

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE WILLIAM PIERCE,

Defendant and Appellant.

E053293

(Super.Ct.No. SWF029636)

OPINION

APPEAL from the Superior Court of Riverside County. Mark E. Petersen, Judge.

Affirmed.

Richard de la Sota, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant of committing a lewd and lascivious act on a minor (Pen. Code, § 288, subd. (a)).¹ In bifurcated proceedings, the trial court found true an allegation that defendant had suffered a prior conviction in the state of Iowa that would constitute a violation of section 288, subdivision (a), and he was, therefore, a habitual sexual offender, within the meaning of section 667.71. He was sentenced to prison for 25 years to life and appeals, claiming the trial court erroneously denied his motion to strike the section 667.71 allegation. We reject his contention and affirm.

FACTS²

The information, filed on August 18, 2010, alleged that defendant was a habitual sexual offender within the meaning of section 667.71 because he had had suffered a conviction in Iowa in 1979 for an offense that was identical to a violation of section 288, subdivision (a). Whether defendant was advised of and waived his *Boykin/Tahl*³ rights in connection with his guilty plea, which had resulted in this conviction, was first broached by defendant in his Trial Brief and Motions in Limine, filed January 18, 2011. At the hearing on the motion the same day, the trial court made clear that defendant had the burden of demonstrating that he was either not aware of or did not waive his *Boykin/Tahl* rights in connection with the Iowa conviction.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The facts of the instant case are irrelevant to this appeal.

³ *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d. 122.

Defendant filed his post-conviction motion to dismiss the section 667.71 allegation on February 4, 2011. In that motion, defense counsel represented to the trial court that in the interim, between the motion in limine and this motion, he had contacted a supervisor for the court clerk's office in what purported to be the county where defendant suffered his Iowa conviction. Counsel represented that this supervisor informed him that she "had made all reasonable efforts to locate the court reporters notes for [the defendant's] case. Those efforts, apparently, included her looking through all pleadings on record [The j]udge . . . , who accepted the plea, passed away several years ago. [¶] . . . She [was unable] to locate the name of the court reporter that was present when [the defendant] entered [his] guilty plea . . . anywhere in the record or a transcript. . . . [S]he was unable to locate the court reporter[']s notes, and such notes would be the only way to obtain a transcript of any proceedings in this case. As such, a transcript cannot be made available. [¶] [I]t would appear that the only records available regarding this case are the documents provided by the [prosecutor]."

In a declaration under penalty of perjury attached to the motion to dismiss, defendant stated that even though he was represented by counsel during the Iowa proceedings, "I was never explained my rights, including my right to confront my accuser, my right that I could have a jury trial to fight th[i]s . . . charge . . . or my right that I did not have to testify pursuant to the Fifth Amendment. . . . [¶] I never challenged the conviction because I was never advised that I could challenge the conviction. [¶] . . . [M]y plea was involuntary because I was unaware of the above-mentioned rights and I would not have pleaded guilty had I known of them."

At the hearing on the motion, the trial court admitted into evidence, inter alia, a certified copy of the court minutes for the taking of defendant's plea in Iowa. Under the title, "Counsel[,]" above the narrative of the minutes are the names, Chuck Thomas, who is identified as the assistant county attorney, and David Vons. The minutes state, in pertinent part, "Defendant appear[ed] personally and by his counsel as set forth above and the State appear[ed] as above set forth" This makes clear that David Vons was defendant's attorney. The minutes continue, "After interrogating defendant and explaining to defendant defendant's rights and the fact that such rights are waived by the defendant by defendant's plea of guilty, the court finds . . . that . . . the plea is made knowingly, willingly, intelligently, without threat, promise or coercion and the defendant understands the proceedings and the import thereof. The court accepts defendant's plea of guilty . . . and finds defendant guilty Defendant [was] apprised of defendant's right to appeal and process therefore."⁴

The only evidence defendant offered at the hearing on the motion to dismiss the section 667.71 allegation was the declaration attached to his written motion to dismiss which we have already described. Defense counsel represented to the court below that if defendant took the stand, he would testify as to the Iowa proceedings that "he has no recollection of ever being . . . in court having a judge . . . read him all of his rights personally." As to the Iowa court minutes, above summarized, defense counsel asserted

⁴ This directly contradicts the assertion in defendant's declaration that he was never advised that he could challenge his conviction.

