NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DEREK SCOTT, Defendant and Appellant.	B235673 (Los Angeles County Super. Ct. No. TA117433)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald V. Skyers, Judge. Reversed in part.

Joseph R. Escobosa, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

The District Attorney of Los Angeles County filed an information that alleged that defendant and appellant Derek Scott committed the offense of first degree burglary. (Pen. Code, § 459[1].) The information further alleged that in case number VA114259 defendant suffered a prior conviction for first degree burglary (§ 459), an offense that was a serious or violent felony within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)); a serious felony under section 667, subdivision (a)(1); and for which defendant served a prior prison term within the meaning of section 667.5, subdivision (b). A jury found defendant guilty of first degree burglary. Defendant admitted that he suffered the prior first degree burglary conviction in case number VA114259 and that he served a prior prison term for that conviction within the meaning of section 667.5, subdivision (b). The trial court struck the allegation that defendant's prior conviction was a strike under the Three Strikes law and sentenced defendant to state prison for a four-year term for his first degree burglary conviction and for consecutive five-year (§ 667, subd. (a)(1)) and one-year (§ 667.5, subd. (b)) terms for his prior conviction and prison term in case number VA114259.

On appeal, defendant's appointed counsel filed an opening brief in accordance with *People v. Wende* (1979) 25 Cal.3d 436 requesting this court to conduct an independent review of the record to determine if there are any arguable issues. On January 12, 2012, we gave notice to defendant that counsel had failed to find any arguable issues and that defendant had 30 days within which to submit by brief or letter any grounds of appeal, contentions, or arguments he wished this court to consider. Defendant did not file a responsive brief or letter.

After independently reviewing the record, we asked the parties to submit letter briefs addressing whether defendant's one-year term under section 667.5, subdivision (b) must be stricken because it was based on the same conviction (case No. VA114259) for which defendant received a five-year term under section 667, subdivision (a)(1). We

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[1]   All statutory citations are to the Penal Code unless otherwise noted.

order defendant's one-year term under section 667.5, subdivision (b) stricken, and otherwise affirm the judgment.

BACKGROUND

At 7:00 a.m. on March 16, 2011, Jose Luevano left his house and went to work at his store about a half a block away. Luevano locked all the doors and windows before he left home. Before 1:00 p.m. that day, Luevano received a telephone call that caused him to return home and check on his house.

Luevano walked into his backyard and looked into his house. Luevano saw defendant standing in Luevano's bedroom. Defendant did not have permission to enter Luevano's house. Luevano got a good look at defendant and recognized him immediately because defendant had been a frequent customer at Luevano's store. Defendant was talking to somebody and laughing. Luevano attempted to trigger the house alarm, but the keypad was not functioning. Upon entering his house, Luevano threw chairs and yelled "Get the fuck out of my house" in an effort to cause defendant and his companions to leave. Luevano heard the intruders leave his house. After defendant and his companions left, Luevano determined that money, Ipods, and other items were missing from his house. The police responded to Luevano's house.

Luevano saw defendant again two weeks later when defendant entered Luevano's store. Luevano recognized defendant immediately and used his telephone to take a picture of defendant to show the police. Defendant left the store and Luevano called the police. The police did not find defendant. Later that day, defendant and a companion returned to the store. Defendant said to Luevano, "Hey, those are your kids out there, huh?" When Luevano said the children were his, defendant said, "Well, you tell them I said hi." Defendant had never previously inquired about Luevano's children, and Luevano believed that defendant was threatening him. Defendant did not buy anything and left the store. Luevano called the police. The police arrested defendant.

Defendant testified in his own behalf. Defendant testified that he was convicted of a theft-related felony on March 5, 2010, and was released from prison on March 8, 2011.

Defendant denied that he broke into Luevano's house or that he threatened Luevano's children. Defendant testified that the jury should believe that he was not the person in Luevano's house because Luevano previously had had "several problems" with defendant's family and had two or three of defendant's family members arrested for stealing.

DISCUSSION

We appointed counsel to represent defendant in this appeal. After examining the record, counsel filed an opening brief asking this court to independently review the record in accordance with *People v. Wende, supra,* 25 Cal.3d 436. On January 12, 2012, we gave notice to defendant that counsel had failed to find any arguable issues and that defendant had 30 days within which to submit by brief or letter any grounds of appeal, contentions, or arguments he wished this court to consider. Defendant did not submit a brief or letter. We independently reviewed the record and asked the parties to submit letter briefs addressing whether defendant's one-year term under section 667.5, subdivision (b) must be stricken because it was based on the same conviction (case No. VA114259) for which defendant received a five-year term under section 667, subdivision (a)(1). The parties agree that defendant's one-year term under section 667.5, subdivision (b) must be stricken.

"[W]hen multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply." (*People v. Jones* (1993) 5 Cal.4th 1142, 1150 [a trial court may not impose both an enhancement pursuant to section 667, subdivision (a)(1) for a prior serious felony conviction and a section 667.5, subdivision (b) enhancement for a prior prison term resulting from that same conviction].) Here, the trial court imposed a five-year enhancement under section 667, subdivision (a)(1) and a one-year enhancement under section 667.5, subdivision (b) based on defendant's prior conviction and prior

prison term in case number VA114259. The one-year term under section 667.5, subdivision (b) must be stricken. (*People v. Jones, supra,* 5 Cal.4th at p. 1153.)[2]

DISPOSITION

Defendant's one-year term under section 667.5, subdivision (b) is stricken. The clerk of the Superior Court is ordered to issue an amended abstract of judgment. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL RESULTS.

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.

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[2]   Because the trial court imposed an unauthorized sentence, we may review the trial court's sentencing error in the absence of an objection in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 354 ["a sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case"].)