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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

NORMA LILIAN CORTEZ,

Defendant and Appellant.

B293511

(Los Angeles County  
Super. Ct. No. BA345971)

APPEAL from an order of the Superior Court of Los Angeles County, Dennis J. Landin, Judge. Affirmed in part, reversed in part, and remanded.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer, Acting Supervising Attorney General, and Zee Rodriguez, Deputy Attorney General, for Plaintiff and Respondent.

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There have been numerous appeals from the jury's conviction of defendant Norma Lilian Cortez of premeditated murder and premeditated attempted murder, and true findings as to the gang and firearm enhancements. (*People v. Cortez* (May 30, 2013, B233833) [nonpub. opn.]; *People v. Cortez* (2016) 63 Cal.4th 101 (*Cortez I*); *People v. Cortez* (Aug. 29, 2016, B233833) [nonpub. opn.]; *People v. Cortez* (Nov. 6, 2017, B280911) [nonpub. opn.], review granted, transferred Jan. 24, 2018, S246000; *People v. Cortez* (Apr. 9, 2018, B280911) [nonpub. opn.].)

Most recently, we remanded the case to the trial court to exercise its sentencing discretion for the firearm enhancement pursuant to Senate Bill No. 620 (2017–2018 Reg. Sess.). (*People v. Cortez, supra*, B280911.) Following resentencing, defendant again appeals, claiming errors with her sentence, and error pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) related to the imposition of the restitution fine and assessments. We affirm the sentence in part, reverse in part, and remand for resentencing.

## **BACKGROUND**

These gang shootings are thoroughly described in the Supreme Court's opinion. (*Cortez I, supra*, 63 Cal.4th at pp. 105–110.) We need not repeat the facts here, as they do not concern the issues raised in this appeal.

As stated above, defendant was convicted of premeditated murder (count 1) and premeditated attempted murder (count 2), and gang and firearm allegations were found true for each count (Pen. Code, §§ 186.22, subd. (b)(1)(C), 187, subd. (a), 664, 12022.53, subds. (d), (e)(1)). (All further statutory references are to the Penal Code unless otherwise indicated.) Defendant was

originally sentenced to a total term of 50 years to life, consisting of 25 years to life for the murder count, and 25 years to life for the firearm enhancement for that count. The sentence for the attempted murder count, and the firearm enhancement for that count, were ordered to run concurrently with the murder count. The gang enhancements were stayed pursuant to section 654.

On August 20, 2018, after we remanded the case for resentencing consistent with Senate Bill No. 620, the trial court elected to strike the firearm enhancement pursuant to section 1385, and impose the previously stayed 10-year gang enhancement. The court sentenced defendant to an aggregate sentence of 35 years to life, consisting of 25 years to life for the murder count, and a 10-year gang enhancement pursuant to section 186.22, subdivision (b)(1)(C). The court imposed a concurrent term of 35 years to life for the attempted murder count, also consisting of 25 years to life for the offense plus a 10-year gang enhancement. The court ordered that the previously imposed fines and fees would “remain the same.” Therefore, the court imposed a \$40 court security assessment (§ 1465.8, subd. (a)(1)) and \$30 criminal conviction assessment (Gov. Code, § 70373) for each count, and a restitution fine of \$200 (§ 1202.4, subd. (b)).

There was no objection that the sentence was unauthorized nor any objection to the restitution fine and assessments, nor was there any indication that defendant was unable to pay the fine and assessments. Defendant timely appealed.

## **DISCUSSION**

### **1. Attempted Premeditated Murder**

Defendant contends the trial court erroneously sentenced her to a term of 25 years to life for count 2, because the sentence

for attempted premeditated murder is life. (§§ 187, 189, 664, subd. (a) [attempted premeditated murder “shall be punished by imprisonment in the state prison for life with the possibility of parole”].) Respondent concedes the error, and we agree that the concurrent sentence on count 2 must be corrected, as discussed here, and in another respect, as discussed *post*.

## **2. Gang Enhancement**

Defendant next contends the 10-year gang enhancement on both counts 1 and 2 under section 186.22, subdivision (b)(1)(C) is unauthorized and must be stricken. She argues the alternate gang penalty applies, under section 186.22, subdivision (b)(5), requiring a minimum parole eligibility date of 15 years for both counts 1 and 2. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004 (*Lopez*) [“section 186.22, subdivision (b) establishes alternative methods for punishing felons whose crimes were committed for the benefit of a criminal street gang. Section 186.22, subdivision (b)(1)(C) . . . imposes a 10-year enhancement when such a defendant commits a violent felony. Section 186.22(b)(1)(C) does not apply, however, where the violent felony is ‘punishable by imprisonment in the state prison for life.’ (Pen. Code, § 186.22, subd. (b)(5).) Instead, section 186.22, subdivision (b)(5) . . . applies and imposes a minimum term of 15 years before the defendant may be considered for parole.”].)

Respondent concedes the 10-year enhancement does not apply to either count 1 or 2, and argues that, rather than correcting the sentence by striking the 10-year gang enhancements, we should remand for the trial court to exercise its discretion to impose the 25-years-to-life firearm enhancement. Respondent argues that if the court had known it could not

impose the 10-year gang enhancement, it may have elected not to strike the firearm enhancement.

Defendant opposes remand, arguing double jeopardy bars imposition of the 25-years-to-life firearm enhancement upon resentencing. We disagree.

Generally, when a defendant successfully appeals a criminal conviction, California's constitutional prohibition against double jeopardy precludes the imposition of more severe punishment on sentencing after retrial. (See *People v. Henderson* (1963) 60 Cal.2d 482, 497.) An exception to this general rule is "when a trial court pronounces an unauthorized sentence. Such a sentence is subject to being set aside judicially and is no bar to the imposition of a proper judgment thereafter, even though it is more severe than the original unauthorized pronouncement." (*People v. Serrato* (1973) 9 Cal.3d 753, 763 (*Serrato*), overruled on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; see also *People v. Vizcarra* (2015) 236 Cal.App.4th 422, 432.)

