Filed 6/4/18 P. v. Suares CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JESSE SUARES, Defendant and Appellant.	B280098 (Los Angeles County Super. Ct. No. BA347720)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed in part, reversed in part and remanded.

Renee Rich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

In a prior appeal, we affirmed the conviction of appellant Jesse Suares on eight counts related to a shooting and a police pursuit. (*People v. Suares* (Apr. 25, 2013, No. B241594) [nonpub. opn.], 2013 Cal.App. Unpub. LEXIS 2901 (*Suares I*).) After his state habeas petitions were denied, appellant filed a pro se petition for writ of habeas corpus in the United States District Court for the Central District of California. The federal court granted appellant's petition based on ineffective assistance of appellate counsel for failure to raise a meritorious sentencing issue and ordered resentencing. Appellant was resentenced on December 19, 2016 and now appeals.

BACKGROUND[1]

In October 2008, appellant pointed a gun at someone, making reference to a gang. Appellant then drove away, leading police officers on a long pursuit until he crashed, injuring three people. Appellant then fled on foot and fought with pursuing officers. After appellant's arrest, the officers found cash and methamphetamine near appellant and a handgun and ammunition in his car. (See *Suares I*, 2013 Cal.App. Unpub. LEXIS 2901, at *2-*3.)

Appellant was charged with nine counts. A gang expert testified at trial that, based on appellant's gang field identification cards and tattoos, he believed appellant was a gang member. The jury convicted appellant of eight of the nine charged counts: count 1, assault with a

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[1] We provide only a short summary of the facts, which are not pertinent to this appeal.

firearm (Pen. Code, § 245, subd. (a)(2));[2] count 2, evading an officer with willful disregard (Veh. Code, § 2800.2, subd. (a)); count 3, resisting an executive officer (§ 69); count 4, transportation of a controlled substance (Health & Saf. Code, § 11379, subd. (a)); count 6, possession of a firearm by a felon (§ 12021, subd. (a)(1)); count 7, possession of ammunition by a felon (§ 12316, subd. (b)(1)); count 8, leaving the scene of an accident (Veh. Code, § 20002, subd. (a)); and count 9, assault with a semiautomatic firearm (§ 245, subd. (b)).[3] (*Suares I*, 2013 Cal.App. Unpub. LEXIS 2901, at *1-*2.)

The trial court originally sentenced appellant to a total term of 37 years, 4 months. "As to count 9 (assault with a semiautomatic firearm), the principal term, the court imposed the midterm of six years, doubled pursuant to Three Strikes, plus a four-year term for the firearm enhancement (§ 12022.5, subd. (a)), and a 10–year gang enhancement (§ 186.22, subd. (b)(1)(C)), for a total of 26 years. As to count 1 (assault with a firearm), the court imposed a term of 20 years (six years, plus a four-year firearm enhancement (§ 12022.5, subd. (a)) and a 10–year gang enhancement (§ 186.22, subd. (b)(1)(C)), and stayed the sentence pursuant to section 654. The court imposed a consecutive 16–month term on count 2 and imposed and stayed a four-month term on the section 12022, subdivision (a)(1) enhancement. On count 3, the court

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[2] Unspecified statutory references are to the Penal Code.

[3] Count 5, alleging possession of a controlled substance for sale (Health & Saf. Code, § 11378), was dismissed on the People's motion after the jury was unable to reach a verdict.

imposed a consecutive term of 16 months. As to count 4, the court imposed a consecutive term of two years, plus a one-year term for the firearm enhancement (§ 12022, subd. (c)) and an eight-month term for the gang enhancement (§ 186.22, subd. (b)(1)(A)). On count 6, the court imposed a concurrent seven-year term (four years plus a three-year term for the gang enhancement (§ 186.22, subd. (b)(1)(A))). As to count 7, the trial court imposed a concurrent term of four years and imposed and stayed a three-year enhancement for the gang allegation (§ 186.22, subd. (b)(1)(A).) The court imposed a concurrent six-month term on count 8. The court imposed a consecutive term of five years pursuant to section 667, subdivision (a)(1), and it imposed and stayed a one-year term pursuant to section 667.5, subdivision (b)." (*Suares I*, 2013 Cal.App. Unpub. LEXIS 2901, at *5-*6.)

