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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. JOSEPH JAMES SAWICKI, Defendant and Appellant.	G041314 (Super. Ct. No. SWF018070) O P I N I O N
In re JOSEPH JAMES SAWICKI on Habeas Corpus.	G041908

Appeal from a judgment of the Superior Court of Riverside, F. Paul Dickerson III, Judge. Affirmed as modified.

Original proceedings; petition for a writ of habeas corpus, after judgment of the Superior Court of Orange County. Petition dismissed as moot.

Rex Williams, under appointment by the Court of Appeal, for Defendant, Appellant and Petitioner.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Daniel Rogers and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Joseph James Sawicki of attempted voluntary manslaughter, a lesser included offense of attempted murder (Pen. Code § 664/192(a)),[1] and found true enhancement allegations for the use of a deadly weapon and the infliction of great bodily injury. (§§ 12022, subd. (b)(1), 12022.7, subd. (a).) The trial court found true allegations Sawicki had served a prior prison term (§ 667.5, subd. (b)), and that he had a prior strike conviction within the meaning of the "Three Strikes" law (§§ 667, subd. (b)-(i), 1170.12, subd. (c)(1).) The court imposed a total term of 11 years, consisting of the mid-term sentence of three years for attempted voluntary manslaughter, which was then doubled to a term of six years by the Three Strikes law, plus consecutive terms of one year for the use of a deadly weapon, three years for the infliction of great bodily injury, and a one year for serving a prior prison term.

On appeal, Sawicki challenges the sufficiency of the evidence to support the trial court's true findings on the prior prison term enhancement and the prior strike allegation. In his companion petition for writ of habeas corpus, Sawicki claims his attorney's failure to investigate and argue sufficiency of the evidence during the court trial on the prior prison constitutes ineffective assistance of counsel.

We reverse the trial court's finding on the prior prison term enhancement for insufficiency of the evidence and strike the one-year term imposed for this finding. In all other respects, the judgment is affirmed.

I

FACTS AND PROCEDURAL HISTORY

On September 8, 2006, Sawicki and his girlfriend, Jessica McCormack, decided to have a party at his home with some friends from school. Sawicki and his good

[1] All future references are to the Penal Code.

friend, Dave Matthews, picked up a keg of beer for the party. During the evening, between 15 and 40 people came to the party, and there were people walking in and out of Sawicki's house throughout the night.

Sometime after 11:30 p.m., an argument broke out in the kitchen between Randy Navarro and Chris Fortuna. The argument escalated to a shoving and wrestling match with 5 to 10 other people joining in the fray at various times. Sawicki came in from the backyard into the kitchen and saw the fight. He then walked into the dining room. When he returned to the kitchen, Sawicki pulled a steak knife out from a kitchen drawer. Matthews grabbed Sawicki from behind and said, "You're not going anywhere with that." Sawicki responded, "There's people fighting in my house[,]" and he told Matthews to "Get the fuck out of my way." Sawicki lunged forward and stabbed Matthews in the chest. Matthews punched Sawicki two or three times before he realized that he had been stabbed in the chest.

Matthews asked Sawicki: "Why did you stab me?" There was blood on Matthews' shirt and all over the kitchen. Matthews' girlfriend, Jodi Lackey, helped him outside and laid him down on the grass. Matthews had trouble breathing and Lackey tried to help by applying pressure to the wound and giving Matthews CPR. Paramedics arrived and transferred Matthews via helicopter to a trauma center where he later recovered.

