Filed 11/8/12 Modified and certified for publication 12/10/12 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. PATRICK LEE CONLEY, Defendant and Appellant.	C070272 (Super. Ct. No. CRF113234)

Appointed counsel for defendant Patrick Lee Conley asked this court to review the record to determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).) Finding no arguable error that would result in a disposition more favorable to defendant, we will affirm the judgment.

BACKGROUND

California Highway Patrol Officer Keerat Lal observed defendant, at about 5:20 p.m., picking up tools in the middle of County Road 27 in Yolo County.

Defendant's parked pickup truck and attached utility trailer partially blocked a lane of the two-lane road.

Defendant appeared intoxicated. His eyes were red and watery and his gait was unsteady as he moved to pick up the tools. Officer Lal estimated that defendant was about six feet tall and weighed 210 pounds.

Officer Lal asked defendant to move to the side of the road, but had to ask three times before defendant complied. Defendant said his tool box fell from the bed of his truck. Officer Lal asked for defendant's driver's license, proof of insurance, and registration. Defendant said his license was suspended and he did not have proof of insurance or registration. Defendant's speech was slurred and Officer Lal could smell alcohol on defendant's breath.

Defendant claimed his son was driving the truck and left to get gas when the truck ran out of fuel. When Officer Lal pointed out that the truck was still running, defendant admitted he was the driver. Defendant told the officer that he consumed three to four 8-ounce cans of Four Loko malt liquor at his son's house, which was about 15 to 20 minutes away.

Defendant failed a series of field sobriety tests. Defendant also took two preliminary alcohol screening tests. His breath samples revealed a blood-alcohol concentration (BAC) of .167 percent and .171 percent. Officer Lal arrested defendant for driving under the influence.

Defendant refused to submit to a chemical test after he was arrested. Defendant's blood was drawn at a hospital at around 6:19 p.m. Defendant's BAC at the time of the draw was .19 percent.

An expert testified that a six foot tall, 210 pound person who consumed 3 to 4 Four Loko's and had his last drink at 4:45 p.m. would have a BAC of .10 percent. A similar individual with a BAC of .19 percent at 6:19 p.m. would have a BAC well over .08 percent between 5:15 p.m. and 5:20 p.m.

In a recorded call from his jail cell, defendant told his girlfriend that he did not know whether the officer asked why his tools were in the middle of the road because defendant "was drunk as fuck right there."

The prosecutor and defense counsel stipulated that undated Department of Motor Vehicle documents listed defendant's height as six foot three inches tall and his weight as 180 pounds. A toxicologist testifying for the defense opined that if a six foot three inch tall and 180 pound person drank an entire 23.5 ounce Four Loko at 5:19 p.m. and had a BAC of .19 percent at 6:19 p.m., then his BAC before drinking the Four Loko at 5:19 p.m. would be .08 percent with a margin of error.

Defendant pleaded no contest to driving with a suspended license with three prior violations within the last five years (Veh. Code, § 14601.2, subd. (a)),[1] failure to provide proof of insurance (§ 16028), and driving an unregistered vehicle (§ 4000, subd. (a)(1)). Following a jury trial, defendant was convicted of driving under the influence of alcohol (§§ 23152, subd. (a)) and driving with a BAC of .08 percent or more (§§ 23152, subd. (b)), with enhancements for refusing to take the chemical test (§ 23578).

In a bifurcated proceeding, the jury sustained allegations that defendant had four prior convictions for violating section 23152 (§ 23550), three prior prison terms (Pen. Code, § 667.5), and two prior strike convictions (Pen. Code, §§ 667, subds. (d) and (e), 1170.12). The trial court denied defendant's motion to dismiss one or both strike allegations and sentenced defendant to 25 years to life plus three consecutive one-year terms. The trial court also awarded 697 days of presentence credit (465 actual and 232 conduct) and imposed various fines and fees.

Appointed counsel filed an opening brief setting forth the facts of the case and asking this court to review the record and determine whether there are any arguable

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[1] Undesignated statutory references are to the Vehicle Code.

issues on appeal. (*Wende*, *supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. Defendant filed a supplemental brief.

DISCUSSION

It appears defendant contends the following: (1) the trial court erred in denying his suppression motion, (2) his trial counsel was ineffective, and (3) there is insufficient evidence to support his convictions. We address each contention in turn.

I

Defendant first contends the trial court erred in denying his suppression motion. The magistrate denied defendant's suppression motion filed at the preliminary hearing. Defendant renewed the issue in a Penal Code section 995 motion seeking to set aside the charges, but the trial court denied that motion, too. Defendant contends the trial court should have granted his suppression motion because (A) he was illegally detained when Officer Lal directed him to the side of the road, and (B) the probable cause to arrest is based on inadmissible hearsay and the circumstances observed by Officer Lal did not support probable cause to arrest defendant.

