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IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DUNIFU ALI KINCY,

Defendant and Appellant.

B276635

(Los Angeles County
Super. Ct. No. GA071703)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jared D. Moses, Judge. Affirmed.

Dunifu Ali Kincy, in pro. per.; and Linda L. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

BACKGROUND

A. Direct Appeal

On September 24, 2008, a jury convicted Dunifu Ali Kincy (Kincy) of two counts of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b); counts 1, 5)¹ as well as one count of shooting a firearm with gross negligence (§ 246.3, subd. (a); count 2), one count of being a felon in possession of a firearm (§ 12021, subd. (a); count 4) and one count of carrying a loaded firearm while an active participant in a street gang (§ 12031, subd. (a); count 6).

The jury also decided that each of these crimes was committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(C).) With respect to count 1, the jury determined that a principal was armed with a firearm in the commission of an assault (§ 12022, subd. (a)(1).) With respect to count 5, the jury further found that Kincy personally used a firearm in the commission of an assault (§ 12022.5, subd. (a).)² Kincy also admitted a section 667.5, subdivision (b), prison term enhancement allegation.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Although this particular enhancement was listed in the amended information as well as the verdict form, the jury's true finding was not listed in the minute order documenting the jury's verdict. The judge subsequently resentencing Kincy noted that "the problem with this case,

The trial court sentenced defendant to a total of 24 years in prison. The court calculated the sentence as follows: On count 5 (§ 245, subd. (b)—the principal count), the court sentenced Kincy to the midterm of six years plus an additional 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C)) and another four years for the personal use of a firearm enhancement (§ 12022.5, subd. (a)).³

On count 1, the court sentenced Kincy to two years (one-third of the midterm) plus four months for the principal armed with a firearm enhancement (one-third of the maximum one-year term). On count 2, the court sentenced

among other things, is that the minute orders are all wrong . . . [and] full of mistakes.”

³ Section 186.22 imposes different levels of enhancement for a base felony if that felony is “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. (§ 186.22, subd. (b)(1).) If the base felony qualifies as a violent felony under the list of felonies in section 667.5, then “the person shall be punished by an additional term of 10 years.” (§ 186.22, subd. (b)(1)(C).) If the base felony qualifies as a serious felony under the list of felonies in section 1192.7, then “the person shall be punished by an additional term of five years.” (§ 186.22, subd. (b)(1)(B).) If the base felony is neither serious nor violent, then “the person shall be punished by an additional term of two, three, or four years at the court’s discretion.” (§ 186.22, subd. (b)(1)(A).) Section 12022.5, subdivision (a), imposes a consecutive term of imprisonment for 3, 4, or 10 years.

Kincy to two years but stayed the sentence. On count 4, the court sentenced Kincy to eight months (one-third of the midterm). On count 6, the court sentenced Kincy to two years to run concurrently. The court also imposed an additional one year for a prior prison conviction.

In an unpublished opinion handed down on April 26, 2010, we modified the sentence on count 6 to an eight-month term, which was stayed pursuant to section 654. We affirmed the judgment in all other respects. (*People v. Kincy* (Apr. 26, 2010, B212639) [nonpub. opn.].)

B. Habeas Petition

On December 28, 2015, Kincy filed a petition for writ of habeas corpus in the trial court. In his petition, Kincy contended that two recent California Supreme Court cases had rendered his sentence illegal. Relying upon *People v. Rodriguez* (2009) 47 Cal.4th 501 (*Rodriguez*) and *People v. Le* (2015) 61 Cal.4th 416 (*Le*), Kincy argued that he should not have been sentenced for both the personal use of a firearm enhancement (§ 12022.5, subd. (a)) and the gang enhancement (§ 186.22, subd. (b)(1)(C)) on count 5.⁴ Kincy sought a new 15-year sentence.

