Filed 5/14/18 P. v. DeJohnette CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CERRON DEJOHNETTE, Defendant and Appellant.	B278736 (Los Angeles County Super. Ct. No. LA083716)

APPEAL from a judgment of the Superior Court of Los Angeles County, Christine Ewell, Judge. Affirmed and remanded with directions.

Susan Morrow Maxwell, 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, Zee Rodriguez and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Cerron DeJohnette appeals from the judgment after a jury convicted him of second degree robbery. He contends the trial court coerced the jury's verdict and abused its discretion in sentencing him to state prison instead of probation so he could receive medical and mental health treatment from the Department of Veterans Affairs. In supplemental briefing, DeJohnette also argues the trial court, in sentencing him, failed to comply with Penal Code sections 1170.9 and 1170.91.[1] Finally, DeJohnette asks us to direct the trial court to correct the abstract of judgment to reflect he was convicted by a jury rather than on a plea.

We affirm the conviction but vacate the sentence and remand for the trial court to resentence DeJohnette in compliance with sections 1170.9 and 1170.91. We also direct the trial court to correct the abstract of judgment.

FACTUAL AND PROCEDURAL HISTORY

A. *DeJohnette Steals a Pair of Sunglasses*

Mery Keshishian, an assistant sales supervisor at a sunglasses store in a shopping mall, noticed DeJohnette and another man laughing inside the store during her evening shift. DeJohnette looked suspicious because he left without looking at or trying on any sunglasses. Twenty minutes later DeJohnette returned to the store alone, and Keshishian heard a noise that "sounded like something got smashed." She thought the noise

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[1] Statutory references are to the Penal Code.

was "similar" to the sound of "somebody picking up and putting down sunglass[es]."

Keshishian turned around, saw DeJohnette, and noticed a pair of sunglasses was missing. Keshishian approached DeJohnette and asked him how he liked the sunglasses. DeJohnette replied, "What sunglasses?" Although Keshishian did not see DeJohnette take the sunglasses, she said, "The ones that were sitting in the tray over there." Keshishian asked DeJohnette to show her the two bags he was holding, but he refused. Keshishian told DeJohnette that, if he did not cooperate, she would call security. As Keshishian "reached over to close the store," DeJohnette tried to escape, gave her "a hard push," dropped his cell phone, and "got out" of the store. Keshishian called a security guard, and the two of them walked through the mall to find DeJohnette.

Meanwhile, DeJohnette returned to the store and asked another employee, Anna Garkusha, "Where the fuck is that bitch with my phone?" Garkusha informed DeJohnette that Keshishian was not in the store and that Garkusha did not have his phone. DeJohnette stated, "Give me my phone or I'll take another 30 pairs of your shades."

Keshishian and the security guard eventually found DeJohnette at a nearby park. Police officers arrived and searched DeJohnette but did not find the missing sunglasses. When the officers informed DeJohnette they were arresting him for robbery, he stated, "It was just a petty theft."

The People charged DeJohnette with second degree robbery in violation of section 212.5, subdivision (c). The People alleged DeJohnette had 11 prior felony convictions within the meaning of section 1203, subdivision (e)(4).

B. *The Jury Deliberates, Reaches an Impasse, and Then Reaches a Verdict*

The trial lasted three days. The prosecutor showed the jury a surveillance video that recorded a portion of the incident.

After approximately five hours of deliberations and readback of one of the witnesses' testimony, the jury sent the court a note stating: "We have reached an impass[e], and cannot come to a unanimous decision." The court read the note to the prosecutor and counsel for DeJohnette and commented the jury had been deliberating "since yesterday on a case with quite a simple fact pattern." The court proposed telling the jury to continue its deliberations. The prosecutor asked the court to send a note to the jurors asking whether further argument, readback, or instructions would assist them.

Counsel for DeJohnette objected to the court's proposed answer, arguing that the court should ask the jurors in open court whether there was anything that would assist them and that the court should not instruct the jurors to continue their deliberations "in light of the fact that they indicated that they have reached an impasse." Citing section 1140 and *People v. Miller* (1990) 50 Cal.3d 954, counsel for DeJohnette argued, "If a judge suspects that the jury cannot reach a verdict, or if the jury so asks, the judge should direct the bailiff to bring the jury back into court, the judge should then attempt to learn whether there's any reasonable probability the jury could reach a verdict. The judge should first ask the foreperson if he or she believes the jury can reach a verdict, and then question jurors individually on whether they feel a verdict can be reached."

