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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.

JEREMY RAKISITS,

Defendant and Appellant.

B294744

(Los Angeles County
Super. Ct. No. MA066076)

APPEAL from an order of the Superior Court of Los Angeles County, Frank M. Tavelman, Judge. Affirmed.

Melanie K. Dorian, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Shezad H. Thakor, Deputy Attorney General, for Plaintiff and Respondent.

In a prior appellate opinion, we affirmed defendant Jeremy Rakisits's (defendant's) judgment of conviction for committing a gang-related murder, but we remanded to permit the trial court to consider whether to exercise newly conferred discretion to strike or dismiss a 25-to-life firearm sentencing enhancement that was a component of defendant's 40 years to life prison sentence. (*People v. Rakisits* (Apr. 12, 2018, B280133) [nonpub. opn.].) The trial court declined to exercise its discretion to reduce defendant's sentence and we now consider (1) whether this was an abuse of discretion and (2) whether defendant could properly raise, on remand, an ability to pay objection to the restitution fine and court assessments imposed at his earlier sentencing.

I. BACKGROUND

In describing the pertinent background, we reproduce our prior opinion's description of the facts, supplemented where necessary for purposes of this appeal.

"Defendant and codefendant, Anthony Juarez[(Juarez)], confronted the victim, Aaron Brockway, on the street and asked him if he 'banged.' Brockway responded in the negative, but one or both of the defendants fired several rounds at him from a revolver, striking the victim once in the back.

"Brockway staggered away, bleeding heavily. When deputies arrived, Brockway was collapsed on the sidewalk. He described his assailants to the deputies and explained they shot him after asking if he 'banged.' Brockway died in the hospital hours later, following surgery.

"Juarez was apprehended a short distance from Brockway's location after he was observed throwing something over a fence. Deputies recovered six spent .22 caliber shell casings from

Juarez's pocket and located [a] .22 caliber revolver near the fence. Defendant was also apprehended nearby.

"Both defendant and Juarez tested positive for gunshot residue. Defendant and Juarez were placed in adjoining cells and their extensive discussions and various admissions concerning the crime were recorded." (*People v. Rakisits, supra*, B280133.) Among the incriminating admissions made by defendant was the statement that he and Juarez were "right next to each other" for the shooting and the statement that "[defendant] started it and [Juarez] finished it."

At trial, a jury found defendant guilty of second degree murder. The jury also found true allegations that the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang (Pen. Code,¹ § 186.22, subd. (b)(1)) and that a principal in the crime discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (d), (e)(1)). The trial court sentenced defendant to 40 years to life in state prison: 15 years for the murder, plus 25 years to life for the firearm enhancement. (Punishment for the gang enhancement and for lesser enhancements under section 12022.53 was stayed.) The trial court also ordered defendant to pay a \$10,000 restitution fine (well above the statutory \$300 minimum fine), a \$40 court operations assessment, and a \$30 criminal conviction assessment. There was no objection at sentencing that defendant was unable to pay the restitution fine or assessments.

On appeal from the trial court's judgment, our disposition was as follows: "The judgment of conviction is affirmed. The

¹ Undesignated statutory references are to the Penal Code.

matter is remanded to permit the trial court to consider whether to exercise its discretion under section 12022.53, subdivision (h) to strike or dismiss the firearm enhancement in furtherance of justice.” (*People v. Rakisits, supra*, B280133.)

