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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.

LAWRENCE HILTON REDDICK,

Defendant and Appellant.

E054361

(Super.Ct.No. FSB1100830)

OPINION

APPEAL from the Superior Court of San Bernardino County. Duke D. Rouse, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

James R. Bostwick, 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, Scott C. Taylor and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Lawrence Hilton Reddick guilty of one count of possession for sale of a controlled substance (hydrocodone). (Health & Saf. Code, § 11351, count 1.)¹ The jury also found true the allegation that defendant was previously convicted of possession for sale of cocaine base on August 24, 2001, within the meaning of Health and Safety Code section 11370.2, subdivision (a). A trial court found that defendant had served a prior prison term. (Pen. Code, § 667.5, subd. (b).) The court sentenced defendant to a total term of seven years in state prison, which included three years on count 1, plus a consecutive three years on the Health and Safety Code section 11370.2 enhancement, and one year on the Penal Code section 667.5, subdivision (b), prison prior. The court also imposed, but stayed, a second three-year enhancement under Health and Safety Code section 11370.2.

On appeal, defendant contends that the court erred in imposing the second three-year term under section 11370.2 because the information only alleged one 11370.2 enhancement. The People maintain that the information alleged two enhancements, and also assert that the court was not authorized to stay execution of the sentence on the second section 11370.2 enhancement. The parties agree that the minute order and abstract of judgment should be corrected to reflect the oral pronouncement of judgment. We conclude that the court erred in imposing the second

¹ All further statutory references will be to the Health and Safety Code, unless otherwise noted.

section 11370.2 enhancement, and that the minute order and abstract of judgment should be corrected. Otherwise, we affirm.

PROCEDURAL BACKGROUND²

The first amended information alleged that “pursuant to Health and Safety Code section 11370.2[, subdivision] (a)[,] the defendant(s) Lawrence Hilton Reddick, was convicted of the following offense(s)” It then listed court case No. FVA014127, section 11351.5 (possession of cocaine base for sale), and the conviction date of August 24, 2001.

At trial, defendant testified that he was previously convicted of two counts of possession and sentenced to 11 years four months. The jury was shown an abstract of judgment from case No. FVA014127, which reflected the two counts (exhibit 15).

After deliberating, the jury found defendant guilty on count 1 in the current case. It also returned a special allegation form, which stated: “We, the jury in the above titled action, find the defendant . . . was previously convicted of POSSESSION FOR SALE OF COCAINE BASE, on August 24, 2001 in Case No. FVA014127.”

The probation officer filed a report recommending that probation be denied and defendant be sentenced to state prison for a total term of 10 years, consisting of three years on count 1, plus two consecutive terms of three years on the two section 11370.2, subdivision (a), enhancements, and one year on the prison prior.

² The facts of the underlying conviction are not relevant to the issues on appeal. Therefore, a recitation of the factual background is not necessary.

At the sentencing hearing, the prosecutor agreed with the probation officer's recommendation, but noted that there was "a little bit of a wrinkle" regarding the prior drug convictions. She pointed out that exhibit 15 was entered into evidence, and it showed two separate convictions of section 11351.5. The prosecutor then explained the following: "Now, on the complaint it shows one case because it is one case. It's two counts. So to add it again, it would have been completely duplicative at that point because it's the same case with the same charge on the same date. . . . [E]ach of those charges, if he is convicted, is worth a three-year enhancement, and that's directly according to [section] 11370.2[, subdivision] (a), and that's why we believe that the probation officer's recommendation in this case is correct, because the cases that [defendant] was convicted of were previously consolidated before he was sentenced."

Defense counsel responded by stating that the People did not plead and prove two Health and Safety Code section 11370.2 enhancements. She argued that "the information filed [listed] one [Health and Safety Code section] 11370.2[, subdivision] (a) allegation and [one Penal Code section] 667.5[, subdivision] (b) allegation," and that defendant's understanding from the beginning was that his "exposure was a maximum of eight years." She further pointed out that the jury was provided with one form on the prior drug enhancement, and it found one possession for sale of cocaine base prior to be true, not two. The prosecutor responded, "They found the prior to be true because there is only one prior. It's one case consisting of two counts that are the same exact thing."

