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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM FREDRICK MAULTSBY,

Defendant and Appellant.

C060532

(Super. Ct. No. 08868)

OPINION ON REMAND

Prior to trial, defendant William Fredrick Maultsby admitted a prior felony conviction for robbery in 1991 within the meaning of the "Three Strikes" law (strike prior) and admitted prior theft-related convictions, including the 1991 robbery, for purposes of Penal Code section 666.¹ A jury convicted defendant of petty theft (§ 484, subd. (a)). Sentenced to state prison, defendant appeals, contending his

¹ Further undesignated statutory references are to the Penal Code.

admission of the strike prior was obtained absent complete advisements (*Boykin v. Alabama* (1969) 395 U.S. 238 [23 L.Ed.2d 274] (*Boykin*); *In re Tahl* (1969) 1 Cal.3d 122 (*Tahl*); *In re Yurko* (1974) 10 Cal.3d 857 (*Yurko*).)

In the first opinion in this matter, this court did not reach the merits. Following *People v. Fulton* (2009) 179 Cal.App.4th 1230 (*Fulton*), this court concluded that defendant could not attack the validity of his admission because he failed to obtain a certificate of probable cause. (*People v. Maultsby* (Mar. 16, 2010, C060532) [nonpub. opn.].)

The California Supreme Court granted review and, disapproving *Fulton*, reversed, remanding for further proceedings. (*People v. Maultsby* (2012) 53 Cal.4th 296.) We now conclude that remand for retrial on the strike prior allegation is required.

FACTS

On January 13, 2008, as defendant left a Wal-Mart store, he set off a theft detector and was detained by an asset protection employee. Defendant removed a package of nicotine gum from his jacket. At the employee's request, defendant stepped through the detector and again set it off. Defendant removed another package of nicotine gum from his jacket. The two packages of gum were the store's merchandise and worth \$83.56. Defendant did not have a receipt.

DISCUSSION

An information charged defendant with petty theft with five prior theft-related convictions and alleged one of those priors

as a strike prior as well. Prior to trial, defendant moved in limine to bifurcate the allegations of the strike prior and the prior theft-related convictions. Defense counsel argued that priors were not elements of the theft offense. The prosecutor had no objection to the bifurcation of the strike prior allegation. The court granted the request to bifurcate the strike prior allegation and asked, "Is he, at this point, waiving his right to a jury, should it get to that point or not?" Defense counsel requested a moment. The record reflects there was a "[d]iscussion off the record" but does not reflect who was involved in the discussion. Back on the record, defense counsel immediately responded, "Yes, your Honor." The court replied, "All right. So that takes care of that part."

With respect to the prior theft-related convictions for purposes of section 666, defense counsel requested that the allegations be omitted from the reading of the information to the jury. After some discussion, defense counsel related that defendant would admit the prior theft-related convictions alleged for purposes of section 666. The court inquired whether defendant was admitting the prior theft-related conviction allegations for purposes of section 666 and defendant responded, "Yes, sir." The court then inquired, "And he is inherently in that, he's also admitting to the enhancement for the prior felony under 667(c) and 667(e)(1) [strike prior allegation]?" Defense counsel agreed that defendant was admitting "the

enhancement as alleged under that -- in that Enhancement a."

Defendant responded, "Yes, sir."²

After the jury convicted defendant of petty theft, the court noted, "Pursuant to the admissions defendant made before, I believe I need to enter on the record the fact that the defendant had stipulated that all of the alleged offenses included in the information, except for the violation of report [sic] to have occurred on December 14, 2001 [an alleged theft-related prior], were admitted, as was the Case Enhancement a admitted [strike prior allegation]."

The record does not reflect that the court ever expressly advised defendant of his rights to a trial, to confrontation or

² The record reads:

"[Prosecutor]: . . . [¶] Now, it was not my understanding that the defendant was admitting the priors.

"THE COURT: I was going to clarify that after I read the materials. [¶] Is it true then, [defense counsel] that the defendant is admitting to the alleged prior [theft-related] convictions [for purposes of section 666] described in lines 2 through 14, basically, with the exception of the December 14th [which had earlier been orally stricken on the prosecutor's request]?"

"THE DEFENDANT: Yes, sir.

"THE COURT: And he is inherently in that, he's also admitting to the enhancement for the prior felony under 667(c) and 667(e) (1) [strike prior allegation]?"

"DEFENSE COUNSEL: He is admitting the enhancement as alleged under that -- in that Enhancement a.

