Filed 2/14/17 P. v. Garcia CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. LEONARDO GARCIA, Defendant and Appellant.	B270691 (Los Angeles County Super. Ct. No. PA070040)

APPEAL from an order of the Superior Court of Los Angeles County, Hayden Zacky, Judge. Reversed and remanded.

Marta I. Stanton, 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 John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Leonardo Garcia, together with three codefendants, was convicted of first degree murder (count 1), attempted premeditated murder (count 2), two counts of shooting at an inhabited dwelling (counts 3 and 4), possession of a firearm by a felon (count 6),[1] discharging a firearm with gross negligence (count 7) and street terrorism (count 8). On June 23, 2015 we reversed the convictions on counts 1 and 7, vacated Garcia's sentence in its entirety and addressed sentencing errors on counts 3, 4 and 8. We remanded for further proceedings and resentencing. (*People v. Gomez* (June 23, 2015, B251303) [nonpub. opn.] [*Gomez I*].)

On remand the trial court held a resentencing hearing at which counsel for the People and Garcia were present, but Garcia was not. Garcia contends the trial court violated his constitutional and statutory rights to be present at the resentencing hearing and abused its discretion in denying his motion for a continuance of the hearing. We reverse and remand again for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Garcia's Initial Sentence*

A jury convicted Garcia on counts 1 through 4 and 6 through 8. The jury also found true as to counts 1 through 7 that the offenses had been committed for the benefit of a criminal street gang and as to counts 1 through 4 that each defendant had personally used and discharged a firearm causing great bodily injury or death and/or a principal personally used and intentionally discharged a firearm causing great bodily injury or

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[1] Count 5 was charged against one of Garcia's codefendants only.

death. In addition Garcia admitted the truth of a special allegation he had served a prior prison term for a felony within the meaning of Penal Code section 667.5, subdivision (b);[2] however that special allegation was dismissed in furtherance of justice.

The trial court sentenced Garcia to an aggregate indeterminate state prison term of 160 years to life: (i) 25 years to life on count 1, plus 25 years to life for the firearm enhancement; (ii) a consecutive term of 15 years to life on count 2, plus 25 years to life for the firearm enhancement; (iii) a consecutive term of 25 years to life on count 3, plus 10 years for the gang enhancement; (iv) a consecutive term of 25 years to life on count 4, plus 10 years for the gang enhancement; (v) a concurrent upper term of three years on count 6, plus four years for the gang enhancement; (vi) a stayed upper term of three years on count 7, plus four years for the gang enhancement; and a concurrent upper term of three years on count 8.

2. *Appeal and Remand*

Garcia and his codefendants appealed, contending, in part, the conviction on count 1 for first degree murder was improper because the jury had been instructed on the natural and probable consequences theory of aiding and abetting, which the Supreme Court subsequently held could not be a basis for that offense. (*People v. Chiu* (2014) 59 Cal.4th 155.) Garcia and his codefendants also argued the conviction on count 7 (shooting a firearm with gross negligence) must be reversed because that offense was a lesser included offense of counts 3 and 4 (shooting

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[2] Statutory references are to this code.

at an inhabited dwelling). We agreed with those arguments and reversed the convictions on counts 1 and 7. On count 1 we directed the People to either accept a reduction of the convictions to second degree murder or to retry the defendants under direct perpetrator or direct aiding and abetting theories.

In light of our reversal of counts 1 and 7, we vacated the sentences of the defendants in their entirety and remanded for resentencing after the People either retried count 1 or elected to reduce the convictions to second degree murder. To assist the trial court at resentencing, we addressed several sentencing errors in the original sentences. On counts 3 and 8 we held the sentences must be stayed pursuant to section 654 because the same act or series of acts was the basis for other convictions. On count 4 we held the sentences of 35 years to life had been incorrectly calculated. The proper sentences were 40 years to life: 15 years to life under section 186.22, subdivision (b)(4)(B), as the alternate base term for a section 246 offense, plus 25 years to life for the firearm enhancement under section 12022.53, subdivisions (d) and (e)(2).

The remittitur issued on October 21, 2015. On January 19, 2016, after receiving the remittitur, the trial court conducted a hearing at which counsel for the People and Garcia appeared. Garcia, who was in custody, was not present. Garcia's counsel filed a motion the same day as the hearing, requesting a continuance so he could have additional time to prepare a motion for a new trial and to prepare for resentencing. The trial court heard argument on the motion, during which Garcia's counsel stated he was not given advance notice of what proceedings would be conducted at the January 19th hearing. Defense counsel requested Garcia be present for the resentencing and he

be given adequate time to address the issues raised in our decision.

The trial court denied Garcia's motion for a continuance and the request to be present at resentencing. The trial court stated it had been "ordered to modify the sentence pursuant to [the Court of Appeal's] opinions, so further preparation wouldn't change anything in terms of what needs to be done today." The trial court further stated, "it is clear what I have to do today because the Court of Appeal told me what to do. I don't really have any discretion."

