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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re

MICHAEL O'NEAL, SR.,

on Habeas Corpus.

B270878

(Los Angeles County
Super. Ct. No. YA063443)

APPEAL from orders of the Superior Court of Los Angeles County, Steven R. Van Sicklen, Judge. Petition for writ of habeas corpus relief granted with directions.

Paul R. Kraus, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Respondent.

Michael O'Neal, Sr. (petitioner) challenges his sentence as unlawful because the trial court purported to amend it by means of nunc pro tunc orders after orally pronouncing sentence on September 18, 2006.

We conclude the trial court erred when it purported to amend petitioner's sentence through nunc pro tunc orders. A petition for writ of habeas corpus is an appropriate vehicle for challenging an unauthorized sentence. (*In re Johnson* (1966) 65 Cal.2d 393, 394; *In re Sandel* (1966) 64 Cal.2d 412, 417; *In re Birdwell* (1996) 50 Cal.App.4th 926, 931; see also *In re Estrada* (1965) 63 Cal.2d 740, 750.) We shall grant the petition for writ of habeas corpus and direct the trial court on remand to: (1) vacate petitioner's original September 18, 2006 sentence and any and all subsequent orders purporting to affect his sentence; (2) appoint counsel to represent petitioner; (3) conduct a new sentencing hearing at which petitioner and his counsel have the right to be present; (4) resentence petitioner as authorized by law; and (5) prepare an amended abstract of judgment reflecting the new sentence.

BACKGROUND

1. Trial court proceedings

A jury convicted petitioner of robbery (Pen. Code, § 211; counts 1, 8)¹, first-degree residential burglary (§ 459; counts 2, 9), elder abuse (§ 368, subd. (b)(1); counts 3, 10), elder false imprisonment (§ 368, subd. (f); count 4), attempted grand theft (§§ 484e, subd. (d), 664; count 5), identity theft (§ 530.5, subd. (a); count 6), and possession of assault weapon (§ 12280, subd. (b); counts 11, 12). It acquitted petitioner of making criminal threats

¹ All further section references are to the Penal Code.

(§ 422; count 7). The jury found true the allegations that the victims were elderly (§ 667.9, subd. (a); counts 1, 2, 8, 9), that petitioner personally used a firearm (§12022.53, subd. (b); counts 1, 2, 8, 9, §12022.5, subd. (a)(1); count 3), and that petitioner caused great bodily injury (§12022.7, subd. (c); counts 1, 2, 3, 4).

On September 18, 2006, the trial court sentenced petitioner to prison for a term of 22 years.² Subsequently, the trial court amended the sentence through nunc pro tunc orders. The changes made to petitioner's sentence through those orders were as follows:³

² The total sentence imposed on September 18, 2006 was 22 years. As subsequently corrected and reflected in the abstract of judgment, the total sentence imposed is 24 years.

³ In the chart that follows, we have indicated the original sentence imposed on September 18, 2006, and the *changes* to petitioner's sentence made on the subsequent indicated dates. The blanks indicate that the sentence as to those counts remained unchanged.

	Sept. 18, 2006	Sept. 22, 2006	Dec. 7, 2006
Count 1 (robbery)	1 year, 4 months	3 years, 4 months ⁴	
Count 2 (burglary)	Stayed, § 654	12 years (stayed, § 654)	7 years, 4 months (stayed, § 654)
Count 3 (elder abuse)	Stayed, § 654	9 years (stayed, § 654)	6 years (stayed, § 654)
Count 4 (elder false imprisonment)	1 year		
Count 5 (attempted grand theft)	8 months		
Count 6 (identity theft)	8 months		
Count 8 (robbery)	17 years		
Count 9 (burglary)	Stayed, § 654	17 years (stayed, § 654)	12 years, 4 months (stayed, § 654)
Count 10 (elder abuse)	Stayed, § 654	4 years (stayed, § 654)	1 year (stayed, § 654)
Count 11 (possession of assault weapon)	8 months		

⁴ The minute orders in our appellate record reflect that sometime after the sentencing hearing, the court added an additional two years nunc pro tunc to defendant's count 1 sentence. The parties assert that the two years was added on September 22, 2012, although this is not entirely clear from the minute orders.

On appeal, this court affirmed the judgment. On April 27, 2015, in the trial court, petitioner filed a petition for writ of habeas corpus challenging his sentence as unlawful because the nunc pro tunc amendments of his original sentence were unauthorized judicial acts disguised as correction of clerical error. On December 30, 2015, the trial court denied the petition.

2. *Proceedings in this court*

On February 4, 2016, petitioner filed a notice of appeal in which he purported to appeal from the trial court's order denying his petition for writ of habeas corpus. On October 28, 2016, he filed an opening brief on appeal.

