Filed 11/19/19 P. v. Crump CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DENNIS ANTHONY CRUMP, Defendant and Appellant.	B290521 (Los Angeles County Super. Ct. No. NA104068)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura L. Laesecke, Judge. Affirmed as modified.

Susan Morrow Maxwell, 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, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Michael J. Wise, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Dennis Anthony Crump of 15 counts of second degree robbery. On appeal Crump primarily contends his aggregate state prison sentence of 495 years to life constitutes cruel and/or unusual punishment in violation of the United States and California Constitutions. We modify Crump's sentence to strike the prior prison term enhancements for felonies under a new law effective January 1, 2020 and, as modified, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Amended Information*

An amended information filed November 8, 2017 charged Crump with 15 counts of second degree robbery. It specially alleged as to certain counts that Crump had personally used a firearm (Pen. Code, § 12022.53, subd. (b))[1] and, as to other counts, that a principal had been armed with a firearm (§ 12022, subd. (a)(1)). In addition, the amended information specially alleged Crump had suffered two prior serious or violent felony convictions within the meaning of the three strikes law (§§ 667, subd. (b)-(i); 1170.12), two prior serious felony convictions within the meaning of section 667, subdivision (a)(1), and had served five prior separate prison terms for felonies within the meaning of section 667.5, subdivision (b). Crump pleaded not guilty and denied the special allegations.

2. *The Trial, Verdict and Sentence*

According to the evidence at trial, between February 9, 2016 and April 19, 2016 Crump and one or more other individuals engaged in a robbery spree of convenience stores at

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[1] Statutory references are to this code unless otherwise stated.

several different locations. Witnesses testified that either Crump or one of his confederates had been armed with what appeared to be a firearm during several of the robberies. At the close of their case-in-chief, the People dismissed the enhancement for personal use of firearm, leaving the enhancement for a principal armed with a firearm as the only weapon enhancement for the jury to decide. There was some evidence the gun used in the robberies was a pellet gun. The jury convicted Crump on all counts but found the firearm enhancement allegations not true.

In a bifurcated proceeding Crump admitted the prior serious felony conviction and felony prison term allegations and moved pursuant to *People v. Superior Court* (*Romero*) 13 Cal.4th 497 (*Romero*) to dismiss the prior serious felony conviction enhancements under the three strikes law in furtherance of justice. The court denied Crump's *Romero* motion and sentenced Crump as a third strike offender to an aggregate state prison term of 495 years to life.[2]

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[2] The court imposed 15 consecutive terms of 25 years to life for the robbery counts under the three strikes law, plus five years on each count pursuant to section 667, subdivision (a), plus three years on each count—one year for each of three prior felony prison term enhancements. (The court imposed only three prior felony prison term enhancements because the other two duplicated the section 667, subdivision (a), enhancement allegations. The court imposed only one section 667, subdivision (a), prior serious felony enhancement on each count because the two prior serious felonies alleged had not been brought and tried separately.)

DISCUSSION

1. *Crump's Sentence Did Not Constitute Cruel and/or Unusual Punishment*

The Eighth Amendment's prohibition of cruel and unusual punishment, applicable to the states through the 14th Amendment, contains a "'narrow proportionality principle' that 'applies to noncapital cases.'" (*Ewing v. California* (2003) 538 U.S. 11, 20 [123 S.Ct. 1179, 155 L.Ed.2d 108, 117] (*Ewing*) (plur. opn. of O'Connor, J.) Although strict proportionality between crime and sentence is not required, "'extreme sentences that are "grossly disproportionate" to the crime'" are constitutionally prohibited. (*Id.* at p. 23; accord, *Graham v. Florida* (2010) 560 U.S. 48, 59 [130 S.Ct. 2011, 176 L.Ed.2d 825].)

The California Constitution's prohibition of "cruel or unusual punishment" (Cal. Const., art. I, § 17) similarly forbids punishment so disproportionate to the crime for which it was imposed that it "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424; accord, *People v. Gomez* (2018) 30 Cal.App.5th 493, 500.)

A claim that a particular sentence amounts to cruel and/or unusual punishment in violation of either the federal or California Constitution is a question of law subject to de novo review, while any underlying disputed facts are reviewed in the light most favorable to the judgment. (*People v. Gomez, supra,* 30 Cal.App.5th at p. 499; *People v. Martinez* (1999) 76 Cal.App.4th 489, 496.) "Successful challenges" to a sentence as cruel and/or unusual under either the federal Constitution or California Constitution are "exceedingly rare." (*Ewing, supra,* 538 U.S. at pp. 20-21; accord, *People v. Perez* (2013) 214 Cal.App.4th 49, 60.)

