

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

BOBBY JOE BREWER III,

Defendant and Appellant.

A130610

(Solano County
Super. Ct. No. FCR277012)

A jury convicted appellant Bobby Joe Brewer III of first degree residential burglary, the unlawful driving of a vehicle and receiving stolen property. (Pen. Code,¹ § 459; former § 496, subd. (a); former Veh. Code, § 10851, subd. (a).)² The trial court found four prior conviction enhancements to be true. (Former §§ 666.5, 667.5, subd. (b).)³ Sentenced to seven years in state prison including three years for the prior convictions, Brewer appeals. He contends that insufficient evidence supports the findings that he suffered these prior convictions and served prison terms for them. We

¹ All statutory references are to the Penal Code unless otherwise indicated.

² Section 496 and subdivision (a) of Vehicle Code section 10851 have been amended since the date of the June 2010 offenses, but the versions of these provisions currently in force are substantially the same as they were on the date of the charged crimes. (See § 496; Veh. Code, § 10851, subd. (a); Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 23; Stats. 1995, ch. 101, § 4, pp. 462-463.)

³ Although aspects of sections 666.5 and 667.5 have been amended since the date of the June 2010 offenses, the former versions of those subdivisions are substantially the same as current law, for purposes of the issues raised in this appeal. (See §§ 666.5, subd. (a), 667.5, subd. (b); Stats. 1999, ch. 706, § 6, pp. 5093-5094; Prop. 83, § 9.)

find sufficient evidence to support the trial court's findings, but remand the sentence for correction of the term imposed on the unlawful driving count.

I. FACTS

A. *Crime and Conviction*

In July 2010, appellant Bobby Joe Brewer III was charged with three June 2010 offenses. The information alleged that he committed first degree residential burglary. It also charged that, along with codefendant Adam Michael Venegas,⁴ he unlawfully drove or took a vehicle and received stolen property. (§ 459; former § 496, subd. (a); former Veh. Code, § 10851, subd. (a).) On the unlawful driving count, the information alleged that on April 22, 2003, and again on September 5, 2008, Brewer had been convicted of previous counts of the same offense. If true, these prior convictions could trigger a lengthier sentence for a new conviction of unlawful driving. (Former § 666.5; former Veh. Code, § 10851, subd. (a).) Finally, it alleged that Brewer had suffered prior convictions between 2003 and 2008 constituting the basis for three prior prison term enhancement allegations. If true, these enhancements could result in an additional three years in prison. (§ 459; former § 667.5; former Veh. Code, §§ 2800.4, 10851, subd. (a).)⁵ In September 2010, a jury convicted Brewer of all three charged offenses. (§ 459; former § 496, subd. (a); former Veh. Code, § 10851, subd. (a).)

B. *Hearing on Prior Convictions*

The trial court had granted Brewer's motion to bifurcate trial of these charges from trial on the enhancement allegations. An October 2010 court trial was conducted on these allegations. (See former §§ 666.5, 667.5.) The prosecution proffered a series of minute orders, waiver forms and abstracts of judgment as evidence of the prior convictions. It also provided a certified prison record from the Department of Corrections evidencing Brewer's prior convictions and prison history. That record

⁴ Venegas's appeal from his conviction is also before this court. (Case No. A130495.)

⁵ Vehicle Code section 2800.4 has been amended since the 2008 alleged prior conviction, but current law is substantially the same as it was at that time. (Stats. 2006, ch. 688, § 1, p. 5608.)

included a chronological history of Brewer's prison commitments, copies of three abstracts of judgment, two fingerprint cards and two photographs. All of these records named Bobby Joe Brewer III except one of the fingerprint cards (Bobby Brewer) and the October 2009 photographs (Brewer, B). (§ 969b.)

The prosecution was unable to provide a fingerprint card for the 2008 prior conviction, but the Department of Corrections provided Brewer's most recent parole violation fingerprint card dated July 2005. That card named "Bobby Joe Brewer III." The two fingerprint cards that were produced both showed the same birthdate and the reverse side of the cards referred to the same Solano County case numbers as those cited in the enhancement allegations.

Defense counsel objected that this evidence was insufficient to prove the allegations set out in the information, particularly with regard to a 2008 prior conviction allegation. He noted discrepancies between the dates alleged in the information and those cited in the records that the prosecutor offered to prove the prior convictions. Because of these discrepancies, Brewer's counsel argued that his client had been given insufficient notice of these enhancement allegations. He also objected that the certification of the June 2010 prison report was only valid for 60 days and had expired before the date of the October 2010 hearing.⁶ Finally, he argued that the evidence did not establish beyond a reasonable doubt that Brewer was the person described in the proffered records.

