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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. FREDDIE CHACON Defendant and Appellant.	2d Crim. No. B238877 (Super. Ct. No. F210166) (San Luis Obispo County)
THE PEOPLE Plaintiff and Respondent, v. RAUL ALBERTO LOPEZ,	2d Crim. No. 241416 (Super. Ct. No. F2099900) San Luis Obispo County

Freddie Chacon and Raul Alberto Lopez appeal post-judgment habeas orders reducing their life-without-possibility-of-parole sentences to life with parole for aggravated kidnapping for ransom with special findings that they inflicted bodily harm and exposed the victim to a substantial likelihood of death. (Pen. Code, § 209, subd. (a).)[1] Chacon (age 17)

[1] All statutory references are to the Penal Code unless otherwise stated.

and Lopez (age 16) were juveniles when they committed the offense. The United States Supreme Court has subsequently held that the sentences to life without the possibility of parole violates the Eight Amendment. (*Graham v. Florida* (2010) 560 U.S. __ [176 L.Ed.2d 825] (Graham).) Appellants contend that the trial court abused its discretion in not ordering new trials or granting probation. We affirm.

Procedural History

In 1993, appellants attempted to escape from the California Youth Authority in Paso Robles by kidnapping the facility librarian, Ava Goldman. Appellants demanded a truck and hit Goldman in the face, choked her unconscious, stabbed her in the stomach, and poked and cut her with shanks. Roy Victorino tried to rescue Goldman but Lopez swung at him with a shank, puncturing Victorino's stomach and cutting his wrist.

Appellants entered pleas of not guilty, waived jury trial, and submitted on the preliminary hearing transcript. The trial court found appellants guilty of aggravated kidnapping for ransom with special findings that they inflicted bodily harm, exposed the victim to a substantial likelihood of death, and personally used a dangerous or deadly weapon. (§ 209, subd. (a); 12022, subd. (b).)[2]

Appellants were sentenced to life without possibility of parole (LWOP) on the kidnapping for ransom count, plus one year on the weapon enhancement. (§§ 209, subd. (a); 12022, subd. (b).) On the counts for escape by means of force and violence, two counts of assault with a deadly weapon, and extortion, the trial court imposed a consecutive nine year sentence and ordered that it be served before the LWOP sentence. (§669.)

In 1995, we vacated the convictions for attempted kidnapping and false imprisonment, stayed the sentences for escape, assault with a deadly weapon and extortion (§ 654), reduced the nine-year sentence to five years, and affirmed the judgment as modified

[2] Appellants were also convicted of escape by means of force and violence (Welf. & Inst. Code, § 1768.7, subd. (b)), two counts of assault with a deadly weapon (§ 245, subd. (a)(1)), extortion (§ 520), false imprisonment of a hostage and use of the victim as shield (§§ 210.5, 236), attempted kidnapping (§§ 664, 207, subd. (a)), and false imprisonment by violence (§ 236) with use of a deadly weapon or dangerous weapon enhancements (§ 12022, subd. (b).)

to provide that the five-year sentence be served before the LWOP sentence. (*People v. Chacon* (1995) 37 Cal.App.4th 52, 58.) We concluded that the sentences were lawfully predicated on the heinous nature of the crime and appellant's individualized culpability, that there was no likelihood that the trial court would impose a more lenient sentence, and that a "[r]emand for resentencing would exalt substance over form. [Citation.]" (*Id.*, at p. 67.)

Graham v. Florida

In 2010, the United States Supreme Court in *Graham v. Florida, supra,* 560 U.S. __ [179 L.Ed.2d 825] (*Graham*) determined that sentencing a juvenile to life without the possibility of parole for a nonhomicide offense violates the Eight Amendment's prohibition against cruel and unusual punishment. Relying on *Graham,* appellants filed habeas petitions to vacate the LWOP sentences and be resentenced. The San Luis Obispo County District Attorney agreed that *Graham* controlled and "that the matter should be returned to the sentencing court (in this case that is Judge Michael Duffy) and that court sentence [appellants] to life in prison with the possibility of parole pursuant to *Graham.*"

On June 30, 2011, a superior court commissioner "granted" the habeas petitions "to the extent that it orders the matters returned to the trial court for re-sentencing of the Petitioner[s] consistent with Graham v. Florida (2010) 130 S.Ct. 2011 [176 L.Ed.2d 825]."[3]

Before appellants were resentenced, Lopez filed a motion for a supplemental probation report and motions for new trial and to withdraw his 1994 jury trial waiver. Lopez claimed that the habeas order restored him to his original position, as if he had never been sentenced, and that he was entitled to a new trial because his waiver of jury trial/right of confrontation was based on the "threat" of a LWOP sentence that has since been deemed unconstitutional.