The court denied counsel for DeJohnette's request and sent the jury a note stating: "Please continue your deliberations. Please let us know if there is anything else that we can provide to you in terms of reading back any testimony, further argument of

counsel, or additional legal instructions that would assist you in your deliberations." The jury deliberated for 25 more minutes and reached a guilty verdict.

C. *The Trial Court Sentences DeJohnette*

The prosecutor argued DeJohnette did not qualify for probation because he had two prior felony convictions.[2] The prosecutor also asked the court to sentence DeJohnette to the middle term of three years in prison. The probation report stated DeJohnette was "unsuitable for probation," "appear[ed] to function well beyond the scope of community based supervision services to adequately monitor," and "appear[ed] to present no redeeming quality, which might lead the court to consider any further leniency."

DeJohnette argued he was eligible for probation because the two prior felony convictions referenced in the prosecutor's sentencing memorandum had been reduced to misdemeanors under Proposition 47 and all of the factors in California Rules of Court, rule 4.414, weighed in favor of probation. DeJohnette noted the crime did not involve a weapon, the monetary loss was only $200, and the victim was not injured, vulnerable, or in fear. In fact, DeJohnette pointed out the victim tried to lock him inside the store with her and then went looking for him with a security guard in the mall.

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[2] Although the People alleged DeJohnette had 11 prior felony convictions, the prosecutor acknowledged nine of those convictions had been reduced to misdemeanors under Proposition 47. The prosecutor argued the remaining two felony convictions, for burglary and grand theft, made DeJohnette ineligible for probation.

DeJohnette also alleged that he was a veteran with serious physical and mental illnesses, including congestive heart failure and post-traumatic stress disorder, and that his "mental health contributed to his conduct in this case . . . ." DeJohnette submitted medical records documenting his physical illnesses while he was in custody and a letter from a clinical social worker for the United States Department of Veterans Affairs stating DeJohnette had served in the Marine Corps, "had a drug problem while in the service," "continued to struggle with substance abuse," and had been diagnosed with post-traumatic stress disorder and other mental illnesses. DeJohnette argued his status as a veteran and his various mental and physical illnesses warranted probation.

The trial court, after reviewing "everything," declined to find DeJohnette was presumptively ineligible for probation.[3] The court denied probation and sentenced DeJohnette to three years in prison. The court stated: "While . . . Mr. DeJohnette may suffer from a number [of] maladies at this point, they certainly were not severe enough so that [they] kept him from . . . stealing sunglasses from the [store] and then giving a really good shove to the shopkeeper when he was escaping, didn't keep him from coming back and confronting the other shopkeeper because he dropped his cell phone when he stole the sunglasses." The court

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[3] The court found the two felony convictions the prosecutor argued precluded probation had been reduced to misdemeanors under Proposition 47. The court noted DeJohnette committed two additional felonies in Minnesota, but, because the probation report did not have enough information about those felony convictions for the court to determine whether they would have been reduced to misdemeanors had they been committed in California, the court declined to use the Minnesota felonies as a basis for finding DeJohnette ineligible for probation.

commented DeJohnette's crimes had increased in seriousness from "pilfering items at [a drug store] to actually shoving the shopkeeper." DeJohnette timely appealed.

DISCUSSION

DeJohnette argues the trial court coerced the jury's verdict by directing the jurors to continue their deliberations without first polling them in open court after they sent the court a note stating they had reached an impasse. He also argues the trial court abused its discretion in sentencing him to prison rather than placing him on probation because the court did not give enough weight to his medical condition. Finally, following our request for supplemental briefing, DeJohnette contends the trial court erred by failing to comply with sections 1170.9 and 1170.91. We find no merit in the first contention, but some merit in the third, and therefore do not reach the second.

A. *The Trial Court Did Not Coerce the Verdict*

Section 1140 provides in relevant part: "[T]he jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, . . . unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." "'The decision whether to declare a hung jury or to order further deliberations rests in the trial court's sound discretion.' [Citations.] However, a court must exercise its power under section 1140 without coercing the jury and 'avoid displacing the jury's independent judgment "in favor of considerations of compromise and expediency."'" (*People v. Brooks* (2017) 3 Cal.5th 1, 88; see *People v. Valdez* (2012) 55 Cal.4th 82, 159 ["[t]he determination . . . of whether a

reasonable probability of agreement exists 'rests in the discretion of the trial court'"].) "We review a trial court's 'determination whether there is a reasonable probability of agreement' for an abuse of discretion." (*People v. Peoples* (2016) 62 Cal.4th 718, 782.) "'Any claim that the jury was pressured into reaching a verdict depends on the particular circumstances of the case.'" (*Brooks*, at p. 88.)