Crump, who was 36 years old at the time of sentencing, contends his aggregate state prison sentence of 495 years to life is grossly disproportionate to the multiple robbery crimes for which he was convicted. He observes that the victims of his robbery spree, while certainly traumatized, did not suffer any physical injuries and the People failed to prove beyond a reasonable doubt that he or one of his confederates was armed with a firearm during the charged robberies. Yet, despite these "favorable" factors, Crump complains, the court sentenced him to the practical equivalent of life without the possibility of parole, a sentence multiple times greater than that statutorily required term for the more egregious crime of first degree premeditated murder.

However, as the court observed when it rejected the same argument at Crump's sentencing hearing, Crump was punished under the three strikes law not only for his current offenses, but also for his lengthy record of recidivism. (See *Ewing*, *supra,* 538 U.S. at p. 29 [in imposing a three strikes sentence, the State's interest is not merely punishing the offense of conviction but also "'dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law'"]; *In re Coley* (2012) 55 Cal.4th 524, 562 ["in evaluating an Eighth Amendment challenge to a sentence imposed under a recidivist statute, we must consider not only [the] triggering offense, but also the nature and extent of [the defendant's] criminal history"; "we must place on the scales not only [the defendant's] current felon[ies] but also his long history of felony recidivism"].)

Crump's criminal history was indeed extensive: In addition to the 15 robberies for which he was convicted in the case at bar, he had suffered a felony conviction for possession of an assault weapon in March 2001, two qualifying strike convictions for residential burglary in September 2001, a felony conviction for illegal possession of ammunition in October 2010 and a felony conviction for illegal access to a firearm in July 2012. As the trial court observed, Crump's current offenses involving "a string of [robbery] crimes" in 2016, coupled with prior residential burglaries and a history of recidivism, were precisely the type of offenses the voters intended to punish under the three strikes law. In short, this is not the exceedingly rare case where the sentence is so grossly disproportionate to the nature of Crump's crimes, together with his unabated recidivism, that it violates the federal or California Constitution. (See, e.g., *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1231 [aggregate state prison sentence of 135 years to life under three strikes law not cruel or unusual even though substantially longer than defendant's possible life span]; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 568-573 [aggregate prison term of 210 years to life not cruel and/or unusual; defendant punished not only for his six counts of robbery but also for his recidivism].)

2. *Crump's Sentence Did Not Violate Due Process or His Sixth Amendment Right to a Jury Trial*

During sentencing the court stated, "And I realize that, [defense counsel], you pointed out in your memo that he had been given an offer before and he tried to take that offer at the last minute. The problem was it was at the last minute. The court isn't persuaded by the fact that he tried to take the offer. He didn't take advantage of it." According to Crump, this statement reveals the court's improper intent to impose a lengthy sentence

in retaliation for his election to go to trial rather than to accept a plea agreement. (See *In re Lewallen* (1979) 23 Cal.3d 274, 279 ["[t]he refusal of an accused to negotiate a plea with the prosecution must not influence the sentence imposed by the court after trial"].) It does no such thing. In response to the defense counsel's argument in his sentencing memorandum that the defendant had tried to accept the prosecutor's plea offer of 30 years but was prevented from doing so when the prosecutor abruptly withdrew it as soon as Crump accepted it, the court corrected defense counsel, explaining that any offer had been revoked before Crump accepted it. Nothing in this record remotely supports Crump's claim that the sentence imposed was in retaliation for his having exercised his right to a jury trial.

3. *Crump Is Not Entitled to a Remand for Resentencing to Address the Section 667, Subdivision (a), Enhancement*

Crump contends remand is necessary to permit the court to exercise its discretion under a new law effective January 1, 2019 authorizing the court to exercise discretion to strike or dismiss section 667, subdivision (a), serious felony enhancements. (See Stats. 2018, ch. 1013, §§ 1 & 2.) However, while remand is appropriate when a reviewing court would otherwise have to speculate as to what a trial court may have done had it been fully aware of its sentencing discretion (see *People v. Johnson* (2019) 32 Cal.App.5th 26, 69; cf. *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111 ["speculation about what a trial court might do on remand is not 'clearly indicated' by considering only the original sentence"]), remand is unwarranted when, as here, the record unequivocally demonstrates the trial court "would not have dismissed [the] prior serious felony enhancement even if it had discretion to do so." (*People v. Jones* (2019)