[3] In an earlier order filed May 26, 2011, the Superior Court Commissioner made a similar order. It referenced this Court of Appeals order transferring the matter for "reconsideration in light of *Graham.*" It also said "that the sole question to be decided is whether the sentencing court must resentence the petitioners according to *Graham.*"

Chacon filed similar motions and filed a Code of Civil Procedure section 170.6 peremptory challenge to reassign the motions to a different judge. Judge Michael Duffy, the trial judge who heard the trial and imposed the original sentence, denied the peremptory affidavit on the ground it was untimely. The trial court also denied the motions to withdraw the jury trial waivers and new trial motions, ordered a supplemental probation report for Lopez, and resentenced Lopez and Chacon to life with parole.

Limited Scope of Habeas Relief

In a habeas proceeding, the order to show cause institutes proceedings to determine what issues of fact are to be decided. (*In re Hochberg* (1970) 2 Cal.3d 870, 875-876, fn. 4.) Because the order to show cause delineates the scope of the proceeding, the habeas petitioner cannot raise additional claims in the traverse. (*People v. Duvall* (1995) 9 Cal.4th 464, 478; *In re Clark* (1993) 5 Cal.4th 750, 781, fn. 16.) "Under this process, the issues to be addressed may not extend beyond the claims in the habeas petition." (*Board of Prison Terms v. Superior Court* (*Ngo*) (2005) 130 Cal.App.4th 1212, 1235.)

Here the order to show cause directed the San Luis Obispo County District Attorney to show cause why writs of habeas corpus should not issue ordering a resentencing to life in prison with the possibility of parole pursuant to *Graham.* Thereafter, the district attorney conceded that the LWOP sentences should be reduced to life sentences in accordance with *Graham*.

In the habeas petitions appellants did not challenge the 1994 jury trial waivers or request a new trial. Nor are these issues mentioned in the order to show cause. "This process of defining the issues is important because issues not raised in the pleadings need not be addressed. [Citation.]" (*People v. Duvall, supra*, 9 Cal.4th at p 478.) It limits the trial court's power and authority to fashion a remedy. (§ 1484; *Board of Prison Terms v. Superior Court* (*Ngo*), *supra,* 130 Cal.App.4th at p. 1236.) Here the habeas petitions are limited to the LWOP component of the sentence which is excessive under *Graham* and may be dealt with without disturbing the valid portion of the sentence. (See e.g., *In re Seeley* (1946) 29 Cal.2d 294, 302-303.)

Motion to Withdraw Jury Trial Waiver and New Trial Motions

Appellants claim that the trial court erred in denying their motions to withdraw the 1994 jury-trial waivers and motions for new trial. As discussed, the motions were outside the scope of the habeas petitions and properly denied. (*Ibid*.; *In re Clark, supra*, 5 Cal.4th at p. 781, fn. 16.) On a remand for resentencing, the trial court is precluded from hearing a motion for new trial or motion to vacate a plea. (See e.g., *People v. Pineda* (1967) 253 Cal.App.2d 443, 453; *People v. Oppenheimer* (1965) 236 Cal.App.2d 863, 866 [trial court lacked jurisdiction to entertain new trial motion after case remanded to vacate order granting probation and correct sentencing errors].)

Peremptory Challenge

Chacon argues that Judge Duffy erred in not transferring the motion for new trial and motion to withdraw the jury-trial waivers to a different judge. (Code Civ. Proc., § 170.6, subd. (a)(2).) Judge Duffy ruled that the peremptory challenge was untimely because the matter was assigned to his department for all purposes five months earlier. The ruling is correct and may be reviewed only by writ of mandate. (Code Civ. Proc., §§ 170.6, subd. (a)(2); 170.3, subd. (d).) Appellants are precluded from challenging the order in this appeal. (*People v. Hull* (1991) 1 Cal.4th 266, 268.) Waiver aside, a Code of Civil Procedure section 170.6 peremptory challenge does not lie on a remand for resentencing. (See *Peracchi v. Superior Court* (2003) 30 Cal.4th 1245 1249.) "[W]hen resentencing is all that is required, the parties are not placed in the same position as if there had been no trial." (*Id.*, at p. 1257.)

Supplemental Probation Report

Chacon asserts that the trial court abused its discretion in denying his motion for a supplemental probation report. The argument is based on the theory that the habeas order placed Chacon in the same position as if he had never been sentenced. (See e.g., *In re Cortez* (1971) 6 Cal.3d 78, 88 [on resentencing defendant entitled to all procedures and rights normally available before pronouncement of judgment]; *Van Velzer v. Superior Court* (1984) 152 Cal.App.3d 742, 744 [resentencing hearing includes the right to a current probation report].) But that is not what happened.

Habeas relief was granted on the LWOP component of the sentence, not the weapon use enhancement or the determinate five year sentence. The order to show cause directed the district attorney to show cause why appellants should not be resentenced to life with the possibility of parole consistent with *Graham*. Appellants cite no authority that the trial court could, on remand, split the sentence by imposing a prison sentence on some offenses and granting probation on the aggravated kidnapping count. (See *People v. Mendosa* (1918) 178 Cal. 509, 511 [defendant cannot be sentenced to both state prison and released on probation in the same case]; *People v. Marks* (1927) 83 Cal.App. 370, 375-376 [same].)

