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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

KENDRICK CHESTER,

Defendant and Appellant.

B293792

(Los Angeles County  
Super. Ct. No. NA100648)

APPEAL from an order of the Superior Court of  
Los Angeles County, Judith L. Meyer, Judge. Affirmed.

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Lori Nakaoka, 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, Paul M. Roadarmel, Jr., and Nicholas J.  
Webster, Deputy Attorneys General, for Plaintiff and  
Respondent.

In a previous opinion (*People v. Chester* (Mar. 1, 2018, B271587) [nonpub. opn.] (*Chester I*)), we affirmed defendant and appellant Kendrick Chester’s convictions for robbery and possession of a firearm by a felon, but we ordered the trial court to consider whether to strike a firearm enhancement in light of Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill No. 620). Chester now contends that the resentencing court erred by failing to exercise its independent discretion upon remand. We affirm.

### **FACTS AND PROCEEDINGS BELOW**

In 2017, a jury convicted Chester of one count of robbery (Pen. Code, § 211)<sup>1</sup> and one count of possession of a firearm by a felon. (§ 29800, subd. (a)(1).) The jury also found true an allegation that Chester personally used a firearm in the robbery. (§ 12022.53, subd. (b).) The court sentenced Chester to 15 years in prison, consisting of the high term of five years for robbery, plus 10 years for the firearm enhancement. The court stayed sentence on the conviction of possession of a firearm by a felon pursuant to section 654.

After Chester’s conviction but while his case was still pending on appeal, the Legislature enacted Senate Bill No. 620, which gives trial courts the discretion to strike or dismiss firearm enhancements under section 12022.53 for purposes of sentencing. (See § 12022.53, subd. (h).) Prior to the enactment of Senate Bill No. 620, those enhancements were mandatory. The new law applies retroactively to defendants like Chester whose convictions were not final at the time Senate Bill No. 620 became effective. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1089–1091.)

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<sup>1</sup> Unless otherwise specified, subsequent statutory references are to the Penal Code.

In our opinion in *Chester I*, we remanded for the trial court to consider whether to strike Chester’s firearm enhancement. (*Chester I, supra*, B271587.) The hearing on the firearm enhancement took place on August 30, 2018, before a different judge than the one who presided over Chester’s trial and original sentencing. Chester presented letters from his wife and two of his children asking the court for leniency, as well as certificates indicating his progress in job preparation and parenting courses. He had not presented any of this material at his initial sentencing.

The resentencing court elected not to strike the firearm enhancement and imposed the same 15-year sentence that the trial court originally imposed. The court explained that it believed it did not have the authority to reconsider the imposition of the high base term for robbery: “I can’t reconsider, as far as [two, three, or five years]. That’s not what the appeal court sent this case back for, so high term is already set, as far as five years is concerned.”

The resentencing court went on to explain its decision not to strike the enhancement. The court stated that it “review[ed] the case extensively, and I’ve also reviewed . . . the plea transcript. . . . I do recall the situation and what had happened.” The court explained that “what was most telling to me” was the moment in the transcript of the sentencing hearing in which the trial court spoke about Chester’s extensive criminal history, and “that it was [the trial court’s] intention, no matter what, to add that gun allegation.”

The court continued as follows: “Therefore, after reconsidering hearing both sides['] arguments, I’m very touched by the letters that were sent to this court, and I want [Chester’s

family members] to understand that their letters have been acknowledged and read by this court. . . . [I]t's always regrettable that we get these things sort of after the fact, and it's no fault of the family by any means. And the only person's fault who this is, quite frankly, is Mr. Chester's, and [he] left the court with very little choice at that time. It's always difficult to see when there's a supportive family and people who truly love their father or the aspect of what they know of their father, not the aspect of the court as being done here, and as much as I wish I could grant children's requests, due to the case of this nature, it's the law, and quite frankly, the victim that the court must be concerned with here. I think it's wonderful that his wife is here, still in support of him and still in support of the children, but at this point, based on [the trial court]'s ruling, I don't think I can overrule and will not overrule what he did. The sentence will stand at 15 years."

## DISCUSSION

Chester contends that the resentencing court erred by failing to exercise its own independent discretion as to whether to strike the firearm enhancement, and by refusing to consider whether to impose the low or middle term rather than the high term. In addition, Chester contends that we must remand the case in light of *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) for determination of whether Chester is able to pay the fines and fees the court imposed. We disagree and affirm.

