Filed 5/16/18 P. v. Ruiz CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ROGER RUIZ,<br><br>Defendant and Appellant. | B280874<br><br>(Los Angeles County Super. Ct. No. LA074974) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael V. Jesic, Judge. Reversed and remanded with directions.

Theresa Osterman Stevenson, 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, Scott A. Taryle, David E. Madeo, and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

A jury convicted appellant Roger Ruiz of one count of assault with a firearm and found true the accompanying firearm and gang enhancements. Appellant was sentenced to 24 years in state prison for the crime. Later, he pled no contest to one count of assault with a firearm on a peace officer with a personal firearm use enhancement, for a stipulated term of 18 years in state prison. The parties also agreed that appellant's prior 24-year prison sentence would be reduced to 18 years and stayed pursuant to Penal Code section 654.[1]

Appellant, who was 16 years old at the time he committed the crimes, then filed a motion to remand his case to juvenile court pursuant to Proposition 57 (effective November 9, 2016), which requires the district attorney to make a transfer motion in juvenile court before prosecuting a juvenile offender in criminal court. The trial court denied the motion, and sentenced appellant to 18 years in state prison.

Appellant raises several challenges to his convictions and sentence. As an initial matter, he contends his convictions and sentence should be conditionally reversed and the matter remanded to the juvenile court pursuant to Proposition 57. Respondent agrees. Accordingly, we will conditionally reverse appellant's convictions and sentence and remand to the juvenile court to hold a juvenile transfer hearing. To assist the court(s) on remand, we address appellant's other claims. As explained below, we conclude (1) that there was sufficient evidence to support the jury's true finding on the gang enhancement; (2) that

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[1] All further statutory citations are to the Penal Code, unless otherwise stated.

the trial court did not abuse its discretion with respect to appellant's motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); and (3) that should the matter be transferred from juvenile court to criminal court, appellant is entitled to a new sentencing hearing.

## PROCEDURAL HISTORY

A. *First Trial*

Appellant and codefendant Bryan Valle were charged with assault with a firearm on David Llanes (§ 245, subd. (a)(2); count 1), assault with a firearm on a peace officer (Llanes) (§ 245, subd. (d)(1); count 2), and conspiracy to commit murder (§ 182, subd. (a)(1); count 3). As to all counts, it was alleged that appellant personally used a shotgun (§ 12022.53, subd. (b)), that the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)(B)), and that appellant was a minor at the time of the commission of the offenses (Welf. & Inst. Code, § 707, subd. (d)(2)(B) & (C)(ii)).

A jury found both defendants guilty as charged on counts 1 and 3, and found true the gang and firearm allegations as to count 1. The jury further found that the murder alleged in count 3 (conspiracy to commit murder) was second-degree murder, and it found not true the allegation that appellant knew the victim was a peace officer. The jury could not reach a verdict on count 2 (assault with a firearm on a peace officer), and the court declared a mistrial as to that count. Subsequently, the trial court ruled that the jury's verdict on count 3 (conspiracy count) was fatally inconsistent, as under California law, there is no such crime as conspiracy to commit second-degree murder. The court also concluded that jeopardy had attached to that count. The court sentenced appellant to 24 years in prison on count 1, consisting of

the upper term of four years, plus 10 years each for the gang and firearm enhancements.[2]

B. *Second "Trial"*

The People then filed an amended information charging appellant with assault with a firearm on a peace officer and premeditated attempted murder. Prior to trial on the amended information, appellant filed a *Pitchess* motion for discovery of personnel information regarding Officer Llanes relevant to allegations of dishonesty and fabrication of evidence. On June 29, 2016, the trial court found good cause to hold an in camera hearing. After reviewing the materials, the court found nothing discoverable.

Subsequently, pursuant to a plea agreement, appellant entered a plea of no contest to one count of assault with a firearm on a peace officer with a personal firearm use enhancement, for a stipulated term of 18 years in state prison. The trial court found that the plea was made freely and voluntarily, and that there was a factual basis for the plea. It accepted the plea and found appellant guilty on count 2. Count 4 (premeditated attempted murder) was dismissed.