On remand, the trial court declined to exercise its discretion to strike or dismiss the firearm enhancement. The court noted it “d[id] remember this trial” and explained: “[W]hile the court does have discretion, I believe that the particular acts by the defendant were particularly heinous in this particular case. I don’t find there’s any mitigation that sufficiently justifies the striking of the gun allegation, and, as such, the motion to strike the gun allegation under 12022.53 and/or 12022.5 after considering your . . . memorandum, which I’ve gone through now as well as your arguments, is denied.” Defendant’s attorney then interjected with “one more thing,” explaining defendant “wants to know if the restitution [fine] as ordered—I believe [that] is in the amount of \$10,000—if that could be stayed or stricken. He says he cannot live comfortable in prison with that restitution order.” The trial court rejected that request, reasoning it could impose restitution anywhere from \$300 to \$10,000 “depending upon the severity of the case and other factors” and concluding “this case would justify the maximum fine”

II. DISCUSSION

Under the deferential abuse of discretion standard that governs defendant’s challenge to the trial court’s decision not to strike or dismiss his 25-year enhancement for discharge of a firearm causing death, the trial court did not err. By his own admissions, defendant was intimately involved in the gang-related killing of victim Brockway, who was shot in the back, and

that is just the sort of criminal conduct the 25-year firearm enhancement was meant to punish. Defendant also cannot challenge, in this appeal, the trial court's imposition of the \$10,000 restitution fine; such a challenge would lie only in an appeal from the judgment, and there was no such challenge. Moreover, even if the issue of the restitution fine were now properly before us, defendant never claimed he would have no ability to pay the restitution fine during the decades he is likely to serve in prison (or thereafter, if and when he is released); rather, he asserted only that striking the fine would permit him to live comfortably in prison. That presents no *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) issue. Constitutional limits on fines and fees are not concerned with defendant's custodial comfort.

A. *The Trial Court Was Within Its Discretion to Decline to Strike the Section 12022.53 25-Year Enhancement*

Section 12022.53 provides for increasingly severe punishment for specified crimes involving a firearm, depending on how the firearm is used and the harm that results from its use. The most severe punishment, a 25-to-life enhancement, applies for discharge of a firearm causing death or great bodily injury (§ 12022.53, subd. (d)), and that enhancement applies to any principal involved in the commission of the crime where the crime is gang-related (§ 12022.53, subd. (e)(1)). “The legislative intent behind section 12022.53 is clear: ‘The Legislature finds and declares that substantially longer prison sentences must be imposed on felons who use firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime.’ [Citation.]” (*People v. Garcia* (2002) 28 Cal.4th 1166, 1172

[upholding imposition of a subdivision (d) 25-year enhancement on a defendant who was not the actual shooter]; see also *People v. Palacios* (2007) 41 Cal.4th 720, 733 [imposition of three 25-year enhancement terms furthered legislative goal of deterring firearm use].)

As amended by legislation that took effect on January 1, 2018, however, section 12022.53 now permits trial courts to exercise discretion to strike or dismiss a firearm enhancement pursuant to section 1385. (§ 12022.53, subd. (h); Stats. 2017, ch. 682, §§ 1-2.) Section 1385, in turn, allows trial judges on their “own motion or [] on application of the prosecuting attorney, and in furtherance of justice” to order an enhancement stricken or dismissed, and requires judges, if such action is taken, to state the reasons therefor on the record. (§ 1385, subds. (a), (b)(1).)

We previously held section 12022.53, subdivision (h) applies retroactively to defendant, so the only question presented to us for decision is whether the trial court’s decision not to exercise its newly conferred discretion in defendant’s favor was an abuse of that discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 371 [a “trial court’s decision *not* to dismiss or strike a sentencing allegation under section 1385 . . . should be reviewed under the deferential abuse of discretion standard . . .”].) When deciding whether an abuse of discretion has been shown, we consider the legal principles and policies behind the laws at issue. (*Id.* at p. 377; *People v. Williams* (1998) 17 Cal.4th 148, 160-161 [section 1385’s concept of “furtherance of justice” must be defined within the bounds of the statutory scheme at issue in a case].) Here, that includes both the law that added section 12022.53 to the Penal Code *and* the law that amended it to give trial courts new discretion to mitigate, in an appropriate case,

overly harsh results that might otherwise obtain from mandatory, inflexible imposition of section 12022.53 enhancements divorced from consideration of the interests of justice.

