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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT VERN CALKINS,

Defendant and Appellant.

A142595

(San Mateo County
Super. Ct. No. SC080706A)

Robert Vern Calkins appeals from a judgment upon his plea of no contest to driving under the influence causing bodily injury (Veh. Code, § 23153, subd. (b)). Defendant also admitted the allegations that he inflicted great bodily injury upon the victim within the meaning of Penal Code¹ section 12022.7, subdivision (a); that the offense was a serious or violent felony (§§ 1192.7, subd. (c)(8); 667.5, subd. (c)(8)), that he suffered a prior serious felony “strike” conviction (§ 1170.12, subd. (c)(1)), and that he had two prior felony convictions within the meaning of section 1203, subdivision (e)(4). Defendant contends that the trial court erred in failing to strike the prior strike allegation in the interests of justice. He also argues that the court’s restitution award is unauthorized because the victim suffered no out-of-pocket losses. We affirm.

I. FACTS

On November 29, 2013, Sergeant Robert Pronske was driving his patrol car at approximately 35 miles per hour when the car was rear ended by a pickup truck.

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

Defendant was driving the truck and had been speeding at approximately 75–80 miles per hour. Both vehicles sustained significant damage.

Pronske got out of his car and made contact with defendant. When he approached defendant's car, he noticed a strong odor of alcohol inside the car. Pronske observed that defendant appeared intoxicated with red, bloodshot, and watery eyes and slurred speech. Pronske suffered pain to his upper shoulder and lower neck area and was taken to the hospital. He was discharged after getting x-rays and a CAT scan, but suffered extreme headaches two to three days later. He was placed on medical leave from work for approximately six weeks due to his injuries.

Officer Joshua Puga responded to the scene. He approached defendant, who was being put in a neck brace. Puga could smell the strong odor of an alcoholic beverage emanating from inside of defendant's truck. He saw what appeared to be a puddle of beer on the driver's side floorboard of the truck. He also saw Heineken cans in brown paper bags; one of the cans was open. The bed of the truck was full of empty beer cans. Defendant was taken to the hospital, where his blood alcohol content measured .19.

II. DISCUSSION

1. Romero² motion

Defendant contends that the trial court abused its discretion in failing to strike the prior strike conviction in the interests of justice under section 1385 and *Romero*. He argues that the conviction was stale as it occurred nearly 30 years ago.

In *Romero*, the court held that the Three Strikes law did not preclude the trial court from exercising its power under section 1385, subdivision (a), to dismiss a prior conviction allegation in the furtherance of justice. (*Romero, supra*, 13 Cal.4th at p. 530.) We review a court's decision not to dismiss or strike a prior serious or violent felony conviction allegation for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 374–375 (*Carmony*).) In ruling on a motion to dismiss a prior strike allegation, the court must consider “ ‘whether, in light of the nature and circumstances of his present felonies

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530 (*Romero*).

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.' ” (*Id.* at p. 377, quoting *People v. Williams* (1998) 17 Cal.4th 148, 161.)

Here, the trial court denied defendant's *Romero* motion because it was concerned that defendant was not going to stop drinking if he was released on probation. The court remarked, “As the People said and it is in the probation report, [defendant] has been drinking two years daily. I would note also in the probation report he is using medical marijuana apparently daily according to the probation report. What it says on Page 3 . . . —of the report—is, ‘As a concern is the defendant's lack of motivation to obtain the treatment he needs to help with his alcohol addiction.’ ” The court opined that in order to protect society, it had no alternative but to sentence defendant to prison because it did not believe defendant would be successful on probation. The court also noted that during the eight months defendant had been in jail, he had attended only five or six AA or NA meetings and had not enrolled in the Choices program.

