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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. WALTER SHANE LANGSTON, Defendant and Appellant.	C037845 (Sup.Ct. No. 00F09092)

APPEAL from a judgment of the Superior Court of Sacramento County, Michael Virga, J. Affirmed as modified.

Robert D.McGhie, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General and Janis Shank McClean, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Walter Shane Langston was convicted by a jury of first degree burglary (Pen. Code, §§ 459, 460, subd. (a);

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts II, III, IV and V.

further undesignated statutory references are to the Penal Code) and receiving stolen property (§ 496, subd. (a)). The trial court found defendant had served three prior prison terms within the meaning of section 667.5, subdivision (b). The trial court imposed the upper term of six years for the burglary, the upper term of three years for the receipt of stolen property to be stayed pursuant to section 654, and three consecutive one-year terms for the prior prison terms with one of those terms stayed pursuant to section 667.5, subdivisions (d) and (g), for an aggregate prison term of eight years.

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) After a review of the record, we directed counsel to submit briefing on whether defendant's prior prison term served for conviction of section 4530, subdivision (b) [escape] constitutes a separately served prison term within the meaning of section 667.5, subdivision (b), and if so, whether the trial court had the authority to stay the one-year enhancement after having found the prior prison term allegation true.

Defendant also filed a supplemental brief contending the trial court: (1) violated his due process rights by allowing the information to be amended to add allegations of prior felony convictions; (2) improperly made dual use of his prior convictions to impose both upper term and consecutive sentences;

(3) failed to instruct the jury on perjury; (4) did not find his 1999 prior conviction true and based its finding of his 1992 prior conviction true on insufficient evidence.

We find the issues raised in defendant's supplemental brief lack merit. We conclude, however, that the trial court improperly found true the one-year prior prison term enhancement for defendant's 1994 escape conviction. Therefore, we shall modify the judgment to strike the enhancement.

DISCUSSION

I

Stay of Enhancement for Defendant's Prior Prison Term

The record indicates that the trial court found defendant had served three prior prison terms within the meaning of section 667.5, subdivision (b). Although the court imposed the one-year enhancements for defendant's 1992 and 1999 prior prison terms, it stayed the one-year enhancement as to the prior prison term for defendant's 1994 section 4530, subdivision (b) [escape], conviction "pursuant to section 667.5 [subdivisions (d) and (g)]." It stayed the enhancement because, while it found it was "a legitimate conviction in that he was convicted of the offense on the date indicated on the count . . . indicated" and that he did serve the state prison sentence, it was unclear whether the term was "separately served."

Section 667.5, subdivision (b) provides for an enhancement of the prison term for a new offense of one year for each prior separate prison term served for any felony, except those previous prison terms unavailable for enhancement by operation

of the five-year "washout" period. Once the prior prison term is found true, the imposition of the additional one-year term is mandatory unless stricken. (See *People v. Jones* (1992) 8 Cal.App.4th 756, 758; *People v. Eberhardt* (1986) 186 Cal.App.3d 1112, 1122-1123.) Thus, once the prior prison term is found true within the meaning of section 667.5, subdivision (b), the trial court may not stay the one-year enhancement.

The question presented in this case is whether defendant's prison term for nonviolent escape from prison is a separate prison term within the meaning of section 667.5, subdivision (b). For the reasons that follow, we conclude it is not.

Subdivisions (b), (d) and (g) of section 667.5 require that, in order to qualify for the enhancement, the prison terms must be served separately. Specifically, section 667.5, subdivision (d), provides: "For the purposes of this section, the defendant shall be deemed to remain in prison custody for an offense until the official discharge from custody or until release on parole, whichever first occurs, including any time during which the defendant remains subject to reimprisonment for escape from custody or is reimprisoned on revocation of parole. The 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."

Subdivision (g) of section 667.5 provides: "A prior separate prison term for the purposes of this section shall mean a continuous completed period of prison incarceration imposed for the particular offense alone or in combination with

concurrent or consecutive sentences for other crimes, including any reimprisonment on revocation of parole which is not accompanied by a new commitment to prison, *and including any reimprisonment after an escape from incarceration*." (Italics added.)

The plain language of subdivision (g) indicates that after a defendant is committed to state prison, additional concurrent or consecutive sentences imposed in the same or subsequent proceedings are deemed to be part of the same prison term, *including* any reimprisonment after an escape from incarceration. (See *People v. Burke* (1980) 102 Cal.App.3d 932, 943-944.) The statute does not distinguish between reimprisonments after escape which are and are not accompanied by a new commitment. The plain language of subdivision (g) is made even more clear upon consideration of its history.

