

NOT TO BE PUBLISHED

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

THIRD APPELLATE DISTRICT

(Yolo)

----

THE PEOPLE,

Plaintiff and Appellant,

v.

CALVIN ANTHONY THOMAS,

Defendant and Respondent.

C070566

(Super. Ct. No. 07-4340)

On August 1, 2007, defendant Calvin Anthony Thomas was charged with three counts of theft or unauthorized use of a vehicle (Veh. Code, § 10851, subd. (a)), three counts of receiving stolen property (Pen. Code, § 496, subd. (a)),<sup>1</sup> misdemeanor acquiring an access card without consent (§ 484e, subd. (c)), felony acquiring an access card with intent to defraud (§ 484e, subd. (d)), and misdemeanor providing false information to a police officer (§ 148.9, subd. (a)). In addition, the complaint alleged

---

<sup>1</sup> Undesignated section references are to the Penal Code.

defendant had a prior conviction for first degree burglary, a serious felony under the “Three Strikes” law (§ 667, subds. (c), (e)(1)), and had served two prior prison terms (§ 667.5, subd. (b)).

On September 26, 2008, over the People’s objection, the trial court granted defendant’s motion to dismiss the strike allegation (§ 1385; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*)); defendant pleaded no contest to all charges and both prior prison term allegations, with the stipulation that he would waive custody credits, receive a suspended state prison sentence, and would complete the Delancey Street program.

On December 5, 2008, the trial court imposed a seven-year state prison term, suspended execution of sentence, and placed defendant on five years’ formal probation.

On February 3, 2012, the trial court found defendant violated his probation. Sentencing defendant on the same day, the trial court imposed a seven-year term pursuant to section 1170, subdivision (h), consisting of 1,640 days in county jail followed by 910 days of mandatory supervision.

The People appeal, contending the trial court did not have the authority to sentence defendant pursuant to section 1170, subdivision (h) rather than to state prison. We modify the sentence and affirm the judgment as modified.

#### FACTUAL AND PROCEDURAL BACKGROUND

We dispense with the facts of defendant’s crimes as they are unnecessary to resolve this appeal.

Defendant’s *Romero* motion asked the court to dismiss the strike allegation because he did not come within the spirit of the Three Strikes law. Defendant’s motion did not assert that his 2000 conviction for first degree burglary either did not exist or was not a strike. The motion asserted that defendant’s involvement with the criminal justice system is a result of his cocaine addiction. Defendant also claimed he was in an abusive

relationship with the victim of his crimes. Admitting the prior burglary conviction was a serious felony, defendant's motion argued that it involved no violence.

The trial court did not give a specific reason for granting defendant's *Romero* motion other than it did not agree with the People's position that defendant came within the spirit of the Three Strikes law.

When defendant was sentenced following his probation violation, the prosecutor asked the trial court to execute the previously suspended state prison term. The prosecutor also asserted that the dismissed prior strike excluded defendant from sentencing pursuant to section 1170, subdivision (h). The trial court rejected the prosecutor's contentions and sentenced defendant under section 1170, subdivision (h). Regarding the prosecutor's argument as to the dismissed strike allegation, the trial court stated: "That would probably be true if the defendant had originally pled guilty before . . . October 1, 2011, but since that wasn't the position beforehand, I do not find that preclusion applies . . . ."

## DISCUSSION

### I

The People contend the trial court lacked the authority to impose a sentence other than executing the suspended seven-year state prison term. We agree.

Pursuant to the Criminal Justice Realignment Act of 2011 (Realignment Act) (Stats. 2011, 1st Ex. Sess. 2011–2012, ch. 15, § 1), many felonies are no longer punished by confinement in state prison, but are instead subject to confinement in county jail. (§ 1170, subdivision (h)(1), (2).) Felons sentenced under this provision may have a concluding portion of the county jail term suspended and placed under the mandatory supervision of the county probation department. (§ 1170, subd. (h)(5)(B)(i).) Defendant's crimes are subject to sentencing under the Realignment Act.

The Realignment Act's sentencing scheme applies only to defendants "sentenced on or after October 1, 2011." (§ 1170, subd. (h)(6).) The question presented here is

whether the Realignment Act applies when the trial court imposes a state prison sentence and stays execution before October 1, 2011, and executes the sentence after that date.

We recently held the Realignment Act does not apply to suspended state prison sentences imposed before October 1, 2011. (*People v. Wilcox* (2013) 217 Cal.App.4th 618.) Applying *Wilcox*, we conclude defendant was sentenced before the effective date of the Realignment Act, and therefore must serve the previously suspended seven-year term in state prison.

Defendant raises two objections to applying the previously imposed prison term. First, he argues that it violates his equal protection rights to subject him to state prison rather than the Realignment Act simply because he was sentenced before the Act's effective date. We held that prospective application of the Realignment Act did not violate a defendant's equal protection rights in *People v. Lynch* (2012) 209 Cal.App.4th 353, 362. We reject defendant's contention for the reasons stated in our opinion in *Lynch*.

