

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 FIVE

**THE PEOPLE,**  
**Plaintiff and Respondent,**  
**v.**  
**JEFFREY LYNN STORY,**  
**Defendant and Appellant.**

**A131958**  
**(Sonoma County**  
**Super. Ct. No. SCR572886)**

Defendant Jeffrey Lynn Story (appellant) appeals his conviction by jury trial of unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a); count I), misdemeanor driving while intoxicated (Veh. Code, § 23152, subd. (a); count III), misdemeanor driving with a blood alcohol level of .08 percent or higher (Veh. Code, § 23152, subd. (b); count IV), and misdemeanor hit and run with property damage (Veh. Code, § 20002, subd. (a); count V).<sup>1</sup> Thereafter, he admitted two prior driving under the influence (DUI) convictions, and the jury found true that he suffered two prior strike convictions (Pen. Code, § 1170.12).<sup>2</sup>

Appellant contends the trial court erroneously permitted the prosecution to amend the information after he had pled guilty and before he was sentenced, and abused its

---

<sup>1</sup> Prior to trial appellant pled no contest to a count VI misdemeanor driving on a suspended license (Veh. Code, § 14601.2, subd. (a)). Thereafter, the jury found him not guilty of receiving stolen property (Pen. Code, § 496d, subd. (a); count II).

<sup>2</sup> The court later struck one of appellant's prior strike convictions pursuant to *People v. Romero* (1996) 13 Cal.4th 497 (*Romero*). Appellant was sentenced to six years in state prison.

discretion in refusing to strike a prior strike conviction. He also contends his sentence on count IV should have been stayed pursuant to Penal Code section 654,<sup>3</sup> and the stay issued on count III should be modified to preclude its use to enhance future punishment. The parties agree the probation conditions imposed on count IV should be stricken since probation was not granted. We order the probation conditions imposed on count IV stricken and otherwise affirm.

### BACKGROUND

At or around noon on November 11, 2009, a truck belonging to contractor O.C. Jones and Sons was discovered missing from a worksite on Old Redwood Highway in Cotati. Around 5:30 or 6:00 p.m. that evening, appellant crashed the truck near an apartment complex. Following the crash, several witnesses saw him exit the truck. At approximately 8:40 p.m., a California Highway Patrol officer detained appellant until the police arrived. At 10:20 p.m., appellant's blood alcohol level was tested and he had a blood alcohol concentration of .12 percent. A criminalist testified that, assuming someone of appellant's gender, height, and weight had stopped drinking and had fully absorbed all the alcohol he consumed by 6:15 p.m., and had a blood alcohol concentration of .12 percent at 10:20 p.m., that person's blood alcohol concentration would have been approximately .19 percent at 6:15 p.m. At that concentration the person would be significantly mentally and physically impaired and unable to safely operate a motor vehicle.

### DISCUSSION

#### I. *Amendment of the Information*

On June 23, 2010, pursuant to a negotiated plea agreement, appellant pled no contest to unlawful taking or driving a vehicle (count I) and driving with a blood alcohol level of .08 percent or higher with two prior DUI convictions (count IV), and admitted an April 1987 Marin County prior strike conviction. The written plea waiver form stated appellant's understanding that, as a result of his plea, he might receive a maximum six-

---

<sup>3</sup> All undesignated section references are to the Penal Code.

year state prison sentence. At the change of plea hearing, the court indicated that if appellant entered residential treatment, it would grant probation and dismiss the strike prior. The matter was continued to August 11, 2010, for sentencing.

On August 11, 2010, when the parties appeared for sentencing, the prosecutor stated that in reviewing appellant's probation report, he noted appellant had a second prior strike conviction from August 1987 in Contra Costa County which did not appear on appellant's rap sheet. The prosecutor sought to amend the information to add the second strike prior. It was agreed that the matter would be continued for informal settlement discussions before sentencing proceeded further. The court noted that if the parties could not resolve the matter informally, it would permit appellant to withdraw his no contest plea.