As originally enacted in Statutes 1976, chapter 1139, section 268, section 667.5, subdivision (g) read as follows: "A continuous completed period of prison incarceration imposed for the particular offense alone or in combination with sentences for other counts or sentences to be served concurrently or consecutively therewith including any reimprisonment on revocation of parole *or new commitment for escape from such incarceration* shall be deemed a single prior separate term for the purposes of this section." (Italics added.) The Legislature then amended section 667.5, subdivision (g) in Statutes 1977, chapter 165, section 13, to its current form, to differentiate between a mere revocation of parole and the

revocation of parole which is accompanied by a new commitment. (See *In re Kelly* (1983) 33 Cal.3d 267, 271.) The purpose of the amendment was to provide for an enhancement when a prisoner is returned to prison on revocation of parole and, at the same time, is incarcerated for a new offense. (*Ibid.*)

As noted by our Supreme Court, in contrast to the provision regarding parole revocation, "the 1977 amendment did not intrinsically change the phrase referring to reimprisonment after escape, which now reads: '. . . and including any reimprisonment after escape from such incarceration.' The only difference is that this phrase is no longer interrupted by the parole revocation wording. *There is no qualifying phrase such as 'which is not accompanied by a new prison commitment to prison.'* . . . It is obvious . . . that the Legislature intended to differentiate between the escape and parole situations (and amend one and not the other)." (*In re Kelly, supra,* 33 Cal.3d at p. 271, fn. 4, italics added.) Thereafter, in explaining the application of subdivision (g) surrounding a parole revocation, the court commented that, '[I]f the person was returned to prison to finish term, for a parole violation or with a new commitment for escape, the period will count as a single prior prison term." (*Id.* at p. 276.) While much of the relevant language in *In re Kelly* is dicta, we find it well reasoned and persuasive. (See *Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266, 297 [dicta of California Supreme Court carries persuasive weight and should be followed,

especially where it demonstrates a thorough analysis of the issue or reflects compelling logic].)[1]

Other courts have relied upon section 1170.1, subdivision (c), to reach the opposite conclusion. In *People v. Carr* (1988) 204 Cal.App.3d 774, the court concluded that "[a]ny new prison sentence imposed on a new escape conviction would not constitute reimprisonment within the meaning of [section 667.5] subdivision (g)." (*Id.* at p. 780, fn. 8.) In reaching that conclusion, the court relied on section 1170.1, subdivision (c), which provides in part: "In the case of any person convicted of one or more felonies committed while the person is confined in a state prison or is subject to reimprisonment for escape from custody and the law either requires the terms to be served consecutively or the court imposes consecutive terms, the term of imprisonment for all the convictions that the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison." (See also *People v. Carr, supra,* 204 Cal.App.3d at pp. 780-781.) Thus, the *Carr* court concluded the term is, therefore a separate, "'continuous completed'" term, which is available for enhancement under section 667.5. (*Id.* at pp. 780-781.) The court in *People v. White* (1988) 202 Cal.App.3d 862, at pages 867-871 applied similar reasoning. However, neither *Carr* nor *White* is mentioned

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[1] Despite our invitation, the People inexplicably elected not to address *In re Kelly, supra,* 33 Cal.3d 267 in their supplemental briefing. At oral argument, the People simply dismissed it as dicta.

In re Kelly, *supra*, 33 Cal.3d 267, and neither undertook an analysis of the history of subdivision (g).

We recognize the apparent dichotomy between the definition of a separately served term for escape under sections 667.5 and 1170.1. Escape from prison, whether or not by force or violence, results by law in the imposition of a consecutive sentence. (§ 4530, subds. (a) and (b).) Statutorily, one convicted of escape from prison in violation of section 4530 comes within the express provisions of section 1170.1, subdivision (c), "which requires the term for escape be treated as a *separate and additional* term to be served consecutive to the remainder of the term under which the person convicted was already confined." (*People v. Galliher* (1981) 120 Cal.App.3d 149, 153, original italics [referencing former § 1170.1, subdivision (b) which was redesignated subdivision (c) by the 1982 amendment].) However, "[t]he true legislative intent in enacting [section 1170.1,] subdivision (b) applicable to crimes committed by state prison inmates, is to require that they serve their full term for such conviction upon the completion of their term for other offenses for which they were convicted. The Legislature has thus made clear that a person who commits offenses while in prison is not entitled to the usual one-third of the middle term for the consecutively imposed sentences." (*In re Sims* (1981) 117 Cal.App.3d 309, 314.) Unlike section 667.5, subdivision (g), section 1170.1 was not specifically enacted to assist in the interpretation of separately served prison terms for purposes of section 667.5. Moreover, since the

enhancement must be found true within the meaning of section 667.5 and subdivision (g) specifically addresses the definition of a prior separate prison term for reimprisonment after an escape, we believe the express language in section 667.5 must prevail.

We do not find that our conclusion contradicts rational Legislative policy, despite the contrary reasoning in *People v. White, supra,* 202 Cal.App.3d at pages 870-871. In deciding that reimprisonment after conviction for escape fell within the provisions for enhancement under section 667.5, subdivision (b), the *White* court, reasoned: "[W]e believe our conclusion is consistent with the legislative intent to provide additional punishment for the recidivist, regardless of whether he commits a new felony inside prison or on the outside. Society is at a greater risk from a hardened criminal and the protection of society warrants harsher punishment for the habitual offender. [Citation.] It would indeed be an unfortunate anomaly if the defendant who escaped one day before his sentence was completed could avoid the application of section 667.5(b) because he was serving a prison term while his confederate who waited until his lawful release two days later before committing a new felony was subject to increased punishment for the prior convictions. To treat the in-prison recidivist more leniently than the out-of-prison recidivist is contrary to the legislative purpose underlying increased punishment for the habitual offender. [Citation.]" (*Id.* at pp. 870-871.) However, as recognized by

our Supreme Court in *People v. Tenner* (1993) 6 Cal.4th 559 at page 567, footnote 3, "it would not necessarily be irrational for the Legislature to devise separate penalties for the crime of escape (see Pen. Code, §§ 4530, 4532), while reserving the section 667.5 enhancement for felons who have completed a term of imprisonment but demonstrate their failure to absorb the penal message by committing further crimes."