The following facts are taken from the preliminary hearing. Officer Lal saw defendant picking up tools in the middle of the road, next to a truck partially obstructing one lane. Officer Lal noticed that defendant had red, watery eyes and looked like other intoxicated persons he had arrested. Smelling alcohol and noticing defendant's staggered gait, Officer Lal asked defendant to move to the side of the road. Officer Lal then commenced an investigation for driving under the influence. After defendant failed various field sobriety tests and tested with a BAC of .167 and .171 percent, Officer Lal arrested him.

A

Defendant argues he was illegally detained when Officer Lal directed him to the side of the road. But "[t]he Fourth Amendment does not proscribe all state-initiated

searches and seizures; it merely proscribes those which are unreasonable. [Citation.]" (*Florida v. Jimeno* (1991) 500 U.S. 248, 250 [114 L.Ed.2d 297, 302].) "To test the detention against 'the ultimate standard of reasonableness embodied in the Fourth Amendment' [citation], we balance the extent of the intrusion against the government interests justifying it, looking in the final and dispositive portion of the analysis to the individualized and objective facts that made those interests applicable in the circumstances of the particular detention." (*People v. Glaser* (1995) 11 Cal.4th 354, 365.) In light of the brief intrusion on defendant's liberty and the clear threat to defendant's and the public's safety posed by an apparently intoxicated man in the middle of a public road, Officer Lal's directive was reasonable and therefore did not constitute an illegal detention.

B

Defendant next argues that the probable cause to arrest is based on inadmissible hearsay and the circumstances observed by Officer Lal did not support probable cause to arrest defendant. Defendant's hearsay contention is based on Officer Lal's testimony that he changed the arrest from a misdemeanor to a felony after receiving a report from dispatch that defendant had four prior convictions for violating section 23152. Defendant's argument is based on the rule that precludes the prosecution from relying on hearsay information communicated to the arresting officer "that is not sufficiently specific and fact based to be considered reliable." (*People v. Gomez* (2004) 117 Cal.App.4th 531, 541.)

But the probable cause supporting the arrest was not based on the prior-conviction information received by the arresting officer (information that was subsequently confirmed when the People submitted certified copies of the prior section 23152 convictions at the preliminary hearing). Rather, probable cause supporting the arrest was based on defendant's red, watery eyes, slurred speech, staggered gait, smell of alcohol, field sobriety test results, preliminary alcohol screening test results, his admission that he

drove his truck, and the fact that the vehicle was running and partially obstructing the road.

II

Defendant claims his trial counsel was ineffective for stipulating to his weight being 180 pounds when he in fact weighed 172 pounds within five days of his arrest. He claims this prejudiced him because a lower body weight would have given him a lower blood-alcohol level according to the hypotheses presented by the prosecution and defense experts.

"To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings. [Citations.]" (*People v. Lewis* (1990) 50 Cal.3d 262, 288.) Defendant does not point to anything in either expert's testimony showing that a lower body weight would result in a lower blood-alcohol level. Defendant has not carried his burden of proving prejudice.

III

Defendant contends there is insufficient evidence to support his convictions because no one saw him driving. But Officer Lal testified that defendant admitted driving the truck, the vehicle was running and it was partially obstructing the road. Nothing more is needed to establish that element of driving under the influence.

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

DISPOSITION

The judgment is affirmed.

MAURO, J.

We concur:

RAYE, P. J.

MURRAY, J.

Filed 12/10/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. PATRICK LEE CONLEY, Defendant and Appellant.	C070272 (Super. Ct. No. CRF113234) ORDER MODIFYING OPINION, DENYING REHEARING AND CERTIFYING OPINION FOR PUBLICATION [NO CHANGE IN JUDGMENT]

APPEAL from a judgment of the Superior Court of Yolo County, Stephen L. Mock, Judge. Affirmed.

Patrick Lee Conley, in pro. per.; and Carol Foster, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Respondent.

THE COURT:

It is ordered that the opinion filed herein on November 8, 2012, be modified as follows:

1. On page 1, after the first paragraph, insert the following two paragraphs:

We publish this decision, however, to address issues raised in a petition for rehearing that are likely to recur. On November 6, 2012, California voters approved Proposition 36, which modifies the three strikes law. After we filed our decision in this case, defendant filed a petition for rehearing seeking the benefit of the change in law. He asked us to vacate his sentence under the three strikes law and remand the matter for a new sentencing hearing.

