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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS R. CABRERA, Defendant and Appellant.	B265653 (Los Angeles County Super. Ct. No. MA058251)

APPEAL from a judgment of the Superior Court of Los Angeles County, Christopher G. Estes, Judge. Affirmed.

Elizabeth K. Horowitz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Carlos Cabrera (defendant) resolved two criminal cases filed against him via a plea agreement that called for an aggregate sentence of 17 years and 8 months, consisting of eight years on a prior sentence he was already serving plus nine years and eight months for the two new cases charging him with burglary and robbery (with alleged sentencing enhancements). The trial court later reduced three of the convictions that were part of the plea deal to misdemeanors under Proposition 47, the Safe Neighborhoods and Schools Act. We consider whether the trial court erred when it then resentenced defendant to a longer term in prison on one of the convictions not eligible for Proposition 47 relief to arrive at an aggregate term of 17 years and 6 months—two months shy of the original sentence imposed.

I. BACKGROUND

A. Procedural History in the Trial Court

Three criminal cases filed against defendant figured in the calculation of his original sentence. We explain how, and we recount what the trial court did when resentencing defendant after he obtained relief under Proposition 47.

The first of the three cases is Los Angeles Superior Court case number MA057407 (Case A), in which the court sentenced defendant on September 27, 2012, to eight years in prison for two second degree burglary convictions under Penal Code section 459.[1] The second case is case number MA057709 (Case B), in which count one of the charging document alleged defendant committed second degree burglary in violation of Penal Code section 459. The third case is case number MA058251 (Case C), in which defendant was charged with one count of robbery in

[1] Statutory references that follow are to the Penal Code.

violation of section 211, and one count of second degree burglary in violation of section 459. The second amended complaint in Case C further alleged defendant had sustained two prior robbery convictions, one in 1999 as an adult and one in 1996 as a juvenile, that qualified as serious or violent felonies under the Three Strikes law (§§ 667, subd. (b)-(i), 1170.12, subd. (a)-(d)).

Defendant appeared with counsel at a hearing on February 11, 2013, to resolve the charges in Case B and Case C by plea agreement. The trial court recited for the record what it understood to be the terms of the deal, namely, that defendant had already been sentenced to eight years for the two burglary charges in Case A and he agreed "there would be a consecutive sentence to that of nine years, eight months" for "what amounts to a total sentence of . . . 17 years, eight months." Defendant confirmed that was his understanding of the deal, and in taking the plea, the court advised defendant his maximum sentencing exposure if he were to reject the plea agreement was 25 years to life because he would be subject to a "third strike" sentence based on his two prior robbery convictions.

In accordance with the plea agreement, defendant pled guilty to burglary in Case B and robbery in Case C. Defendant also admitted certain sentencing enhancements alleged against him in Case C. The trial court then imposed sentence—using the already-imposed eight-year sentence in Case A as the principal term—as follows: "[D]efendant is sentenced to nine years, eight months state prison. That's a forthwith commitment with zero custody credits. For the record, that is arrived at by taking one-third the mid-term of Penal Code section 211 in [Case C] for one year. That is doubled to two years because of the strike. So two years on that count. The court's adding an additional year [under section] 12022(b)(1) for the knife allegation. That's three years

total. An additional year because of the prison prior pursuant to [section] 667.5(b) adds another year for four years total. And because of the prior admission related to [section] 667(a)(1), that adds another five years for a total sentence of nine years on [Case C]. [¶] Additionally, as to [Case B], the court runs consecutive one-third the mid-term or one-third of two years which is eight months for an additional eight months for a total sentence of nine years, eight months state prison."

After defendant's sentencing, California voters approved Proposition 47 on November 4, 2014. Just over a month later, defendant filed a sentence recall petition as authorized by section 1170.18, which Proposition 47 added to the Penal Code. Defendant sought to reduce his burglary convictions in Case A (the 2012 case that served as the principal eight year term for his overall sentence) and Case B (the case responsible for the eight month portion of the consecutive nine year, eight month term) to misdemeanors as permitted under the terms of Proposition 47.

