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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. TRACEY MILES, Defendant and Appellant.	B288271 (Los Angeles County Super. Ct. No. NA020171)

APPEAL from an order of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. The petition for writ of habeas corpus is granted. The resentencing order is vacated and the original sentence reinstated.

James Koester, 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 and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

In 1994, Tracey Miles was convicted of two counts of robbery based on the holdup of two employees at a Taco Bell restaurant. He was sentenced under the Three Strikes law to a term of 36 years to life on the first count concurrent with a 26-years-to-life term on the second count. At the time of his sentencing, the Courts of Appeal were split on whether consecutive sentences were mandatory when a third strike offender is convicted of multiple felonies based on a single act of violence against multiple victims.

Miles appealed his conviction on several grounds. The Court of Appeal affirmed, but ordered that the terms on counts 1 and 2 be imposed consecutively. (*People v. Miles* (1996) 43 Cal.App.4th 364 (*Miles I*).) On remand, the trial court resentenced Miles accordingly. One month later, the California Supreme Court in *People v. Hendrix* (1997) 16 Cal.4th 508 (*Hendrix*) held that trial courts had discretion to sentence defendants convicted of multiple felonies based on a single act of violence against multiple victims to concurrent terms.

In 2018, Miles filed in the trial court a motion for resentencing. He argued that *Hendrix* is fully retroactive, and the trial court's original concurrent sentence should be reinstated. The trial court denied the motion. We treat Miles's appeal from this order as a petition for writ of habeas corpus, and conclude that Miles is entitled to the benefit of *Hendrix*. We vacate the resentencing order, and reinstate the original sentence.

FACTUAL AND PROCEDURAL BACKGROUND

In 1994, Miles and two other men robbed a Taco Bell restaurant. While one of the men was pointing a handgun at the two employees present, Miles and the other man emptied the cash registers. The three co-conspirators were arrested shortly thereafter and charged with two counts of robbery.

A jury convicted the defendants on both counts. The armed principal was sentenced to 11 years, 4 months in prison. The other codefendant was sentenced to 7 years. Miles was sentenced to 36 years to life on the first count under the Three Strikes law and 26 years to life on the second count.[1] The trial court ordered Miles's sentence on count 2 to run concurrent to the sentence on count 1 "because both crimes were committed on the same occasion and arise from the same facts." Miles appealed, raising a number of issues. In response, the Attorney General argued the sentence was legally unauthorized because Penal Code section 667, subdivision (e)(2)(B) of the Three Strikes law mandated consecutive sentences when there were multiple victims.[2]

At the time the trial court imposed concurrent sentences on Miles, the Courts of Appeal were split on whether consecutive sentences are mandatory when a defendant has two or more prior strikes and is convicted of multiple felonies based on a single act of violence against multiple victims. (See *People v. Hill* (1995) 37 Cal.App.4th 220, 228; *People v. Markson* (1995) 41 Cal.App.4th 387; cf. *People v. Carter* (1995) 41 Cal.App.4th 683.)

In Miles's first appeal, the Court of Appeal held that consecutive sentences were mandated by section 667, subdivision (e)(2)(B) whenever a consecutive sentence can be imposed. (*Miles I, supra,* 43 Cal.App.4th at p. 369.) The court affirmed the

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[1] His original sentence of 25 years to life on the second count was subsequently increased to 26 years to life. This discrepancy is not at issue on appeal.

[2] All further statutory references are to the Penal Code unless otherwise stated.

judgment as modified ordering the sentence on count 2 to run consecutively to count 1. (*Id.* at p. 371.) Four months later, the California Supreme Court granted review of the issue in *People v. Hendrix* (1996) 57 Cal.Rptr.2d 277.

A year later, in July 1997, the trial court resentenced Miles to consecutive life terms on counts 1 and 2. Neither Miles nor his counsel was present for the resentencing. The court provided notice of the amended abstract of judgment to the Department of Corrections and Rehabilitation (CDCR). One month later, in August 1997, the Supreme Court filed its opinion in *Hendrix*, holding that consecutive sentences are not mandatory under section 667 when the defendant has two or more strikes and commits serious or violent felonies against multiple victims at the same time. (*Hendrix*, *supra*, 16 Cal.4th at p. 515; see also *People v. Deloza* (1998) 18 Cal.4th 585, 588 [*Hendrix* holding not affected by section 654].)

