Filed 3/14/18 P. v. Mendez CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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

THE PEOPLE, Plaintiff and Respondent, v. ADAN MENDEZ, Defendant and Appellant.	B282751 (Los Angeles County Super. Ct. No. BA450395)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig Richman, Judge. Affirmed as modified.

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and John R. Prosser, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Adan Mendez (defendant) appeals from the judgment entered after his conviction of robbery and assault, challenging only the sentence. He contends that the sentence on count 2 was unauthorized, requiring remand for resentencing. He also requests that the case be remanded for resentencing of both counts, under the recently amended Penal Code sections 12022.53, subdivision (h) and 12022.5, subdivision (c).[1] We conclude that the error in count 2 was clerical error which may be corrected on appeal without remand, and that remand under the recently amended statutes is unwarranted. We thus modify the judgment and affirm as modified.

BACKGROUND

Defendant was charged in count 1 with second degree robbery in violation of section 211, and in count 2 with assault with a firearm in violation of section 245, subdivision (a)(2). As to the robbery count, it was alleged that a principal personally used a firearm, within the meaning of former section 12022.53, subdivisions (b) and (e)(1); and as to the assault with a firearm, it was alleged that defendant personally used a firearm, within the meaning of former section 12022.5, subdivision (a). The amended information alleged that defendant had suffered five prior convictions for which he had separate prison terms within the meaning of section 667.5. Allegations that the crimes were gang related were later stricken by the trial court.

A jury found defendant guilty of both counts as charged, and the firearm allegation as to count 1 under section 12022.53,

---

[1] The Legislature amended Penal Code section 12022.53, subdivision (h), effective January 1, 2018, to give the sentencing court discretion to strike the firearm enhancement in the interests of justice. (See Stats. 2017, ch. 682 § 2.) All further statutory references are to the Penal Code, unless otherwise indicated.

subdivision (b), and as to count 2 under section 12022.5, subdivision (a), to be true. In a bifurcated proceeding, the trial court reduced one of defendant's prior convictions to a misdemeanor pursuant to Proposition 47.[2] The parties and the court agreed that the reduced conviction would be stricken pursuant to section 1385, and defendant admitted the remaining four prior prison term convictions, all of which were for possession of a firearm by a felon.

On May 12, 2017, the trial court sentenced defendant to a total term of 15 years in prison, comprised of the middle term of three years as to count 1, plus a 10-year firearm enhancement, and the middle term of three years as to count 2, plus a 10-year firearm enhancement, and one year for each of the prior prison terms. The court struck the remaining two prior convictions pursuant to section 1385, and stayed the sentence on count 2 under section 654.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

On September 5, 2016, defendant and three companions entered a shoe store where they spent time trying on shoes. After putting on one of the new pair of shoes, defendant placed his old shoes in a box and returned the box to the shelf. Defendant milled around the store a bit, but did not accompany his companions when they went to a register to pay for some items, not including the shoes defendant was wearing. After the others paid, they left the store with defendant, who was still wearing the new shoes he had taken. A store employee stopped the group just outside the store and demanded that defendant return the shoes, telling defendant that he would be allowed to leave as long

---

[2] See generally, section 1170.18.

as he returned the shoes. Defendant then reached into his pocket and pulled out a pistol. When the store employee saw the gun, he jumped back saying, "Get out of here," and defendant left.

DISCUSSION

I. Sentencing error

Defendant contends that the sentence on count 2 was unauthorized, and the matter must be remanded for resentencing. Respondent counters that the error was clerical error which may be corrected by the reviewing court without remand.

The trial court erroneously stated that the firearm enhancement for count 2 was imposed pursuant to section 12022.53, subdivision (a), although it was alleged under section 12022.5, subdivision (a), and was correctly stated on the verdict form. Section 12022.5, subdivision (a), provides for an additional and consecutive term of imprisonment of 3, 4, or 10 years, while section 12022.53, subdivision (a), which the trial court cited upon imposing a 10-year enhancement, does not set forth any punishment at all. It is subdivision *(b)* of 12022.53, that provides for an additional 10-year prison term. It is thus clear that the trial court misspoke by citing the incorrect code section.

"[A] court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts. [Citations.] The power exists independently of statute and may be exercised in criminal as well as in civil cases. [Citation.] The power is unaffected by the pendency of an appeal or a habeas corpus proceeding. [Citation.] The court may correct such errors on its own motion or upon the application of the parties. [Citation.]" (*In re Candelario* (1970) 3 Cal.3d 702, 705.) "The distinction between clerical error and judicial error is 'whether the error was made in rendering the judgment, or in recording the judgment rendered.' [Citation.] Any attempt by a court,

under the guise of correcting clerical error, to 'revise its deliberately exercised judicial discretion' is not permitted. [Citation.]" (*Ibid.*)

Defendant contends that the court's error was judicial error because it resulted in a failure to exercise discretion to choose among the range of terms set forth in section 12022.5, subdivision (a). Defendant notes the that sole choice in section 12022.53 is a 10-year term for the use of a firearm, while 12022.5, subdivision (a) provides for terms of 3, 4, or 10 years. He then reasons that the trial court's failure to exercise discretion is demonstrated by its immediate imposition of 10 years and express statement that it did so "pursuant to Penal Code section 12022.53(a)," without expressly discussing a discretionary range, and despite having considered factors in aggravation and mitigation to support the middle term.

