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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.

LAMONT KELLY,

Defendant and Appellant.

B272314

(Los Angeles County
Super. Ct. No. YA082586)

APPEAL from a judgment of the Superior Court of Los Angeles County. Victor L. Wright, Judge. Affirmed in part and remanded in part with direction.

Pamela J. Voich, 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, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

PROCEDURAL BACKGROUND

A jury convicted appellant of three counts of second degree robbery (Pen. Code, § 211).¹ At a bifurcated trial, the jury also found true a number of prior conviction enhancements: that appellant had suffered (1) three prior “serious felony” or “strike” convictions (§§ 667, subds. (b)-(i), 1170.12 (a)-(d)); (2) three “serious felony” five-year prior convictions (§ 667, subd. (a)(1)); and (3) eight one-year prison prior convictions (§ 667.5, subd. (b)).

At sentencing, the trial court dismissed two of the three “strike” prior conviction allegations found true by the jury, pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), finding that they were remote in time and that a life sentence would be cruel and unusual punishment.² Thereafter, the trial court sentenced appellant to a second-strike determinate term as follows: three years for the base robbery count, doubled to six years for the remaining strike prior conviction, plus one-third the mid-term of three years for the two remaining subordinate counts, each doubled to two years for the remaining strike prior conviction, plus 15 years for the three five-year serious felony prior convictions, plus another seven years for

¹ All further undesignated statutory references are to the Penal Code.

² The trial court purported to dismiss an additional strike prior at sentencing, but that prior had already been dismissed on the People’s motion during the bifurcated priors trial.

seven of the one-year prison prior convictions, for a total determinate term of 32 years.³

On appellant's first appeal (case No. B244227), we affirmed his convictions, finding substantial evidence to support the jury's verdicts of guilty. We, however, determined that the trial court had imposed an unauthorized sentence when it improperly used the same three prior convictions to impose both five-year terms pursuant to section 667, subdivision (a)(1) and one-year terms pursuant to section 667.5, subdivision (b). (See *People v. Jones* (1993) 5 Cal.4th 1142, 1150.) We ordered the three one-year prison prior allegations stricken. We then remanded so the trial court could (1) state its reasons, in a written order entered upon the minutes, for its previous decision to dismiss two of the strike prior convictions, as was then required under section 1385, and (2) reconsider its exercise of discretion to dismiss the strike priors in light of the reduced sentence because of the stricken prison priors.

On remand for resentencing, the trial court denied appellant's renewed *Romero* motion and sentenced appellant to an indeterminate Three Strikes term of 25 years to life for the robbery in count one. The abstract of judgment, which is not entirely consistent with the oral pronouncement of sentence by the trial court, reflects two consecutive one-year terms on counts two and three. The trial court imposed 15 years for the three five-year serious felony prior convictions, but apparently merged that 15-year term into the indeterminate 25-years-to-life term for the robbery in count 1. The trial court struck the various one-year prison prior convictions.

³ The trial court found that two of the one-year prison priors merged, and could not be used twice.

STATEMENT OF FACTS

The precise facts proven at appellant's trial are not germane to the issues raised on this appeal, but in any event, are summarized in our earlier opinion in this case. It is sufficient to state that the jury convicted appellant of three counts of robbery based upon his robbery of three separate Starbuck's employees at a single Starbuck's location during a single event.

What is germane is the record of the resentencing after the trial court denied the renewed *Romero* motion. That record, though, is both confusing and contradictory:

“At this time, Mr. Kelly, you'll be sentenced as follows, sir: this is on Count 1, [the base count] violation of Penal Code section 211. Sir, you're going to be sentenced in [sic] any state prison for a total aggregate term of 25 years to life, sir. The court is selecting the middle term of three years on count 1 as the base term in this matter. That term that's imposed is calculated pursuant to the Three Strikes law and, therefore, is doubled.

“The court [is] also imposing [on] count 2, one-third the mid-term, as well as on Count 3, one-third the mid-term. Again, that is also doubled based upon the Three Strikes law, so it's a total of five years doubled for ten years.