On August 25, 2010, the court suspended proceedings pursuant to section 1368 and an expert was appointed to determine if appellant was competent to proceed.

On September 22, 2010, the court reinstated criminal proceedings after appellant was found competent. On that date, with no objection by the defense, the prosecutor filed a first amended information which added the August 1987 prior strike conviction. The court permitted appellant to withdraw his prior no contest plea and enter a plea of not guilty to the charges alleged in the first amended information.

Appellant challenges the court's decision to grant the amendment on numerous grounds.<sup>4</sup> First, he argues that the court "failed to demonstrate it understood its discretion to refuse the amendment." We reject this contention. Appellant points to nothing in the record expressly reflecting the trial court's ignorance of its discretion and

---

<sup>4</sup> None of these grounds were raised in the trial court, and this commonly results in a forfeiture of these issues on appeal. (*People v. Walker* (1959) 170 Cal.App.2d 159, 164; accord, *People v. Lewis* (1983) 147 Cal.App.3d 1135, 1140.) To avoid forfeiture appellant makes two arguments. First, he contends defense counsel might have been unaware of some of the grounds raised on appeal. Alternatively, appellant argues that if trial counsel were aware of these grounds for objecting to the amendment of the information, and failed to do so, she provided ineffective assistance of counsel. Because we address these issues on the merits, we need not resolve the forfeiture question.

never argues a trial court is legally obligated to weigh the relevant factors on the record. Section 1009 provides the court with discretion to grant or deny a motion to amend and we presume the trial court knew and applied the correct statutory and case law in the exercise of its official duties. (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456; Evid. Code, § 664.)

Appellant next contends the trial court abused its discretion in permitting the amendment because there was “*prima facie* evidence of bad faith on the part of the prosecutor . . . [in] violation of the plea agreement.” This argument is unpersuasive. On August 11, 2010, the prosecutor notified the court he had first learned of the second, uncharged strike prior conviction after reviewing appellant’s probation report. However, the amended information filed by the prosecutor on September 22, 2010, which included the second strike prior, was stamped “received but not filed [by the] Superior Court . . . County of Sonoma” on *April 25*, 2010, a date before appellant’s plea was entered. Certainly this file stamp is *prima facie* evidence that the prosecution had learned of the second strike before appellant entered his plea and before it successfully moved to amend the information. But the file stamp provides no basis for attributing an improper, bad faith motive for the delay in informing the trial judge. Appellant never explains what possible benefit the prosecutor could have hoped to receive from hiding the existence of the prior conviction from the judge at the time the prosecutor entered into the plea agreement, so that it could then unveil the conviction at the time set for sentencing in order to overturn its own agreement. We are unable to conjure any such benefit and are unwilling to conclude the prosecutor’s actions resulted from an ulterior motive instead of simple inadvertence.

*People v. Valladoli* (1996) 13 Cal.4th 590 (*Valladoli*) confirms the trial court’s authority to permit this post-guilty plea amendment of the information. In *Valladoli*, the Supreme Court held that section 969a<sup>5</sup> permits the amendment of an information to

---

<sup>5</sup> Section 969a provides in relevant part: “Whenever it shall be discovered that a pending . . . information does not charge all prior felonies of which the defendant has been convicted either in this State or elsewhere, said . . . information may be forthwith

allege prior felony convictions “up to sentencing.” (*Id.* at pp. 594, 604; see also *People v. Martin* (1978) 87 Cal.App.3d 573, 579 [“[T]he filing of a new or amended information solely for the purpose of charging priors has been prohibited once a defendant has been found guilty and sentenced on the substantive charges.”].)<sup>6</sup> *Valladoli* made clear that section 969a is “broad enough to encompass [an] amendment to charge prior felony convictions that were previously known[.]” (*Valladoli*, at p. 606.) No abuse of discretion has been shown.<sup>7</sup>