The trial court (with a different judge presiding than the judge who originally imposed sentence) held a hearing on defendant's sentence recall petition, and defendant was present and represented by counsel. The People did not object to defendant's petition to reduce his felony burglary convictions to misdemeanors under section 459.5, and the court so ordered. There was, however, some dispute concerning how the court should recalculate defendant's sentence. The People explained the reduction of the burglary convictions in Case A to misdemeanors meant the court must select a new primary term, which in the People's view should be the term for the robbery conviction in Case C. The People further argued that the court should impose a much higher sentence for that robbery conviction than the court originally imposed so as to approximate the

aggregate sentence defendant originally received pursuant to the plea agreement. The court agreed over defense counsel's objection, noting defendant had been a "potential third strike candidate" and explaining "the court's position is the resentencing cannot exceed the original agreement, but in the spirit of the original disposition could reach as close if not the same [sentence]."

The court accordingly resentenced defendant on all three cases, imposing 180-day consecutive sentences for the three (newly reduced) misdemeanor convictions in Cases A and B and a 16-year sentence for the robbery conviction in Case C that remained a felony. For the Case C robbery sentence, which became the new principal term, the court selected the high term of five years, doubled pursuant to defendant's previous admission of the "strike prior," plus five years pursuant to section 667, subdivision (a)(1) and one year for the deadly weapon enhancement under section 12022, subdivision (b)(1). The new aggregate sentence was therefore 17 years and six months, two months less than the sentence originally imposed.

B. Procedural History in This Court

We appointed counsel to represent defendant on appeal. After examining the record, counsel filed an opening brief raising no issues but asking us to independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) On November 25, 2015, we advised defendant he had 30 days within which to personally submit any contentions or issues he wished us to consider. In response, defendant submitted a one-page letter in which he contended he "fall[s] under prop. 47" and asked us to reduce his sentence to allow him to spend more time with his family and "to reduce the population in our prison systems."

After an initial review of the record, we issued an order on March 30, 2016, asking the parties to submit supplemental briefs addressing the question of "[w]hether the trial court erred in resentencing the defendant to a 16-year prison term on the robbery count of conviction . . . when conducting a resentencing under Proposition 47 for burglary offenses in [Case A and Case B]." Counsel for defendant promptly filed a supplemental brief as requested, arguing the trial court erred when resentencing defendant. Respondent sought and received permission to file a late brief urging affirmance.

II. DISCUSSION

There have been significant developments in the law since we issued our order requesting supplemental briefing. At the time we issued the order, we were aware of little published authority that addressed whether section 1170.18 should be interpreted to permit a court to impose a longer sentence on a conviction not reduced to a misdemeanor under Proposition 47 in resentencing defendant to an overall aggregate sentence that does not exceed the original aggregate sentence imposed. Now, the First Appellate District has issued a published decision on precisely the question we confront here (*People v. Roach* (2016) 247 Cal.App.4th 178 (*Roach*)), and our own appellate district has issued another decision discussing the same issue (*People v. McDowell* (2016) 2 Cal.App.5th 978 (*McDowell*)). We find the rationale and result in both cases persuasive, and we follow these decisions in holding the trial court could reconsider all prior sentencing choices after Proposition 47 required it to select and calculate a new principal term when resentencing defendant.