The prosecutor acknowledged that the dates for the offenses cited in the information charged did not always match the actual conviction dates. Some of those discrepancies turned on whether the conviction date was construed as the date of the plea or the date of sentencing. Still, he argued, the evidence he offered met his burden of proof beyond a reasonable doubt that the person described in the records was Brewer. He asked the trial court to make a factual finding to that effect. The prosecution also argued that the allegations contained in the information were sufficient to put Brewer on notice.

⁶ The trial court found that the evidence had been authenticated, apparently overruling this objection.

Ultimately, the trial court found that the prison report and the photographs were Brewer's records. It was satisfied that the documents it had before it were sufficient to support the enhancement findings, even without a fingerprint card. The trial court found beyond a reasonable doubt that Brewer had been convicted of violating former Vehicle Code section 10851 within the meaning of former section 666.5. It also found beyond a reasonable doubt that on three occasions, Brewer had been convicted of a felony, went to prison, and failed to remain free of prison for five years. (See former § 667.5, subd. (b).)

C. Sentence

Brewer was sentenced to a total term of seven years in state prison—a four-year midterm for burglary; and concurrent midterms of three and two years for the vehicle offense and receiving stolen property, respectively. The trial court struck the former section 666.5 enhancement finding and imposed three consecutive one-year terms based on its former section 667.5, subdivision (b) enhancement findings.

II. SECTION 666.5 ENHANCEMENT

A. Pleading and Proof

1. Facts

On appeal, Brewer first challenges the sufficiency of evidence supporting the trial court's finding that he had been convicted of a prior unlawful driving count. At the time of the June 2010 offense, one found guilty of a first offense of unlawful driving was punished by imprisonment in county jail; a state prison term of 16 months, two years or three years; a \$5,000 fine; or both fine and imprisonment. One convicted of this offense who had suffered a prior conviction for the same offense—even if that prior offense did not result in a prison term—was subject to an increased penalty of a \$10,000 fine, an increased prison term of two, three or four years, or both. (Former §§ 18 [Stats. 1976, ch. 1139, § 98, p. 5089; now § 1170, subd. (h)(1)], 666.5, subd. (a) [Stats. 1999, ch. 706, § 6, pp. 5093-5094]; former Veh. Code, § 10851, subd. (a) [Stats. 1995, ch. 101, § 4, pp. 462-463].)

The unlawful driving count set out in the information alleged that on April 22, 2003 and September 5, 2008, Brewer had suffered prior convictions for the same offense.

(Former § 666.5; former Veh. Code, § 10851, subd. (a).) The allegations relating to this count did not cite a case number for either of these alleged prior convictions. The trial court found the former section 666.5 prior conviction enhancement allegation to be true.

2. Sufficiency of General Finding

On appeal, Brewer raises several challenges to this finding. First, he suggests that the finding was inadequate because the trial court did not specify whether it relied on the 2003 or the 2008 prior conviction. The enhancement allegation in the information cited dates for the two prior convictions, but the trial court did not identify which one it relied on to find that the enhancement allegation was true.

Former section 666.5 provides for an increased punishment if a defendant currently convicted of unlawful taking has been “previously convicted” of this offense. (Former § 666.5, subd. (a); see former Veh. Code, § 10851.) If multiple qualifying prior convictions were alleged, the enhancement statute did not require the trial court to identify which formed the basis of its finding. Either would suffice. We are satisfied that if the prior conviction enhancement finding is supported by evidence of either the 2003 or the 2008 prior conviction, the trial court’s finding must be upheld on appeal. Thus, we reject Brewer’s lack of specificity challenge to the former section 666.5 finding.

3. Lack of Notice

In a related challenge, Brewer argues that the finding was improper because the information did not identify a specific prior conviction. He appears to contend that he was not given sufficient notice of the prior convictions alleged against him because the enhancement allegation related to the new charge of unlawful driving did not identify the prior court case numbers for the 2003 and 2008 convictions. However, in another part of the information, it specified details of two earlier violations of Vehicle Code section 10851 that *did* cite case numbers—one for an April 23, 2003 prior conviction and one for a September 5, 2008 prior conviction. The September 2008 date was identical to the one cited in the former section 666.5 allegation; the other was one day later than the April 2003 date cited in the allegation charged as part of the new unlawful driving charge. Under these circumstances, we are satisfied that the information provided Brewer with

sufficient notice that he might face an increased sentence if convicted of the new unlawful driving charge and if the trial court found either the April 2003 or September 2008 prior convictions detailed in other parts of the information to be true.