We will conclude that the relief defendant seeks in his petition for rehearing is not appropriately requested in such a petition, because this appeal involves consideration of the law in effect at the time defendant was originally sentenced. The trial court correctly sentenced him under that law. Proposition 36 instead authorizes defendant to file a petition for recall in the trial court. Accordingly, we will deny his petition for rehearing.

2. On page 4, after the heading DISCUSSION, add the following heading:

I

3. On page 4, replace the first paragraph under DISCUSSION with the following paragraph and heading:

In his supplement brief, it appears defendant contends the following: (A) the trial court erred in denying his suppression motion, (B) his trial counsel was ineffective, and (C) there is insufficient evidence to support his convictions. We address each contention in turn.

A

4. On page 4, the paragraph beginning with "Defendant first contends," fourth sentence, replace "(A)" with (1) and "(B)" with (2).

5. On page 4, replace heading "A" with 1.

6. On page 5, replace heading "B" with 2.

7. On page 6, replace heading "II" with B.

8. On page 6, replace heading "III" with C.

9. On page 6, add the following text after the last full paragraph (which ends with the words "under the influence"):

II

After we filed our decision in this case, defendant filed a petition for rehearing seeking the benefit of the change in law enacted by Proposition 36. He asked us to vacate his sentence under the three strikes law and remand the matter to the trial court for a new sentencing hearing.

Defendant was sentenced to 25 years to life under the three strikes law for a crime that was not a serious or violent felony. Proposition 36 limits three strikes sentences to current convictions for serious or violent felonies, or a limited number of other felonies not relevant here. (See Penal Code, §§ 1170.12, subd. (c), 667, subd. (c).) If defendant had been sentenced today, he would not be subject to a 25 to life three strikes sentence.

A

In asking us to vacate his sentence and remand the matter, defendant relies on *People v. Estrada* (1965) 63 Cal.2d 740 (*Estrada*). In that case, the California Supreme Court held that, absent indication of a contrary intent, the Legislature is presumed to intend retroactive application of legislation lessening punishment. (*Id*. at pp. 744, 746.) But the presumption in *Estrada* does not apply here, because Proposition 36 is not silent on retroactivity. It authorizes limited application to prisoners serving three strikes sentences when the measure was enacted, and establishes a specific procedure for defendant to follow in this case.

Proposition 36 added Penal Code section 1170.126, which provides for the resentencing of "persons presently serving an indeterminate term of imprisonment pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, whose sentence under this act would not have been an indeterminate life sentence." (Pen. Code, § 1170.126, subd. (a).) A person serving a three strikes sentence for a current conviction that is not a serious or violent felony "may

file a petition for a recall of sentence, within two years after the effective date of the act that added this section or at a later date upon a showing of good cause, before the trial court that entered the judgment of conviction in his or her case, to request resentencing in accordance with" Proposition 36. (Pen. Code, § 1170.126, subd. (b).) An inmate is eligible for resentencing unless he has prior convictions for certain specified offenses. (*Id.* at subd. (e).) If the prisoner is eligible, then the trial court will resentence defendant "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (*Id.* at subd. (f).) The factors governing the exercise of the trial court's discretion -- the prisoner's criminal history, record in prison and any other relevant evidence -- are set forth in Penal Code section 1170.126, subdivision (g).

Because Proposition 36 provides for limited application to prisoners serving three strikes sentences when the measure was enacted, the presumption in *Estrada* does not apply here. We thus reject defendant's first argument.

Moreover, because the trial court correctly sentenced defendant based on the law applicable at the time of sentencing, the relief requested by defendant in his petition for rehearing is inappropriate. Our review in this appeal is limited to whether the trial court erred, and it did not.

Defendant is a "person[] presently serving an indeterminate term of imprisonment pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, whose sentence under this act would not have been an indeterminate life sentence," and thus his case is governed by Penal Code section 1170.126. That section provides defendant with a specified procedure for addressing the change in the three strikes law: a petition for recall in the trial court.

B

In the alternative, defendant argues in his petition for rehearing that retroactive application of Proposition 36 is compelled by equal protection. His argument lacks

merit. To the extent Proposition 36 applies prospectively, prospective application of a statute that lessens punishment does not violate equal protection. (*People v. Floyd* (2003) 31 Cal.4th 179, 182, 191; *People v. Lynch* (2012) 209 Cal.App.4th 353, 360-361.)

10. On page 7, add the following sentence after the single sentence under DISPOSITION:

The petition for rehearing is denied.

[There is no change in the judgment.]

Defendant's petition for rehearing is denied.

The opinion in the above-entitled matter filed on November 8, 2012, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

FOR THE COURT:

RAYE, P. J.

MAURO, J.

MURRAY, J.