The procedural facts in *Roach* and this case are remarkably similar. As here, the defendant in *Roach* had been convicted and

sentenced for multiple offenses in three separate cases. (*Roach*, *supra*, 247 Cal.App.4th at pp. 180-181.) The trial court originally sentenced Roach to an aggregate prison term of four years and four months, with a conviction for possession of methamphetamine in one of the cases selected as the principal term. (*Id.* at p. 182 [three years on the principal term in case one, consecutive subordinate terms of eight months for receiving stolen property and unlawful possession of a firearm convictions in case two, and a concurrent three-year term for reckless driving conviction in case three].) Roach filed a section 1170.18 petition seeking to reduce his methamphetamine possession and receiving stolen property offenses to misdemeanors, the People conceded Proposition 47 relief was appropriate, and the trial court granted Roach's petition. In resentencing Roach, the "court indicated its intention was 'to fashion a sentence that would be equal to the one he is now serving, no more, which would be precluded, but also no less, which I don't think would be appropriate.'" (*Ibid.*) Because the original principal term for possession of methamphetamine had been reduced to a misdemeanor, the trial court selected the reckless driving conviction as the new principal term and imposed sentence on that conviction and the other remaining convictions that ultimately produced the same aggregate sentence the trial court originally imposed. (*Ibid.*)

On appeal, the First Appellate District rejected Roach's contention that the trial court erred in resentencing him to the same aggregate sentence originally imposed. (*Roach*, *supra*, 247 Cal.App.4th at p. 180.) Roach acknowledged section 1170.18 "'provides scant textual guidance'" on how a court should reconstruct an aggregate sentence upon granting Proposition 47 relief but argued the statute should be "'read so as to effectuate the intent of the voters to reduce the amount of time a qualifying

defendant spends incarcerated'" and pointed to ballot materials for Proposition 47 evincing an intent to reduce the size of prison populations. (*Id.* at p. 184.) Unpersuaded, the Court of Appeal observed section 1170.18 vests a trial court with jurisdiction to resentence a successfully petitioning defendant and held a court must follow "the generally applicable sentencing procedures in section 1170 et seq." in doing so. (*Ibid.*)

Analogizing to cases where a conviction underlying a principal term is reversed on appeal and the matter remanded for resentencing, the *Roach* court explained a trial court resentencing a defendant to an aggregate sentence after reducing a prior principal term to a misdemeanor must select the next most serious conviction as the new principal term. The Court of Appeal further held a trial court may also modify the sentences it imposed on other non-reduced counts because an aggregate prison term is not a series of separate independent terms but rather a single term made up of interdependent components. (*Roach*, *supra*, 247 Cal.App.4th at p. 185 [citing *People v. Burbine* (2003) 106 Cal.App.4th 1250 for the proposition that a trial court is entitled to reconsider all sentencing choices and is not limited to striking the illegal portions of an aggregate sentence].) The Court of Appeal recognized "the only express limit in section 1170.18—the prohibition on imposing a longer term—is the same limit that applies in resentencing following a reversal," and found it significant that "[a]dditional restrictions on a trial court's authority at resentencing could have been included in section 1170.18, but were not." (*Roach*, *supra*, 247 Cal.App.4th at p. 185.) The court therefore "presume[d] . . . the voters were aware of a trial court's authority to reconsider all sentencing choices

upon resentencing, with the corresponding potential for imposition of the same aggregate term . . . ."[2] (*Ibid*.)

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[2] The *Roach* court also found support for its rationale in this district's decision in *People v. Sellner* (2015) 240 Cal.App.4th 699 (*Sellner*) and case law discussing resentencing under Proposition 36 (see, e.g., *People v. Garner* (2016) 244 Cal.App.4th 1113 (*Garner*)).

In *Sellner*, the court held resentencing a defendant to an increased sentence on a previously subordinate term after reducing what was the principal term to a misdemeanor under Proposition 47 did not offend double jeopardy principles. (*Sellner*, *supra*, 240 Cal.App.4th at p. 702.) The *Sellner* court explained that "[w]hen the principal term is no longer in existence, the subordinate term must be recomputed. . . . As long as the recomputed term is less than the prior aggregate term, the defendant has not been punished more severely for the successful filing of a Proposition 47 petition." (*Ibid*.) As *Roach* observes, *Sellner* did not address the argument that imposing the same aggregate term would be contrary to the voters' intent in enacting Proposition 47, but the case does support the proposition that a court may reconsider all components of an aggregate sentence when resentencing a defendant after granting a Proposition 47 petition that impacts a previously imposed principal term. (*Roach*, *supra*, 247 Cal.App.4th at p. 186.)

