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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

KEITH RENE MARCHAND,

Defendant and Appellant.

2d Crim. No. B180931
(Super. Ct. No. BA219176)
(Los Angeles County)

In a prior appeal, we affirmed the conviction of appellant, Keith Rene Marchand, for unlawfully driving and taking a vehicle, and evading an officer in disregard for the safety of others. (Veh. Code, §§ 2800.2, subd. (a), 10851, subd. (a).) We remanded the matter for a determination of whether his prior Nevada robbery conviction qualifies as a "strike" under California's Three Strikes law. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) The trial court found that the Nevada robbery qualifies as a strike and resentenced Marchand accordingly. Marchand appeals.

Marchand contends the prior Nevada robbery does not qualify as a strike in California because the crime of robbery in Nevada does not require three of the elements necessary to be convicted of robbery in California: 1) specific intent to permanently deprive the victim of his property, 2) creating immediate fear in the victim, and 3) asportation of the goods. The trial court found that Marchand's conduct in committing

the Nevada robbery would constitute robbery in California. Substantial evidence supports the court's findings.

Marchand also contends that the court improperly sentenced him to the upper term without a jury. The United States Supreme Court granted Marchand's petition for writ of certiorari, vacated the judgment, and remanded the case for further consideration in light of *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856] overruling *People v. Black* (2005) 35 Cal.4th 1238 in part.¹ We once again affirm, but remand for resentencing in light of *Cunningham*.

FACTS and PROCEDURAL HISTORY

Marchand was charged with various Vehicle Code offenses, and the special allegation he suffered a "strike" within the meaning of the Three Strikes law due to his prior Nevada robbery conviction. Marchand was convicted of the Vehicle Code offenses and admitted he suffered the strike. The trial court found a factual basis for the admission and sentenced Marchand to six years – double the upper term for evading an officer – based on the prior strike conviction. (Pen. Code, § 667, subs. (b)-(i), esp. (e)(1).)

On appeal, we affirmed his conviction on the Vehicle Code offenses, but remanded the matter to the trial court to determine whether the prior Nevada robbery conviction would constitute robbery in California so as to support sentencing based on the admitted strike.

Marchand failed to appear at his arraignment on the Nevada robbery charge, which had been set for March 4, 1992. A bench warrant was issued for his arrest. On November 13, 1995, Marchand was arrested in Los Angeles and extradited to Nevada. Marchand pled guilty "to the crime of ROBBERY (Felony), committed on the 27th day of January, 1992, in violation of NRS 200.380" The Nevada court

¹ We take judicial notice of appellant's petition for writ of certiorari, and note that the only issue addressed therein is "Whether California's Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments."

sentenced him to 5 years in prison, ordered him to pay restitution in the amount of \$2,878.35, and entered judgment.

The trial court considered the certified record of the Nevada conviction, including the criminal complaint, the bench warrant, and the judgment of conviction for the robbery. Based on these documents, the trial court concluded that Marchand's conduct would constitute the crime of robbery in California. The court found that he had the specific intent at the time of the robbery to permanently deprive the victim of the money he took by threat of force. The court relied on the fact that he fled Nevada and several years passed before he was arrested on the arrest warrant in Los Angeles. Furthermore, the court noted, after he pled guilty to the robbery, the Nevada court ordered him to pay restitution.

DISCUSSION

"A prior conviction for purposes of the three strikes law includes 'A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of [Penal Code] Section 667.5 or subdivision (c) of [Penal Code] Section 1192.7.'" (*People v. Laino* (2004) 32 Cal.4th 878, 895; *People v. Avery* (2002) 27 Cal.4th 49, 53; Pen. Code, §§ 667, subd. (d)(2), 1192.7, subd. (c).) Penal Code section 667.5, subdivision (c)(9) provides, in pertinent part, that for the purposes of the section a "'violent felony' shall mean any of the following: . . . [¶] (9) Any robbery."

In California, "[r]obbery is defined as the taking of personal property of some value, however slight, from a person or the person's immediate presence by means of force or fear, *with the intent to permanently deprive* the person of the property." (*People v. Marshall* (1997) 15 Cal.4th 1, 34, italics added; *People v. Harris* (1994) 9 Cal.4th 407, 415; Pen. Code, § 211.) At the time of Marchand's conviction, the Nevada statute read: "[r]obbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of

injury, immediate *or future*, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. A taking is by means of force or fear if force or fear is used" (Nev. Stats., § 200.380, subd. (1), italics added; *Litteral v. State* (1981) 97 Nev. 503, 505-508 [634 P.2d 1226], disapproved on other grounds in *Talancon v. State* (1986) 102 Nev. 294, 301 [721 P.2d 764].)