"THE DEFENDANT: Yes, sir."

to remain silent with respect to the strike prior allegation or the prior theft-related convictions for purposes of section 666. Nor did the court obtain defendant's express waiver of any of those rights.

Defendant contends that his admission of the strike prior allegation was obtained without proper advisements and waivers and requests remand for a new trial. Defendant states that he "makes no complaint" about the advisements as to the prior theft-related conviction allegations; instead, "[h]is appeal is limited to a claim of error concerning the serious felony prior allegation [the strike prior allegation]."

Defendant argues that under the totality of the circumstances test of *People v. Mosby* (2004) 33 Cal.4th 353 (*Mosby*), this is a silent-record case, rendering defendant's admission of the strike prior allegation invalid and warranting reversal. We agree.

Boykin held that in accepting a guilty plea to an offense, the trial court should ensure that the record reflects on its face that the defendant voluntarily and knowingly waived his constitutional rights to a jury trial, to confrontation, and to remain silent. (*Boykin, supra*, 395 U.S. at pp. 242-243.) *Tahl* determined that *Boykin* required that the record reflect that a defendant in entering a plea of guilty "was aware, or made aware, of his right to confrontation, to a jury trial, and against self-incrimination, as well as the nature of the charge and the consequences of his plea. Each must be enumerated and responses elicited from the person of the defendant." (*Tahl*,

supra, 1 Cal.3d at p. 132.) *Yurko* held that the *Boykin-Tahl* requirements applied when a defendant admits the truth of a prior felony conviction for purposes of a sentencing enhancement and that the lack of express advisements and waivers required automatic reversal regardless of prejudice. (*Yurko, supra*, 10 Cal.3d at pp. 863-864; see *People v. Wright* (1987) 43 Cal.3d 487, 493-495.) *Yurko* concluded that the trial court must further advise a defendant of the penal consequences of admitting a prior conviction, that is, "(1) that he may thereby be adjudged an habitual criminal . . . ; (2) of the precise increase in the term or terms which might be imposed, if any . . . ; and (3) of the effect of any increased term or terms of imprisonment on the accused's eligibility for parole." (*Yurko, supra*, at p. 864, fn. omitted.) *People v. Howard* (1992) 1 Cal.4th 1132 reexamined *Boykin* and concluded that the trial court's failure to articulate each of the three rights in obtaining a plea of guilty or an admission of a prior conviction does not warrant reversal where the record affirmatively reflects that the defendant's plea or admission was voluntary and intelligent under the "totality of the circumstances." (*People v. Howard, supra*, at pp. 1175, 1177-1178.)

After *Howard*, "an appellate court must go beyond the courtroom colloquy to assess a claim of *Yurko* error.

[Citation.] Now, if the transcript does not reveal complete advisements and waivers, the reviewing court must examine the record of 'the entire proceeding' to assess whether the defendant's admission of the prior conviction was intelligent

and voluntary in light of the totality of circumstances.

[Citation.]” (*Mosby, supra*, 33 Cal.4th at p. 361.)

“Truly silent-record cases are those that show no express advisement or waiver of the *Boykin-Tahl* rights before a defendant’s admission of a prior conviction. [Citations.]” (*Mosby, supra*, 33 Cal.4th at p. 361.) *Mosby* noted three cases in which the record did not reflect express advisements or waivers prior to the defendant admitting prior convictions which occurred *after* a jury trial on the underlying offense and concluded that in such cases, it could not be inferred that the defendant knowingly and intelligently waived his right to trial on the prior conviction or his rights to confrontation and to remain silent. (*Id.* at pp. 361-362.) In the silent-record category, *Mosby* also cited a case where “the record was not entirely silent . . . [but] was so nearly silent as to be indistinguishable” from the other cases noted; although the defendant was aware of his rights having just exercised them on the underlying offense and the court made a “fleeting reference to “whether or not [he] want[ed] a jury trial,”” the court did not wait for the defendant’s response and asked if he had been convicted, rendering defendant’s admission of the priors “neither intelligent nor voluntary.” (*Mosby, supra*, at p. 362.)

Mosby discussed several cases which fall into the incomplete *Boykin-Tahl* advisements category where, *after* jury trial on the underlying offense, a defendant has been expressly advised of his jury trial right on his prior conviction and expressly waived the same but was not advised of his rights to

confrontation and to remain silent. (*Mosby, supra*, 33 Cal.4th at pp. 362-364.)

