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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

KIRK TREMAINE HARRIS,

Defendant and Appellant.

F061768

(Super. Ct. No. F09904610)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. John F. Vogt, Judge.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

## **INTRODUCTION**

In this court's published opinion, *People v. Harris* (1990) 226 Cal.App.3d 492, we noted that appellant Kirk Tremaine Harris's 1980 conviction was invalid and could not be used to enhance his sentence for his 1988 conviction for robbery. (*Id.* at pp. 494, 497.) In this current appeal, Harris contends his conviction on two counts of robbery must be reversed because the invalid 1980 conviction was used to impeach his testimony and to enhance his sentence. We agree the 1980 conviction was improperly used, but conclude: (1) the use of the invalid conviction for impeachment purposes was harmless error and (2) the sentencing error can be corrected by a remand for resentencing.

## **FACTUAL AND PROCEDURAL SUMMARY**

On the night of August 3, 2009, a robbery took place at a Valero gas station. About two hours later, a robbery occurred at a Walgreens less than three miles from the Valero gas station. Surveillance videos from the two businesses show the same white Pontiac parked in the respective parking lots at the time of the robberies. Two men are sitting inside the Pontiac; neither man is seen entering the Walgreens or purchasing gas. The surveillance videos show the man sitting in the passenger seat of the Pontiac exiting the car at each location, assaulting a lone older male at each location as they left the place of business, and taking each gentleman's wallet.

At the Valero station, the man assaulted was Michael Simpson. The passenger stepped out of the Pontiac, confronted Simpson, and asked for money. Simpson replied he had none, went inside the gas station building, and then returned to pump gas. When he had finished, the man grabbed Simpson's arm and said, "Give me your fuckin' wallet old man," spun Simpson around, and hit Simpson in the head with a hammer. Simpson fell to the ground; the man took his wallet and walked away.

At the Walgreens store, the man accosted was John Quiroz. Quiroz parked in the Walgreens lot and entered the store in order to buy a candy bar. When Quiroz exited the store, a Black man walked toward him and asked for money. Quiroz responded that he

had no money and the man punched him in the face. The man told Quiroz to hand over all his money and then punched Quiroz again. The man took Quiroz's wallet and ran to the white Pontiac, which then drove off.

An eyewitness to the incident at the Valero gas station wrote down the license plate number of the white Pontiac. The police ran the license plate number and found the car was registered to Tommy Wallace. Wallace told police he sold the car to Harris in June 2009.

On August 4, 2009, the police stopped a white Pontiac that Harris was driving. The police ran the license plate and found a bulletin for the vehicle; Harris was taken into custody.

An eyewitness to the Walgreens robbery identified Harris from a photo line-up and also in court.

Harris was charged with two counts of second degree robbery, pursuant to Penal Code section 211.<sup>1</sup> It also was alleged that Harris had four prior serious felony convictions that constituted "strikes" for purposes of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and that he had served six prior prison terms.

Harris testified in his own defense. He claimed he was purchasing the Pontiac from Wallace and making monthly payments. Harris testified that on the night of the robberies, he was smoking crack cocaine under the freeway at G Street and had rented the Pontiac to a lot of young people in exchange for the cocaine. He denied being at the Valero gas station or the Walgreens that evening.

In rebuttal, the investigating detective testified that Harris told him only he, Harris, and his girlfriend ever drove the Pontiac. Harris also told the detective that he had the Pontiac the entire night of August 3, 2009, using it to drive to his sister-in-law's and then to meet up with a prostitute.

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<sup>1</sup> References to code sections are to the Penal Code unless otherwise specified.

The jury found Harris guilty of both robbery counts. Following a bench trial, the trial court found true the allegations that Harris had suffered four prior serious felony “strike” convictions and served two prior prison terms.

On January 12, 2011, the trial court sentenced Harris to a total term of 82 years to life, consisting of two consecutive 25 years to life terms on the two robbery counts after application of Three Strikes (§ 667, subs. (b)-(i)), plus two 15-year terms for three prior serious felony enhancements (§ 667, subd. (a)(1)), and two 1-year terms for the prior prison term enhancements (§ 667.5, subd. (b)).

### **DISCUSSION**

Harris contends it was error to use his 1980 conviction to impeach him. In related arguments, Harris also contends the prosecutor committed misconduct and deprived him of a fair trial by using the invalid 1980 conviction; defense counsel rendered ineffective assistance of counsel by failing to object to use of the 1980 conviction for impeachment and sentencing purposes; and the trial court abused its discretion and deprived him of a fair trial by allowing use of the 1980 conviction.

The People concede the error in using the 1980 conviction for impeachment, but contend the error was harmless. The People also note that while the current convictions should be affirmed, the matter should be remanded for resentencing because it was error to use the constitutionally invalid conviction to enhance Harris’s sentence.