“There's an additional term of 15 years imposed pursuant to Penal Code section 667(a)(1). That's for each of the prior convictions respectively in case No. YA010304 for charge of Penal Code section 211, conviction date April 7, 1992. Case No. 25723, charged with Penal Code section 215(a), conviction date September 25, 2001. That's in the county of Merced, and case No. SA043682, that's for [a]

charge of Penal Code section 211, conviction date March 21, 2003, that's in the county of Los Angeles.

“The total aggregate term of imprisonment with all counts and enhancements is 25 years to life. The life is added based upon the Three Strikes law as well.

[¶] . . . [¶]

“The court is noting that it's stricken the enhancements under Penal Code section 667.5(b). [The] court [is] striking those based upon remoteness in the time of each of those.”

The abstract of judgment continues the confusion: it indicates that the court sentenced appellant to an indeterminate term of 25 years to life based on the robbery in count one, plus two consecutive one-year terms (one-third the mid-term of three years) for the convictions on counts two and three. The abstract of judgment makes no reference to the disposition of the three five-year serious felony prior convictions.

DISCUSSION

A. *The Sentence is Vacated and the Case Remanded to the Trial Court for Resentencing to Correct the Unauthorized Sentence*

On this appeal, appellant asks us to reverse the trial court's denial of his renewed *Romero* motion for abuse of discretion. The People oppose, arguing that it was within the court's discretion to deny the *Romero* motion on remand. What neither side mentions is that the sentence imposed on remand is contradictory and wholly unauthorized by law. Since we must vacate the entire sentence, the trial court will have to sentence appellant again. We therefore decline to reach the issue of whether or not the trial

court abused its discretion when it denied the renewed *Romero* motion upon the first remand. We will, however, provide some guidance to the trial court for purposes of the resentencing upon this second remand.

As mentioned above, at resentencing, the trial court denied appellant's renewed *Romero* motion and refused to dismiss any of the strike priors. Based upon that denial, the mandatory sentence for each robbery count would be 25 years to life. (See §§ 667, subd. (e)(2)(A)(ii), 1170.12, subd. (c)(2)(A)(ii).) The court had no authority to impose consecutive one-third the mid-term sentences on counts 2 and 3, as was apparently done here, since such consecutive determinate sentences would only be lawful if the court dismissed all strike priors as to the two determinate counts, which the record shows it never did. (See *People v. Garcia* (1999) 20 Cal.4th 490, 502 [court may dismiss or vacate strikes as to some counts, but refuse to do so as to others].) And, in any event, the first consecutive determinate term imposed in conjunction with an indeterminate term is a principal term and thus fully consecutive, not one-third the mid-term. (*People v. McGahuey* (1981) 121 Cal.App.3d 524, 531-532; see *People v. Felix* (2000) 22 Cal.4th 651, 655.)

Under the law prior to Proposition 36, the Three Strikes Reform Act of 2012, it would be discretionary with the trial court whether to run the three 25-years-to-life sentences consecutively or concurrently since the crimes were committed on a single occasion and arose from the same operative set of facts. (*People v. Hendrix* (1997) 16 Cal.4th 508, 513.) However, since the amendment to section 1170.12, subdivision (a)(7), by the enactment of Proposition 36, it is now an open question whether the electorate has withdrawn that discretion and made

consecutive sentencing mandatory where multiple current strike convictions with strike prior convictions are involved. (Couzens, Bigelow & Prickett, Sentencing California Crimes (The Rutter Group 2016) § 20.44, pp. 20.78-20.82.1.) In any event, a single indeterminate term of 25 years to life in a case involving multiple third-strike convictions, where the court has also denied a *Romero* motion in its entirety, is unauthorized by law.

The sentence also is unauthorized by law since the three five-year section 667, subdivision (a) serious felony prior conviction enhancements must be added consecutively to each indeterminate term. They are not merged into the indeterminate terms as appears to have been done based upon the trial court's oral statement of the total sentence and the manner in which the abstract of judgment was prepared. (See *People v. Williams* (2004) 34 Cal.4th 397, 402-404 [in determinate sentencing cases, any five-year serious felony prior conviction is added once at the end of the sentence to increase the aggregate term; when the sentence is an indeterminate term pursuant to the Three Strikes law, however, it is added separately to each indeterminate count].) Further, as we mentioned in our earlier opinion, a trial court has no authority to dismiss five-year serious felony prior convictions. (*People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045.)