With the purposes behind these two laws in mind, this is not a case where the trial court abused its discretion in declining to strike or dismiss the challenged firearm enhancement. Procedurally, the trial court's ruling is unimpeachable. The record demonstrates the trial court considered defendant's written submission and the attorneys' arguments at the hearing, the trial court acknowledged it had discretion to do what defendant asked, and the court stated for the record that it remembered defendant's trial.² Substantively, the court was within its discretion to conclude the interests of justice warranted no sentencing reduction for what by all appearances was an unprovoked gang murder accomplished by shooting the victim in the back. Defendant's appellate briefing seeks to minimize his involvement in the crime, but the trial court could rightly conclude his admissions told a different story, particularly his statement that he was right next to Juarez for "it" (i.e., the shooting) and his concession that he "started it" while Juarez "finished it."³ Whether considered through the prism of

² Defendant seems to suggest the trial court may not have considered what he identified as mitigating factors. The record establishes the court considered "any mitigation" but did not believe it "sufficiently justifi[ed] the striking of the gun allegation."

³ In declining to exercise its discretion to strike or dismiss the firearm enhancement, the trial court characterized

deterrence, public protection, or retribution, the trial court was well within its discretion to conclude the interests of justice did not call for leniency here.⁴

B. An Ability to Pay Challenge to the Restitution Fine Is Not Properly Raised in This Appeal and Is Groundless Anyway

In *People v. Rakisits*, *supra*, B280133, we affirmed the judgment of conviction and remanded to permit the trial court to consider whether to exercise its discretion to strike or dismiss the firearm enhancement. That is all—we did not remand for

defendant's acts as "particularly heinous." Defendant reads the remark as if the trial court was unjustifiably drawing a comparison to special circumstance murders that are "especially heinous, atrocious, or cruel, manifesting exceptional depravity" (§ 190.2, subd. (a)(14)), including all of the legal prerequisites that must be satisfied to prove such a special circumstance. We see no indication that the trial court was invoking a legal term of art. The court said "particularly heinous," a characterization that fairly applies in common usage, and did not precisely invoke the language of the special circumstance statute.

⁴ Having permitted defendant, without objection from the People, to make a written record pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 at the same hearing where it denied defendant's motion to strike or dismiss the firearm enhancement, the trial court could have also reasonably thought exercising discretion in defendant's favor was unnecessary because mitigating factors, including his age at the time of the crime, would be more appropriately taken into account at the youth offender parole hearing he would receive after 25 years in prison. (§ 3051, subd. (b)(3).)

resentencing and the trial court held no resentencing hearing. In light of our disposition and the limited nature of the remand, the trial court had no proper basis to even entertain defendant's request to stay or strike the restitution fine. (*People v. Ramirez* (2019) 35 Cal.App.5th 55, 64 ["when an appellate court remands a matter with directions governing the proceedings on remand, "those directions are binding on the trial court and *must* be followed. Any material variance from the directions is unauthorized and void""].) Rather, a challenge to the restitution fine amount on ability to pay grounds would lie only in an appeal of the January 2017 judgment of conviction—and no such challenge was raised in that appeal (or during the sentencing hearing held in connection with that judgment). It should go without saying, but defendant cannot obtain reversal arguing the trial court wrongly denied relief it was not authorized to grant in the first place.

Furthermore, even if a challenge to the restitution fine were within the scope of this appeal, defendant's *Dueñas*-based challenge would not warrant reversal because he never claimed in the trial court he would be unable to pay the fine imposed—and he certainly made no *showing* of an inability to pay. Rather, all defendant said, through counsel, is that he could not "live comfortable in prison with that restitution order." That protestation is a far cry from the facts in *Dueñas* (*Dueñas, supra*, 30 Cal.App.5th at pp. 1161-1163), and it is an inadequate basis on which to interpose constitutional objections to a criminal fine.

DISPOSITION

The trial court's order is affirmed.

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BAKER, J.

We concur:

RUBIN, P. J.

MOOR, J.