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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Glenn)

THE PEOPLE,

Plaintiff and Respondent,

v.

REGINALD DENNIS SCOTT,

Defendant and Appellant.

C068608

(Super. Ct. No. 10SCR06426)

A jury convicted defendant Reginald Dennis Scott of driving under the influence (DUI) (count I) and driving with a blood alcohol content (BAC) of .08 percent or more (count II). Prior to trial, defendant had entered a plea of guilty to driving on a suspended license, a misdemeanor (count III), and admitted a prior DUI offense within 10 years for purposes of punishing his current offenses as felonies (Veh. Code, § 23550.5), and six prior prison term allegations (Pen. Code, § 667.5, subd. (b)) with a reservation that he could argue at sentencing whether all were applicable.

The trial court sentenced defendant to state prison for an aggregate term of seven years consisting of the upper term of three years for count I; a concurrent upper term for count II; and one year each for the prior prison terms.

Defendant appeals. Defendant contends the sentences imposed for the prior prison terms must be stricken because he was denied due process by not having a jury trial on these priors and the trial court did not make the required findings on these priors. Defendant also contends the trial court erred in failing to state the statutory bases for the \$25 court processing fee and the \$500 felony report fee. The People properly concede this error.

We conclude defendant admitted the prior prison term allegations but did so without waiving his privilege against compulsory self-incrimination and his rights to jury trial and confrontation. Accordingly, we reverse the prior prison term enhancements and remand for further proceedings on these allegations. We also direct the trial court to state the statutory bases for all fees, fines, and penalties imposed upon defendant. Defendant's convictions on counts I and II are affirmed.

PROCEDURAL HISTORY

A second amended information charged defendant with DUI (count I), driving with a BAC of .08 percent or more (count II), and driving on a suspended or revoked license, a misdemeanor (count III).¹ In connection with counts I and II, it was alleged defendant had sustained a May 2005 DUI conviction within the prior 10 years that had been punished as a felony within the meaning of Vehicle Code section 23550.5. It was further alleged he had been convicted of six felonies and served a prison term for each within the meaning of Penal Code section 667.5, subdivision (b). All six prior prison term allegations were prior DUI convictions (January 1991, January 1994, two on the same date in February 1994, July 2000, and May 2005).

A few days after the second amended information was filed and before trial, defense counsel indicated to the court that defendant would most likely admit the prior

¹ Count III was dismissed at sentencing.

prison term allegations. On the first day of trial, prior to jury selection, defendant orally entered a plea of guilty to count III and admitted the prior DUI alleged in connection with counts I and II and the six prior prison term allegations as follows:

“THE COURT: All right. The Court is convening in the matter of the People of the State of California, plaintiff, versus Reginald Dennis Scott. And that’s you, sir?”

“THE DEFENDANT: Yes, sir.

“THE COURT: All right. This matter is scheduled for a jury trial this morning. We are meeting, in effect, in camera, and the jury is not present. This matter’s scheduled for a jury trial today. I’ve gone over certain legal aspects with the attorneys, and I am led to believe, [defendant] that you are prepared at this point, in Count 1 and 2, to admit the prior violation of the felony driving under the influence as alleged in Count 1 and Count 2; is that correct? That is just for purposes of the jury not hearing that.

“[Defense Counsel]: He’s admitting the fact of the prior conviction, your Honor.

“THE COURT: Thank you. And I also understand, as alleged in Count 2, that you are going to admit that the felony convictions, [prior prison term allegations] as outlined in Count 2, for purposes of the jury not hearing about -- those are to be admitted, correct?”

“THE DEFENDANT: Yes, your Honor.

“THE COURT: Okay. So what the jury is going to hear when I admonish them will be as to Count 1 a driving under the influence, a violation of [Vehicle Code section] 23152(a) as a felony. Count 2 would be the 0.08 percent by weight of alcohol or more, which is [Vehicle Code section] 23152(b), driving under the influence as a felony. And Count 3 is going to be a violation of [Vehicle Code section] 14601.2(a), and that is that you knowingly drove a vehicle when you knew that your privilege to drive had been suspended, and that was due to a prior driving-under-the-influence violation. Do you understand that?”

“THE DEFENDANT: Yes, your Honor.

“THE COURT: That’s what I’m going to read. Is that your understanding of what you’re agreeing to?

“[Defense Counsel]: Maybe I misunderstood, your Honor. With regard to Count 3, is the Court saying the jury will or will not be told the language about suspended for a prior driving under the influence?

“THE COURT: I’m going to read it the way it says.