In *Garner*, the Court of Appeal held a trial court could impose sentencing enhancements that were originally stricken when resentencing a defendant pursuant to Proposition 36 because voters enacting Proposition 36 were presumably aware of existing law that allows a court to reconsider all the charges against the defendant when "recalling" a sentence under section 1170, subdivision (d). (*Garner*, *supra*, 244 Cal.App.4th at p. 1118 [explaining there is no reason why a recall of sentence pursuant to Proposition 36 should be treated differently than a recall of sentence under section 1170].)

The analysis and result in *Roach* obtains equally here. The trial court granted defendant's Proposition 47 petition, which reduced the burglary convictions in Case A to misdemeanors and necessarily required selection of a new principal term. The court properly selected the robbery conviction in Case C as the new principal term, and the court was entitled to reconsider the sentence previously imposed for that conviction in fashioning a new overall aggregate sentence of interdependent components. Because the overall term imposed on resentencing did not exceed (and indeed was two months shorter) than the original term, the recalculated sentence was legally permissible. (*Roach*, *supra*, 247 Cal.App.4th at p. 185; see also § 1170.18, subd. (e) ["Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence"].)

To say the sentence imposed here was legally permissible, however, is not to say that a court resentencing a defendant under Proposition 47 must impose the same or nearly the same aggregate sentence originally imposed whenever a plea agreement is involved. We have no doubt California voters enacting Proposition 47 intended to provide resentencing relief to defendants convicted by plea just like defendants convicted at trial. (§ 1170.18, subd. (a) ["A person currently serving a sentence for a conviction, whether by trial or plea . . . may petition for a recall of sentence . . ."]; see also, e.g., *T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 652.) As our Supreme Court has explained, "the general rule in California is that plea agreements are deemed to incorporate the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy." (*Doe v. Harris* (2013) 57 Cal.4th 64, 71.) Thus, as *McDowell* holds, although a court is not required to resentence a defendant to the identical

term he or she previously received for a conviction that is unaffected by Proposition 47 (the net effect of which would almost always produce a lower aggregate sentence), neither is a court prohibited from doing so.[3] (*McDowell*, *supra*, 2 Cal.App.5th at pp. 982-983.) Rather, when conducting the resentencing required by Proposition 47 upon reduction of a principal term conviction to a misdemeanor, the court should fashion the new aggregate sentence—which in no case may exceed the original aggregate sentence—after considering the terms of the prior negotiated agreement, the changes in law worked by Proposition 47, and customary general sentencing objectives, including achieving uniformity in sentencing, punishing the defendant, and protecting society. (Cal. Rules of Court, rule 4.410.)

Here, the trial court indicated it had reviewed defendant's probation report and it articulated the reason it intended to impose close to the same aggregate sentence, namely, that such a sentence remained warranted notwithstanding the reduction of certain of his crimes to misdemeanors because defendant had received an original sentence that was substantially less than the third strike indeterminate sentence that could have been imposed for the robbery in Case C alone. In our judgment, defendant's recalculated sentence and the reason for it were sound.

In sum, we have examined the record and are satisfied defendant's attorney on appeal has complied with the responsibilities of counsel and no other arguable issue exists. (*People v. Wende*, *supra*, 25 Cal.3d 436, 441; see also *Smith v.*

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[3] Indeed, defendant received a slightly shorter sentence than originally called for under the plea agreement and the People have not contended imposition of this lesser sentence was error.

Robbins (2000) 528 U.S. 259, 278-282; *People v. Kelly* (2006) 40 Cal.4th 106, 122-124.)

DISPOSITION

The judgment is affirmed.

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BAKER, J.

We concur:

TURNER, P.J.

KUMAR, J.*

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