Ordinarily, when a defendant successfully appeals a criminal conviction, California's double jeopardy prohibition prevents a greater total sentence on remand. (*People v. Hanson* (2000) 23 Cal.4th 355, 357.) An exception to this rule occurs, however, when a case is remanded for resentencing based upon an "unauthorized" sentence: an unauthorized sentence may be "set aside judicially and is no bar to the imposition of a proper

judgment thereafter, even though it is more severe than the original unauthorized pronouncement.” (*People v. Serrato* (1973) 9 Cal.3d 753, 764 (*Serrato*), overruled on another ground in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.)

During the earlier appeal, the People cited *Serrato* in support of their argument that the trial court could reevaluate its decision to dismiss the strike priors and impose an indeterminate, and therefore harsher, Three Strikes sentence upon remand. Despite this assertion, appellant chose not to file a reply brief. We relied on *Serrato* and the People’s unopposed argument in our earlier opinion when we agreed, on remand, that the trial court could reevaluate its *Romero* decision and impose an indeterminate Three Strikes sentence. The trial court has now reconsidered its earlier decision to dismiss strikes and imposed a harsher, indeterminate Three Strikes term on remand. While the *Serrato* rule has limits to its application, they do not prohibit 25-years-to-life indeterminate sentencing in this case. Even though we must vacate that sentence as unauthorized for the reasons stated above, we will discuss the *Serrato* rule’s limitations to provide guidance to the trial court on this second remand.

“The *Serrato* rule protects the People’s right to mandated, lawful sentences. The limitations of the rule ‘rebut’ any appearance of vindictiveness. If an increase in penalty has no nexus to the original illegality in the sentence, the protection against vindictiveness is not applicable. The general rule [then] applies that in California a harsher penalty may not be imposed after a successful appeal.” (*People v. Price* (1986) 184 Cal.App.3d 1405, 1413 (*Price*); accord *People v. Calderon* (1993) 20 Cal.App.4th 82, 89 (*Calderon*).) Whether the *Serrato* rule

allows a harsher sentence on remand, then, depends upon whether the increase in punishment is related to the portion of the sentence that was unauthorized. (See *Price* at p. 1409.) An “unauthorized” sentence is one in which the court acts “ ‘beyond’ ” its power. (*Id.* at p. 1412.)

Whether the *Serrato* rule, as limited in *Price* and *Calderon*, *supra*, permits a harsher indeterminate Three Strikes term on remand, then, depends upon whether the trial court’s original decision to dismiss the strike priors was an “unauthorized” sentence, rather than merely an erroneous one. (See *Price*, *supra*, 184 Cal.App.3d at p. 1409 [“In order to determine if the sentencing court on remand properly could impose a harsher sentence, we must characterize the sentencing errors occurring at the first sentencing.”].) As discussed in our earlier opinion, the problem with the trial court’s original decision to dismiss the strike priors was that the trial court failed to provide written reasons, entered on the minutes, in support of its dismissal order, as was then required by section 1385.⁴ Although such an omission, at first glance, may appear simply to create error rather than an unauthorized sentence “ ‘beyond the power of the sentencing court’ ” (*Price*, *supra*, 184 Cal.App.3d at page 1412), a review of section 1385 and its history convinces us otherwise.

In *People v. Bonnetta* (2009) 46 Cal.4th 143, 148 (*Bonnetta*), the trial court, pursuant to section 1385, dismissed several admitted drug enhancements over the People’s objection in order to dispose of a case through an open plea. The People appealed,

⁴ Section 1385, subd. (a), was amended effective January 1, 2015, and now requires a written statement of reasons only if requested by a party or if the proceedings are not being reported or recorded electronically. (See Stats. 2014, ch. 137 (S.B. 1222).)

arguing abuse of discretion and that the dismissals were ineffective in any event because the reasons were not entered in writing upon the minutes. (*Ibid.*) The Court of Appeal reversed, but in its opinion urged the Supreme Court to adopt a rule that would allow a reviewing court to affirm in the absence of written reasons where the oral record disclosed the trial court's reasons for a section 1385 dismissal. (*Id.* at pp. 148, 150.)