Defendant concedes her sentence is unauthorized, as she must to obtain appellate review, since she did not object to the sentence in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 354 ["[T]he 'unauthorized sentence' concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal."]; see also *People v. Irvin* (1991) 230 Cal.App.3d 180, 191-192 [discussing failure to impose enhancement as an unauthorized sentence].) Therefore, defendant's sentence falls within the exception to the general rule limiting more severe punishment on resentencing. (*Serrato, supra*, 9 Cal.3d at p. 763.)

Defendant cites *People v. Torres* (2008) 163 Cal.App.4th 1420 (*Torres*) and *People v. Mustafaa* (1994) 22 Cal.App.4th 1305 (*Mustafaa*), arguing these cases limit *Serrato*'s unauthorized sentence exception to the *Henderson* double jeopardy rule. Defendant is mistaken, as neither case applies here. In *Torres*, the California Department of Corrections and Rehabilitation advised the trial court that the seven-year sentence it had imposed for a criminal threat conviction exceeded the authorized upper term of three years. The trial court recalled the sentence under section 1170, subdivision (d)(1), which provides for resentencing subject to "the limitation that the new sentence may not exceed the initial sentence." (*Torres*, at pp. 1428–1429.) *Torres* is distinguishable because the limitation of section 1170, subdivision (d)(1) does not apply to this discretionary resentencing.

In *Mustafaa*, the trial court "imposed a legal aggregate sentence, only fashioning it in an unauthorized manner" (*Mustafaa*, *supra*, 22 Cal.App.4th at pp. 1311–1312) by separating the defendant's three robbery convictions from their attached personal gun-use enhancements and imposing *consecutive* sentences for the enhancements but imposing *concurrent* sentences for the robbery convictions to which they were attached. (*Ibid.*) *Mustafaa* is distinguishable because the 35-years-to-life sentence the court imposed in this case after our remand for resentencing was not a legal aggregate sentence.

Neither *Torres* nor *Mustafaa* supports defendant's argument that remand to permit the court to exercise its sentencing discretion in correcting the unauthorized sentence would implicate double jeopardy.

Upon remand, the trial court is directed to reconsider its sentence. As to both counts, if the trial court chooses to impose the firearm enhancement, it may not impose the alternate gang penalty under section 186.22, subdivision (b)(5). (§ 12022.53, subd. (e)(2) [“An enhancement for participation in a criminal street gang . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense.”]; see also *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1238; *People v. Gonzalez* (2010) 180 Cal.App.4th 1420, 1424-1425; *People v. Salas* (2001) 89 Cal.App.4th 1275, 1281-1282.)

However, the trial court’s alternatives for counts 1 and 2 are different. On count 1, if the court chooses to strike the firearm enhancement, then the penalty for the section 186.22, subdivision (b)(5) gang enhancement, which imposes a minimum parole eligibility term of 15 years, will have no practical effect on defendant’s first degree murder conviction, as she now has a minimum parole eligibility term of 25 years (§ 190, subds. (a), (e)). (*Lopez, supra*, 34 Cal.4th at p. 1009.) Accordingly, as to count 1, the trial court can either strike the gun-use enhancement or impose it.

As to count 2, the term for attempted premeditated murder is life, and defendant’s minimum parole eligibility term is seven years. (§ 3046.) So, if the court chooses to impose the alternate gang penalty under section 186.22, subdivision (b)(5), the alternate minimum parole eligibility would have the effect of changing defendant’s base term. So, as to this count, the trial court may choose to impose the firearm enhancement pursuant to section 12022.53, subdivisions (d), (e)(1), or the court may choose

to impose the alternate 15-years-to-life gang penalty under section 186.22, subdivision (b)(5). (§ 12022.53, subd. (e)(2).) It cannot do both; nor can it impose an additional 10 years under section 186.22, subdivision (b)(1)(C).

Having set forth the authorized sentencing alternatives from which the trial court may choose, we remand this matter for the court to make a fully informed authorized sentence. We make no comment on how the court should exercise its discretion.

### **3. Fine and Assessments**

Defendant, relying on *Dueñas*, *supra*, 30 Cal.App.5th 1157, contends the court security and criminal conviction assessments must be reversed, and that the restitution fine must be stayed unless the People prove her ability to pay. Respondent argues defendant forfeited any challenge to the restitution fine and assessments by failing to object at the sentencing hearing, and has failed to show any due process violation. We agree with respondent.

Here, defendant made no objection to the restitution fine and assessments at the time of sentencing, and no evidence can be gleaned from the record that defendant is unable to pay the relatively minor fines imposed upon her. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155.) It is fair to presume defendant will be able to pay the \$340 fine and assessments from her future prison wages. (See, e.g., *People v. Frye* (1994) 21 Cal.App.4th 1483, 1487.)

### **4. Abstract of Judgment**

Lastly, defendant contends the abstract of judgment must be corrected to reflect that the firearm enhancements were stricken rather than stayed. Because we remand for resentencing, this claim of error is moot.



### **DISPOSITION**

The sentencing order is affirmed in part and reversed in part. The 25-years-to-life sentence on count 2 and the imposition of the 10-year gang enhancements on counts 1 and 2 are reversed. The proper term for count 2 is life. The cause is remanded to the superior court for the limited purpose of conducting a new sentencing hearing consistent with this opinion.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

CHAVEZ, J.\*

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\* Justice of the Second District Court of Appeal, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.