Appellant further contends the amendment constituted the prosecution’s violation of the plea agreement. The plea agreement, according to appellant, “contained an implicit term that the prosecution would not add a second strike.” Even if we were to find that the plea agreement precluded a motion to amend made in good faith, which we do not, appellant’s contention is misplaced. First, though the state and the defendant are bound by the plea agreement they have entered into, the sentencing court is not. (*People v. Kim* (2011) 193 Cal.App.4th 1355, 1360 (*Kim*)). Second, any error in permitting the amendment is harmless. The trial court did not reject the plea bargain because the information was *amended* to add a second strike, but because there *was* a second strike. Pursuant to section 1192.5,<sup>8</sup> the trial court “always retains the discretion not to sentence

---

amended to charge such prior conviction or convictions, and if such amendment is made it shall be made upon order of the court . . . . Defendant shall promptly be arraigned on such information . . . as amended and be required to plead thereto.”

<sup>6</sup> Section 969.5 is the parallel provision to section 969a; section 969.5 concerns the situation where a defendant pleads guilty, section 969a concerns the situation where a defendant pleads not guilty and goes to trial. (*Valladoli, supra*, 13 Cal.4th at p. 601.) Both statutes concern amendments to charge additional prior felony convictions. (*Id.* at p. 601; accord, *People v. Tindall* (2000) 24 Cal.4th 767, 778.)

<sup>7</sup> For the first time in his reply brief, appellant contends the record does not reflect that the court conducted the proper inquiry or analysis in permitting the amendment. Since this issue was not raised in appellant’s opening brief, we decline to consider it. (See *Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794 [points raised for the first time in reply brief will ordinarily not be considered].)

<sup>8</sup> Section 1192.5 provides, in relevant part, that the trial court “may, at the time set for the . . . pronouncement of judgment, withdraw its approval [of the plea] in the light of

in accordance with the terms of the plea, *especially if it subsequently learns of facts or law that render the agreed sentence inappropriate.*” (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1385, italics added.) Here, the probation report as well as the prosecutor informed the trial court about the uncharged prior strike conviction. There is simply no reason to believe that the result would have been any different in the absence of a motion to amend.

Section 1192.5 expressly gives the trial court the power to refuse to approve a plea bargain so long as the defendant is given the opportunity to withdraw his or her plea if he or she desires to do so. (*Kim, supra*, 193 Cal.App.4th at p. 1361.) In accordance with section 1192.5, appellant’s June 2010 written plea waiver form stated his understanding that “if the court declines to accept this negotiated disposition, I may withdraw my plea(s) of guilty/no contest, re-enter my not guilty plea(s), and go to trial on all counts as originally charged.” After the court granted the prosecution’s motion to amend the information to charge the second strike prior, it permitted appellant to withdraw his plea.<sup>9</sup> Even assuming the prosecutor breached the plea agreement by seeking leave to file the amended information, appellant has not established that the trial court erred in declining to accept that bargain and allowing appellant to withdraw his no contest plea after amendment of the information. No prejudice is shown.

## II. *The Trial Court’s Refusal to Strike the Second Strike Prior*

Appellant argues the trial court’s decision to strike only one of his two prior strike convictions was an abuse of discretion because the factors relied on by the court in

---

further consideration of the matter, and . . . in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so.”

<sup>9</sup> Appellant’s argument that he was entitled to specific performance of his plea agreement fails because he never requested that remedy and he does not claim that defense counsel was incompetent in failing to request that remedy. Appellant sought to withdraw his plea following amendment of the information and the court permitted him to do so.

striking one of the strike priors were applicable to the second strike prior and the court did not distinguish between the two strike priors.<sup>10</sup>

Pursuant to section 1385, the trial court may on its own motion or upon application of the prosecution, “and in furtherance of justice” order an action dismissed. (§ 1385, subd. (a).) Under section 1385, a trial court may strike or vacate a prior conviction allegation or finding under the Three Strikes law in furtherance of justice. (*People v. Carmony* (2004) 33 Cal.4th 367, 373 (*Carmony*), citing *People v. Williams* (1998) 17 Cal.4th 148, 158.) In ruling on a motion to dismiss a prior strike conviction the trial court “must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*Williams*, at p. 161.)