Over the next 20 years, Miles submitted various petitions for writs of habeas corpus, none of which raised a challenge under *Hendrix*. On November 8, 2016, the voters passed Proposition 57, the Public Safety and Rehabilitation Act of 2016. (*People v. Dynes* (2018) 20 Cal.App.5th 523, 526.) On January 25, 2018, Miles in pro. per. filed a motion for resentencing in the trial court, claiming that he had been given "a new release date under Prop 57" based on the running of his sentence on count 2 consecutive to count 1. According to Miles, he had an "abstract of judgment . . . and a minute order of 1997 that both fail to reflect a total term imposed. So how do the Department of Correction come up with I have 62 years to life."

Miles argued to the trial court that when the court had initially sentenced him, it "understood the scope of its discretion to run the sentence concurrent because both crimes were committed on the same occasion and from the same facts." He

cited to *Hendrix* in support of the argument that he "was prejudice[d] by the court of appeal [] ordering . . . count two . . . to run consecutive to count one," and requested that his original sentence be reinstated.

The trial court summarily denied the motion. Miles timely appealed and was appointed counsel. We treat the appeal as a petition for writ of habeas corpus. (See *People v. Gallardo* (2000) 77 Cal.App.4th 971, 986 [construing the notice of appeal from the trial court's denial of a request for resentencing as a habeas corpus petition].)[3]

DISCUSSION

1. *Hendrix is Retroactive*

In *Hendrix*, *supra*, 16 Cal.4th 508, the California Supreme Court framed the issue before it as "whether consecutive sentences are mandatory under [section 667,] subdivision (c)(6), (c)(7), or subdivision (e)(2)(B), when the defendant has two or more prior felony convictions within the meaning of subdivision (d), and commits serious or violent felonies against multiple victims at the same time." (*Id.* at p. 511.) The Court held that consecutive sentences are not mandated "if all of the serious or violent current felony convictions are 'committed on the same occasion' or 'aris[e] from the same set of operative facts.' " (*Id.* at p. 513.) Because the parties conceded all of the defendant's current convictions "were 'committed on the same occasion,' " the trial court "retained discretion to sentence defendant either concurrently or consecutively." (*Id.* at p. 514.)

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[3] Respondent agrees with this approach: "If the Court finds that [Miles] is entitled 'to the benefits of *Hendrix*,' the best disposition would be to grant [Miles's] request to deem this appeal to be a habeas corpus petition." Because we treat the appeal as a habeas petition, respondent's motion to dismiss the appeal because it is from a nonappealable order is denied.

Hendrix explicitly rejected the *Miles I* analysis which held that consecutive sentences were mandated under section 667, subdivision (e)(2)(B) whenever a consecutive sentence could be imposed. (*Hendrix*, *supra*, 16 Cal.4th at pp. 514–515.) Miles now argues that *Hendrix* is fully retroactive and, therefore, he may secure reconsideration of his sentence via a petition for writ of habeas corpus. Respondent argues that *Hendrix* is not fully retroactive because (1) the Court of Appeal in *Miles I* acted with "informed discretion" when it ordered Miles to be resentenced, and (2) *Hendrix* may be read to suggest that it should not be applied retroactively. We conclude that whether the court in *Miles I* acted within its so-called discretion is irrelevant, and that *Hendrix* is fully retroactive.

An opinion that relates only to sentencing and does not require any retrials "is fully retroactive." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530 n. 13; *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8 ["Since our holding . . . relates only to sentences and will not require any retrials, it shall have full retroactive effect."]; *People v. Tenorio* (1970) 3 Cal.3d 89, 95 fn. 2 ["Inasmuch as today's decision relates only to sentencing and will not require any retrials, we have concluded that it should enjoy fully retroactive effect."].)

Respondent does not dispute that *Hendrix*'s holding relates only to sentencing and would not require a retrial. Rather, respondent argues that *Hendrix* may only be applied retroactively here if we find that the Court of Appeal in *Miles I* "failed to exercise 'informed discretion.' " We disagree.

As observed generally in *Belmontes*, defendants "are entitled to sentencing decisions made in the 'informed discretion' of the *sentencing court*. [Citations.]" (*Belmontes*, *supra*, 34 Cal.3d at p. 348, fn. 8 [emphasis added].) The trial court is the sentencing court, not the Court of Appeal. Therefore, the

relevant question is whether the trial court acted with informed discretion, not, as respondent argues, the Court of Appeal.

Here, when the trial court originally sentenced Miles, it exercised its discretion to impose concurrent or consecutive sentences, choosing the former. When that same court resentenced Miles to consecutive sentences, it did not act with informed discretion. Rather, the trial court acted upon the Court of Appeal's express instructions to impose mandatory consecutive sentences under the erroneous reasoning that such a result was required by section 667. If "informed discretion" has any application to our analysis, it actually supports Miles's argument that his original sentence was the product of informed discretion, lawfully exercised, and should be reinstated.