that they failed to set forth exactly what rights defendant was advised of and waived.⁵ In response, the People asserted that the matter was a credibility question, with the court minutes saying that defendant had been advised of and waived his rights, and defendant asserting that he had not. The People pointed out, as to the latter, that it was not until defendant was facing a habitual sexual offender allegation and its 25-years-to-life sentence here that he had the motivation to claim that he had not been advised of and did not waive his rights before pleading guilty in Iowa. The People also pointed out that the defense had not indicated what steps they had taken to contact defendant's attorney in Iowa and secure testimony or a declaration from him. Defense counsel responded that although defendant had retained the attorney who represented him in Iowa, he could not recall his name. He incorrectly asserted that the court minutes provided no name other than the judge's. He added that the Iowa court clerk supervisor informed him that the only name she had in connection with the case was the judge's.⁶ He allowed that the court minutes had the name David Vons on it, but he asserted that neither he nor the supervisor could determine who that was. Quite to the contrary, it is very apparent who this person was, yet defense counsel apparently made no effort to contact him.

The trial court said it was defendant's burden to overcome the proof offered by the People that defendant had been told about and waived his *Boykin/Tahl* rights in Iowa.

⁵ Defense counsel made the same argument in his declaration attached to the written motion.

⁶ This seems difficult to believe in light of the fact that the names of both the prosecutor and the defense attorney appear on the face of the court minutes.

The court added, “I . . . have a declaration [from defendant] which essentially looks to [me to be] buyer’s remorse. . . . I accept [the defense’s] offer of proof that if he took the stand, he’d say it never happened. But . . . that, to me, does not overcome the presumption that the minutes are correct, that the rights were given . . . [and] waived. . . . [¶] . . . [¶] . . . If every time a defendant came into court and said my attorney never told me that [he was never advised of or waived his rights,] and I had to overturn a case or change something because a defendant said that, we’d probably overturn 99 percent of the cases, okay? That’s why we have court minutes. That’s why we have clerks take down notes. That’s why we have court reporters take down transcripts because defendants have buyer’s remorse. Defendants get into situations that later they try to get out of. And so we have these systems in place so that we have court minutes that accurately reflect what happened that are then certified so that judges such as myself can rely upon them. [¶] And if that’s not good enough, you bring in the live witness, the lawyer, or you bring in the transcript or you do these things, which I know you attempted to do in some form or fashion. But if there’s nothing else out there and if all I’m left to rely upon is the defendant’s word that, well, that’s not the way I remember it, I remember some of it happening this way but not all of it, then what do I do? Do I say, well, apparently these minutes must be wrong? I guess I should throw . . . the certified minutes out the window. I can’t do that. [¶] You have not met your burden. Your client has not met his burden. In other words, these minutes are here for a reason. They’re certified. I can rely upon these. But for a defendant just to walk into court and just say, [‘W]ell, it is true the conviction is there, but I didn’t agree to waive my rights. [It] is true I got that

sentence and I was placed on probation, but I didn't waive my rights['], or ['I]t is true I had these terms, but I didn't waive my rights[']; in other words, half of it's true or three-fourths of it is true, but I didn't waive my rights, you can kind of see the problem we get into there is that it's very selective as to what part he wants to be true and what parts he doesn't want to be true; whereas, I have a minute order that tells me everything that happened. [¶] And so that's why the burden is on the defense to show if there truly wasn't a waiver of rights, then that's fine. We'll deal with it. But I don't have that in front of me. All I have is his declaration telling me I don't remember. So I don't have a transcript. I don't have the lawyer here. I don't have anything but [defendant] telling me that. [¶] But what I do have is a certified minute order telling me . . . a judge so ordered . . . that the defendant waived his rights." With that, the trial court denied defendant's motion to dismiss the section 667.71 allegation.

ISSUE AND DISCUSSION

In *People v. Sumstine* (1984) 36 Cal.3d 909, the California Supreme Court held, "[A] defendant seeking to challenge a prior conviction on *any* ground must allege actual denial of his constitutional rights . . . rather than rely on mere silence of the record. [¶] . . . When a defendant has made allegations sufficient to justify a hearing, the court must conduct an evidentiary hearing [thusly] . . . , '[The] prosecutor shall first have the burden of producing evidence of the prior conviction sufficient to justify a finding that defendant "has suffered such previous conviction." [Citation.] . . . [When] this prima facie showing has been made, the defendant shall thereupon have the burden of producing evidence that his . . . [Boykin/Tahl rights were] infringed in the prior proceeding at

issue [If] defendant bears this burden, the prosecution shall have the right to produce evidence in rebuttal.’ [Citation.] The state at first need prove only the fact of the prior conviction, but once defendant has produced evidence tending to show his constitutional rights were infringed, it will not be sufficient rebuttal for the state to simply invoke the regularity of the silent record.” (*Id.* at pp. 922, 923, fn. omitted)