In February 2008, the Riverside County District Attorney filed an amended information charging Sawicki with attempted first degree murder and assault with a deadly weapon. Two sentencing enhancements were alleged: the information first alleged that Sawicki had been convicted of furnishing marijuana to a minor (Health & Saf. Code, § 11361, subdivision (b)), that he had been sentenced to a prison term for this offense, that he served a term of imprisonment in state prison, and that he had not remained free of custody for five years. (§ 667.5, subd. (b).) (Riverside County case number SWF003370 (case number SWF003370)). The information also alleged Sawicki

had been convicted of assault with a firearm (§ 245, subd. (a)(1), a prior felony conviction within the meaning of the "Three Strikes" law (Riverside County case number SWF009230 (case number SWF009230)).[2]

Following his conviction on the underlying charges, Sawicki elected to have a court trial to determine the truth of the enhancement allegations. At the hearing, the prosecution introduced evidence in the form of a section 969b prison packet. The packet contained: (1) a letter from the Department of Corrections certifying the authenticity of the documents contained in the section 969b packet; (2) a single-page document entitled chronological history; (3) an abstract of judgment and minute order from case number SWF003370, which showed that Sawicki had been convicted in January 2005 of furnishing marijuana to a minor and sentenced to prison for one year and four months for the crime; (4) an abstract judgment from case number SWF009230, which reflected Sawicki's conviction for negligent discharge of a firearm and the imposition of a 16-month prison term for this conviction; (5) a copy of Sawicki's fingerprint cards; (6) a form from the United States Department of Justice, Federal Bureau of Investigation, indicating Sawicki was sentenced to prison for 16 months for his conviction in case number SWF009230 for negligent discharge of a firearm and being a felon in possession of a firearm; and (7) a booking photograph of Sawicki.

The California Department of Corrections chronological history, a single-page document with handwritten notes, mentioned both prior cases by number, but also has the following notation dated August 10, 2005: "Discharged case #SWF003370 per Crt. Order. dtd 7-8-05, remains on case #SWF009230." The trial court found true both allegations, doubled the midterm sentence on count one as required by the Three Strikes

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[2] At the court trial, the prosecutor orally amended the information to reflect that Sawicki's prior strike was actually for a violation of section 246.3, negligent discharge of a firearm. The amended information includes a handwritten notation to this effect.

law, and imposed an additional one-year term under section 667.5, subdivision (b), for service of a prior prison term.

II

DISCUSSION

Sufficiency of the Evidence to Prove the Prior Prison Term Allegation

Sawicki first challenges the sufficiency of the evidence to support the court's true finding on the section 667.5, subdivision (b) enhancement. Specifically, he argues the prosecution failed to prove he served a term of imprisonment in case number SWF00370. We agree.

The law governing claims of insufficiency of the evidence are well established. "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) When reviewing a sentence enhancement under section 667.5 there must be sufficient evidence that "the defendant (1) was previously convicted of a felony, (2) was imprisoned as a result of that conviction, (3) completed that term of imprisonment, and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction." (*People v. Elmore* (1990) 225 Cal.App.3d 953, 956-957.)

In this case, the prosecution alleged that Sawicki had served a prior prison term under section 667.5, subdivision (b), specifically referencing case number SWF00370. Therefore, the prosecution was required to prove beyond a reasonable doubt Sawicki completed a prison term *in that case*. As noted, for reasons not explained in the record, the prison sentence imposed in case number SWF00370 was "discharged" and

therefore *not completed*. Although the abstract of judgment proved Sawicki pled guilty to furnishing drugs to a minor, the CDC chronological history rebuts evidence he served a prison term for this particular offense. In fact, the chronological history expressly states the conviction was vacated and the prosecution offered no evidence to suggest this notation was inaccurate. Accordingly, the evidence presented to the trial court was insufficient to find Sawicki had completed a prior prison term for this particular felony conviction. (*In re Acker* (1984) 158 Cal.App.3d 888, 891-892.) Accordingly, the court's finding is reversed and the one-year prison term imposed for this enhancement is stricken.

The Attorney General asserts, without citation to pertinent authority, that we may rely on the fact that Sawicki served a prison term in another case, case number SWF009230, to affirm the trial court's finding. Acknowledging that our reliance on this fact could be considered a deprivation of Sawicki's right to due process of law, the Attorney General also suggests Sawicki waived the issue by failing to object below. In the alternative, the Attorney General contends the information as written provided Sawicki with adequate notice of the prior prison term allegation because the information also referenced case number SWF009230 under the hearing of a strike allegation. We find none of these arguments persuasive.

