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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HAC NHU NGUYEN,

Defendant and Appellant.

G046229

(Super. Ct. No. 11CF0388)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William D. Claster, Judge. Reversed with directions.

Phillip I. Bronson, 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, William M. Wood and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In this appeal, both the Attorney General and appellant, Hac Nhu Nguyen, agree that the trial judge made a mistake when he extended appellant's guilty plea in a shoplifting case to his three prior prison terms for sentence enhancement purposes. The question before us is what to do about it. The Attorney General asks us to send the case back for further proceedings. Appellant wants us to strike the enhancement sentences.

The case cannot be sent back for "further proceedings," if by that phrase the Attorney General means retrying appellant's prior prison term enhancements. The appellant did not waive his right to a jury trial on these enhancements and did not plead guilty to them. The necessary findings to support the imposition of an enhanced sentence for prior prison terms were not made. Under these circumstances, the prosecution does not get to take another shot.

Accordingly we reverse the trial court's judgment to the extent it can be interpreted to find allegations of prior prison terms true or admitted and impose enhanced sentences for them. We also order the clerk to correct the minutes of the case to show a finding of "not true" as to the sentence enhancements. The abstract of judgment, however, came out right; it does not need to be corrected.

FACTS

On February 8, 2011, Walmart security apprehended appellant for shoplifting at a store in Orange. He was arrested and charged with one count of robbery, one count of commercial burglary, and, since he had lied to the arresting officer about his name and date of birth, one count of false representation to a police officer. The complaint also alleged that appellant had three prior felony convictions for which he served separate prison terms of more than one year. (See Pen. Code, § 667.5, subd. (b).)¹ He pleaded not guilty.

¹ All further statutory references are to the Penal Code.

The case went to trial in September 2011. The trial was not bifurcated between the charged offenses and the prior prison terms. At the close of evidence, the court granted the defense motion for judgment of acquittal on the robbery count. Appellant then pleaded guilty to the remaining two counts, for burglary and false representation.² The jury was excused, without making any findings.

Appellant was also before the court on a different case, one for residential burglary and criminal threats. The residential burglary case also included allegations regarding appellant's three prior prison terms. The case proceeded to a verdict, and the jury convicted appellant on both counts. The court then held one sentencing hearing for both cases, on November 18, 2011.

As to the residential burglary case, "[t]he court found, after the conclusion of the jury trial, that the three prior prison enhancements were applicable here" Appellant has admitted that he waived his right to a jury trial as to the effect of the prior prison terms on his sentence in that case, and it is not before us.

The judge then moved to the Walmart case, in which appellant had pleaded guilty to both of the counts remaining after the dismissal of the robbery count. "We also have an allegation that if accepted as true for purposes of that case, based on your pleading guilty, which are, again, the three prison priors" The court then proceeded to sentencing for both cases.

Appellant was sentenced to a total of seven years in state prison for both cases. Six of those years were imposed in the residential burglary case. The court added one year for one of the prior prison terms and struck the other two. It sentenced appellant to two years on the criminal threats count, to run concurrently with the burglary sentence. No one contests the propriety of that sentence.

² After the judge granted the motion on the robbery count, defense counsel stated, "In light of Your Honor's ruling, I have discussed with Mr. Nguyen, and he is willing to plead guilty to the remaining charges" The judge then clarified what "remaining charges" appellant was pleading to: "commercial burglary and a violation of . . . section 148.9 [false representation of identity to a peace officer]."

The sentence in the Walmart case, as recorded in the reporter’s transcript, is another matter. The court said it was imposing “a total sentence of six years on that case, which is going to run concurrent to the seven years we already talked about [for the residential burglary case].” It then explained that it usually gave a midterm sentence of two years for commercial burglary, but it was concerned about appellant’s “long history of [] criminal offenses” and his apparent aspirations to become a “professional burglar.” The court then stated, “I would add the prison priors on this one – the three prison priors on this one to the two years [*sic*] In any case, I’m going to run all these concurrent because I think seven years is an appropriate overall term, given the types of offenses you were involved in.”

The minutes in the Walmart case compounded the confusion. The entry made on the date of the sentencing hearing showed all three priors “charged and found true or admitted.” In fact, the priors were not admitted, and they were not separately found to be true. Appellant had pleaded guilty to the charged offenses, but not to the prior prison terms. The court imposed a one-year sentence enhancement for each of the three priors. Then the minutes stated, “State Prison sentence for all priors entered in error.” The correction, entered nunc pro tunc on November 21, 2011, again stated that all three priors were “charged and found true or admitted” and imposed one-year terms for each prior. The new entries added a stay of the punishment on all three. The original sentence of five years entered in the minutes was also corrected to two years (concurrent) at the same time.³

The abstract of judgment – one abstract for both cases – records a sentence of six years for the residential burglary, two years for the criminal threats, and two years for the Walmart shoplifting, the latter two sentences running concurrently with the

³ The sentence initially pronounced at the sentencing hearing was six years, not five.

former. The abstract shows a sentence enhancement of one year for one prior prison term and stays for two other priors.

