

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF CONTRA COSTA

**FILED**  
MAY 15 2017  
STATE CLERK OF THE COURT  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF CONTRA COSTA  
*[Signature]*  
B.M.C CAUSE

PEOPLE OF THE STATE  
OF CALIFORNIA

Plaintiff,

vs.

COBY PHILLIPS,

Defendant.

NO. 5-150124-6

Order Finding That Prior  
1992 PC 246.3 Conviction  
Is Not a Strike

I. Introduction

Defendant Phillips stands convicted in this case of several charges including First Degree Murder. The indictment in this case alleges that Mr. Phillips has previously been convicted of two "strike" offenses. The defendant has waived a jury trial as to proof of these prior convictions. There is no dispute that one of the convictions for assault with a firearm is clearly a strike pursuant to Penal Code (hereafter PC) section 1192.7(c)(31). However, there is a material question as to whether the defendant's second conviction sustained in 1992 for discharging a firearm with gross negligence in violation of PC 246.3 is a strike.

II. Discussion

The defendant's 1992 conviction for a violation of PC 246.3 (Case## 923100-2; 117124-8) does not categorically qualify as a violent or serious crime under either PC 1192.7 or 667.5. Rather, the People claim that the offense is a violent or serious felony under PC 1192.7(c)(8) because the offense involved the defendant's "personal use of a firearm." The People further

argue that there is proof beyond a reasonable doubt that the defendant personally used a firearm based solely on the transcript of the preliminary hearing in that prior case. The People contend that use of the transcript for that purpose is permitted by *People v. Reed*, (1996) 13 Cal 4<sup>th</sup> 217, 222-23. The People do not proffer a transcript of the guilty plea or no contest plea proceeding in the 1992 case nor have they suggested that the defendant ever made a judicial admission of personal use of a firearm when his plea was taken,

A review of the transcript of the preliminary hearing demonstrates several critical problems with the People's contention that the transcript proves "personal use" by the defendant in relation to his 1992 conviction. First, it does not appear from the transcript that the charges in defendant's 1992 case included any allegation of personal use of a firearm. Therefore, in order to determine whether the defendant's conduct in that case involved personal use of a firearm, one must review the testimony of the witnesses at the hearing and make credibility assessments about those witnesses. Second, the defendant contested at the preliminary hearing that he ever fired a gun at anyone and, in fact, made no judicial admission of personal use of a firearm. Third, there were multiple people in the car from which the defendant allegedly fired a gun. The evidence suggested that an arm reached out of a car window and fired the gun but no one could identify the defendant as the shooter. While the evidence at the preliminary hearing showed that the defendant admitted to a police officer that he was the shooter of the gun, there was also the suggestion that he may have confessed to the shooting to protect a female in the car who was the actual shooter. Fourth, there were several other witnesses to the shooting who were not called to testify at the preliminary hearing. There is no way to tell how the testimony of those persons might have affected a determination of probable cause at that hearing or proof beyond a reasonable doubt at

the present trial. Fifth, the purpose of a preliminary hearing is to establish a “strong suspicion” as to whether the defendant has committed a particular crime. There is no reference in the preliminary hearing transcript and the related documents of a charge of personal use of a firearm. If there was no such charge, there was no particular reason for the People to present the strongest possible evidence on that issue or for the defendant to present evidence or vigorously contest a “personal use” allegation that did not exist.

In this court’s opinion, the holding in *People v. Reed*, *supra*, has been overruled by *Descamps v. United States*, (2013) \_\_\_ U.S. \_\_\_, 133 S. Ct. 2276. In *Descamps*, the Court held that lower courts had erred in using the so-called “modified categorical approach” to look behind a conviction to determine whether certain conviction documents established that a prior conviction was a “violent felony.” In essence, *Descamps* held that a fact finder must look solely to the elements of the prior offense in order to decide whether that prior offense is of the type that justifies the imposition of an enhanced sentence.