32 Cal.App.5th 267, 274; accord, *Johnson*, at p. 69; *People v. McDaniels* (2018) 22 Cal.App.5th 405, 419-420.)

The court's intent to impose the longest sentence statutorily possible was plain: In addition to denying Crump's *Romero* motion to dismiss a prior qualifying strike conviction, the court acknowledged, and declined, to exercise its discretion to run some of the counts involving the same incident concurrently, emphasizing both the different victims and Crump's conduct in threatening the victims and taking their mobile phones. The court also refused to exercise its discretion to dismiss any of the three qualifying one-year prior prison term enhancements under section 667.5, subdivision (b). Even more tellingly, in rejecting Crump's request to shorten his sentence of 120 years (determinate term) plus 375 years to life (indeterminate term) because it amounted to the functional equivalent of life without the possibility of parole, the court stated, "I appreciate the argument that you're making, Mr. McDowell (defense counsel), I do. But your client—I have yet to see anything which your client deserves any sort of compassion. He has a significant criminal history both before and after the strikes. Residential burglary is also a very scary crime. It's when someone comes into your house. It's your place of safety. . . . Mr. Crump was not compassionate with respect to any of the people he stole from. And even three counts would be a life sentence for him, in a sense. So the court is not inclined. I know I have discretion. The court is choosing not to exercise it because I don't think Mr. Crump is entitled to it." On this record, we have no difficulty concluding the trial court would not have dismissed any of Crump's prior serious felony enhancements under section 667, subdivision (a), even if it had the discretion to do so. (See *People*

v. Jones, supra, 32 Cal.App.5th at pp. 274, 275 ["Besides not exercising its discretion for leniency when it could have, the trial court made clear its intention to impose the most stringent sentence it could justifiably impose"; "[u]nder these circumstances we are confident the court would not strike the felony prior and its resulting enhancement out of lenience toward the defendant"].)

4. *Remand Is Not Required for a Hearing on Crump's Ability To Pay the Imposed Fines, Fees and Assessments*

At sentencing the court imposed a $450 court facilities assessment (Gov. Code, § 70373), a $600 court security fee (§ 1465.8) and a $5,000 restitution fine (§ 1202.4, subd. (b)). In regard to the restitution fine, the court stated, "I find you have the ability to pay that restitution fine based on any work that you will be doing in custody, if you choose to do so, during the course of the sentence." The court did not award any victim restitution.

In *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas)* this court held it violated due process under both the United States and California Constitutions to impose a court operations assessment as required by section 1465.8 or the court facilities assessment mandated by Government Code section 70373, neither of which is intended to be punitive in nature, without first determining the convicted defendant's ability to pay. (*Dueñas*, at p. 1168.) A restitution fine under section 1202.4, subdivision (b), in contrast, is intended to be, and is recognized as, additional punishment for a crime. Section 1202.4, subdivision (c), provides a defendant's inability to pay may not be considered a compelling and extraordinary reason not to impose the restitution fine; inability to pay may be considered only when increasing the amount of the restitution fine above the minimum required by statute. To avoid the serious constitutional question

raised by these provisions, we held, although the trial court is required to impose a restitution fine, the court must stay execution of the fine until it is determined the defendant has the ability to pay the fine. (*Dueñas*, at p. 1172.*)*

Relying on our decision in *Dueñas, supra,* 30 Cal.App.5th 1157, Crump argues remand is required to permit him to establish his inability to pay the court operations assessments. The People insist Crump forfeited that argument by failing to object to the assessments in the trial court.

We have previously declined to apply a general rule of forfeiture in these cases because our decision in *Dueñas* announced a constitutional principle that could not have been reasonably anticipated at the time of sentencing. (See *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 [at the time defendant was sentenced, "*Dueñas* had not been decided; and no California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to pay"].)[3] Here, however, unlike the

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[3] The intermediate appellate courts are currently divided as to whether such a claim is forfeited by the defendant's failure to raise it in the trial court prior to issuance of our decision in *Dueñas*. (Compare, e.g., *People v. Castellano*, *supra,* 33 Cal.App.5th at pp. 488-489 [issue not forfeited]; *People v. Johnson* (2019) 35 Cal.App.5th 134, 138 [same] with *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155 [forfeited]; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [forfeited].) Several other appellate courts have taken issue with our substantive holding in *Dueñas*. (See, e.g., *People v. Hicks* (2019) 40 Cal.App.5th 320, 327; *People v. Aviles* (2019) 39 Cal.App.5th 1061, 1068; *People v. Caceres* (2019) 39 Cal.App.5th 917, 926-928.) The Supreme Court recently granted review of the decision

defendant in *Castellano*, Crump was on notice and had every opportunity to raise an ability-to-pay objection in connection with the $5,000 restitution fine. (See § 1202.4, subds. (c) [court may increase restitution fine beyond $300 statutory minimum], (d) [defendant bears burden of demonstrating his or her inability to pay restitution fine in excess of statutory minimum].) Crump did not claim an inability to pay the restitution fine imposed. To be sure, the court's ability-to-pay finding, and Crump's failure to object to it, related to the $5,000 restitution fine and not to either of the assessments he challenges on appeal. Still, Crump's failure to request an inability-to-pay hearing on the much more significant $5,000 restitution fine leaves no doubt that he would not have challenged the assessment fees on ability-to-pay grounds even if he had been aware of the constitutional principles announced in *Dueñas*. Accordingly, whether we label Crump's failure to request an ability-to-pay hearing under these circumstances as a forfeiture or the absence of advice that Crump had a right to an ability-to-pay hearing before the court imposed assessments and fees as harmless error, we have no difficulty rejecting Crump's claim that remand is constitutionally required.