⁴ Section 1170.1, subdivision (f), provides, in relevant part, “[w]hen two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense.” In *Rodriguez, supra*, 47 Cal.4th 501, a jury convicted the defendant of assault with a firearm (§ 245, subd. (a)(2)) and found two sentencing allegations to be

On April 27, 2016, the People filed a detailed informal response to the habeas petition. The People acknowledged that Kincy had established a *prima facie* case for habeas relief and agreed he should be resentenced. However, the People noted, the *Le, supra*, 61 Cal.4th 416 case left open the

true—section 12022.5, subdivision (a), and section 186.22, subdivision (b)(1)(C). (*Id.* at p. 505.) The trial court imposed sentence on both allegations. The California Supreme Court reversed, holding that a defendant’s single act of personally using a gun during the commission of a felony could not be used both to support the personal use of a firearm enhancement under section 12022.5, subdivision (a), and to elevate the punishment for a criminal street gang allegation to a “violent felony” under section 186.22, subdivision (b)(1)(C). “Because two different sentence enhancements were imposed for defendant’s firearm use in each crime, section 1170.1’s subdivision (f) requires that ‘only the greatest of those enhancements’ be imposed.” (*Id.* at pp. 508–509.) In *Le, supra*, 61 Cal.4th 416, a jury convicted the defendant of assault with a semiautomatic firearm (§ 245, subd. (b)) and found two sentencing allegations to be true—section 12022.5, subdivision (a), and section 186.22, subdivision (b)(1)(B). *Le* held that the base offense could not be enhanced under both section 12022.5, subdivision (a), and section 186.22, subdivision (b)(1)(B). Rather, section 1170.1 required that only the greater of the two enhancements—in this case, the enhancement under section 12022.5—could be imposed. (*Id.* at pp. 425, 429.) However, the *Le* court noted, “the parties have not raised, nor do we address or decide, whether subdivision (b)(1)(A) of section 186.22 might be applicable here.” (*Id.* at p. 425, fn. 6.)

consecutive application of section 186.22, subdivision (b)(1)(A), to charges in which a defendant personally uses a firearm (§ 12022.5, subd. (a)) or a principal is armed with a firearm (§ 12022, subd. (a)(1)) when the defendant is convicted of assault with a semiautomatic firearm (§ 245, subd. (b).) The People urged the court to do so when resentencing Kincy. The People also noted that the trial court had overlooked several other sentencing enhancements when initially sentencing Kincy and urged the court to impose them upon resentencing. In all, the People now sought a 29-year sentence. On May 12, 2016, Kincy filed a reply.

The resentencing hearing took place on July 19, 2016. The court first noted that Kincy had been sentenced to six years (the midterm) for the assault with a semiautomatic firearm offense in count 5 plus an additional 10 years for the gang enhancement and another four years for the personal use of a firearm enhancement. However, the court found, the 10-year gang enhancement had to be stayed pursuant to *Rodriguez, supra*, 47 Cal.4th 501 and *Le, supra*, 61 Cal.4th 416.⁵ The court then noted that the sentencing judge had made additional errors, including neglecting to sentence Kincy on the gang allegations in counts 1, 4 and 6. Citing *People v. Sinclair* (2008) 166 Cal.App.4th 848, the court also

⁵ The court noted that the sentencing judge had not truly erred given that these cases were handed down well after Kincy's sentencing.

found that the principal armed with a firearm allegation should not have been added to count 1.⁶

Despite the sentencing judge's main error—adding a 10-year sentence on count 5 for the gang enhancement—the court stated that it was not “simply going to strike the 10 years and send [Kincy] to state prison for 14 years down from 24.” Rather, “[m]y goal is to effectuate the intent of the sentencing judge.” “It was that judge . . . who presided over the jury trial, who heard all of the evidence, and who made her determination of what the appropriate sentence would be. So, in resentencing, my goal is going to be to effectuate her intent, correct the sentencing errors. And, yet, if I can arrive right at 24 years, that’s what I’m going to do.” The court also rejected the People’s contention that it could impose a higher sentence on resentencing, stating that, “You can’t punish somebody for successfully bringing a writ. You

⁶ As noted above, on count 1, the court sentenced Kincy to two years (one-third of the midterm) for the assault (§ 245, subd. (b)), offense plus an additional four months (one-third of the maximum one-year term) for the principal armed with a firearm enhancement. Section 12022, subdivision (a)(1), authorizes a one-year enhancement for the use of a firearm in the commission of a felony, *unless* the arming is an element of that offense. Because use of a firearm in the commission of an assault is an element of section 245, subdivision (b) offense, a section 12022, subdivision (a)(1), enhancement cannot be imposed when a defendant is convicted of this charge. (*People v. Sinclair*, *supra*, 166 Cal.App.4th at pp. 855–856.)

can't go more than 24 [years]. That's my view." Both the People and defense counsel agreed with the court's position.