The court initially agreed with the prosecutor, stating that the information alleged that defendant “was convicted of the following offense, paren[theses] S, for offenses, which makes it plural” The court found that the charge was in the plural, and that defendant was, in fact, convicted of two counts of possession in case No. FVA014127. However, the court then noted that the special allegation form simply stated the jury found that defendant was previously convicted of possession of cocaine for sale on August 24, 2001, but it “[did not] say of one count.” Defense counsel reiterated that defendant understood that he was facing one prior drug conviction. The court asked how defendant was prejudiced, “because the fact [was] he went to trial because he didn’t want to accept eight years.” Defense counsel replied that defendant was prejudiced because he was never advised that his potential punishment was 10 years. She further asserted that she had discussed defendant’s maximum exposure of eight years with the prosecutor.

The court acknowledged that the information was “a little ambiguous,” and that it “could have been pled better.” The court stated that the enhancement “could be charged as two [separate] counts and it was not.” The court concluded by stating, “[I]t was unusual and it happened, and I think—all in all, I think probably I am going to impose it, but I am going to stay it, so you are right back where you wanted to be, more or less.” The court stated that, “the point was there was an ambiguity, and I can see where that wasn’t discussed with him, so that’s how—that’s my intention how I am going to resolve it.” The court then sentenced defendant to the middle term of three years on count 1, and imposed a three-year consecutive enhancement for the

conviction of “the first count in case FVA[014127].” The court also imposed an “additional consecutive three years for the conviction of Count 2 in that case under [section] 11370.2[, subdivision] (a),” but stayed the execution of the second term, in light of the previous discussion. The court imposed a consecutive one-year term for the prison prior, for a total term of seven years in state prison.

ANALYSIS

I. The Second Enhancement Was Not Properly Pleaded

Defendant contends that the information alleged only one conviction of possession of cocaine base (§ 11351.5) in case No. FVA014127, as an enhancement under section 11370.2. Since a second enhancement was not pleaded in the information, he did not receive notice that he would be subject to two enhancements under section 11370.2. As such, the court improperly imposed the second section 11370.2 enhancement. Thus, he asserts that the enhancement for count 2 in case No. FVA014127, which was imposed but stayed, should be stricken. We agree.

Health and Safety Code section 11370.2, subdivision (a), provides in relevant part: “Any person convicted of a violation of, or of a conspiracy to violate, Section 11351, 11351.5, or 11352 shall receive, in addition to any other punishment authorized by law, including Section 667.5 of the Penal Code, a full, separate, and consecutive three-year term for each prior felony conviction of . . . Section . . . 11351.5, . . . whether or not the prior conviction resulted in a term of imprisonment.”

Enhancements under Health and Safety Code section 11370.2, subdivision (a), “shall be pleaded and proven as provided by law.” (Health & Saf. Code, § 11370.2,

subd. (d).) “ ‘Due process requires that an accused be advised of the specific charges against him so he may adequately prepare his defense and not be taken by surprise by evidence offered at trial. [Citation.]’ ” (*People v. Mancebo* (2002) 27 Cal.4th 735, 750.) “The words used in an accusatory pleading are construed in their usual acceptance in common language” (Pen. Code, § 957.) Furthermore, if more than one previous conviction of another offense is charged in an accusatory pleading, “a separate finding must be made as to each.” (Pen. Code, § 1158.)

Here, the information alleged the following: “[P]ursuant to Health and Safety Code section 11370.2[, subdivision] (a)[,] the defendant(s) Lawrence Hilton Reddick, was convicted of the following offense(s)” The information then listed court case No. FVA014127, section 11351.5, and the conviction date of August 24, 2001. The court initially said that the information’s wording that defendant “was convicted of the following offense(s)” meant that “the charge [was] in the plural.” (Italics added.) However, the court almost immediately changed its view and stated that “[t]he allegation just says he was convicted in that case. . . . Doesn’t say singular or plural.” We agree. The “s” in parentheses was just part of the standard form language, and it did not necessarily mean that there was more than one offense being alleged. In the same way, the information alleged that “the defendant(s) . . . was convicted” The “s” in parentheses there did not necessarily mean there were two defendants. There is clearly only one. Furthermore, the trial court expressly found that the section 11370.2 enhancement “could be charged as two [separate] counts and *it was not.*” (Italics added.) We agree that the two convictions from August 24, 2001, in case

No. FVA014127, were not alleged as separate counts, for purposes of the section 11370.2 enhancement.

