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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

AGUSTIN PEREZ,

Defendant and Appellant.

B281529 c/w B281981

(Los Angeles County
Super. Ct. No. KA104290)

APPEAL from judgments of the Superior Court of Los Angeles County. Juan Carlos Dominguez, Judge. Reversed.

Maureen L. Fox, 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, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, and Nima Razfar, Deputy Attorney General, for Plaintiff and Respondent.

* * * * *

In September 2016, we affirmed Agustin Perez’s (defendant’s) multiple convictions, but identified several sentencing errors to be corrected on remand. Defendant complains that the trial court, during resentencing, did not correct the errors we previously identified. The People agree. Accordingly, we remand for sentencing.

FACTS AND PROCEDURAL BACKGROUND

I. Trial and Conviction

For his actions in beating a woman and taking her cell phone, vandalizing a car, and making calls from jail aimed at having other people track down and “talk” to the victims of his earlier crimes, defendant was charged and convicted of (1) robbery (Pen. Code, § 211),¹ (2) assault with a semiautomatic firearm (§ 245, subd. (b)), (3) assault by means of force likely to cause great bodily injury (§ 245, subd. (a)(4)), (4) vandalism (§ 594, subd. (a)(4)), (5) conspiracy to attempt to dissuade a witness (§ 182, subd. (a)(1)), and (6) attempting to dissuade a witness with malice and in furtherance of a conspiracy (§ 136.1, subd. (c)(2)). The jury also found true the allegations that defendant had personally used a semiautomatic firearm (§ 12022.53, subd. (b)) and personally inflicted great bodily injury (§ 12022.7, subd. (a)) while committing the robbery, assault with a semiautomatic firearm, and assault by means of force likely to cause great bodily injury; and that he committed all of the crimes for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)). Defendant admitted that his 1993 conviction for attempted murder constituted a “strike” within our Three Strikes law (§§ 667, subds. (b)-(i))

¹ All further statutory references are to the Penal Code unless otherwise indicated.

& 1170.12, subds. (a)-(d)) as well as a prior “serious felony” (§ 667, subd. (a)(1)).

II. Sentencing

The trial court sentenced defendant to prison for a term of 56 years and four months to life. The court treated the assault with a semiautomatic firearm count as the principal term, and imposed a sentence of 40 years, comprised of a 12-year base sentence (six years, doubled due to the prior strike), plus 10 years for the personal use of a firearm, plus 10 years for the gang enhancement, plus three years for the personal infliction of bodily injury, plus five years for the prior serious felony. The court then imposed a consecutive term of two years and four months on the vandalism count. And it imposed a consecutive term of 14 years to life on the conspiracy to attempt to dissuade a witness count, comprised of a seven-year-to-life base sentence under the gang enhancement for a crime involving “threats to victims [or] witnesses” (§ 186.22, subd. (b)(4)(C)), doubled due to the prior strike. Invoking section 654, the court stayed the remaining sentences—that is, a 34-year sentence for the robbery count, a 34-year sentence for the assault by means of force likely to produce great bodily injury, and a 14-year-to-life sentence on the attempted dissuasion count.

III. Appeal

On appeal, defendant challenged his convictions and his sentence. We affirmed his convictions and rejected some of his sentencing arguments, but found merit in three of his sentencing arguments: (1) the trial court erred in imposing the 10-year enhancement for personal use of a firearm as to *both* assault counts because that enhancement could only be applied to certain enumerated crimes, which did *not* include assault with a

semiautomatic firearm or assault with means of force likely to produce great bodily injury (§ 12022.53, subd. (a)); (2) the trial court erred in imposing a base sentence of seven years to life for the conspiracy to dissuade a witness and for attempted dissuasion because that base sentence under the gang enhancement statute could only be applied where the underlying crime involved “threats to victims and witnesses” (§ 186.22, subd. (b)(4)(C)), and the dissuasion crimes here involved no such threats; and (3) the probation report erroneously stated that defendant’s 1993 conviction was for *murder* rather than *attempted murder*. We remanded the case back to the trial court for resentencing to correct these three errors.