The Supreme Court granted review. The court affirmed the Court of Appeal's reversal, but refused to allow a review of the record to substitute for the required written statement of reasons entered upon the minutes. (*Bonnetta, supra*, 46 Cal.4th at p. 151.)

In its opinion, the court discussed the history of section 1385. The court observed that the Legislature, through section 1385, transferred the authority to dismiss a prosecution in "the furtherance of justice" from the executive (the traditional doctrine of *nolle prosequi*) to the judiciary. (*Bonnetta, supra*, 46 Cal.4th at p. 149.) That authority, though, given its possibility for abuse, was constrained by mandatory limitations: any dismissal had to be "in furtherance of justice" and written reasons for any dismissal had to be entered upon the minutes. (*Ibid.*) The court held that "the public declaration inherent in a written order is a purposeful restraint," and the requirement of written reasons is therefore mandatory, rather than directory. (*Ibid.*) Thus, the court added, "[t]he cases have long held a dismissal without a written statement of reasons ***is invalid and of no effect*** regardless of the reviewing court's belief that the reasons for the dismissal can be discerned by other portions of the record." (*Ibid.*, emphasis added.)

Other cases have used similarly strong language when describing the effect (or lack thereof) of a section 1385 dismissal without the previously- required written statement of reasons. Under “settled law,” a ruling that is unaccompanied by reasons set forth in a written order entered upon the minutes is simply “ineffective.” (*Romero, supra*, 13 Cal.4th at p. 532; accord *People v. Williams* (1998) 17 Cal.4th 148, 162; *People v. Superior Court (Pipkin)* 59 Cal.App.4th 1470, 1478.) “Even an *express* order of dismissal pursuant to section 1385 is ineffective in the absence of a [written] statement of reasons[.]” (*People v. Hunt* (1977) 19 Cal.3d 888, 897, emphasis in original.) If the reasons for a dismissal are not set forth in the written minutes, it cannot be considered a dismissal under section 1385. (*People v. Orin* (1975) 13 Cal.3d 937, 944.) The “‘[r]equirement of a [written] statement of reasons for dismissal pursuant to section 1385 is mandatory, not directory, and in the absence of such statement “the order may not be considered a dismissal under section 1385.” [Citation.]’ ” (*People v. Alvarez* (1996) 49 Cal.App.4th 679, 691.) In the absence of a written statement of reasons, a dismissal pursuant to section 1385 “is invalid” and “may not be considered a dismissal made under the authority of section 1385.” (*People v. Smith* (1975) 53 Cal.App.3d 655, 657.)

In short, *Bonnetta* and the other cases referenced above describe a section 1385 dismissal in the absence of written reasons entered upon the minutes not as simply judicial error, but as an “invalid” or “ineffective” judicial act. Described in this manner, we conclude that any failure to enter a written statement of reasons on the minutes renders a sentence that results from a corresponding dismissal to be beyond the court’s power to act, and therefore unauthorized. On remand in this

case, then, the *Serrato* rule is not limited by *Price* and *Calderon* and a harsher, indeterminate sentence may be imposed.

DISPOSITION

The trial court's sentence upon remand is vacated. The case is remanded again for resentencing consistent with this opinion.

Specifically, on this remand the trial court must adhere to a number of principles: (1) in the event of a renewed *Romero* motion, the trial court must exercise its discretion whether or not to dismiss any, some, or all of the proven strike priors, and whether or not to do so on any, some, or all of the counts; (2) if the court chooses to dismiss any of the strike priors, the trial court should state its reasons on the record; (3) the trial court must impose a lawful sentence on each count; (4) the trial court must impose a consecutive five-year term for each five-year serious felony prior conviction, unless the People move to dismiss any such priors on their own motion; (5) the trial court has no authority to dismiss any five-year serious felony prior on its own motion; and (6) the trial court must impose the five-year enhancements lawfully, attached to each and any indeterminate sentence and once to any consecutive or concurrent determinate term.

Other than the general principles described above, we express no opinion on whether or not the trial court should dismiss any, some, or all of the proven strike priors on any, some or all of the counts. That decision is left entirely to the sound discretion of the trial court based upon the record before it at the time of any renewed *Romero* motion.

In all other respects, the judgment is affirmed.

SORTINO, J.*

WE CONCUR:

BIGELOW, P. J.

FLIER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.