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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

A113349

v.

**(Napa County
Super. Ct. No. CR125813)**

EDWARD WILLIAM WESTPHAL,

Defendant and Appellant.

_____ /

Edward William Westphal appeals from a judgment entered after a jury convicted him of driving under the influence, (Veh. Code, § 23152, subd. (a))¹ driving with a blood alcohol level above 0.08 percent, (§ 23152, subd. (b)) and driving with a license that has been suspended for a prior driving under the influence offense. (§ 14601.2, subd. (a).) He contends (1) an enhancement that was found by the jurors to be true is not supported by substantial evidence, and (2) the court erred when imposing a fine. We agree a fine was imposed incorrectly and order the appropriate modification. In all other respects, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts of the underlying crime are not relevant to this appeal. In essence, on September 24, 2005, near 3:00 a.m., police officers stopped appellant after they saw him

¹ Unless otherwise indicated, all further section references will be to the Vehicle Code.

drive his car into the oncoming lane. Appellant had a suspended license. He smelled of alcohol and was unsteady on his feet. He performed poorly on field sobriety tests, and had a blood-alcohol level of .177 percent. The officers arrested appellant.

Based on these facts, an information was filed charging appellant with the offenses described above. As is relevant, the first two counts were enhanced by the allegation that appellant had a prior felony conviction for driving under the influence. (§ 23550.5, subd. (a)).

The case was tried to a jury that convicted appellant on all counts and found the enhancements to be true. Subsequently, the court sentenced appellant to four years in prison.

II. DISCUSSION

A. Sufficiency of the Evidence

Appellant contends the jury's finding that he had a prior felony conviction for driving under the influence is not supported by substantial evidence.

First time offenses of driving under the influence and driving with a blood-alcohol level of above 0.08 percent are punished as misdemeanors. (§ 23536, subd. (a).)² However, each offense can be punished as a felony if it is committed within 10 years of a prior violation that was punished as a felony. Specifically, section 23550.5, subdivision (a) states, "A person is guilty of a public offense, punishable by imprisonment in the state prison . . . if that person is convicted of a violation of Section 23152 . . . and the offense occurred within 10 years of any of the following: [¶] (1) A prior violation of Section 23152 that was punished as a felony"

Here, the prosecution alleged that appellant's driving under the influence and driving with a blood-alcohol level of above 0.08 percent offenses should be punished as felonies because in December 1995, appellant had been convicted in El Dorado County of driving under the influence.

² Section 23536, subdivision (a) states, "If a person is convicted of a first violation of Section 23152, that person shall be punished by imprisonment in the county jail for not less than 96 hours . . . nor more than six months, and by a fine of not less than three hundred ninety dollars . . . nor more than one thousand dollars"

At trial, the prosecution attempted to prove those allegations by introducing documents from the El Dorado County proceedings. The complaint from those proceedings alleged that “on or about the 23rd day of November, 1995” appellant committed a felony offense of driving under the influence. A change of plea form showed appellant pleaded nolo contendere to felony driving under the influence. An abstract of judgment showed the court sentenced appellant for felony driving under the influence.

Based on that evidence, the jurors found appellant previously had been convicted of felony driving under the influence, and that “the date of that offense or violation was on November 23, 1995.”

Appellant now claims the jury’s finding on this point is not supported by substantial evidence. He bases his argument on the fact that the underlying complaint the prosecution used to prove the enhancement says appellant committed the prior offense “on or about” November 23, 1995. Appellant contends the quoted words are ambiguous and that they “create a reasonable doubt as to the specificity of the date of the prior, and therefore a reasonable doubt as to whether the prior occurred within ten years of the current offense.”

“In deciding the sufficiency of the evidence, we ask whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.” (*People v. Maury* (2003) 30 Cal.4th 342, 403, internal punctuation & citations omitted.)

Here, the underlying complaint alleged that appellant committed his prior offense “on or about” November 23, 1995. One inference the jurors reasonably could draw from

that evidence is that appellant committed the offense on the specific date alleged; i.e., November 23, 1995. We conclude the jury's verdict is supported by substantial evidence.

In arguing the evidence was not sufficient, appellant relies on cases that hold "on or about" charging allegations can support a conviction even when the evidence shows the crime was committed on a date that is different from the date alleged. (See, e.g., *People v. Rice* (1887) 73 Cal. 220, 221 [variance of three months between the allegations and the evidence]; *People v. Triplett* (1945) 70 Cal.App.2d 534, 541-542 [the allegation that an offense was committed "during or about the month of July" could support a conviction based on evidence that showed the offense was committed in September]). Appellant argues that under these cases, it is possible his prior driving under the influence offense was committed on a date that was outside the 10-year window specified in section 23550.5, subdivision (a).

It may be true that the underlying complaint would have supported a conviction that was more than 10 years prior to the date of the current offense. However, the jurors here found, as a matter of fact, that appellant committed his offense on a date that was less than 10 years prior to the current offense. " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.' " (*People v. Thomas* (1992) 2 Cal.4th 489, 514, internal citation omitted, quoting *People v. Bean* (1988) 46 Cal.3d 919, 932-933.)

B. Fines

At sentencing, the trial court imposed several fines. As is relevant here, the court stated: "[Y]ou will be ordered to pay the fines which I take it are essentially mandated for the DUI, and 14601 offense, of \$3,050, which includes the \$50 fine pursuant to 23645 of the Vehicle Code. [¶] And \$1550 as to count three."

Appellant now challenges both these fines contending they were in excess of the amount authorized.

Addressing the latter fine first, appellant was convicted in count three of driving with a suspended license under 14601.2, subdivision (a). Section 14601.2, subdivision

(d)(1) mandates a fine of not less than \$300, nor more than \$1,000 for a first time offense. However, section 14601.2, subdivision (d)(2) states that, “[i]f the offense occurred within five years of a prior offense that resulted in a conviction of a violation of this section or Section . . . 14601.5 . . .” the minimum fine is \$500 and the maximum fine is \$2,000. Here, the jurors also found true an allegation that appellant had a prior conviction for driving with a suspended license under section 14601.5, and that the date of the prior violation was March 9, 2005. Thus, under section 14601.2, subdivision (d)(2), the court could impose a fine of up to \$2,000. The fine at issue, \$1,550, was well below the maximum amount authorized.

Turning to appellant’s other argument, it appears the court imposed a \$3,050 fine for appellant’s driving under the influence conviction. Appellant and respondent agree that the court did not explain the statutory bases for this fine adequately, and both agree on the appropriate remedy: a remand so the court can explain and, if necessary, recalculate the fine. We modify the judgment accordingly.

III. DISPOSITION

The trial court is ordered to conduct a hearing so it can explain and, if necessary, recalculate the fine to be imposed for appellant’s driving under the influence conviction. In all other respects, the judgment is affirmed.

Jones, P.J.

We concur:

Simons, J.

Needham, J.