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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

MAURICE MALCOLM
TAYLOR,

Defendant and Appellant.

B292901

(Los Angeles County
Super. Ct. No. YA097520)

APPEAL from the judgment of the Superior Court of Los Angeles County. Scott T. Millington, Judge. Affirmed and remanded with directions.

Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Defendant and appellant Maurice Malcolm Taylor was convicted by jury of multiple felonies arising from a vicious home invasion robbery. He was sentenced to state prison for 19 years eight months. Defendant contends he is entitled to a remand for resentencing to allow the trial court the opportunity to exercise its newly granted discretion pursuant to Senate Bill No. 1393 (2017-2018 Reg. Sess.). He further contends the court's imposition of various statutory fines and fees was improper, citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

We affirm defendant's conviction and remand with directions for the trial court to conduct a new sentencing hearing in light of the passage of Senate Bill No. 1393 during the pendency of this appeal. We conclude defendant has forfeited his contention with respect to the imposition of statutory fines and assessments.

FACTUAL AND PROCEDURAL BACKGROUND

On December 9, 2017, defendant committed a violent home invasion robbery in which he hogtied the homeowner, causing serious injuries, threatened him with death, and stole numerous items. Defendant left the homeowner tied up, face down in a bathtub and fled in the victim's Porsche. The victim was not discovered until seven hours later and taken to a hospital.

Defendant was charged with first degree residential robbery (Pen. Code, § 211 [count 1]), first degree residential burglary (§ 459 [count 2]), mayhem (§ 203 [count 3]), false imprisonment by violence (§§ 236, 237, subd. (a) [count 4]), criminal threats (§ 422, subd. (a) [count 5]), and unlawful taking or driving of a vehicle (Veh. Code, § 10851 [count 6]). Count 6 was originally alleged as burglary of a vehicle but was amended during trial to conform to proof.

It was alleged as to counts 1 through 4 that defendant inflicted great bodily injury on the victim in the commission of the offenses (Pen. Code, § 12022.7, subd. (a)). It was further alleged that defendant had suffered a prior felony conviction that qualified as a strike prior and a felony enhancement (§§ 667, subds. (b)-(j), 1170.12, subd. (b), & § 667, subd. (a)(1)), as well as two prison priors (§ 667.5, subd. (b)).

The case proceeded to a jury trial in June 2018. The jury found defendant guilty of all counts, except criminal threats (count 5), and found true the great bodily injury allegations. The court declared a mistrial as to count 5 and the prosecutor subsequently dismissed it.

Defendant waived his right to a jury trial on the prior allegations and admitted he had previously suffered two prison priors and a prior felony conviction that qualified as a strike and as a felony enhancement.

The court sentenced defendant to state prison for 19 years eight months calculated as follows: a midterm of four years on count 1 (robbery), doubled due to the strike, plus three years for the great bodily injury enhancement, a consecutive term of two years eight months (one-third the midterm, doubled) on count 3 (mayhem), a consecutive five-year term for the felony enhancement, and a consecutive one-year prison prior. The court imposed concurrent midterms on counts 2, 4 and 6.

Defendant was awarded 283 days of presentence custody credits. The court imposed the following fines and assessments: \$300 restitution fine (Pen. Code, § 1202.4, subd. (b)), \$200 court security fee (Pen. Code, § 1465.8), and \$150 criminal conviction assessment (Gov. Code, § 70373). The court imposed and stayed a \$300 parole revocation fine (Pen. Code, § 1202.45).

This appeal followed.

DISCUSSION

1. The Felony Enhancement

Defendant argues, and respondent concedes, that he is entitled to a remand for resentencing pursuant to Senate Bill No. 1393. We agree.

On January 1, 2019, during the pendency of this appeal, Senate Bill No. 1393 became effective. As relevant here, Senate Bill No. 1393 amended provisions of Penal Code section 667 and section 1385, granting discretion to trial courts to strike a prior serious felony conviction in connection with imposition of the five-year enhancement set forth in section 667, subdivision (a)(1). (Stats. 2018, ch. 1013, § 1, § 2.) At the time defendant was sentenced, imposition of the enhancement was mandatory.

Defendant is entitled to the benefit of the amendatory provisions. (*In re Estrada* (1965) 63 Cal.2d 740, 744-745; see also *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [“remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement”].)

On remand, the trial court shall exercise its newly granted sentencing discretion pursuant to Senate Bill No. 1393. The trial court shall consider the factors enumerated in California Rules of Court, rule 4.428(b) in making its determination whether to strike, dismiss or impose the five-year enhancement. We express no opinion on how the court should exercise its discretion.

2. The Statutory Fines and Assessments

Relying on *Dueñas, supra*, 30 Cal.App.5th 1157, defendant contends the trial court’s imposition of the court security fee, criminal conviction assessment and restitution fine without a

finding of his ability to pay violated his due process rights. Defendant concedes he did not object on these, or any, grounds in the trial court.

Defendant has forfeited this contention. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155 (*Frandsen*) [finding forfeiture where no objection raised in trial court to imposition of court operation assessment, criminal conviction assessment and restitution fine]; accord, *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1032-1033; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464; see also *People v. Avila* (2009) 46 Cal.4th 680, 729 [finding forfeiture where the defendant failed to object to imposition of restitution fine under Pen. Code, former § 1202.4 based on inability to pay].)

Defendant urges us to reject *Frandsen* and find the contention has not been forfeited, citing *People v. Castellano* (2019) 33 Cal.App.5th 485, 489. We believe *Frandsen* to be the better reasoned decision and conclude there is no basis for excusing defendant's forfeiture on this issue.

In any event, nothing in the record supports defendant's contention the imposition of the fines and assessments was fundamentally unfair to defendant or violated his constitutional right to due process as found in *Dueñas*. The fines and assessments were imposed pursuant to clear statutory authority. *Dueñas* not only involved unique factual circumstances not applicable here, but the validity of its analytical framework has been questioned by numerous courts: see, e.g., *People v. Allen* (2019) 41 Cal.App.5th 312, 326-329 (review den. Jan. 2, 2020); *People v. Kingston* (2019) 41 Cal.App.5th 272, 279-282; *People v. Hicks* (2019) 40 Cal.App.5th 320, 326-329 (review granted

Sept. 14, 2019, S258946); *People v. Caceres* (2019) 39 Cal.App.5th 917, 926-929 (review den. Jan. 2, 2020).

Defendant was represented by counsel at the sentencing hearing and in the absence of a timely objection, the trial court could reasonably presume the fines and assessments would be paid out of defendant's future prison wages. (See, e.g., *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397; *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837; *People v. Frye* (1994) 21 Cal.App.4th 1483, 1487.)

DISPOSITION

The judgment of conviction is affirmed.

The matter is remanded for a new sentencing hearing to allow the superior court the opportunity to exercise its newly granted discretion pursuant to Senate Bill No. 1393 to strike or impose the five-year enhancement pursuant to Penal Code section 667, subdivision (a)(1). At the resentencing hearing, defendant has the right to be present and be represented by counsel. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 34-35.)

Following resentencing, the superior court is directed to prepare and transmit an abstract of judgment to the Department of Corrections and Rehabilitation.

GRIMES, J.

I CONCUR:

WILEY, J.

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BIGELOW, P.J., Concurring:

I concur. I write separately to add that I believe the imposition of the assessments and restitution fine did not violate appellant's Due Process rights, as articulated in *People v. Hicks* (2019) 40 Cal.App.5th 320.

BIGELOW, P. J.