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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH WAYNE JOHNSON,

Defendant and Appellant.

B278683

(Los Angeles County
Super. Ct. No. TA042592)

APPEAL from an order of the Superior Court of Los Angeles County, Laura R. Walton, Judge. Reversed and remanded.

Patricia S. Lai, 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, Steven E. Mercer and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Kenneth Wayne Johnson appeals an order denying his petition for resentencing after the trial court reduced his 1995 felony conviction for possession of cocaine to a misdemeanor pursuant to Penal Code section 1170.18.¹ Johnson argues, and the Attorney General acknowledges, the court erroneously denied the petition in the mistaken belief the sentence in the drug case had run concurrently with, rather than consecutively to, Johnson's 1996 three strikes sentence for a robbery/burglary. However, the Attorney General asserts Johnson forfeited the issue by failing to object in the trial court and, in any event, the claim is moot. Neither contention has merit. We reverse the order and remand the matter for a new resentencing hearing.

FACTUAL AND PROCEDURAL BACKGROUND

1. Johnson's Felony Sentences

Following a no contest plea on September 7, 1995, Johnson was convicted of possession of a controlled substance (cocaine) (former Health & Saf. Code, § 11350, subd. (a)) and sentenced as a second strike offender to 32 months in state prison (the low term of 16 months doubled). He was awarded 444 days of custody and conduct credits and ordered to pay a restitution fine of \$200. (Super. Ct. L.A. County, No. TA040492.)

Johnson was charged the same day with one count of robbery (§ 211) and one count of first degree burglary (§ 459). (Super. Ct. L.A. County, No. TA042592.) Following his conviction on both charges, Johnson was sentenced on March 14, 1996 in case No. TA042592 as a third strike offender to state prison for an indeterminate term of 37 years to life: 25 years to life for

¹ Statutory references are to this code unless otherwise stated.

robbery, plus 10 years for two prior serious felony convictions (§ 667, subd. (a)), plus two years for an on-bail enhancement (§ 12022.1). The sentence imposed for the burglary conviction, 25 years to life, was stayed pursuant to section 654. Johnson was awarded 292 days of custody and conduct credits and was ordered to pay a restitution fine of \$200. The court ordered the sentence in case No. TA042592 to run consecutively to the sentence previously imposed in case No. TA040492.²

2. Johnson's Postconviction Petitions

On January 14, 2016 the trial court granted Johnson's petition pursuant to Proposition 47 (§ 1170.18, subd. (f)), to designate his felony drug possession conviction in case No. TA040492 a misdemeanor.

On August 10, 2016 Johnson petitioned the court to resentence him by removing the felony sentence imposed in the drug possession case, which was now classified a misdemeanor, and to issue an amended abstract of judgment reflecting modification of his aggregate sentence imposed in the robbery/burglary case. On October 7, 2016, at a hearing at which Johnson was not present and was not represented by counsel, the court denied the petition, stating in its minute order, "Case TA040492 has been reduced to a misdemeanor and the defendant was not sentenced consecutively for case TA042592. Therefore, the sentence for case number TA042592 remains imposed."

Johnson filed a timely notice of appeal.

² Imposition of the indeterminate sentence in case No. TA042592 to run consecutively to the determinate sentence in case No. TA040492 was recorded in both the March 14, 1996 minute order and the abstract of judgment filed March 26, 1996.

DISCUSSION

The Attorney General acknowledges in a somewhat understated manner that, in denying Johnson's petition for resentencing, "[t]he trial court, here, appears to have relied on an incorrect factual finding, i.e., that appellant was not sentenced consecutively." We agree. Although the minute order from the March 14, 1996 sentencing hearing expressly orders that the indeterminate life sentence imposed for robbery is "to run consecutive to case TA040492," the court's October 7, 2016 minute order incorrectly stated, as the sole basis for denying the petition, the sentence imposed in case No. TA042592 was not consecutive to the sentence in case No. TA040492.

