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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

AUGUSTINE ACOSTA,

Defendant and Appellant.

B260021

(Los Angeles County
Super. Ct. No. MA013724)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Reversed and remanded with directions.

Richard B. Lennon, 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, Noah P. Hill and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

Augustine Acosta, serving a three strikes, indeterminate life sentence of 25 years to life, petitioned pursuant to Penal Code section 1170.126,¹ part of the Three Strikes Reform Act (Proposition 36), for recall of his sentence and resentencing as a second strike offender. The superior court denied the petition on the ground Acosta was ineligible for resentencing because one of the commitment offenses, dissuading a witness by force or threat of force or violence (§ 136.1, subs. (a), (c)(2)), is a serious felony. (See § 1170.126, subd. (e)(2).) We reverse the order and remand for resentencing in light of *People v. Johnson* (2015) 61 Cal.4th 674 (*Johnson*), decided during the pendency of this appeal, and to correct an unauthorized sentence on the dissuading a witness count.

PROCEDURAL BACKGROUND

Acosta was convicted in 1999 of inflicting corporal injury on a cohabitant (count 1), dissuading a witness by force or threat (count 2) and simple battery (count 3). In a bifurcated proceeding the trial court found true special allegations that Acosta had suffered three prior convictions for serious or violent felonies under the three strikes law (one robbery and two burglaries). Acosta was sentenced as a third strike offender to an indeterminate term of 25 years to life for inflicting corporal injury on a cohabitant. The court then imposed and stayed under section 654 three-year determinate middle term sentences for dissuading a witness by force or threat and simple battery. Although the court struck a section 667.5, subdivision (b), prior prison term enhancement allegation in the interest of justice (§ 1385), the minute order from the sentencing hearing does not indicate that the court exercised its discretion to dismiss the prior strike allegations in sentencing Acosta for dissuading a witness or battery. (See generally *People v. Garcia* (1999) 20 Cal.4th 490, 496 [court may exercise discretion to dismiss prior strike allegations as to some, but not all, counts].)²

¹ Statutory references are to this code.

² Neither the record in the current appeal nor our opinion in Acosta's direct appeal following his convictions (*People v. Acosta* (Jan. 9, 2001, B137311) [nonpub. opn.]) explains the felony sentence imposed and stayed for simple battery. According to the minute order of September 17, 1999, the

When Acosta committed these crimes in 1997, none qualified as a serious or violent felony. However, the crime of dissuading a witness by force or threat was classified as a serious and violent felony by voter initiative in 2000. (*Johnson, supra*, 61 Cal.4th at p. 680; see §§ 667.5, subd. (c)(20), 1192.7, subd. (c)(37).)

DISCUSSION

1. Acosta Is Entitled To Recall of His Third Strike Sentence for Inflicting Corporal Injury on a Cohabitant

Acosta raises two contentions on appeal: Whether the classification of dissuading a witness by force or threat as a serious or violent felony for purposes of section 1170.126 is properly based on the law as of November 7, 2012, the effective date of Proposition 36, or the law in effect when Acosta committed the offense; and, if dissuading a witness by force or threat is a serious and violent felony, whether Acosta is nonetheless eligible for resentencing on the offense of inflicting corporal injury on a cohabitant, which is neither a serious nor a violent felony.

The Supreme Court recently resolved both issues in *Johnson, supra*, 61 Cal.4th 674. First, the Court held, when a trial court “resents a third-strike defendant the classification of an offense as serious or violent is based on the law as of November 7, 2012, the effective date of Proposition 36.” (*Id.* at p. 680.) The Court explained, as a matter of statutory interpretation, “the use of the present tense in the provisions describing the nature of the current conviction reflects an intent that the nature of the current conviction as serious or violent is based on its characterization as of the date of resentencing. In addition, the parallel structure of [Proposition 36’s] sentencing and resentencing provisions appears to contemplate identical sentences in connection with identical criminal histories, unless the trial court concludes that resentencing would pose

jury found Acosta not guilty of assault by means likely to produce great bodily injury as charged in count 3 and found him guilty of battery, “a misdemeanor, a lesser offense than that charged in count 3 of the information.” Because we remand in part, as discussed below, for correction of the apparently unauthorized sentence imposed on count 2, the superior court should also determine whether the count 3 sentence is unauthorized and, if so, correct it.

an unreasonable risk to public safety. Finally, interpreting the scheme to allow resentencing despite the current classification of the offense as serious or violent is not supported by the arguments set forth in the ballot pamphlet.” (*Id.* at p. 687.)