The trial court did not abuse its discretion in denying the *Romero* motion. While we recognize that defendant's prior conviction for armed robbery was remote in that it occurred in 1987, defendant was subsequently convicted of reckless driving, a “wet reckless” (see Veh. Code, § 23103.5),³ in 1991. In 1992, defendant was convicted of misdemeanor assault with a deadly weapon based on his admission that he used his car to hit another person's car. In 1993 and 1994, defendant was convicted of several acts of domestic violence. Although defendant appears to have remained free of crime from 1994 until the present offense, he had been drinking alcohol excessively on a daily basis for two years and was driving at a speed of 75 to 80 miles per hour when he struck Pronske's patrol car. He had a .19 blood alcohol level after the collision. As the

³ Section 23103.5 permits a court to reduce a driving under the influence of alcohol or drugs offense to reckless driving if the prosecution agrees to a plea bargain. A wet reckless refers to a reckless driving offense where alcohol was involved.

probation report noted, moreover, defendant minimized his alcoholism, using his medical issues as an excuse for his drinking and his failures to seek treatment. At the time of the *Romero* hearing, defendant had not yet availed himself of services available in the county jail and had attended AA or NA meetings only five to six times in eight months. Given his lack of commitment to treatment, and the “ ‘particulars of his background, character, and prospects’ ” (*Carmony, supra*, 33 Cal.4th at p. 377), the court did not abuse its discretion in denying defendant’s *Romero* motion.

2. Restitution

The trial court ordered defendant to pay restitution to Pronske in the amount of \$6,289.30 for medical costs and \$9,676.21 in lost wages. Pronske was reimbursed for these sums by worker’s compensation. Defendant argues that the trial court abused its discretion in ordering restitution because Pronske suffered no out-of-pocket losses. This contention lacks merit.

Section 1202.4, subdivision (a)(1), provides that “[i]t is the intent of the Legislature that a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime.” In *People v. Birkett* (1999) 21 Cal.4th 226, 246 (*Birkett*), our Supreme Court explained, in analyzing section 1203.04, subdivision (a)(1), the former version of the statute, “the Legislature intended to require a probationary offender, for rehabilitative and deterrent purposes, to make *full* restitution for all losses *his crime had caused*, and that such reparation should go entirely to the *individual or entity the offender had directly wronged*, regardless of that victim’s reimbursement from other sources.” The *Birkett* court thus concluded that victims of crime are entitled to receive the full amount of the loss caused by the crime, even if the victim was otherwise reimbursed, leaving private insurers or other third parties to their separate civil remedies to recover any prior indemnification to the victims. (*Ibid.*)

“Consistent with the statute, payments to the victim by the victim’s *own insurer* as compensation for economic losses attributed to a defendant’s criminal conduct *may not* offset the defendant’s restitution obligation. [Citations.] And, although a restitution

order is not intended to give the victim a windfall [citation], a third party source which has reimbursed a direct victim for his or her loss may pursue its civil remedies against the *victim or perpetrator*. ‘[T]he possibility that the victim may receive a windfall because the third party fails to exercise its remedies does not diminish the victim’s right to receive restitution of the full amount of economic loss caused by the perpetrator’s offense.’ ” (*People v. Hume* (2011) 196 Cal.App.4th 990, 996; quoting *People v. Duong* (2010) 180 Cal.App.4th 1533, 1537–1538; and see *People v. Hove* (1999) 76 Cal.App.4th 1266, 1272 [“the fortuity that the victim here was over age 65, and thus covered by Medicare, should not shield defendant from a restitution order which requires him to pay the full amount of the losses caused by his crime”].)

Thus, the trial court did not abuse its discretion in ordering defendant to pay restitution to Pronske even though he incurred no out-of-pocket losses. That defendant was sentenced to prison and not placed on probation is also of no import to the restitution order. “Amendments to the [restitution] statute after *Birkett, supra*, 21 Cal.4th 226, indicate the Legislature intended the same rehabilitative and deterrent purposes to apply to non-probationary offenders as well. (Stats. 1995, ch. 313, § 5; Pen. Code, § 1202.4, subd. (a)(1).)” (*People v. Hamilton* (2003) 114 Cal.App.4th 932, 941, fn. 9.)

III. DISPOSITION

The judgment is affirmed.

Rivera, J.

We concur:

Reardon, Acting P. J.

Streeter, J.

A142595