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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

THONE PHANTHA,

Defendant and Appellant.

C068212

(Super. Ct. No.
CFR110567)

Convicted of possession of a firearm and ammunition by a felon, as well as a prior strike allegation, defendant Thone Phantha appeals. He contends first that the trial court erroneously denied him a trial regarding the issue of his identity when adjudicating his prior strike, and second that denying him application of the conduct credit provisions of the Realignment Act violated his Constitutional right to equal protection. Disagreeing, we shall affirm.

PROCEDURAL BACKGROUND¹

Defendant was charged with possession of a firearm and possession of ammunition by a convicted felon (Pen. Code, §§ 12021, subd. (a)(1), 12316, subd. (b)(1).) It was further alleged that defendant had suffered a 1995 strike conviction for assault with a dangerous or deadly weapon. (Pen. Code, §§ 245, subd. (a)(1), 667, subds. (c) through (e)(1).)

At a bifurcated jury trial, in which defendant stipulated he had been previously convicted of a felony, the jury first found defendant guilty on both possession charges and then found the prior strike allegation to be true. The trial court sentenced defendant to 32 months in state prison.

DISCUSSION

I

The Trial Court's Finding of Identity

Defendant first contends that the trial court erroneously denied him a trial regarding the issue of his identity when adjudicating his prior strike. He contends that he was "never given an opportunity to refute or even to comment on the issue of identity." But the record shows otherwise, as we explain *post*.

¹ We shall not recite the underlying facts of defendant's offenses as they are not relevant to the disposition of this appeal.

A. *The Law*

The trial court, rather than the jury, is tasked with identifying a defendant as the same person who has suffered an alleged prior conviction. (Pen. Code, § 1025, subd. (c).) Where the identity of a defendant's name is the same--that is, the name of the person currently charged is the same as the name of the person who suffered the prior conviction--the identity of a defendant may be presumed absent evidence to the contrary. (*People v. Mendoza* (1986) 183 Cal.App.3d 390, 401 (*Mendoza*) ["It has long also been the rule in California, in the absence of countervailing evidence, that *identity of person may be presumed, or inferred, from identity of name*"] (emphasis in original); *People v. Sarnblad* (1972) 26 Cal.App.3d 801, 805 (*Sarnblad*) ["There is no evidence in the record before us that defendant was not the Donald Sarnblad previously convicted. We think the name is sufficiently uncommon that the magistrate's finding of identity of person is supported by an inference based on identity of name"]; *People v. Bradley* (1970) 3 Cal.App.3d 273, 277-278 [since defendant failed to present any evidence to overcome or meet prima facie establishment of prior conviction based on submitted documents, no factual issue was tendered].)

When the trial court finds that a defendant is the person named in the conviction records, it may so instruct the jury. (*People v. Kelii* (1999) 21 Cal.4th 452, 458.) The jury then determines whether the documents are authentic and sufficient to establish that the convictions the defendant sustained are

indeed those alleged. (*People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165.)

B. The Evidence and Preliminary Finding

Here, the jury trial on the prior strike commenced directly after the jury's return of its guilty verdicts on the charged offenses. Immediately before the trial court read the allegation to the jury, it called both counsel to the bench for an unreported sidebar. After opening statements, the People moved a certified copy of a conviction packet into evidence as Exhibit 7. Defense counsel stated he had no objection and the trial court admitted Exhibit 7. The People also presented the trial court with a certified copy of defendant's rap sheet, in the name of "Phantha, Thone" marked as "Exhibit Court 2 - ID" as a court exhibit "for the purposes of ID." Defense counsel stated he had no objection. The trial court then asked, "Defense wish to present any evidence in this second phase?" to which defense counsel replied, "No, your Honor." The court then asked the People if they had jury instructions; after it received an affirmative response, the court again called both counsel to the bench, where it held an unreported discussion at sidebar.

With no objection by defendant, the court then instructed the jury on the prior conviction allegation, beginning: "It's been determined by the court that the defendant is the person named in Exhibit 7." Counsel delivered their closing arguments; the jury was provided with Exhibit 7 and began deliberations.

