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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. JOHNNY TAUCH, Defendant and Appellant.	G042555 (Super. Ct. No. 08WF0755) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Reversed and remanded for resentencing.

Christopher Nalls, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Johnny Tauch was convicted by a jury of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))[1] and active participation in a street gang (§ 186.22, subd. (a)) for his role in a nightclub altercation. Having waived jury on allegations he had suffered prior convictions, he stipulated to the truth of the prior conviction allegations, but the court made no finding on them, even though it expressly considered them during sentencing. Tauch does not contest his conviction, but contends the court erred in sentencing by imposing punishment for enhancements not properly found by the court to be true and by imposing a consecutive sentence for the substantive street gang crime, a sentencing choice he contends violates the prohibition against double punishment set out in section 654.

He is correct about the section 654 violation. Having been convicted of only one act, he could not be punished for both assault with a deadly weapon and active participation in a street gang growing out of that one act. But we find the failure to make an oral finding on his prior convictions harmless and affirm the court's sentencing choice in that regard.

FACTS

Because this appeal turns only on broad factual questions, our review of the facts need not be detailed. Appellant Johnny Tauch is an admitted member of the Asian Boyz street gang, whose primary activities he describes as including "beating up people," committing robberies, using weapons, and other criminal acts.

One night, he and four other Asian Boyz gang members went to a nightclub called Club Bleu to celebrate Cambodian New Year. There they got into an altercation with another group whose ethnicity is reflected in the fact someone yelled, "Fuck the Mexicans, Asian Boyz" during the fight. Security guards emptied the nightclub and the

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1 All further statutory references are to the Penal Code.

vitriol and vituperation spilled out into the parking lot. Appellant and his cohorts eventually got into their SUV and were directed to make a left turn out of the parking lot by one of the security guards.

Instead, appellant turned right and drove the car at a high rate of speed toward a "Hispanic group," a short distance away, narrowly missing them.[2] Shots were fired at the SUV, it sped off, returned to the area, sped off again, and was eventually stopped by police just a few blocks away. Appellant, who first denied, then admitted, being the driver, was charged with assault with a deadly weapon, active participation in a street gang, and a gaggle of enhancements for street gang activity and prior convictions.

Appellant waived jury as to the prior convictions, and a jury trial was held on the substantive counts and the gang enhancement for committing the crime to benefit a street gang (§ 186.22, subd. (b)(1)). He was found guilty and the gang enhancement was found to be true. Afterward, the court directed its attention to the prior conviction allegations upon which there had been a jury waiver, saying, "We need to address those [with] respect to proving those up." Counsel stipulated appellant had suffered the prior convictions and the court accepted the stipulation and moved on. It did not, however, make any finding – oral or written – on the priors.

Five months later, the court sentenced appellant to fifteen years and four months in prison, computed as four years for the assault with a deadly weapon (low term doubled due to prior strike conviction), a consecutive term of one year four months for the substantive gang crime (1/3 the mid-term), and five years each for the prior serious felony conviction and the gang enhancement.[3] Two weeks later, the court made a nunc

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2 As might be expected, testimony differed as to how fast the car was traveling, its precise direction, and how close it came to the group of bystanders. But appellant admitted in his testimony that he drove toward the group, explaining he wanted to scare them, so there was clearly evidence supporting the assault conviction if the jury did not accept appellant's representation his intent was limited to fright.

3 The court struck the two prior prison term enhancements.

pro tunc entry in a minute order dated back to the sentencing to the effect that appellant had admitted all the priors, but there is nothing in the record to support that entry.

DISCUSSION

I. Section 654 Bars Punishment of Defendant for Both Convictions

While California courts have struggled somewhat with the application of section 654 to cases involving conviction of gang participation under section 186.22, they have agreed on one fundamental principle: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).)

That is, after all, the plain language of the statute. Clearly, by its plain terms, section 654 operates to bar multiple punishments of a single, physical act. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19-21.) And where, as here, there is only one *act*, there can be only one punishment.

Appellant was convicted of assault with a deadly weapon, based upon his attempt to run people down with his car. That was the only *act* the jury found him guilty of committing. The basis for the section 186.22 conviction was that by committing that act, he did "promote, further or assist in any felonious criminal conduct by members of [the] gang." It seems clear to us that punishing him for that assault and for the fact the assault assisted the gang would run afoul of section 654's abjuration against multiple punishment.

II. The Court's Failure to Make a Finding Under Section 1158 is not Reversible Error

Appellant contends the trial court erred in enhancing Mr. Tauch's sentence pursuant to prior conviction allegations because Mr. Tauch did not admit them and the court did not find them true. Our reading of the case law is that this argument is not well taken.

On August 28, 2009, defense counsel stipulated that appellant had suffered the prior convictions alleged in the information, upon which the enhancements were based. Under section 1158, "[w]henever the fact of a previous conviction of another offense is charged in an accusatory pleading . . . the jury, or the judge if a jury trial is waived, must unless the answer of the defendant admits such previous conviction, find whether or not he has suffered such previous conviction. The verdict or finding upon the charge of previous conviction may be: 'We (or I) find the charge of previous conviction true' or 'We (or I) find the charge of previous conviction not true,' according as the jury or the judge find that the defendant has or has not suffered such conviction."

