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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY CARL DIBLASIO,

Defendants and Appellants.

B240909

(Los Angeles County
Super. Ct. No. LA062829)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gregory A. Dohi, Judge. Affirmed.

A. William Bartz, Jr., 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, Assistant Attorney General, Lawrence M. Daniels and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Anthony Carl DiBlasio (defendant) appeals from his conviction of assault with a deadly weapon, attempted robbery, and robbery. He challenges the trial court's refusal to dismiss two prior convictions, entered upon guilty pleas and alleged in this case as "strikes" under the Three Strikes law. We reject defendant's contention that the trial court was required to dismiss the prior convictions due to alleged constitutional violations in postconviction proceedings. Finding no error or abuse of discretion, we affirm the judgment.

BACKGROUND

Procedural history

Defendant was charged in count 1 of the first amended information with assault with a deadly weapon in violation of Penal Code section 245, subdivision (a);¹ in count 2 with attempted second degree robbery, in violation of sections 211 and 664; in count 3 with second degree robbery in violation of section 211. The information specially alleged for purposes of section 1170.12, subdivisions (a) through (d), and section 667, subdivisions (b) through (i), that defendant had suffered three prior serious or violent felony convictions or juvenile adjudications: a 1983 burglary conviction in Los Angeles County Superior Court case No. A700307 (case A700307); a 1986 burglary conviction in Los Angeles County Superior Court case No. A705650 (case A705650); and a 1990 federal robbery conviction (the federal case).

Defendant represented himself at the preliminary hearing and for a period prior to trial. While self-represented he filed two motions to strike his prior convictions and one nonstatutory motion to dismiss the information, which were denied. A jury found defendant guilty of all three counts as charged. After defendant waived his right to a jury trial on the prior convictions the trial court conducted a bench trial and found them true

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

beyond a reasonable doubt. After the verdicts, defense counsel brought a *Romero*² motion to dismiss the prior convictions which was denied.

On April 19, 2012, defendant was sentenced to 25 years to life in prison as to each count, to run consecutively. The sentence was recalled and on April 27, 2012, and the court imposed the same sentence but ordered the terms on counts 2 and 3 to run concurrently. Defendant's total sentence was 50 years to life in prison, with 988 days of actual custody credit, plus 147 days of conduct credit for a total of 1,135 days credit. Defendant filed a timely notice of appeal from the judgment.

Defendant's motions to dismiss strikes

After the verdicts, defense counsel filed a sentencing memorandum and motion to dismiss two of defendant's three prior felony convictions on the ground that they were obtained in violation of defendant's constitutional and statutory rights to due process, a speedy trial, and representation by counsel, the same grounds urged in defendant's previously denied pro se motions. In the alternative, defendant asked the trial court to exercise its discretion to strike the two prior convictions for purposes of sentencing.³

In case A700307, defendant pled guilty in August 1983 to first degree burglary pursuant to a plea agreement in which he would serve no more than three years in prison. The superior court sentenced defendant to two years in prison, suspended execution of

² See *People v. Superior Court (Romero)* 13 Cal.4th 497, in which the California Supreme Court held that a trial court may strike, on its own motion, "in furtherance of justice" pursuant to section 1385, subdivision (a), an allegation or finding that a defendant had previously been convicted of a serious or violent felony qualifying as a strike under the Three Strikes law.

³ Counsel's motion and its supporting exhibits were not made part of the clerk's transcript on appeal, although defendant's pro se motions have been included with exhibits. The appellate record has been augmented at defendant's request with a compendium of approximately 300 or more pages which have not been paginated. Exhibit H to the motion includes petitions for writ of habeas corpus and exhibits which were Bates-stamped, but much of the material has been rendered illegible by repeated photocopying. We thus summarize as possible from the legible portions of the augmented material, from defendant's pro se motions in the clerk's transcript, and we occasionally resort to undisputed factual representations in the parties' appellate briefs.

the sentence and referred him to Department 95 (the superior court mental health department) for evaluation pursuant to Welfare and Institutions Code section 3051. Defendant was subsequently committed to the California Rehabilitation Center (CRC) for treatment of his narcotics addiction. In November 1985, the CRC notified the superior court that defendant, who was incarcerated at that time on another case, had been found unsuitable for its program. The following month, Department 95 dismissed its case and notified the sentencing court.

In 1986, defendant was charged with another first degree burglary in case A705650 and pled guilty to the charge in exchange for referral to Department 95 for evaluation for commitment to CRC. In September 1986, defendant was sentenced to six years in prison, criminal proceedings were suspended and defendant was referred to Department 95 for evaluation. Defendant was again committed to the CRC for treatment of his narcotics addiction. In January 1987, the CRC again found him unsuitable.