While the jury was deliberating, the trial court asked if there was anything counsel wished placed on the record. The People asked whether the trial court had "do[ne] the ID on the packet[]." The trial court stated that it "did the ID." It added: "I did the ID based on the court exhibit and Exhibit 7. And when I read the jury instruction to the jury, I told them [sic] that the court had determined that the defendant is the person named in Exhibit 7. So the court did make a preliminary finding as required."

The trial court then asked both counsel if they had anything to add. After the People responded in the negative, defense counsel responded, "No, your Honor. Just, again, the rap isn't going to the jury, it's for purposes of identification, which the court has made; correct?" The trial court confirmed defense counsel was correct. Soon after, the jury reached its verdict finding the prior conviction allegation true.

C. Analysis

Defendant argues the procedure utilized by the court violated his due process rights. Defendant acknowledges he had no constitutional right to a jury trial on the prior conviction allegation. (*People v. Epps* (2001) 25 Cal.4th 19, 23.) Instead, he argues that the failure to hold a separate trial or hearing on the issue of identification violated his due process right to "an opportunity to be heard."

1. Forfeiture

Defendant's failure to object to procedure utilized below resulted in his forfeiting his right to appellate review of his claim of error.² (*People v. Saunders* (1993) 5 Cal.4th 580, 589-592 [appellate court will ordinarily not consider procedural defects where objection could have been, but was not, presented to lower court by some appropriate method]; *People v. Belmares* (2003) 106 Cal.App.4th 19, 28 [objection necessary for appellate review of compliance with section 1025] (*Belmares*); *Oyler v. Boyles* (1962) 368 U.S. 448, 453 [7 L.Ed.2d 446, 451] [failure to object to insufficient notice and opportunity to be heard on issue of identity barred raising matter on appeal].) Further, as we explain *post*, defendant's claim fails to persuade when considered on the merits.

2. Right to be Heard

We agree that defendant was entitled to reasonable notice and an opportunity to be heard on the prior conviction allegation (*People v. Monge* (1997) 16 Cal.4th 826, 836). However, defendant cites no authority supporting the suggestion in his briefing, reiterated in oral argument, that the trial

² At oral argument, defendant suggested that the *People* attempted to object to this procedure, presumably by asking if the trial court had completed its identification of defendant, and were prematurely stifled by the trial court. A careful review of the record reveals no attempt at objection by the *People*, and ample opportunity to be heard offered to both parties by the trial court--by direct invitation as well as during two sidebar conferences.

court was required to conduct a separate, formal hearing and make explicit findings on the question of his identity before proceeding to the jury trial on the prior conviction allegations.

Here, contrary to his contention, the trial court *did* provide defendant with the opportunity to present evidence as well as to be heard on the issue of identification. Indeed, after the prosecution presented its evidence, the trial court expressly asked if the defendant "wish[ed] to present any evidence" and defense counsel expressly declined.³

Absent evidence to the contrary, defendant's name is sufficiently uncommon that the trial court was permitted to find his identity from an inference based on identity of name. (See *Mendoza, supra*, 183 Cal.App.3d at p. 401; *Sarnblad, supra*, 26 Cal.App.3d at p. 805.) It is clear that the trial court made the finding, based on its instruction to the jury and subsequent clarification to counsel. (See *Belmares, supra*, 106 Cal.App.4th at p. 28-29 [court's instruction to jury that defendant was person named in packet is sufficient affirmative act to infer true finding on identity made].) Further, the record is devoid

³ At oral argument, defendant suggested that this invitation to be heard was insufficient because the court's inquiry was made in the presence of the jury. We disagree that the jury's presence at the time of the inquiry rendered the opportunity ineffectual. In any event, we have explained that the trial court held sidebar conferences both before and directly after its inquiry, which provided defendant additional opportunities to address the court out of the jury's presence.

of any later request from the defense to revisit the issue despite *ample* opportunity to do so. Because the record shows defendant was provided with sufficient hearing on the issue of identity, there was no error.

II

Equal Protection Claim

Defendant also argues that the prospective-only application of the conduct credit provisions of the Realignment Act violates his Constitutional right to equal protection. The California Supreme Court has rejected this contention. (*People v. Brown* (2012) 54 Cal.4th 314, 330; see also *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9.) We are bound to reject it as well. (See also *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

BLEASE, Acting P. J.

MAURO, J.