### A. *Exercise of Discretion in Sentencing*

Chester contends that the resentencing court erred by failing to exercise its independent discretion in deciding whether or not to strike his firearm enhancement. We disagree.

“Defendants are entitled to ‘sentencing decisions made in the exercise of the “informed discretion” of the sentencing court,’ and a court that is unaware of its discretionary authority cannot exercise its informed discretion.” (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) When making decisions regarding sentencing, the court’s exercise of discretion must be independent—that is, it must reflect “the use by the judicial officer of his own judgment arrived at after a careful consideration of all the evidence before him in the light of the law applicable to the case.” (*People v. Hernandez* (1984) 160 Cal.App.3d 725, 750) In short, “[t]he essence of the rule mandating independent discretion is that the ultimate decision must be made by the judge himself.” (*Ibid.*)

The transcript of the hearing shows that the resentencing court studied the prior proceedings in the case, including the original sentencing hearing in which the trial court summarized Chester’s long criminal history. This was not improper, and indeed was necessary for the resentencing court to exercise its informed discretion. In taking the prior proceedings into account, the resentencing court did not abdicate its responsibility to reach an independent decision regarding the sentencing enhancement. Instead, it appears that the resentencing court found most relevant the same factors that the trial court relied on when sentencing Chester in the first place, and concluded that it would be inappropriate to show leniency to a defendant who had committed a number of previous crimes before the robbery.

At most, the resentencing court was ambiguous in explaining its reasoning. It is possible to interpret the resentencing court’s statement, “I don’t think I can overrule and will not overrule what [the trial court] did,” as indicating

that the court did not believe it had the authority to disagree with the trial court's interpretation of Chester's conduct. But it is at least equally likely that the court meant merely that in light of Chester's conduct in this and prior cases, the court could not in good conscience strike the firearm enhancement. We presume that the resentencing court knows the law. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913.) Unless the court's statements "unambiguously disclose that . . . the [resentencing court] applied an erroneous interpretation of the law" (*People v. Tessman* (2014) 223 Cal.App.4th 1293, 1303), we will not reverse on the basis of oral statements from the bench.

We agree with Chester that the resentencing court erred in concluding that it could not consider whether to impose the low or middle term for robbery, rather than the high term. Although we remanded the case for the purpose of allowing the resentencing court to consider striking the firearm enhancement, when we did so we vacated the sentence on the robbery count. (See *Chester I, supra*, B271587.) As the court explained in a slightly different context in *People v. Hill* (1986) 185 Cal.App.3d 831, 834, "[w]hen a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. . . . This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components." At a sentencing hearing, the court must be free to adjust the base term in addition to deciding whether or not to strike the firearm enhancement in order to reach a just sentence.

We will not reverse on this basis, however, because the resentencing court's error was harmless. When the trial court misunderstands its discretion in sentencing, "the appropriate

remedy is to remand for resentencing unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) In this case, the record clearly indicates that the resentencing court believed a sentence of 15 years in prison was appropriate, and it would be idle to remand the case for further proceedings to confirm that.

### **B. *Reassessment of Fines and Fees***

At the resentencing hearing, the court ordered Chester to pay a restitution fine of \$4,500 (§ 1202.4, subd. (b)), as well as a court operation assessment of \$80 (§ 1465.8, subd. (a)(1)) and a court facility assessment of \$60 (Gov. Code, § 70373, subd. (a)(1)). These fines and fees were identical to those the trial court imposed at the initial sentencing hearing. Chester did not object to these fines and fees at either sentencing hearing, and did not request that the court consider his ability to pay them.

For the first time in this appeal, Chester argues that the fines and fees should be stayed unless and until the government proves he has the ability to pay them. He relies on *Dueñas*, *supra*, 30 Cal.App.5th 1157, which was decided in January 2019, while this appeal was pending.

In *Dueñas*, the trial court imposed on the defendant certain assessments and a \$150 restitution fine—the minimum amount required under section 1202.4, subdivision (b). The court rejected the defendant’s argument that the imposition of the assessments and the fine without consideration of her ability to pay them violated her constitutional rights to due process and equal protection. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1163.)

The Court of Appeal reversed, holding that “the assessment provisions of Government Code section 70373 and Penal Code section 1465.8, if imposed without a determination that the defendant is able to pay, are . . . fundamentally unfair[, and] imposing these assessments upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution.” (*Dueñas, supra*, at p. 1168.) The imposition of a minimum restitution fine without consideration of the defendant’s ability to pay also violated due process. (*Id.* at pp. 1169-1172.) The court reversed the order imposing the assessments and directed the trial court to stay the execution of the restitution fine “unless and until the People prove that [the defendant] has the present ability to pay it.” (*Id.* at p. 1173.)

