Filed 9/11/19 P. v. Brown CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CINDY IRENE BROWN, Defendant and Appellant.	B292735 (Los Angeles County Super. Ct. No. NA020150)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Matter remanded for resentencing.

Christopher Hawthorne, 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, Assistant Attorney General, and Zee Rodriguez, Supervising Deputy Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General and Corey J. Robins, Deputy Attorney General.

Appellant Cindy Brown appeals from the denial of her motion for resentencing upon remand from this court for resentencing. We reverse in part, and remand for further proceedings.

FACTURAL AND PROCEDURAL HISTORY

Appellant Brown plead no contest in 1996 to first degree murder with a special circumstance allegation, a crime she committed as a juvenile, and was sentenced to life without the possibility of parole.[1] After habeas corpus proceedings, the trial court conducted a new sentencing hearing, and imposed the same sentence. Brown appealed to this court, arguing that the trial court had failed to consider the factors relevant to juvenile sentencing mandated by the United States Supreme Court and the California Supreme Court. This court agreed that the trial court had erred, reversed, and remanded for resentencing.[2]

After remand, the People filed a document entitled Memorandum for Franklin hearing, in which they argued that resentencing in the matter was no longer required, and that the trial court should conduct only a hearing pursuant to *People v. Franklin* (2016) 63 Cal.4th 261. The People argued that Senate Bill 394, which amended Penal Code section 3051[3] to provide that juvenile homicide offenders sentenced to life without the

---

[1] Because the issues before this court relate solely to sentencing, and the underlying crime has been finally adjudicated, we do not address the circumstances of that crime.

[2] *People v. Brown* (Sept. 16, 2016, B265329) [nonpub. opn.].

[3] All further statutory citations are to the Penal Code.

possibility of parole be provided a Youth Offender Parole Hearing in the 25th year of incarceration (§ 3051 (b)(4)), converted Brown's sentence to life with the possibility of parole. Accordingly, they concluded that resentencing was not appropriate, and that the trial court should instead conduct a *Franklin* hearing, which would permit Brown to establish an evidentiary record necessary for her parole consideration.

In response, Brown filed a motion in support of resentencing. She also asked the court, in the alternative, to conduct a *Franklin* hearing and to provide recall and resentencing relief under section 1170(d)(2) hereinafter Section 1170(d)(2).)

The trial court heard the matter on July 18, 2018. The court denied resentencing, denied the motion for a hearing under Section 1170(d)(2), and set the matter for a *Franklin* hearing. The court explained that the resentencing hearing ordered by this Court was no longer required in light of the amendments to section 3051, and denied Brown's request for a Section 1170(d)(2) hearing without explanation. Brown appeals.

DISCUSSION

1. Brown Has Not Been Resentenced

In our prior decision in this matter in 2016, we explained that the presumption in favor of a sentence of life without the opportunity for parole for juveniles convicted of special circumstances murder, like Brown, had been held to violate the Eighth Amendment to the Constitution. (*Miller v. Alabama* (2012) 567 U.S. 460, 463 [132 S.Ct. 2455, 2460]; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1360) [applying *Miller* and

holding no presumption in favor of life without parole].) *Gutierrez* delineated factors that a sentencing court must consider in sentencing a juvenile for homicide offenses. (*Id.* at pp. 1388-1389.) Because the trial court had failed to consider all of the necessary factors, we reversed the judgment and remanded the matter for resentencing.

At the trial court, Respondent objected, both in writing and at the hearing, to the resentencing this Court ordered in this matter. Respondent argued that *Montgomery v. Louisiana* (2016) 577 U.S. __, __ [193 L.Ed.2d 599, 136 S.Ct. 718, 736] permitted a state to cure the constitutional violation we had found by permitting juvenile offenders to be considered for parole, and that California, in amending section 3051, had satisfied that requirement. Accordingly, the amended statute mooted any requirement for resentencing.

Respondent is correct that a *Miller* hearing is no longer required, although it now incorrectly, and inconsistently with its position at the trial court, asserts that resentencing has been accomplished. (See *In re Cook* (2019) 7 Cal.5th 439 (*Cook)* [*Franklin* relief is in lieu of resentencing.].) *Franklin* concluded that "[T]he combined operation of section 3051, section 3046, subdivision (c), and section 4801 means that Franklin is now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration. Such a sentence is neither LWOP nor its functional equivalent." (*People v. Franklin*, *supra* 63 Cal.4th at pp. 279-280.)

