Filed 4/19/18 P. v. Joe CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. WARDELL JOE, Defendant and Appellant.	B282478 (Los Angeles County Super. Ct. No. BA240172)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Reversed and remanded for resentencing; judgment of conviction otherwise affirmed.

Tracy J. Dressner, 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 D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Wardell Joe was originally sentenced in 2004 to life without possibility of parole (LWOP) for first degree murder with a special circumstance finding as an aider and abettor. Based on new authority, the trial court resentenced him in 2017. Joe appeals. He contends that he is entitled to a hearing under *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*) and to the benefit of newly enacted Senate Bill No. 620, and that other sentencing errors must be corrected. The People concede all issues. We correct the sentencing errors and remand for a *Franklin* hearing and for resentencing.

BACKGROUND

On November 3, 1998, Joe was the getaway driver for an armed robbery. His accomplice shot and killed a security guard. Joe was charged with crimes arising out of those events, and, on February 27, 2004, a jury found him guilty of count 1, special circumstance first degree murder (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(17))[1] and of counts 2 and 3, second degree robbery (§ 211). As to all counts, the jury found true principal gun use allegations (§§ 12022.53, subds. (c), (d) & (e)(1)). As to counts 1 and 3, the jury found true gang allegations (§ 186.22, subd. (b)(1)). The jury hung on the gang allegation as to count 2. The trial court sentenced Joe to LWOP plus 25 years to life in prison.[2]

Thereafter, our California Supreme Court, in *People v. Banks* (2015) 61 Cal.4th 788, held that LWOP for an aider and abettor of felony-murder is constitutionally permissible only if

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[1] All further undesignated statutory references are to the Penal Code.

[2] We affirmed the judgment of conviction in *People v. Bridges et al.* (Jan. 30, 2006, B176263) [nonpub. opn.].)

the aider and abettor was a "major participant" in the crime and acted with "reckless indifference to human life." Applying that rule to the defendant in *Banks*, also the getaway driver for an armed burglary during which a security guard was killed, *Banks* found that there was insufficient evidence to uphold the special circumstance finding.

Based on its holding in *Banks*, the California Supreme Court remanded Joe's case to this court, and we held that there was insufficient evidence to support the special circumstance finding and remanded for resentencing. (*People v. Joe* (Sept. 15, 2016, B275593) [nonpub. opn.].)

On remand, the trial court, on March 29, 2017, resentenced Joe as follows: **count 1**, 50 years to life (25 years to life for the murder plus 25 years to life for the gun enhancement under section 12022.53, subdivisions (d) and (e)(1)), five years (§ 667, subd. (a)), 20 years (§ 12022, subds. (c) & (e)(1)) stayed, 10 years (§ 186.22, subd. (b)(1)) stayed; **count 2**, five years for robbery plus 25 years to life (§ 12022.53, subds. (d) & (e)(1)), 20 years (§ 12022.53, subds. (c) & (e)(1)), and 10 years (§ 186.22, subd. (b)(1)); and **count 3**, five years, plus 25 years to life (§ 12022.53, subds. (d) & (e)(1)), 20 years (§ 12022.53, subds. (c) & (e)(1)) stayed, and 10 years (§ 186.22, subd. (b)(1)) stayed. The court stayed the entire sentence on count 2 under section 654 and ran the sentence on count 3 concurrent to the sentence imposed on count 1. Joe's sentence therefore was 50 years to life plus five years in prison.

Joe appeals again, contending that he is entitled to a remand to make a record for his eventual youth offender parole hearing, for reconsideration of his sentence under Senate Bill No. 620, and to a correction of other errors in his sentence.

DISCUSSION

I. Youth offender parole hearing

Joe was 20 years old when he committed his crimes. Since his conviction in 2004, our courts have recognized that youthful offenders have diminished culpability and greater prospects for reform and therefore are "constitutionally different from adults" for purposes of sentencing them when they commit crimes. (*Miller v. Alabama* (2012) 567 U.S. 460, 471 [mandatory LWOP may not be imposed on juvenile offenders]; *People v. Jones* (2017) 7 Cal.App.5th 787, 817; see also *Roper v. Simmons* (2005) 543 U.S. 551 [death penalty may not imposed on juveniles]; *Graham v. Florida* (2010) 560 U.S. 48 [LWOP may not be imposed on juveniles who commit nonhomicide offenses]; *People v. Caballero* (2012) 55 Cal.4th 262 [de facto LWOP sentence may not be imposed on a juvenile nonhomicide offender].)