In this case, the People do not seek to have the fact finder ascertain whether the elements of a PC 246.3 violation involve a violent or serious felony. Rather, they assert that the fact finder can look to evidence taken at a preliminary hearing to prove a fact that was not even charged in the prior case. At the very least, *Descamps* prohibits consideration of a preliminary hearing transcript for that purpose. It simply overrules *Reed, supra*, to the extent that *Reed* permitted looking at the transcript of the preliminary hearing to prove a fact that might establish a basis for a recidivist sentence enhancement in a later case.

The California Supreme Court has yet to determine the extent to which the holding of *People v. Reed* and other case authority has been limited or overruled by *Descamps*. However, it has agreed to review the unreported decision in *People v. Gallardo*, (2015) 2015 Cal. App. Unpub. LEXIS 8238. In *Gallardo* the parties will be briefing for the California Supreme Court the following question: "Was the trial court's decision that defendant's prior conviction constituted a strike compatible with *Descamps v. United States*, (2013) 570 U.S. \_\_\_\_ (133 S. Ct. 2276) because the trial court relied on judicial fact-finding beyond the elements of the actual prior conviction?" To date, several appellate court opinions have found that *Descamps* limits a determination that a prior conviction is a strike solely to the elements of the prior offense and no further. That being so, the People's position in the present case is untenable.

For example, in *People v. Saez*, (2015) 237 Cal. App. 4<sup>th</sup> 1177, 1203-1207, the court held that *Descamps* precluded a finding that a prior conviction involved personal use of a firearm where the prior offense did not involve personal use as one of its elements and there had been no judicial admission of "personal use of a firearm" when the plea was taken. Indeed, *Saez* left open the issue of whether *Descamps* permits a judicial admission at the time of the plea to be sufficient where "personal use" is not an element of the offense to which the defendant is pleading guilty. In the present case, defendant Phillips pleaded guilty or no contest to a violation of PC 246.3. As noted above, a violation of PC 246.3 was not statutorily defined as a "strike" nor does it require proof of personal use of a firearm as an element of the offense. Defendant's entry of a guilty plea to that charge did not establish "personal use" of a firearm. For this court to find "personal use" solely on

the basis of a preliminary hearing transcript where “personal use” was an evidentiary possibility but not even necessary to a finding of probable cause would clearly violate the limitations set forth in both *Descamps* and *Saez*.

Other recent opinions by our courts of appeal further reinforce the holdings in *Descamps* and *Saez*. *People v. McCaw*, (2016) 1 Cal. App. 5<sup>th</sup> 471 (now on review in the California Supreme court held that a trial court called upon to determine whether a prior conviction is a strike may not consider statements at a plea colloquy in the prior case where those statements do not relate directly to the elements of the prior offense. Thus *McCaw* purported to answer the question left open in *Saez* and determined that referring to a plea colloquy on a contested issue of fact constituted impermissible judicial fact-finding in violation of the clear holding in *Descamps*. *McCaw* is also on appeal to the California Supreme Court (Case #236618). This court is not citing the appellate opinion in *McCaw* as precedent but rather simply referring to it as informative on the scope of the holding presently being contemplated by the California Supreme Court in the *Gallardo* case. *See also, People v. Marin*, (2015) 240 Cal. App. 1344 (finding “great bodily injury” as part of the record of a prior conviction is not permitted by *Descamps* where “great bodily injury” was not an element of the prior offense).

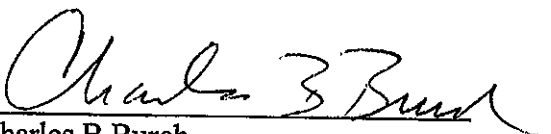
For the reasons stated above, this court finds as a matter of law that a violation of PC 246.3 does not have as one of its elements the “personal use of a firearm.” This court also finds, contrary to the People’s contention, that under *Descamps, supra*, the court may not rely on testimony taken at the defendant’s contested preliminary hearing in 1992 to find that his prior offense involved

“personal use of a firearm.” Therefore, it logically follows that the defendant’s prior conviction for a violation of PC 246.3 cannot be deemed a “strike” for purposes of the present case.

III. Conclusion

As a matter of law, this court cannot and does not find that defendant’s 1992 conviction for a violation of PC 246.3 is a strike.

Date: 5/15/17

  
Charles B Burch  
Superior Court Judge