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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(El Dorado)

THE PEOPLE,

Plaintiff and Respondent,

v.

THEODORE JOHN WEISENBERGER,

Defendant and Appellant.

C069063

(Super. Ct. No.
P10CRF0197)

A jury found defendant Theodore John Weisenberger guilty of driving under the influence of alcohol (DUI) and driving with a blood-alcohol content above the legal limit. (Veh. Code,¹ § 23152, subds. (a) and (b).) Defendant admitted he had suffered two prior convictions for DUI, and the jury found he had suffered a 2004 conviction for alcohol-related reckless driving (§ 23103.5). Sentenced to two years in state prison, defendant appeals. Defendant raises various claims of error;

¹ Further undesignated statutory references are to the Vehicle Code.

all are centered on his contention that his 2004 conviction was invalid. We disagree with his claims of error; accordingly, we shall affirm.

PROCEDURAL BACKGROUND²

On May 24, 2010, the People filed a felony complaint charging defendant with DUI and also with driving with a blood-alcohol level of 0.08 percent or greater, in violation of sections 23152, subdivisions (a) and (b). The complaint further alleged that defendant had suffered three prior convictions (§ 23550), including convictions in 2001 and 2002 for DUI and in 2004 for alcohol-related reckless driving under section 23103.5.³

On December 7, 2010, defendant moved to strike the 2004 prior conviction allegation, arguing that it was "not indicated in the official court record." The trial court (Phimister, J.) denied the motion for reasons that are not specified in the record provided to us. The People later filed an information containing the same charges and allegations outlined *ante*.

On March 25, 2011, defendant filed a demurrer to the information, arguing that he did not suffer the 2004 prior conviction alleged in the information because he "never did, in fact, enter a plea." The gist of his argument was that his plea

² The facts of defendant's underlying offenses are irrelevant to our analysis.

³ Commonly known as a "wet reckless," a conviction under section 23103.5 results only when a defendant is permitted to plead to reckless driving (§ 23103) *specifically in satisfaction of a charge of driving under the influence*. (See § 23103.5.)

was not taken orally. On April 22, 2011, after hearing argument, the trial court (Wagoner, J.) overruled the demurrer, finding "no constitutional infirmity in the prior."

On June 10, 2011, defendant filed a motion to vacate the ruling on the demurrer and request for rehearing. The trial court (Proud, J.) denied the motion, noting that defendant had *signed a plea and waiver form* indicating a plea of no contest to section 23103.5 and had been questioned orally about his written plea before it was accepted. On July 1, 2011, defendant filed a motion for reconsideration of the ruling on the demurrer and request for findings and conclusions of law. The trial court (Proud, J.) denied the motion and the request, again for the reasons previously articulated.

Defendant admitted the 2001 and 2002 prior conviction allegations and proceeded to jury trial on the underlying charges and 2004 prior conviction. At trial, and over defendant's objection, the trial court instructed the jury that a plea of guilty or nolo contendere may be oral or in writing. The jury found defendant guilty of both counts of the information and further found he had suffered the 2004 prior conviction.

On August 9, 2011, defendant filed a motion in arrest of judgment as to the 2004 prior conviction, wherein he once again argued his plea was invalid because it was not taken orally. The trial court (Saint-Evens, J.) denied his motion and sentenced him to two years in state prison.

DISCUSSION

Defendant's 2004 Conviction

Defendant first contends the trial court repeatedly erred in overruling his attempts to demur and denying his many motions--all of which related to the validity of his 2004 prior conviction for a wet reckless. Citing mainly to nineteenth century authority, most of which is not on point to his argument and much of which is superseded by statute, he insists, as he did in the trial court, that his plea was invalid because it was not "made in response to a question by the court as to how the defendant pleads." He also argues that he did not intend to plead to a wet reckless and believed he was convicted only of reckless driving, and that these claims are "supported by the court's own records."

We look to these records, and conclude that they clearly show a valid plea to a wet reckless charge.⁴

A. Defendant's Plea

October 7, 2004, defendant appeared in court with his then counsel, Kyle Knapp, for change of plea to DUI and driving with a blood-alcohol level of 0.08 or higher (§ 23152, subds. (a) and (b)), as well as two prior convictions. That hearing began with the following colloquy:

⁴ Because defendant's claims fail so spectacularly on their merits, we address neither the propriety of the procedural vehicles defendant used in the trial court to challenge his 2004 conviction, nor his failure to provide a complete record on appeal.

"THE COURT: All right. Mr. Knapp, are you ready yet?

"MR. KNAPP: Let's hope so, Your Honor.