After the trial court, on its own motion, recalled appellant's sentence imposed following the jury trial, the prosecutor informed the court that the parties also had agreed that appellant's prior 24-year prison sentence would be reduced to 18 years, consisting of the high term of four years for the assault,

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[2] As respondent correctly notes, the jury found true the gang allegation pursuant to section 186.22, subdivision (b)(1)(B). That allegation however results in only a five-year sentence enhancement, not the 10-year enhancement imposed by the court. (See § 186.22, subd. (b)(1)(B).)

plus 10 years for the firearm enhancement, plus the high term of four years for a gang allegation under section 186.22, subdivision (b)(1)(A). Because the crimes were committed against the same victim, the sentence on count 1 would be stayed pursuant to section 654, and appellant would receive only one strike for the two convictions (count 1 and count 2). The court then inquired whether the parties agreed to that disposition, and defense counsel expressed agreement. The court then set a date for the sentencing hearing.

Prior to sentencing, appellant filed a motion to remand his case to juvenile court pursuant to Proposition 57. The trial court denied the motion, finding Proposition 57 did not apply retroactively.

C. *Sentencing Hearing*

At the sentencing hearing, the court orally pronounced sentence on count 2 (assault with a firearm on a peace officer). The court denied probation and sentenced appellant to 18 years in state prison, consisting of the high term of eight years "pursuant to the plea agreement" for the assault with a firearm on a peace officer and 10 years for the firearm enhancement. Appellant was ordered to pay various assessments and fees, including one court security assessment of $40 and one court facilities assessment of $30. The court did not orally pronounce sentence on appellant's conviction after trial on count 1 (assault with a firearm). Nor did it make any remark referencing the stipulated agreement between the parties with respect to that count. Both the minute order and the abstract of judgment accurately reflect the oral pronouncement of judgment, excluding any reference to a sentence on count 1.

Appellant timely appealed.

## STATEMENT OF THE FACTS

A. *The Prosecution Case*

Pasadena Police Department Officer David Llanes testified that on August 13, 2013, he was on a stakeout of a building in the City of Van Nuys. Officer Llanes observed appellant, Valle and two other individuals conversing in front of the building. Appellant approached Llanes's unmarked vehicle, looked into the vehicle, flashed gang signs and then returned to the group. Codefendant Valle also examined Llanes's vehicle. When Valle approached the front passenger window, Officer Llanes observed Valle reaching into his front waistband. Afraid that Valle might be drawing a weapon, Officer Llanes rolled down his window, and yelled, "Police. Get the fuck away from my car." Valle said, "Oh, fuck. Okay. Okay, man. Okay." He then appeared angry. Officer Llanes observed Valle have a heated conversation with his companions. Shortly thereafter, appellant and Valle walked past Llanes's vehicle and headed eastbound until Llanes lost sight of them.

Officer Llanes exited his vehicle, retrieved a shotgun and police vest from the trunk, got back into his vehicle and put on the vest. Minutes later, Llanes observed appellant and Valle walking out together from a nearby apartment complex and approaching his vehicle. Appellant was carrying a large red nylon bag. When appellant reached the rear passenger side bumper of Llanes's vehicle, he crouched down and held the bag in a "low ready position," i.e., as he would hold a rifle. Llanes opened the driver's side door, covertly exited his vehicle, went to the rear of the vehicle and peeked out from behind. He observed appellant, who had moved to the front of Llanes's vehicle, pointing the red bag toward the front windshield. Llanes aimed

his shotgun at the men and yelled out, "Police. Hands up. Get on the ground." Appellant and Valle were surprised. Llanes screamed, "Police. Drop the gun. Drop the gun." Appellant dropped the red bag. He fled, but was quickly apprehended. Llanes recovered the red bag and observed that it contained a shotgun.

Glendale Police Detective Jeffrey Davis testified that the shotgun was loaded. Davis also testified he took photographs of Valle's calves when Valle was booked, as he observed that Valle had tattoos of the letters "L" and "H" on each of his calves. Davis did not see any tattoos on appellant.

Los Angeles Police Department Officer James Jeppson testified as the prosecution's gang expert. Jeppson stated that the Logan Heights gang is a criminal street gang in Van Nuys. The assault on Llanes occurred in the heart of the gang's territory. Jeppson opined that Valle was a Logan Heights gang member, based on Valle's tattoos, his admissions to other officers that he was a Logan Heights gang member, and his gang moniker. Jeppson also opined that appellant was a Logan Heights gang member, based on photos of appellant throwing Logan Heights gang signs in the company of Valle and other Logan Heights gang members.

After being presented with a hypothetical question mirroring the facts of the case, Officer Jeppson opined that the assault on an undercover officer was committed for the benefit of the Logan Heights gang. He explained that the armed assault (1) showed the gang was strong, (2) caused fear within the community, and (3) maintained its violent reputation against police. Jeppson also stated that the assault promoted criminal conduct by other gang members because the crime increased the

reputation or notoriety of the gang members within the gang and in the community.

