

39 Cal.App.4th 1811, 46 Cal.Rptr.2d 836, 95 Cal. Daily Op. Serv. 8744, 95 Daily Journal D.A.R. 15,125
(Cite as: 39 Cal.App.4th 1811)

H

THE PEOPLE, Plaintiff and Respondent,
v.
HENRY DAVID FLORES, Defendant and Appellant.
No. B087747.

Court of Appeal, Second District, California.
Nov 14, 1995.

[Opinion certified for partial publication. FN*]

FN* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for partial publication. The portions of this opinion to be deleted from publication are identified as those portions between double brackets, e.g., [[/]].

SUMMARY

A jury convicted defendant of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)). Defendant received a five-year sentence enhancement (Pen. Code, § 667, subd. (a)) based on a prior felony conviction for attempted arson (Pen. Code, § 455). (Superior Court of Santa Barbara County, No. 201315, Patrick L. McMahan, Judge.)

The Court of Appeal affirmed the judgment. It held that the trial court properly enhanced defendant's sentence with an additional five-year term for the prior attempted arson conviction. Pen. Code, § 667, provides that any person convicted of a serious felony who previously has been convicted of a serious felony shall receive a five-year enhancement for each such prior conviction, and the statute defines "serious felony" to mean those listed in Pen. Code, § 1192.7. Pen. Code, § 1192.7, subd. (c)(14), includes "arson" and Pen. Code, § 1192.7, subd. (c)(27), includes "any attempt to commit a crime listed in this subdivision." Although defendant asserted that only an attempted arson conviction under Pen. Code, § 664 (general attempt statute), and Pen. Code, § 451 (arson), could enhance his

sentence, since Pen. Code, § 455, defines "attempt" behavior more broadly than Pen. Code, § 664, attempted arson must be charged under Pen. Code, § 455, which is the specific statute that prohibits attempted arson and those acts preliminary to and in furtherance of the arson, and that statute prevails over Pen. Code, § 664, the general attempt statute. Thus, by the plain language of Pen. Code, § 1192.7, subd. (c)(14) and (27), defendant's sentence was properly enhanced. (Opinion by Gilbert, J., with Stone (S. J.), P. J., and Yegan, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Arson and Other Wilful Burnings § 6--Trial--Sentence Enhancements-- Attempted Arson as Prior "Serious Felony":Criminal Law § 688.2--Enhancements-- Felony Conviction With Prior Serious Felony Conviction.

In a criminal prosecution in which defendant was convicted of assault with a deadly weapon, the trial court properly enhanced defendant's sentence with an additional five-year term (Pen. Code, § 667, subd. (a)) for a prior conviction of attempted arson (Pen. Code, § 455). Pen. Code, § 667, provides that any person convicted of a serious felony who previously has been convicted of a serious felony shall receive a five-year enhancement for each such prior conviction, and the statute defines "serious felony" to mean those listed in Pen. Code, § 1192.7. Pen. Code, § 1192.7, subd. (c)(14), includes "arson" and Pen. Code, § 1192.7, subd. (c)(27), includes "any attempt to commit a crime listed in this subdivision." Although defendant asserted that only an attempted arson conviction under Pen. Code, § 664 (general attempt statute), and Pen. Code, § 451 (arson), could enhance his sentence, since Pen. Code, § 455, defines "attempt" behavior more broadly than Pen. Code, § 664, attempted arson must be charged under Pen. Code, § 455, which is the specific statute that prohibits attempted arson

and those acts preliminary to and in furtherance of the arson, and that statute prevails over [Pen. Code, § 664](#), the general attempt statute. Thus, by the plain language of [Pen. Code, § 1192.7](#), subd. (c)(14) and (27), defendant's sentence was properly enhanced.

[See 2 [Witkin & Epstein](#), Cal. Criminal Law (2d ed. 1988) § 671 et seq.]

COUNSEL

Raymond L. Girard, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, William T. Harter and Thomas W. Casparian, Deputy Attorneys General, for Plaintiff and Respondent.
***1813**

GILBERT, J.

Here we hold, among other things, that a prior conviction for attempted arson is a “serious felony” under [Penal Code section 1192.7](#) for which a five-year enhancement is proper.^{FN1}

FN1 All statutory references are to the Penal Code unless otherwise stated.

[[]] ^{FN*}

FN* See footnote, *ante*, page 1811.