The People stipulated to reduce count 1 to second degree murder; the sentence on that count was modified to 15 years to life, plus 25 years to life for the firearm enhancement. The court corrected the sentencing errors identified in our opinion and otherwise upheld the same terms as in its original decision, resulting in an aggregate indeterminate state prison term of 120 years to life.

DISCUSSION

1. *A Resentencing Hearing in the Presence of Garcia Was Required*

A criminal defendant "has a constitutional right to be present at all critical stages of the criminal prosecution, i.e., 'all stages of the trial where his absence might frustrate the fairness of the proceedings' [citation], or 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" (*People v. Rodriguez* (1998) 17 Cal.4th 253, 260.) This constitutional right to be present extends to sentencing proceedings (*People v. Sanchez* (2016) 245 Cal.App.4th 1409, 1414) and, in certain circumstances, to

resentencing proceedings (*People v. Rouse* (2016) 245 Cal.App.4th 292, 300; *People v. Arbee* (1983) 143 Cal.App.3d 351, 356). In addition, defendants have a statutory right to be present at sentencing. (See § 977, subd. (b)(1) ["in all cases in which a felony is charged, the accused shall be personally present at the . . . time of the imposition of sentence"].)[3]

In light of these well-established principles, Garcia contends he was entitled to be present at the hearing after receipt of the remittitur at which the new sentence was pronounced. In response the People assert our disposition in the prior appeal merely directed the trial court to impose a new sentence on count 1 after reduction of that conviction to second degree murder and to correct the errors discussed in our opinion. Thus, the People argue, because the resentencing involved "only a ministerial sentence reduction, it [was] not a critical stage of the proceeding" and Garcia had no right to be present.

In support of their position the People rely primarily on *United States v. Jackson* (11th Cir. 1991) 923 F.2d 1494, in which the Eleventh Circuit held defendant had no right to be present at a resentencing hearing involving "a remedial sentence reduction." (*Id.* at p. 1497; cf. *Hall v. Moore* (11th Cir. 2001) 253 F.3d 624, 627 [stating no right to counsel exists at resentencing hearing where imposition of sentence "'is merely a ministerial ceremony, with no discretion to be exercised by the sentencing judge'"].) In

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[3] A defendant may "validly waive his or her right to be present at a critical stage of the trial, provided the waiver is knowing, intelligent, and voluntary." (*People v. Cunningham* (2015) 61 Cal.4th 609, 633; see also § 977, subd. (b).) There is no evidence in the record, and the People do not contend, Garcia waived his right to be present at the resentencing hearing.

Jackson the defendant had originally been sentenced pursuant to the penalty prescribed by statute at the time of his conviction; however, the trial court later reduced his sentence to the statutory penalty in effect at the time the acts were committed. The Eleventh Circuit held Jackson's presence was not required at the resentencing hearing because "a remedial sentence reduction is not a critical stage of the proceedings . . . ." "We, therefore, hold that, where the entire sentencing package has not been set aside, a correction of an illegal sentence does not constitute a resentencing requiring the presence of the defendant, so long as the modification does not make the sentence more onerous." (*Jackson*, at p. 1497.)

The exception to a defendant's right to be present at sentencing articulated in *Jackson* does not apply in this case because Garcia's resentencing was not a "ministerial ceremony." To the contrary, our prior opinion "vacate[d] the defendants' sentences in their entirety and remand[ed] for resentencing" and ordered the trial court to "conduct further proceedings not inconsistent with this opinion." (*Gomez I*, *supra*, at pp. 2, 34.) The trial court, therefore, had jurisdiction to reconsider the entirety of Garcia's sentence, including portions of the sentence related to convictions affirmed on appeal. (*People v. Rosas* (2010) 191 Cal.App.4th 107, 118; see *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1257 ["we endorse the notion that trial courts are, and should be, afforded discretion by rule and statute to reconsider an entire sentencing structure in multicount cases where a portion of the original verdict and resulting sentence has been vacated by a higher court"]; *People v. Hill* (1986) 185 Cal.App.3d 831, 834 ["When a case is remanded for resentencing by an appellate court, the trial court is entitled to

consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices."].) "This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components. The invalidity of one component infects the entire scheme." (*Hill*, at p. 834; accord, *Burbine*, at p. 1257 ["felony sentence for a multiple-count conviction" comprises an "integrated whole"].)

Because the trial court was entitled to reconsider Garcia's entire sentence, including reconsideration of any aggravating factors in light of the reduction of count 1 to second degree murder or any other evidence Garcia wished to submit in favor of lower or concurrent sentences, Garcia, with his counsel, had a right to be present for the resentencing. (See *People v. Rouse*, *supra*, 245 Cal.App.4th at pp. 297, 300 [resentencing is a "critical stage in the criminal process" when "resentencing will occur anew, with the court exercising its sentencing discretion and restructuring the entire sentencing package"]; *Hall v. Moore, supra*, 253 F.3d at p. 628 [when "entire sentencing package was set aside . . . [defendant's] presence and his counsel's presence [at resentencing] were a necessity, not a 'luxury'"].)