Marchand contends the Nevada conviction for robbery does not qualify as a strike in California because Nevada's robbery statute does not require three of the elements needed to sustain a robbery conviction in California: 1) fear of *present* harm, 2) asportation of the property taken, and 3) *specific intent to permanently deprive* the victim of the property taken. (*Litteral v. State, supra*, 634 P.2d 1226.)

In determining whether a prior foreign conviction constitutes a strike, the trial court is not limited to matters necessarily established by the prior judgment, or to the least adjudicated elements of the crime. Instead, the court may review the entire record to ascertain whether the defendant's *conduct* in committing the foreign crime would qualify as a strike conviction in California, regardless of the differences between the statutory definitions of the crime. (*People v. Woodell* (1998) 17 Cal.4th 448, 452-455; accord, *People v. Avery, supra*, 27 Cal.4th at p. 53; *People v. Riel* (2000) 22 Cal.4th 1153, 1204-1205; Pen. Code, §§ 667, subd. (d)(2), 1170.12, subd. (b)(2); and see *People v. Guerrero* (1988) 44 Cal.3d 343, 355 [burglary of a residence]; Evid. Code, §§ 452, subd. (d), 453 [on judicial notice of official court records].) In doing so, the court may consider the allegations set forth in the foreign accusatory pleading and the defendant's plea of guilty or nolo contendere to those charges. (*Guerrero, supra*, at pp. 345, 356; *People v. Laino, supra*, 32 Cal.4th at pp. 895-896 [guilty plea constitutes a conviction].)

The trial court found that because Marchand absconded for three years, pled guilty to the Nevada robbery, and was ordered to pay restitution, there is no reasonable doubt that he had the specific intent to permanently deprive the victim of his money at the time he committed the offense, and that he did so by force or fear. (See *People v. Marshall, supra*, 15 Cal.4th at p. 34 [requisite intent at time of theft].) The

court was also "convinced beyond a reasonable doubt that when that property was taken, it was taken to permanently deprive [the victim of his property.]" (*People v. Avery, supra*, 27 Cal.4th at pp. 54-57; and see *People v. Riel, supra*, 22 Cal.4th at pp. 1205-1206.)

Substantial evidence supports these factual findings. Marchand pled guilty to the robbery committed on January 27, 1992. The only charge to which his plea relates is count V which states, in pertinent part, that he "did, on or about January 27, 1992, then and there willfully, unlawfully, and feloniously take personal property, to-wit: lawful money of the United States, from the person of JEFFREY JOHNSRUDE, or in his presence, . . . said Defendant using a deadly weapon, to-wit: a firearm, during the commission of said crime." (*People v. Guerrero, supra*, 44 Cal.3d at pp. 345, 356 [courts may consider entire record including foreign accusatory pleading and defendant's plea]; see also *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1526-1527, 1531.) Thus, the record establishes that Marchand committed the crime by the present use of force or fear of force. The Nevada court's minutes and its bench warrant of March 10, 1992, show that nearly three years elapsed between his arraignment on the charges and his arrest on the warrant in Los Angeles on November 13, 1995. Marchand's act of absconding from the state of Nevada establishes both asportation of the property taken, and his specific intent to permanently deprive the victim of that property. (See *People v. Avery, supra*, 27 Cal.4th at pp. 54-57.) After he was extradited, Marchand pled guilty to one count of robbery, and the court ordered restitution.

We conclude that the Nevada conviction constitutes a strike for purposes of sentencing under the Three Strikes law. (See *People v. Woodell, supra*, 17 Cal.4th at pp. 460-461 [appellate opinion logically showed what trial court found as facts, based on court documents, to establish personal use of a weapon, the basis for a qualifying theory to support a strike].)

Upper Term Sentence

Marchand contends the trial court should have reduced his sentence to the middle term of two years because that is the maximum sentence which could have been

imposed without additional findings by the original jury. He contends that the sentence was based on sentencing factors not tried by a jury in violation of his Sixth Amendment right to jury trial and due process. Subsequent to the filing of the case, the United States Supreme Court invalidated the portion of California's Determinate Sentencing Law that permits a judge to impose an upper term sentence based on aggravating sentencing factors that are not determined by a jury. (*Cunningham v. California, supra*, 127 S.Ct. 856.) The United States Supreme Court granted Marchand's petition for certiorari and remanded the matter for further consideration in light of *Cunningham*.

Accordingly, we vacate the sentence and remand for resentencing consistent with *Cunningham*. The trial court is directed to prepare an amended abstract of judgment in accordance with this opinion and deliver it to the Department of Corrections. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Paul M. Enright, Judge

Superior Court County of Los Angeles

Keith R. Marchand, in pro. per.; Sally P. Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

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