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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT EUGENE WAINSCOTT, JR.,

Defendant and Appellant.

E053674

(Super.Ct.No. RIF153356,  
RIF10001335)

OPINION

APPEAL from the Superior Court of Riverside County. John M. Davis, Judge.

Affirmed in part; reversed in part and remanded for resentencing.

Susan K. Massey, 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, and Natasha Cortina and Barry Carlton, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant Robert Eugene Wainscott, Jr. appeals from his conviction in case No. RIF10001335 of assault with a deadly weapon—a vehicle (Pen. Code,<sup>1</sup> § 245, subd. (a)(1), count 1); two counts of battery of a former cohabitant (§ 243, subd. (e)(1), counts 2 & 4); disturbing the peace (§ 415, cl. (3), count 2);<sup>2</sup> and vandalism of more than \$400 (§ 594, subd. (b)(1), count 3) and in case No. RIF153356 of two counts of grand theft (§ 487, subd. (a), counts 1 & 3); attempted grand theft (§§ 664, 487, subd. (a), count 5); three counts of second degree burglary (§ 459, counts 2, 4, & 9); and identity theft (§ 530.5, count 6).

Defendant contends the trial court erred in permitting amendment of the information after the jury was discharged in case No. RIF10001335 to allege a prior strike offense because he was denied his right to have the jury determine both his guilt of the crimes charged and the truth of the allegation that he had suffered a prior strike. The People concede error under the controlling Supreme Court case of *People v. Tindall* (2000) 24 Cal.4th 767 (*Tindall*). We will therefore remand the matter for resentencing.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> Both defendant and the People state that defendant was convicted of a violation of section 273.5, subdivision (a)(1). In fact, the jury returned a not guilty verdict on that charge and found defendant guilty of the lesser included misdemeanor offenses of simple battery and disturbing the peace.

## II. FACTS AND PROCEDURAL BACKGROUND

The facts concerning defendant's substantive offenses are not at issue in this case and will therefore be set forth only summarily.

### **A. Case No. RIF10001335**

Defendant destroyed the possessions of his former domestic partner, Yvonne Bertoli, in February 2010 after she left their house following a fight. Bertoli returned to live with defendant for awhile, but when she found another apartment and was moving out, defendant struck her on the cheek. She was sitting in her vehicle waiting for defendant to leave when he saw her and drove his truck into the side of her vehicle, pushing it up onto the sidewalk. Bertoli nonetheless continued to date defendant until June, when he followed her to her apartment, threw her onto the couch, and threatened to hurt himself with a knife.

Based on those incidents, defendant was convicted of assault with a deadly weapon—a vehicle (§ 245, subd. (a)(1), count 1); two counts of battery of a former cohabitant (§ 243, subd. (e)(1), counts 2 & 4); disturbing the peace (§ 415, cl. (3), count 2); and vandalism of more than \$400 (§ 594, subd. (b)(1), count 3).

After the trial court discharged the jury, the prosecution sought to amend the information to allege a prior burglary conviction as a strike. Defense counsel objected on the ground that such amendment would deprive defendant of his statutory right to have the same jury decide both his guilt of the charged offenses and the prior. At a pretrial hearing, defendant had agreed to waive a jury trial on out-on-bail allegations.

(§ 12022.1.)<sup>3</sup> The prosecutor argued that such waiver was a waiver of a jury trial on *all* matters concerning sentencing. The trial court accepted that argument, heard the prior strike evidence, and found true that allegation and the on-bail allegations.

**B. Case No. RIF153356**

Defendant purchased \$1,830.84 worth of tires using the name and account of his former employer on July 10, 2009. He purchased another \$1,624.98 worth of tires, again using his former employer's name and account, on July 23. When he made a third attempt to purchase tires in September, the former employer was contacted and said the order was fraudulent. In May 2010, defendant carried merchandise worth \$279 to a self-checkout stand at a Home Depot store and scanned a UPC tag he took out of his pocket; that tag showed a \$5 charge for the item.

Based on those incidents, the jury found defendant guilty of two counts of grand theft (§ 487, subd. (a), counts 1 & 3); one count of attempted grand theft (§§ 664, 487, subd. (a), count 5); three counts of second degree burglary (§ 459, counts 2, 4, & 9); and one count of identity theft (§ 530.5, count 6). The same jury found a prior strike

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<sup>3</sup> In a pretrial discussion of the on-bail allegations, the trial court asked defense counsel to confirm that defendant had agreed to waive a jury trial on those allegations. Defense counsel conferred with defendant and then stated that it was “his desire to bifurcate those issues for the purposes of trial and also to waive a jury finding on those, and he would like to proceed with those before the Court.” The court took a personal waiver as follows: “Mr. Wainscott, you understand what Counsel has just said, that technically you have a right to have these out-on-bail enhancements determined along with your other trial, and you also have the right to have it done by the same jury at the same time or at a different time. [¶] Do you give up those rights and agree that your out-on-bail enhancement allegations could be done separately from the trial and that the Court could hear them rather than the jury?” Defendant responded, “Yes, Your Honor.”

allegation true. In bifurcated proceedings, the trial court found true allegations that defendant had committed those crimes while on bail. (§ 12022.1.)

### **C. Sentence**

In case No. RIF10001335, the trial court sentenced defendant to six years (the middle term, doubled) for count 1; 16 months (one-third the middle term, doubled) for count 3; and five years for the serious felony prior. The court stayed sentence for the on-bail enhancements and stayed sentence on the remaining counts under section 654.