A trial court’s refusal to dismiss a prior strike conviction is reviewed for abuse of discretion. (*Carmony, supra*, 33 Cal.4th at p. 374.) Because the Three Strikes law establishes a sentencing norm and requires the court to explicitly justify its decision to depart from that norm, the law creates a strong presumption that a sentence that conforms to the sentencing norm is both rational and proper. Thus, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. (*Carmony*, at p. 378.) Such an abuse of discretion occurs where the trial court was unaware of its discretion to dismiss, where the court considered impermissible factors in refusing to dismiss, or where the refusal to dismiss the strike prior produces an arbitrary, capricious or patently absurd result under the specific facts of a particular case. (*Ibid.*)

“While a court must explain its reasons for striking a prior [citations], no similar requirement applies when a court declines to strike a prior. [Citation.] ‘The absence of such a requirement merely reflects the legislative presumption that a court acts properly

---

<sup>10</sup> Appellant moved to strike both prior strike convictions; the court dismissed only the first strike prior.

whenever it sentences a defendant in accordance with the three strikes law.’ [Citation.]” (*In re Large* (2007) 41 Cal.4th 538, 550.)

Appellant’s prior strike convictions arose from residential burglaries, the first committed on October 14, 1986 and the second committed on October 17, 1986. In dismissing the first strike prior, the court considered that the strike priors were committed three days apart in 1986 against family members of appellant’s codefendant, were drug-related and were committed when appellant was 24 years old. The court also considered that appellant had committed no strikes within 23 years and no felonies within 10 years. It also considered his social history including his mental condition and alcohol consumption at the time of the current offense, his hospitalization for depression and alcohol dependence, and his employment and marriage history. It also noted that appellant had acknowledged responsibility and shown remorse for his acts. The court also considered the April 2011 probation report which details an extensive criminal history stemming from 1980, including numerous prior felony convictions and numerous prior misdemeanor convictions. His criminal history includes burglaries, weapons offenses, drug and alcohol related offenses, and violent behavior. His performance on probation was “dismal,” with the exception of two brief time periods, and his performance on parole was similarly poor.

Appellant cites no authority, nor have we found any, for the position that where the same mitigating factors are applicable to two alleged strike priors, the court abuses its discretion in striking one, but not both strike priors. Based on the record before us, the court considered the requisite factors in ruling whether to strike the second prior strike allegation, and appellant has failed to establish that its refusal to do so was arbitrary, capricious, or patently absurd.

### III. *Section 654*

In sentencing appellant to six years in state prison the court imposed the upper three-year term on count I (vehicle theft), which it doubled under the Three Strikes law; stayed the one-year jail term on count III (misdemeanor driving while intoxicated), and imposed consecutive one-year terms on count IV (misdemeanor driving with a blood

alcohol level of .08 percent or higher) and count V (misdemeanor hit and run with property damage). Appellant's presentence credit for time served was applied against the terms imposed on the misdemeanor counts.

Appellant contends the sentence on count IV should have been stayed pursuant to section 654 because that count was part of the same indivisible transaction as the count I vehicle theft. He argues these convictions stem from his driving a construction truck without permission while intoxicated and his intoxication "clearly motivated the driving[.]" Thus, he argues the incident was a continuous, single event committed with a single intent and objective.<sup>11</sup>

Section 654, subdivision (a) provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

"Section 654 is intended to ensure that punishment is commensurate with a defendant's criminal culpability. [Citations.] It expressly prohibits multiple sentences where a single act violates more than one statute. [¶] Section 654 also prohibits multiple sentences where the defendant commits different acts that violate different statutes but the acts comprise an indivisible course of conduct engaged in with a single intent and objective. [Citation.] 'If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.] Thus, in legal effect, different acts that violate different statutes merge under the perpetrator's single intent and objective and are treated as if they were a single act that violates more than one statute. [¶] If, on the other hand, in committing various criminal acts, the perpetrator acted with multiple criminal objectives that were independent of and not merely incidental to each other, then he may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of

---

<sup>11</sup> Appellant's failure to raise a section 654 claim below does not waive the issue on appeal. (*People v. Hester* (2000) 22 Cal.4th 290, 295; *People v. Le* (2006) 136 Cal.App.4th 925, 931.)

an otherwise indivisible course of conduct. [Citations.]” (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 196.)