B. *The Defense Case*

Glendale Police Officer Davis was recalled as a witness. Davis testified that DNA analysis was performed on swabs taken of the shotgun and shotgun shells, but none of the DNA was matched to appellant's DNA profile. Davis further testified that the police had no evidence that appellant had a gang moniker or gang tattoos. Appellant did not live in Van Nuys at the time he was arrested for the assault on Llanes.

## DISCUSSION

A. *Proposition 57*

"Proposition 57 prohibits prosecutors from charging juveniles with crimes directly in adult court. Instead, they must commence the action in juvenile court. If the prosecution wishes to try the juvenile as an adult, the juvenile court must conduct . . . a 'transfer hearing' to determine whether the matter should remain in juvenile court or be transferred to adult court. Only if the juvenile court transfers the matter to adult court can the juvenile be tried and sentenced as an adult." (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 303.) In *Lara*, our Supreme Court held that Proposition 57 applies retroactively. (*Id*. at p. 309.) It endorsed the following remedy where a minor defendant did not receive the benefit of Proposition 57: The minor defendant's conviction(s) and sentence would be conditionally reversed and the matter remanded to the juvenile court to hold a juvenile transfer hearing. If, after conducting the hearing, the juvenile court determines that it would not have transferred appellant to a court of criminal jurisdiction, the court shall treat the convictions as juvenile adjudications and impose

an appropriate disposition within its discretion. Otherwise, appellant's convictions and sentence shall be reinstated. (See *Lara*, *supra*, at p. 310.)

Here, appellant was entitled to the benefit of Proposition 57. He was a minor at the time he committed his crimes, and the prosecutor directly filed charges against him in criminal court without seeking a transfer in juvenile court. Thus, we will conditionally reverse appellant's convictions and sentence, and remand to the juvenile court to hold a juvenile transfer hearing. As appellant's challenges to his conviction and sentence will impact the ultimate disposition, whether in juvenile court or criminal court, we address appellant's other claims on appeal.

B. *Gang Enhancement*

Appellant contends there was insufficient evidence to support the gang enhancement on count 1 (assault with a firearm on Llanes), as the jury found that he did not know Llanes was a peace officer, and there was insufficient evidence to show he was a Logan Heights gang member. We note that as part of the plea agreement, the parties stipulated that appellant's sentence on count 1 would be enhanced by four years pursuant to section 186.22, subdivision (b)(1)(A). As a result of the parties' agreement, appellant arguably forfeited any challenge to the factual basis for the gang allegation. Nevertheless, even if not forfeited, there was substantial evidence in the record to support the gang enhancement.

Section 186.22, subdivision (b)(1) provides a sentencing enhancement for felonies "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." Thus, the prosecution must prove

that the underlying felonies were "'gang related,'" and that the gang-related offenses were committed """with the specific intent to promote, further, or assist in any criminal conduct by gang members."""" (*People v. Weddington* (2016) 246 Cal.App.4th 468, 484.) An expert can properly "express an opinion, based on hypothetical questions that track[] the evidence, whether the [crime], if the jury found it in fact occurred, would have been for a gang purpose. 'Expert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement. [Citation.]" (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

To prove the crime was "gang related," the prosecution need only prove one of three alternatives: the crime was committed "(1) for the benefit of, (2) at the direction of, or (3) in association with a gang." (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198, italics omitted.)

Here, the jury found that the armed assault of Llanes was a gang-related offense. The prosecution's gang expert opined that the armed assault benefited the Logan Heights gang because it enhanced the gang's reputation in its territory by increasing fear and intimidation in the community. That expert opinion constitutes substantial evidence to support the jury's finding that the armed assault was a gang-related offense. (See *People v. Albillar* (2010) 51 Cal.4th 47, 63 ["Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang.'"].)

As to the specific intent of the gang enhancement, "if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*People v. Albillar*, *supra*, 51 Cal.4th at p. 68; accord, *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 ["Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime."].) Here, Officer Jeppson opined that Valle was a Logan Heights gang member based on Valle's gang tattoos and self-admission. The jury also saw photos of appellant with Valle and other Logan Heights gang members, throwing Logan Heights gang signs. The evidence showed that appellant and Valle communicated before jointly committing the assault on Llanes. In short, the jury could reasonably infer the requisite specific intent to assist in criminal conduct by a gang member. In sum, substantial evidence supported the gang enhancement.

