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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.

ANTONIO SPENCER,

Defendant and Appellant.

B271514

(Los Angeles County
Super. Ct. No. TA120527)

APPEAL from a judgment of the Superior Court of Los Angeles County, John J. Cheroske, Judge. Affirmed and remanded.

Law Offices of John F. Schuck and John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Antonio Spencer appeals an order denying his “petition for resentencing under Senate Bill No. 260” (SB 260). (See Stats. 2013, ch. 312, § 4, effective Jan. 1, 2014.) We affirm the order, but remand for further proceedings pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*).

FACTS

In February 2013, Spencer agreed to plead no contest to forcible rape (count 4; Pen. Code, § 261, subd. (a)(2))¹ and to admit an enhancement allegation that he personally used a firearm during the commission of the offense (§ 12022.53, subd. (b)). In accord with the plea agreement, the trial court sentenced Spencer to state prison for the negotiated term of 18 years as follows: the upper term of 8 years for the forcible rape offense, plus 10 years for the firearm enhancement. The court dismissed four other counts.

In February 2016, Spencer was self-represented and filed a one-page, hand-written, “petition for resentencing under SB 260.” The trial court denied the petition. The court’s minute order reads: “*People v. Miller* only applies to cases where the defendant [is sentenced to] life without the possibility of parole and the defendant in this case got 18 years”

Spencer filed a timely notice of appeal.

DISCUSSION

Spencer raises a single contention. He claims that because he committed his crime when he was a minor, we should remand his case to allow the trial court to make a record under sections 3051 and 4801 regarding any factors related to his youth that

¹ All further statutory references are to the Penal Code.

might be relevant in a future Parole Board hearing. The Attorney General agrees and so do we.

Section 3051, subdivision (b)(1), enacted after Spencer was sentenced, states that if a defendant is convicted for an offense that he or she committed before age 23, and is sentenced to a determinate term, the defendant “shall be eligible for release on parole at a youth offender parole hearing by the [Parole Board] during his or her 15th year of incarceration” Section 3051, subdivision (f)(1), sets forth the requirements for the factors that shall be considered at such a hearing.

In *Franklin, supra*, 63 Cal.4th 261, the trial court sentenced a juvenile defendant to an indeterminate sentence of 50 years to life for murder. On appeal, the defendant argued that his sentence violated constitutionally-based rules governing juveniles in that the sentence amounted to the equivalent of a sentence of life without the possibility of parole in violation of *Miller v. Alabama* (2012) 567 U.S. ____ ; 132 S.Ct. 2455 and related cases. Our Supreme Court in *Franklin* found the defendant’s claim to be moot in light of SB 260, which, by “operation of law,” now grants juvenile defendants who have received “lengthy” sentences the opportunity for a hearing to seek parole before the end of their sentences. (*Franklin, supra*, 63 Cal.4th at pp. 280-282.)

At the same time, however, the Supreme Court noted in *Franklin*: “It is not clear whether Franklin had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing. Thus, although Franklin need not be resentenced . . . , we remand the matter to the trial court for a determination of whether Franklin was afforded sufficient opportunity to make a

record of information relevant to his eventual youth offender parole hearing.” (*Franklin, supra*, 63 Cal.4th at p. 284.)

The Supreme Court explained that, in the event the trial court were to find that Franklin did not have a sufficient opportunity to make such a record, the court was to allow him to do so, under governing rules of evidence including cross-examination. Also, the prosecutor was to be allowed “likewise [to] put on the record any evidence that demonstrates the juvenile offender’s culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors.” (*Franklin, supra*, 63 Cal.4th at p. 284.) “The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender’s characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation” in reviewing the decision to grant or deny parole under sections 3051 and 4801. (*Ibid.*)

Here, Spencer was convicted and sentenced in February 2013. Because sections 3051 and 4801 did not exist at that time, Spencer had no reason to seek an opportunity at the time of his sentencing to preserve a record for later use at a juvenile offender Parole Board hearing. Under *Franklin*, Spencer is entitled to a remand for a determination as to whether the parties should be granted an opportunity to make a record for purposes of sections 3051 and 4801. While *Franklin* involved an indeterminate sentence of 50 years to life, and Spencer’s sentence is a shorter, determinate term, we agree with the Attorney General that this “is not a material distinction” given that Spencer’s sentence is more than 15 years, and he will be entitled to a hearing under section 3051, subdivision (b)(1), after he serves 15 years in

custody. On remand, both parties are entitled to present evidence regarding the factors mentioned in *Franklin*.²

DISPOSITION

The order denying Spencer's petition for resentencing is affirmed. The matter is remanded to the trial court for the limited purpose of determining whether Spencer was afforded an adequate opportunity to make a record of information that will be relevant to the Parole Board as it fulfills in the future its statutory obligations under sections 3051 and 4801.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.

² In his reply brief on appeal, Spencer argues that the prosecutor "should not be allowed to present evidence of any rule 4.421-type aggravating circumstances." Because *Franklin* hearing proceedings are new creatures of criminal procedure, we leave it to the trial court to make decisions in the first instance regarding the type of information which should be collected for potential use at a later Parole Board hearing.