Filed 10/10/19 P. v. Torres CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. VICTOR TORRES, Defendant and Appellant.	B292495 (Los Angeles County Super. Ct. No. BA451597)

APPEAL from judgment of the Superior Court of Los Angeles County. Craig Richman, Judge. Affirmed in part, and remanded with directions.

Aurora Elizabeth Bewicke, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Shezad H. Thakor, Deputy Attorneys General, for Plaintiff and Respondent.

We previously affirmed Victor Torres's convictions for assault with a semi-automatic firearm (Pen. Code, § 245, subd. (b))[1] and discharging that firearm with gross negligence (§ 246.3), but remanded the matter to the trial court to exercise its discretion under section 12022.5, subdivision (c), to strike a firearm enhancement. The trial court declined to do so, and Torres appealed.

Torres now seeks conditional reversal of the judgment and remand of the matter for the trial court to exercise its discretion to: (1) order pretrial mental health diversion pursuant to section 1001.36; (2) impose or strike a prior serious felony conviction pursuant to Senate Bill No. 1393 (2017–2018 Reg. Sess.) (SB 1393); and (3) hold a hearing to determine his ability to pay various fines, fees, and assessments pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We find none of his contentions meritorious except remand is necessary for the trial court to exercise its discretion under SB 1393. We thus conditionally reverse the judgment and remand the matter with directions to the trial court to decide whether it will exercise its newfound discretion to strike the prior prison term enhancement pursuant to SB 1393.

---

[1] All further undesignated section references are to the Penal Code unless otherwise specified.

DISCUSSION[2]

I. Pretrial Mental Health Diversion Is Not Retroactive

Torres seeks a conditional reversal and remand for possible pretrial mental health diversion under recently enacted section 1001.36. He contends he is eligible for diversion due to mental health disorders resulting from a brain injury. We disagree.

Section 1001.36 "authorizes, in lieu of criminal prosecution, the placement of certain alleged offenders into mental health treatment programs." (*People v. Craine* (2019) 35 Cal.App.5th 744, 749 (*Craine*), rev. granted Sept. 11, 2019, S256671.) Relying on *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), Torres requests remand for a consideration of pretrial diversion in his case, arguing the new provision should be applied retroactively to all cases not yet final on appeal.

On December 27, 2018, the Supreme Court granted review in *Frahs* (S252220) to address the question of retroactivity of section 1001.36.

Craine was filed after the grant of review in *Frahs*. *Craine* rejected the reasoning of *Frahs*, holding that section 1001.36 does not apply retroactively where, as here, the defendant has been tried and sentenced. The Supreme Court has granted review in *Craine* pending its disposition in *Frahs*. Division 6 of this court has also rejected the argument the statute should be applied retroactively to cases not final on appeal. (*People v. Torres* (2019) 39 Cal.App.5th 849, 852.)

---

[2] To the extent the facts and procedural background underlying Torres's judgment are relevant, they will be set forth in the sections below. Otherwise, we will not repeat them here since they were addressed extensively in our previous opinion. (*People v. Torres* (Mar. 1, 2018, B282426) [nonpub. opn.].)

Recently, another court rejected the reasoning of *Craine* and concluded, like *Frahs*, that the statute should be applied retroactively. (*People v. Weaver* (2019) 36 Cal.App.5th 1103 (*Weaver*).) *Weaver* acknowledged that retroactivity is conceptually in conflict with several aspects of the statute's explicit text, but nonetheless concluded that the statutory language was insufficient to overcome the presumption of retroactivity set forth in *In re Estrada* (1965) 63 Cal.2d 740. (*Weaver,* at p. 1120.) Two additional courts have followed this reasoning: *People v. Burns* (2019) 38 Cal.App.5th 776 and *People v. Hughes* (2019) 39 Cal.App.5th 886, 896.)

We believe *Craine* and *Torres* to be better reasoned. Other than expressing our agreement with the careful and correct analysis in *Craine*, we have nothing to add. We will follow *Craine* and reject Torres's contention.

II. Remand is Necessary for the Trial Court to Exercise Its Discretion Under SB 1393

Torres's sentence included a five-year enhancement for a prior serious felony conviction pursuant to section 667, subdivision (a)(1). At the time he was sentenced, the trial court was required to impose a five-year consecutive term for "[a]ny person convicted of a serious felony who previously has been convicted of a serious felony" (§ 667, subd. (a)(1)), and had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (§ 1385, subd. (b).) SB 1393, effective January 1, 2019, amended section 667, subdivision (a), and section 1385, subdivision (b), to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2.)