Our legislature responded to this evolution with section 3051.[3] As relevant here, section 3051 provides "youth offender parole hearings" to "any prisoner who was 25 years of age or younger . . . at the time of his or her controlling offense." (§ 3051, subd. (a)(1).)[4] Joe therefore will be entitled to a youth offender parole hearing during his 25th year of incarceration. (§ 3051,

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[3] See also section 4801, subdivision (c) ["When a prisoner committed his or her controlling offense . . . when he or she was 25 years of age or younger, the board . . . shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."].)

[4] At the time Joe was sentenced, former section 3051 applied to prisoners under the age of 23.

subd. (b)(3).) That hearing "shall provide for a meaningful opportunity to obtain release." (§ 3051, subd. (e).) The Board of Parole Hearings shall take into consideration, among other things, "the diminished culpability of youth as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual" (§ 3051, subd. (f)(1)) and the knowledge of, for example, family members, friends, school personnel and faith leaders who knew the juvenile before the crime or who know of the juvenile's growth and maturity since the crime (§ 3051, subd. (f)(2)).

Because this information about the juvenile before he or she committed the crime "is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away," a juvenile offender, at the time of sentencing, must be given a "sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (*Franklin*, *supra*, 63 Cal.4th at pp. 283-284.)

Here, at neither Joe's original sentencing hearing in 2004 or at his resentencing hearing in 2017 did he have a sufficient opportunity to make a record of information that might be relevant at his youth offender parole hearing. At his 2017 resentencing hearing, the trial court did order a new probation report but, when the court asked Joe's counsel whether he wanted a *Franklin* hearing, counsel "defer[red]." It is unclear whether counsel meant to defer a hearing to a later date or whether he waived one. In any event, Joe was entitled to a *Franklin* hearing. Notwithstanding the passage of time since Joe

committed his crime in 1998, it is better to have an untimely *Franklin* hearing to preserve whatever record can be made than never to have one.

II. Senate Bill No. 620

Joe is also entitled to the benefit of another law that has come into effect since he was resentenced in March 2017. When Joe was resentenced, the trial court lacked discretion to strike the firearm enhancements found true under section 12022.53. Newly amended section 12022.53, subdivision (h), which became effective January 1, 2018, grants to trial courts the discretion they previously lacked. Subdivision (h) provides: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

As the People correctly concede, the amendment to section 12022.53 applies retroactively to cases, such as Joe's, that were not final when the amendment became operative. (*People v. Woods* (2018) 19 Cal.App.5th 1080 [amendment to section 12022.53, subd. (h) is retroactive].) 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 [judgment is not final, for purposes of retroactivity analysis, until time for petitioning United States Supreme Court has expired].) 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.)

The People do not argue that the trial court would have declined to exercise its discretion to strike the firearm enhancement had the court known it had such discretion. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [remand to consider striking a prior conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 unnecessary when record demonstrated that court would not have exercised its discretion to impose a lesser sentence].) The record here does not show what the court would have done. Remand is therefore appropriate. (See *People v. Deloza* (1998) 18 Cal.4th 585, 599-600 [remand for resentencing where trial court understood its discretion to strike a prior conviction under three strikes law and declined to do so, but did not understand it had discretion to impose concurrent rather than consecutive sentences].) We offer no opinion as to how the court's discretion should be exercised on remand.

III. Additional sentencing errors

Although the jury did not find the gang allegation true as to count 2, the trial court imposed but stayed sentence on the allegation. That sentence must be stricken.

On count 2, the trial court also imposed but stayed a 25-year-to-life sentence under section 12022.53, subdivisions (d) and (e)(1), and 20 years under section 12022.53, subdivisions (c) and (e)(1). However, those enhancements only apply to an aider and abettor if the gang enhancement was found true. (§ 12022.53, subd. (e)(1)(A); *People v. Garcia* (2002) 28 Cal.4th 1166, 1171.) The jury did not find the gang allegation true as to count 2, and

therefore the sentences on the gun enhancements on count 2 must be stricken.

Finally, the trial court, on count 1, imposed and stayed 10 years on the gang enhancement. Although such a term is proper under section 186.22, subdivision (b)(1)(C), when the defendant commits a violent felony, it may not be imposed where, as here, the violent felony is "punishable by imprisonment in the state prison for life." (§ 186.22, subd. (b)(5).) In such cases, a 15-year minimum term of parole eligibility is instead imposed. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004.)

DISPOSITION

On count 1, the 10-year term imposed under section 186.22, subdivision (b)(1)(C), is stricken and the court is directed to impose a 15-year minimum term of parole eligibility. On count 2, the sentences on the gun and gang enhancements are stricken. The matter is otherwise remanded for resentencing in light of Senate Bill No. 620. Further, on remand, the court shall conduct a *Franklin* hearing. The judgment of conviction is otherwise affirmed.

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DHANIDINA, J.*

We concur:

EDMON, P. J.

LAVIN, 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.