4. *Failure of Proof*

Having rejected these collateral attacks, we turn to Brewer's primary challenge—that the prosecution did not offer sufficient evidence to prove either the 2003 or the 2008 prior conviction for purposes of former section 666.5. An enhancement finding that is not supported by substantial evidence violates a criminal defendant's due process rights and is invalid. (*People v. Rowland* (1992) 4 Cal.4th 238, 269; U.S. Const., 14th Amend.; Cal. Const., art. I, § 15.)

When considering an attack on the sufficiency of evidence to support an enhancement, we view the *entire record* in the light most favorable to the judgment. We determine if that record contains substantial evidence from which a reasonable trier of fact could find the enhancement to be true beyond a reasonable doubt. We presume every fact in support of that judgment that the trier of fact could have reasonably deduced from the evidence in the record. If the record reasonably supports the trier of fact's findings, we will not reverse the judgment even if other circumstances might reasonably support a contrary finding. On appeal, we have no authority to weigh the evidence before the trial court. (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.) We determine whether substantial evidence supports the finding of the trier of fact, not whether evidence proves the finding beyond a reasonable doubt. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Crittenden* (1994) 9 Cal.4th 83, 139.)

As we have determined that either prior conviction would support the former section 666.5 finding, we need only determine whether one was proven. We focus on the allegation that Brewer had been convicted of unlawful driving on September 5, 2008. (Former Veh. Code, § 10851, subd. (a).) In addition to the recitation in the unlawful driving count, the information contained another allegation that Brewer had been convicted of this offense as well as another Vehicle Code violation on the same date in

Solano County. During trial on the new charges, Brewer admitted that he had been convicted of two felonies on September 5, 2008.

At the trial on this enhancement allegation, the court had before it three abstracts of judgment about these two offenses—an original abstract and two copies of an amended version. Each cites a June 27, 2008 date of conviction for unlawful driving based on Brewer’s plea,⁷ and a prison term imposed for this offense. In two places, the three abstracts of judgment each set out a “09-95-08” date when sentence was pronounced. A September 95th date is physically impossible. (See Evid. Code, § 451, subd. (f).) As the trial court suggested at the trial on the enhancement allegations, we are satisfied that this recorded date was a clerical error and that the date of conviction was actually September 5, 2008.

The error was corrected, although it is unclear who made the correction. The abstract of judgment filed on September 10, 2008 recites the “09-95-08” sentencing date twice. The record contains two copies of the January 2009 amended abstract of judgment reflecting additional sentence credits. On the amended abstract that was contained in the certified prison packet, the second reference to a “09-95-08” sentencing date, the “9” in “95” is obliterated, such that the date reads “09-5-08.” Regardless of who corrected this record, an amended abstract of judgment reflects a sentencing date of September 5, 2008—the same date that was pled in the former section 666.5 enhancement allegation related to the new unlawful driving count and the date on which he admitted at trial on the new charges that he had been convicted of two felonies.

Brewer cannot undermine the enhancement finding because of the difference between the June and September 2008 dates, either.⁸ Viewed in its totality, the record before the trial court provided substantial evidence from which a trier of fact could reasonably conclude that on September 5, 2008, Brewer was sentenced to prison for an

⁷ The record of the prior conviction hearing also included a copy of Brewer’s June 27, 2008 waiver of rights in support of his motion to change his plea. In it, Brewer pled no contest to unlawful taking of a vehicle.

⁸ At the court trial, the prosecution conceded that the information incorrectly listed the September 2008 sentencing date, rather than the June 2008 conviction date.

unlawful driving offense to which he pled no contest on June 27, 2008. An information must allege each fact required for imposition of a sentence enhancement in order to comport with due process. (*People v. Shoaff* (1993) 16 Cal.App.4th 1112, 1118; see *People v. Hernandez* (1988) 46 Cal.3d 194, 208, criticized on another point in *People v. King* (1993) 5 Cal.4th 59, 78 fn. 5.) Former section 666.5 applied to persons who had been “previously convicted” of a prior offense of unlawful driving. (Former § 666.5, subd. (a).) This enhancement does not require the pleading or proof of a specific date, as long as the date of the actual conviction occurred before the newly charged offense. Whether we construe the date of conviction to be the date of Brewer’s plea or the date on which he was sentenced, both dates occurred before the June 2010 unlawful driving offense was committed. Thus, we are satisfied that the evidence of Brewer’s 2008 prior conviction was sufficient to support the trial court’s finding that the former section 666.5 allegation was true.⁹

