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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MERCEDES JUANITA FLORES,

Defendant and Appellant.

A143876

(Sonoma County
Super. Ct. No. SCR-645284)

Mercedes Juanita Flores (appellant) appeals from a judgment entered after she pleaded no contest to allegations that she violated “Section 666.5 of the PENAL CODE . . . in that SHE did unlawfully take an automobile” on or about January 22, 2014, and that she had also been “previously convicted” of a violation of Vehicle Code section 10851, subdivision (a) (vehicle theft) in August 2012. Appellant contends the trial court lacked authority to sentence her and that her conviction must be reversed because she was improperly charged with and convicted of a penalty provision—Penal Code, section 666.5—rather than a substantive offense. We reject the contention and affirm the judgment, with instructions to the superior court clerk as set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

On January 24, 2014, the Sonoma County District Attorney filed a complaint charging appellant with: (1) unlawfully driving and taking a vehicle, to wit, a 1986 Pontiac Trans Am, on January 22, 2014 (Veh. Code, § 10851, subd. (a), count 1); and (2) unlawfully taking a vehicle, to wit, a 1986 Pontiac Trans Am, on January 22, 2014,

with a prior conviction from August 2012 for unlawfully taking a vehicle under Vehicle Code, section 10851, subdivision (a) (Pen. Code, § 666.5,¹ count 2).

The complaint was based on an incident that occurred on January 22, 2014. That day, the victim momentarily exited his 1986 Pontiac Grand Am with the engine still running in order to open the gate to his residence, when a woman—later identified as appellant—entered his car. Appellant put the car in reverse, accelerated, spun the car out, hit a curb, broke the right rear tire rim and rear window, then sped off. The car was found a short distance away. During their search for appellant, officers spoke to a woman who knew appellant. The woman said appellant was a “ ‘car thief’ ” and that appellant had been in the area earlier that day. The officers located and interviewed appellant, who admitted she was in the area at the time of the car theft but denied taking the car.

On March 4, 2014, appellant entered a no contest plea to count 2, which stated in full: “As and for a further and separate cause of action, being a different offense from but connected in its commission with the crime set forth in Count I hereof, complainant further complains and says upon further information and belief, that said defendant **MERCEDES JUANITA FLORES**, did, in the County of Sonoma, State of California, on or about the **22nd day of January, 2014**, violate Section **666.5** of the PENAL CODE, a **felony**, in that SHE did unlawfully take an automobile, 1986 PONTIAC TRANS AM. [¶] It is further alleged that the defendant **MERCEDES JUANITA FLORES** was previously convicted of the crime(s) listed below: [¶] [an August 17, 2012 conviction for a violation of Vehicle Code section 10851, subdivision (a), in case SCR 622135, Sonoma County Superior Court].” On the plea form that appellant signed, the offense to which she was pleading no contest was described as “F 666.5 PC, auto theft w/a prior F 10851(a) VC 8/17/12 SCR-622135,” and the maximum penalty was listed as four years. The plea agreement stated: “Custody Term will be for the stipulated term of Mid-term 3 yrs (split 2 yrs incarceration; 1 yr mandatory supervision) . . . violations of probation to

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

run concurrent w/ this sentence; Reserve Restitution; Arbuckle waiver [*People v. Arbuckle* (1978) 22 Cal.3d 749].”

At the time the trial court took the plea, the following discussion took place:

“[THE COURT:] All right. So Ms. Flores, then, in case 645284, you’re charged in count—did you say she’s just pleading to two?

“[PROSECUTOR:] Yes.

“[THE COURT:] You’re charged in Count II with a violation of Penal Code section 666.5, which alleges that on January 22 of this year you unlawfully took a 1986 Pontiac Trans Am. How do you plead to that charge?

“[THE DEFENDANT:] No contest.

“[THE COURT:] And then do you admit you have a prior conviction from August 17 of 2012 for the same charge and—well for Vehicle Code 10851 A in Sonoma County, the date of that conviction again August 17th, 2012? Do you admit that’s yours, ma’am?

“[THE DEFENDANT:] I admit. Guilty.

“[THE COURT:] Okay. Counsel, any further inquiry you would like the court to make?

“[DEFENSE COUNSEL:] No.

