Filed 10/30/19 P. v. Jones CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. KEONTE RUNELL JONES, Defendant and Appellant.	B292934 (Los Angeles County Super. Ct. No. NA103402)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura L. Laesecke, Judge. Affirmed and remanded with directions.

David Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnsen and Scott A. Taryle, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Keonte Runell Jones of one count of first degree murder (Pen. Code, §§ 187, subd. (a), 189, subd. (a)),[1] one count of possession of a firearm by a felon (§ 29800, subd. (a)(1)), and one count of driving with a willful or wanton disregard for safety while fleeing a pursuing peace officer (Veh. Code, § 2800.2, subd. (a)). The jury also found that Jones personally used and discharged a firearm to commit the murder (§ 12022.53, subds. (b)-(d)), and that Jones committed the murder and the flight from a police officer for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). Jones admitted that he had suffered two prior strike convictions under the "Three Strikes" law (§§ 667, subds. (b)–(i), 1170.12), and one prior serious felony conviction (§ 667, subd. (a)(1)).

The trial court sentenced Jones to an aggregate sentence of 119 years to life. On the murder count, the court imposed a sentence of 105 years to life, which included a base sentence of 25 years to life (§ 190, subd. (a)), tripled because of the two prior strikes (§ 667, subd. (e)(2)(A)(i)), plus 25 additional years for the firearm enhancement (§ 12022.53, subd. (d)), and five additional years for the serious felony enhancement. (§ 667, subd. (a)(1).) The court imposed a consecutive 14-year sentence for fleeing from a police officer, consisting of the high term of three years, doubled for the prior strike (§ 667, subd. (e)(1)), plus five additional years for a prior serious felony (§ 667, subd. (a)(1)), plus three more years for the gang enhancement (§ 186.22, subd. (b)(1)(A)). The court stayed imposition of the sentence for possession of a firearm by a felon pursuant to section 654.

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[1] Unless otherwise specified, subsequent statutory references are to the Penal Code.

Jones does not challenge the murder conviction on appeal. Instead, he contends that there was insufficient evidence to support his conviction of recklessly fleeing a pursuing peace officer. He also contends that the court erred by imposing a five-year enhancement under section 667, subdivision (a)(1) with respect to that offense because the prosecution failed to allege that the enhancement applied to that conviction and because recklessly fleeing from a peace officer is not a serious felony. Finally, Jones contends that we must remand the case to allow the trial court to exercise its discretion granted by Senate Bill No. 1393 (2017-2018 Reg. Sess.) to strike the five-year enhancement on his murder conviction. We agree with Jones's argument regarding the enhancement on the conviction for fleeing from a peace officer, but we otherwise affirm.

FACTS AND PROCEEDINGS BELOW

Jones was a member of the Rollin' 20's street gang in Long Beach. Keondre Newton, whom Jones shot to death, was a member of another gang, the Insane Crips. According to a police detective who testified as a gang expert, the two gangs dispute control over certain territory in Long Beach and have long regarded one another as enemies. The Insane Crips have adopted the Cleveland Indians baseball team logo as a gang symbol. A member of the Rollin' 20's would assume that anyone wearing a Cleveland Indians cap on the streets of Long Beach was a member of the rival gang. Members of the Rollin' 20's use the word "Tramp[s]" as a derogatory term for the Insane Crips.

On December 10, 2015, Keondre Newton exited a liquor store in Long Beach and began walking north on Orange Avenue wearing a red Cleveland Indians baseball cap. A friend who was walking with Newton slowed down to take a phone call, and

Newton kept walking. Jones jumped out from behind a wall and approached Newton. He shouted, "Where are you all from, Fuck Tramps," and shot Newton in the head. Newton died from the gunshot.

Approximately one month after the murder, on January 16, 2016, Long Beach Police Officer Ryan Christopher, who was driving an unmarked police car, observed a Chevrolet Suburban drive through a stop sign at a high rate of speed. Jones was driving the Suburban, and a fellow Rollin' 20's member, Derion Harris, was riding in the front passenger seat. Officer Christopher and his partner began following the Suburban, ran its license plate, and determined that the vehicle had been reported stolen. Officer Christopher radioed for assistance, and at least four marked black-and-white patrol cars with lights on top joined in the pursuit. One of the marked cars took the lead position immediately behind the Suburban and initiated a traffic stop. Instead of stopping, the Suburban fled, driving 60 miles per hour in a 35 mile-per-hour zone, and running red lights and stop signs along the way. During the pursuit, all the marked police cars had turned on their lights and sirens. The Suburban drove into heavy traffic and collided with several vehicles, but kept going. The Suburban continued driving erratically and violating traffic laws until it crashed head-on into another car and was forced to stop.