#### **I. Standard of Review**

The use of a constitutionally invalid conviction to impeach or to enhance punishment is error of federal constitutional magnitude. (*People v. Coffey* (1967) 67 Cal.2d 204, 218-219.) Evidence of prior convictions that are invalid may not be used to establish guilt, enhance punishment, or to impeach. (*Bates v. Nelson* (9th Cir. 1973) 485 F.2d 90, 95.) Erroneous use of a defendant’s constitutionally invalid priors must be assessed under a “harmless beyond a reasonable doubt” standard. (*Burgett v. Texas* (1967) 389 U.S. 109, 115.) Where there is other, strong evidence of a defendant’s guilt,

use of the constitutionally invalid priors is harmless error. (*People v. Coffey, supra*, at p. 223.)

## **II. Use of 1980 Convictions to Impeach**

Harris concedes that prior convictions may be used to impeach a defendant's testimony. (Evid. Code, § 788.) He contends, however, that it was error to allow the use of 1980 convictions for kidnapping and robbery to be used to impeach him when those convictions had previously been determined to be invalid.<sup>2</sup>

We assess the use of the invalid 1980 conviction (or convictions) under a harmless error standard. (*People v. Taylor* (1972) 8 Cal.3d 174, 186.) In light of the abundant other evidence establishing Harris's guilt, we conclude the use of the invalid conviction to impeach was harmless error.

The evidence established that Harris had purchased the white Pontiac seen in the videos of the robberies in 2009, was making payments on the vehicle, and was in possession of that vehicle when he was arrested. Harris told the investigating detective that he was in possession of the white Pontiac the entire night of August 3, 2009, when the robberies took place, and that only he or his girlfriend ever drove the Pontiac.

An eyewitness to the Walgreen's robbery identified Harris from a photo line-up and in court as the driver of the white Pontiac at the time of the robbery. An eyewitness to the robbery at the Valero gas station recorded the license plate of the vehicle used by the robbers; it was the license number of Harris's white Pontiac.

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<sup>2</sup> The testimony in the current trial was that Harris suffered a 1980 conviction for robbery and a 1980 conviction for kidnapping. Harris does not dispute this characterization of his invalid 1980 convictions in this appeal, although we noted in *People v. Harris, supra*, 226 Cal.App.3d at page 494, footnote 1, that the 1980 conviction appeared to be robbery with the use of a firearm, not robbery and kidnapping.

Harris was of the same size and build as the man shown in the two surveillance videos as the driver of the white Pontiac during the robberies. At the time of his arrest, Harris was wearing the same distinctive shirt seen in the surveillance videos.

We disagree with Harris's statement that his "credibility was a critical issue at trial" and that the 1980 conviction(s) were somehow inherently more prejudicial than the 1986 and 1988 convictions, and therefore the error is not harmless. As the above recitation of the evidence demonstrates, Harris's testimony was hardly the crux of the case. Harris's guilt was established by abundant other evidence. Furthermore, when Harris was charged with two robberies in the current case, the jury was not likely to view two prior robberies committed in 1986 and 1988 as somehow "less damaging" than the 1980 offenses that were more remote in time. (See *Tucker v. United States* (N.D.Cal. 1969) 299 F.Supp. 1376, 1378-1379 [holding that use of constitutionally invalid prior convictions to impeach was harmless error where defendant's testimony had been impeached by prior inconsistent statements and other evidence].)

Harris's testimony and credibility at trial, where he claimed he had rented the white Pontiac to people in exchange for crack cocaine during the time the robberies took place, was impeached by other, valid evidence exclusive of the invalid 1980 convictions. Harris's testimony at trial was inconsistent with his statement to the investigating detective at the time of arrest that he was in possession of the car the entire evening of August 3, 2009, and did not let others (except his girlfriend) drive the Pontiac. In addition, Harris had suffered a 1986 conviction for robbery and a 1988 conviction for robbery, which were used to impeach. This other impeaching evidence, combined with the strong evidence of Harris's guilt, establishes that the error of using the 1980 conviction(s) to impeach was harmless beyond a reasonable doubt. (*People v. Coffey, supra*, 67 Cal.2d at p. 223.)

In light of our conclusion that use of the invalid 1980 conviction(s) for purposes of impeachment was harmless error, we need not address Harris's claims of prosecutorial misconduct and ineffective assistance of counsel.

### **III. Sentencing Issues**

The trial court found true that Harris had suffered two convictions in 1980, one for kidnapping and one for robbery with a firearm enhancement. Those true findings were used to increase the punishment imposed for the current offenses.

The true findings on the 1980 convictions must be reversed in light of the decision in *People v. Harris, supra*, 226 Cal.App.3d at pages 494 and 497, and the People concede this point. In addition, because the 1980 convictions were used to increase punishment for the current offenses, the sentence must be vacated and the matter remanded for resentencing.

### **DISPOSITION**

The sentence is vacated and the true findings on the 1980 convictions for kidnapping and robbery with a firearms enhancement are reversed. The matter is remanded for resentencing. The trial court shall prepare an amended abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation. In all other respects the convictions are affirmed.<sup>3</sup>

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Kane, J.

WE CONCUR:

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Cornell, Acting P.J.

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Detjen, J.

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<sup>3</sup> Appellant's request for judicial notice filed on November 17, 2011, is denied.