IV. First Resentencing on Remand

In February 2017, the trial court resentenced defendant to 54 years and four months to life in prison. The court treated the robbery count as the principal term and imposed a sentence of 38 years, comprised of a 10-year base sentence (five years, doubled due to the prior strike), plus 10 years for personal use of a firearm, plus 10 years for the gang enhancement, plus three years for personal infliction of great bodily injury, plus five years for a prior serious felony conviction. The court then imposed a consecutive term of two years and four months for the vandalism count. And it imposed a consecutive term of 14 years to life for the conspiracy to dissuade a witness count, comprised of a base sentence of 14 years to life (seven years to life doubled due to the prior strike). Invoking section 654, the court stayed the remaining sentences—a 34-year sentence for assault with a semiautomatic firearm (which included a 10-year gang enhancement that the minute order and abstract of judgment incorrectly reflected as a 10-year firearm enhancement pursuant

to section 12022.53, subdivision (b)),² a 24-year sentence for assault by means of force likely to produce great bodily injury (which also included a 10-year gang enhancement that the minute order and abstract of judgment incorrectly reflected as a 10-year firearm enhancement pursuant to section 12022.53, subdivision (b)), and a 14-year sentence for attempted dissuasion of a witness.³ The court awarded defendant a total of 1,203 days in “actual” custody credits.

V. Second Resentencing on Remand

In April 2017, the trial court resentenced defendant a second time, making two further changes to the sentence imposed in February 2017. First, the court clarified that the sentence for the assault with a semiautomatic firearm (which was stayed) was 34 years. However, the minute order and abstract again mistakenly reflected that a 10-year enhancement pursuant to section 12022.53, subdivision (b) had been imposed. Second, the court modified the sentence for the conspiracy to dissuade a witness count from 14 years to life to 19 years to life, adding a five-year “prior serious felony” enhancement that the court had stricken during the first resentencing. The court again awarded

² As to this count, the trial court also imposed a four-year enhancement for use of a firearm in the commission of a felony (§ 12022.5, subds. (a) & (d)), presumably as an uncharged “lesser included enhancement” (*People v. Fialho* (2014) 229 Cal.App.4th 1389, 1395), because that enhancement was never charged, proven, or admitted. Furthermore, the court inadvertently stated the “total sentence imposed . . . is 30 years” when in fact it totaled 34 years.

³ The court inadvertently stated on the record that the “total” sentence for this count was “11 years,” when in fact it totaled 14 years.

defendant 1,203 days in “actual” custody credits.

VI. Appeal

Defendant filed notices of appeal after the first and second resentencing hearings, and we consolidated the two appeals.

DISCUSSION

I. Sentencing

In this appeal, defendant argues that the trial court did not heed the instructions we laid out in the prior appeal for resentencing because the court erred (1) in imposing a base term of seven years to life on the conspiracy to dissuade a witness count using the gang enhancement statute, (2) in imposing the personal use of a firearm enhancement on both of the assault counts, and (3) in not correcting the probation report’s mistaken reference to his 1993 conviction as murder (rather than attempted murder). Defendant argues that the resulting sentence is unauthorized. (E.g., *People v. Martinez* (2017) 10 Cal.App.5th 686, 721.) The People concede that the trial court erred. We agree.

Accordingly, we remand for a further resentencing where the trial court is to (1) impose a base term of two, three, or four years on the conspiracy to dissuade a witness count (§ 186.22, (b)(1)(A)), along with any other properly charged and proven enhancements, (2) impose sentences on both assault counts that do not include an enhancement for personal use of a firearm pursuant to section 12022.53, subdivision (b), and (3) correct the probation report to reflect that defendant’s 1993 conviction is for attempted murder, not murder.

II. Custody Credits

In this appeal, defendant also contends that the trial court erred in its calculation of custody credits because (1) it did not

separate out the number of days of presentence credits (that is, actual custody time and custody credits that had accrued prior to defendant's initial sentencing) from the number of days of actual postsentence time served, as required by *People v. Buckhalter* (2001) 26 Cal.4th 20, 29-31, 36, and (2) it did not award him any additional time served for the period between the first and second resentencing hearings. Again, the People concede the trial court erred. Again, we agree. (*Id.* at pp. 29-31, 36-37 [requiring separate calculation of presentence credits from "actual days of confinement" pursuant to a sentence, using the date of the initial sentencing as the dividing line].)

Accordingly, at the resentencing on remand from this appeal, the trial court is to set forth the fact that defendant is entitled to 525 days of presentence credits (comprised of 457 actual custody time and 68 days custody credits), and the number of actual time served from the date of the initial sentencing to the date of the resentencing on this second remand.

DISPOSITION

The sentence is reversed, and the matter is remanded to the trial court for resentencing consistent with this opinion. The trial court is also directed to correct the probation report to reflect that defendant suffered a 1993 attempted murder conviction in case number KA014509, and to correctly set forth defendant's custody credits consistent with this opinion. In all other respects, the judgment is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