Jones climbed out the window of the crashed Suburban and fled on foot, but officers took him into custody. Christopher's partner ordered Harris out of the vehicle, searched him, and found a .38 caliber Smith and Wesson revolver. Harris initially told police that the gun was his, but later he stated that it belonged to Jones. Harris said that he decided to claim the gun

was his own because he believed Jones already had a criminal record, and he wished to protect Jones from the legal consequences of possessing the gun. A criminalist from the Long Beach Police Department who is an expert on firearms determined that the gun seized from Harris had fired the shot that killed Newton.

DISCUSSION

A. *Sufficiency of Evidence of Fleeing a Peace Officer*

Jones contends that his conviction of fleeing a pursuing peace officer with willful or wanton disregard for the safety of persons or property, in violation of Vehicle Code section 2800.2, subdivision (a), must be overturned because the prosecution failed to introduce sufficient evidence that there was at least one lighted red lamp visible from the front of a marked police car during the pursuit. We disagree.

" '[The] Fifth Amendment right to due process and Sixth Amendment right to jury trial . . . require the prosecution to prove to a jury beyond a reasonable doubt every element of a crime.' [Citation.] 'In reviewing a sufficiency of evidence challenge, we view the evidence in the light most favorable to the verdict and determine whether *any* rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " (*People v. Davis* (2013) 57 Cal.4th 353, 357 (*Davis*).)

A driver is guilty of fleeing from a pursuing peace officer if, "with the intent to evade, [he] willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle" while four conditions are met: The pursuing car (1) was displaying

at least one lighted red lamp, (2) was sounding a siren, (3) was distinctively marked, and (4) was driven by a peace officer. (Veh. Code, § 2800.1, subd. (a).) The crime may be charged as a felony rather than a misdemeanor if the fleeing driver drove with "a willful or wanton disregard for the safety of persons or property." (Veh. Code, § 2800.2, subd. (a).) Jones contends that the prosecution failed to produce sufficient evidence of just one of these requirements: He argues that a jury could not reasonably conclude on the basis of the evidence at trial that a pursuing police car was "exhibiting at least one lighted red lamp visible from the front." (Veh. Code, § 2800.1, subd. (a)(1).)

Jones correctly notes that the prosecution presented no direct evidence of the color of the lights on the police cars that pursued him. This is not dispositive, however. The jury may convict a defendant on the basis of reasonable inferences drawn from the evidence and from its own common knowledge. (See *Davis*, *supra*, 57 Cal.4th at p. 360.) "If the People seek to excuse the production of evidence by urging the fact is one of common knowledge, the following test applies. First, 'is the fact one of common, everyday knowledge in that jurisdiction, which everyone of average intelligence and knowledge of things about him can be presumed to know; and [second,] is it certain and indisputable?' [Citation.] '[I]f there is any reasonable question whatever as to either point, proof should be required.' " (*Ibid.*)[2]

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[2] Jones cites another Supreme Court case *People v. Centeno* (2014) 60 Cal.4th 659 (*Centeno*) for the proposition that "[a]lthough the jurors may rely on common knowledge and experience in *evaluating* the evidence [citation], they may not go beyond the record to *supply* facts that have not been proved." (*Id.* at pp. 669–670.) In *Centeno*, the Court was

We agree with the court in *People v. Acevedo* (2003) 105 Cal.App.4th 195, 199 (*Acevedo*) that "it is common knowledge that police patrol cars carry red lights." The experience of seeing marked police cars with red lights flashing, both in person and in news broadcasts, is an ordinary part of everyday life. We cannot imagine that anyone of average intelligence and experience in Los Angeles County will have failed to notice that all local police cars are equipped with red lights.