Respondent next points to the *Hendrix* court's decision not to address the issue of whether the trial court in that case understood the scope of its discretion. Respondent argues this "suggests the Supreme Court did not want to overturn previous decisions that were already final before *Hendrix*." On the contrary, the *Hendrix* court explained its decision not to address the trial court's discretion, and that explanation had nothing to do with retroactivity.

In *Hendrix*, the defendant pointed a gun at four people and demanded their money. (*Hendrix*, *supra*, 16 Cal.4th at p. 510.) He was convicted of two counts of robbery and two counts of attempted robbery. (*Ibid*.) The trial court sentenced him to four consecutive terms of 25 years to life. (*Id.* at p. 511.) The Court of Appeal concluded that the trial court understood the scope of its discretion in imposing consecutive terms; the defendant contested that conclusion. (*Id.* at p. 515.)

Given that the defendant's sentence was "already being remanded for reconsideration under *People v. Superior Court (Romero), supra,* 13 Cal.4th 497," the Supreme court declined to

resolve "the issue of whether the trial court understood the scope of its discretion." (*Hendrix, supra,* 16 Cal.4th at p. 515.) Rather, the Court concluded "the most efficient procedure in this case is to allow the trial court to decide at that time whether to sentence defendant consecutively or concurrently." (*Ibid.*) We see nothing in this statement or anything else in *Hendrix* to suggest its holding was prospective only.[4]

Because *Hendrix* states only a sentencing rule that does not require resolution of contested facts, it has full retroactive effect.[5]

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[4] Respondent also contends that the Supreme Court's decision not to "expressly state that *Hendrix* was fully retroactive," suggests that the decision is not. We disagree: " 'It is axiomatic . . . that a decision does not stand for a proposition not considered by the court.' [Citation.]" (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 332.)

[5] Even if *Hendrix* were not fully retroactive, the result would be the same under a different mode of analysis employed by our Supreme Court in *People v. Mutch* (1971) 4 Cal.3d 389 (*Mutch*). In that case, our Supreme Court held it need not undertake an analysis of whether its decision in *People v. Daniels* (1969) 71 Cal.2d 1119 was retroactive because "the purpose of our decision in *Daniels* was not to 'redefine' the crime of kidnapping to commit robbery—under our tripartite system of government, that power is vested exclusively in the legislative branch—but simply to declare what the intent of the Legislature has been in this regard since the enactment of the 1951 amendment to section 209 [kidnapping for robbery]." (*Mutch*, *supra*, at p. 394.) In other words, *Daniels* simply confirmed what section 209 had always meant. Similarly, here, the decision in *Hendrix* confirms what the pertinent provisions of section 667 have always meant, i.e., that courts are not required to sentence consecutively.

2. *We Decline to Find Waiver*

Respondent contends that Miles waived his right to request resentencing by not timely appealing the resentencing order or raising this argument in his several prior habeas petitions. Miles argues that his failure to raise the *Hendrix* argument earlier was the result of excusable delay and also should be excused because his sentence involved a fundamental miscarriage of justice.

"Where a court may have been influenced by an erroneous understanding of the scope of its sentencing powers, habeas corpus is a proper remedy to secure reconsideration of the sentence imposed. [Citation.]" (*Belmontes*, *supra*, 34 Cal.3d at p. 348, fn. 8.) When the trial court sentences a defendant to consecutive terms under the belief it has no discretion to impose concurrent terms, the defendant "may seek relief by petition for writ of habeas corpus alleging such sentencing and the failure of the sentencing court to exercise discretion" in sentencing the defendant. (*Ibid.*) *Belmontes* is not square with the present case: (1) at the time defendant was originally sentenced the trial court did understand its discretion and exercised it; and (2) when defendant was resentenced the trial court had no discretion because it was following an express remand order from the Court of Appeal. (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982 [material variance from remand is void]; see also *People v. Vizcarra (*2015) 236 Cal.App.4th 422, 441.) Nevertheless, we find under the unique facts of this case that a habeas petition is the appropriate vehicle to address defendant's sentence.