The People also conceded that Kincy could not be sentenced for both the personal use of a firearm and violent felony gang enhancements but noted that no case law addressed whether he could be sentenced for both personal use of a firearm and felony gang enhancement. The court declined to decide the issue, noting, "Why raise an issue that doesn't need to be raised? If I can get to 24 years without having to raise that issue, why go down that road?"

The court then held in-chambers conference with the People and defense counsel and reread *Rodriguez, supra*, 47 Cal.4th 501 and *Le, supra*, 61 Cal.4th 416. Based on its reading of the cases, the court determined it could not impose the 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)) or the 5-year gang enhancement (§ 186.22, subd. (b)(1)(B)) on count 5. As a result, the personal use of a firearm enhancement (§12022.5, subd. (a))—which carries a 3, 4 or 10-year sentence—became the greater of the enhancements under section 1170.1, subdivision (f).⁷ The

⁷ Section 12022.5, subdivision (a), provides that "any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense." Thus, at first glance, it appears that this enhancement—like the section 12022, subdivision (a)(1) enhancement—cannot be imposed when a defendant is convicted of violating section 245,

court stated it would be imposing the maximum 10-year sentence for the firearm allegation while staying the sentence for the gang allegation.

Kincy argued that the firearm allegation had rendered his assault with a semiautomatic firearm conviction a “violent felony” under section 667.5. This, in turn, had elevated the gang enhancement to a 10-year term pursuant to section 186.22, subdivision (b)(1)(C). Kincy reasoned that if the court struck the firearm allegation, and, therefore, the violent felony designation for his base felony, the court could then apply the 5-year gang enhancement, rather than the 10-year gang enhancement, in his case.⁸ According to Kincy, the *Le, supra*, 61 Cal.4th 416 case mandated this result. The court disagreed with Kincy’s analysis. “Don’t mix up the charges with the sentencing issue,” the court cautioned Kincy. “It’s still a violent felony. And the reason it’s a violent felony is because [the jury] found true the gun allegation. It’s always going to be a violent felony.” “[Y]ou’re

subdivision (b). However, section 12022.5, subdivision (d), contains an exception to this rule, providing that: “Notwithstanding the limitation in subdivision (a) relating to being an element of the offense, the additional term provided by this section shall be imposed for any violation of Section 245 if a firearm is used.”

⁸ In other words, by staying the firearm enhancement and imposing the gang enhancement instead, Kincy would receive a maximum five-year increase in his sentence rather than the 10-year increase the trial judge informed Kincy he would be imposing.

mixing up the charge and the allegations, what you were convicted of and were found true and the sentencing aspects.”⁹

The court reiterated that it wanted to impose a sentence as close as possible to the 24 years originally imposed by the sentencing judge. The court then stated it had recalculated Kincy’s sentences and arrived at a 23-year 8-month sentence. Addressing Kincy, the court observed: “I know you wanted more [than] that. But the fact is, look, I’ve got to give you what the trial court gave. I got to recalculate it under the law, fix the mistakes, and yet still effectuate the trial court’s intent in creating a sentence in this case.”

The court then resentenced Kincy on count 5, first imposing a nine-year sentence (the high term) for the assault with a semiautomatic firearm offense.¹⁰ The court then

⁹ Under section 667.5, subdivision (c)(8), any felony in which the defendant uses a firearm which use has been charged and proved as provided in subdivision (a) of section 12022.5 qualifies as a violent felony. The court was therefore correct—the jury’s true finding as to the section 12022.5, subdivision (a), allegation rendered the base felony a violent felony. Staying the *sentence* for the allegation would not have changed this outcome.

¹⁰ When the California Supreme Court “concluded [in *Rodriguez, supra*, 47 Cal.4th 501] that section 1170.1 precluded the imposition of sentence on both enhancements, this left the opportunity for the trial court to restructure its sentence by imposing the *upper* terms for the base felonies, if it was inclined to compensate for the loss of one of the

imposed a 10-year sentence for the personal use of a firearm allegation. The court imposed and stayed a five-year sentence for the gang allegation.

