Filed 10/15/18 P. v. Nunnery CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. WILLIE NUNNERY, Defendant and Appellant.	2d Crim. No. B285011 (Super. Ct. No. BA303882-01) (Los Angeles County)

Willie Nunnery, a Three Strikes offender, appeals a postjudgment order resentencing him to two consecutive 25-year-to-life terms after he threatened to shoot three undercover police officers and was convicted by jury of two counts of making criminal threats (Pen. Code, § 422)[1] and possession of a firearm by a felon (§ 12021, subd. (a)(1)). We affirm.

Procedural History

In 2006, appellant threw gang signs at three Los Angeles Police Department undercover officers stopped at a

[1] All statutory references are to the Penal Code.

traffic light. The area was controlled by the Rollin 20's criminal gang. Appellant shouted "Fuck Barlems," a derogatory reference to the Rollin 30's Harlem Crips. Appellant stepped out of his Mercedes, brandished a nine-millimeter semi-automatic handgun, and said "I'm going to blast your ass." Fearing that they were about to be shot, the officers shouted "Police," and exited the unmarked car with weapons drawn. Appellant threw the handgun into the Mercedes and tried to flee but was apprehended. The officers found the handgun on the Mercedes floorboard with a round in the chamber and ten rounds in the magazine.

In 2008, a jury convicted appellant of two counts of criminal threats (counts 5 and 6; § 422) and possession of a firearm by a felon (§ 12021, subd. (a)(1)), with firearm and gang enhancements (§§ 12022.5, subd. (a); 186.22, subd. (b)(1)(A)). In a bifurcated proceeding, the trial court found that appellant had suffered two prior strike convictions (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)), two prior serious felony convictions (§ 667, subd. (a)(1)), and had served five prior prison terms (§ 667.5, subd. (b)). The trial court denied a *Romero* motion (*People v. Superior Court* (*Romero*) 13 Cal.4th 497) to strike a prior strike conviction and sentenced appellant to 50 years to life state prison on count 5 (criminal threats), and concurrent 50-year-to-life terms on count 6 (criminal threats) and count 7 (felon in possession of firearm) which were stayed pursuant to section 654.

We affirmed the judgment of conviction in an unpublished opinion (*People v. Nunnery* (June 1, 2009, B208398)) but reversed the sentence on count 7 (felon in possession of firearm) because the trial court imposed a firearm enhancement

(§ 12022.5, subd. (a)) that was not pled or found true by the jury. The case was remanded with directions to strike the firearm enhancement on count 7 and impose a new sentence that did not exceed the original sentence of 50 years to life. On remand, the trial court resentenced appellant to 50 years to life on counts 5 and 6, stayed the sentence on count 6, and imposed a 42-year-to-life sentence on count 7 which was stayed.

In 2014, appellant filed a habeas petition alleging that the trial court erred in imposing both a Three Strikes sentence and a 10-year gang enhancement. (See *People v. Williams* (2014) 227 Cal.App.4th 733, 736-737.) The prosecution conceded the issue. The trial court granted the habeas petition and resentenced appellant to an aggregate term of 50 years to life state prison, consisting of 25 years to life on count 5 plus a consecutive 25-year-to-life term on count 6, (§ 1170.12, subd. (c)(2)(A)(ii). On count 7, a 25-year-to-life sentence was imposed but stayed pursuant to section 654. No sentence enhancements were imposed.

Consecutive Sentence

Appellant contends that the trial court erred in not articulating its reasons for imposing consecutive sentences. (Cal. Rules of Court, rule 4.406(b)(5).) Appellant forfeited the error by not objecting and is precluded from raising the issue for the first time on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 352-353.)

On the merits, the error was harmless because the trial court had multiple reasons for imposing consecutive sentences and those reasons were stated on the record when it denied the *Romero* motion in 2008. When appellant was resentenced in 2017, the trial court ordered that all "findings imposed at [the] original sentence of 5/22/08 be included in

resentence of this date." Those findings include the 2008 *Romero* findings that appellant had five felony convictions dating back to 1987 and "has spent most of [the] past 15 years . . . either in prison or in jail. [Appellant's] prior strike convictions include convictions for violent serious felonies, including robbery and manslaughter. [¶] And I also take into consideration the fact that he was on parole for less than one year at the time of his arrest in this current offense."

Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences. (Cal. Rules of Court, rule 4.425(b).) Here there were many aggravating factors including appellant's lengthy criminal history and prior strike convictions, the fact that appellant threatened to shoot three undercover officers (Cal. Rules of Court, rule 4.421(a)(1); *People v. Calhoun* (2007) 40 Cal.4th 398, 408), and the fact that he personally used a firearm (Cal. Rules of Court, rule 4.421(a)(2)). Appellant was also on parole when he committed the current offense. (Cal. Rules of Court, rule 4.421(b)(4).) "Only one criterion or factor in aggravation is necessary to support a consecutive sentence. [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 552.)

Appellant asserts that the trial court had the discretion to impose concurrent rather than consecutive 25-years-to-life sentences because the offenses were committed on the same occasion and were based on the same operative facts. (See §§ 667, subd. (c)(6); 1170.12, subd. (a)(6); *People v. Deloza* (1998) 18 Cal.4th 585, 596.) Those factors are sentencing guidelines, not rigid rules that courts are bound to follow in every case. (*People v. Calderon* (1993) 20 Cal.App.4th 82, 87). It is presumed that the trial court was aware of and followed the applicable law.

(*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1178-1179.) Based on appellant's lengthy criminal history and threat to shoot three undercover officers, the trial court reasonably believed that an aggregate 50-year-to-life sentence should be imposed. The 2008 probation report listed six aggravating factors, no mitigating factors, and recommended consecutive sentences. It stated that appellant "is a violent and dangerous criminal with an extensive prior criminal history" and "is an acute threat to the community. . . . A maximum prison sentence is the only appropriate sentence for the defendant in this matter."

Where the sentencing court fails to explicitly state its reasons for consecutive sentences, we are to reverse the sentencing only if it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. (*People v. Scott*, *supra*, 9 Cal.4th at p. 355; *People v. Osband* (1996) 13 Cal.4th 662, 728.) In *People v. Champion* (1995) 9 Cal.4th 879, the trial court failed to articulate a reason for imposing consecutive sentences. (*Id.* at p. 934.) Our Supreme Court held that remand was unnecessary, given the multiple circumstances in aggravation noted by the trial court, with no factors in mitigation. "It is inconceivable that the trial court would impose a different sentence if we were to remand for resentencing." (*Ibid.*)

The same principle applies here. There were multiple aggravating factors, any one of which justified the imposition of a consecutive sentence. The trial court indicated that it intended to impose a 50-year-to-life sentence, as it had done twice before, and we discern no reasonable probability that it would not do so again if we were to remand for yet another

sentence hearing. (*People v Osband*, *supra*, 13 Cal.4th at p. 729; *People v. Davis*, *supra*, 10 Cal.4th at p. 552.)

Ineffective Assistance of Counsel

Appellant, in the alternative, claims that trial counsel was ineffective in not objecting or requesting that the trial court state its reasons for imposing consecutive sentences. To prevail on an ineffective assistance of counsel claim, appellant must show defective performance and resulting prejudice, both of which are lacking here. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

The record shows that the trial court discussed sentencing with counsel and advised counsel that it intended to sentence appellant to 50 years to life. Appellant's trial attorney stated that he was ready to proceed and "[j]ust for the record we had a brief sidebar; *a preview of things to come. The court asked me to explain to* [appellant] *what the court's indicated* [sentence] *would be and I have done that*." (Italics added.) The trial court proceeded with sentencing and stated: "It is going to be the same sentence of 50 years to life in prison. . . . [¶] However, there is a bit of a different calculation. The gang enhancements . . . [are] now stricken. That does not apply to Mr. Nunnery's case." Pursuant to Three Strikes law, the trial court imposed 25-years-to-life terms on counts 5, 6, and 7, and stated that count 6 "run[s] consecutive to the term in count 5. [¶] Once again the sentence [is] 50 years to life in prison."

Based on counsel's comments, the fact that a 50-year-to-life sentence was imposed twice before, and the fact that the trial court incorporated by reference its 2008 *Romero* findings, there is no reasonable probability that the trial court would have imposed a more favorable sentence had trial counsel objected to

the imposition of consecutive 25-year-to-life terms. We will not second-guess trial counsel's tactical decision to refrain from making a sentencing objection, particularly where it is evident from the face of the record that any objection would have been futile. (*People v. Kelly* (1992) 1 Cal.4th 495, 520.)

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Drew E. Edwards, Judge

Superior Court County of Los Angeles

David M. Thompson, under appointment by the Court of Appeal for Defendant and Appellant.

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