Finally, Crump contends the court's finding that he had the ability to pay a $5,000 restitution fine is not supported by any evidence. However, as discussed, it was Crump's burden to demonstrate an inability to pay that fine (§ 1202.4, subd. (d)), and

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in *People v. Kopp* (2019) 38 Cal.App.5th 47, 96-99, limited to the following issues: "Must a court consider a defendant's ability to pay before imposing or executing fines, fees and assessments? If so, which party bears the burden of proof regarding defendant's inability to pay?" (*People v. Kopp* (review granted Nov. 13, 2019, S257844) 2019 Cal.Lexis 8371.)

he failed to carry it. To the extent there is a deficiency in the evidence, that failure is Crump's. (See *People v. Avila* (2009) 46 Cal.4th 680, 729 [court not required to make any findings on defendant's ability to pay restitution fine; burden lies with defendant to dispute it]; *People v. Romero* (1996) 43 Cal.App.4th 440, 448-449 [section 1202.4, subdivision (d)'s imposition on defendant of the burden to prove inability to pay "makes sense only if the statute is construed to contain an implied rebuttable presumption, affecting the burden of proof, that a defendant has the ability to pay a restitution fine. . . . Where, as here, a defendant adduces no evidence of inability to pay, the trial court should presume ability to pay, as the trial court correctly did here"].)

5. *Crump's Sentence Is Modified To Strike the One-year Prison Term Enhancements*

In October 2019 the Legislature passed Senate Bill No. 136 (Stats. 2019, ch. 590, § 1) (S.B. 136) amending section 667.5, subdivision (b). Prior to these amendments, "[i]n sentencing a defendant for a new felony offense, a one-year sentence enhancement under section 667.5, subdivision (b) [was] applied 'for each prior separate prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended for any felony.'" (*People v. Buycks* (2018) 5 Cal.5th 857, 889.) The only exception was for defendants who had remained "free for five years of both prison custody and the commission of a new offense resulting in a felony conviction." (*Ibid.*)

S.B. 136 amends section 667.5, subdivision (b), to state that a one-year term under that section shall be imposed "for each prior separate prison term for a sexually violent offense . . . ." Thus, S.B. 136 eliminates the prior prison term enhancement

except in cases involving sexually violent offenses. None of Crump's prior convictions was for a sexually violent offense. Accordingly, under section 667.5, subdivision (b), as amended, Crump would not qualify for the imposition of the one-year enhancements for his prior prison terms.

S.B. 136 is effective January 1, 2020. (Cal. Const., art. IV, § 8, subd. (c)(2).) As of that date, Crump's conviction will not yet be final; and the remittitur will not have issued. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306 ["for the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed"].) Accordingly, as the Attorney General concedes, section 667.5, subdivision (b), as amended, applies retroactively to Crump, who will benefit from the reduced sentence. (See *People v. Brown* (2012) 54 Cal.4th 314, 323-324; *In re Estrada* (1965) 63 Cal.2d 740, 748 [for a non-final conviction, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed"].)

Ordinarily, we would remand for resentencing so the trial court may reconsider the entire sentencing scheme when striking the one-year priors. (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258 [trial courts are generally "afforded discretion by rule and statute to reconsider an entire sentencing structure in multicount cases where a portion of the original verdict and resulting sentence has been vacated by a higher court"]; see *People v. Hill* (1986) 185 Cal.App.3d 831, 834 [on remand for resentencing a trial court is "[n]ot limited to merely striking illegal portions" of a sentence but "may reconsider all sentencing

choices," "because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components"].) However, where, as here, the trial court originally imposed the maximum sentence available, there is no reason to remand for resentencing. Thus, we strike the three one-year prison prior terms imposed on each of Crump's 15 counts of conviction, effective January 1, 2020.

DISPOSITION

We modify Crump's sentence to strike the three one-year prior felony prison term enhancements imposed on each count of conviction under section 667.5, subdivision (b), effective January 1, 2020. The modified judgment shall reflect an aggregate state prison term of 450 years to life. As modified, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.