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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERTO CARRERAS,

Defendant and Appellant.

B233728

(Los Angeles County
Super. Ct. No. KA088123)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tia Fisher, Judge. Affirmed.

Tanya Dellaca, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Alberto Carreras had been convicted of “[e]xpos[ing] his person, or the private parts thereof, in [a] public place” in violation of Penal Code section 314, paragraph 1.¹ He now appeals from the judgment entered following a court trial which resulted in his conviction of failing to annually update his registration as a sex offender within five working days of his birthday (§ 290.012, subd. (a)), the finding that two prior convictions precluded a grant of probation (§ 1203, subdivision (e)(4))² and the finding that he had suffered a prior conviction within the meaning of the Three Strikes law (§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The trial court sentenced Carreras to four years in state prison. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts.

a. The prosecution’s case.

Annette Flores has been an office assistant for the Sex Offender Registration Department in the Detective Bureau of the Pomona Police Department since 2003. She is “in charge of maintaining the [records regarding the] registrations [of] all sex offenders in the City of Pomona.” She maintains the records and the files and assists offenders whenever they come into the office to register. As part of her duties, Flores also checks to see if sex offenders are in compliance with their registration requirements. In order to accomplish this goal, Flores uses the Department of Justice Databases, referred to as the VCIN, as well as an internal data base referred to as the JDIC. In addition, she “run[s] rap sheets.”

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

² Section 1203, subdivision (e) provides: “Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to . . . the following persons: [¶] . . . [¶] (4) Any person who has been previously convicted twice in this state of a felony or in any other place of a public offense which, if committed in this state, would have been punishable as a felony.”

On September 10, 2008, Carreras pled guilty to failing to register in accordance with section 290, subdivision (b). Pursuant to a plea agreement, Carreras was placed on probation, one of the conditions of which was that he “register as prescribed by law.”

On August 3, 2009, Flores received notification from the California Department of Justice indicating that Alberto Carreras was “out of compliance with [his] sex offender registration” requirements. In order to find Carreras, Flores first “look[ed] on the system” to determine whether he was in custody. When she discovered that he was not, she attempted to make contact with Carreras by calling the most recent phone numbers in his file. When that proved unsuccessful, Flores checked “actual registration forms that [were] currently in Mr. Carreras’s file.” One form in the packet, dated August 2, 2006, listed Carreras’s date of birth, home address and the offense of which he had been convicted. The form showed a home address of 785 West Monterey Avenue, City of Pomona, County of Los Angeles.

The crime, indecent exposure (§ 314, [¶] 1), had occurred on September 2, 1998. A copy of another form in the packet, dated September 16, 2008 and entitled “Notice of Sex Offender Registration Requirement,” had been provided to Carreras as he was being released from “incarceration.” This particular form showed that Carreras had initialed all of the conditions of release, including the provision which stated his obligation to register each year within five working days of his birthday and to provide any change of address which occurred between his annual registration. Carreras had then signed and dated the form. On the bottom of the form, where it stated “ ‘Print Registering Officer’s Name and Title,’ ” Flores had printed her name and title. At trial, she recognized the registering officer’s handwriting as hers and the offender’s signature as that of Carreras. Carreras had come into the office and filled out the registration papers on that date because he had just been released from prison and was going to be in Pomona.

Carreras was again taken into custody on October 1, 2009. While in custody, he had no obligation to register. However, after being released from custody in September 2008 and before being taken into custody on October 1, 2009, Carreras had been subject to registration requirements. After reading requirement No. 4, which stated that an

offender “must annually *update* [his] registration information within five working days of [his] birthda[y] at the law enforcement agency having jurisdiction over [his] residence address or where [he was] currently present as a transient” (italics added), Flores indicated that updating did not necessarily mean the providing of new information. In addition, Flores could not remember whether, in October 2009, she had reviewed the form with Carreras in Spanish, or simply provided him with a copy of it in English. Flores indicated that “when a registrant comes in already knowing what type of registration they are there to do, I don’t feel the need to have to explain to them something that they already have knowledge of.”

After determining that Carreras had failed to comply with the annual registration requirement and that he could not otherwise be found, Flores notified a detective from the police department who conducted a more extensive investigation. The detective, Terry Hryskanich, was informed that Carreras had not registered since September 16, 2008, had not provided a change of address and had not registered as a transient. The detective went to Carreras’s last known address, 785 West Monterey Avenue in Pomona, showed the man who answered the door a photograph of Carreras and a copy of his registration form and asked if Carreras lived there. Hryskanich, who did not enter the house or go into the backyard, was told by the man that Carreras did not live “at the house.” Hryskanich then sent a patrol officer to the West Monterey address. The officer did not find Carreras there.

