



## People v. Mowatt

2002 | Cited 0 times | California Court of Appeal | May 29, 2002

### NOT TO BE PUBLISHED

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Appellant James Duncan Mowatt appeals from judgment sentencing him to a second strike sentence of 30 years in prison. This is his second appeal. In the first, we held that the evidence was insufficient to prove that his prior conviction for discharging a firearm in a grossly negligent way (Pen. Code, § 246.3) was a serious felony within the meaning of the "Three Strikes" law. On remand the prosecution presented additional evidence, and the trial court again found the allegation true after denying appellant's "Motion to Preclude Trial on Prior Conviction, and in the Alternative, Motion for Order Declaring Prior Conviction Not `Strike.'" Appellant contends this was error. For reasons explained in this opinion, we reject this contention and affirm the judgment.

### PROCEDURAL SUMMARY

At the original trial of the prior conviction alleged against appellant, the prosecution offered a packet of documents that included an abstract of judgment reflecting his conviction for violation of Penal Code section 246.3. The abstract did not, however, indicate that appellant personally used a firearm. For this reason respondent conceded, and we held, that the evidence was insufficient to prove the crime was a strike.

On remand, the prosecution requested judicial notice of appellant's admission to a probation officer that he discharged a shotgun three to four times. The court found this admission, plus the proof previously presented, sufficient to prove that appellant acted with a general criminal intent and that the crime was therefore a serious felony. (People v. Rodriguez (1998) 17 Cal.4th 253, 261-262; People v. Bartow (1996) 46 Cal.App.4th 1573, 1576-1577.)

The court sentenced appellant, as he was originally sentenced, to 30 years in prison.

### DISCUSSION

Appellant contends the judgment must be reversed because the second trial of his prior conviction violated the prohibition against double jeopardy and the principles of res judicata and law of the case.



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He acknowledges that among the split authorities on this point, this court held, in *Cherry v. Superior Court* (2001) 86 Cal.App.4th 1296, that when an appellate court finds the evidence insufficient to prove a prior conviction is a "strike," retrial of that allegation is not barred by the prohibition against double jeopardy. (Id. at p. 1303.) We further held that if the People offer additional evidence on remand, neither res judicata nor law of the case precludes the court from finding the allegation true if, upon consideration of all the evidence, the prior conviction has been proved beyond a reasonable doubt to be a "strike." (Id. at pp. 1304-1305.)

Appellant argues that *Cherry* was incorrectly decided. He urges that we will "foster careful prosecutions and promote judicial economy" if we reconsider *Cherry* and hold, instead, that our first decision in this case was final and precluded retrial of the prior conviction allegation. We decline.

We stand by our decision in *Cherry*, and reject appellant's contention of error for the reasons explained therein.

### DISPOSITION

For the foregoing reasons, the judgment is affirmed.

I concur:

CURRY, J.

I concur in the judgment.

EPSTEIN, Acting P.J.

