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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL DELREAL,

Defendant and Appellant.

B277721

(Los Angeles County
Super. Ct. No. KA098112)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Judge. Vacated and remanded.

Edward Mahler, 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, Paul M. Roadarmel, Jr., and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Miguel DelReal appeals from the judgment resentencing him to 42 years 4 months in prison after we remanded the case to the trial court. Appellant complains that the trial judge failed to exercise its sentencing discretion—that the trial court did not consider his postjudgment behavior while incarcerated when it resentenced him. Appellant also requests that because of the sentencing errors, a different trial judge resentence him on remand. A reasonable interpretation of the record shows that the trial court failed to consider appellant’s postconviction prison conduct in sentencing and therefore the matter must be remanded for resentencing. Appellant has not, however, demonstrated that resentencing before a different trial judge is warranted.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2013, appellant, age 21, suffered convictions for two counts of attempted murder (count 4 and count 5), two counts of felony firearm assault (count 6 and count 7) and one count of shooting at an occupied motor vehicle (for firing at a car occupied by two people) (count 8). He was also convicted of auto theft (count 9), willful evasion of the police (count 10), and possession of a firearm by a felon (count 11). The jury also found true the firearm, prior prison term, and gang allegations.

The trial court sentenced appellant to an indeterminate term of 37 years to life on the conviction for shooting at an occupied motor vehicle (count 8) with the true findings on the firearm, gang and prison term allegations; a consecutive determinate term of four years for the auto theft (count 9); and a consecutive term of eight months for willful evasion (count 10), for a total sentence of 41 years 8 months in state prison. Appellant challenged his convictions and sentence on appeal.

In the first appeal (*People v. DelReal* (Oct. 31, 2014, B249636) [nonpub. opn.]), this court affirmed the convictions but found

insufficient evidence supported the gang enhancement findings. We remanded the matter with directions to the trial court “to vacate the gang enhancements” and “resentence defendant accordingly.”

In January 2015, the original trial judge (Judge Mike Camacho) conducted the resentencing hearing. The trial judge increased the sentenced to 42 years 4 months in state prison. The trial court indicated that the sentences for the two attempted murders “must” run consecutively and that the state prison was required to calculate appellant’s post-sentence credits. Appellant appealed from the judgment, again challenging his sentence.

In the second appeal (*People v. DelReal* (Mar. 28, 2016, B262410) [nonpub. opn.]), this court found that the trial court failed to calculate and award custody credits. We also concluded that the trial court failed to exercise its discretion in deciding whether to impose consecutive or concurrent sentences for the attempted murders, but rejected the argument that the resentencing needed to be done by a different trial judge. The case was remanded to allow the trial court to exercise its discretion and to calculate and award credits.

At the resentencing hearing on August 1, 2016, appellant’s counsel stated that appellant had changed since committing the offenses. Counsel asked the trial court to consider this information and impose concurrent sentences because appellant was “turning himself around in prison” and had taken responsibility for his actions. As of that date appellant had spent more than three years in custody.

The trial court responded that it appreciated this new information and was glad to hear that appellant was taking advantage of the programs offered in prison. Nonetheless, the trial court stated that the sentence that “this court is responsible for imposing is based upon largely in part the conduct that was displayed on the date in question, not so much the aftermath

in terms of the defendant's behavior while incarcerated, albeit I acknowledge that certainly the courts are in favor of that type of consideration for purposes of juveniles and sentencing with respect to life without parole matters. But this, obviously, is not a case that falls within that category. Mr. DelReal was convicted as an adult and the court is, obviously, not going to ignore the conduct that brought us here and obviously is the basis for which Mr. DelReal continues to stand convicted."

The trial court found no factors in mitigation for the crime "nor were there any factors relating to the defendant himself that I could see, albeit I am not ignoring what [defense counsel] has certainly brought to the attention of the court, that is, Mr. DelReal is a changed man now that he has been incarcerated for a substantial period of time to date." The trial court noted that the appellant had "seen the error of his ways. He's willing to change his lifestyle once he does receive a parole date, and he will be a productive member of society." Lastly, the trial court concluded, "I want you to understand that I'm not sentencing you based upon conduct while . . . incarcerated. I have to sentence you based upon the conduct that brought you to this court in the first place." After being sentenced, appellant asked for a second chance and an opportunity to receive a shorter sentence, acknowledging that he had made "bad choices," but now was a "changed man." The trial court replied that it knew appellant was sincere and told the appellant that he had "a significant criminal history up to the time you were arrested on the present offense, and I couldn't ignore that prior history." The trial judge sentenced appellant to a total of 42 years 4 months in state prison—the same sentence the trial court had imposed the first time we remanded the case in January 2015.

