Filed 10/16/18 P. v. Rodriguez CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT ANDREW RODRIGUEZ, Defendant and Appellant.	B285593 (Los Angeles County Super. Ct. No. KA111372)

APPEAL from an order of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Affirmed.

Carlos Ramirez, under appointment by the Court of Appeal, for Defendant and Appellant Robert Andrew Rodriguez.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Colleen M. Tiedemann and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

BACKGROUND

Robert Andrew Rodriguez (Rodriguez) broke into a home when all four family members—Masae Hayashi (Hayashi), her husband Michiaki Ishimura, their 22-year-old son, Nobuhide, and 17-year-old daughter, Yuri—were present. Rodriguez threatened Hayashi, telling her that if she did not disrobe, he would kill her, her husband and their two children. A jury convicted Rodriguez of first degree residential burglary (Pen. Code, § 459; count 3)[1] and criminal threats (§ 422, subd. (a); count 4). The jury made no finding as to the "person present" allegation attached to the burglary charge. The trial court found that Rodriguez had two prior "strike" convictions (§ 1170.12), alleged as to all counts, as well as two five-year prior convictions (§ 667, subd. (a)(1)), and four one-year prior prison terms (§ 667.5, subd. (b).)

The trial court sentenced Rodriguez to a total of 35 years to life in prison as a "third striker"—25 years to life on count 3, plus two consecutive five-year terms under section 667, subdivision (a). As to count 4, the trial court imposed a concurrent term of 25 years to life. The trial court struck the prior prison enhancements. The trial court initially awarded Rodriguez a total of 892 days of presentence custody credit, comprised of 446 days of actual credit and 446 days of conduct credit. However, after receiving two inquiries from the California Department of Corrections and Rehabilitation (CDCR), the trial court subsequently reduced Rodriguez's conduct credit, awarding

---

[1] All further statutory references are to the Penal Code, unless otherwise specified.

Rodriguez 66 days of credit rather than 446 days. Rodriguez now appeals this credit reduction.[2] We affirm.

DISCUSSION

The trial court imposed sentence on March 6, 2017. On August 7, 2017, the CDCR sent a letter to the trial court regarding Rodriguez's sentence. The CDCR first advised the trial court that Rodriguez's abstract of judgment did not state whether the "person present" allegation had been found true.[3] The CDCR requested disposition of this particular allegation so that it could determine whether Rodriguez had been convicted of a violent felony and was thus subject to the credit restriction in section 2933.1.[4] The CDCR also noted that the trial court's abstract of judgment and sentencing minute order reflected two enhancements under section 667, subdivision (a)(1) "of 5 years

---

[2] Rodriguez first appealed his underlying conviction, which we upheld in an unpublished opinion on May 24, 2018. (See *People v. Rodriguez* (May 24, 2018, B281282) [nonpub. opn.].

[3] Section 667.5 lists crimes deemed to be violent felonies. One such felony is first degree burglary "wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary." (§ 667.5, subd. (c)(21).)

[4] A defendant convicted of a violent felony, as defined by section 667.5, may not accrue presentence conduct credits greater than 15 percent of his or her actual period of confinement. (§ 2933.1, subd. (c).) The accrual rate for felonies *not* listed in section 667.5 is governed by section 4019, which authorizes two days of good time/work time credit for each completed four-day block of actual custody time. (§ 4019, subd. (f).)

imposed and concurrent." (Boldface and underlining omitted.) The CDCR asked for clarification regarding these two enhancements given that, under section 667, subdivision (a)(1), the terms of the present offense and each enhancement must run consecutively, rather than concurrently.[5]

In response to the CDCR's letter, the trial court held hearings on August 22, 2017, and September 27, 2017, but did not recall its original sentence. Instead, the trial court answered the CDCR's questions regarding Rodriguez's conduct credit and two five-year enhancements. Initially, the trial court asked the parties to research whether a "person present" finding was required if "the evidence is so apparent." At the next hearing, the trial court noted that the "person present" allegation had not been submitted to the jury in the form of a jury instruction and no jury finding of this allegation was made on the verdict form. However, based on *People v. Garcia* (2004) 121 Cal.App.4th 271 (*Garcia*), the trial court determined that a jury finding on the "person present" allegation was not required under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).[6] The trial court

---

[5] Under section 667, subdivision (a)(1), "any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively."

[6] In *Apprendi*, the U.S. Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum

further found that the evidence supported the "person present" allegation, noting that one of the family members at the burglarized home said she saw Rodriguez in the home. Therefore, the trial court determined that Rodriguez's burglary conviction was a violent felony. As a result, the trial court reduced the amount of custody credit awarded to Rodriguez from 892 days—446 days of actual credit and 446 days of conduct credit—to 512 days, comprised of 446 days of actual credit but only 66 days of conduct credit. As for the CDCR's question regarding the previously imposed five-year enhancements, the trial court clarified that the two enhancements were to run consecutively, as required by law.

