

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID HAWKINS,

Defendant and Appellant.

B249578

(Los Angeles County
Super. Ct. No. BA407516)

**ORDER MODIFYING OPINION
NO CHANGE IN JUDGMENT**

THE COURT:

It is ordered that the opinion filed herein on March 12, 2014, and not certified for publication, be modified as follows:

1. On page 5, before the Disposition, add the following two paragraphs:

We recognize a defendant who has pleaded guilty to an offense or admitted the truth of an enhancement allegation cannot on appeal challenge the evidentiary basis for the charge even if the trial court has issued a certificate of probable cause: “Admissions of enhancements are subject to the same principles as guilty pleas. [Citation.] A guilty plea admits every element of the offense charged and is a conclusive admission of guilt. [Citations.] It waives any right to raise questions about the evidence, including its sufficiency.” (*People v. Lobaugh* (1987) 188 Cal.App.3d 780, 785; accord, *People v. Fulton* (2009) 179 Cal.App.4th 1230, 1237; see *People v. DeV Vaughn, supra*, 18 Cal.3d at

pp. 895-896.) Here, however, although Hawkins admitted he had committed battery with serious bodily injury, the offense alleged in the strike enhancement, he disputed it constituted a serious felony within the meaning of the three strikes law—a legal question involving statutory interpretation, not an evidentiary one. The trial court acknowledged Hawkins’s legal contention and impliedly ruled against him as part of the sentencing proceedings, imposing a 32-month, second strike sentence (the low term of 16 months doubled), while expressly confirming he could continue to assert his legal position on appeal.

Hawkins, who requested and received a certificate of probable cause, was entitled to raise his claim of sentencing error on appeal: “Of course, a prosecutor and a defendant may enter into a negotiated disposition that expressly recognizes a dispute or uncertainty about the trial court’s authority to impose a specified maximum sentence—because of Penal Code section 654’s multiple punishment prohibition or for some other reason—and preserves the defendant’s right to raise that issue at sentencing and on appeal. [Citation.] In that situation, the plea agreement’s validity and enforceability would be unaffected by the ultimate resolution of the disputed issue because each party could be understood to have expressly or impliedly accepted and assumed the risk that the issue would be resolved in the opposing party’s favor.” (*People v. Shelton* (2006) 37 Cal.4th 759, 769; see also *People v. Johnson* (2009) 47 Cal.4th 668, 678.)

The foregoing does not change the judgment. The petition for rehearing is denied.

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Defendant and Appellant.

B249578

(Los Angeles County
Super. Ct. No. BA407516)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Dennis J. Landin, Judge. Affirmed.

Richard B. Lennon, 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, and Chung L.
Mar, Deputy Attorney General, for Plaintiff and Respondent.

In a negotiated agreement David Hawkins pleaded no contest to one count of possession of a firearm by a felon and admitted an alleged prior strike conviction for battery with serious bodily injury in return for a 32-month state prison sentence. On appeal, Hawkins seeks to reverse the judgment on the ground the prosecutor improperly induced his plea. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. Hawkins's Prior Strike Conviction for Battery with Serious Bodily Injury

In November 2001, a jury convicted Hawkins of battery with serious bodily injury (Pen. Code, § 243, subd. (d))¹ after he punched a fellow patient in the face at a drug rehabilitation facility.² A section 12022.7, subdivision (a) allegation was not submitted to the jury and the People subsequently struck it. Hawkins admitted he had served one prior prison term. (§ 667.5, subd. (b).) At sentencing, the trial court limited Hawkins's conduct credits pursuant to section 2933.1 [individual convicted of violent felony "shall accrue no more than 15 percent of worktime credit"]. (*People v. Hawkins* (2003) 108 Cal.App.4th 527, 529-530 (*Hawkins I*).

Hawkins appealed, contending his conduct credits were improperly limited because he had not been convicted of one of the enumerated violent felonies in section 667.5, subdivision (c). (*Hawkins I, supra*, at p. 530.) The People argued Hawkins's conduct credits were properly limited because his conviction qualified as a violent felony under section 667.5, subdivision (c)(8), which includes "[a]ny felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7" The People maintained Hawkins's crime was charged and proved within the meaning of the statute, because a section 12022.7 enhancement was alleged in the information, and the element of "great bodily injury" was proved when Hawkins was convicted of battery with serious bodily injury. (*Ibid.*)

¹ Statutory references are to the Penal Code.

² The jury acquitted Hawkins of the charge of making a criminal threat.