Notwithstanding his concession, the Attorney General argues Johnson forfeited the issue because he did not object to the court's reasoning at the hearing on his petition, citing *People v. Scott* (1994) 9 Cal.4th 331, 351, 354 [to encourage prompt detection and correction of error and to reduce unnecessary appellate claims, a defendant is required to raise certain issues at the time of sentencing; "claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner"].) However, the October 7, 2016 minute order states Johnson was neither present nor represented by counsel at the hearing on his petition. As the Supreme Court explained in *Scott*, "Of course, there must be a meaningful opportunity to object to the kinds of claims otherwise deemed waived by today's decision." (*Id.* at p. 356.) When, as here, the trial court conducts a sentencing or resentencing hearing without the presence of defendant or defense counsel, no opportunity for objection, let alone a

meaningful one, has been provided. Johnson's claim of error has not been forfeited.

The Attorney General insists as an alternate argument that Johnson's claim is moot because he has already completed the term of his sentence on the drug possession charge. Accordingly, the Attorney General argues, this court is unable to award any effective relief. Once again, the Attorney General's objection misses the mark. (See *People v. Sellner* (2015) 240 Cal.App.4th 699, 701 [rejecting contention that resentencing order following grant of Proposition 47 relief was moot because the new sentence had been deemed served; "the new sentence affects the custody credits that can be applied to outstanding fines or fees" pursuant to section 2900.5, subdivision (a)].)

As our colleagues in Division Eight of this court explained in *People v. Rouse* (2016) 245 Cal.App.4th 292, 299, at least where multiple counts are involved, "a resentencing on a petition under section 1170.18, subdivision (a) . . . is akin to a plenary sentencing hearing." That is, when a court has decided to grant relief and reclassify a felony conviction as a misdemeanor, the statutory scheme envisions that "resentencing will occur anew, with the court exercising its sentencing discretion and restructuring the entire sentencing package. 'The purpose of section 1170.18 is take the defendant back to the time of the original sentence and resentence him with the Proposition 47 count now a misdemeanor.' [Citation.] 'If the petitioner is resentenced as a misdemeanor on an eligible count, but will remain sentenced as a felon on one or more other counts, the court should resentence on all counts.'" (*Rouse*, at p. 300, italics omitted.)

The plenary nature of the resentencing process applies to an aggregate sentence, as here, imposed based on convictions from separate cases pursuant to section 1170.1, subdivision (a), and California Rules of Court, rules 4.451(a) and 4.452. Thus, when the trial court resentences a defendant pursuant to Proposition 47, “the trial court not only [is] vested with jurisdiction to resentence in [a separate] case, it [is] required to do so.” (*People v. Sellner, supra*, 240 Cal.App.4th at p. 701; accord, *People v. Roach* (2016) 247 Cal.App.4th 178, 186.)

Applying these principles to Johnson’s resentencing, on remand the trial court will have discretion to impose a misdemeanor sentence for drug possession fully concurrent with, or fully consecutive to, the sentence imposed for his third strike robbery conviction. (See § 1170.1, subd. (a) [one-third the middle term limitation applies only to felonies sentenced under the Determinate Sentencing Law].) Even if the sentence on the drug possession charge remains fully consecutive to the indeterminate life term, however, Johnson’s 444 days of presentence custody credit will more than satisfy any misdemeanor sentence imposed (see §§ 18.5, subd. (a), 19.2 [one year (364 days) maximum period of confinement for misdemeanor conviction]). Accordingly, Johnson will be entitled to credit against the sentence imposed in the robbery/burglary case for all the time he served following his March 14, 1996 sentencing in that case. (See § 1170.18, subd. (d) [“[a] person who is resentenced pursuant to subdivision (b) shall be given credit for time served”]; see also Couzens et al., *Sentencing California Crimes* (The Rutter Group 2017) ¶ 25:11, p. 25-84 (rev. 7/2017).)

In addition, recalculating the custody credits to which Johnson is entitled may affect his obligation for fines and fees

previously imposed. (See *People v. Sellner, supra*, 240 Cal.App.4th at p. 701.) The proper determination of Johnson's custody credits upon resentencing, however, must be left to the trial court in the first instance.

DISPOSITION

The order denying Johnson's petition for resentencing is reversed, and the matter remanded to the trial court to resentence Johnson in accordance with the views expressed in this opinion. The trial court shall provide notice to Johnson prior to the new sentencing hearing so he may be present or at least represented by counsel.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.*

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