“[Defense Counsel]: Then I’m going to advise the client to plead guilty to it now and take it away from the jury. It is a misdemeanor. It references prior convictions for alcoholic beverages and agree -- the jury’s going to hear you have priors by inference just from the reading of that charge.

“THE DEFENDANT: Okay.

“THE COURT: Is that what you’re going to do, sir?

“THE DEFENDANT: Yes, sir.

“THE COURT: So the misdemeanor driving on a suspended license as a result of prior driving under the influence you’re going to admit.

“THE DEFENDANT: Yes, your Honor.

“THE COURT: Okay. There’s a plea form that will have to be filled out. I don’t think that it necessarily has to precede the calling of the jury, which is now. We can do that at one of the intermissions. Is that agreeable with you, [defendant]?

“THE DEFENDANT: Yes, your Honor.

“THE COURT: All right. Anything else that we need to be putting on the record prior to the jury being convened?

“[The Prosecutor]: Judge, when we were off the record the Court said that it understood that the 667.5(b) allegations as alleged applied only to the second count.

“THE COURT: That’s where they’re charged.

“[The Prosecutor]: And the wording on lines 21 through 23 says that, ‘[Penal Code section] 667.5(b) is alleged prior to all of the acts in counts herein alleged and

charged.’ That language was intended to mean all of the acts in counts herein charged, which would be Count 1 and 2.

“THE COURT: All right. The reason I remarked on that is because normally it comes behind every count. I understand what you’re saying. [Defense counsel].

“[Defense Counsel]: I read it the way counsel has read it.

“THE COURT: So it’s applicable to both Count 1 and 2.

[Defense Counsel]: I can’t stipulate to that but that was my understanding. The Court’s asking me what my understanding is.

“THE COURT: Okay. And that’s acceptable.”

After the prosecution rested its case, defense counsel waived opening statement. During an in-chambers conference immediately afterward, defendant informed the trial court he had decided not to testify. The prosecutor commented that his “resting was subject to the marking of the exhibits with regard to those priors, and we can do that some time.” Defense counsel agreed, stating, “I agree with that. If that’s a court exhibit that will be received as part of our admission this morning or in preparation for sentencing. It’s part of the trial transcript as far as I’m concerned.”

After the jury returned its verdicts on counts I and II, the trial court discharged the jury. Defense counsel did not object to the jury’s discharge and waived time for judgment and sentencing.

The probation report recommended a sentence of four years, consisting of the upper term on count I, a concurrent term on count II, and one year for one prior prison term defendant had admitted. The other prior prison terms were not mentioned.

At sentencing, a deputy district attorney who did not conduct the trial appeared for the People and relied on the probation report. The trial court sentenced defendant according to the probation officer’s recommendation. Count III was dismissed.

The deputy district attorney who conducted the trial filed a motion for new sentencing, arguing the trial court failed to sentence appropriately on the six prior prison terms that defendant had “admitted.” The court recalled the sentence on its own motion.

At the new sentencing hearing, the trial court found defendant has served four, not six, prior prison terms. Defense counsel sought leniency, and requested the original sentence of four years be imposed. The trial court confirmed its prior sentencing (the upper term of three years on count I, and a concurrent term on count II) and then added one year for each of the four prior prison terms.

DISCUSSION

I

Prior Prison Terms Admission

A criminal defendant’s plea of guilty amounts to a waiver of three constitutional rights: (1) the privilege against self-incrimination; (2) the right to a trial by jury; and (3) the right to confront one’s accusers. Accordingly, the trial court must advise a defendant of these rights and obtain his or her waiver of each right before taking such a plea. (*Boykin v. Alabama* (1969) 395 U.S. 238, 243 (*Boykin*) [23 L.Ed.2d 274, 279]; *In re Tahl* (1969) 1 Cal.3d 122, 132 (*Tahl*) [“each of the three rights mentioned — self-incrimination, confrontation, and jury trial — must be specifically and expressly enumerated for the benefit of and waived by the accused prior to acceptance of his [or her] guilty plea”].) For a waiver of these constitutional rights to be valid, it must be knowing, intelligent, and voluntary. (*Boykin, supra*, 395 U.S. at p. 243.)

In California, the *Boykin-Tahl* advisements must also be given before the trial court may accept a criminal defendant’s admission that he or she has prior felony convictions. (*In re Yurko* (1974) 10 Cal.3d 857, 863.) “As an accused is entitled to a trial on the factual issues raised by a denial of the allegation of prior convictions, an admission of the truth of the allegation necessitates a waiver of the same constitutional rights as in the case of a plea of guilty.” (*Ibid.*) The trial court must also advise such a

defendant of “the full penal effect of a finding of the truth of an allegation of prior convictions.”² (*Id.* at p. 865.)