Our colleagues in Division Six held section 2933.1 did not apply to Hawkins's sentence. (*Hawkins I, supra*, 108 Cal.App.4th at p. 532.) The court noted that the version of section 12022.7 in effect at the time Hawkins committed his crime provided for an additional punishment for having inflicted great bodily injury, ““unless infliction of great bodily injury is an element of the offense of which he or she is convicted.” (§ 12022.7, former subd. (a), italics omitted, now subds. (a), (g).)”³ (*Id.* at pp. 530-531.) The court reasoned that because “serious bodily injury” is essentially the equivalent of “great bodily injury,” the section 12022.7 enhancement, by its own terms, cannot be applied to a conviction for battery with serious bodily injury. (*Id.* at p. 531.) The court concluded there was a statutory exception: The enhancement could nevertheless be applied where the underlying crime involved domestic violence, citing section 12022.7, former subdivision (e), now subdivisions. (a) and (g). (*Ibid.*) In its reasoning, the court recognized a felony offense, in which the personal infliction of great bodily injury is an element could still qualify as a serious felony for purposes of enhancement under section 1192.7, subdivision (c)(8), which defines a serious felony “as any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice. . . .” (*Ibid.*)

2. *Hawkins's Current Conviction for Possession of a Firearm by a Felon*

In February 2013, officers recovered a firearm, among other items, from Hawkins's car. The People charged Hawkins in an information with possession of a firearm by a felon and other felony offenses. Hawkins's 2001 conviction for battery with serious bodily injury was specially alleged as a prior serious or violent felony conviction within the meaning of the three strikes law (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)). Represented by counsel, Hawkins pleaded not guilty and denied the special allegation.

³ Penal Code section 12022.7 was amended in 2002 to delete this language. (Stats. 2002, ch. 126, § 6 (Assembly Bill No. 2173).

Before a jury was empanelled, the prosecutor proposed that Hawkins plead guilty to possession of a firearm by a felon and admit the prior strike allegation in return for a state prison sentence of 32 months (the 16-month lower term doubled under the three strikes law). Addressing the trial court directly, Hawkins said he did not believe his conviction for battery with serious bodily injury qualified as a strike in light of *Hawkins I*.⁴ The prosecutor explained that although his prior conviction was not a violent felony, it was considered to be a serious felony under the three strikes law. Hawkins disagreed, stating he was reluctant to accept the plea offer unless he could pursue that issue on appeal. The prosecutor replied she had no objection if Hawkins wished to reserve the issue for appeal as a term of his plea agreement.

After conferring with defense counsel, Hawkins accepted the prosecutor's offer and entered a plea of no contest to one count of possession of a firearm by a felon and admitted he had suffered a serious felony conviction for battery with serious bodily injury as a prior strike, which he reserved his right to contest on appeal. At the time Hawkins entered his plea, he was advised of his constitutional rights and the nature and consequences of his plea, which he stated he understood. Defense counsel joined in the waivers of Hawkins's constitutional rights. The trial court expressly found Hawkins's waivers and plea were voluntary, knowing and intelligent.

The trial court sentenced Hawkins in accordance with the plea agreement to an aggregate state prison term of 32 months.⁵ The remaining counts were dismissed as part of the agreement.

Hawkins filed a timely notice of appeal. The trial court granted Hawkins's request for a certificate of probable cause, in which he challenged the "determination that his

⁴ Defense counsel informed the court that Hawkins wanted to speak about the prior conviction, against counsel's advice. Thereafter, counsel conferred with Hawkins, but he did not participate with Hawkins in the ensuing plea negotiations with the prosecutor.

⁵ The trial court revoked and terminated probation in LASC case No. BA401401.

previous conviction for a violation of California Penal Code 243(d) qualifies as a serious felony making it a strike prior for sentencing purposes.”

DISCUSSION

Hawkins contends and the People concede that his plea and admission were improperly induced by the prosecutor’s assurance he could challenge on appeal the validity of the prior conviction as a serious felony under the three strikes law. We reject the People’s concession; the parties are simply wrong.

It is true that Hawkins was induced to accept the negotiated plea based on the prosecutor’s assurance that, as a term of the agreement, Hawkins could contest on appeal the validity of his prior conviction for aggravated battery as a serious felony. More importantly, the trial court issued a certificate of probable cause allowing Hawkins to appeal from the judgment on that ground. Furthermore, the prosecution honored its promise not to object to Hawkins raising the issue on appeal, but Hawkins did not do so. Thus, far from being misled or improperly induced to enter his plea, Hawkins received the full benefit of his bargain, although he elected not to take advantage of it on appeal. (Compare *People v. DeVaughn* (1977) 18 Cal.3d 889, upon which both parties rely, in which the Supreme Court found the defendants were improperly induced to plead guilty to burglary following their illegal arrest.)

DISPOSITION

The judgment is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J.

SEGAL, J.*

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