First, a criminal defendant does not waive the right to challenge the sufficiency of the evidence by failing to specifically object on that ground in the trial court. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 262.) Second, while there is no doubt Sawicki served a prior prison term in case number SWF009230, the information failed to allege this case as the basis for a section 667.5, subdivision (b) finding. As noted, the prosecution was required to prove Sawicki's service of a prior prison term for the particular crime of furnishing marijuana to a minor. (*In re Acker, supra,* 158 Cal.App.3d at p. 891-892.) Here, the prosecution failed to produce such evidence at the court trial. To the contrary, the evidence affirmatively establishes that Sawicki *did not*

serve a prior prison term for this case. Therefore, the evidence is insufficient to support the court's section 667.5, subdivision (b) finding and the judgment must be modified to correct the error.

The Three Strikes Allegation

Sawicki also challenges the sufficiency of the evidence to support the trial court's finding he was previously convicted of a serious or violent felony conviction as required by the Three Strikes law. Specifically, he contends his conviction for discharging a firearm in a negligent manner, a violation of section 246.3, is not one of the enumerated offenses under section 667.5 (violent) or section 1192.7 (serious). Although true, the evidence is sufficient to support the court's finding.

At the sentencing hearing, the prosecution admitted into evidence an abstract of judgment indicating that Sawicki had violated section 246.3, discharging a firearm in a negligent manner in case number SWF009230. In addition, a document generated by the United States Department of Justice, Federal Bureau of Investigation indicates Sawicki was convicted of both negligent discharge of a firearm and being a felon in possession of a firearm (§ 12021, subd. (a)(1)) in the same case. Further, the probation report lists convictions for both negligent discharge of a firearm and being a felon in possession of a firearm, plus a finding Sawicki either inflicted great bodily injury or personally used a firearm in the commission of these offenses.

The court found the prior allegation true and consequently doubled the term of attempted voluntary manslaughter from three to six years. On appeal, "The prosecution bears the burden of proving beyond a reasonable doubt that a defendant's prior convictions were for either serious or violent felonies. When a defendant challenges the sufficiency of the evidence to uphold a finding that his prior convictions qualified as strikes, the test on appeal is whether a reasonable trier of fact could have

found that the prosecution sustained its burden. We review the record in the light most favorable to the trial court's findings." (*People v. Towers* (2007) 150 Cal.App.4th 1273, 1277.) Furthermore, "Where, as here, the mere fact that a prior conviction occurred under a specified statute does not prove the serious felony allegation, otherwise admissible evidence from the entire record of the conviction may be examined to resolve the issue. [Citations.]" (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065.)

Although section 246.3 is not one of the enumerated violent felonies under section 667.5, subdivision (c), nor is it specifically listed in section 1192.7, subdivision (c), which defines serious felonies. However, under section 1192.7, subdivision (c)(8), section 246.3 may qualify as a serious felony if the defendant personally uses a firearm in the commission of the offense. (*People v. Leslie* (1996) 47 Cal.App.4th 198, 202 ["'any felony in which the defendant personally used a dangerous or deadly weapon'" is considered a serious felony.].) Therefore, the trial court properly found true the prior serious felony conviction alleged as a strike under the Three Strikes law.

Petition for Writ of Habeas Corpus

In his petition for writ of habeas corpus, Sawicki asserts his counsel was ineffective for failing to challenge the sufficiency of the evidence to prove the prior prison term allegation. Having reversed the court's finding on grounds of insufficiency of the evidence, we dismiss the petition as moot.

III

DISPOSITION

The court's true finding on the prior prison term allegation is stricken for insufficiency of the evidence. The clerk of the superior court is directed to correct its minute order of July 1, 2008 and the abstract of judgment, to strike the prior prison term

allegation, reduce Sawicki's sentence by one year, and send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

IKOLA, J.