The Attorney General agrees, as do we, that SB 1393 applies retroactively in this case. When a statute is amended to either lessen the punishment for a crime or provide the trial court discretion to do so, absent evidence to the contrary and as a matter of statutory construction, courts may infer that the Legislature intended the statute to apply retroactively in all cases that are not final when the statute becomes effective. (*In re Estrada, supra,* 63 Cal.2d at pp. 744–745.) Torres's case is not yet final. (*People v. Vieira* (2005) 35 Cal.4th 264, 306.)

The Attorney General, however, argues remand would be futile, interpreting the trial court's comments and sentencing decisions to mean it would not dismiss the prior serious felony enhancement even if it had the authority to do so. The Attorney General cites to the trial court's denial of Torres's *Romero*[3] motion and refusal to strike the firearm enhancement as proof of its resolve. At the initial sentencing hearing, the trial court stated it believed it would be an abuse of its discretion to grant Torres's *Romero* motion because the offense was "unprovoked" and involved a firearm. The trial court found "the crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty [or] viciousness or callousness . . . ." Further, "the manner in which the crime was carried out indicates planning, sophistication, or professionalism." The trial court also found Torres "engaged in violent conduct that indicates serious danger to society." At resentencing, the trial court again found the factors in aggravation "significantly outweigh[ed]" the factors in mitigation when it decided not to strike or dismiss the firearm enhancement.

---

[3] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

We are not persuaded these sentencing decisions and findings unequivocally demonstrate that the trial court will not exercise its newfound discretion to strike the prior serious felony enhancement. " '[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] 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.' [Citation.] But if ' "the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required." ' [Citation.]" (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*).) "The trial court need not have specifically stated at sentencing it would not strike the enhancement if it had the discretion to do so. Rather, we review the trial court's statements and sentencing decisions to infer what its intent would have been. [Citations.]" (*People v. Jones* (2019) 32 Cal.App.5th 267, 273 (*Jones*).)

This case is unlike *Jones* and *People v. McVey* (2018) 24 Cal.App.5th 405, 419 (*McVey),* upon which the Attorney General relies. In *Jones, supra,* 32 Cal.App.5th at page 274, the defendant stabbed and attacked several victims only months after his release from a 10-year sentence for stabbing his ex-wife. The trial court imposed the maximum sentence, choosing not to exercise its discretion for leniency when it could have. It stated, " 'This gives me obviously, as you know, great satisfaction in imposing the very lengthy sentence here today.' " It also noted

the defendant had " 'earned the sentence here today.' " (*Ibid.*) The Court of Appeal found remand unnecessary.

Likewise, in *McVey, supra,* 24 Cal.App.5th at page 419*,* the trial court described the defendant's conduct in shooting an unarmed homeless man multiple times as " 'pretty haunting.' " In imposing the maximum 10-year prison term for the firearm enhancement, the trial court noted, " 'this is as aggravated as personal use of a firearm gets.' " (*Ibid.*) The Court of Appeal concluded, "In light of the trial court's express consideration of the factors in aggravation and mitigation, its pointed comments on the record, and its deliberate choice of the highest possible term for the firearm enhancement, there appears no possibility that, if the case were remanded, the trial court would exercise its discretion to strike the enhancement altogether." (*Ibid.*)

Unlike in *Jones* and *McVey,* the trial court did not impose the maximum sentence here; it instead imposed the midterm for each count. Neither did the trial court make the "pointed comments" that the courts in *Jones* and *McVey* did during sentencing. Instead, the trial court's comments at sentencing were related to making findings as to the factors in aggravation and mitigation. There was no clear indication of the trial court's intent not to strike the prior serious felony conviction at sentencing.

Thus, remand is necessary so the trial court may have the opportunity to exercise its "informed discretion" at a new sentencing hearing. (*McDaniels, supra,* 22 Cal.App.5th at p. 425.) On remand, the trial court has discretion to consider whether to strike or dismiss the prior serious felony enhancement. In addition, the trial court has discretion to strike only the punishment for the enhancement. (§ 1385, subd. (c).)

We express no opinion on how the court should exercise its discretion.

III. Torres Forfeited His Challenge to the Fines, Fees, and Assessments

At sentencing, the trial court imposed a $300 restitution fine (§ 1202.4, subd. (b)), and a $300 parole revocation restitution fine (§ 1202.45), which it stayed unless parole is revoked. It further imposed an $80 court security fee (§ 1465.8) and a $60 criminal conviction assessment (Gov. Code, § 70373).