Defendant also contends the suspended seven-year term was invalid because the trial court did not properly arraign him for sentencing when imposing the suspended seven-year term. Before imposing sentence, the trial court must inform defendant of the nature of the charge against him, the verdict or plea, and ask "whether he has any legal cause to show why judgment should not be pronounced against him." (§ 1200.) Section 1201 states: "He or she may show, for cause against the judgment: [¶] (a) That he or she is insane . . . . [¶] (b) That he or she has good cause to offer, either in arrest of judgment or for a new trial . . . ."

Imposing sentence but suspending execution is an appealable order; if it is not challenged on an appeal from the order it is final and binding when probation is revoked. (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421.) Defendant did not appeal from the original order imposing the suspended prison term, so he cannot now contest the

validity of that sentence. Therefore, his contention regarding arraignment for sentencing is forfeited.

Since the trial court did not have the authority to modify the previously imposed seven-year state prison term (*People v. Howard* (1997) 16 Cal.4th 1081, 1084), it would be a waste of judicial resources to remand for resentencing. We therefore modify defendant's sentence to seven years in state prison. The trial court shall prepare an abstract of judgment reflecting the state prison sentence and make all arrangements necessary to implement defendant's transfer to state prison pursuant to section 1216.<sup>2</sup>

## II

We requested additional briefing on whether defendant's 2000 conviction for burglary disqualified him from sentencing under the Realignment Act. We conclude that the burglary conviction provides an additional reason for finding the trial court lacked authority to sentence defendant under the Realignment Act.

A defendant is ineligible for sentence under the Realignment Act if he has a current or prior conviction for a serious felony. (§ 1170, subd. (h)(3).) Defendant contends his prior burglary conviction must be pled and proven to the trier of fact before it can render him ineligible for Realignment Act sentencing. We recently rejected this contention in another case. (*People v. Griffis* (2013) 212 Cal.App.4th 956, 959 (*Griffis*).) Defendant asks us to disagree with *Griffis*, which we decline to do.

The dismissal of the burglary conviction is of no importance. “ ‘[W]hen a court has struck a prior conviction allegation it has not “wipe[d] out” that conviction as though

---

<sup>2</sup> Section 1216 states: “If the judgment is for imprisonment in the state prison, the sheriff of the county shall, upon receipt of a certified abstract or minute order thereof, take and deliver the defendant to the warden of the state prison. The sheriff also shall deliver to the warden the certified abstract of the judgment or minute order, a Criminal Investigation and Identification (CII) number, a Confidential Medical Mental Health Information Transfer Form indicating that the defendant is medically capable of being transported, and take from the warden a receipt for the defendant.”

the defendant had never suffered it; rather, the conviction remains a part of the defendant's personal history' and available for other sentencing purposes. [Citations.]' (*People v. Lara* (2012) 54 Cal.4th 896, 906.) Thus, a trial court's power to dismiss prior convictions pursuant to section 1385 does not extend to preventing a prior conviction from being used as a sentencing factor. (*In re Varnell* (2003) 30 Cal.4th 1132, 1137.) Defendant's prior burglary conviction is a sentencing factor when used to determine his eligibility for Realignment Act sentencing. (*Griffis, supra*, 212 Cal.App.4th at p. 959.) The trial court's section 1385 dismissal of the conviction does not bar it from being considered when determining whether the Realignment Act applies to defendant.

The complaint stated that defendant's 2000 conviction was for first degree burglary, a serious felony. (§ 1192.7, subd. (c)(18).) The crime was also identified as a first degree burglary in the probation report following defendant's no contest plea. In addition, defendant's *Romero* motion admitted the conviction was for first degree burglary and was therefore a serious felony. This constitutes sufficient notice and proof to satisfy defendant's due process rights regarding the use of the prior burglary conviction as a sentencing factor. (See *People v. Lara, supra*, 54 Cal.4th at p. 907 [allegation of prior serious felony conviction in the complaint and reference to the prior serious felony in the probation report sufficient notice and proof to deprive defendant of additional presentence conduct credits].) Defendant's contention to the contrary is without merit.<sup>3</sup> Defendant's prior serious felony conviction renders him ineligible for sentencing under the Realignment Act.

---

<sup>3</sup> Since there was sufficient evidence of the prior serious felony conviction as a sentencing factor, the People did not, as defendant contends, forfeit the issue by failing to make an offer of proof regarding the prior conviction to the trial court.

DISPOSITION

Defendant's sentence pursuant to section 1170, subdivision (h) is modified to a seven-year state prison term. As modified, the judgment is affirmed. The trial court is directed to prepare an abstract of judgment reflecting the modified sentence and make all arrangements necessary to transfer defendant to state prison in accordance with section 1216.

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.