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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE PATRICK GAINES,

Defendant and Appellant.

B277126

(Los Angeles County
Super. Ct. No. TA063063)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Sentence vacated and remanded with directions.

Thomas K. Macomber, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer, Shaw McGahey Webb, and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Joe Patrick Gaines was convicted by a jury in 2002 of special circumstances murder, burglary, and robbery, with arming and firearm use findings. (Pen. Code, §§ 187, 459, 211, 12022, 12022.53.)¹ He was sentenced to state prison for a term of life without the possibility of parole (LWOP) for first degree murder, plus an additional 25 years to life for firearm use pursuant to section 12022.53, subdivision (d); his sentences on the burglary and robbery convictions were stayed pursuant to section 654.²

Gaines was 17 years old when he committed the offenses of which he was convicted. In 2015, Gaines filed a petition for writ of habeas corpus in the trial court alleging that his LWOP sentence for an offense committed as a juvenile constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution. The Attorney General conceded that Gaines was entitled to a resentencing hearing. The trial court conducted a resentencing hearing and, on August 19, 2016, reimposed the same sentence.

Gaines filed the present appeal from the judgment reimposing LWOP, arguing that the trial court did not correctly apply the United States Supreme Court's newly articulated interpretation of *Miller v. Alabama* (2012) 567 U.S. 460, as set forth in *Montgomery v. Louisiana* (2016) 577 U.S. __ [193 L.Ed.2d

¹ All subsequent undesignated statutory reference are to the Penal Code.

² The jury also convicted Gaines of attempted robbery and made a special circumstances finding of murder during the commission of an attempted robbery. In 2003, we vacated these portions of Gaines's sentence, and otherwise affirmed.

599]. While the appeal was pending, the Legislature enacted two new laws (discussed below) that are relevant to Gaines’s appellate claims. In February and March 2018, we asked the parties to file supplemental letter briefs addressing the impact of these new laws on Gaines’s appeal.

DISCUSSION

I.

Gaines’s Constitutional Challenge to His Sentence Is Moot

In his appellant’s opening brief, Gaines urged that an LWOP sentence may not be imposed for a crime committed as a juvenile, and he urged this court to reduce his special circumstances murder sentence from LWOP to 25 years to life. He also urged that were he to be resentenced, he would be eligible to earn custody credits that could advance his parole eligibility date.

After Gaines filed his opening brief, the Legislature adopted Senate Bill 394 (SB 394), which became effective on January 1, 2018. SB 394 amended section 3051 to provide, among other things, that a person sentenced to LWOP for an offense committed before the person had attained 18 years of age “shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing.” (§ 3051, subd. (b)(4).) It is undisputed that SB 394 applies to Gaines, and thus Gaines will be eligible for release on parole at a youth offender parole hearing during his 25th year of incarceration.

In supplemental briefing, Gaines concedes his constitutional challenge to his sentence is moot following the enactment of SB 394. We agree. Even if we were to reduce

Gaines’s LWOP sentence to 25 years to life, his *total* sentence (25 years to life for special circumstances murder, plus 25 years to life for the arming enhancement) would be 50 years to life. Although in that case Gaines would be eligible to earn custody credits that could advance his parole eligibility date to earlier than his 50th year of incarceration, Gaines concedes that he would not be eligible for parole any earlier than his 25th year of incarceration, at which time he will be entitled to a youth offender parole hearing pursuant to SB 394.

An issue becomes moot “when a court ruling can have no practical effect or cannot provide the parties with effective relief.” (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 454.) “ ‘[A]n action that originally was based on a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events. A reversal in such a case would be without practical effect, and the appeal will therefore be dismissed.’ ” (*People v. Herrera* (2006) 136 Cal.App.4th 1191, 1198.)

In the present case, even if we were to agree with Gaines’s claims of sentencing error, we could not grant him any relief that would shorten his period of incarceration. Accordingly, his claim of error is moot.

II.

Remand to Exercise Sentencing Discretion Under Amended Section 12022.53 (SB 620)

When Gaines was sentenced, trial courts had no discretion to strike enhancements under section 12022.53. (See former § 12022.53, subd. (c), Stats. 2010, ch. 711, § 5; *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362–1363.) Effective January 1, 2018, the Legislature amended section 12022.53 to give trial

courts authority to strike firearm enhancements in the interest of justice. (Sen. Bill No. 620 (2017–2018 Reg. Sess.), Stats. 2017, ch. 682, §§ 1, 2.)

This amendment applies to cases, such as *Gaines’s*, that were not final when the amendments became operative. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091.) Under *In re Estrada* (1965) 63 Cal.2d 740, we presume that, absent contrary evidence, an amendment reducing punishment for a crime applies retroactively to all nonfinal judgments. (*Id.* at p. 745; *People v. Brown* (2012) 54 Cal.4th 314, 323; *People v. Vieira* (2005) 35 Cal.4th 264, 305–306.) The *Estrada* rule has been applied to penalty enhancements, as well as to amendments giving the court discretion to impose a lesser penalty. (*People v. Nasalga* (1996) 12 Cal.4th 784, 792; *People v. Francis* (1969) 71 Cal.2d 66, 75–76.)

Accordingly, we remand this matter to the trial court to allow it to exercise discretion, under amended section 12022.53, to consider whether or not to strike the firearm enhancement.³

³ The Attorney General urges that we need not remand to the trial court because the trial court would not have exercised its discretion to strike the firearm enhancement. We do not agree. “ ‘Defendants are entitled to sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that ‘informed discretion’ than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record.” [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record “clearly indicate[s]” that the trial court would have reached the same conclusion “even if it had been aware that it

We offer no opinion on how the court’s discretion should be exercised.

III.

Remand for Consideration of *Franklin* Issues

Because defendant is now eligible for a youth offender parole hearing in his 25th year of incarceration (§ 3051, subd. (b)(4)), he is entitled to a sufficient opportunity to assemble a record of information about his characteristics and circumstances that will be relevant at the hearing. (See *People v. Franklin* (2016) 63 Cal.4th 261, 283–284 (*Franklin*) [providing examples of the type of information that will be relevant at a youth offender parole hearing].) Gaines was originally sentenced in 2003, before the Supreme Court’s decisions in *Miller v. Alabama*, *supra*, 567 U.S. 460 and *People v. Gutierrez* (2014) 58 Cal.4th 1354; and at the resentencing hearing in August 2016, section 3051 did not authorize youth offender parole hearings for a person in Gaines’s situation. It is not clear that Gaines had a sufficient opportunity to make a record that will be relevant at a youth offender parole hearing. Accordingly, we will remand to permit Gaines to make such a record. (See *Franklin*, at p. 284.)

had such discretion.”’ (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)” (*People v. Chavez* (2018) 22 Cal.App.5th 663, 713.) In this case, the record does not clearly indicate the trial court would have declined to strike or dismiss the section 12022.53 firearm enhancement if it had the discretion to do so at the time of Gaines’s sentencing; thus, remand is appropriate.

DISPOSITION

The sentence is vacated. The matter is remanded to allow the trial court to exercise sentencing discretion pursuant to amended section 12022.53, and to allow the parties to make a record of information that will be relevant to Gaines's future youth offender parole hearings.

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EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.