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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.

RICARDO AVILA,

Defendant and Appellant.

B283199

(Los Angeles County
Super. Ct. No. BA423043)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Lisa B. Lench, Judge. Reversed and
remanded.

Maxine Weksler, 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, Margaret E. Maxwell and Lindsay Boyd, Deputy Attorneys
General, for Plaintiff and Respondent.

Appellant Ricardo Avila appeals from the judgment entered after this court remanded the case for resentencing. He claims that the trial court erred (1) in failing to consider his good behavior in prison as a post-conviction mitigating factor when it imposed a sentence on his conviction of assault upon a peace officer, and (2) in calculating his conduct credits. As we shall explain, we agree and remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND¹

In 2016, this court affirmed appellant's convictions of battery, discharge of a firearm, possession of an assault weapon, and assault upon a peace officer by means likely to produce great bodily injury (GBI), but we remanded for resentencing. We directed the trial court to, inter alia, strike the GBI sentencing enhancement (Pen. Code, § 12022.7) found on the battery conviction alleged in count 4, and instead to consider whether to impose the GBI sentencing enhancement on the count 9 assault conviction. We also directed the court to "reconsider its discretionary sentencing choices with the limitation that [appellant's] new aggregate term not exceed his original sentence" of 18 years. (*People v. Avila* (Nov. 29, 2016, B263496) [nonpub. opn.], p. 23.)

At the resentencing hearing, appellant's counsel asked the court not to impose the GBI sentencing enhancement on count 9. He argued that appellant's culpability was mitigated by the circumstances of the crime and by his post-conviction good conduct in prison—appellant was not involved with gangs in prison, had no disciplinary record; attended school, and was being transferred to a lower security facility. The court responded that although it was glad to learn that appellant was doing well in prison, it was not

¹ The underlying facts of the crimes are omitted because this appeal concerns only the resentencing proceedings and not the events and circumstances related to the crimes or convictions.

permitted not to consider his post-conviction prison behavior as a mitigating factor when it imposed his sentence: “Clearly, I can’t consider [appellant’s behavior in prison] with respect to the sentence that I impose, because I have to consider the situation as it was on the original sentencing date.” The court also reflected that mitigating and aggravating factors that it could consider “balanced each other out.” Thereafter, the court resentenced appellant to an aggregate term of 18 years, including as to count 9, three years for the GBI enhancement.

Appellant filed a timely notice of appeal.

DISCUSSION

I. Remand is Required for Resentencing on Count 9

Appellant contends, the Attorney General concedes, and we agree, that the trial court had authority to consider appellant’s prison behavior in sentencing him on count 9. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 460 [“it is well settled that when a case is remanded for resentencing after an appeal, the defendant is entitled to ‘all the normal rights and procedures available at his original sentencing’ [citations], including consideration of any pertinent circumstances which have arisen since the prior sentence was imposed”], citing *People v. Foley* (1985) 170 Cal.App.3d 1039, 1047.) The Attorney General argues, however, that we need not remand for resentencing because the trial court would not have exercised its discretion to reduce appellant’s sentences even if it realized it had the authority to do so. The Attorney General cites *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*), in which the defendant requested that his case be remanded to the trial court for resentencing after the Supreme Court decided *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The *Gutierrez* Court rejected the defendant’s request, noting that the trial court indicated that it

would not, in any event, have exercised its discretion to lessen the sentence and, thus, no purpose would be served in remanding for reconsideration. (*Gutierrez, supra*, 48 Cal.App.4th at p. 1896.)

Here, the Attorney General argues, that by the same reasoning, there is no need to remand appellant's case, pointing to the court's remark that the mitigating and aggravating factors balanced out.

We are not persuaded. In *Gutierrez*, the trial court stated during the initial sentencing hearing that it would not have exercised its discretion to lessen the sentence even if it could do so. (*Gutierrez, supra*, 48 Cal.App.4th at p. 1896.) In contrast, here the court made no such observation. In addition, the court's statement that the aggravating factors and mitigating factors "sort of balanced each other out"—reflected the court's assessment of *only* the circumstances of the crime *without* consideration of his post-conviction conduct. Contrary to the Attorney General's view of appellant's prison behavior, the fact that the court commended appellant on his good conduct implies that the court found that factor remarkable. Finally, the court did not express a specific desire to impose the maximum possible sentence. Consequently, remand for resentencing is appropriate on count 9.

II. The Court Miscalculated Appellant's Conduct Credits, Requiring Correction of the Abstract of Judgment

Appellant contends, the Attorney General concedes, and we agree, that the trial court erred in recalculating appellant's conduct credits. At the original sentencing hearing, the court granted appellant 55 days of conduct credit. Upon resentencing, the trial court recalculated appellant's actual time in custody and his conduct credits, awarding appellant 170 days of conduct credit. Pursuant to *People v. Buckhalter* (2001) 26 Cal.4th 20, the trial court should have only recalculated the actual time appellant had served on his sentence, not the conduct credits. When, as here,

remand results in modification of a felony sentence during the term of imprisonment, the trial court must calculate only the actual time the defendant has already served; a defendant cannot earn good behavior credits under the formula applicable to persons detained in a local facility during this limited period that the matter has been remanded for correction of sentencing errors. (*Id.* at pp. 23, 26.) Here, the trial court should not have recalculated appellant's custody credits when it resentenced him. Accordingly, the judgment must be corrected to reflect the 55 days of conduct credit the court granted appellant at his initial sentencing.

DISPOSITION

The GBI sentence enhancement imposed under Penal Code section 12022.7 on appellant's conviction on count 9 is stricken, and the matter is remanded. Upon remand, the trial court shall hold a sentencing hearing and shall exercise its discretion to consider whether to impose that enhancement based on all aggravating and mitigating factors, including appellant's post-conviction prison conduct. The trial court is also directed to correct appellant's custody credits to reflect that appellant is entitled to 55 days of conduct credit and forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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ROTHSCHILD, P. J.

We concur.

CHANEY, J.

BENDIX, J.