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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ELIAS LOPEZ SIERRA,

Defendant and Appellant.

F063012

(Super. Ct. No. LF008600A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

Roberta Simon, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Cornell, J., and Kane, J.

STATEMENT OF THE CASE

On February 16, 2011, appellant, Elias Lopez Sierra, was charged in an information with felony flight in a vehicle from a peace officer with willful or wanton disregard for the safety of people or property (Veh. Code, § 2800.2, count 1) and misdemeanor driving under the influence of a drug or alcohol (Veh. Code, § 23152, subd. (a), count 2). The information further alleged two prior prison term enhancements (Pen. Code, § 667.5, subd. (b)). At the conclusion of a jury trial on June 15, 2011, appellant was found guilty of both counts. In a bifurcated proceeding, the trial court found the two prior prison term enhancements to be true.

On July 21, 2011, the trial court sentenced appellant to prison for the upper term of three years for felony flight. The court struck one prior prison term enhancement and applied a consecutive one-year term for the remaining enhancement for a total prison term of four years. Appellant was awarded actual custody credits of 56 days and 56 days of conduct credits for total custody credits of 112 days. We review this case pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).

FACTS

At the conclusion of an in limine hearing, the trial court ruled that statements appellant made to officers prior to receiving advisements pursuant to *Miranda*¹ would not be admissible during trial, but statements made after appellant was advised would be admissible. The court further ruled that defense counsel could refer to injuries appellant sustained during his arrest to explain why he refused a field sobriety test.

Kern County Sheriff's Deputy Logan Hagost testified that at 10:40 p.m. on January 22, 2011, he was on patrol in the City of Arvin. Logan was driving a white, marked patrol car with large, bold lettering on each side that said "Sheriff's Department."

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

The patrol car had a mounted light bar on top with emergency lights, sirens, and forward facing lights that alternated between solid red, white, and blue. When the red, white, and blue lights are activated, they can be viewed for 360 degrees. There was also lettering identifying the patrol car as a sheriff's vehicle on the rear trunk and bumper. The siren alternates from a low to high pitch.

As Hagost was about to stop at the intersection of Widmere Road and Tejon Highway, he saw headlights from a pickup truck driven by appellant traveling towards him at a high rate of speed. Appellant was driving between 80 and 100 miles per hour. As appellant was approaching the intersection, Hagost activated his lights and sirens and pursued appellant. Appellant ran a stop sign.

There were other vehicles going through the next intersection at Tejon Highway and Bear Mountain Boulevard as appellant approached it. The drivers of those vehicles had to swerve off the roadway to avoid running into appellant. Appellant was driving so fast that his pickup truck lifted up as he drove through the intersection. There was also a stop sign at the intersection of Tejon Highway and Bear Mountain Road that appellant ignored. Hagost was pursuing appellant with no cars between them with his lights and siren activated during the entire pursuit.

Hagost followed appellant through residential neighborhoods. Appellant continued speeding at between 80 and 100 miles per hour. The speed limit was no more than 55 miles per hour. During most of the pursuit, appellant was driving down the middle of the roadway or swerving into oncoming lanes. A pedestrian had to jump out of the way to avoid being hit by appellant.

As appellant drove into a dirt lot, his pickup truck was fishtailing. Appellant nearly hit a fence and a building. Appellant left the lot, ran another stop sign, and then drove up the street into another dirt lot. Appellant traveled down a dirt road at a high

speed, nearly losing control of his pickup truck several times. When appellant came to Butte Avenue, he jumped out of his pickup truck and threw his jacket into it.

Hagost exited his patrol car and chased appellant, yelling at him several times to stop and telling appellant he was under arrest. Appellant ignored Hagost's orders. At Butte Avenue, appellant stopped and faced Hagost, who was still in close pursuit on foot. Appellant squared his shoulders and raised his hands like a boxer, taking a fighting stance. Hagost described appellant as a large man.

Hagost pulled out his baton, commanded appellant to go to the ground, and told him he was under arrest. Appellant came toward Hagost and tried to grab him. Hagost reacted immediately, striking appellant with the baton in the right arm. Appellant turned away from Hagost. Hagost struck appellant again with his baton, hitting him in the upper back and shoulder. This second blow still had no effect on appellant, who was still turning and standing. Hagost struck appellant again in the upper back and shoulder area.

