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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.

ERWIN MAURICE WALKER,

Defendant and Appellant.

E061546

(Super.Ct.No. INF1302354)

OPINION

APPEAL from the Superior Court of San Bernardino County. Dale R. Wells,  
Judge. Affirmed.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Teresa  
Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Erwin Maurice Walker of one count of possessing ammunition by a felon (count 1—Pen. Code, § 30305, subd. (a)(1), a felony)<sup>1</sup> and one count of resisting arrest (count 2—§ 148, subd. (a)(1), a misdemeanor).<sup>2</sup> At a bifurcated bench trial, the trial court found true the allegations in the information that defendant suffered three prior strikes and a prior prison term.

The trial court sentenced defendant to a total of five years in state prison: a two-year midterm on count 1, doubled to four years because of the prior strike; a one-year enhancement for the prison prior, to run consecutively; and 365 days on count 2, to run concurrently.

On appeal, defendant argues only that the trial court abused its discretion in denying his oral motion to reduce count 1 from a felony to a misdemeanor. (§ 17, subd. (b).) We disagree and affirm the judgment.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Because defendant's argument on appeal centers on the trial court's exercise of discretion in deciding his section 17, subdivision (b) motion, we relate only those underlying facts necessary to frame his argument.

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

<sup>2</sup> Defendant was also found guilty and sentenced in a related violation of probation case, and in a different burglary case, but those are not relevant here.

At approximately 2:30 in the early morning of September 7, 2013, defendant was riding his bicycle in Palm Springs. A patrolling police officer noticed defendant's bicycle had no lights or reflectors. The officer turned on his sirens and attempted to pull defendant over. Defendant fled on his bike, fell off, and was arrested. Defendant was carrying two saddlebags attached to the rear of the bike. A search of the saddlebags revealed a single live .380 cartridge at the bottom. Defendant and the People stipulated that defendant was previously convicted of a felony.

After defendant and the People rested at trial, defendant orally moved the trial court pursuant to section 17, subdivision (b), to reduce count 1 from a felony to a misdemeanor on the ground that the evidence showed the offense was not serious enough to warrant the charge as a felony. The People objected on the ground that defendant was a "career criminal" and had three prior strikes associated with using a loaded firearm. The trial court did not think the motion statutorily ripe for consideration at that time. After the jury returned the guilty verdicts, defendant renewed the section 17, subdivision (b) motion; the trial court denied the motion. Upon sentencing defendant, the trial court reviewed prior instances in which defendant had been granted section 17, subdivision (b) relief, and it explained that it could not "in good conscience go to [the] upper term because of the nature of this offense. But I also can't give him [a] low term because of his continued history."

## DISCUSSION

Defendant argues the trial court abused its discretion by denying his section 17, subdivision (b) motion because it failed to give sufficient weight to the extraordinarily minor nature of the offense. We disagree.

Section 17, subdivision (b), authorizes trial courts to reduce “wobbler” offenses from felonies to misdemeanors in their discretion. “[Trial courts should consider] ‘the nature and circumstances of the offense, the defendant’s appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.’ [Citations.] When appropriate, [trial courts] should also consider the general objectives of sentencing such as those set forth in California Rules of Court [, including public safety.]” (*People v. Superior Court (Alvarez)* (1996) 14 Cal.4th 968, 978-979.) We review the trial court’s decision based on *Alvarez* deferentially, for abuse of discretion; it is the task of the defendant-appellant to show that the trial court’s decision was “irrational or arbitrary,” and absent such a showing, a reviewing court presumes the trial court “acted to achieve legitimate sentencing objectives.” (*Id.* at p. 977.) Only sentencing determinations made outside of these parameters “‘exceed[] the bounds of reason’” and thus constitute an abuse of discretion. (*Id.* at p. 978.)

Here, the record reveals the trial court was aware of the de minimis nature of defendant’s wobbler offense—the trial court heard argument to that effect from defense counsel, and presided over defendant’s jury trial. The record reveals the trial court was also aware of defendant’s prior criminal record, including the prior offenses involving the use of loaded firearms—the trial court heard the People’s objections to defendant’s oral

motion. Evident in the trial court's explanation of its reasoning for imposing the midterm sentence on count one is a balancing of the de minimis nature of the current offense and defendant's prior criminal history, as well as defendant's unwillingness or inability to make use of the section 17 subdivision (b) relief he had been awarded on other occasions. Defendant has not shown that the trial court either impermissibly went beyond the *Alvarez* factors or that the trial court considered them in an irrational or arbitrary way when it denied his section 17, subdivision (b) motion.

In sum, based on the record, defendant has not shown that the trial court abused its discretion by denying his section 17, subdivision (b) motion.

Defendant contends that the nature of the present offense was so uniquely de minimis that the trial court acted in a plainly arbitrary and irrational manner by sending him to prison for four years for that offense instead of automatically reducing the offense to a misdemeanor. Defendant cites three United States Supreme Court cases in support of this proposition: *Bradwell v. Illinois* (1872) 83 U.S. 130 (court permitted Illinois to prohibit women from the practice of law, a result recognized modernly as absurd); *Rochin v. California* (1952) 342 U.S. 165 (formulating the "shocks the conscience" test to evaluate violations of due process); and *Jacobellis v. Ohio* (1964) 378 U.S. 184 (just as Justice Stewart recognized obscenity, though the precise definition eluded him, we may recognize an abuse of discretion though the precise definition eludes us). However, our own high court in *Alvarez, supra*, spoke squarely on the question at issue here: how California trial courts should evaluate section 17, subdivision (b) motions. Unless and

until *Alvarez* is overruled, we are bound to follow it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

**DISPOSITION**

The judgment is affirmed.

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RAMIREZ  
P. J.

We concur:

HOLLENHORST  
J.

CODRINGTON  
J.