C. *Pitchess Motion*

Appellant requests that this court review the in camera proceedings on the *Pitchess* motion. As previously noted, appellant filed a *Pitchess* motion relating to Officer Llanes, and the trial court found nothing discoverable. We review a trial court's decision on a *Pitchess* motion for an abuse of discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228.) After independently reviewing the sealed transcript of the in camera proceeding on the *Pitchess* motion, we find no abuse of discretion.

(*People v. Mooc*, *supra*, at p. 1232.) Thus, the *Pitchess* motion provides no basis to challenge appellant's convictions.

D. *Sentencing in Criminal Court*

Finally, should the juvenile court determine that it would have transferred the matter to criminal court, appellant argues that he is entitled to a new sentencing hearing for the trial court to correct sentencing errors and to exercise its discretion whether to strike the firearm enhancements under State Bill No. 620 (2017-2018 Reg. Sess.) (SB 620). We agree that if the matter is transferred to criminal court, appellant is entitled to a new sentencing hearing.

As noted above, after accepting appellant's plea, the trial court, on its own motion, recalled the sentence imposed after the jury trial. Under section 1170, subdivision (d)(1), a court may, "within 120 days of the date of commitment on its own motion," "recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced." Thus, appellant's previous sentence on count 1 was vacated. However, as appellant was convicted of count 1, the court was required to sentence him on that count in accordance with the applicable sentencing statutes. (See, e.g., *People v. Williams* (2007) 156 Cal.App.4th 898, 907 ["When Williams pleaded guilty in the attempted pimping case, the court was obligated under sections 1191 . . . and 1170.1(a) to promptly recalculate Williams's sentence in the [prior] drug case and aggregate the prison term to be imposed in the attempted pimping case with the recalculated prison term in the drug case" pursuant to the plea bargain.].) However, the trial court did not pronounce any sentence on count 1. The resulting sentence was thus unauthorized.

Respondent contends that the sentencing errors are akin to clerical errors that may be corrected without remand. Respondent asks this court to amend the abstract of judgment to reflect the stipulated disposition on count 1. We decline to do so. This is not a case where the minute order or abstract of judgment did not accurately reflect the trial court's oral pronouncement of judgment. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [courts, including appellate courts, may correct "'clerical errors in [court] records so as to make [those] records reflect the true facts"'].) Rather, no sentence or enhancement was imposed on count 1 at all. Nor did the court impose mandatory fees. (See *People v. Sencion* (2012) 211 Cal.App.4th 480, 484 [sentencing court required to impose a $40 court security fee and a $30 court facilities assessment as to each count on which defendant was convicted, including the stayed counts].)

Respondent notes that the court's sentence on count 2 was, as stated by the trial court, "pursuant to the plea agreement." Respondent argues that because the terms of the stipulated agreement are in the record, this court may correct the judgment to reflect those terms. However, the trial court's reference to the plea agreement was in connection with the sentence on count 2. The trial court never mentioned count 1. Nor did it make any prefatory remarks that could be construed as stating an intention to sentence appellant on count 1 in accordance with the plea agreement. On this record, it is unclear whether the trial court intended to sentence appellant on count 1 in accordance with the parties' stipulated agreement. As the trial court has discretion to withdraw its prior approval of the plea agreement, remand for a new sentencing hearing is the appropriate remedy to correct the court's sentencing errors. (See *People v. Kim* (2011) 193

Cal.App.4th 1355, 1361-1362 [rejecting request to order trial court to enter specific sentence, as trial court's initial approval of plea is not binding and may be withdrawn at time of sentencing].)

E. *Firearm Enhancements*

Finally, assuming that the criminal court would hold a new sentencing hearing, appellant contends he is entitled to the benefit of SB 620. SB 620 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." (§12022.53, subd. (h).) Respondent concedes that SB 620 applies retroactively to nonfinal judgments, but argues that appellant is not entitled to the benefit of SB 620 because of the plea agreement. Because we have concluded that appellant would be entitled to a new sentencing hearing in criminal court, appellant would also be entitled to the benefit of SB 620, as SB 620 "applies to any resentencing that may occur pursuant to any other law." We express no opinion how the court should exercise its discretion on remand.

**DISPOSITION**

The convictions and sentence are conditionally reversed and the matter is remanded to the juvenile court to hold a juvenile transfer hearing (Welf. & Inst. Code, § 707). If, after conducting the hearing, the juvenile court determines that it would not have transferred appellant to a court of criminal jurisdiction, the court shall treat the convictions as juvenile adjudications and impose an appropriate disposition within its discretion. Otherwise, appellant's convictions shall be reinstated,

and appellant shall be entitled to a new sentencing hearing in criminal court.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.**

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.