“[THE COURT:] Well, based on your questions and answers, Ms. Flores, and basically you didn’t have any questions of me—the fact that you’ve completed this form and that your mind is clear and you seem to be totally aware of what you’re doing, I will then find that you have knowingly, understandingly and intelligently waived your constitutional rights. [¶] That your plea and your admission are made freely, knowingly, intelligently and voluntarily. And Counsel, do you join in the waivers?

“[DEFENSE COUNSEL:] Yes.

“[THE COURT:] And factual basis?

“[DEFENSE COUNSEL:] Stipulated to a factual basis based on my review of the police reports.

“[THE COURT:] Thank you. People you’re stipulating as well?

“[THE PROSECUTION:] Yes.

“[THE COURT:] So I’ll find that the defendant does understand the nature of the charges, the consequences of the plea and the admission, and that there is a factual basis that supports the plea and the admission. So I’m going to accept the plea and find you guilty on County II.”

On April 8, 2014, the trial court sentenced appellant to the agreed upon aggregate term of three years, consisting of two years in county jail and one year of mandatory supervision. Appellant did not appeal from the judgment at that time, but on November 18, 2014, she filed a petition for resentencing under Proposition 47, which went into effect on November 5, 2014, and rendered misdemeanors certain drug and theft-related offenses that were previously felonies or wobblers, unless they were committed by certain ineligible defendants. Proposition 47 also created a new resentencing provision by which a person serving a felony sentence for an offense that is now a misdemeanor, may petition for a recall of that sentence and request resentencing in accordance with the offense statutes as added or amended by Proposition 47. (§ 1170.18, subd. (a).) The trial court denied the petition on December 12, 2014, and appellant filed a notice of appeal on December 23, 2014.

DISCUSSION

Appellant contends the trial court lacked authority to sentence her and that her conviction must be reversed because she was improperly charged with and convicted of a penalty provision—section 666.5—rather than a substantive offense. The Attorney General (respondent) acknowledges that section 666.5 is a penalty provision and that count 2 of the complaint was inartfully worded, but argues that reversal is not required because appellant had actual notice that she was charged with vehicle theft, in addition to an enhanced penalty under section 666.5. We agree with respondent.

Courts have distinguished statutes that provide for increased penalties from those defining substantive offenses. Section 666.5,² which provides for increased penalties for

²Section 666.5 provides: (a) Every person who, having been previously convicted of a felony violation of Section 10851 of the Vehicle Code, or felony grand theft involving an automobile in violation of subdivision (d) of Section 487 or former

the illegal taking or driving of a vehicle (Veh. Code, § 10851) with a prior conviction for the same offense, “creates only enhanced punishment for repeat offenders, not a new substantive offense.” (*People v. Young* (1991) 234 Cal.App.3d 111, 114–115; *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165–1166.)

However, “[n]o accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits.” (§ 960.) Constitutional due process guarantees require that a defendant “ ‘receive notice of the charges adequate to give a meaningful opportunity to defend against them.’ ” (*People v. Coryell* (2003) 110 Cal.App.4th 1299, 1308.) “Adequate notice to the defendant of the offense with which he is charged is not determined solely by the charging statute. A reference to an incorrect penal statute can be overcome by factual allegations adequate to inform the defendant of the crime charged.” (*People v. Haskin* (1992) 4 Cal.App.4th 1434, 1439.) Section 952, which governs how an offense should be stated in an accusatory pleading, provides in relevant part as follows: “In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused.”

In *People v. Thomas* (1987) 43 Cal.3d 818, the defendant contended he was improperly convicted of involuntary manslaughter because the information specifically

subdivision (3) of Section 487 . . . or felony grand theft involving a motor vehicle, . . . any trailer, . . . any special construction equipment, . . . or any vessel . . . in violation of former Section 487h, or a felony violation of Section 496d regardless of whether or not the person actually served a prior prison term for those offenses, is subsequently convicted of any of these offenses shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years, or a fine of ten thousand dollars (\$10,000), or both the fine and the imprisonment.”

and exclusively charged him with voluntary manslaughter. The California Supreme Court rejected the claim, explaining: “Given that a specific statutory enumeration is not a prerequisite for a valid accusatory pleading under section 952, it is unremarkable that we have held ‘the specific allegations of the accusatory pleading, rather than the statutory definitions of offenses charged, constitute the measuring unit for determining what offenses are included in a charge.’ [Citation.] More importantly, ‘even a reference to the wrong statute has been viewed of no consequence under the circumstances there appearing.’ ” (*People v. Thomas, supra*, 43 Cal.3d at p. 826; *People v. Ellis* (1987) 195 Cal.App.3d 334, 338–339 [an incorrect statutory reference did not require vacation of the defendant’s plea].)