In *People v. Allen* (1999) 21 Cal.4th 424, the Supreme Court declared that a defendant could challenge a conviction resulting from a guilty plea that had been entered after the opinion in *In re Tahl* was filed on the ground that his or her *Boykin/Tahl* right(s) had been violated, thusly, “Although a hearing on whether a defendant was given adequate *Boykin/Tahl* admonitions and waivers and whether the defendant was actually aware of his rights when he pleaded may, in some cases, involve a full-blown trial of contested facts, we reasoned in *Sumstine* that such wide-ranging inquiries should largely be avoided by the rule that *Boykin/Tahl* waivers be placed on the record to facilitate future review. [Citation.] . . . [¶] [T]he primary evidence of a *Boykin/Tahl* violation will usually appear on the face of the record . . . [¶] . . . After *Tahl*, . . . we have followed a rule in this state requiring a pleading defendant be told on the record that he is waiving the rights to a jury, to confront the witnesses against him, and the freedom from compelled self-incrimination. For post-*Tahl* guilty pleas, then, the record of the hearing in which the trial court accepted the defendant’s plea should clearly demonstrate the defendant was told of his rights and that he affirmatively waived them. Thus, permitting defendants to raise a *Boykin/Tahl* claim in a motion to strike at trial would entail little disruption; a quick review of the transcript of the sentencing hearing may be all that is

necessary. [¶] . . . [¶] Our expectation that evidence pertinent to the concerns addressed in *Boykin* . . . and *Tahl* . . . will appear on the face of the record presupposes that the prior guilty plea was accepted after we decided *Tahl* on November 7, 1969. It is only in post-*Tahl* cases that trial courts were on notice that ‘the record must contain *on its face* direct evidence that the accused was aware, or made aware, of his right to confrontation, to a jury trial, and against self-incrimination’ [Citation.] [¶] For pre-*Tahl* guilty pleas, we cannot expect the record clearly or succinctly to demonstrate whether or not the defendant was aware of his constitutional rights before pleading. For such cases, the determination of the voluntariness of defendant’s plea, untethered to anything in the existing record, would be an onerous task requiring resort to much evidence outside the trial record. The disruption of the trial caused by having to determine the voluntariness of a pre-*Tahl* guilty plea would be similar to that caused by having to determine whether prior counsel was constitutionally ineffective. As in [*People v.*] *Garcia* [(1997)] 14 Cal. 4th 953 [holding that a defendant may not collaterally attack a prior on the basis of incompetency of counsel], we find that permitting defendants to raise challenges to pre-*Tahl* prior convictions will be judicially inefficient and will saddle the trial courts with an unreasonable burden. Accordingly, we conclude that motions to strike prior felony convictions on *Boykin/Tahl* grounds are limited to post-*Tahl* guilty pleas.” (*Id.* at pp. 441-443, italics added.)

In *People v. Green* (2000) 81 Cal.App.4th 463 (*Green*), the appellate court held, “[I]n the absence of the expectation that the advisements and waivers of constitutional rights will appear on the face of the record, determination of the voluntariness of an out-

of-state plea would be an onerous task and place an unreasonable burden on the trial courts. Allowing a defendant to challenge a plea based on an out-of-state conviction not entered under *Tahl*-like protections is judicially inefficient and will saddle the California trial courts with obligations not required by either the federal or state constitutions. Consequently, *a defendant may not collaterally attack a prior out-of-state conviction unless there is evidence that Tahl-like requirements operated in the jurisdiction at the time of the plea.* [¶] . . . [I]f a *Tahl*-like policy of requiring preplea advisements and waivers on the record was in effect in the state court where the plea was taken, we will allow a collateral attack on the ensuing conviction. If no such policy operated at the time or place of the prior plea, in the interests of finality of judgments . . . and judicial efficiency, we will not allow collateral challenges to the subsequent conviction.” (*Id.* at pp. 470-471, fn. omitted, italics added.)