We are mindful of the rule that a habeas corpus petitioner generally must act without delay and may not file multiple petitions attacking the proceedings in a piecemeal fashion. (*In re Clark* (1993) 5 Cal.4th 750, 768 superseded by statute on other grounds as stated in *Briggs v. Brown* (2017) 3 Cal.5th 808.) The exceptions are when the defendant can demonstrate "justification

for the failure to present all known claims in a single, timely petition for writ of habeas corpus" or show "that a *fundamental* miscarriage of justice occurred as a result of the proceedings leading to conviction and/or sentence." (*Ibid.*)

Respondent first argues that Miles's petition is untimely because Miles "should have filed an appeal from the trial court's sentence 60 days after the abstract of judgment was last amended on July 15, 1997." We reject that argument as a review of the record reflects neither Miles nor counsel were present when Miles was resentenced. Nor does the record reflect either Miles or counsel was served with any notice of resentencing or a change in the abstract of judgment.

Respondent next contends that Miles "had access to his central file" at the CDCR and "could have discovered" the amended abstract of judgment, citing to regulations that permit inmates access to their files. (See Cal. Code Regs., tit. 15, sec. 3370, subd. (c).) According to respondent, Miles, therefore, "had constructive notice of the new abstract of judgment for over 20 years, and he could have raised his current claim in his prior petitions and motions." Respondent cites to no authority that an inmate is deemed to have constructive notice of a modification to his sentence because the rules allow him access to his file. Under respondent's theory, an inmate must continually check his case file, and understand its contents, in order to preserve his appellate rights concerning orders of which he did not earlier have notice.

Respondent does not assert that Miles was provided notice of the resentencing hearing or the amended abstract of judgment. Respondent argues that Miles knew his sentence had been modified, and thus, could have raised his claims under *Hendrix* earlier. Respondent does not support this claim with a citation to a specific statement Miles made in a prior habeas petition. Our

review of Miles's petitions filed between the years of 2009 and 2016 shows that Miles consistently represented that his sentence was 36 years to life.[6] The record thus is consistent with Miles's claims that he did not understand that his sentence had effectively been lengthened to 62 years until the CDCR recently informed him of his "new release date." That information prompted him to file the motion for resentencing which the trial court denied.

Under these circumstances, language in *In re Clark, supra,* 5 Cal.4th 750 about excusable delay suggests we should address the petition on the merits: "[W]here the factual basis for a claim was unknown to the petitioner and he had no reason to believe that the claim might be made, or where the petitioner was unable to present his claim, the court will continue to consider the merits of the claim if asserted as promptly as reasonably possible. And, as in the past, claims which are based on a change in the law which is retroactively applicable to final judgments will be considered if promptly asserted and if application of the former rule is shown to have been prejudicial." (*Id* at p. 775 [emphasis added].)

The Attorney General's concern for the finality of judgments is, of course, legitimate—and not lightly cast aside. But the concern must yield on these uncommon facts where there is excusable delay, an unquestioned legal error (the requirement for consecutive sentencing repudiated by *Hendrix*), and significant prejudice resulting from what would otherwise be an unaddressed error.

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[6] The 2016 habeas petition was the final one filed before Miles filed his motion for resentencing in the Superior Court.

3. *The Proper Remedy is to Reinstate the Trial Court's Sentence*

Respondent argues that if we were to grant relief the proper disposition would be to remand the matter to the trial court to allow it to "re-examine the facts of [Miles's] case, reconsider all of its discretionary sentencing choices, and determine the appropriate sentence under *Hendrix*." Acknowledging that the trial judge who sentenced Miles has retired, respondent contends it would be "prudent" to allow a new trial judge the opportunity to exercise its discretion.

There is no dispute that when the original trial judge imposed concurrent sentences on Miles, she was correctly informed of her discretion under section 667 to impose concurrent or consecutive sentences for felonies against multiple victims committed on the same occasion. The trial court exercised that discretion after presiding over Miles's trial and before being directed by the appellate court to impose consecutive sentences. At this juncture, there are no facts to adjudicate, no discretion to exercise; nothing is left but to reinstate the original concurrent sentence the trial court imposed in 1996.[7] (See *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228–1229 ["Remand for resentencing is not required, however, if the record demonstrates that the trial court was aware of its sentencing discretion."].)

DISPOSITION

The petition for writ of habeas corpus is granted. The order of July 15, 1997 is vacated, and the original sentence (36-years-to-life term on count 1 and a concurrent 26-years-to-life term on count 2) is reinstated. The superior court shall prepare a minute

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[7] We do not reach Miles's argument that his constitutional right to be present at resentencing was violated.

order reflecting the reinstatement of the original sentence, and prepare and send to the CDCR an amended abstract of judgment.

RUBIN, P. J.

WE CONCUR:

BAKER, J.

MOOR, J.