Torres challenges the imposition of these fines, fees, and assessments on due process and equal protection grounds. Relying on *Dueñas, supra,* 30 Cal.App.5th at page 157 and *People v. Castellano* (2019) 33 Cal.App.5th 485 (*Castellano*),[4] he requests

---

[4] In *Dueñas*, Division 7 of this court held that "due process of law requires the trial court to conduct an inability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373." (*Dueñas*, *supra,* 30 Cal.App.5th at p. 1164.) It also held that "although Penal Code section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Ibid.*) In *Castellano,* Division 7 applied *Dueñas* to a defendant who had been assessed various court fees and the statutory minimum restitution fine. It held the defendant did not forfeit the issue and explained that remand is necessary for the defendant "in the first instance" to request an ability-to-pay hearing and present evidence demonstrating his inability to pay the fines, fees, and assessments imposed by the trial court. (*Castellano, supra,* 33 Cal.App.5th at p. 491.)

we remand the matter to afford him the opportunity to request a hearing to determine his ability to pay these fines, fees, and assessments.

Torres, however, concedes he did not raise the issue of his inability to pay in the trial court. For the reasons set out in *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155 (*Frandsen*), we find the issue forfeited. (See also *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033 [finding forfeiture where defendant failed to object to fines and fees under §§ 1202.4, 1465.8, & 290.3, and Gov. Code, §§ 70373 & 29550.1, based on inability to pay]; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [citing *Frandsen* to find *Dueñas* issue forfeited for failure to object in trial court]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [finding forfeiture where the defendant failed to object to imposition of a restitution fine under former § 1202.4 based on inability to pay].)

Torres contends *Frandsen* is distinguishable because the appellant there sought automatic application of *Dueñas*, urging this court to vacate the assessments and impose a stay of the fines until the People prove his ability to pay. Torres, on the other hand, merely seeks remand to request an ability-to-pay hearing and to present evidence demonstrating his inability to pay, as discussed in *Castellano, supra,* 33 Cal.App.5th at page 491. We find this a distinction without a difference as it relates to the forfeiture issue. It is irrelevant what disposition Torres seeks. He has forfeited the issue for failure to raise it below and the holding in *Frandsen* applies to this case.

Torres insists *Frandsen* is further distinguishable because the trial court there imposed the maximum $10,000 restitution fine, while the trial court here imposed the minimum $300 fine. Section 1202.4, subdivision (c), expressly prohibits the trial court from declining to impose the restitution fine due to a defendant's inability to pay. Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the minimum fine. (§ 1202.4, subd. (c).) Given this statutory prohibition, Torres argues his failure to object is excused. The law was against him and any objection to the restitution fine would have been futile. We are not persuaded.

The minimum restitution fine was also imposed on the defendant in *Dueñas*. (*Dueñas, supra,* 30 Cal.App.5th at p. 1163.) Nothing in the record of the sentencing hearing indicates that Torres was foreclosed from making the same request that the defendant in *Dueñas* made in the face of identical statutory provisions. *Dueñas* was decided based on longstanding constitutional principles and represents a clarification of existing law rather than new law. We therefore stand by the traditional and prudential virtue of requiring parties to raise an issue in the trial court if they desire appellate review of that issue.

DISPOSITION

The convictions are affirmed. The case is remanded with directions to the trial court to decide whether it will exercise its newfound discretion to strike the five-year enhancement pursuant to section 667, subdivision (a)(1). At the hearing upon remand, Torres has the right to assistance of counsel, and unless he chooses to forgo it, the right to be present. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 34–35.) If the court elects to exercise this discretion, Torres shall be resentenced and the superior court shall prepare and forward an amended abstract of judgment to the Department of Corrections and Rehabilitation.

BIGELOW, P. J.

I Concur:

GRIMES, J.

STRATTON, J., Concurring.

The mental health diversion statute, Penal Code section 1001.36, became effective June 27, 2018. Defendant was resentenced on August 22, 2018 and never raised the issue of mental health diversion. I would find the issue waived. Otherwise I concur in the majority's discussion of the retroactivity of Senate Bill No. 1393 and whether defendant is entitled to an ability-to-pay hearing under *People v. Dueñas* (2019) 30 Cal.App.5th 1157.

STRATTON, J.