In an order to show cause filed August 8, 2017, we deemed the opening brief to be an original petition to this court for a writ of habeas corpus, because no appeal lies from a trial court's order denying a petition for a writ of habeas corpus. (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7.) We further stated: "It appears to this court that petitioner has made a prima facie case for relief when he claims the trial court's purported corrections of his sentence should not have been accomplished by way of nunc pro tunc orders. (See *In re Candelario* (1970) 3 Cal.3d 702.) Instead, the trial court should have conducted a new sentencing hearing with petitioner present and represented by counsel. (See Cal. Const., art. I § 15; Pen. Code, § 977, subd. (b)(1); *In re Cortez* (1971) 6 Cal.3d 78, 88; *People v. McGahuey* (1981) 121 Cal.App.3d 524, 530.)"

Having determined petitioner made a prima facie case for relief based on his claim of sentencing error, we ordered the Secretary of the Department of Corrections and Rehabilitation (respondent) to show cause "why the trial court should not be compelled to (1) vacate the orders entered on September 22, 2006,

and December 7, 2006, which purported to correct petitioner's sentence nunc pro tunc, (2) appoint counsel to represent petitioner, (3) conduct a new sentencing hearing at which petitioner and his counsel have the right to be present, (4) resentence petitioner as authorized by law, and (5) correct the abstract of judgment consistent with the new sentence."

In a written return to the order to show cause, respondent conceded that "the trial court's original sentencing minute order contained numerous errors, some of which were corrected by subsequent 'nunc pro tunc' orders and some of which remain today."⁵ Respondent also indicated it "would not oppose the issuance of a writ vacating the trial court's September 22 and December 7, 2006 orders and remanding to the trial court to conduct a new sentencing hearing where petitioner will be represented by counsel."

DISCUSSION

The trial court's nunc pro tunc orders purport to correct *judicial* errors, rather than clerical errors, and thus they are void. "The scope of orders and judgments nunc pro tunc in California has consistently been described by our Supreme Court in the following terms: "A court can always correct a clerical, as distinguished from a judicial error which appears on the face of a

⁵ Although not challenged by petitioner, the trial court also attempted to amend petitioner's sentence through an August 13, 2014 nunc pro tunc order. In its original oral pronouncement of sentence on count 5, the trial court imposed the subordinate sentence of eight months, or one-third the two-year middle term. On August 13, 2014, the court issued a nunc pro tunc order striking that sentence and resentencing petitioner to four months, or one-third the 12-month middle term.

decree by a nunc pro tunc order. [Citations.] It *cannot*, however, change an order which has become final even though made in error, if in fact the order made was that intended to be made. . . . ‘ “The function of a nunc pro tunc order is merely to correct the record of the judgment and not to alter the judgment actually rendered—not to make an order now for then, but to enter now for then an order previously made. The question presented to the court on a hearing of a motion for a nunc pro tunc order is: What order was in fact made at the time by the trial judge?” ’ [Citation, italics omitted.]” (*In re Marriage of Padgett* (2009) 172 Cal.App.4th 830, 852, italics added.) “To summarize, it is not proper to amend an order nunc pro tunc to correct judicial inadvertence, omission, oversight or error, or to show what the court might or should have done as distinguished from what it actually did. An order made nunc pro tunc should correct clerical error by placing on the record what was actually decided by the court but was incorrectly recorded. It may not be used as a vehicle to review an order for legal or judicial error by “correcting” the order in order to enter a new one.’ [Citation.]” (*Ibid.*)

By changing the substantive terms of petitioner’s sentence, the trial court was attempting to correct a *judicial* error, not a clerical error. This was improper. Sentencing errors must be corrected at a hearing at which petitioner has the right to be present. “Pronouncing judgment against a defendant in absentia . . . can only be done with a valid waiver, because a criminal defendant has a constitutional and statutory right to be present at sentencing. [Citations.]” (*People v. Fedalizo* (2016) 246 Cal.App.4th 98, 110.) Petitioner did not waive such rights

when the trial court purported to resentence him nunc pro tunc, nor does he waive such right now.

It is incumbent on this court to enforce a defendant's invocation of the right to be present at sentencing. Further, this reviewing court does not impose sentences in the first instance; that is the task of the trial court. (See, e.g., *People v. Oates* (2004) 32 Cal.4th 1048, 1056, 1069 [remand to appellate court for further proceedings consistent with the opinion, including "remanding to the trial court for resentencing in accordance with the views expressed in this opinion," e.g., mandatory imposition of firearm enhancement under section 12022.53, subd. (d)].)

In short, this matter must be remanded to the trial court with directions to resentence petitioner, with an opportunity for him to be present with counsel.

DISPOSITION

The petition for writ of habeas corpus is granted and the matter is remanded with directions. The trial court is directed to: (1) vacate petitioner's original September 18, 2006 sentence and any and all subsequent orders purporting to affect his sentence; (2) appoint counsel to represent petitioner; (3) conduct a new sentencing hearing at which petitioner and his counsel have the right to be present; (4) resentence petitioner as authorized by law; and (5) prepare an amended abstract of judgment reflecting the new sentence.

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EDMON, P. J.

We concur:

LAVIN, J.

STONE, J.*

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