This appeal followed.

DISCUSSION

Appellant contends that the trial court erred in sentencing him because the trial court failed to comprehend that it had the discretion to consider his postconviction prison conduct when it resentenced him.

Both parties properly agree that the trial court has the discretion to consider the appellant's postconviction conduct when it resentences him. (*People v. Bullock* (1994) 26 Cal.App.4th 985, 990 ["The defendant's postconviction behavior and other possible developments remain relevant to the trial court's consideration upon resentencing."]; see also *People v. Garcia* (2008) 161 Cal.App.4th 475, 484 [following *Bullock*].)

Appellant and the Attorney General disagree, however, as to whether the trial court here actually considered his postconviction conduct or instead believed that it lacked the discretion to do so. When a matter entrusted to the trial court's discretion is properly presented, the trial court must exercise its discretion: "In such a case a statement or other evidence that the court believes it has no discretion, but must rule in a certain way, indicates an error so fundamental as to be said to amount to a refusal to exercise jurisdiction." (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1421; *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228, quoting *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8 ["Defendants are entitled to 'sentencing decisions made in the exercise of the "informed discretion" of the sentencing court,' and a court that is unaware of its discretionary authority cannot exercise its informed discretion."].)

Here, the record discloses that the trial court erroneously believed that it had no discretion to consider appellant's postconviction behavior as a relevant sentencing factor. Although the trial court commended appellant for his good behavior in custody and made some ambiguous statements about sentencing

criteria, the trial court's last comment before sentencing reveals that it believed it had no discretion to consider the recent behavior: "I'm not sentencing you based upon conduct while . . . incarcerated. I *have* to sentence you based upon the conduct that brought you to this court in the first place." (Italics added.) Accordingly, we conclude the trial court did not exercise its discretion in resentencing appellant and that this error requires that reversal of the judgment and remand for resentencing. (See *People v. Penoli* (1996) 46 Cal.App.4th 298, 305-306 [exercise of discretion is not found where "the court's comments unambiguously disclose that it failed to pass on the merits of the issue [citation], or that its ruling embodied, or rested upon, a misunderstanding of the relevant law [citation] or an arbitrary or irrational point of view."].)

Although the case must be return to the trial court for resentencing, appellant has not demonstrated that a different trial judge must conduct the sentencing proceedings on remand. "[T]he statutory power of appellate courts to disqualify sentencing judges should be used sparingly and only where the interests of justice require it," such as "where the [action] of the original judge indicates an animus inconsistent with judicial objectivity." (*People v. Gulbrandsen* (1989) 209 Cal.App.3d 1547, 1562.) Moreover, a bench officer's legal error may warrant disqualification where it "suggests a whimsical disregard of the [legal] scheme that is incompatible with a judicious effort to comply with its complex terms." (*Ibid.*) Nonetheless, "mere judicial error is not conclusive evidence of bias or grounds for disqualification." (*People v. Superior Court* (1996) 50 Cal.App.4th 1216, 1231.) Failure in the application of a complex statutory scheme "cannot be said to reflect a lack of objectivity implicating the interests of justice." (*People v. Gulbrandsen, supra*, 209 Cal.App.3d at p. 1562.)

The trial court's failure to recognize that it had discretion to consider appellant's post-conviction prison conduct when it

sentenced him does not demonstrate a “whimsical disregard” of a statutory scheme. Likewise, the court’s explanation of its sentencing rationale showed a misunderstanding of the sentencing law, but it did not indicate partiality, unusual personal involvement or improper motive. Consequently, appellant has failed to show a sufficient basis to substitute a new judge.

DISPOSITION

The judgment is vacated and remanded for resentencing in accordance with this opinion. The trial court shall forward a corrected abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.