Second, the *Johnson* Court held Proposition 36 “requires an inmate’s eligibility for resentencing to be evaluated on a count-by-count basis. So interpreted, an inmate may obtain resentencing with respect to a three-strikes sentence imposed for a felony that is neither serious nor violent, despite the fact that the inmate remains subject to a third-strike sentence of 25 years to life.” (*Johnson, supra*, 61 Cal.4th at p. 688.)

Based on these holdings, although Acosta’s conviction for dissuading a witness by force or threat is properly considered a disqualifying conviction as a serious felony under section 1170.126, he is nonetheless eligible for recall of his indeterminate sentence for inflicting corporal injury on a cohabitant. On remand Acosta must be resentenced as a second strike offender for inflicting corporal injury on a cohabitant pursuant to section 1170.126, subdivision (f), if he satisfies all the criteria set forth in subdivision (e), “unless the court, in its discretion, determines that resentencing [Acosta] would pose an unreasonable risk of danger to public safety.”

2. Acosta’s Sentence for Dissuading a Witness Is Unauthorized and Must be Corrected on Remand

We have an obligation to order the correction of an unauthorized sentence whenever it comes to our attention. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1044-1045; *People v. Dotson* (1997) 16 Cal.4th 547, 554 fn. 6 [an unauthorized sentence is subject to judicial correction “whenever the error comes to the attention of the reviewing court”]; see also *In re Ricky H.* (1981) 30 Cal.3d 176, 191.)³ “[A] sentence is generally ‘unauthorized’ where it could not lawfully be imposed under any circumstance in the particular case.” (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

³ We requested supplemental briefing from Acosta and the Attorney General to address the issue of resentencing Acosta not only on the count for inflicting corporal injury on a cohabitant but also on the count for dissuading a witness.

Because the People had pleaded and proved Acosta was a third strike offender, the trial court was required (whether viewed at the time of his original sentencing or under the revised version of the three strikes law implemented by Proposition 36) either to sentence him to an indeterminate life term of 25 years to life for dissuading a witness by force or threat of force (count 2) or, pursuant to former section 1385, subdivision (a), to state on the record and include in a minute order its decision to dismiss the prior strike allegations as to that count “in furtherance of justice” and its reasons for doing so.⁴ The trial court was jurisdictionally obligated to do one or the other. (See *People v. Vizcarra* (2015) 236 Cal.App.4th 422, 436 [failure to either double sentence on count 3 under the three strikes law or to exercise discretion under § 1385, subd. (a), to strike the strike resulted in a sentence that was not authorized by law]; *People v. Morales* (2003) 106 Cal.App.4th 445, 454-455 [“[a] failure to double subordinate terms when a prior violent or serious felony conviction allegation has been found to be true is a jurisdictional error which can be raised for the first time on appeal”]; *People v. Bradley* (1998) 64 Cal.App.4th 386, 390-391 [“The trial court had a duty to impose sentence in accord with the law. [Citations.] The failure to impose or strike an enhancement is a legally unauthorized sentence subject to correction for the first time on appeal”].)

Accordingly, upon recall of Acosta’s sentence pursuant to section 1170.126, in addition to considering whether to resentence Acosta as a second strike offender for inflicting corporal injury on a cohabitant, the trial court is directed to correct the unauthorized sentence imposed for dissuading a witness and either to sentence Acosta as a third strike offender on that count or to exercise its discretion in conformity with *People*

⁴ When Acosta was sentenced in 1999, section 1385, subdivision (a), required the court’s decision to dismiss a prior strike allegation be reflected in a minute order: “The reasons for the dismissal must be set forth in an order entered upon the minutes.” (Stats. 1986, ch. 85, § 2, p. 8000.) As amended effective January 1, 2015 (see Stats. 2014, ch. 137, § 1), subdivision (a) now provides, “The reasons for the dismissal shall be stated orally on the record. The court shall also set forth the reasons in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter.”

v. Carmony (2004) 33 Cal.4th 367 and *People v. Williams* (1998) 17 Cal.4th 148 to dismiss one or more of the strike allegations as to that count and to sentence Acosta accordingly.

DISPOSITION

The order is reversed, and the matter remanded with directions to the superior court to grant the petition for recall of sentence and to proceed in accordance with the procedures specified in section 1170.126 as to the sentence for inflicting corporal injury on a cohabitant and to correct the unauthorized sentence that appears to have been imposed and stayed for dissuading a witness.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.