Filed 6/29/18 P. v. Weathers CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. VICTOR WEATHERS, Defendant and Appellant.	B281483 (Los Angeles County Super. Ct. No. BA445380)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Kennedy-Powell, Judge. Affirmed and remanded with directions.

Patricia A. Scott, under appointment for 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, Shawn McGahey Webb, Kenneth C. Byrne, and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

Victor Weathers appeals from the judgment entered following his conviction of first degree murder with true findings on firearm and gang enhancement allegations. The trial court sentenced defendant, who was 18 years old at the time of the murder, to an aggregate state prison term of 50 years to life. He contends the case should be remanded for resentencing in light of the Legislature's recent amendment to the law that requires imposition of firearm enhancements (Pen. Code, §§ 12022.5, 12022.53)[1] and to afford him the opportunity to present mitigating evidence under *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*). We vacate the sentence and remand for the trial court to hold a new sentencing hearing under the amended statutes. We also order the court to award defendant an additional day of presentence custody credit.

FACTUAL AND PROCEDURAL BACKGROUND

On February 29, 2016, Deontae Ruffin's girlfriend drove him and another friend into gang territory to visit Ruffin's grandmother. The girlfriend parked on the street outside the grandmother's house. She and the friend remained inside the car and waited for Ruffin to return. When Ruffin came back, he got into the back seat of the car and the girlfriend began to drive away. A silver car approached from behind and stopped in front of the girlfriend's car at an angle, preventing her from leaving. Defendant stepped out of the silver car and produced a gun. He then walked up to Ruffin and fired three shots through the open car window, striking Ruffin in his chest and back. Defendant fled from the scene in the silver car. Ruffin was transported to the hospital and later died from his wounds.

Defendant was a member of the 62 Harvard Park Brims, a criminal street gang, which claimed the neighborhood where

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[1] Further statutory references are to the Penal Code unless otherwise indicated.

Ruffin's grandmother lived. Ruffin, his girlfriend, and the other friend were not affiliated with any gangs.

In January 2017, the jury convicted defendant as charged of first degree murder (§ 187, subd. (a)) and found true the special allegations that he had committed the crime while personally using a firearm causing death (§ 12022.53, subd. (d)) and for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).

In March 2017, the trial court sentenced defendant to state prison for 25 years to life for first degree murder plus 25 years to life for the firearm enhancement. Defendant filed a timely notice of appeal.

DISCUSSION

I. Remand For Resentencing in Light of Recent Amendments to Sections 12022.5 and 12022.53

In October 2017, the Legislature enacted Senate Bill No. 620 (2017-2018 Reg. Sess.). The bill amended sections 12022.5 and 12022.53, which define enhancements for defendants who personally use a firearm in the commission of certain felonies. Under Senate Bill No. 620, "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (Sen. Bill No. 620, §§ 1 & 2, amending §§ 12022.5, subd. (c) & 12022.53, subd. (h).) Before the enactment of Senate Bill No. 620, these enhancements were mandatory, and the trial court lacked the authority to strike or dismiss them. (See, e.g., *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362-1363.)

Defendant contends, the Attorney General acknowledges, and we agree, that Senate Bill No. 620 applies retroactively to defendant. The Attorney General argues, however, that we need

not remand for resentencing because the trial court would not have exercised its discretion to reduce defendant's sentences even if it had been aware of its authority to do so. The Attorney General cites *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*), in which the defendant requested that his case be remanded to the trial court for resentencing after our Supreme Court decided in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, that trial courts have the discretion to strike prior strikes in determining a defendant's sentence. The court in *Gutierrez* rejected the defendant's request, noting that the trial court indicated that it would not, in any event, have exercised its discretion to lessen the sentence, and, thus, no purpose would be served in remanding for reconsideration. (*Gutierrez, supra*, 48 Cal.App.4th at p. 1896.)

The Attorney General argues here, by the same reasoning, there is no need to remand defendant's case, pointing out the court commented that Ruffin was an "innocent young man," who had done nothing to defendant to provoke the shooting. The court told defendant, "[Y]ou have to be responsible for your own actions. And it doesn't make me happy to have to send a young man like you to prison for 50 years to life. But people have a right to be safe on the streets." The court also told defendant, "[I]f you're going to act in the way that you acted, there are consequences for actions. And these are those consequences."