In his prior appeal, appellant challenged the imposition of section 12022.5 firearm enhancements and section 186.22 gang enhancements in counts 1 and 9. His arguments were based on *People v. Sinclair* (2008) 166 Cal.App.4th 848, which did not apply to either claim. We therefore affirmed. (*Suares I*, 2013 Cal.App. Unpub. LEXIS 2901, at *10.)

After his state habeas petitions were denied, appellant filed a habeas petition in federal district court. Appellant claimed "that he was denied effective assistance of trial counsel, conflict-free appointed counsel of choice, and the right to self-representation at trial, all in violation of the Sixth Amendment. He further claim[ed] that he was denied effective assistance of appellate counsel because counsel did not challenge these Sixth Amendment trial violations or the trial court's

imposition of an unauthorized enhancement at sentencing." The district court granted relief based on ineffective assistance of appellate counsel for failure to challenge an unauthorized sentencing enhancement, which respondent conceded was in violation of section 1170.1, subdivision (f).[4] The court ordered that appellant be released unless he was resentenced within 90 days and denied relief on appellant's other claims.

At the December 19, 2016 resentencing hearing, the trial court sentenced appellant to a total term of 33 years. The court selected count 9 (assault with a semiautomatic firearm) as the principal term and imposed the upper term of nine years, doubled under the Three Strikes law. The court imposed a consecutive 10-year term for the gang enhancement on count 9 (§ 186.22, subd. (b)(1)(C)) and imposed and stayed a four-year term for the firearm enhancement (§ 12022.5). On count 1 (assault with a firearm), the court imposed and stayed under section 654 the midterm of three years, doubled under the Three Strikes law, and imposed 10 years for the gang enhancement and four years for the firearm enhancement for a total sentence of 20 years. As to count 2 (evading an officer), the court imposed the midterm of two years,

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[4] In *People v. Rodriguez* (2009) 47 Cal.4th 501, 509, the court held that the imposition of enhancements for both firearm use (§ 12022.5) and a violent felony to benefit a gang (§ 186.22, subd. (b)(1)(A)), as was imposed here, violated the following provision of section 1170.1: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense." (§ 1170.1, subd. (f).)

doubled to four years, and added a year for the firearm enhancement, to run concurrent to count 9. On count 3 (resisting an executive officer), the court imposed a concurrent sentence of the midterm of two years, doubled to four years. A 10-year concurrent sentence was imposed on count 4 (transportation of a controlled substance), composed of the midterm of two years doubled to four years because of the prior strike conviction, plus three years for the firearm enhancement and three years for the gang enhancement. On count 6 (possession of a firearm by a felon) and count 7 (possession of ammunition by a felon), the court imposed concurrent sentences of six years on each count by selecting the midterm of two years, doubling the term to four years, and then adding two years for the gang enhancement. The court also imposed a concurrent sentence of six months in county jail for the misdemeanor conviction in count 8 (leaving the scene of an accident). The court imposed a consecutive five-year term for a prior serious felony under section 667, subdivision (a)(1).

DISCUSSION

Appellant raises five issues on appeal.

I. *Assault with a Firearm* (*Count 1*) *a Lesser Included Offense of Assault with a Semiautomatic Firearm* (*Count 9*)

Appellant contends that he received ineffective assistance of counsel in his prior appeal because his appointed counsel failed to argue that his conviction for assault with a firearm in count 1 should be reversed and dismissed as a lesser included offense of his conviction in count 9 for assault with a semiautomatic firearm. Respondent concedes

that appellant's conviction in count 1 must be reversed, and we agree. (See *People v. Martinez* (2012) 208 Cal.App.4th 197, 199 [reversing convictions for firearm assault as lesser included offenses of convictions for semiautomatic firearm assault].) We therefore reverse the conviction in count 1 for assault with a firearm and the corresponding firearm and gang enhancements. (See *People v. Wilson* (2013) 219 Cal.App.4th 500, 518 ["'If a trial court imposes a sentence unauthorized by law, a reviewing court may correct that sentence whenever the error is called to the court's attention.' [Citation.] '[A] sentence is generally "unauthorized" where it could not lawfully be imposed under any circumstance in the particular case.'"].)