2. *Garcia's Absence from the Resentencing Was Not Harmless Beyond a Reasonable Doubt*

Error resulting in a violation of a defendant's federal constitutional rights, including the right to be present at a critical stage of the proceeding, is reviewed under the beyond-a-reasonable-doubt harmless error standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], to determine whether the conviction, or in this case the

sentence, may nonetheless be affirmed.[4] (*People v. Mendoza* (2016) 62 Cal.4th 856, 902 ["'[u]nder the federal Constitution, error pertaining to a defendant's presence is evaluated under the harmless-beyond-a-reasonable-doubt standard set forth in *Chapman v. California*'"]; *People v. Davis* (2005) 36 Cal.4th 510, 532 [same].) The beyond-a-reasonable-doubt standard in *Chapman* requires "reversal of the judgment against a criminal defendant unless the prosecution can show 'beyond a reasonable doubt' that the error was harmless." (*People v. Rutterschmidt* (2012) 55 Cal.4th 650, 661; accord, *People v. Mower* (2002) 28 Cal.4th 457, 484 ["the standard stated in [*Chapman*], requires the People, in order to avoid reversal of the judgment, to 'prove beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained'"]; *People v. Alvarez* (1996) 14 Cal.4th 155, 216, fn. 21 ["it is the general rule for error under the United States Constitution that reversal requires prejudice and prejudice in turn is presumed unless the state shows that the defect was harmless beyond a reasonable doubt"]; *People v. Louis* (1986) 42 Cal.3d 969, 993 [""before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." [Citation.] The

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[4] A violation of rights protected by the California Constitution and section 977 "is state law error only, and therefore is reversible only if "'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'"" (*People v. Davis* (2005) 36 Cal.4th 510, 532-533; accord, *People v. Blackburn* (2015) 61 Cal.4th 1113, 1132.) Because we find the federal constitutional error was not harmless beyond a reasonable doubt, we need not consider whether the state law violations were harmless.

burden is on the beneficiary of the error "either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment."'"].)

The People argue Garcia's absence at the resentencing was harmless beyond a reasonable doubt because Garcia has not, either in the trial court or on appeal, identified any evidence he could have submitted if present that may have persuaded the court to reduce his sentence. The People fundamentally misapprehend their burden on appeal; as discussed, the burden is on the People, not on defendant, to show the federal constitutional error was harmless beyond a reasonable doubt.[5] (*People v. Rutterschmidt*, *supra*, 55 Cal.4th at p. 661.) The People have not met this burden.

Garcia's absence from the resentencing hearing prevented him from providing his attorney and the court with evidence supporting a lesser or concurrent sentence. There also may have been certain aggravating factors accompanying the first degree murder conviction that no longer applied after the reduction of

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[5] In determining whether the defendant was absent from a critical stage of a criminal case, the Supreme Court has held it is the defendant's burden to demonstrate his or her presence would have contributed to the fairness of the proceedings. (See, e.g., *People v. Blacksher* (2011) 52 Cal.4th 769, 799; *People v. Bradford* (1997) 15 Cal.4th 1229, 1357.) As discussed, because the trial court here had jurisdiction to reconsider Garcia's sentence in its entirety after correcting the errors identified in our opinion in *Gomez I*—a discretion the trial court failed to recognize—the resentencing hearing was unquestionably a critical stage in the criminal process. Accordingly under *Chapman v. California*, *supra*, 386 U.S. 18, it is the People's burden to establish the error in conducting the hearing without Garcia's presence was harmless beyond a reasonable doubt.

the conviction on count 1 to second degree murder. While the trial court may not have been persuaded by any new evidence or argument and certainly may have imposed the identical sentence, we cannot foreclose the possibility beyond a reasonable doubt that the trial court would have exercised its discretion differently. (See *People v. Rodriguez*, *supra*, 17 Cal.4th at p. 258 ["[t]he evidence and arguments that might be presented on remand cannot justly be considered 'superfluous,' because defendant and his counsel have never enjoyed a full and fair opportunity to marshal and present the case supporting a favorable exercise of discretion"].)[6]

DISPOSITION

Garcia's sentence is vacated in its entirety. The matter is remanded for resentencing in accordance with this opinion and our prior opinion in this case. Garcia, represented by counsel, is entitled to be present for resentencing.

PERLUSS, P. J.

We concur:

ZELON, J. KEENY, J.*

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[6] Because we remand for resentencing, we need not reach Garcia's argument the trial court erred in denying his request for a continuance.

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