On October 1, 2009, San Bernardino Police Department Detective David Baughman was assigned to property crimes. At approximately 5:55 p.m. that day, Baughman contacted Carreras near the 500 block of West 5th Street in San Bernardino. When Baughman had asked Carreras where he lived, Carreras indicated that his address was 785 West Monterey in the City of Pomona. Carreras and the detective communicated in English and Carreras appeared to have no problem answering Baughman’s questions. He told Baughman his marital status, where he was born, how many years he had lived in California and how many years he had lived at 785 West Monterey.

After Baughman determined that Carreras had four outstanding warrants, all of which were from Pomona and one of which was for failing to register as a sex offender, he took Carreras into custody.

Tony Nguyen is a crime scene investigator for the Pomona Police Department. He has made over 18,000 print comparisons and has over 300 hours of training through the National Institute of Justice of the Los Angeles County Sheriff's Department, the San Bernardino County Sheriff's Office and the Forensic Science Academy. Nguyen had rolled Carreras fingerprints and placed them on a fingerprint card, which was subsequently signed by Carreras. The People then presented as an exhibit an 11-page document consisting of certified records for a plea bargain between Carreras and the County of San Bernardino. On the last page there appeared a set of rolled fingerprints. After Nguyen compared the fingerprints on the last page of the plea bargain agreement with those he had just taken from Carreras, he determined that the prints had been "made by the same [person]."

Carreras was a former probationer in the Rancho Area of San Bernardino County. His former probation officer, Evelyn McCorkle, spoke with Carreras on October 9, 2009. The two had a "fairly lengthy and detailed discussion," during all of which both parties spoke in English. Carreras appeared to "understand and speak English fine."

b. *Defense Evidence.*

Reino Perdomo Martinez (Martinez) had known Carreras for 20 years.³ Martinez and his wife, Marta Zermeno Perdomo (Perdomo), lived in a house located at 785 West Monterey in the City of Pomona. Carreras lived in a trailer parked in their backyard. He had rented the trailer, and had been living there from 1989 until he was arrested in October 2009. At times, when he was unable to pay his rent, Carreras would go live in

³ Martinez had, while in San Francisco, been convicted of felony assault in 1988 and served nine years in prison for the offense. In Bexar County, San Antonio, Martinez had been convicted of voluntary manslaughter and served 10 years in prison. However, according to Martinez, he was "pardoned . . . on everything."

the park next door. During those times, Martinez's wife, Perdomo, would tell Carreras to "do something because he's a good mechanic." He had fixed one of Martinez's cars. However, Carreras would inevitably get sick after living in the park for awhile. When he stayed in the park, he would not take his medication, which consisted of approximately eight pills each day. Sometimes Martinez would sneak Carreras back into the trailer "behind [his] wife's back." Carreras would become dizzy and Martinez would escort or carry him. Martinez did not believe that Carreras drank. Martinez did not drink and he "would have been able to tell if there was such [a] smell on [Carreras]." Martinez indicated that, if Carreras were to get sick in the park again, he would do the same thing. He would bring Carreras back to the trailer. Martinez had "an appreciation for [Carreras] as if he [were] a member of [Martinez's] family."

Martinez remembered taking Carreras to the Chino and Pomona hospitals on several occasions. Martinez stated he took Carreras because "of the pain." Martinez continued, "[H]e would get on the floor and he was in so much pain and I would feel bad and so I would put him in my truck and take him to the hospital because the pills were not working anymore." After he had been treated at the hospital emergency room, Martinez would take Carreras back to the trailer at 785 West Monterey.

Martinez could not remember when Carreras was arrested. Martinez, himself, had been "under treatment" for the three months prior to trial, had been "given . . . anesthesia" and was taking medication. He was scheduled to undergo surgery for his condition the following day. He never wanted to see Carreras "in trouble" and he "wouldn't want to say anything to get [him] in trouble[.]" At the same time, Martinez would never lie for Carreras. He had sworn to tell the truth and that is what he had done. Martinez indicated that he "would never lie even if [Carreras had been his] own son."