We are not persuaded. In *Gutierrez,* the trial court stated during the initial sentencing hearing that it would not have exercised its discretion to lessen the sentence even if it could do so. (*Gutierrez, supra,* 48 Cal.App.4th at p. 1896.) In contrast, here the record does not clearly show the trial court would not have exercised its discretion to strike the firearm enhancement had the court known it had that discretion. To be sure the court informed defendant that he alone was responsible for being subjected to a lengthy sentence in this "very pathetic case," and imposition of

the sentence was necessary to protect the public. Nonetheless, the court did not express a specific desire to impose the maximum possible sentence or state that it would have imposed the firearm enhancement under the circumstances, even if it had the discretion to strike it. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 ["a remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement"]; accord, *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081.) Furthermore, because the law at the time of sentencing did not allow the trial court to strike the firearm enhancement, defendant had no reason to urge the trial court to strike it. Remand for resentencing is appropriate.

II. Defendant's Opportunity To Present Mitigating Evidence at Sentencing

"When a prisoner committed his or her controlling offense . . . when he or she was 25 years of age or younger, the [Board of Parole Hearings], in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).)

Defendant argues that because he was 18 years old when he committed the murder, and will be entitled to a youthful offender parole hearing during the 25th year of his sentence, he is entitled to a limited remand to provide information relevant to that eventual hearing. (§§ 3051, 4801, subd. (c); *Franklin*, *supra*, 63 Cal.4th at p. 269.) We disagree.

In *Franklin*, the court held that a youthful offender, like defendant, who is serving a lengthy sentence but is eligible for

a youthful offender parole hearing in the 25th year of incarceration under sections 3051 and 3046, subdivision (c), and section 4801, should have "an adequate opportunity to make a record of factors, including youth-related factors, relevant to the eventual parole determination" under section 3051. (*Franklin*, *supra*, 63 Cal.4th at p. 286.) Because it was "not clear whether [defendant] 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," the court "remand[ed] the matter to the trial court for a determination of whether [defendant] was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing. [¶] If the trial court determines that [defendant] did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. [Defendant] may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may 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. 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 to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law' [citation]." (*Id.* at p. 284.)

Defendant was sentenced on March 9, 2017, more than nine months after *Franklin* was decided on May 26, 2016 and over

a year after sections 3051 and 4801 became effective as amended. The record does not reflect that the parties had filed sentencing memoranda. At the outset of the sentencing hearing, the trial court indicated it had read and considered the probation officer's report. Prior to imposing sentence, the court offered defense counsel an opportunity to be heard. In response, counsel stated, "Submitted"; he did not mention any age-related mitigating circumstances.

Here, it cannot be said, in the language of *Franklin*, that it is unclear "whether [defendant] 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." (*Franklin*, *supra*, 63 Cal.4th at p. 284.) Nothing in the record suggests that defense counsel failed to understand the decision or had insufficient time to gather requisite evidence. Thus, there is no need to "remand the matter to the trial court for a determination of whether [defendant] was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Ibid.*)

Defendant contends in the alternative that his attorney was ineffective for not creating a record for use at a youthful offender parole hearing.

"To prevail on a claim of ineffective assistance of counsel, a defendant ' "must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice." ' [Citation.] A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. [Citation.] Tactical errors are generally not deemed reversible, and counsel's decision[-]making must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation

and failed to provide one, or unless there simply could be no satisfactory explanation. [Citation.] Moreover, prejudice must be affirmatively proved; the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

Nothing in the appellate record suggests defense counsel failed to render reasonable professional assistance, or that defendant suffered any prejudice. Although defendant committed the murder when he was 18 years old, there is no basis to infer that any mitigating youthful offender evidence existed or would have revealed helpful evidence relevant to his maturity level or other youth-related factors. Nor is there any basis in the record to conclude that family members, friends, or other persons would have provided evidence that would aid them in their future youthful parole hearing. For the same reason, there is no basis to conclude that had defense counsel produced some age-related evidence, a record more favorable to defendant would have been created. We note that if other favorable evidence exists or develops, defendant will have the opportunity to present it at the parole hearing. (See § 3051, subd. (f).) Therefore, we conclude that defendant has failed to prove that his attorney was ineffective.

III. Defendant Is Entitled To One More Day of Presentence Custody Credit

Defendant asserts and the Attorney General agrees the trial court miscalculated defendant's presentence custody credit by one day.

Pursuant to section 2900.5, a defendant shall receive credit for all days served in custody, including both the day of arrest and the day of sentencing. Here, defendant was awarded 344 days of

presentence custody credit. He was arrested on March 30, 2016 and remained in custody through sentencing on March 9, 2017, which totals 345 days. Accordingly, defendant was entitled to 345, not 344, days of presentence custody credit.

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated. The matter is remanded for the limited purpose of allowing the trial court to exercise its discretion under section 12022.53, subdivision (h), and to award defendant an additional day of presentence custody credit.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.