations—is tried in a unitary proceeding, a constitutionally effective waiver of jury trial is required. (Cf. *People v. Berutko* (1969) 71 Cal.2d 84, 94 [77 Cal.Rptr. 217, 453 P.2d 721]; *People v. Zavaleta* (1960) 182 Cal.App.2d 422, 429-430 [6 Cal.Rptr. 166]; *People v. Ysabel* (1938) 28 Cal.App.2d 259, 263 [82 P.2d 476].) When the defendant seeks to bifurcate the determination of the truth of the prior conviction allegation from determination of the defendant's guilt of the charged crimes, however, only the statutory right to jury trial is implicated in the trial of the sentencing allegations.

(*People v. Vera, supra*, 15 Cal.4th at p. 277.)

Here, unlike in *Vera*, the prior conviction allegation under section 273.5, subdivision (a) was not bifurcated from the determination of the guilt on the substantive offenses. Instead, the substantive offenses and priors were tried in a unitary proceeding. The trial court took Mr. Cross' stipulation to the truth of the prior conviction allegation without advising him of his *Boykin-Tahl* rights (RT 85-86), and unlike in *Vera*, defense counsel never stated in open court that he had advised Mr. Cross of his right to a jury trial on the prior conviction allegation, or that Mr. Cross waived that right. Under these circumstances, *Vera* is inapposite and Mr. Cross' claim cannot be deemed forfeited.

B. There is No Meaningful Distinction Between *Yurko* and This Case

As explained in the opening brief, the trial court was required to advise Mr. Cross of his *Boykin-Tahl* rights, because the enhanced triad of two, four, or five years in prison (as opposed to two, three, or four years) falls well-within the type of additional penalties contemplated by *In re Yurko, supra*, 10 Cal.3d 857. (OBM 8-11.)

Respondent attempts to distinguish *Yurko* by arguing that section 273, subdivision (e)(1) does not set forth “a term of punishment in addition to the punishment set forth for an underlying offense.” (ABM 11.) However, respondent offers no meaningful distinction between *Yurko* in this case. *Yurko* recognized that “the practical aspects of a finding of prior convictions may well impose upon a defendant additional penalties and sanctions which may be even more severe than those imposed upon a finding of guilty without the defendant having suffered the prior convictions.” (*In re Yurko, supra*, 10 Cal.3d at p. 862.)

Stipulating to the truth of a prior conviction under section 273, subdivision (e)(1) subjected Mr. Cross to a longer period in prison—a more severe sentence than the one imposed if he were only convicted of the substantive crime. The enhanced triad is no less of a consequence than the penalties contemplated in *Yurko* (foreclosing the possibility of probation or

extending the time before a defendant is eligible for parole). (*In re Yurko, supra*, 10 Cal.3d at p. 862.) Thus, the stipulation in this case was well-within the scope of the advisement requirement.

Respondent attempts to distinguish *People v. Little* (2004) 115 Cal.App.4th 766, on grounds that the defendant in that case stipulated to the statutory violation the prosecution charged (Health & Saf. Code, § 11550, subd. (a)), instead of stipulating to facts. (ABM 12.) However, respondent overlooks the important point of *Little*. As discussed in the opening brief, *Little* explains the difference between stipulating to all of the facts necessary for a true finding of an enhancement, versus stipulating to some, but not all evidentiary facts that eliminate every element of the enhancement. (OBM 15-16; *People v. Little, supra*, 115 Cal.App.4th at pp. 773, 778.) Furthermore, *Little* distinguished *People v. Adams* (1993) 6 Cal.4th 574 (on bail enhancements), and *People v. Newman* (1999) 21 Cal.4th 413 (felon in possession of a firearm offense) as being in the latter category not requiring *Boykin-Tahl* advisements and waivers. (*Id.* at p. 773.)

Mr. Cross stipulated to having suffered a conviction under section 273.5, subdivision (a) within seven years of the current offense—meeting all the elements of section 273.5, subdivision (e)(1). (1 RT 85-86.) His stipulation to the fact of the prior conviction left no elements of the

enhancement for the prosecution to prove, except conviction of the underlying offense as a prerequisite to imposition of punishment. He was therefore immediately subject to the enhanced sentencing triad of two, four, or five years. His stipulation “implicitly and necessary covered all evidentiary facts required for a conviction and imposition of punishment.” (*People v. Little, supra*, 115 Cal.App.4th at p. 778.)

C. Respondent Does Not Acknowledge the *Shippey* Case

Respondent does not acknowledge or attempt to deal with the *Shippey* case. As explained in the opening brief (AOB 23-24), *People v. Shippey* (1985) 168 Cal.App.3d 879, held that the trial court was required to give the advisements and waivers prior to accepting an admission of a prior conviction under Penal Code section 666 (petty theft with a prior). (*Id.* at pp. 887-888.)

The Court of Appeal found *Yurko* applicable, reasoning that proof of a prior conviction under section 666 raises a misdemeanor crime punishable by a fine or county jail time, to a felony punishable by imprisonment. The court pointed out that the defendant’s admission of the prior petty theft ultimately resulted in a state prison sentence of three years. (*People v. Shippey, supra*, 168 Cal.App.3d at p. 888-889.) Thus, *Boykin-Tahl* advisements were required because the prior convictions subjected the defendant to penalties even more severe than the underlying offense. (*Id.* at

p. 889, citing *In re Yurko, supra*, 10 Cal.3d at p. 862.) That reasoning should be equally applicable to this case.

There is no question that Mr. Cross' stipulation to section 273.5, subdivision (e)(1) subjected him to an increased penal consequence: the upper term of five years based on the enhanced triad prescribed in that section. As a result, the trial court erred in failing to advise Mr. Cross in accordance with *Yurko* before accepting the stipulation.

CONCLUSION

Appellant respectfully requests that the judgment be reversed.

Dated: May 30, 2014.

Respectfully submitted,
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CERTIFICATE OF WORD COUNT

I, John Hargreaves, appointed counsel for appellant, certify that I prepared this opening brief on behalf of my client, Joshua Cross, and that the word count for this opening brief is 2496.

This brief complies with Rule 8.520(c), California Rules of Court. I certify that I prepared this document in WordPerfect 15 and that this is the word count WordPerfect generated for this document.

Dated: May 30, 2014



John Hargreaves
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DECLARATION OF SERVICE

People v. Joshua Cross - S212157

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 2407 J Street, Suite 301, Sacramento, CA 95816.

On May 30, 2014, I served the attached

APPELLANT'S REPLY BRIEF ON THE MERITS

by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on May 30, 2014, at Sacramento, California.



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