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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

LLOYD JOHNSON,

Defendant and Appellant.

B291454

(Los Angeles County
Super. Ct. No. BA450691)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry J. Hall, Judge. Conditionally reversed and remanded, with directions.

Tanya Dellaca, 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, Senior Assistant Attorney General, Scott A. Taryle, Supervising

Deputy Attorney General, Stephanie C. Santoro, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Lloyd Johnson guilty of second degree robbery for forcibly taking a wallet. (Pen. Code, § 211.)¹ In bifurcated proceedings, the trial court found true the allegations that Johnson suffered five prior serious and/or violent felonies within the meaning of the three strikes law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d), and suffered one prior conviction of a serious felony within the meaning of section 667, subdivision (a)(1). The trial court dismissed four of Johnson’s prior strikes pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. Johnson was sentenced to a total of 15 years in state prison, comprised of a term of 5 years, doubled to 10 years under the three strikes law, plus a consecutive term of 5 years for the prior conviction enhancement (§ 667, subd. (a)(1)).

Johnson contends that his conviction must be conditionally reversed because he is entitled to an eligibility hearing under recently enacted section 1001.36, which gives trial courts discretion to grant pretrial diversion for mental health treatment to qualified defendants. He also contends he is entitled to remand for the trial court to determine whether to exercise its discretion to strike the five-year prior felony conviction enhancement under section 667,

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

subdivision (a)(1), and for the trial court to conduct a hearing on his ability to pay court-ordered fines and fees.

The People agree that the matter should be remanded for the trial court to determine whether to exercise its discretion to strike the prior felony conviction enhancement, but argue that conditional reversal is inappropriate because section 1001.36 does not apply retroactively. The People assert that Johnson should raise his ability to pay arguments on remand.

We conditionally reverse Johnson's conviction and remand for the trial court to determine whether to exercise its discretion to (1) strike Johnson's prior serious felony convictions under section 667, subdivision (a)(1); and (2) to grant pretrial mental health diversion pursuant to section 1001.36, including whether to conduct a hearing to determine Johnson's eligibility. If the trial court reinstates the judgment, we direct it to first consider any argument raised by Johnson about his ability to pay court fines and fees.

DISCUSSION²

Pretrial Diversion for Mental Health Disorders

Johnson contends that his conviction must be conditionally reversed because he is entitled to a hearing under recently enacted section 1001.36, which allows qualifying defendants to participate in pretrial diversion and receive mental health treatment in lieu of prosecution. (§ 1001.36, subd. (c).)

Relevant Proceedings

Prior to trial, on February 8, 2017, defense counsel requested a continuance due to concerns about Johnson's mental health. Counsel stated that he was not prepared to declare a doubt as to Johnson's competency to stand trial, but felt it was necessary for Johnson to undergo psychiatric evaluation.

Dr. Ann L. Walker evaluated Johnson on April 10, 2017. In Dr. Walker's opinion, Johnson was not competent to stand trial. Johnson "showed an interesting pattern of weaknesses and strengths that is consistent with the diagnosis of Major Persistent Neurocognitive Disorder" Dr. Walker's diagnostic impression was that Johnson

² Because the underlying facts of Johnson's conviction are not necessary to our resolution of his contentions on appeal, we do not include them here.

suffered from Major Depressive Disorder, Probable Major Neurocognitive Disorder due to Alzheimer's Disease, and Stimulant Use Disorder, as defined in the Diagnostic and Statistical Manual V. Dr. Walker tested Johnson for malingering using two separate test instruments and found no evidence of malingering. Dr. Walker recommended that Johnson receive competency training, but was unable to opine whether he could be restored to competency due to his Probable Major Neurocognitive Disorder. She also recommended that Johnson be considered for a placement that could offer psychiatric treatment and that he should be offered psychiatric treatment and psychotherapy for Major Depressive Disorder.