In *In re Kirchner* (2017) 2 Cal.5th 1040 (*Kirchner*), the Supreme Court, citing *Montgomery,* clarified that correction of the *Miller* error, after the amendment of section 3051, does not require resentencing, but rather permits the remedy of parole

consideration. (*Kirchner, supra,* 2 Cal.5th at p. 1054.) This is the remedy that Brown will receive, by operation of law, and is sufficient to address the prior order of this Court.

2. The Law of the Case Doctrine Does Not Require A Resentencing Hearing

Brown now argues that the trial court was without jurisdiction to deny resentencing in that our prior decision is the law of the case. Because there has been a significant change in the law since our decision, the trial court was not bound.

Ordinarily it is correct that "[w]here an appellate court states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case. (*Clemente v. State of California* (1985) 40 Cal.3d 202, 211, [219 Cal.Rptr. 445, 707 P.2d 818].) The law of the case must be adhered to both in the lower court and upon subsequent appeal. (*Ibid.*) This is true even if the court that issued the opinion becomes convinced in a subsequent consideration that the former opinion is erroneous. (*Ibid.*)" (*Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2007) 157 Cal.App.4th 149, 156.) The decision is "determinative of the rights of the same parties in any subsequent retrial or appeal in the same case." (*Leider v. Lewis* (2017) 2 Cal.5th 1121,1127.)

There are, however, exceptions: "The principal ground for making an exception to the doctrine of law of the case is an intervening or contemporaneous change in the law. (*Davies v. Krasna, supra,* 14 Cal.3d 502, 507, fn. 5; *Anton v. San Antonio Community Hospital* (1982) 132 Cal.App.3d 638, 647 [183 Cal.Rptr. 423]; *Riemar v. Hart* (1977) 73 Cal.App.3d 293, 296,

[142 Cal.Rptr. 174].)" (*Clemente v. State of California* (1985) 40 Cal.3d 202, 212.)

That exception applies here. *Franklin*, *Kirchner* and *Montgomery* were all decided after our prior opinion issued. This significant change in the law required the trial court to consider the rules set forth in those cases in making its determination in this case; it properly did so.

3. The Trial Court Erred in Denying Brown a Section 1170(d)(2) Hearing

Without stating a reason, the trial court declined to conduct a hearing under Section 1170(d)(2). Respondent had argued that there was no basis for that hearing, based on the same grounds: that resentencing and a new *Miller* hearing was not required.

Section 1170(d)(2) permits defendants sentenced to life without the possibility of parole to seek recall of their sentence and resentencing. Rather than addressing *Miller* error, the statute permits eligible defendants to set forth their remorse, efforts at rehabilitation, and basis for qualification under the circumstances set out in the statute. As a result, it is not an adequate remedy for *Miller* error, but rather provides a mechanism for revisiting lawful sentences of life without parole. (*Kirchner, supra*, 2 Cal.5th at p. 1043; *Cook, supra,* 7 Cal.5th 439.)

The effect of Respondent's successful argument that no resentencing is required in this case renders Brown's request for Section 1170(d)(2) relief appropriate for consideration, as her sentence has been rendered lawful. Whether Respondent's

successful position at the trial court, that there should be no resentencing, or its position in the briefing to this court,[4] that Brown is no longer serving a sentence of life without the possibility of parole, is considered, Brown remains entitled to seek relief at the trial court by a petition compliant with the statute. (See *People v. Lopez* (2016) 4 Cal.App.5th 649 [permitting Section 1170(d)(2) relief even after party had obtained *Miller* resentencing to life with the possibility of parole because initial sentence had been to life without the possibility of parole].)

On remand, Brown may file a petition for relief under the statute, which the trial court shall consider.[5]

---

4 At oral argument, respondent conceded that Brown has the right to submit a petition to the trial court, and to have the trial court consider that petition. We agree.

5 Brown also sought relief based on her claims of intellectual disability. Because she neither raised those issues at the trial court, nor did the trial court have an opportunity to consider them, we do not address them in this appeal.

DISPOSITION

The order of the trial court denying a Miller hearing is affirmed. The denial of the right to proceed under Section 1170(d)(2) is reversed and the matter is remanded. On remand, Brown may file a petition under Section 1170(d)(2) which the trial court shall consider.

ZELON, Acting P. J.

We concur:

SEGAL, J.

FEUER, J.