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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JASON STARR, Defendant and Appellant.	B293969 (Los Angeles County Super. Ct. No. LA065393)

APPEAL from an order of the Superior Court of Los Angeles County, Shellie Samuels, Judge. Affirmed.

Pamela J. Voich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven E. Mercer, Supervising Deputy Attorney General, Esther P. Kim, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Jason Starr pled no contest to assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)),[1] and admitted the corresponding gun use and gang enhancements, in exchange for a specific sentence of 15 years in state prison. On appeal, appellant argues that the trial court erred in refusing to resentence him pursuant to the Supreme Court's subsequent decision in *People v. Le* (2015) 61 Cal.4th 416 (*Le*), in accordance with the Department of Corrections and Rehabilitation's (Department) recommendation. We affirm the trial court's order.[2]

PROCEDURAL BACKGROUND

A felony complaint charged appellant with assault with a semiautomatic firearm (§ 245, subd. (b) [count 1]), shooting

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[1] All further statutory references are to the penal code unless otherwise indicated.

[2] An order denying recall and resentencing under section 1170, subdivision (d), is an appealable order. (§ 1237, subd. (b); see *People v. Loper* (2015) 60 Cal.4th 1155, 1158 [in a case involving compassionate medical release under section 1170, subdivision (e), "when the proceeding is properly initiated by prison or parole authorities as required by law, the trial court's decision produces an appealable order that may be appealed by the prisoner"].)

at an occupied motor vehicle (§ 246 [count 2]), discharge of a firearm with gross negligence (§ 246.3, subd. (a) [count 3]), 20 counts of vandalism (§ 594, subd. (a) [counts 4–23]), and possession of a firearm by a felon with one prior conviction (§ 12021, subd. (a)(1) [count 24]). The complaint further alleged appellant personally used a firearm in the commission of count 1 (§ 12022.5, subd. (a)), committed counts 1 through 3 for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(B)), and had served a prior prison term (§ 667.5, subd. (b)).

On August 10, 2010, in exchange for dismissal of all other charges, appellant waived his right to a hearing and arraignment, and entered into a negotiated plea agreement whereby he pled no contest to assault with a semiautomatic firearm (§ 245, subd. (b) [count 1]), and admitted the corresponding gun use and gang enhancements (§§ 12022.5, subd. (a), 186.22, subd. (b)(1)(B)). Appellant stipulated to an aggregate prison term of 15 years, consisting of the middle term of 6 years in count 1, plus the middle term of 4 years for the gun use enhancement, plus 5 years for the gang enhancement.

On August 26, 2010, the trial court accepted appellant's plea, and sentenced him to 15 years in state prison, consistent with the terms of the plea agreement.

In 2015, the California Supreme Court decided *Le*, *supra*, 61 Cal.4th 416, which held that under section 1170.1, subdivision (f), "a trial court is precluded from imposing both a firearm enhancement under section 12022.5, subdivision

(a)(1) and a serious felony gang enhancement under section 186.22, subdivision (b)(1)(B) when the crime qualifies as a serious felony solely because it involved firearm use." (*Id.* at p. 429.)

On August 4, 2017, appellant filed a petition for writ of habeas corpus, which the trial court denied on March 16, 2018.[3] The trial court ruled that appellant's petition, filed approximately seven years after he entered his plea of no contest, was "untimely without justification for the delay." The court noted that appellant was challenging an error that would have been "patently obvious" at the time appellant was sentenced in light of our Supreme Court's opinion in *People v. Rodriguez* (2009) 47 Cal.4th 501 (*Rodriguez*). (*Id.* at pp. 508–509 [holding § 1170.1, subd. (f) requires that where defendant's firearm use makes him eligible for sentence enhancements under §§ 12022.5, subd. (a), and 186.22, subd. (b)(1)(C), only the greater enhancement may be imposed].) Citing to *People v. Couch* (1996) 48 Cal.App.4th 1053 (*Couch*), the trial court found that appellant was "estopped from challenging his sentence because he agreed to it and waived any alleged errors which he now claims occurred." The court reasoned that appellant "was not prejudiced by the actual sentence imposed," because "[h]e received the benefit of the bargain." Finally, the court concluded, "Given the above rulings, this court need not decide whether, as [appellant] argues, the trial court lacked

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[3] Appellant's petition for writ of habeas corpus is not included in the record on appeal.

discretion to impos[e] both . . . Penal Code 12022.5 and Penal Code 186.22(b)(1)(B) under the teachings of *People v. Le* (2015) 61 Cal.4th 416."