We conclude that defendant's 1994 prior prison term for nonviolent escape was not "separately served" within the meaning of section 667.5 and, consequently, must be stricken from the judgment.

II

Amendment of Information

Defendant contends that his due process rights were violated when the court allowed the information to be amended after his preliminary hearing to add allegations of prior felony convictions within the meaning of section 667.5, subdivision (b). He argues the amendment violated established state procedures. (*Ibid.*) We disagree.

Section 969a specifically provides: "Whenever it shall be discovered that a pending indictment or information does not charge all prior felonies of which the defendant has been convicted either in this State or elsewhere, said indictment or information may be forthwith amended to charge such prior conviction or convictions, and if such amendment is made it shall be made upon order of the court, . . ." Such amendment may be made at any time prior to the discharge of the jury.

(*People v. Valladoli* (1996) 13 Cal.4th 590, 607-608; *Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, 150.)

Thus, the amendment of the information to add allegations of prior felony convictions did not violate state procedural rules or due process.

III

Dual Use of Facts in Sentencing

Defendant next contends the trial court improperly used the facts of his prior convictions and that they were numerous and increasing in seriousness to impose both the upper term for his burglary conviction and consecutive sentences for his prior convictions. (See Cal. Rules of Court, rule 4.421.) Defendant is mistaken.

While it is true that section 1170 prohibits the dual use of facts in sentencing by proscribing the use of the same fact to both aggravate the base term and impose consecutive sentences, that is not what happened in the instant case. (*People v. Lawson* (1980) 107 Cal.App.3d 748, 752.) The trial court used the number and increasing seriousness of defendant's prior convictions as one of several circumstances in aggravation justifying the imposition of the upper term. It did not, however, use that fact to impose consecutive sentences on defendant's prior felony convictions. Those sentence enhancements were imposed consecutively pursuant to statutory mandate.

Section 667.5, subdivision (b) requires the "[e]nhancement of prison terms for new offenses because of prior prison terms

shall be imposed as follows: [¶] . . . [¶] (b) Except where subdivision (a) applies, where the new offense is any felony for which a prison sentence is imposed, in addition *and consecutive* to any other prison terms therefor, the court *shall* impose a one-year term for each prior separate prison term served for any felony; . . ." (Italics added.) (See also *People v. Gulbrandsen* (1989) 209 Cal.App.3d 1547, 1552-1553 [section 667.5 enhancement must run consecutively].)

Thus, the trial court did not improperly make dual use of facts in sentencing defendant to both the upper term and to consecutive terms for his prior prison terms.

IV

Instruction on Perjury

Defendant next contends that the trial court failed to instruct the jury on perjury. We find no error.

CALJIC Nos. 7.20 through 7.25, instructing on perjury, are used when the defendant is charged with the offense of perjury. Defendant, here, was not charged with perjury. Thus, the perjury instructions would not have been appropriate.

To the extent defendant is arguing that the jury should have been instructed that the victim in this case had previously been convicted of perjury, he is factually incorrect. Although the record indicates that the parties originally believed the victim had been convicted of felony perjury under section 118, it was later revealed that she had pled no contest to misdemeanor welfare fraud (Welf. & Inst. Code, § 10483) and the perjury charge had been dismissed.

The welfare fraud incident was brought out by counsel during the victim's testimony and the jury was instructed with CALJIC No. 2.23.1, explaining that the victim's prior commission of a misdemeanor may be taken into consideration for the purpose of her believability. Therefore, we find the jury was properly instructed on the matter.

V

Proof of Prior Convictions

Finally, defendant contends the trial court did not find his 1999 prior conviction true beyond a reasonable doubt and that there was insufficient evidence that he was sent to prison for his 1992 prior conviction. Both of these claims lack merit.

The trial court specifically found defendant's 1992 and 1999 prior convictions to be true within the meaning of section 667.5, subdivision (b). There was also a certified copy of an abstract of judgment reflecting defendant was committed to state prison, to be remanded "forthwith," upon his 1992 conviction. Thus, the true finding on the 1992 prior prison term allegation is supported by substantial evidence. (See *People v. Bradley* (1970) 3 Cal.App.3d 273, 276; *People v. Spearman* (1969) 1 Cal.App.3d 898, 905.) We reject defendant's contentions to the contrary.

Having undertaken an examination of the entire record, we find no other arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is modified to strike the true finding and enhancement for defendant's 1994 escape conviction. As so modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect this modification, and forward a certified copy of the amended abstract to the Department of Corrections.

MORRISON, J.

We concur:

SIMS, Acting P. J.

DAVIS, J.