The flaw in defendant's reasoning is that section 12022.53, subdivision (a), does not set forth any term of punishment at all, but merely lists the felonies to which section 12022.53 applies. It is subdivision (b) that provides for an additional 10-year prison term. It is subdivision (a) of section 12022.5 which provides for additional punishment. Thus, the court's mention of subdivision (a) does not require the conclusion that he meant the incorrect subdivision (a).

Further, defendant's reasoning is too narrowly focused and ignores the surrounding circumstances. A broader review reveals that the trial court was well aware of the correct statute. Count 2 of the information expressly referred to section 12022.5, subdivision (a), and at the time the information was amended, defense counsel made clear to the court that the firearm enhancement was alleged under section 12022.5, subdivision (a). In the initial instructions to the jury at the outset of trial, the court read or summarized the information, and as to count 2, the

court stated: "It is further alleged in the commission of that offense that [defendant] personally used a firearm, to wit, a handgun, within the meaning of Penal Code section 12022.5(a)." Finally, the verdict form described the allegation as personal use of a firearm within the meaning of section 12022.5, subdivision (a).

We thus agree with respondent that the trial court simply misspoke, resulting in error that was clerical, not judicial. We modify the judgment accordingly.

II. Amended firearm enhancements

In supplemental briefing, defendant contends that he is entitled to a remand for resentencing under the amendments to sections 12022.5 and 12022.53, which went into effect January 1, 2018. (See Stats. 2017, ch. 682, §§ 1 & 2.)

Prior to January 1, 2018, subdivision (c) of section 12022.5, and subdivision (h) of section 12022.53 provided: "Notwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." Under the amended statutes, the subdivision now reads: "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."

Respondent acknowledges that the revised statute will have retroactive effect here. The amendment applies retroactively to nonfinal judgments under the reasoning of *In re Estrada* (1965) 63 Cal.2d 740, as it gave the trial courts new sentencing discretion to lessen punishment. (See *People v. Brown* (2012) 54 Cal.4th 314, 324; *People v. Francis* (1969) 71 Cal.2d 66, 75-76.) In general, when new statutory discretion is applied

retroactively or the trial court was unaware of its discretion, a defendant is entitled to resentencing. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.)

Although respondent agrees that the statute will have retroactive effect, he contends that remand would be futile and thus inappropriate in this case. Relying on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, respondent argues that the reviewing court need not remand for resentencing if the record shows that the trial court "would not . . . have exercised its discretion to lessen the sentence." (*Id.* at p. 1896.) Pending appeal in that case, the California Supreme Court held in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, that trial courts have discretion under section 1385 to strike prior convictions alleged under the Three Strikes law. The *Gutierrez* court held that although the *Romero* holding was retroactive, remand was unnecessary because the trial court's comments "clearly indicated that it would not, in any event, have exercised its discretion" in the defendant's favor had the *Romero* decision been in effect at the time of sentencing. (*Gutierrez*, *supra*, at p. 1896, citing *Romero*, *supra*, at p. 530, fn. 13.) We agree that where "'the record shows that the trial court would not have exercised its discretion even if it believed it could do so,'" remand may be denied as an "'idle act.'" (*People v. Gamble* (2008) 164 Cal.App.4th 891, 901.)[3]

---

[3] We do not agree, however, with respondent's contention that we should consider remand to be inappropriate "because no reasonable court would exercise its new discretion to strike [defendant's] firearm enhancements." There was no such reasoning in *Gutierrez* and respondent has cited no other authority for such a broad assertion, which would undermine the rule that when a trial court has failed to exercise discretion under section 1385, "[a]ppellate courts do not have the power to

Here, after careful consideration, the trial court found no factors in mitigation, and found in aggravation, that the crime involved great violence and the threat of great bodily harm, and was committed with "a high degree of cruelty, viciousness, or callousness." The court further found that "the defendant was armed with or used a weapon at the time of the commission of the offense, and that the manner in which the crime was carried out indicates planning, sophistication, or professionalism." The court continued: "As to the factors relating to [defendant] himself, he has engaged in violent conduct that indicates a serious nature [*sic*] to society. His prior convictions as an adult or sustained petition in juvenile delinquency proceedings are numerous or increasing in seriousness. He has served a prior prison term. He was on probation or parole at the time the crime was committed. His prior performance on probation or parole has been unsatisfactory."

As respondent argues, the court's comments make clear that if it had considered a sentence of less than 15 years appropriate, the court would have struck more than two of the four one-year prison priors and selected the low term of two years for the offense. Indeed, the court explained that "based upon the violent nature of this offense and the fact that the defendant will serve 85 percent custody time, . . . the punishment imposed of a total of 15 years is sufficient for the manner in which the crime was committed on this particular occasion." Thus the trial court made its preference very clear, and we have found nothing in the record that would suggest that the trial court might exercise its discretion in a manner that would result in a sentence of less than 15 years. We thus decline to remand for resentencing.

---

substitute their discretion for that of the trial court or to direct the trial court to exercise its discretion to dismiss.' [Citation.]" (*People v. Orabuena* (2004) 116 Cal.App.4th 84, 100.)

DISPOSITION

The judgment is modified to show that the 10-year firearm enhancement imposed as to count 2 was imposed pursuant to section 12022.5, subdivision (a). In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting the modification, and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

---

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.