II. *Confrontation Clause and Sanchez*

Appellant's second claim of ineffective assistance is based on prior appellate counsel's failure to raise a Confrontation Clause challenge to the gang expert testimony as inadmissible testimonial hearsay. (See *Crawford v. Washington* (2004) 541 U.S. 36; *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*)).[5]

Respondent contends that this claim is not cognizable on appeal because it is not within the scope of the federal court order granting appellant's habeas petition. We agree. The magistrate judge

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[5] *Sanchez* held that state hearsay law permits an expert witness to refer generally to hearsay sources of information as a basis for the expert's opinion, but precludes experts from "rely[ing] on case-specific hearsay to support their trial testimony. [Citation.]" (*People v. Williams* (2016) 1 Cal.5th 1166, 1200.)

recommended that the district court "issue a writ directing that the trial court resentence Petitioner consistent with California Penal Code § 1170.1(f) and *People v. Rodriguez*. [Fn. omitted.] Nothing in this recommendation, however, is meant to suggest that a particular sentence be imposed at resentencing. The trial court would remain free to impose whatever legal sentence it deems appropriate."

The district court order stated that appellant's petition was "conditionally granted in part as to the claim of ineffective assistance of appellate counsel regarding the trial court's unauthorized sentencing enhancement, but denied in all other respects, including the request for an evidentiary hearing. A conditional writ of habeas corpus shall issue requiring Respondent to release and discharge Petitioner from his sentence imposed by the Los Angeles County Superior Court . . . unless, within 90 days of the entry of Judgment herein, Petitioner is brought before the trial court for a resentencing hearing in accordance with this Order and consistent with the findings and conclusions in the Report and Recommendation."

The matter accordingly was returned to the superior court solely for resentencing, and therefore our review is limited to resentencing issues. (See *People v. Murphy* (2001) 88 Cal.App.4th 392, 396–397 (*Murphy*) ["In an appeal following a limited remand, the scope of the issues before the court is determined by the remand order"]; *People v. Deere* (1991) 53 Cal.3d 705, 713 ["Although the judgment was reversed as to penalty, it was 'affirmed in all other respects.' [Citation.] Thus, only errors relating to the penalty phase retrial may be considered in this subsequent appeal"].)

The *Sanchez* issue is a substantive evidentiary issue that requires consideration of the gang expert's testimony and the basis for his testimony. (See, e.g., *People v. Garton* (2018) 4 Cal.5th 485, 506-507 [conducting *Sanchez* analysis].) It is not a resentencing issue and accordingly cannot be considered on this appeal. (See *Murphy*, *supra*, 88 Cal.App.4th at pp. 395–396.)

III. *Amendment to Health and Safety Code Section 11379*

Appellant contends his conviction for transportation of methamphetamine must be reversed because of an amendment to Health and Safety Code section 11379, effective January 1, 2014. Appellant was convicted in count 4 of transporting methamphetamine in violation of Health and Safety Code section 11379. However, the amendment does not apply because appellant's conviction was final before the effective date.

Assembly Bill No. 721 amended the Health and Safety Code to "narrow[] the definition of 'transport' to 'transport for sale,'" so that "unlawful transportation of methamphetamine without proof of transport for sale could only result in conviction of a misdemeanor possession offense." (*People v. Martinez* (2018) 4 Cal.5th 647, 653.) "Generally, 'where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed' if the amended statute takes effect before the judgment of conviction becomes final. [Citation.]" (*People v. Eagle* (2016) 246 Cal.App.4th 275, 279.)

"'State convictions are final "for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for writ of certiorari has elapsed or a timely filed petition has been finally denied." [Citations.]' [Citation.]" (*People v. Superior Court* (*Rodas*) (2017) 10 Cal.App.5th 1316, 1325 (*Rodas*); *People v. Vieira* (2005) 35 Cal.4th 264, 306 ["for the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed"].) A petition for a writ of certiorari to review a state court judgment must be filed in the United States Supreme Court within 90 days after entry of the judgment. (*Rodas*, *supra*, 10 Cal.App.5th at p. 1325, citing U.S. Supreme Ct. Rules, rule 13.1.)