In the first appeal, appellants' determinate sentence was reduced from nine years to five years. Having received the benefit of the sentence modification, appellants are precluded from claiming that the habeas order vacates the entire sentence (i.e., both the determinate and indeterminate sentences) and places them in the position as if they had never been sentenced.[4] To hold otherwise, would undermine the strong public policy favoring the finality of judgments. (*In re Clark, supra,* 5 Cal.4th at p. 770.) "Were we to come to appellant[s'] aid at this late hour, . . . [w]e would be encouraging a further expenditure of time and scarce resources chasing the ever elusive ideal of 'perfect justice.' [Citation.]" (*People v. Lyons* (2009) 178 Cal.App.4th 1355, 1363.)

Due Process

Appellants argue that their due process rights were violated because the trial court failed to exercise an informed discretion at resentencing. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) Appellants complain that the trial court "converted" the LWOP sentence to a parole-eligible life term and declined to consider probation. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 847-848 [trial court's failure to recognize sentencing discretion is itself, an abuse of discretion; *People v. Tatlis* (1991) 230 Cal.App.3d 1266,

[4] Based on appellants' construction of the law, a remand to correct any sentencing error (i.e., to recalculate presentence custody credits, to strike an enhancement, or to stay a sentence pursuant to section 654), constitutes a "resentencing" by which the defendant can move for new trial, make a motion to withdraw a jury-trial waiver, and demand that the trial court order a supplemental probation report and consider the sentence anew.

1274 [failure to exercise informed sentencing discretion and ordering a supplemental probation report an abuse of discretion].)

Appellants waived the due process issue by not objecting on that ground and are precluded from raising the issue for the first time on appeal. (See e.g., *United States v. Olano* (1993) 507 U.S. 725, 731-732 [123 L.Ed.2d 508, 517-518; *People v. Sanders* (1995) 11 Cal.4th 475, 526, fn. 17.) Although section 1203, subdivision (e) provides that defendants convicted of kidnapping with a weapon may receive probation "in unusual cases," probation is not a constitutional right. (See *People v. Howard* (1997) 16 Cal.4th 1081, 1092.) Other than reduce the LWOP sentences to life with possibility of parole, the habeas order did not require the trial court to consider other sentencing options.

Conclusion

The order to show cause limited the scope of the habeas hearing. It authorized the trial court to order parole eligibility. Consistent with *Graham*, the trial court reduced the LWOP sentences to life with possibility of parole, which rendered appellants eligible for parole by operation of law. (See § 3046, subd. (a)) [prisoner serving life sentence is eligible for parole in seven years].) The parole eligibility aspect of the appeal is now moot because appellants were granted full Eighth Amendment relief. Chacon's acknowledges that his parole hearing date is set for July 30, 2013. He does not contend that the date set for the hearing is constitutionally defective. A June 14, 2012 Board of Prison Terms Notice of Hearing in the superior court file indicates that Lopez's parole hearing was scheduled for August 29, 2012. (See Evid. Code, §§ 452, subd. (d); 459 [appellate court may take judicial notice of superior court file].)

Even if we were to assume that the trial court abused its discretion in not ordering a supplemental probation report, any error was harmless.[5] (*People v. Dobbins*

[5] Chacon argues that the aggravated kidnapping statute (§ 209, subd. a)) authorizes only two possible sentences: (1) probation or (2) life without parole where the victim suffers bodily harm or is exposed to a substantial likelihood of death. He claims that a *Graham* sentence of life with parole is unlawful unless the trial court strikes the bodily harm and substantial likelihood of death findings. (See e.g., *People v. Marsh* (1984) 36 Cal.3d 134, 144.) The trial court rejected the argument on the ground that "[t]he allegations are what they were back then. It's just because of [their] age [that appellants] can't have a sentence [of] life

(2005) 127 Cal.App.4th 176, 182 [no constitutional right to supplemental probation report].) The trial court stated that "if I had the discretion to sentence to something less than life, I don't believe I would do so." The seasoned trial court made an "informed" sentence. Remanding the matter back for further proceedings would be an idle act. "Despite the expanded scope of the great writ on California, the principle endures that habeas corpus will not lie to correct procedural error which is not of fundamental jurisdictional character. [Citations.]" (*In re Sands* (1977) 18 Cal.3d 851, 857.)

The judgments (habeas orders modifying LWOP sentences to sentences of life with possibility of parole) are affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

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without possibility of parole." We agree. Because the Eight Amendment trumps state law, there is no requirement that a trial court strike the bodily harm and substantial likelihood of death findings before imposing a life sentence that is constitutionally mandated by *Graham*, *supra*, 560 U.S. ___ [176 L.Ed.2d 825].) In any event, appellants now have the benefit of newly enacted section 1170, subdivision (d)(2), effective January 1, 2013.

Michael L. Duffy, Judge

Superior Court County of San Luis Obispo

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