Defendant was ordered back to court on both cases and after some time and several proceedings, the superior court referred him once again to Department 95 in December 1987. In January 1988, defendant was again committed to CRC. In November 1990, when defendant was again found unsuitable for CRC, the superior court ordered defendant back to court and issued a bench warrant when he failed to appear. By that time defendant had been convicted in the federal case of armed bank robbery and had been sentenced in July 1990 to 220 months in federal prison.

In late 1992, while incarcerated in federal prison, defendant executed an Interstate Agreement on Detainers, including a demand for final disposition of his 1983 and 1986 superior court cases and for appointment of counsel.⁴ The United States Bureau of Prisons forwarded the request to the superior court and notified the court that 184 months remained on his federal prison term. On January 14, 1993, after an investigation by the district attorney, the superior court issued ex parte minute orders purporting to terminate probation in cases A700307 and A705650.

⁴ See sections 1381.5 and 1389 et seq.

On August 31, 1993, after determining that defendant was not on probation in the two cases, the superior court entered ex parte orders nunc pro tunc as of January 14, 1993, correcting the orders by striking the probation termination language and adding additional language. The court's minutes of August 31, 1993, reflect the finding that defendant had been rejected by CRC and a bench warrant had issued and was then recalled when it was determined that defendant was in federal custody. The minutes in case A700307 further state: "State prison sentence imposed on 9-20-83 and suspended is ordered imposed forthwith (2 years); defendant given credit for 1668 days, which is in excess of original sentence. Defendant has served his time on this case." The minutes in case A705650 further state: "State prison sentence of 6 years imposed on 9-10-86 and suspended is ordered imposed forthwith; defendant given credit for 2373 days, which is in excess of original sentence. Defendant has served his time on this case." Thereafter, the superior court advised the Department of Corrections that defendant's parole period had long since expired and he would not be ordered to report to the parole office.

In September 1993, a few weeks after the nunc pro tunc orders, defendant requested leave to withdraw his guilty pleas in cases A700307 and A705650, on the grounds that he was not afforded the opportunity to be present and represented by counsel at the sentencing on August 31, 1993. In the alternative, defendant asked that his request be considered a notice of appeal. The superior court denied the motion to withdraw plea and declined to issue a certificate of probable cause to appeal. In 1996 and 1997, defendant filed petitions for writ of habeas corpus in the superior court, the Court of Appeal, the California Supreme Court, and the United States District Court, as well as a motion in federal court to vacate the sentences, pursuant to title 28 of United States Code section 2255. All such applications were based on essentially the same contentions raised here: denial of due process, representation by counsel, and a speedy trial (meaning speedy sentencing). All said petitions and motions were denied.

DISCUSSION

Defendant contends that his 1983 and 1986 first degree burglary convictions are constitutionally invalid and thus cannot be used to enhance his current sentence.

Defendant argues that the prior convictions are invalid because he was denied his federal and state constitutional rights to due process, representation by counsel, and speedy trial due to the violation of his statutory right to a hearing on his CRC exclusion under Welfare and Institutions Code section 3053, and his right under Penal Code sections 1381.5 and 1389 to sentencing within 90 days of his demand.⁵

Respondent contends that the issues raised here were decided against defendant when his federal motion and habeas petitions were denied and are thus barred under the doctrine of collateral estoppel. Respondent acknowledges the petition filed in the California Supreme Court was summarily denied, and thus does not claim that the motion or other petitions were heard on the merits. That being so, collateral estoppel is not applicable here. (See *Gomez v. Superior Court* (2012) 54 Cal.4th 293, 305.)

In any event, we need not determine the issues presented in defendant's federal motion and habeas petitions. As respondent also notes, defendant's challenge does not go to the validity of his convictions so much as the validity of the sentences ultimately executed. We agree that regardless of the validity of the sentences in cases A700307 and A705650, the fact of those convictions was properly used to enhance defendant's sentence under sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d). Whether a felony conviction qualifies as a strike must be "made upon the