A trial court "'is not bound to take as final the statement of the [jurors] that they cannot agree upon a verdict.'" (*People v. Valdez*, *supra*, 55 Cal.4th at p. 159.) "'[T]he court may direct further deliberations upon its reasonable conclusion that such direction would be perceived "'as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.'"'" (*People v. Debose* (2014) 59 Cal.4th 177, 209.) "Whether the jury has had sufficient time to deliberate, and whether there is no reasonable probability of a verdict, are determinations committed to the sound discretion of the trial court." (*People v. Price* (1991) 1 Cal.4th 324, 467; see *People v. Howard* (2008) 42 Cal.4th 1000, 1029 [trial court may ask jurors to continue deliberating when, "in the exercise of its discretion, it finds a 'reasonable probability' they will be able to reach agreement"].)

Here, the jurors had only deliberated for approximately four hours (excluding readback) before reporting they had reached an impasse. Four hours is not a lot of deliberation time, particularly after the jurors had listened to readback of one of the witnesses' testimony. Considering the trial court's actions "'" in its context and under all the circumstances'" (*People v. Brooks*, *supra*, 3 Cal.5th at p. 89), the court did not abuse its discretion in instructing the jury to deliberate further after only four hours of deliberations following a three-day trial. (See *People v. Moore*

(2002) 96 Cal.App.4th 1105, 1121-1122 ["because of the relatively brief duration of deliberations conducted by the jurors before they announced they could not reach a verdict," the trial court did not abuse its discretion in concluding "further deliberations might be beneficial without questioning the jury regarding the impasse"]; see also *People v. Valdez*, *supra*, 55 Cal.4th at p. 160 ["[n]one of the factors defendant cites—the length of deliberation, the absence of questions about the law, the jurors' statements about their inability to reach a verdict—removed the trial court's discretion to require further deliberation"].) Even though the trial court found the case involved a "simple fact pattern," the trial court did not abuse its discretion in ordering further deliberations after such a relatively short period of jury deliberation time.

Nor did the trial court abuse its discretion by declining (yet) to poll the jurors. "'[I]nquiry as to the possibility of agreement is "not a prerequisite to denial of a motion for mistrial,"'" and "a trial court does not abuse its discretion merely by declining to poll the jury as to the likelihood of reaching a unanimous verdict." (*People v. Peoples*, *supra*, 62 Cal.4th at p. 782; see *ibid.* [trial court did not abuse its discretion by declining to poll the jury and concluding instead it was reasonably probable further deliberations would be productive]; *People v. Bell* (2007) 40 Cal.4th 582, 616-617 [trial court did not abuse its discretion in denying a motion for a mistrial without first asking the jurors whether they were deadlocked], disapproved on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13; *People v. Proctor* (1992) 4 Cal.4th 499, 539 [trial court properly found a reasonable probability of agreement and ordered further deliberations without polling the jury]; *People v. Moore*, *supra*, 96 Cal.App.4th at pp. 1121-1122 [trial court was not required to poll the jurors on whether further

deliberations would be productive before ordering them to continue their deliberations].) Indeed, even if the court had polled the jurors, and each juror had stated he or she did not believe the jury would be able to reach a verdict, the court could still reasonably have concluded further deliberations could assist the jury. (See *People v. Debose*, *supra*, 59 Cal.4th at p. 209 [court did not abuse its discretion by recessing for the afternoon and ordering the jurors to return the next morning to continue their deliberations, even though each juror had stated there was nothing the court could do to assist them in reaching a verdict]; *People v. Sandoval* (1992) 4 Cal.4th 155, 195 [trial court did not abuse its discretion in ordering further deliberations, even after each juror stated further deliberations would not produce a verdict].)

Citing California Rules of Court, rule 2.1036(a), DeJohnette contends the trial court should have asked the jurors in open court whether they had any specific concerns. This rule of court, however, recommends the trial court "ask the jury if it has specific concerns which, if resolved, might assist the jury in reaching a verdict." The rule does not require the court to conduct such an inquiry, let alone require the court to conduct such an inquiry in open court. In fact, the trial court complied with the rule by asking the jurors in writing whether further readback, instruction, or argument would assist them in their deliberations.