Defendant made no showing below that *Tahl*-like requirements operated in Iowa at the time defendant entered his plea there.⁷

Had *Green*, which bound the trial court here,⁸ been brought to its attention, no doubt, defendant’s motion to dismiss would have been denied on the basis that he failed

⁷ The People, in their brief, cite Iowa law and court cases establishing that in 1979, a trial court accepting a guilty plea had to advise defendant of his *Boykin/Tahl* rights and that written guilty pleas that did not contain such rights were subject to reversal unless the in-court colloquy showed advisement. However, this is not the time to bring this information to light. It should have been brought below, by *defendant*, so that under *Green*, he could pursue his challenge to the Iowa guilty plea. We are not a trial court—we determine whether what the trial court did in denying defendant’s motion to dismiss was an abuse of discretion. Under *Green*, it was not, because defendant did not show that *Tahl*-like requirements operated in Iowa at the time he entered his plea there.

to show that *Tahl*-like requirements operated in Iowa at the time of his guilty plea. Defendant here, for the first time, asserts that the statement in the Iowa minutes that defendant’s rights were explained to him and he waived those rights “constitutes ‘evidence’ that that the court in Iowa in 1979 . . . did operate under *Tahl*-like procedures”⁹ However, below, and not here, was the time for defendant to argue that this statement constituted the proof required by *Green*. Moreover, defendant cannot have it both ways. He argued below that because each of the rights was not expressly set forth in the minutes, they were inadequate as proof that he had been advised of his *Boykin/Tahl* rights.

Defendant calls our attention to the fact that in addition to asserting in his declaration that he was never explained his *Boykin/Tahl* rights, he also asserted that his attorney “told me that I would have to plead guilty and that I could not fight the charge[.]. He stated that the law did not allow for me to challenge these types of cases and that I had no choice but to plead guilty. I wanted to contest what this ‘victim’ was accusing me of but my attorney told me that it was not possible. [¶] . . . I was told that the victim’s statement could not be contradicted and that I would have to plead guilty.” However, defendant went on to assert, “[M]y plea was involuntary because I was unaware of [my *Boykin/Tahl*] rights and I would not have pleaded guilty had I known of them.” Nowhere in defendant’s written motion to dismiss the section 667.71 allegation, or at the hearing

⁸ Defendant does not appear to contest this fact—he does not assert that *Green* was wrongly decided or that it is somehow distinguishable from this case.

⁹ See footnote seven, *ante*, page 10.

on it, did defendant assert that he was coerced by his lawyer into pleading guilty and if his attorney had not coerced him, he would not have pled guilty. Defendant's entire basis for requesting dismissal was his assertion that he had not been given, and, therefore, did not waive, his *Boykin/Tahl* rights. Defense counsel made one reference during the hearing as to these allegations, saying, "[S]ome of the other things that are discussed in the declaration [is that defendant was told] essentially . . . [that] you can't really contest this. This is what you've been accused of. If you take this deal, you won't go to jail. You'll get a suspended sentence and probation.^{10]} Just sign here and we'll be done with it." Of course, this is a bit different than the allegations defendant made in his declaration about what he was told by his attorney. Moreover, because defendant did not argue that he was coerced by his lawyer into entering the plea as a basis for his motion to dismiss, the trial court did not rule on this basis.

Defendant's current assertion that the trial court did not afford him an opportunity to prove the allegations he made and pre-judged his testimony concerning them as false is, therefore, entirely unsupported by the record. Defendant's allegation that the trial court did not afford him an opportunity to prove his allegation that he had not been advised of his *Boykin/Tahl* rights is absolutely contradicted by the record. In fact, after the trial court made its ruling, which we have reiterated above, it asked defense counsel if he had any other evidence to offer and counsel responded that he did not. As to defendant's current allegation that the trial court pre-judged his assertion that he was not

¹⁰ This is precisely what defendant got, according to the Iowa minutes.

told about his *Boykin/Tahl* rights, again, the record belies it. The court's remarks clearly show that it considered defendant's assertion, treated it as though it had been made on the stand under oath, but ultimately concluded it was unworthy of belief for reasons it stated, which were supported by the record. No more can be required of the trial court.

This case is a prime example of why the holding in *Green* is sound. The problems defense counsel outlined in his attempt to discover exactly what had happened in Iowa, while, in part, a bit difficult to believe, as already discussed,¹¹ support *Green*'s conclusion that saddling a trial court with the responsibility of ferreting out such facts is an unfair burden on it. Moreover, despite having months to contact the parties that the Iowa minutes indicated were involved in defendant's plea, defense counsel failed to do so and presented only defendant's self-serving declaration as proof that he had not been made aware of his rights. In light of this, defendant's current assertion that he was unfairly prevented from presenting such evidence and the credibility of his declaration was prejudged by the trial court appears somewhat disingenuous.

¹¹ See footnote six, *ante*, page five.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.