Mosby also involved incomplete advisements *after* jury trial on the underlying offense. The defendant was expressly advised and expressly waived his right to a jury trial on the prior conviction allegation. *Mosby* concluded the defendant would have known of and understood his right to remain silent, having just exercised that right, and his right to confrontation, because his attorney had just confronted witnesses at that trial. (*Id.* at p. 364.) *Mosby* considered the defendant's prior experience with the criminal justice system in determining the defendant's understanding and concluded under the totality of the circumstances, defendant's admission was voluntary and intelligent. (*Id.* at p. 365.)

Defendant relies upon *People v. Sifuentes* (2011) 195 Cal.App.4th 1410 (*Sifuentes*), a silent-record case. There, the trial on the priors was bifurcated and, *after* a jury trial on the underlying offense, the trial court failed to advise the defendant of any of his constitutional rights or obtain any express waivers prior to the defendant admitting a strike prior and prior prison term allegation. (*Id.* at pp. 1420-1421.) *Sifuentes* noted, "*Mosby's* recognition that a defendant's prior experience with the criminal justice system is relevant to the question whether he knowingly waived constitutional rights comes into play *only in incomplete advisement cases.*" (*Sifuentes, supra*, at p. 1421; italics added.)

The People misplace their reliance upon *People v. Witcher* (1995) 41 Cal.App.4th 223 (*Witcher*). *Witcher* rejected the defendant's claim that his admission of two prior theft-related convictions for purposes of section 666 was not voluntary and intelligent because the prior theft-related convictions were not elements of the offense and defendant could enter a self-serving stipulation to their validity, requiring no *Boykin-Tahl* advisements. (*Id.* at pp. 226, 233-234; see *People v. Newman* (1999) 21 Cal.4th 413, 422-423.) Agreeing that "a different analysis applies" where a strike prior and a prior prison term had penal consequences which had not been discussed with the defendant, *Witcher* remanded for trial on the issue of the truth of the strike prior and prior prison term. *Witcher* affirmed the section 666 conviction. (*Id.* at pp. 234-235.)

Again, defendant does not challenge his admission of his prior theft-related convictions for purposes of section 666. That part of *Witcher* is inapplicable. Defendant does challenge his admission of his strike prior. That part of *Witcher* is applicable.

Here, defendant admitted his strike prior *before* he went to trial on the underlying offense. Although defendant may have been aware of a right to a trial on the strike prior, the court did not expressly advise defendant of his right to a trial on the strike prior. (*Mosby, supra*, 33 Cal.4th at p. 360.) Although defense counsel did so on defendant's behalf, defendant never expressly waived his right to a trial on the strike prior. And the trial court did not advise defendant of his right to

confrontation and to remain silent on the strike prior allegation and defendant never expressly waived those rights either. In admitting the strike prior, defendant was not advised by the court of the penal consequences of admitting a strike prior allegation; it doubled defendant's state prison commitment. The lack of express advisements or waivers make this a silent-record case.

Because the case is a silent-record case, we do not discuss defendant's prior experience with the criminal justice system. (*Sifuentes, supra*, 195 Cal.App.4th at p. 1421.) In any event, although the now 56-year-old defendant's criminal history is extensive (three felony convictions and 12 misdemeanor convictions), prior to admitting the prior strike and theft-related conviction allegations, defendant wrote a letter to the court, explaining that he had never gone to trial, always entered a plea, and served his time. The record does not reflect whether any of defendant's numerous convictions resulted from trials or pleas. "In the absence of that information, we are unable to determine whether or not [defendant] was ever informed on any occasion of his privilege against compulsory self-incrimination and/or his right to confront his accusers. We thus decline to find that [defendant's] prior convictions, standing alone, serve to establish that he was aware of his rights. Were we to conclude otherwise, there would be no need to admonish any defendant who had previously been convicted of a crime, and we decline to adopt such a rule." (*Witcher, supra*, 41 Cal.App.4th at p. 231, italics omitted.)

Retrial of the strike prior allegation is not barred.
(*Monge v. California* (1998) 524 U.S. 721 [141 L.Ed.2d 615];
People v. Monge (1997) 16 Cal.4th 826; *Sifuentes, supra*, 195
Cal.App.4th at p. 1421; *People v. Fielder* (2004) 114 Cal.App.4th
1221, 1234.)

DISPOSITION

The sentence is vacated. Defendant's section 666
conviction is affirmed. The matter is remanded to the trial
court for retrial of the strike prior allegation.

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

HOCH, J.