Appellant concludes that language requires an express, oral finding on a defendant's prior allegations, and that no such finding was made here[4]. Further, appellant argues the court's failure to make a finding results in a silent record on the point and constitutes a "not true" finding. (*People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1440.) He does acknowledge that the court — in cases where the defendant waives jury trial on the prior allegations — does not have to use the specific words "I find." (*Ibid.*) Thus, under *Gutierrez*, the court has some leeway regarding the form in which it acknowledges and affirms the defendant's previous convictions. But appellant's position is the failure in this case exceeds that latitude.

The controlling authority on whether special allegations involving "silent records" can be deemed to have been impliedly found true is *People v. Clair* (1992) 2 Cal.4th 629. (*People v. Chambers* (2002) 104 Cal.App.4th 1047, 1050.) In *Clair*, the California Supreme Court addressed a concession by the People that the defendant's serious-felony enhancement had to be set aside because no finding on the underlying prior-conviction allegation had been made. The defendant in *Clair* stipulated that the trial court could consider the People's evidence on the prior, including certified copies of

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[4] Appellant does not argue the prior conviction allegations should have been found to be untrue.

the conviction. Thereafter, the issue of whether the prior allegation was true or not was argued to the trial court. The trial court never rendered an express finding about the prior, but at sentencing the trial court expressly imposed the pertinent enhancement. The Supreme Court held: "At sentencing, the court impliedly – but sufficiently – rendered a finding of true as to the allegation when it imposed an enhancement *expressly* for the underlying prior conviction. Contrary to defendant's claim, there is no failure of proof. Neither is there any reason to vacate the enhancement — and less reason still to disturb the penalty of death." (*People v. Clair*, *supra*, 2 Cal.4th at p. 691, fn 17.) Applying *Clair* to the case at hand, section 1158's requirement the trial court judge find whether or not the defendant suffered a previous conviction has been sufficiently met. In applying enhancements to sentencing, the trial court impliedly acknowledged the defendant's prior convictions.[5]

The same result was reached in *People v. Chambers, supra*, 104 Cal. App.4th 1047. There, the reviewing court found a true finding was implied and acceptable even though the trial court failed to expressly find that a firearm use allegation was true. The Court of Appeal rejected the notion "that the trial court's failure to make an express finding constitutes a 'silent' record, which operates as a finding that the special allegation is not true." (*People v. Chambers, supra,* 104 Cal.App.4th at p. 1050.) Citing *Clair* as the controlling authority, the *Chambers* court found appellant's argument inconsistent with the California Supreme Court's pronouncement on the subject. (*Ibid.*) The *Chambers* court stated, "Here the record is not 'silent' as the oral pronouncement of judgment 'speaks' to impliedly affirm the truth of the use of a firearm allegation." (*Ibid.*)

We, like the *Chambers* court, are bound by *Clair*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Here, appellant stipulated he had suffered the prior conviction in question. Thereafter, the court orally pronounced judgment,

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[5] It is unclear from the record whether the enhancements to sentencing were "expressly" for the underlying prior conviction, as in *Clair*.

including the imposition of the pertinent enhancements stemming from the prior conviction allegations. Under these circumstances, *Clair* and *Chambers* validate the enhancements imposed in this matter as acceptable implied true findings.

III. Failure to advise defendant of his Boykin-Tahl rights does not require reversal.

Prior to oral argument, we became concerned that perhaps appellant should have been advised of his *Boykin-Tahl* rights (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122) before the stipulations were accepted. We asked the parties to submit additional briefing on this point. Appellant took the position "[t]here is no *Boykin-Tahl* issue in this case because appellant never admitted the prior conviction allegations." He contends "[t]his court cannot treat the trial court's error as *Boykin-Tahl* error because appellant did not admit the prior conviction allegations."

The Attorney General, on the other hand, takes the position that even if *In re Yurko* (1974) 10 Cal.3d 857, requires *Boykin-Tahl* advisement, the case makes clear that "there may be other circumstances in particular cases which may warrant the finding of a proper waiver." (*Id.* at p. 863, fn. 6.) He points out that appellant was advised that the priors had to be proved beyond a reasonable doubt prior to trial and he was advised of his right to have a jury trial on them. He waived that right, and then he admitted the priors when he was impeached with them – while being represented by counsel and after waiving his right against self-incrimination – during his testimony on the substantive offenses at the jury trial. Applying the federal standard of review to this issue, as required by *People v. Howard* (1992) 1 Cal.4th 1132, 1175-1177, the question before us is whether it has been shown that the stipulation in question represented "a voluntary and intelligent choice among the alternative courses of action." (*North Carolina v. Alford* (1970) 400 U.S. 25, 31; see *Parke v. Raley* (1992) 506 U.S. 20, 29.) We conclude it has been. Clearly.

DISPOSITION

The combination of the responses to our inquiry convinces us there is no *Boykin-Tahl* issue here. The court's only error was in imposing a consecutive sentence for the violation of Penal Code section 186.22, subdivision (a). The judgment is reversed and remanded for resentencing.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.