On June 28, 2018, the Department filed a letter under section 1170, subdivision (d), recommending that the trial court recall appellant's sentence and resentence him pursuant to *Le*, *supra*, 61 Cal.4th 416, in the interests of justice.

On November 8, 2018, the trial court held a hearing to consider the Department's request. The court noted that "[t]his was the exact issue that [appellant] raised on a habeas [corpus petition] which . . . was denied." The court distinguished *Le* on the ground that "the defendant [in *Le*] was convicted in that case by a jury," whereas this case involved "a bargain struck between the People and [appellant]." The court found that appellant "was not prejudiced by the actual sentencing. He receive[d] the benefit of the bargain." The court reiterated that appellant "pled to one count and two enhancements in exchange for a 15-year determinant sentence. In exchange for his plea, the prosecution dismissed three felony counts, 20 misdemeanor counts and numerous enhancements which would have made his sentence significantly longer. He could have been and still could be sentenced to [the] high term of count one of nine year[s] and [the] high term of 10 years on the 12022.5 allegation for a total of 19 years." Relying on *Couch*, *supra*, 48 Cal.App.4th 1053, the court concluded that appellant "is estopped from challenging his sentence because he agreed to

it and waived any alleged error which he now claims occurred." Appellant argued that per *Le*, *supra*, 61 Cal.4th 416, the court had imposed "an illegal sentence." Moreover, "the only thing that we can do mathematically to get the People the benefit of their bargain is to go to 14 years because we can't get to 15."[4] The court rejected appellant's arguments, observing that "[t]his was a gift at 15 years. I'm not inclined to reduce it." The court refused "to give [appellant] even one year less when he made a deal, and he was looking at so many more years -- as I said, the minimum -- at the minimum 19 years for the same count and allegation without the gang allegation would be 19 years. And the People offered him 15 years. . . . It seems he was looking at a very, very long sentence."

Appellant obtained a certificate of probable cause on November 15, 2018, and filed a notice of appeal the same day.

DISCUSSION

Appellant argues that the trial court erred when it denied the Department's request to resentence him in the interests of justice. We review the trial court's decision to resentence or recall pursuant to section 1170 for an abuse of

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[4] The sentencing triad for violations of section 245, subdivision (b) is 3, 6, or 9 years, and the triad for the gun enhancement under section 12022.5, subd. (a) is 3, 4, or 10 years.

discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847; *People v. Moberly* (2009) 176 Cal.App.4th 1191, 1196 ["the broad discretion given to trial courts by section 1170 is subject to review for an abuse of discretion"].) We conclude that the trial court did not abuse its discretion by finding appellant estopped from challenging the agreed-upon determinant sentence, which was unauthorized at the time the plea bargain was made. We affirm the trial court's order.

"'Where defendants have pleaded guilty in return for a *specified sentence*, appellate courts are not inclined to find error even though the trial court acts in excess of jurisdiction in reaching that figure, as long as the court does not lack *fundamental jurisdiction*. . . . The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to "trifle with the courts" by attempting to better the bargain through the appellate process.' [Citation.] 'Where a court is merely acting in excess of its jurisdiction, the defendant who agrees to such actions may be estopped later from challenging the court's actions on jurisdictional grounds.' [Citation.]" (*Couch*, *supra*, 48 Cal.App.4th at pp. 1056–1057; see also *People v. Hester* (2000) 22 Cal.4th 290, 295.) "When a defendant maintains that the trial court's sentence violates rules which would have required the imposition of a more lenient sentence, yet the defendant avoided a potentially harsher sentence by entering into the plea bargain, it may be implied that the defendant waived any rights under such rules by

choosing to accept the plea bargain." (*Couch*, *supra*, at p. 1057.)

California courts have routinely followed this rule, even where the trial court otherwise lacked the authority to impose the agreed-upon sentence. (See, e.g., *People v. Nguyen* (1993) 13 Cal.App.4th 114 [defendant who pleaded guilty in exchange for specified sentence waived right to complain of technical sentencing defects]; *People v. Beebe* (1989) 216 Cal.App.3d 927 [defendant estopped from withdrawing plea, although trial court lacked statutory authority to accept plea providing reduction of felony conviction to misdemeanor upon completion of probation]; *People v. Jones* (1989) 210 Cal.App.3d 124 [by entering into plea agreement, defendant waived right to later challenge improperly imposed prior serious felony enhancement]; *People v. Ellis* (1987) 195 Cal.App.3d 334 [defendant who agreed to imposition of prior serious felony enhancement as part of plea estopped from attacking sentence later shown to be unauthorized by statute]; *People v. Otterstein* (1987) 189 Cal.App.3d 1548 [defendant who agreed to erroneous imposition of great bodily injury enhancement as part of plea bargain waived objection to imposition of enhancement].)