Jones notes that although all police cars are required to display at least one red light, they may also display blue, white, and amber emergency lights (see Veh. Code, §§ 25252, 25258, 25259), and that in *Acevedo* and *People v. Brown* (1989) 216 Cal.App.3d 596 (*Brown*), courts overturned convictions because it was not certain which color lights were flashing on the patrol car from which the defendant fled. In *Brown*, the police officer who drove the pursuing car testified that she had turned on her overhead lights, but she could not remember whether she had activated amber; or blue and white; or red, blue and white lights. (*Id.* at p. 599.) Similarly, in *Acevedo*, the officer testified that he activated his overhead emergency lights, but did not specify which color they were. (*Acevedo*, *supra*, 105 Cal.App.4th at p. 197.) But the evidence in this case was strong enough to establish that at least one red light was displayed. Officer Christopher testified that the lead pursuit car

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critiquing the prosecution's use during closing argument of a visual aid unrelated to the facts of the case. We do not understand the Court to have intended with its statement in *Centeno* to overturn the standard articulated one year earlier in *Davis*.

had "all" of its lights turned on. The jury thus did not have to guess which color of light the pursuing car was displaying. Because the jury could draw a reasonable inference that the lead pursuit car was displaying at least one lighted red light, there was sufficient evidence to support the conviction.

B. *Unpleaded Five-Year Enhancement Under Section 667, Subdivision (a)(1)*

Jones contends that the trial court erred by imposing a five-year enhancement on his conviction on count 1, fleeing from a pursuing peace officer. He argues that fleeing from a peace officer does not fall within the definition of a serious felony (see § 1192.7, subd. (c)) and is therefore not subject to a five-year enhancement under section 667, subdivision (a)(1). He also contends that the court could not impose a five-year enhancement on count 1 because the prosecution did not allege such an enhancement in its pleading regarding count 1. The Attorney General agrees with Jones's second argument, as do we.

Section 1170.1, subdivision (e) provides that "[a]ll enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." The prosecution may not meet this requirement merely by pleading the fact of the prior conviction, but rather must notify the defendant that it seeks to use the prior conviction as the basis of the specific enhancement to be imposed. (*People v. Nguyen* (2017) 18 Cal.App.5th 260, 266-267.) "[W]hen, as here, the People allege a prior serious felony conviction, and when they cite the [T]hree [S]trikes law but do *not* cite the prior serious felony conviction statute, we can only conclude that they have made 'a discretionary charging decision.' " (*Id.* at p. 267, quoting *People v. Mancebo* (2002) 27 Cal.4th 735, 749.)

In this case, the information cited Jones's prior robbery conviction as a basis for a longer conviction under the Three Strikes law, but it did not allege a five-year enhancement under section 667, subdivision (a)(1) on count 1. Nor, as far as we are aware, did the prosecution or trial court inform Jones that a five-year enhancement was possible for that count. The trial court therefore could not impose the enhancement as part of Jones's sentence, and it must be stricken on remand. (See *Nguyen*, *supra*, 18 Cal.App.5th at p. 270.)

C. *Discretion to Strike Enhancement Under Senate Bill No. 1393*

Senate Bill No. 1393, which became effective January 1, 2019, gives trial courts discretion to strike five-year enhancements under section 667, subdivision (a)(1) for purposes of sentencing. At the time Jones was sentenced in 2018, those enhancements were mandatory. (See former § 1385, subd. (b).) Jones contends that we must remand his case to the trial court to allow it to decide whether to exercise its discretion to strike the five-year enhancement on his murder conviction in this case. Although the Attorney General agrees, we disagree.

Notwithstanding that the new law applies retroactively to those like Jones whose cases were not yet final when it became effective (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971–973), remand for resentencing is not necessary where "the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110.) "The trial court need not have specifically stated at sentencing it would not strike the enhancement if it had the discretion to do so. Rather, we review the trial court's statements

and sentencing decisions to infer what its intent would have been." (*People v. Jones* (2019) 32 Cal.App.5th 267, 273.)

The trial court's sentencing decisions show that remand for resentencing in this case would be futile. The court imposed a sentence longer than that recommended by the prosecution in its sentencing memorandum, including the high term of three years as the base term for count 1, fleeing from a pursuing peace officer. The court also imposed rather than striking the gang enhancement on that count. Indeed, the aggregate sentence was only one year less than the maximum allowed by law. If the court believed any reduction in the aggregate sentence was appropriate, it could have selected the middle term for count 1 or struck the gang enhancement on that count for purposes of sentencing. Further, our opinion in this case requires the trial court to strike the five-year enhancement on count 1. The sentencing choices made by the trial court make it clear that the court would not reduce the sentence by five more years if given the opportunity.

DISPOSITION

The defendant's convictions are affirmed. The matter is remanded to the trial court with directions to strike the enhancement under Penal Code section 667, subdivision (a)(1) with respect to count 1, and to amend the abstract of judgment accordingly.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

WEINGART, J.*

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