"THE COURT: All right. This is Theodore -- is it Weisenberger, Theodore?

"THE DEFENDANT: Yes.

"MR. KNAPP: Speak up.

"THE DEFENDANT: Yes, sir.

"THE COURT: You're here on three matters. I'll go through each one. They're all Placerville [El Dorado County] cases. The newest one is Case Number P04CRM0087.

"Now, it's my understanding, if I'm correct, he's going to enter a plea to Count I as a wet reckless; is that correct?

"MR. KNAPP: That's correct. *He's going to enter a plea to a reasonably related [section] 23153 as a wet reckless, so it would be punished under 23103.5. I have a waiver and plea form.*

"He's also going to admit to violations of probation in the two listed cases" (Italics added.)

The court gave an indicated sentence of "90 days on the wet reckless." After additional proceedings that are not relevant here, defendant submitted a waiver and plea form, signed by both him and attorney Knapp, which properly reflected the original charges of violation of section 23152, subdivisions (a) and (b). The trial court noted that, "Now, just to make it clear, you -- Counsel, you wrote down here 23103. Can I add the .5?" Attorney Knapp responded, "That's fine, Your Honor." Accordingly, line 21 of the waiver and plea form reads, "I

hereby freely and voluntarily plead no contest to the following:
V.C. 23103.5." Defendant had initialed line 21.

During the discussion that followed, the trial court reviewed defendant's rights and ensured that he understood the rights he was waiving "if you enter a plea to the wet reckless." The trial court specifically ensured that defendant knew that "even though this is being reduced at this time to what we call a wet reckless, you should be well aware that this would be a prior" if he were to be convicted again in the future. Defendant stated that he understood.

The judge signed the written plea and waiver form, verifying that it found defendant's plea was freely and voluntarily made, with a factual basis supporting it, and stating that it "accepts the defendant's plea(s)" and was ordering the "form filed and incorporated in the docket by reference as though fully set forth therein." The form was filed with the trial court.

Likewise, the handwritten minute order for October 7, 2004, reflects "Count 1 amended to 23103.5 VC." The trial court docket and the computer generated minute order for October 7, 2004, also state, "On motion of the District Attorney, Complaint/Information amended by interlineations to change Count 1 to a violation of 23103.5 VC" and that the "written waivers

[were] incorporated herein by reference,"⁵ and that defendant "pleads Nolo Contendere [sic] to Counts(s) 1."

B. Analysis

As is patently obvious from our description of the proceedings immediately above, and the records generated therefrom, defendant's plea was a valid no contest plea to a wet reckless charge, in violation of section 23103.5.

Penal Code section 1018 requires a defendant plead in person, directing that "[u]nless otherwise provided by law, every plea shall be entered or withdrawn by the defendant himself . . . in open court." The purpose of this requirement is to "ensure that the plea is his own," and not that of his counsel without his express authorization. (*People v. Rogers* (1961) 56 Cal.2d 301, 306-307.) In misdemeanor pleas, such as defendant's plea to a wet reckless charge, a plea may be entered by either the defendant or his attorney--defendant need not be personally present. (See Pen. Code, § 1429; *Mills v. Municipal Court for San Diego Judicial Dist.* (1973) 10 Cal.3d 288, 304-308, 311.)

Here, defendant was present in court, with his counsel, when counsel submitted the written waiver and plea form to the court. The trial court then reviewed defendant's rights with

⁵ The heading of the minute order reflects the charges as "1) 23103(A) VC-M C, 2) 23152(B) VC-M Q." Defendant's reliance on the fact that this cite to section 23103, subdivision (a), appears without reference to section 23103.5, to argue that he did not plead to the wet reckless that he so clearly pled to fails to persuade and is specious.

him to ensure defendant's plea was knowingly and intelligently entered. The trial court accepted defendant's written plea and incorporated it into the record. The record sufficiently establishes defendant's plea was his own and not that of his counsel. The fact that the trial court did not require defendant to reiterate his plea orally in court is of no consequence to the validity of the plea. (See *People v. Niendorf* (1961) 197 Cal.App.2d 594, 598-599.)

II

Jury Instruction

Defendant further argues that the trial court erred in instructing the jury, with respect to the wet reckless prior, that "[a] plea of guilty or nolo contendere may be oral or in writing."

Penal Code section 1017 expressly provides that "a plea may be oral or in writing." Accordingly, the instruction was a correct statement of the applicable law, despite defendant's protestations to the contrary. The trial court did not err.

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

RAYE, P. J.

NICHOLSON, J.