The Attorney General contends that Chester forfeited any challenge to the assessments and fine by failing to object or raise the issue below. This general rule is well-settled. (See, e.g., *People v. Aguilar* (2015) 60 Cal.4th 862, 864; *People v. Avila* (2009) 46 Cal.4th 680, 729.) Chester argues, however, that the forfeiture rule should not apply because his sentencing occurred prior to *Dueñas*, and any objection would therefore have been futile. Courts have addressed similar arguments with different results. In *People v. Castellano* (2019) 33 Cal.App.5th 485, Division Seven of this court held that the forfeiture rule did not apply to a defendant sentenced prior to *Dueñas* because no court had previously “held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant’s ability to pay.” (*Id.* at p. 489; accord, *People v. Johnson* (2019) 35 Cal.App.5th 134, 138.) In *People v. Frandsen* (2019) 33 Cal.App.5th 1126 (*Frandsen*), Division Eight of this court



applied the forfeiture rule and disagreed with the defendant's assertion that *Dueñas* constituted “‘a dramatic and unforeseen change in the law.’” (*Id.* at p. 1154; accord, *People v. Bipialaka* (2019) 34 Cal.App.5th 455.)

More recently, the Fourth District, Division One, addressed the forfeiture argument in *People v. Gutierrez* (2019) 35 Cal.App.5th 1027 (*Gutierrez*). In that case, the trial court imposed a restitution fine in the amount of \$10,000 and certain fees and assessments totaling \$1,300. The court held that the defendant, who had been sentenced prior to *Dueñas*, had forfeited his right to raise an inability-to-pay argument on appeal by failing to raise the argument below. (*Id.* at p. 1029.) The court expressly avoided the “perceived disagreement” between *Castellano* and *Frandsen* about the foreseeability of *Dueñas* by explaining that, in the case before it, the trial court had imposed a restitution fine greater than the statutory minimum; indeed, it had imposed the maximum amount permitted by statute. (*Id.* at p. 1032) Because “even before *Dueñas*” section 1202.4 permitted the court to consider a defendant's ability to pay when it imposed a fine above the statutory minimum, “a defendant had every incentive to object to imposition of a maximum restitution fine based on inability to pay.” (*Id.* at p. 1033; see also *Frandsen, supra*, 33 Cal.App.5th at p. 1154 [prior to *Dueñas*, an object to a fine above the statutory minimum would not have been futile]; *People v. Avila, supra*, 46 Cal.4th at p. 729 [defendant forfeited challenge to restitution fine greater than the minimum by failing to raise the argument below].) “Thus,” the *Gutierrez* court explained, “even if *Dueñas* was unforeseeable . . . , under the facts of this case [the defendant] forfeited any ability-to-pay argument regarding the restitution fine by failing to object.”

(*Gutierrez, supra*, 35 Cal.App.5th at p. 1033.) Regarding the lesser sum imposed for other fees and assessments, the court stated that the defendant’s challenge to these amounts was also forfeited because, as “a practical matter, if [the defendant] chose not to object to a \$10,000 restitution fine based on an inability to pay, he surely would not complain on similar grounds regarding an additional \$1,300 in fees.” (*Ibid.*)

The *Gutierrez* court’s rationale applies here. Because the court imposed a \$4,500 restitution fine—an amount far greater than the \$300 statutory minimum—Chester had the right, even before *Dueñas*, to request that the court consider his inability to pay that amount and “had every incentive” to do so. (*Gutierrez, supra*, 35 Cal.App.5th at p. 1033.) Because he failed to raise his inability to pay the \$4,500 fine, Chester, like the defendant in *Gutierrez*, “surely would not complain on similar grounds” as to the relatively insignificant \$80 and \$60 assessments. (*Ibid.*; see also *Frandsen, supra*, 33 Cal.App.5th at p. 1154 [because the defendant failed to object to \$10,000 restitution fine based on inability to pay, he failed on appeal to show “a basis to vacate assessments totaling \$120 for inability to pay”].) We therefore conclude that defendant has forfeited his arguments challenging these assessments and restitution fine.

**DISPOSITION**

The trial court's order is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

WEINGART, J.\*

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