Here, appellant entered into a plea agreement for a specified sentence,[5] and is precluded from asserting the

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[5] Although appellant argues in the opening brief that he bargained for a *maximum sentence* of 15 years, which contemplates that the trial court will exercise its discretion and which appellant may challenge, the plea agreement

claimed sentencing error. It is undisputed that the trial court had fundamental jurisdiction to decide this matter and properly entered judgment in accordance with the specific terms of appellant's plea agreement. Appellant received the benefit of his bargain. He faced the possibility of an exponentially greater prison term than the 15-year sentence he bargained for absent the plea agreement, which as the trial court noted, "dismissed three felony counts, 20 misdemeanor counts and numerous enhancements which would have made his sentence significantly longer." Even if the court had only imposed a single enhancement, in accordance with *Le*, appellant could have still been sentenced to the high term of 9 years in count 1, plus the high term of 10 years for the gun enhancement, for a total of 19 years in prison. Because appellant received the benefit of a more lenient sentence as part of a negotiated plea agreement, he is estopped from raising the instant claim. (See *Couch*, *supra*, 48 Cal.App.4th at p. 1057.)

We reject appellant's challenge to the sentence on the basis that subsequent changes in the law have rendered it unlawful; namely, that the Supreme Court's holding in *Le* precludes imposition of an enhancement for personal use of a

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clearly provides for a *specified sentence* of the six-year middle term for assault with a semi-automatic weapon (§ 245, subd. (b)), the middle term of four years on the personal firearm use enhancement (§ 12022.5, subd. (a)), and the middle term of five years on the gang enhancement (§ 186.22, (b)(1)(B)), which is the sentence the trial court imposed.

firearm pursuant to section 12022.5, subdivision (a) in conjunction with a serious felony gang enhancement pursuant to section 186.22, subdivision (B)(1)(b), when the underlying conviction qualifies as a serious felony solely because it involves use of a firearm. (*Le*, *supra*, 61 Cal.4th at p. 429.)

Appellant relies on "the general rule in California . . . that a plea agreement is '"deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. . . ."' [Citation.] It follows, also as a general rule, that requiring the parties' compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement, nor does the failure of a plea agreement to reference the possibility the law might change translate into an implied promise the defendant will be unaffected by a change in the statutory consequences attending his or her conviction. To that extent, then, the terms of the plea agreement can be affected by changes in the law." (*Doe v. Harris* (2013) 57 Cal.4th 64, 73–74 (*Doe*).)

The cases appellant cites for the proposition that a plea bargain is deemed to incorporate and contemplate subsequent changes in the law are inapposite, however. (See *Harris v. Superior Court* (2016) 1 Cal.5th 984, 991 [plea may be modified or invalidated by state initiative reducing subject felony to a misdemeanor, where initiative is intended to apply retroactively to convictions by plea agreement]; *Doe*,

supra, 57 Cal.4th at pp. 73–74 [plea deemed to incorporate post-judgment Legislative amendment rendering compliance with revised law violation of plea agreement]; *People v. Collins* (1978) 21 Cal.3d 208, 213 [parties may rescind plea where Legislature repeals criminal statute under which defendant was convicted subsequent to plea but prior to sentencing].) In all three cases, the sentence was authorized *at the time the defendant's plea was taken*.

That was not the case here. Section 1170.1, subdivision (f), which prohibited imposing two or more enhancements for using a firearm in the commission of a single offense, was in effect at the time that appellant pled no contest. Also prior to appellant's plea, in *Rodriguez*, our Supreme Court held that the trial court "erred in imposing additional punishment for defendant's firearm use under both section 12022.5's subdivision (a) and section 186.22's subdivision (b)(1)(C)", pursuant to section 1170.1, subdivision (f). (*Rodriguez*, *supra*, 47 Cal.4th at p. 504.) The rule articulated in *Couch*, that a defendant who pleads no contest in return for a specified, more lenient sentence than that to which he was potentially exposed may not complain that the trial court acted in excess of its jurisdiction, controls. (*Couch*, *supra*, 48 Cal.App.4th at p. 1057.)

DISPOSITION

The order is affirmed.

MOOR, J.

We concur:

BAKER, Acting P. J.

KIM, J.