In case No. RIF153356, the trial court sentenced defendant to 16 months (one-third the middle term, doubled) for each of the two grand theft counts, the identity theft count, and one burglary count and to eight months for the attempted grand theft count. The court imposed a two-year enhancement for one on-bail allegation and stayed the remaining on-bail enhancements. The trial court stayed sentence on the two other burglary counts under section 654. Defendant's total sentence for the two cases was 20 years four months.

### **III. DISCUSSION**

In *Tindall*, the defendant had waived a jury trial on a prior prison term conviction and two prior convictions for possession for sale of rock cocaine. The trial court permitted the prosecutor to amend the information to allege three prior strikes and additional prior prison term convictions after the jury had been discharged following its entry of a guilty verdict on the charge of possession of rock cocaine. (*Tindall, supra*, 24 Cal.4th at pp. 770-771.) The defendant then invoked his right to a jury trial on the strike

allegations, and the trial court permitted him to withdraw his previous waiver of a jury trial on the original prior conviction allegations. (*Ibid.*) The allegations were tried before a new jury, which was unable to reach a verdict, and the trial court granted a mistrial. (*Id.* at p. 771.) The trial court impaneled a third jury, which found true the three prior strikes. (*Ibid.*) The Court of Appeal affirmed the trial court’s order allowing the postverdict, postdischarge amendment of the information. (*Ibid.*) However, the California Supreme Court reversed. The court stated: “Section 1025, subdivision (b) provides, in pertinent part: ‘the question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty . . . .’” (*Id.* at pp. 771-772, fn. omitted.) The court found the language of section 1025 “straightforward and clear: if a defendant pleads not guilty to the underlying offense, and a jury decides the issue of guilt, that same jury shall decide whether the defendant ‘suffered the prior conviction,’ unless the defendant waives jury trial.” (*Tindall, supra*, at p. 772.) Thus, the court held that section 1025, subdivision (b) confers a right on defendants to have the same jury hear both substantive charges and any alleged priors, and the trial court cannot, over a defense objection, have a different jury try the strike allegation. (*Tindall, supra*, at pp. 771-776.) The court held that because of this right, the trial court exceeded its jurisdiction when it permitted amendment of the information after the jury was discharged to allege prior convictions, and the subsequent proceedings were therefore void. (*Id.* at pp. 771-776, 782-783.) The court reversed the judgment and remanded for further proceedings. (*Id.* at p. 783.)

Here, the trial court found *Tindall* distinguishable, because it found that defendant's waiver of a jury trial as to on-bail allegations was a waiver of a jury trial as to *all* enhancement allegations, including the prior strike alleged after the jury was discharged. However, in *People v. Luick* (1972) 24 Cal.App.3d 555, the court held that a defendant's waiver of a jury trial before prior conviction allegations were added did not extend to those allegations. The court stated: “[W]here allegations of priors are added *after* a jury waiver, defendant must, personally and expressly, waive jury trial on the issue thus presented . . . .” (*Id.* at p. 559; see also *People v. Diaz* (1992) 3 Cal.4th 495, 565 [holding that to waive the right to a jury trial on both guilt and special circumstances, “[t]he waiver must be made by the defendant personally, and must be ‘separate’—that is, if the defendant is to be deemed to have waived the right to jury trial on both guilt and special circumstances, the record must show that the defendant is aware that the waiver applies to each of these aspects of trial.”].) We therefore conclude the trial court erred in finding defendant had waived his right to a jury trial on the strike allegation.

As the People concede, *Tindall* is precisely on point and is controlling authority under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455. The People argue, however, that the Supreme Court should reconsider *Tindall*. We agree. The California Constitution provides that judgments may not be reversed for errors of California procedure unless the errors are prejudicial. (Cal. Const., art. VI, § 13.) In *Tindall*, the court found prejudice as follows: “[T]he postdischarge amendment, which increased defendant's prison sentence from four years to 25 years to life” resulted in

“manifest” prejudice. (*Tindall, supra*, 24 Cal.4th at p. 782.) As the People point out, that reasoning was circular. The question was not whether defendant’s exposure could be increased, but whether he had a right to trial by a single jury. Having found that such a right existed, and it had been violated, the court should then have asked whether trial by two juries instead of one caused prejudice. Logic makes a finding of prejudice under those circumstances unsupportable. (See, e.g., *People v. Monge* (1997) 16 Cal.4th 826, 834-835 [error relating to prior trials is remedied by retrial with another jury]; *People v. Barragan* (2004) 32 Cal.4th 236, 241-259 [retrial of priors reversed for insufficient evidence is not barred by due process, law of the case, res judicata, collateral estoppel, or legislative intent].) We agree with the People that *Tindall*’s analysis is flawed; however, we are bound by our Supreme Court’s holding.

#### IV. DISPOSITION

The true finding on the prior strike allegation in case No. RIF10001335 is reversed, and the matter is remanded for resentencing. In all other respects, the convictions are affirmed.

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HOLLENHORST

J.

I concur:

RAMIREZ

P.J.

MILLER, J.,

I concur with the majority opinion reversing the jury's true finding on the prior strike allegation and remanding the matter for resentencing, but disagree with the majority's conclusion that our Supreme Court incorrectly decided the issue in *People v. Tindall* (2000) 24 Cal.4th 767, and the Supreme Court should, therefore, reconsider that decision.

MILLER

J.