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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT BESINGER,

Defendant and Appellant.

2d Crim. No. B280455  
(Super. Ct. Nos. 2012007062,  
2012015126 & 2015001404)  
(Ventura County)

Robert Besinger appeals the sentencing order after he pled guilty in three cases (Case Nos.: 2012007062, 2012015126 & 2015001404). (Pen. Code, § 1237, subd. (b).)<sup>1</sup> He was sentenced to a total of 24 years in state prison.

Besinger contends the trial court failed to exercise its discretion because it did not consider mitigating factors. The Attorney General argues no error but contends that a remand is necessary because of an ambiguity in the court's oral

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<sup>1</sup> Further unspecified statutory references are to the Penal Code.

pronouncement of sentence. On this record, we cannot review for error because we cannot determine what sentence the court intended to impose. Therefore, we remand the case to the trial court to resolve the ambiguity.

### **PROCEDURAL HISTORY**

In Case No. 2012007062, Besinger pled guilty to one count of first degree residential burglary (§ 459) and admitted a prior serious felony conviction (§ 667, subd. (a)(1)).

In Case No. 2012015126, Besinger pled guilty to possessing a firearm by a felon (§ 29800, subd. (a)(1); count 1) and possessing a controlled substance (Health & Saf. Code, § 11377, subd. (a); count 4). He admitted a prior felony conviction.

While out on bail in the two prior cases, Besinger committed another residential burglary. He pled guilty in Case No. 2015001404 to first degree residential burglary (§ 459). He admitted two allegations that he committed the burglary while released on bail (§ 12022.1, subd. (b)), two prior serious felony convictions (§ 667, subd. (a)), and two prior strike convictions (§§ 667, subds. (c) & (e), 1170.12). The parties agreed that the maximum aggregate sentence for the three cases would be 24 years.

The trial court sentenced Besinger to an aggregate term of 24 years in state prison for the three cases. The sentence consisted of 22 years in Case No. 2015001404, a consecutive 8 months for count 1 and a concurrent 180 days for count 4 in Case No. 2012015126, and a consecutive 16 months in Case No. 2012007062.

### **DISCUSSION**

Besinger contends that this case should be remanded for resentencing because the trial court failed to exercise

sentencing discretion by failing to consider mitigating factors. The Attorney General disagrees the trial court failed to exercise discretion, but agrees the matter should be remanded because of an ambiguity in the oral pronouncement of the sentence.

Where there is a discrepancy between the clerk's minutes, abstract of judgment, and the oral pronouncement of a sentence, the oral pronouncement prevails. (*People v. Price* (2004) 120 Cal.App.4th 224, 242 (*Price*).) When the oral pronouncement is ambiguous and the trial court's intended sentence cannot be determined from the record, the matter should be remanded for resentencing. (*Id.* at pp. 244-245.)

Here, there are discrepancies and ambiguities in the clerk's minutes, abstract of judgment, and the oral pronouncement of sentence. The clerk's minutes and the abstract of judgment reflect a total sentence of 22 years for Case No. 2015001404, using the midterm sentence of four years for the residential burglary offense. The court orally pronounced that the total sentence for this case was 22 years, but it stated that it was imposing "the low term of two years." Were a low term imposed, the total sentence would be 18 years: two-year low term, doubled for a prior strike allegation (§§ 667, subd. (e)(1), 1170.12, subds. (b) & (c)), plus five years each for the two prior serious felony convictions (§ 667 subd. (a)), plus two years each for the two on-bail enhancements (§ 12022.1, subd. (b)). The imposition of the midterm sentence, however, would result in a 22-year sentence.

Based on this record, we cannot be certain of whether the trial court intended to impose a low term of two years or a midterm of four years for the burglary offense. Although the clerk's minutes and the abstract of judgment reflect that the

court selected the midterm, the oral pronouncement controls. (*Price, supra*, 120 Cal.App.4th at p. 242.) The court pronounced it was imposing the low term, but also pronounced that the total sentence was 22 years. Either the court erroneously stated it was selecting the low term or it miscalculated the total term. Because of this ambiguity, we are unable to properly review Besinger’s claim of error. “In order to understand this claim of error, we must understand what sentence was imposed . . . .” (*Id.* at p. 241.) We therefore remand the sentencing order so that the trial court can clarify the sentence and cure the ambiguity in the record. (§ 1260.)

### **DISPOSITION**

The sentencing order is reversed and remanded with direction to the trial court to clarify whether the sentence imposed for the offense in case number 2015001404 consisted of a low term of two years or a midterm of four years and the reasons for that selection.

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TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Bruce A. Young, Judge

Superior Court County of Ventura

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Jolene Larimore, 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, Margaret E. Maxwell, Supervising Deputy Attorney General, Peggy Z. Huang, Deputy Attorney General, for Plaintiff and Respondent.