Here, although count 2 alleged a violation of section 666.5, it also specified that appellant was being charged with having committed vehicle theft of the 1986 Pontiac Trans Am on January 22, 2014, and that she had also suffered a prior conviction on August 17, 2012, for a violation of Vehicle Code, section 10851. In her written plea form, appellant pleaded no contest to a felony violation of “auto theft [with] a prior” and agreed she would be sentenced to the mid-term of three years, consisting of two years of “incarceration” and one year of “mandatory supervision.” When she entered her plea, she stated “No contest” after being told she was being charged with count 2, which “alleges that on January 22 of this year you unlawfully took a 1986 Pontiac Trans Am.” Moreover, she stated, “I admit. Guilty,” when asked, “And then do you admit you have a prior conviction from August 17 of 2012 for the same charge and—well for Vehicle Code 10851 A in Sonoma County, the date of that conviction again August 17th, 2012? Do you admit that’s yours, ma’am?” It is evident from the record that appellant understood she was charged both with the January 22, 2014 vehicle theft of the Pontiac Trans Am, and with having a prior vehicle theft conviction from August 17, 2012. We are satisfied that appellant was given adequate notice of the charges against her and of the facts underlying the charges, and that she was not misled to her prejudice by the inartful pleading. Because there was no due process notice violation, appellant’s failure to object to the complaint defects and plea form waived any objections to the allegations in the

complaint. (*People v. Haskin, supra*, 4 Cal.App.4th 1434, 1438; *People v. Coryell, supra*, 110 Cal.App.4th at pp. 1307–1308.)

People v. Wallace (2003) 109 Cal.App.4th 1699, on which appellant relies, is distinguishable. There, the defendant pleaded no contest to a violation of section 422.7, which is a penalty enhancement provision for hate crimes.³ (*Id.* at p. 1700.) The Court of Appeal held that because section 422.7 is solely a penalty enhancement provision and specifies no substantive offense, the defendant was convicted of a nonexistent crime, rendering the judgment void. (*Id.* at pp. 1702–1704.) The Court of Appeal distinguished section 422.7 from crimes such as section 666—petty theft with a prior—noting that section 666, which establishes an elevated penalty for repeat offenders, is attached to the specified substantive offense of petty theft, whereas section 422.7 does not specify any substantive offense. (*Id.* at p. 1703.) The Court of Appeal concluded it could not affirm a conviction and sentence for a penalty enhancement provision that was not attached to any substantive offense. (*Id.* at p. 1704.)

In contrast, here, section 666.5 is—as is section 666—a statute that provides for an elevated penalty for repeat offenders. It provides that those who are previously convicted of certain specified crimes including auto theft are to be punished more severely when subsequently convicted of the same crime. Thus, as the observation in *People v. Wallace, supra*, 109 Cal.App.4th 1699 suggests, there is no comparison to be drawn between section 422.7 and statutes such as section 666, or section 666.5, that are attached to a substantive offense. Unlike the defendant in *People v. Wallace*, appellant was informed that she was being charged with the substantive offense of auto theft with a prior conviction for the same offense, and entered a plea to that effect.

³Section 422.7 provides: “. . . any hate crime that is not made punishable by imprisonment in the state prison shall be punishable by imprisonment in a county jail not to exceed one year, or by imprisonment pursuant to subdivision (h) of Section 1170, or by a fine not to exceed ten thousand dollars (\$10,000), or by both that imprisonment and fine, if the crime is committed against the person or property of another for the purpose of intimidating or interfering with that other person’s free exercise or enjoyment of any right secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States”

DISPOSITION

The judgment is affirmed. The superior court clerk is directed to correct the abstract of judgment to reflect that appellant is convicted of the substantive offense of vehicle theft in violation of Vehicle Code section 10851 and add to the abstract, as to that count, under “enhancements,” the section 666.5, subdivision (a) enhancement, with sentencing stayed on the enhancement. The superior court clerk shall forward a corrected copy of the abstract of judgment to the Department of Corrections.

McGuiness, P.J.

We concur:

Pollak, J.

Siggins, J.