The lack of express advisement, and waiver, of each of the *Boykin-Tahl* rights constitutes reversible error unless “the record affirmatively shows that [the admission] is voluntary and intelligent under the totality of the circumstances.” (*People v. Howard* (1992) 1 Cal.4th 1132, 1175; *People v. Mosby* (2004) 33 Cal.4th 353, 360 (*Mosby*).

In *Mosby, supra*, 33 Cal.4th 353, our Supreme Court drew a distinction between “silent-record cases” and cases of “[i]ncomplete advisement of *Boykin-Tahl* rights.” (*Id.* at pp. 361-363.) In the former situation, the record reveals “no express advisement or waiver of the *Boykin-Tahl* rights before a defendant’s admission of a prior conviction.” (*Id.* at p. 361.) “In such cases, in which the defendant was not advised of the right to have a trial on an alleged prior conviction, we cannot infer that in admitting the prior the defendant has knowingly and intelligently waived that right as well as the associated rights to silence and confrontation of witnesses.” (*Id.* at p. 362.) In the incomplete advisement situation, the defendant is advised of the right to have a trial on the alleged prior conviction, but not the privilege against self-incrimination or the right to confront witnesses. It is in these cases we “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.” (*Id.* at p. 361.)

² Based on the premise that a bench trial occurred on the prior prison term allegations without objection, the People argue defendant has forfeited any error with respect to the lack of advisement of his right to a jury trial on his priors and corresponding lack of personal waiver as to his jury trial rights on those allegations. These arguments are not well-taken. In a silent record case, it is hard to imagine how a defendant can forfeit his or her rights when there are no advisements by the trial court. It is the trial court’s duty to advise a defendant of his or her rights before taking a plea and obtain a knowing, intelligent, and voluntary waiver of those rights.

This is a silent-record case. Defendant admitted the prior prison term allegations *before* he went to trial on the underlying offenses. Although he may have been aware of a right to a trial on the prior prison term allegations, the trial court did not expressly advise defendant of his right to a trial on these allegations. Neither defense counsel nor defendant expressly waived defendant's right to a trial on the prior prison term allegations. The trial court did not advise defendant of his right to confrontation and his privilege against self-incrimination on the prior prison term allegations and defendant never expressly waived those rights either. In admitting the prior prison term allegations, defendant was not advised by the court of the penal consequences. Each prior prison term adds one year to a sentence to state prison.

Because this is a silent-record case, we do not examine the record to determine whether a defendant's admission of a prior conviction was intelligent and voluntary in light of the totality of circumstances. (*Mosby, supra*, 33 Cal.4th at p. 361.) In a silent-record case, we cannot infer whether a defendant has intelligently and knowingly waived his or her rights, and must remand the matter to the trial court for retrial on the prior convictions. (*Monge v. California* (1998) 524 U.S. 721 [141 L.Ed.2d 615]; *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1421; *People v. Fielder* (2004) 114 Cal.App.4th 1221, 1234; *People v. Monge* (1997) 16 Cal.4th 826.)

II

Fines and Fees

Defendant also contends the trial court failed to state the statutory bases for the \$25 court processing fee and the \$500 felony report fee. Relying on *People v. High* (2004) 119 Cal.App.4th 1192 (*High*), the People properly concede this point.

As we explained in *High*, at sentencing, the trial court must provide a "detailed recitation of all the fees, fines and penalties on the record," including their statutory bases. (*High, supra*, 119 Cal.App.4th. at p. 1200.) All of these fines and fees must be set forth in the abstract of judgment. (*Ibid.*)

Here, the trial court did not recite the statutory bases for the \$25 court processing fee and the \$500 felony report fee. Because we are reversing the findings on the prior prison term allegations and remanding for further proceedings, the trial court will have the opportunity at the new sentencing hearing following retrial to state the statutory bases for all fines, fees, and penalties imposed upon defendant.

DISPOSITION

Defendant's convictions on counts I and II are affirmed. The true findings on the allegations that defendant served four prior prison terms are reversed. The matter is remanded for retrial on the prior prison term allegations. At the new sentencing hearing following retrial, the trial court is directed to specify the statutory bases for all the fines, fees, and penalties imposed upon defendant.

HOCH, J.

We concur:

BLEASE, Acting P. J.

DUARTE, J.