DISCUSSION

The Attorney General and appellant agree that sentences for the prior prison terms were improperly imposed in this case. Section 1158 requires the trier of fact to find whether or not the appellant has suffered a previous conviction, unless the appellant admits it. If more than one previous conviction is charged, the trier of fact must make a separate finding for each one.⁴ Under section 1025, subdivision (b), if the appellant pleads not guilty, the jury that tries the main charges also tries the question of his or her prior convictions. If the appellant pleads guilty, a jury must be impaneled to try the prior conviction question, unless the appellant waives a jury. If the jury is waived, the court tries the question.⁵

A number of venerable authorities have held that a failure to make the specific findings required by section 1158 – in the absence of a waiver, a stipulation, or an admission by the appellant – is the equivalent of a “not true” finding. *People v. Eppinger* (1895) 109 Cal. 294, aptly illustrates the rule. There, the defendant was charged with passing a fictitious check and with a former conviction for petty larceny.

⁴ Section 1158 provides, “Whenever the fact of a previous conviction or another offense is charged in an accusatory pleading, and the defendant is found guilty of the offense with which he is charged, the jury, or the judge if a jury trial is waived, must unless the answer of the defendant admits such previous conviction, find whether or not he has suffered such previous conviction. The verdict or finding upon the charge of previous conviction may be: ‘We (or I) find the charge of previous conviction true’ or ‘We (or I) find the charge of previous conviction not true,’ according as the jury or the judge find that the defendant has or has not suffered such conviction. If more than one previous conviction is charged a separate finding must be made as to each.”

⁵ In *People v. Saunders* (1993) 5 Cal.4th 580, the defendant’s trial was bifurcated between the charged offenses and the priors. A jury returned verdicts on the charged offenses, but was discharged before making any findings on the prior convictions. (*Id.* at p. 586.) There was a dispute over whether the defendant had waived his right to a jury trial on the prior convictions, and ultimately the waiver was withdrawn. The court then impaneled another jury to hear the prior conviction evidence. On appeal, the defendant asserted that his subsequent conviction on the priors violated section 1025, because the same jury did not determine both the charged offenses and the prior convictions. (*Id.* at p. 587.) The reviewing court held he had forfeited his right to have the same jury decide all the issues by not objecting to the discharge of the first jury. (*Id.* at p. 591.)

In this case, however, the appellant definitely did not waive his right to a jury trial on this prior prison terms, and he is not complaining about the loss of his right to have the same jury hear the charged offense and the priors. Moreover, he did not change his mind about waiving his right to a jury trial, as did the defendant in *Saunders*, after the jury was discharged.

The jury found him guilty as charged, but did not make a specific finding about the prior conviction. The Court held, “It was unquestionably error for the jury to have failed to find upon the issue. The error being shown, the injury will be presumed, unless the contrary is clearly made to appear. . . . [¶] The verdict rendered should be treated as a finding against the defendant on the crime charged, and in favor of the defendant upon the question of prior conviction.” (*Id.* at pp. 297-298; see also *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1440; *People v. Molina* (1977) 74 Cal.App.3d 544, 550; *People v. Garcia* (1970) 4 Cal.App.3d 904, 906; *People v. Huffman* (1967) 248 Cal.App.2d 260, 261; *In re Daniels* (1931) 119 Cal.App. 350, 351; *In re Hall* (1927) 88 Cal.App. 212, 215 [“absence of any finding of prior conviction leaves the principle verdict standing alone as a conviction upon a first offense”]; *People v. Franklin* (1918) 36 Cal.App. 23, 24; *People v. Dueber* (1917) 34 Cal.App. 686, 690.)