Carreras testified through a Spanish interpreter, although he indicated that he spoke "a little bit of English." In July, August and September 2009, Carreras lived in "a little trailer" behind the house at 785 West Monterey in Pomona. The front house was owned by Perdomo and her boyfriend, Martinez. At times, when he could not pay his rent, Carreras would leave for one or two days, until he became very ill. He has stones in

his gall bladder, stones in his kidneys and an enlarged prostate gland. At times he was in great pain and unable to urinate. He took medication, including Vicodin, Norcos, Seroquel and something to dissolve the stones.

Because he was so ill, Martinez and Perdomo would feel badly that he had left, would go looking for Carreras and bring him back to the trailer. From July to September, Carreras was taken to the hospital on a number of occasions. He was even taken to Pomona Hospital by police officers on two occasions because he fainted on the street.

Carreras believed that, during the months of August and September, he registered as a sex offender. He stated: “[I]t was like a big circle. And I cannot swear that I did register, but I thought that I had because the medicine would make me dumb. I would fall asleep anywhere. And . . . if I were to take the other pills, they would not let me sleep for two or three days.” The medications Carreras was taking caused him to be confused and disoriented and “that’s why [the police officers] helped [him] instead of taking [him] in[to] custody. They [took him] to the hospital because they saw the bag full of medication that [he] was taking.” At the time of trial, Carreras was still having “medical issue[s].” For one thing, he had a bag that he wore for his urine.

Carreras became so sick that he could not go to work. He either fell down or “soil[ed] [him]self,” and he was “ashamed.” It was at that time that he could not pay his rent and he left the trailer. He left in part because his failure to pay the rent caused Perdomo and Martinez to argue and he did not want to be responsible for that.

On October 1, 2009, Carreras was taken into custody and he has been in continuous custody ever since. Although he was not positive, he believed he registered on his birthday in 2009. He had registered in September 2008 and, at that time, no one had told him when he was next expected to register. Although his birthday was approximately 10 months later, Carreras was taken into custody one year and five days after he had last registered. He seemed to understand that he was to register “every time [he had] a birthday” and he recognized several documents which indicated that he had registered on prior occasions.

2. Procedural history.

Following a preliminary hearing, on October 14, 2010, an information was filed alleging that Carreras failed to change his address in violation of section 290.013, subdivision (a), a felony (count 1); failed to register after changing his address in violation of section 290, subdivision (b), a felony (count 2); and failed to annually update his registration in violation of section 290.012, subdivision (a), a felony (count 3). It was further alleged that Carreras had previously been convicted of second degree burglary on July 5, 1984, in case No. A752792, and petty theft with a prior on December 5, 2008, in case No. FWV802624, within the meaning of section 1203, subdivision (e)(4). Finally, it was alleged, pursuant to the Three Strikes law (§§ 667, subd. (b)-(i), 1170.12, subds. (a)-(d)), that Carreras had suffered serious or violent felony convictions or juvenile adjudications for first degree burglary in violation of section 459 on February 1, 1991 and January 27, 1993.⁴

After the information was filed, Carreras, assisted by a Spanish speaking interpreter, stated that he wished to make a *Marsden*⁵ motion. Carreras indicated that he believed his counsel did “not want to help [him] with this case.” Counsel stated that Carreras had a number of prior convictions and that, should he go to trial and should the district attorney choose to do so, Carreras could be treated as a third striker. However, the prosecutor had made Carreras an offer of four years. Counsel continued: “They have chosen to give him a four-year offer. . . . [N]ot only did he fail to register, but he then proceed[ed], while he [was] on probation on some other misdemeanor matters, to pick up a felony 666⁶ in San Bernardino. While it may not be the biggest crime in the world, it is something the D.A.’s and the court could consider in deciding what the court thinks is

⁴ Carreras had also been convicted of “[e]xpos[ing] his person, or the private parts thereof, in [a] public place” in violation of section 314, paragraph 1, and failing to register as a sex offender in violation of section 290.

⁵ *People v. Marsden* (1970) 2 Cal.3d 118.

⁶ Section 666 prohibits the crime of petty theft with a prior.

an appropriate disposition. But in either event[,] [this case] is not . . . simply credit [for] time served and walk out the door.” After determining that Carreras’s counsel was “ready, willing and able to try [the] case[,]” the trial court denied the *Marsden* motion.