The record does not support DeJohnette's assertion the court's actions pressured "dissenting jurors." The court never ascertained, and the record does not reflect, whether there were any dissenting jurors because the jurors did not disclose how they voted. (See *People v. Debose*, *supra*, 59 Cal.4th at p. 210 ["[a]s the numerical division of the jury was not announced in open court, it cannot be said that ordering the jury to return the next day had a

potentially coercive effect on holdout jurors"].) Moreover, the court did not make any statements to the jury that could be interpreted as "exerting pressure on any juror." (*People v. Sandoval*, *supra*, 4 Cal.4th at p. 196.) The court did not make any statements at all, other than to direct the jurors to continue their deliberations with a reminder to advise the court if they needed anything to assist them in their deliberations.[4]

B. *The Trial Court Failed To Comply with Sections 1170.9 and 1170.91*

We review the trial court's sentencing decisions for abuse of discretion. (*People v. Sandoval*, *supra*, 41 Cal.4th at p. 847; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512.) "Within the limits set forth by the Legislature, a trial court has broad discretion to decide whether to grant probation" and "whether to select the upper, middle, or lower term of imprisonment . . . ." (*People v. Clancey* (2013) 56 Cal.4th 562, 579.) "The trial court's sentencing decision must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' [Citation.] . . . [A] trial court will abuse its discretion . . . if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision. [Citations.] A failure to exercise discretion also may constitute an abuse of discretion." (*Sandoval*, at pp. 847-848.) "Exercises of

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[4] DeJohnette does not argue the court made any statements akin to an "*Allen* charge." (See *Allen v. United States* (1896) 164 U.S. 492; *People v. Gainer* (1977) 19 Cal.3d 835, 848-849, disapproved on another ground in *People v. Valdez*, *supra*, 55 Cal.4th at p. 163.)

discretion must be "'grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.'" (*People v. Diaz* (2014) 227 Cal.App.4th 362, 377.)

1. *The Trial Court Did Not Comply with Section 1170.9*

Section 1170.9, subdivision (a), provides in relevant part: "In the case of any person convicted of a criminal offense who . . . alleges that he or she committed the offense as a result of . . . post-traumatic stress disorder, substance abuse, or mental health problems stemming from service in the United States military, the court shall, prior to sentencing, make a determination as to whether the defendant was, or currently is, a member of the United States military and whether the defendant may be suffering from . . . post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her service. . . ." Section 1170.9, subdivision (b)(1), provides: "If the court concludes that a defendant convicted of a criminal offense is a person described in subdivision (a), and if the defendant is otherwise eligible for probation, the court shall consider the circumstances described in subdivision (a) as a factor in favor of granting probation."[5] Because the Legislature used the words

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[5] Section 1170.9, subdivision (d), also provides in relevant part: "When determining the 'needs of the defendant,' for purposes of Section 1202.7, the court shall consider the fact that the defendant is a person described in subdivision (a) in assessing whether the defendant should be placed on probation and ordered into a federal or community-based treatment service program with a demonstrated history of specializing in the treatment of mental health problems, including substance abuse, post-traumatic stress disorder, . . . and other related mental health problems."

"shall . . . make a determination" (§ 1170.9, subd. (a)) and "shall consider" (§ 1170.9, subd. (b)), the trial court must, prior to sentencing, make certain findings if the defendant alleges the facts specified in the statute and the court must consider these findings in sentencing. (See *People v. Abdullah* (1992) 6 Cal.App.4th 1728, 1735 ["'the language of section 1170.9 is mandatory rather than permissive'"].)

The trial court did not comply with section 1170.9. The court failed to "make a determination as to whether" DeJohnette was a member of the United States military and whether he may be suffering from post-traumatic stress disorder, substance abuse, or mental health problems as a result of his service (§ 1170.9, subd. (a)) and failed to consider the circumstances of his service-related illness "as a factor in favor of granting probation" (§ 1170.9, subd. (b)). The trial court did not make any reference to DeJohnette's service-related mental illness at the sentencing hearing. And even if the trial court had impliedly found DeJohnette did not suffer from mental illness stemming from his service in the military, that finding would not be supported by substantial evidence because there was no evidence to contradict that DeJohnette was a veteran and suffered from service-related mental illness, which he documented with the letter from his social worker. (See *In re M.M.* (2015) 235 Cal.App.4th 54, 64 ["if there were *no* evidence to support the decision, there would be an abuse of discretion"]; *People v. Leonard* (2014) 228 Cal.App.4th 465, 503 ["'[a] trial court abuses its discretion when the factual findings critical to its decision find no support in the evidence'"]; cf. *People v. Dove* (2004) 124 Cal.App.4th 1, 10 [appellate court will sustain the trial court's implied finding for sentencing "as long as it is supported by substantial evidence"].)