In this case, appellant did not plead guilty to the priors, and the jury (the trier of fact) did not make any findings about them. Appellant did not waive his right to a jury trial on the priors or admit them. In addition, it does not appear from the record that the court itself made any finding about the validity of the prior prison term allegations. (See *People v. Gutierrez, supra*, 14 Cal.App.4th at p. 1440 [record fails to show finding]; see also *In re Candelario* (1970) 3 Cal.3d 702, 706-707 [record must include pronouncement of guilt for prior offense]; *In re Myetta* (1930) 106 Cal.App. 191, 192.) Therefore, the court could not impose sentences for them, even if the sentences were stayed. So the Attorney General’s concession on this point is well made.⁶

⁶ Appellant argues that offensive collateral estoppel cannot be used to import the findings from the residential burglary case into the Walmart case, an argument the Attorney General does not dispute. In criminal cases generally, “offensive use of collateral estoppel has been limited to alienage and evidence suppression issues.” (*People v. Burns* (2011) 198 Cal.App.4th 726, 731.) Offensive collateral estoppel would not seem to apply here in any event because the Walmart matter was tried first, in September 2011. The residential burglary case did not come to trial until the following month. Thus the first element of collateral estoppel – “a claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding” (*ibid.*) – is not present. Of the two cases, the Walmart case is the “prior proceeding,” and the prior prison terms were not litigated during that proceeding.

Appellant's reply brief raises *People v. Monge* (1997) 16 Cal.4th 826 (*Monge*) to support his argument that his case should not be sent back for retrial and resentencing. In *Monge*, the defendant was charged with drug-related offenses and a prior serious felony conviction, making him eligible for a "Three-Strikes" sentence enhancement. He waived his right to a jury trial on the prior conviction, and the court found him guilty on that charge. (*Id.* at pp. 830-831.) On appeal, the reviewing court affirmed the underlying conviction on the drug charges, but reversed on the prior conviction for insufficient evidence. The appellate court also held that the issue could not be retried, because of the prohibition against double jeopardy. Thus, the issue before the Supreme Court was whether "the state and federal prohibitions against double jeopardy apply to a proceeding, in a noncapital case, to determine the truth of a prior serious felony allegation." (*Id.* at p. 831.)

The Supreme Court held that the prohibition against double jeopardy in the state and the federal constitutions did not prevent a retrial of sentence enhancements in a noncapital case. (*Monge, supra*, 16 Cal.4th at p. 845.) The court specifically noted, however, that it expressed no opinion about "whether section 1025 (or some other applicable provision) might in some cases bar retrial of the prior conviction allegation as a statutory matter irrespective of constitutional constraints." (*Ibid.*)

This case does not rest on double jeopardy; instead, it involves the application of a statute "irrespective of constitutional constraints." That is, regardless of the protection afforded defendants by the prohibition against double jeopardy, the Legislature has mandated (in section 1158) that prior convictions be separately tried and found to be true or not true. When no explicit finding has been made, as happened in this case, case law interpreting the statute has long held such an omission constitutes a "not true" finding. (See, e.g., *People v. Eppinger, supra*, 109 Cal. at pp. 297-298.) Under section 1158, there is no mulligan.

To the extent that the judgment pronounced at the sentencing hearing includes enhanced sentences in the Walmart case, it must be reversed. The minutes should also be corrected to show a finding of “not true” for the three prison priors. The abstract of judgment, however, does not reflect any sentencing for any prior prison terms in this case. The court unquestionably enhanced appellant’s sentence in the residential burglary case based on one of his priors, and that appears to be what is recorded on the abstract of judgment.⁷ For the Walmart shoplifting, the abstract of judgment shows a sentence of to two years, notwithstanding the court’s initial remark at the sentencing hearing that he was sentencing appellant to six years. The abstract does not show any sentence enhancement connected with shoplifting guilty plea.

“An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court’s oral judgment and may not add to or modify the judgment it purports to digest or summarize.” (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Nevertheless, an abstract of judgment in a criminal case is an order sending the appellant to prison; it imposes a duty on the warden to carry out the judgment. (*People v. Hong* (1998) 64 Cal.App.4th 1071, 1076.) Usually, when an abstract of judgment is incorrect, it is because it does not match the oral judgment, which is correct. Appellate courts routinely correct the abstracts to conform to the oral ruling. (*People v. Mitchell, supra*, 26 Cal.4th at pp. 186-187.) In this case, however, the abstract of judgment is correct as to the prior prison terms; the oral judgment is wrong. The abstract of judgment does not need to be modified as to the sentencing in this case.

DISPOSITION

The judgment pronounced at the sentencing hearing, to the extent that it includes enhanced sentences for appellant’s prior prison terms in this matter, is reversed

⁷ The residential burglary case is also on appeal to this court, and we express no opinion about the issues in that appeal.

as to those enhanced sentences. The clerk is directed to correct the minutes to reflect a finding of “not true” for the three prior prison term allegations. The abstract of judgment as it relates to this case remains unchanged, and appellant’s sentence in this case is not affected.

BEDSWORTH, J.

WE CONCUR:

O’LEARY, P. J.

RYLAARSDAM, J.