B. *Correction of Unauthorized Sentence*

Brewer does not challenge the trial court’s imposition of a three-year sentence on the unlawful driving count, but in our review on appeal, we find that the abstract of judgment reflects an unauthorized sentence for this count. The pronouncement of sentence was unclear on this count. The trial court stated that it struck the former section 666.5 enhancement punishment, but it set out its sentence on the unlawful driving count twice, each time specifying a different term. First, it pronounced a concurrent midterm of *three* years for this count, which was consistent with the imposition of a former section 666.5 enhancement. Then, after defense counsel asked for clarification, the trial court said that it had imposed a *two*-year concurrent midterm, which would have been the midterm applicable if the former section 666.5 enhancement was actually stricken.¹⁰ The abstract of judgment reflects a *three*-year concurrent term for this offense.

⁹ In light of this conclusion, we need not determine whether the trial court had sufficient evidence of an April 2003 conviction of unlawful driving to support imposition of this enhancement.

¹⁰ The prosecution suggested that the court miscalculated this term, to no avail.

At the time of the June 2010 offense, unless the former section 666.5 enhancement applied, a trial court opting for a prison sentence for this offense was required to choose among three possible sentences—16 months, two years or three years. (Former §§ 18, 666.5, subd. (a); former Veh. Code, § 10851, subd. (a).) Thus, the midterm for unlawful driving was only *two* years unless the trial court chose not to strike the former section 666.5 enhancement. The abstract of judgment reflects the imposition of a concurrent midterm of *three years* for this offense, without reference to former section 666.5.

This is an illegal sentence. (*People v. Price* (2004) 120 Cal.App.4th 224, 243.) An unauthorized sentence may be vacated and corrected whenever the error comes to our attention, regardless of whether the appellant raised the issue. (See *People v. Hester* (2000) 22 Cal.4th 290, 295; *People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6; *People v. Price, supra*, 120 Cal.App.4th at p. 244.) It is unclear from the pronouncement of sentence whether the trial court intended to impose (a) an enhanced midterm of three years pursuant to former section 666.5; (b) an upper term of three years for unlawful driving after striking the former section 666.5 enhancement; or (c) a midterm of two years after the enhancement was stricken. In these circumstances, we think it prudent to remand the matter to the trial court for the limited purpose of clarifying its sentence on this count and correcting the abstract of judgment to reflect an authorized sentence. (See *People v. Eastman* (1993) 13 Cal.App.4th 668, 679-680 [calculation of credits].)

III. SECTION 667.5 ENHANCEMENTS

A. Trial Court Findings

Brewer also contends that there is insufficient evidence to support the findings that he suffered three prior convictions and served prison terms for them. Thus, he reasons, the three one-year sentencing enhancements imposed by the trial court violate his state and federal constitutional rights to due process. When a trial court imposes a determinate sentence, a one-year consecutive term must be added to that sentence for each prior separate prison term served by the defendant, unless a five-year period ran during which he or she did not commit a felony offense and remained free from custody. (Former § 667.5, subd. (b).) The information alleged that Brewer suffered four prior convictions

that could form the basis of three prior prison term enhancements. At the conclusion of a court trial, the three enhancement allegations were found to be true. (*Ibid.*) Each finding resulted in an additional one-year term, adding a total of three years to Brewer's sentence.

B. *General Challenge*

As he did against the former section 666.5 enhancement, Brewer challenges the former section 667.5 findings because the trial court did not cite which prior conviction formed the basis of its three enhancement findings. The former section 667.5 enhancement allegations cited specific prior convictions from 2003 to 2008. The trial court did not identify which prior convictions it relied on when finding that the enhancement allegations were true. Instead, it concluded that "on three separate occasions, the defendant was convicted of a felony, went to prison; [and] did not remain free of prison custody for . . . five years"

These are the key elements that must be proven beyond a reasonable doubt in order to impose a one-year sentence enhancement pursuant to former section 667.5, subdivision (b). The prosecution was required to prove that Brewer had been previously convicted of a felony; that he was imprisoned as a result of that conviction; and that he completed that term of imprisonment. It was also required to prove that in the five years after his release, Brewer failed to avoid reincarceration or the commission of a new felony offense. (Former § 667.5, subd. (b); *People v. Tenner* (1993) 6 Cal.4th 559, 563.) The former statute did *not* require the trial court to specify which prior convictions formed the basis of its finding. (See pt. II.A.2., *ante.*) We are satisfied that if each of the prior prison term enhancement findings are supported by evidence of the prior convictions cited in the information, those findings are proper.