At Carreras’s request, on January 5, 2011, the trial court held a second *Marsden* hearing. Carreras indicated that it seemed his trial counsel did not understand that one of his priors was 16 years old and he could not be punished for it. In response, counsel indicated that she had obtained the file from the matter and, surprisingly, the entire case, including the plea, had been done in English. Since, in the present matter, Carreras was using the services of a Spanish speaking interpreter, the prosecutor could persuasively argue that, whether the documents and proceedings were in English or Spanish, Carreras “had knowledge; he knew his responsibility.” Moreover, although the case had started as a misdemeanor, given Carreras’s intervening offenses, it had been elevated to a felony. After some additional discussion, defense counsel stated: “Mr. Carreras has simply refused to hear—he hears it but he doesn’t like it. And that’s the bottom line. He will get hysterical and cry hysterically. I told him, I said, you know, all the tears in the world can’t change what the law provides.”

The trial court addressed Carreras, stating: “The People have offered four years to take care of all your cases; yet, you are still rejecting them because you don’t like the idea of having to serve state prison time. I don’t blame you for that. No one wants to go to prison. But four years is a lot less than a life sentence in which you will never get out of prison if you go to trial and you lose. But, again, I want to focus on the issue at hand[,] whether or not you have provided me articulable facts upon which I can grant your motion to relieve . . . your lawyer. I haven’t received that information from you[.]” The trial court then denied Carreras’s second *Marsden* motion.

After Carreras’s *Marsden* motions had been denied, an amended information was filed in which it was charged that, pursuant to the Three Strikes law, Carreras had committed an additional count of first degree burglary on July 5, 1984.

On January 5, 2011, Carreras determined that he wished to represent himself. Although the trial court advised Carreras that “self-representation is almost always an

unwise choice, and [would] not work to his advantage,” Carreras chose to proceed in propria persona. However, out of the presence of Carreras and the court reporter, the trial court appointed stand-by counsel. Several weeks later, on February 8, 2011, Carreras “request[ed] to withdraw his pro per status.” The trial court granted the request and appointed stand-by counsel to represent Carreras for the remainder of the proceedings.

Trial was set to begin on April 18, 2011. The People again made their offer of four years in state prison and Carreras again rejected it. Instead, at proceedings held on May 3, 2011, Carreras indicated that he wished to give up his right to have a jury trial and, to have instead, a court trial. The trial court then indicated that Carreras had knowingly and intelligently given up his right to have a jury try his case. The court stated it was “satisfied that [there had been] a knowing and intelligent waiver of [the] right to a jury trial in this matter.”

After the prosecution finished presenting their case, defense counsel moved to dismiss the action pursuant to section 1118.1. Counsel argued that the term “to update registration information” is ambiguous and confusing. It is unclear whether a sex offender must re-register every year regardless of whether he is at the same address and living under the same circumstances or re-register only if his situation has changed. In response, the trial court indicated that section 1118.1 applied only to jury trials and, accordingly, it was “not going to entertain the motion.”

As a “secondary motion,” defense counsel moved, pursuant to section 17, subdivision (b), “to reduce” a number of charges to “misdemeanor[s] since [they were] . . . wobbler[s].” The trial court indicated that the offenses would only be wobblers “if [the court] actually [found Carreras] guilty.” The court indicated that it would consider the question at a later point in time.

Carreras waived his right to have a jury trial on his prior convictions. The People then re-opened their case to mark and present the documents proving the priors. The prosecutor presented packets to show that Carreras had committed petty theft with a prior in 2008 in San Bernardino, burglary in Los Angeles in 1984, first degree burglary in Norwalk in 1991, first degree burglary in South Dakota in 1993 and first degree burglary

in downtown Los Angeles in 1991. Counsel for Carreras agreed that “argument about the truth of the priors [could] be made at a different date” and that the prosecutor could have “30 more days after whatever date that might be if there [were] issues that need[ed] to be addressed [regarding the validity of the] priors[.]” The trial court then addressed the prosecutor and stated: “You’ve got 30 days if I convict the defendant of any of the pending charges. Thirty days from whatever that next date [is]. And then that date would be sentencing, possible *Romero*⁷ motion and then essentially court trial on the priors.”

After hearing argument from the parties on the substantive offenses, the trial court found Carreras guilty beyond a reasonable doubt of failing to annually update his registration as a sex offender within five days of his birthday in violation of section 290.012, subdivision (a), as alleged in count 3 of the information. The court found Carreras not guilty of count 1, that he had failed to change his address in violation of section 290.013, subdivision (a); and count 2, that he had failed to register after changing his address in violation of section 290, subdivision (b).