Hagost struck appellant in the leg. When appellant went to the ground, he grabbed at Hagost's legs and started to pull Hagost down. Hagost feared that if he went to the ground, appellant would have access to his pistol, pepper spray, and baton. Hagost again hit appellant in the back with his baton. Appellant eventually rolled onto his face. Hagost got on top of appellant's shoulders, placing his body weight on appellant's shoulders, back and head. Appellant placed his hands behind his head and locked his fingers. Hagost ordered appellant several times to release his hands so Hagost could handcuff appellant.

Hagost, who still had no backup deputies to assist him, was beginning to get extremely tired. He made a closed fist and began to strike appellant in his shoulders and arm to get him to release his hands. After a struggle lasting 15 to 20 seconds, Hagost was able to get appellant to release his hands. Hagost was finally able to handcuff appellant. Appellant smelled of a strong odor of alcohol. His eyes were red, bloodshot, and glazed.

Appellant was unsteady on his feet. Appellant's speech was slurred and thick. He appeared to be intoxicated to the point where he was no longer safe to operate a vehicle.

After he was taken into custody, appellant was seen by medical aid but refused treatment at the scene of his arrest. Hagost placed appellant into his patrol car until California Highway Patrol officers arrived to perform field sobriety tests. Appellant refused to take any field sobriety tests.² Hagost found spilled liquid, which he identified as beer on the floorboard of appellant's pickup truck. When appellant was transported to Kern Medical Center, he declined any treatment. Appellant also refused to take a blood alcohol test.

After appellant refused to take a blood test, Kern County Sheriff's Senior Deputy Royce Haislip met with Hagost and appellant. Haislip corroborated Hagost's testimony that appellant was intoxicated and could no longer safely operate a motor vehicle. The defense called no witnesses.

APPELLATE COURT REVIEW

Appellant's appointed appellate counsel has filed an opening brief that summarizes the pertinent facts, raises no issues, and requests this court to review the record independently. (*Wende, supra*, 25 Cal.3d 436.) The opening brief also includes the declaration of appellate counsel indicating that appellant was advised he could file his own brief with this court. By letter on March 5, 2012, we invited appellant to submit additional briefing.

Appellant replied with a document setting forth the following assertions and statements: 1) the trial court did not permit testimony concerning the beating he received

² In her closing argument to the jury, defense counsel opined that appellant did not take field sobriety tests because he had been batoned several times and was not likely to be in a good mood or willing to follow the deputy's instructions. Counsel suggested that appellant's refusal to cooperate with Hagost was not indicative of anything.

from three officers; 2) Hagost changed his testimony from the preliminary hearing; 3) Hagost denied using excessive force on appellant during the preliminary hearing; 4) appellant described himself as a “witness” at the preliminary hearing and states the testimony as transcribed by the court reporter from that hearing did not correspond to what he heard the witnesses say; 5) appellant wants an audio recording of the preliminary hearing; 6) appellant asserts that he is Hispanic, the jurors were all White, and he therefore suffered discrimination; and 7) appellant asserts that one of his prior prison term enhancements occurred too far in the past to be applied to him.

Initially, we note the testimony of Hagost and Haislip at the preliminary hearing was largely consistent with their testimony at trial. There is no merit to appellant’s contention that Hagost changed his testimony at trial or to the assertion that Hagost denied using excessive force during the preliminary hearing. The trial court permitted the parties to ask Hagost questions at trial concerning his use of force to subdue and arrest appellant.

We reject appellant’s assertion that the preliminary hearing transcript is inaccurate and his request for an audio recording of that proceeding. Appellate counsel augmented the record to include a copy of the jury voir dire transcript, which we have reviewed. We have found no evidence in the record to support appellant’s assertion that the jury was biased against him.³ Finally, appellant was sentenced to prison in 2005, paroled, and sentenced to prison again in August of 2006. Appellant committed the instant offense in

³ The prosecutor made a claim of biased jury selection because defense counsel exercised preemptory challenges on four white male jurors. The trial court denied the prosecutor’s motion. No similar motion was made by defense counsel. The failure to raise a timely objection that an excusal was improper based on *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258 constitutes a waiver of the issue on appeal. (*People v. Anderson* (2001) 25 Cal.4th 543, 568; *People v. Overby* (2004) 124 Cal.App.4th 1237, 1244.)

January 2011. The five-year washout term would not apply to either of his convictions in 2005 or 2006.

After independent review of the record, we have concluded there are no reasonably arguable legal or factual issues.

DISPOSITION

The judgment is affirmed.