C. *Specific Challenges*

1. *2004 Prior Conviction*

Brewer also raises specific challenges to the sufficiency of evidence to support each of the three enhancements. First, he contends that there was no evidence that he suffered a November 2004 prior conviction. On appeal, we determine if substantial evidence supports the trial court's enhancement findings. (See pt. II.A.4., *ante.*) The

information alleged that in a specific case identified by number, Brewer was convicted of burglary on “11/04/2004.” A May 2004 abstract of judgment for this same case number established that on January 14, 2004, Brewer was convicted by plea of second degree burglary. When the January 14, 2004 date is expressed as 1/14/2004, and the information’s citation of 11/04/2004 is read as 11/4/2004—it is clear that the discrepancy is a clerical error.

According to the prison packet, in May 2006, Brewer completed his term for the 2004 burglary conviction, although he remained in prison for other offenses. In July 2006, he was formally paroled. He committed the offenses charged in the case at bar in June 2010, less than five years after he completed his sentence for the 2004 conviction. The totality of the evidence before the trial court supports its finding that Brewer had been convicted of felony burglary in 2004, was committed to state prison based on that conviction, and failed to remain free of prison custody for five years after his 2006 release from prison. Accordingly, all the elements of a former section 667.5 prior prison term enhancement were proven for the 2004 burglary conviction.¹¹ (See *People v. Albillar, supra*, 51 Cal.4th at pp. 59-60.)

2. 2005 Conviction

Brewer also challenges the imposition of a second prior prison term enhancement based on a 2005 conviction. The information alleged that Brewer had been convicted of burglary on May 21, 2005, citing a specific case number. An abstract of judgment for this same case number showed that he pled to second degree vehicular burglary and was convicted of this offense on June 14, 2005. He was sentenced to a two-year term in prison for this offense. Despite the discrepancy in dates, the consistency between the case numbers and the offenses satisfies us that Brewer was actually convicted of a felony and committed to state prison for a second prison term.

Prison records show that Brewer was incarcerated for this offense in July 2005 and was released on parole a year later, in July 2006. He committed new offenses in June

¹¹ In light of this conclusion, we need not consider whether the April 2003 prior conviction might also support imposition of this prior conviction enhancement.

2010, less than five years since his prison release. Thus, the record contains substantial evidence supporting each of the elements of a prior prison term enhancement based on Brewer's 2005 burglary conviction. (See *People v. Albillar, supra*, 51 Cal.4th at pp. 59-60.)

3. 2008 Conviction

As with his attack on the former section 666.5 enhancement finding, Brewer's challenge to a prior prison term enhancement based on a 2008 conviction is grounded in the discrepancy between the September 5, 2008 date specified in the information and the June 27, 2008 date of conviction shown in the abstract of judgment. We have already rejected that challenge. (See pt. II., *ante*.) The trial court had substantial evidence from which it could reasonably conclude that on September 5, 2008, Brewer was sentenced to prison for two vehicular offenses—unlawful driving and evading an officer—to which he pled no contest on June 27, 2008. The one-year enhancement of former section 667.5 subdivision (b) did not require the pleading or proof of a specific date of conviction. The information alleged the facts necessary to impose this enhancement. (See *People v. Shoaff, supra*, 16 Cal.App.4th at p. 1118; see also *People v. Hernandez, supra*, 46 Cal.3d at p. 208.)

An amended abstract of judgment showed that Brewer was convicted of these two vehicular offenses and was sentenced to prison for them in September 2008. He committed new offenses within days of his June 2010 release from prison. Thus, there is substantial evidence to support all elements of the prior prison terms finding based on Brewer's 2008 conviction. (See *People v. Albillar, supra*, 51 Cal.4th at pp. 59-60.)

IV. REMITTITUR

The matter is remanded to the trial court for clarification of its sentence on the unlawful driving of a vehicle conviction. In all other respects, the judgment—including the sentence—is affirmed.

Reardon, J.

We concur:

Ruvolo, P.J.

Rivera, J.