Carreras’s counsel argued that count 3 could be considered a wobbler and, under the circumstances, the court could reduce it from a felony to a misdemeanor. The trial court, however, believed that “it read[] as . . . a straight felony.” Moreover, “if for some reason [he had] missed something and [it was] a wobbler, . . . [he] would not reduce it based on [Carreras’s] criminal history.”

With regard to the prior convictions alleged under section 1203, subdivision (e)(4), which prohibits the granting of probation, the trial court found both the burglary and the petty theft with a prior to be true beyond a reasonable doubt. As to the allegations made pursuant to the Three Strikes law, the trial court found that the People had proven beyond a reasonable doubt that Carreras suffered the alleged prior burglary conviction. Trial on the other two alleged priors, including the South Dakota burglary, was continued to the date of sentencing.

⁷ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

Sentencing proceedings were held on May 25, 2011. The trial court indicated that “[t]he only outstanding issues remaining were relative to the elements in the South Dakota case and . . . the issue pertaining to whether or not [the] A752792 case was a first degree.” With regard to the South Dakota burglary, the prosecutor indicated that it “contain[ed] different elements” from those which make a crime a burglary in California. Accordingly, the trial court found that, in particular for purposes of the Three Strikes law, the 1993 “South Dakota prior . . . [was] not true” and “that the People [did not prove] that aspect of it beyond a reasonable doubt.” As to “the A752792 ’84 case[,]” the prosecutor argued that it was a valid strike. The prosecutor indicated that “the plea transcript usually clarifie[d] everything.” Based on the transcript of the plea in that matter, the trial court found that the People had “proven beyond a reasonable doubt” that the offense had been committed and qualified as a strike.

The trial court next considered Carreras’s *Romero* motion. The trial court indicated that, although it found the prior to be true, it was “striking under *Romero* [and section] 1385[,] the A7 [or 1984 first degree burglary] case.” It was, however, denying the motion to strike “the VA case,” or the 1991 first degree burglary. The court continued: “[T]here’s no question that Mr. Carreras has an extensive criminal history, has been in and out of custody, has been violated on probation and/or parole throughout [the] years. . . . And based on Mr. Carreras as an individual, the circumstances of the case which were unique, the fact frankly that the 290 is based on a misdemeanor prior from years and years ago, I think mid-80’s maybe, all of those cause the court to strike that A7 case. But I deny the motion as to the VA case. So I will be sentencing Mr. Carreras under the second strike law.”

The trial court imposed a mid-term sentence of two years in prison for Carreras’s failure to register as a sex offender, then doubled the term to four years pursuant to the Three Strikes law. The court commented that, in its view, the low term was not appropriate due to Carreras’s “extensive criminal history.”

The trial court ordered a \$30 criminal conviction fee, a \$40 court security fee, a \$200 victim restitution fine and a \$200 parole revocation restitution fine. Carreras was

awarded presentence custody credit for 350 days actually served and 350 days of good time/work time for a total of 700 days.

Carreras filed a timely notice of appeal on June 14, 2011.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record. By notice filed January 17, 2012, the clerk of this court advised Carreras to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. In a handwritten supplemental brief filed February 7, 2012, Carreras first indicated that the use of his prior convictions to enhance his sentence was improper and violated his rights under *Boykin-Tahl* as the convictions occurred before March 7, 1994. The contention is without merit. Both *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122 were decided in 1969 and a review of the record reveals that all of Carreras's convictions occurred on or after 1984. Moreover, Carreras neither pled to the substantive offense nor admitted his prior convictions. All of the allegations against him were decided by the trial court. Under these circumstances, the rules set forth in *Boykin/Tahl* do not apply here.

Carreras also asserts that the appellate court violated his right to counsel as stated in *Gideon v. Wainwright* (1963) 372 U.S. 335. The assertion has no merit. Counsel was appointed to represent Carreras throughout the appellate process.

Carreras next contends that "the court [had] . . . [received] from the Norco Mental Hospital . . . proof that at the time [he] was not capable of report[ing for] nor sitting at trial." However a review of the record, including the probation report, fails to reveal any such letter from Norco or any other hospital.

Finally, Carreras asserts that he and his lawyer "requested . . . the court to subpoena 3 people [he] wanted to be [his] witnesses" and that his counsel requested two extensions so that this could be done. Again, however, a review of the record fails to support Carreras's assertion. The record does not indicate that the trial court failed to

issue subpoenas for any of the witnesses requested by the defense or that defense counsel requested extensions of time so that the presence of such witnesses could be obtained.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.