On appeal, Rodriguez contends that the trial court was time barred under section 1170, subdivision (d)(1), from recalling his prison sentence and resentencing him.[7] However, contrary to

---

must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at p. 490.) In *Garcia*, Division Seven of this court was tasked with determining whether the jury or the trial court must find that a non-accomplice was present during the commission of the offense. *Garcia* held that such a finding is properly part of a trial court's traditional sentencing function; that the trial court determines whether a defendant's current conviction for first degree burglary is a violent felony for the purpose of calculating presentence conduct credits. (*Garcia*, *supra*, 121 Cal.App.4th at p. 274.)

[7] Under section 1170, subdivision (d)(1), when a defendant has been sentenced to state prison or county jail and has been committed to the custody of the secretary or the county correctional administrator, the trial court may, "within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings in the case of state prison inmates . . . recall the

Rodriguez's claim on appeal, the trial court did not recall Rodriguez's sentence on its own motion.[8] Nor did the trial court resentence Rodriguez. Instead, the trial court simply answered the two questions posed by the CDCR. In so doing, the court merely corrected the accrual rate for Rodriguez's conduct credit after properly finding that Rodriguez's burglary conviction was a violent felony within the meaning of section 667.5, subdivision (c), and clarified that the previously imposed five-year enhancements were to run consecutively, as mandated by section

---

sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence." Had Rodriguez sought to correct his sentence, rather than the CDCR or the trial court, then no such time limit would have applied. (See *People v. Fares* (1993) 16 Cal.App.4th 954, 958 ["There is no time limitation upon the right to make the motion to correct the sentence" because a trial court's power to correct its judgment "includes corrections required not only by errors of fact (as in the mathematical calculation) but also by errors of law"].)

[8] Rodriguez admits that neither the secretary nor the Board of Parole recommended that the trial court recall his sentence. Rodriguez further acknowledges that the CDCR's letter did not cite section 1170, subdivision (d)(1), and instead sought clarification from the trial court regarding his sentence. From these facts, Rodriguez comes to the "inescapable conclusion" that the trial court recalled his sentence on its own motion. However, Rodriguez cites no case law or record reference in support of this proposition.

667, subdivision (a)(1).[9] Accordingly, the120-day time limit set forth in section 1170, subdivision (d)(1), did not apply.

Contrary to Rodriguez's argument on appeal, *Garcia*, *supra*, 121 Cal.App.4th 271, is applicable here. As noted above, *Garcia* held that section 2933.1's limitations on earning conduct credits is not a sentencing enhancement and does not increase the maximum six-year penalty prescribed for first degree burglary. "Rather, the provisions for presentence conduct credits function as a sentence 'reduction' mechanism outside the ambit of *Apprendi*. [Citations.] . . . Lessening the 'discount' for good conduct credit does not increase the penalty beyond the prescribed maximum punishment and therefore does not trigger the right to a jury trial identified in *Apprendi*." (*Garcia*, at p. 277.)

Nevertheless, Rodriguez argues, the issue here is whether the trial court had jurisdiction to recall the sentence to begin with and make the "person present" finding. As discussed above, the trial court did not recall Rodriguez's sentence. Indeed, such a procedural act is typically evidenced by the trial court's consideration of postconviction factors, such as the inmate's disciplinary record and record of rehabilitation while incarcerated, whether the inmate's age, time served, and diminished physical condition have reduced the inmate's risk for future violence, and whether "circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice." (§ 1170, subd. (d)(1).)

---

[9] Indeed, Rodriguez concedes that the trial court clarified its sentence with respect to the enhancements.

Here, however, the trial court was not asked to consider any of these factors or to resentence Rodriguez in reliance thereon. Rather, the trial court was tasked with correcting and clarifying its previously-imposed sentence. Although this was not a ministerial task given that it required additional briefing by the parties and a subsequent hearing, it cannot be described as a proceeding pursuant to section 1170, subdivision (d)(1). While the parties appeared in court in order to discuss the sentence, this hearing was not tantamount to the trial court recalling the sentence as that term of art is used in section 1170. Given that the trial court merely answered the CDCR's inquiries by properly finding that Rodriguez's burglary conviction was a violent felony, correcting the conduct credit in accordance with that finding, and explaining, without changing or re-imposing, its original sentence, section 1170, subdivision (d), did not apply and the court acted within its jurisdiction here.

DISPOSITION

The order is affirmed.
NOT TO BE PUBLISHED

JOHNSON, Acting P. J.

We concur:

BENDIX, J.

CURREY, J.*

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