On count 1, the court sentenced Kincy to two years (one-third of the midterm) for the assault with a semiautomatic firearm offense. The court then imposed a one-year sentence (one-third the midterm) for the gang allegation.¹¹ The court stayed the sentence originally imposed for the principal armed with a firearm allegation.

enhancements.” (*Le, supra*, 61 Cal.4th at p. 428.) Kincy argued that imposing the upper term was improper under *Cunningham v. California* (2007) 549 U.S. 270. In *Cunningham*, the Supreme Court held that California’s then operative determinate sentencing law (DSL) violated the right to a jury trial by allowing a defendant—for whom the statutory maximum term would otherwise be the midterm—to have his sentence increased to the upper term based solely on a fact or facts found by the trial judge rather than by the jury. (*Id.* at p. 293.) However, after *Cunningham*, the Legislature amended the DSL so that now “(1) the middle term is no longer the presumptive term absent aggravating or mitigating facts found by the trial judge; and (2) a trial judge has the discretion to impose an upper, middle or lower term based on reasons he or she states.” (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992.) Subdivision (b) of section 1170 states the court “shall select the term which, in the court’s discretion, best serves the interests of justice.”

¹¹ Because this section 245, subdivision (b), assault offense was based on derivative liability, it was neither a serious nor a violent felony. Thus, the sentencing triad for

On count 2, the court sentenced Kincy to two years (one-third of the midterm) for the grossly negligent discharge of a firearm offense but stayed the sentence. The court also imposed and stayed a five-year sentence for the gang allegation. On count 4, the court sentenced Kincy to eight months (one-third of the midterm) for the felon in possession of a firearm offense. The court also imposed a one-year sentence (one-third of the midterm) for the gang allegation. On count 6, the court sentenced Kincy to two years (one-third the midterm) for the carrying a loaded firearm offense but stayed the sentence. The court also imposed and stayed a three-year sentence for the gang allegation.

Lastly, the court struck the one-year sentence originally imposed for the prison prior conviction. “If I were to impose that, that would get us to 24 years and eight months, which would exceed Mr. Kincy’s original [24-year] sentence and I believe would be improper and reversible,” the court noted. In all, the court sentenced Kincy to 23 years 8 months.

The court granted Kincy 360 days of actual custody credit plus 54 days of good time/work time credit for a total of 414 days of custody credit.

the gang allegation was two, three or four years. (See § 186.22, subd. (b)(1)(A).)

C. Current Appeal

Kincy filed a timely notice of appeal on August 18, 2016, but did not identify any grounds for relief. We appointed counsel to represent Kincy on appeal. After examination of the record, counsel filed an opening brief raising no issues and asking this court to independently review the record. We have examined the entire record and are satisfied that Kincy’s counsel fully complied with his responsibilities and that no arguable issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 109–110; *People v. Wende* (1979) 25 Cal.3d 436, 441–442.)

D. IAC Claim in Supplemental Brief

On April 10, 2017, Kincy filed a supplemental brief. In his brief, Kincy contends that he “was deprived of adversarial representation during a crucial part of the sentencing phase when appointed counsel failed to produce and submit rebuttal mitigating factors as instructed by the Judge.” Kincy specifically points to counsel’s failure to file a sentencing memorandum and his failure to review the *Le*, *supra*, 61 Cal.4th 416 opinion before the resentencing.

The standard of review for an ineffective assistance of counsel claim is well settled. To prevail, a defendant must show that counsel’s performance fell below prevailing professional standards and was prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–694.) To prove prejudice, the defendant must demonstrate a “‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” (*People*

v. Ledesma (1987) 43 Cal.3d 171, 217–218.) “ “ “ ‘A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ ” ” ” (*People v. Weaver* (2001) 26 Cal.4th 876, 925.)

Here, the court engaged in a detailed analysis of the errors committed during Kincy’s first sentencing. Indeed, the court’s preparation and mastery of the applicable law, as well as the facts of the underlying case, were apparent throughout the hearing. Furthermore, although Kincy was represented by counsel, the court frequently engaged in direct and extensive colloquies with Kincy, repeatedly remarking on Kincy’s demonstrated legal acumen. It is clear from our independent review of the record that Kincy’s claims received a full and fair hearing. Furthermore, as discussed above, we have determined that no arguable substantive issues exist here. Thus, Kincy cannot show that but for sentencing counsel’s alleged errors, the result of the proceeding would have been different.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.