The intent and objective of the defendant are factual determinations for the trial court. (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.) The court’s implied finding that a defendant harbored a separate intent and objective for each offense will be affirmed on appeal if supported by substantial evidence. (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

Contrary to appellant’s assertion, there is no evidence establishing that intoxication “clearly motivated” his taking or driving the truck. The court could reasonably conclude that appellant’s intent in taking the truck was merely to deprive the owner of it; his decision to drive despite being intoxicated involved a separate intent and objective.

#### IV. Stay on the “Use of” the Count III Conviction

The trial court stayed the sentence on count III pursuant to section 654. In reliance on *People v. Duarte* (1984) 161 Cal.App.3d 438 (*Duarte*), appellant contends the stay on count III should be modified to include a stay on the use of the count III conviction for future punishment.

In *Duarte*, the defendant was convicted, inter alia, of violating subdivisions (a) and (b) of Vehicle Code section 23153. Since both convictions arose from a single act of drinking and driving, the court stayed the sentence on the second conviction pursuant to section 654. (*Duarte, supra*, 161 Cal.App.3d at pp. 440-441, 447.) The Court of Appeal affirmed the convictions, but noted that, although the second conviction was stayed under section 654, the risk remained that both convictions might be used to enhance future punishment: “Having suffered two convictions and one punishment, defendant remains exposed to the use of the two convictions to enhance future punishment. The Vehicle Code contains an increasing number of sections which penalize recidivism. These sections ordinarily refer to prior ‘convictions’ without qualifying them to exclude multiple convictions arising from a single driving occasion. By only staying *punishment* on one of the two convictions, another court at another time may have to determine

whether the defendant has one or two ‘priors’ arising from this prosecution.” (*Id.* at p. 447.) To avoid imposition of multiple enhancements based on a single act of drunk driving, the court modified the judgment to order that “the *use* of the [second] conviction . . . as a prior conviction for penal and administrative purposes, be stayed[.]” (*Id.* at p. 448.)

In *People v. Pearson* (1986) 42 Cal.3d 351, 361, 363, the Supreme Court recognized that enhancement of a defendant’s sentence because of a stayed conviction violates the proscription against multiple punishment in section 654, unless the Legislature expressly declares otherwise. In *People v. Benson* (1998) 18 Cal.4th 24, 29, the court reiterated that legislation enacted after the date of a conviction may permit the use of the conviction for enhancement or other purposes in a later prosecution even if the sentence on the conviction was originally stayed under section 654.

Whether appellant’s stayed conviction on count III may be used to enhance his sentence in any future penal or administrative proceeding depends on the laws in effect at that time. We therefore, decline appellant’s request to order a stay of the use of his conviction on count III.

#### V. *Probation Conditions*

Finally, appellant contends, and the People agree, the court’s imposition of various probation conditions<sup>12</sup> on his count IV conviction was erroneous because the court did not place him on probation. They request that the probation conditions be stricken from the court’s May 5, 2011 minute order. We agree.

---

<sup>12</sup> The court ordered appellant to stay out of places where alcohol is the primary item of sale, to not to use alcohol, not to drive with any measurable amount of alcohol in the blood and to enroll in a multiple offender program.

DISPOSITION

The probation conditions imposed on count IV are ordered stricken. The judgment is otherwise affirmed.

---

SIMONS, Acting P.J.

We concur.

---

NEEDHAM, J.

---

BRUINIERS, J.