The trial court also failed to comply with section 1170.9, subdivision (b), which required the court to consider DeJohnette's service-related mental illness "as a factor in granting probation."[6] "[T]he trial court should affirmatively indicate an exercise of discretion under section 1170.9 wherever a prima facie showing of eligibility under that section has been made. An intelligent exercise of discretion cannot be inferred from a silent record." *People v. Bruhn* (1989) 210 Cal.App.3d 1195, 1200; see *id.* at pp. 1198-1200 [case remanded under section 1170.9 "for a proper exercise of discretion" where the defendant submitted a letter from a Veterans' Service officer stating he might be suffering from post-traumatic stress disorder, his attorney argued the crime stemmed from the defendant's difficult readjustment to civilian life following his return from Vietnam, and "the record fail[ed] to show that the trial court considered the federal treatment program alternative set forth in section 1170.9"].)

The People argue DeJohnette "did not allege that his mental health issues stemmed from service in the United States military or that he committed the instant offense because of such conditions." But he did. DeJohnette alleged he was a "homeless veteran who has struggled with substance abuse and mental illness," he had been diagnosed with post-traumatic stress disorder, and his "mental health contributed to his conduct in this case." The Department of Veterans Affairs confirmed his service in the Marines and recited his admission of a "drug problem" "while in the service," as well as the diagnoses of his other mental illnesses.

Citing *People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1093, the People argue the court first had to grant DeJohnette

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[6] As noted, the trial court did not find DeJohnette ineligible for probation.

probation before the provisions of section 1170.9 could apply. Not so. *People v. Ferguson* involved former section 1170.9, which required the trial court first to sentence the defendant to probation before considering placing the defendant in an alternative treatment program. As noted, however, the current version of section 1170.9, subdivision (a), which went into effect in January 2015 (after *People v. Ferguson*), does not contain this requirement. Under the current version of the statute, the court's duty to consider the defendant's service-related mental illness arises once the defendant alleges he or she committed the criminal offense as a result of mental health problems stemming from service in the United States military.

Finally, again citing *People v. Ferguson*, the People argue that, even if the trial court found DeJohnette had satisfied the eligibility criteria under former section 1170.9, subdivision (a), "the trial court would still have denied probation given the overwhelming weight of the facts before it at sentencing." *People v. Ferguson* is distinguishable on this point. In that case the trial court held a hearing under former section 1170.9 but erroneously found the defendant ineligible for probation. The court concluded that the erroneous finding was one of three reasons for denying probation, and that, even if the trial court had found the defendant eligible for probation, the court would not have granted the defendant probation given the severity of the crimes. (*People v. Ferguson*, *supra*, 194 Cal.App.4th at p. 1092.) The court pointed out, however, that "[t]his is not a case in which the court failed to hold a hearing to assess whether [the defendant] was a person described by section 1170.9, subdivision (a)." (*Ferguson*, at p. 1093.) But this case is: The trial court here never made the determination required by section 1170.9, subdivision (a).

2. *The Trial Court Did Not Comply with Section 1170.91*

Section 1170.91 provides in relevant part: "If the court concludes that a defendant convicted of a felony offense is, or was, a member of the United States military who may be suffering from . . . post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her military service, the court shall consider the circumstance as a factor in mitigation when imposing a term under subdivision (b) of Section 1170."[7] Like the mandatory language in section 1170.9, subdivision (b), the language of section 1170.91 requires the trial court to consider a defendant's service-related mental illness in selecting the appropriate term of imprisonment once the court makes the applicable findings under section 1170.9, subdivision (a).

The trial court failed to comply with section 1170.91. Not only is the record devoid of any reference to DeJohnette's service-related illness when the trial court selected the middle term of three years in prison, the court stated it could not find any circumstances in mitigation that applied to DeJohnette under California Rules of Court, rule 4.423.[8] (See *People v. Tatlis* (1991) 230 Cal.App.3d 1266, 1274 ["the court should consider all mitigating circumstances in imposing sentence"].)

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[7] Section 1170, subdivision (b), provides in relevant part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court."

[8] California Rules of Court, rule 4.423 lists the circumstances in mitigation when sentencing the defendant to a term of imprisonment.

C. *The Trial Court Should Correct the Abstract of Judgment*

The abstract of judgment states DeJohnette was convicted of second degree robbery on a plea. DeJohnette was actually convicted by a jury. The trial court's amended abstract of judgment should correct this error.[9]

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated. The case is remanded with directions to resentence DeJohnette in compliance with sections 1170.9 and 1170.91. The trial court is also directed to prepare an amended abstract of judgment to reflect that a jury convicted DeJohnette of second degree robbery.

SEGAL, J.

We concur:

PERLUSS, P. J. ZELON, J.

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[9] DeJohnette also filed a petition for writ of habeas corpus, case No. B285130, which he asks us to consider with his direct appeal. We deny the petition by separate order.