Defense counsel submitted Dr. Walker's report to the court and prosecution and declared a doubt as to Johnson's competency on May 9, 2017. The court also declared a doubt as to Johnson's competency and suspended proceedings for a second psychological evaluation. Following two subsequent psychological evaluations of Johnson—one inconclusive, and the other concluding that Johnson was competent to stand trial—the trial court found Johnson competent to stand trial and reinstituted criminal proceedings on August 31, 2017.³

³ Dr. Jack Rothberg attempted to interview Johnson on June 6, 2017, but Johnson would not speak with him. Dr. Kory J. Knapke interviewed Johnson on August 17, 2017. Dr. Knapke "did not see any signs or symptoms of a major mental illness that would prevent [Johnson] from having the capacity to work with his attorney." Dr. Knapke opined that

Analysis

Relying on *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), review granted Dec. 27, 2018, S252220,⁴ Johnson argues that the Legislature intended for section 1001.36, which provides ameliorating benefits to defendants, to apply retroactively in cases like his, in which the judgment was not final at the time the statute was enacted. The People counter that the language of subdivision (c) of section 1001.36 demonstrates that the Legislature intended the enactment to operate prospectively, i.e., the enactment would not apply to cases such as this one in which there has already been an adjudication.

Our Supreme Court has granted review to decide whether section 1001.36 applies retroactively. (*Frahs*, *supra*, 27 Cal.App.5th 784 [holding that section 1001.36 applies retroactively].) Because our Supreme Court will soon have the final word, we will keep our discussion brief.

Johnson was competent to stand trial. Johnson reported to Dr. Knapke that he heard voices, but denied that the voices ever commanded him to do things.

⁴ See California Rules of Court, rule 8.1115(e)(1) [“[p]ending review and filing of the Supreme Court’s opinion, unless otherwise ordered by the Supreme Court . . . , a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only”].

We agree with the outcome in *Frahs*, which held that section 1001.36 applies retroactively to defendants whose cases are not yet final. Johnson’s case is not yet final, and the record affirmatively discloses that he meets at least one of section 1001.36’s threshold eligibility requirements—Johnson “suffers from a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders . . . [as evidenced by] a recent diagnosis by a qualified mental health expert.” (§ 1001.36, subd. (b)(1)(A)). The record reflects that Dr. Walker diagnosed Johnson with Major Depressive Disorder, Probable Major Neurocognitive Disorder due to Alzheimer’s Disease, and Stimulant Use Disorder, as defined in the Diagnostic and Statistical Manual V. The People do not argue otherwise. We therefore remand to allow the trial court to determine whether Johnson should benefit from pretrial diversion under section 1001.36. (*Frahs*, *supra*, 27 Cal.App.5th at p. 791.)

Prior Serious Felony Enhancement

Senate Bill No. 1393, signed into law on September 30, 2018, amends sections 667 and 1385 to provide the trial court with discretion to strike five-year enhancements pursuant to section 667, subdivision (a)(1), in the interests of justice. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.) §§ 1, 2.) The new law took effect on January 1, 2019. We agree with the parties that the law applies to Johnson, whose appeal

was not final on the law's effective date. Accordingly, we remand the matter for the trial court to consider whether to exercise its discretion to strike the section 667, subdivision (a)(1) enhancement.

Ability to Pay Fines and Fees

Johnson also argues that the trial court's failure to determine whether he had the ability to pay court fines and fees prior to their imposition violated his constitutional rights to due process and equal protection under *People v. Dueñas* (2019) 30 Cal.App.5th 1157. Because we are remanding the case for consideration of Johnson's eligibility for mental health diversion under section 1001.36, he will have the opportunity to raise this argument before the trial court. If mental health diversion is not an appropriate or viable option for Johnson and the trial court reinstates the judgment, the trial court shall in connection with those proceedings consider Johnson's ability to pay fines and fees under *Dueñas*.

DISPOSITION

The judgment is conditionally reversed and the matter is remanded to the trial court with directions to, within 90 days from the remittitur: (1) consider whether to exercise its discretion to strike the five-year section 667, subdivision (a)(1) enhancement (in the event the conviction is

reinstated); and (2) consider whether to exercise its discretion to grant pretrial diversion, including whether to conduct a diversion eligibility hearing, under section 1001.36.

If the court grants Johnson pretrial mental health diversion, and Johnson successfully completes a diversion program, the court shall dismiss the charges in accordance with section 1001.36, subdivision (e). If either of these conditions is not met, the trial court shall reinstate the judgment, with any modifications required as a result of any decision to exercise its discretion to strike the section 667, subdivision (a)(1) enhancement.

If the trial court reinstates the judgment, it shall in advance consider any argument raised by Johnson about his ability to pay court fines and fees.

MOOR, J.

We concur:

BAKER, Acting P. J.

KIM, J.