We affirmed appellant's conviction on April 25, 2013 (*Suares I*, 2013 Cal.App. Unpub. LEXIS 2901), and the remittitur was issued on June 27, 2013, indicating that the decision was final. The time for filing a petition for a writ of certiorari elapsed on September 25, 2013. Because appellant's conviction was final before the January 1, 2014 effective date of the amendment to Health and Safety Code section 11379, the amendment does not apply. (*Rodas*, *supra*, 10 Cal.App.5th at p. 1325.)

Appellant contends that a new judgment was imposed when he was resentenced in 2016 and that his judgment accordingly was not final at the time the amendment went into effect. We disagree. For purposes of determining whether an amendatory statute that mitigates punishment applies to a judgment of conviction, "a judgment is 'not

final so long as the courts may provide a remedy on *direct review* [including] the time within which to petition to the United States Supreme Court for writ of certiorari.' [Citation.]" (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1336, italics added.) Appellant's conviction became final on direct review when his time to petition for writ of certiorari elapsed in September 2013.

The federal court's grant of appellant's habeas petition and order for resentencing did not vacate appellant's conviction. "'Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner. [Citation.]' [Citations.]" (*People v. Black* (2004) 116 Cal.App.4th 103, 108-109; cf. *People v. Webb* (1986) 186 Cal.App.3d 401, 410 [where the appellate court "specifically affirmed the judgment of conviction in the prior appeal and remanded only for resentencing," the defendant "cannot now be permitted to make a direct attack upon his convictions"]; *Murphy*, *supra*, 88 Cal.App.4th at p. 395 ["'California law prohibits a direct attack upon a conviction in a second appeal after a limited remand for resentencing'"].) The amendment accordingly does not apply.

IV. *Section 654 Stay of Sentence in Count 7*

Appellant contends and respondent concedes that his sentence for possession of ammunition in count 7 must be stayed under section 654. Appellant was convicted of possession of a firearm by a felon in count 6 (§ 12021, subd. (a)(1)) and possession of ammunition in count 7

(§ 12316, subd. (b)(1)). The trial court imposed concurrent six-year terms on each count, calculated by selecting the midterm of two years, doubling it and adding the low term of two years on the gang enhancement.

The ammunition appellant possessed was loaded in the firearm he possessed. "Where, as here, all of the ammunition is loaded into the firearm, an 'indivisible course of conduct' is present and section 654 precludes multiple punishment." (*People v. Lopez* (2004) 119 Cal.App.4th 132, 138.) The trial court accordingly should have stayed the sentence for count 7. (See *People v. Sok* (2010) 181 Cal.App.4th 88, 100 [trial court erred in failing to stay sentences for unlawful possession of ammunition pursuant to section 654 because the ammunition "was either loaded into [the defendant's] handgun or had been fired from that gun"].)

V. *Section 12022.5*

The jury found true allegations that appellant personally used a firearm as to counts 1 and 9. (§ 12022.5.) The trial court imposed and stayed four-year terms for the firearm enhancements on each count. Appellant contends and respondent concedes that the matter should be remanded for the trial court to exercise its discretion to strike the firearm enhancement as to count 9.

"Prior to January 1, 2018, trial courts did not have authority to dismiss or strike a firearm sentencing allegation under . . . section 12022.5 or 12022.53. [Citations.] [¶] Effective January 1, 2018, the Legislature amended . . . sections 12022.5 and 12022.53 to add the

following language: 'The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.' (§§ 12022.5, subd. (c), 12022.53, subd. (h).)" (*People v. Vela* (2018) 21 Cal.App.5th 1099, 1113–1114.)

Appellant was resentenced pursuant to the federal district court order granting his habeas petition. The amended statute therefore applies. On remand, the trial court shall exercise its discretion under section 12022.5 to determine whether to strike the firearm enhancement as to count 9.

DISPOSITION

We order as follows: (1) the conviction for assault with a firearm in count 1 is reversed and the firearm and gang enhancements attached to count 1 are stricken; (2) the six-year sentence for possession of ammunition in count 7 is ordered stayed under section 654; and (3) the trial court is to exercise its discretion under section 12022.5 to determine whether to strike the firearm enhancement imposed on count 9. The trial court is directed to amend the abstract of judgment to reflect these changes and to forward a copy of the amended abstract to

the Department of Corrections. In all other respects, the judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.