[[Facts]]*

[[]]*

A jury convicted Henry David Flores of assault with a deadly weapon. ([§ 245](#), subd. (a)(1).) The trial judge found Flores had two prior felony convictions, within [section 667](#), subdivision (a). One of the convictions was for [section 455](#), attempt to burn. (*People v. Flores* (Super. Ct. Santa Barbara County, 1989, No. 176641).) [[]]*

[[]]*

Discussion

I.

(1) Flores contends the five-year enhancement for his attempted arson conviction in *People v. Flores*, *supra*, No. 176641, is improper because attempted arson under [section 455](#) is not a “serious felony” under [section 1192.7](#), subdivision (c)(14) and (27). Flores argues that only an attempted arson conviction under [sections 664](#) (general attempt statute) and 451 may enhance punishment of a recidivist offender under [section 667](#), subdivision (a). He adds that [section 455](#) defines “attempt” behavior more broadly than the general attempt statute ([§ 664](#)) because [section 455](#) includes acts “preliminary thereto, or in furtherance thereof” attempts to burn.^{FN2}

FN2 [Section 451](#) provides: “A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property.”

[Section 455](#) provides: “Any person who willfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any structure, forest land or property, or who commits any act preliminary thereto, or in furtherance thereof, is punishable by imprisonment in the state prison for 16 months, two or three years.”

[Section 664](#) provides, in part: “Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows: ...”

In February 1994, the time of Flores's present criminal offense, [section 667](#), subdivision (a) provided: “[A]ny person convicted of a serious felony *1814 who previously has been convicted of a serious felony in this state ... shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction” “Serious felony” means a serious felony listed in [section 1192.7](#). (§ 667, subd. (d).) [Section 1192.7](#), subdivision (c)(14) includes “arson” and subdivision (27) includes “any attempt to commit a crime listed in this subdivision”

The 1989 felony information in *People v. Flores*, *supra*, No. 176641, charged Flores with “attempt to set fire and attempt to burn a structure” as well as committing “an act preliminary thereto and in furtherance thereof” in violation of [section 455](#). Flores pleaded guilty to attempted arson and stated, in writing, this factual basis for his plea: “I admit that there are facts from which a jury could find me guilty of attempted arson.”

In *People v. Alberts* (1995) 32 Cal.App.4th 1424 [37 Cal.Rptr.2d 401], we held that [section 455](#) was a special statute concerning attempted arson which prevailed over [section 664](#), the general attempt statute. (32 Cal.App.4th at p. 1428.) We reasoned that [section 664](#) expressly applied only “where no provision is made by law for the punishment of such attempts” (32 Cal.App.4th at p. 1427.) [Section 455](#) punishes “attempts to set fire to or attempts to burn.” Also, [section 455](#) prohibits specific conduct while [section 664](#) prohibits general conduct. (32 Cal.App.4th at p. 1428.) “Thus, the general statutes (§§ 664, 451, subd. (b)) are included in the special statute (§ 455). Since these sections cannot be reconciled, [section 455](#) must prevail. [Citation.]” (*Ibid.*)

[Section 1192.7](#), subdivision (c)(27) includes as a “serious felony” “any attempt to commit a crime listed in this subdivision.” Subdivision (c)(14) lists arson as a serious felony. Under *Alberts*, attempted arson must be charged under [section 455](#), the specific statute that prohibits attempted arson and acts

preliminary to and in furtherance of the arson. (See also *People v. Lavine* (1931) 115 Cal.App. 289, 296 [1 P.2d 496] [attempted extortion is punishable by specific attempted extortion statute, not general attempt statute].) Thus, by the plain language of [section 1192.7](#), subdivision (c)(14) and (27), Flores's sentence in the present case was properly enhanced by a five-year term under [section 667](#), subdivision (a), for his 1989 attempted arson conviction. *1815

[[II.]] FN*

FN* See footnote, *ante*, page 1811.

Accordingly, the judgment is affirmed.

Stone (S. J.), P. J., and Yegan, J., concurred.
 Appellant's petition for review by the Supreme Court was denied February 14, 1996.

Cal.App.2.Dist.
 People v. Flores
 39 Cal.App.4th 1811, 46 Cal.Rptr.2d 836, 95 Cal.
 Daily Op. Serv. 8744, 95 Daily Journal D.A.R.
 15,125

END OF DOCUMENT