The People argue that defendant had actual notice of the convictions the prosecutor sought to use as enhancements “because he testified to having suffered two prior drug convictions under that single case number.” However, at trial, the prosecutor showed defendant exhibit 15, and asked a few questions. Defendant testified that he went to trial and was sentenced to 11 years four months, on two counts of possession. He confirmed that “[o]ne [was] for October 18th, 2000, and one on July 23rd of 2001.” Although exhibit 15 contained the abstract of judgment from case No. FVA014127, defendant’s testimony did not clearly explain that he was convicted of two counts of possession on August 24, 2001, in that case. In any event, defendant’s testimony *at trial* did not constitute prior notice of two enhancement allegations under section 11370.2.

We further note that one of the jury instructions stated that defendant was “charged with *a* prior conviction of possession for sale of cocaine base.” (Italics added.) Another one instructed the jury to decide whether the evidence showed that defendant had been convicted of “[*a*] violation of Health and Safety Code Section 11351.5 on August 24, 2001, in the County of San Bernardino Case Number FVA014127.” Thus, the record reflected that there was only one enhancement being alleged.

Finally, we observe that the jury was never asked to determine whether defendant had two prior convictions. The special allegation form, which the jury

marked “true” only stated that defendant “was previously convicted” of possession for sale of cocaine base, on August 24, 2001, in case No. FVA014127. Thus, the jury did not actually find that defendant had more than one prior conviction. Moreover, the jury did not make a separate finding as to each of the two counts in case No. FVA014127, as required by Penal Code section 1158.

We conclude that defendant was not given notice of a second section 11370.2 enhancement allegation. As a matter of due process, a second enhancement could not be imposed. (See *People v. Hernandez* (1988) 46 Cal.3d 194, 208.) Therefore, the additional sentence under section 11370.2 that the court imposed but stayed should be stricken.³

II. The Minute Order and Abstract of Judgment Should Be Corrected

Both parties agree that the clerk’s minute order and the abstract of judgment should be corrected to reflect the oral pronouncement of judgment.

“Courts may correct clerical errors at any time, and appellate courts . . . that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts.

[Citations.]” (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

³ We note the People’s argument that the stay of the prior conviction enhancement was an unauthorized sentence, requiring remand for the trial court to either impose or strike it. (*People v. McCray* (2006) 144 Cal.App.4th 258, 267; *People v. Bradley* (1998) 64 Cal.App.4th 386, 390.) However, in light of our conclusion, we need not remand the matter.

The sentencing minute order from July 29, 2011, and abstract of judgment differ from the court's oral pronouncement. The court imposed and stayed a three-year enhancement under Health and Safety Code section 11370.2, and imposed one year on the prior prison term, under Penal Code section 667.5, subdivision (b). However, the minute order and abstract of judgment state the following: "One year state prison imposed but stayed as to an additional count of PC 667.5(b) as defendant's priors were consolidated into one case." This statement does not reflect the court's oral pronouncement and should be deleted from both the July 29, 2011 minute order and the abstract of judgment.

Curiously, the abstract of judgment does not reflect that a second enhancement under section 11370.2 was imposed and stayed, as the court announced. It only reflects one enhancement under section 11370.2. In light of our conclusion that the second enhancement under section 11370.2 should be stricken, no change to the abstract of judgment needs to be made, in this respect. (See *ante*, § I.)

DISPOSITION

The judgment is modified to strike the three-year enhancement imposed under section 11370.2, on count 2 in case No. FVA014127. The trial court is directed to amend the July 29, 2011 minute order to reflect this modification. The court is further directed to amend the July 29, 2011 minute order and the abstract of judgment to delete the following statement: "One year state prison imposed but stayed as to an additional count of PC 667.5(b) as defendant's priors were consolidated into one case." Copies of the amended minute order and abstract of judgment should be

forwarded to the California Department of Corrections and Rehabilitation. We otherwise affirm the judgment.

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HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

KING
J.