⁵ Section 1381.5 requires the state court to sentence a federal prisoner within 90 days of receiving a demand, and if it does not do so, must "dismiss the action" if requested to do so. These provisions reflect that the right to a speedy trial includes sentencing. (*In re Shute* (1976) 58 Cal.App.3d 543, 548.) There are no published cases with the identical context as presented in defendant's motions to dismiss, but in analogous contexts, it has been held that the time limit does not apply to resentencing or to an order for the execution of a previously imposed sentence. (See *People v. Domenzain* (1984) 161 Cal.App.3d 619, 621 [resentencing after remittitur]; *Boles v. Superior Court* (1974) 37 Cal.App.3d 479, 484 [sentence imposed and suspended; defendant placed on probation].) The 90-day time requirement is applicable to initial sentencing and sentencing after *imposition* of sentence had previously been suspended; but while delay beyond the limit compels dismissal of the delayed sentencing proceedings, it does not compel dismissal of the underlying conviction. (See *People v. Wagner* (2009) 45 Cal.4th 1039, 1046, 1058 [probation revocation proceeding].)

date of that prior conviction and is not affected by the sentence imposed.” (§ 667, subd. (d)(1); § 1170.12, subd. (b)(1).) The determination that a prior conviction is a strike under the two statutes is not affected by any of the following dispositions: “(A) The suspension of imposition of judgment or sentence. [¶] (B) The stay of execution of sentence. [¶]. . . [¶] (D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.” (§ 667, subd. (d)(1); § 1170.12, subd. (b)(1).)⁶

Thus, a felony that otherwise qualifies as a strike is available for use as an enhancement upon entry of a guilty plea, regardless of the sentence imposed. (*People v. Laino* (2004) 32 Cal.4th 878, 895.)⁷ Further, “‘it is settled that for purposes of a prior conviction statute, a conviction occurs at the time of entry of the guilty plea.’ [Citation.]” (*Id.* at pp. 895-896.) This is so even when the sentence was imposed under a statutory scheme providing for dismissal of the conviction after the successful completion of a diversion program. (*Id.* at pp. 896-898.) Because a prior conviction in this context is not the judgment entered upon conviction, but the ascertainment of guilt, it may be used for enhancement purposes even where sentence in the prior case was suspended (*People v. Johnson* (1989) 210 Cal.App.3d 316, 324-325), or not yet pronounced (*People v. Williams* (1996) 49 Cal.App.4th 1632, 1637-1638), or never imposed. (See *People v. Shirley* (1993) 18 Cal.App.4th 40, 46.)

Defendant assumes that if the sentences in the two cases are constitutionally infirm, the underlying convictions would be equally invalid. To support his assumption that a conviction must be vacated along with an illegal sentence, defendant relies on *People v. Ramirez* (1979) 25 Cal.3d 260 (*Ramirez*), which does not so hold and does not speak to the question of enhancement with prior convictions. In *Ramirez*, the California

⁶ An exception made as to “wobblers” is not applicable here, as first degree burglary is punishable only as a felony. (§ 461, subd. (a); see *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974-975; § 17, subd. (b)(1).)

⁷ First degree burglary is a serious felony and a strike offense. (§§ 1192.7, subd. (c)(18); 667, subd. (d)(1); 1170.12, subd. (b)(1).)

Supreme Court held that a CRC inpatient was entitled to an administrative hearing with limited due process rights prior to exclusion from the program. (*Id.* at pp. 264-265, 274.) Because the defendant in that case had completed his probationary term and the term of imprisonment, a remand for a new exclusion hearing would have been inappropriate; but “because his improper exclusion from the CRC may have denied him a more favorable disposition of the criminal proceedings (Welf. & Inst. Code, § 3200),” the court reversed the order of exclusion from CRC, as well as the “judgment” appealed from. (*Ramirez*, at p. 277.)

The court did not reverse the judgment of conviction or rule that the conviction was constitutionally infirm, and in fact, clarified that the judgment appealed from was an order granting probation. (*Ramirez*, *supra*, 25 Cal.3d at pp. 264-265.)

In general, the remedy for an unlawful sentence is a remand for resentencing, not reversal of the underlying conviction. (See, e.g., *People v. Serrato* (1973) 9 Cal.3d 753, 763-764, overruled on another ground in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *People v. Massengale* (1970) 10 Cal.App.3d 689, 692.) A guilty plea is the “highest kind of conviction which the case admits’ [citations]”; and unless a defendant has properly reserved a pre-plea issue, a challenge to a post-plea sentence will not affect the validity of the plea. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1094-1096; see § 1237.5.) Even if we agreed with defendant that the sentences on the prior convictions were rendered constitutionally infirm by a denial of the right to be present, represented by counsel, or sentenced within a certain time, it would remain that defendant was convicted upon his guilty plea to first degree burglary in cases A700307 and A705650. Thus, enhancement in this case was proper.

We conclude that the trial court did not err or abuse its discretion in denying defendant’s motions.

DISPOSITION

The judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.*
FERNES

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.