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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALAN LANCE JEKYLL,

Defendant and Appellant.

H042234

(Santa Clara County
Super. Ct. No. B1470543)

I. INTRODUCTION

Defendant Alan Lance Jekyll pleaded no contest to resisting or deterring an officer (former Pen. Code, § 69)¹ and admitted that he had a prior strike (§§ 667, subds. (b)-(i), 1170.12). During sentencing, the trial court stated that four prior prison terms (§ 667.5, subd. (b)) and the punishment for those terms were stricken. The court sentenced defendant to four years in prison.

On appeal, defendant contends that there were no prison priors alleged or proven in his case, and therefore the trial court had no authority to take any sentencing action regarding prior prison term enhancements. He requests that all references to prison priors be stricken from the sentencing minutes and the abstract of judgment.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

For reasons that we will explain, we will order the sentencing minutes and the abstract of judgment modified to delete any reference to prior prison term enhancements, and we will affirm the judgment as so modified.

II. FACTUAL AND PROCEDURAL BACKGROUND

The police obtained a warrant for defendant and went to his home.² Defendant pulled away from officers, kicked his legs, and violently flailed about. He refused to follow officers' commands and continued to fight before being arrested.

On January 15, 2014, defendant was charged by first amended complaint with resisting or deterring an officer (former § 69; count 1) and making criminal threats (§ 422; count 2). The amended complaint further alleged that defendant had a prior strike (§§ 667, subds. (b)-(i), 1170.12).

On February 28, 2014, a second amended complaint was filed which added allegations that defendant had three additional prior strikes and, relevant to this appeal, that he had served four prior prison terms (§ 667.5, subd. (b)).

Significantly, on March 10, 2014, the second amended complaint was withdrawn and the first amended complaint was deemed the charging document. Defendant pleaded no contest to resisting or deterring an officer and admitted that he had a prior strike, with the understanding that he would receive four years "top" and that he would be filing a *Romero* motion.³ The remaining count for making criminal threats was submitted for dismissal at the time of sentencing.

The probation report prepared for the sentencing hearing indicated that four prison priors (§ 667.5, subd. (b)) had been alleged and recommended that the court "[s]trike [the] additional punish[ment] [p]urs[uant] to [section] 1385."

² As defendant was convicted by plea, the summary of his offense is taken from the probation report, which was based on a report by the Sunnyvale Police Department.

³ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

On September 4, 2014, the trial court denied defendant's *Romero* motion and sentenced him to prison for four years (double the middle term) for resisting or deterring an officer. The remaining count was dismissed. The court, relying on the probation report, also stated: "The four prison priors under [section] 667.5[, subdivision] (b) are stricken. The punishment for those is stricken pursuant to [section] 1385." The minutes of the sentencing hearing and the abstract of judgment reflect the court's oral pronouncement that the punishment for four prison priors was stricken pursuant to section 1385.

III. DISCUSSION

Defendant contends that there were no prison priors (§ 667.5, subd. (b)) alleged in the first amended complaint, which was the operative charging document, and that no prison priors were proven. Because prison priors were never alleged or proven, defendant argues that the trial court had no authority to take any action on a prison prior and that the court's action in striking punishment for prison priors was an unauthorized sentence. Defendant requests that all references to the prison priors be stricken from the sentencing minutes and the abstract of judgment.

The Attorney General concedes that the trial court improperly struck the punishment for four prison priors that were not alleged in the operative complaint or proven. We find the concession appropriate.

Section 667.5, subdivision (b) generally provides for a one-year enhancement for "each prior separate prison term or county jail term . . . for any felony." However, section 667.5 also provides that "[t]he additional penalties provided for prior prison terms shall not be imposed unless they are charged and admitted or found true in the action for the new offense." (*Id.*, subd. (d); see also § 1170.1, subd. (e).) The California Supreme Court has stated that, "in addition to the statutory requirements that enhancement provisions be pleaded and proven, a defendant has a cognizable due process right to fair

notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes.” (*People v. Mancebo* (2002) 27 Cal.4th 735, 747.)

In this case, the trial court’s exercise of its power under section 1385 to strike the prior prison terms, or punishment for those terms, presumes that punishment could have been imposed under section 667.5, subdivision (b). However, the operative charging document, the first amended complaint filed January 15, 2014, did not contain any allegation that defendant had served a prior prison term. The record also lacks any indication that defendant admitted that he had served a prior prison term, or that any such an allegation was found true. In view of the record, no punishment could be imposed on defendant under section 667.5, subdivision (b), and consequently there was no basis for the court to exercise its power under section 1385 to purportedly strike the prior prison terms or punishment for those terms. We conclude that the references to prison priors (§ 667.5, subd. (b)) in the September 4, 2014 sentencing minutes and in the abstract of judgment must be deleted, because such references incorrectly indicate that prison priors were alleged, proven, and punishable.

IV. DISPOSITION

The clerk of the superior court is directed to modify the abstract to delete any reference to prior prison term enhancements (Pen. Code, § 667.5, subd. (b)) and to forward the modified abstract of judgment to the Department of Corrections and Rehabilitation. The clerk of the superior court is also ordered to correct the minutes of September 4, 2014 by deleting any reference to prior prison term enhancements (Pen. Code, § 667.5, subd. (b)). As so modified, the judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.