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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RANDY BUCHWITZ,

Defendant and Appellant.

B281241

(Los Angeles County
Super. Ct. No. BA420380)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie A. Swain, Judge. Affirmed in part, reversed in part.

Sally Patrone Brajevich, 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, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

This is defendant and appellant Randy Buchwitz's second appeal. In connection with Buchwitz's first appeal, this court modified the judgment and, as modified, we affirmed it. After the remittitur issued, the trial court modified Buchwitz's sentence consistent with the remittitur but also imposed two additional one-year terms under Penal Code section 667.5, subdivision (b).¹ Buchwitz therefore brought this second appeal, contending that his sentence must be modified again, this time to strike those two 1-year terms. We agree and reverse the sentences imposed on the two 1-year prison priors but otherwise affirm the judgment.

BACKGROUND

In January 2014, Buchwitz caused a fire in his motel room while manufacturing concentrated cannabis using butane honey oil. He was charged with various offenses arising out of this incident. A jury found Buchwitz guilty of: count 1, manufacturing a controlled substance other than PCP (Health & Saf. Code, § 11379.6, subd. (a)); count 2, vandalism with over \$400 in damage (§ 594, subd. (a)); and count 3, recklessly causing fire to an inhabited structure (§ 452, subd. (b)).

Buchwitz was sentenced on May 11, 2015. He first admitted having suffered five prior convictions (Case Nos. PA021403, PA027667, PA037966, PA059638 & PA069262) within the meaning of section 667.5, subdivision (b). The court then sentenced Buchwitz to seven years on count 1 and a consecutive one-year term on count 3. And, as we later explain, the record is ambiguous whether the court sentenced Buchwitz to eight months, stayed, or to two years, stayed, on count 2. The

¹ All further undesignated statutory references are to the Penal Code.

court imposed a three-year term under Health and Safety Code section 11370.2, subdivision (b), based on a prior conviction for violating Health and Safety Code section 11383.5. The court also imposed a one-year term for the prison prior in case number PA059638. The court struck the remaining four prison priors.² Buchwitz's total sentence therefore was 12 years in state prison.

Buchwitz appealed, contending only that the one-year sentence on count 3 should have been stayed under section 654 and that the three-year term under Health and Safety Code section 11370.2, subdivision (b) was unauthorized. Agreeing, this court modified Buchwitz's sentence to stay the sentence on count 3 and to strike the three years imposed under Health and Safety Code section 11370.2. (*People v. Buchwitz* (Aug. 2, 2016, B264571 [nonpub. opn.] (*Buchwitz I*)).³ The remittitur issued on October 12, 2016.

On February 23, 2017, the trial court resentenced Buchwitz. The court reimposed the seven-year term on count 1; imposed eight months, stayed, on count 2; and sentenced Buchwitz to two years (rather than one), stayed, on count 3. The court struck the three-year term imposed under Health and

² The minute order and abstract of judgment were silent as to the priors.

³ Our disposition read: "The judgment is modified to stay, under Penal Code section 654, the one-year sentence imposed on count 3. The three-year term imposed under Health and Safety Code section 11370.2 is also stricken. The clerk of the superior court is directed to modify the abstract of judgment and to forward the modified abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed." (*Buchwitz I*, *supra*, B264571.)

Safety Code section 11370.2. The court again sentenced defendant to one year under section 667.5, subdivision (b), for the prison prior in case number PA059638. But the court also sentenced Buchwitz to two of the previously stricken one-year terms under section 667.5, subdivision (b) (Case Nos. PA027667 & PA037966). The court did not address, and the minute order and abstract of judgment were silent as to, the remaining two prison priors. Buchwitz’s new sentence therefore was 10 years in state prison.⁴

Buchwitz then brought this second appeal.

DISCUSSION

Buchwitz contends that the trial court erred in sentencing him to the additional two 1-year terms under section 667.5, subdivision (b). Before directly addressing that contention, some additional context is in order. At the original May 11, 2015 sentencing hearing, the trial court, as we have said, sentenced Buchwitz to seven years on count 1 and to a consecutive one year on count 3. But what the court did on count 2 is less clear. Although the minute order states that the court imposed eight months—indeed, the court made an oral statement to that effect—it appears that the court actually imposed the midterm of two years. The court initially said it was sentencing Buchwitz to “one-third the midterm of two years, which is eight months,” stayed. The prosecutor then inquired, “I’m sorry, it was the

⁴ Defendant and the People objected, with defense counsel saying, “I just want to lodge an objection, that it’s hard to say because we’re happy with what the court did, but I want to protect myself just in case. I just want to lodge an objection to the sentence.” The People “concur[red] on our own basis for the objection.”

midterm stayed,” and the court replied, “Yes.” (Italics added.) Based on this colloquy, the court imposed the midterm of *two years* on count 2 and not one-third the midterm of eight months. This makes sense, because the court stayed the sentence on count 2. And, when a court stays a sentence under section 654, the “one-third-the-midterm” rule of section 1170.1, subdivision (a), does not apply. (*People v. Relkin* (2016) 6 Cal.App.5th 1188, 1197; see also *People v. Alford* (2010) 180 Cal.App.4th 1463, 1468.) Thus, the court could not as a matter of law impose eight months (one-third the midterm) on count 2; it had to impose a full term and stay it. (*Relkin*, at p. 1198; *Alford*, at p. 1472.)

This clarifies what happened after our remittitur issued. The trial court, apparently based on the clerical error in the record, imposed eight months, instead of two years, on count 2. The court properly struck the three-year term under the Health and Safety Code and stayed the sentence on count 3. But it did several other things. First, recognizing that the “one-third-the-midterm” rule no longer applied, it imposed the low term of two years on count 3 and stayed that two-year sentence. (*People v. Relkin*, *supra*, 6 Cal.App.5th at p. 1197.) This did not conflict with the remittitur. After a remittitur, the court to which the matter has been remitted shall make “all orders necessary to carry the judgment into effect.” (§ 1265, subd. (a); *People v. Dutra* (2006) 145 Cal.App.4th 1359, 1366.) Our remittitur modified the judgment and stayed the “one-year sentence imposed on count 3.” (*Buchwitz I*, *supra*, B264571, at p. 6.) At that time, one year *was* the sentence. But once count 3 was stayed, the trial court had to impose and stay a full term to “carry the judgment into effect,” because the one-third-the-midterm rule no longer applied.

This brings us to the second thing the trial court did and to Buchwitz's primary contention of error: according to him, imposing sentence on the two additional prison priors exceeded the scope of the remittitur. The order of a reviewing court is in the remittitur, which defines the scope of jurisdiction of the court to which the matter is returned. (See generally § 1260 [reviewing court has authority to "reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances"]; *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701.) Any material variance from the remittitur is unauthorized and void. (*Ayyad v. Sprint Spectrum, L.P.* (2012) 210 Cal.App.4th 851, 859-860; *People v. Dutra, supra*, 145 Cal.App.4th at pp. 1367-1369.)

Here, we did not remand for resentencing. (See, e.g., *People v. Burgos* (2004) 117 Cal.App.4th 1209, 1214, fn. 4; *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258 [when appellate court remands case for resentencing, trial court is entitled to consider the entire sentencing scheme].) Rather, the remittitur was limited and did not address the prison priors. Indeed, neither Buchwitz nor the People, in the prior appeal, raised any issue as to the priors, and therefore *Buchwitz I* did not address any issue regarding them. Because our remittitur was limited in scope and did not remand for resentencing, the trial court, by imposing the two 1-year prison priors in case numbers PA027667 and PA037966, exceeded the scope of the remittitur.

The People, however, argue that the trial court could impose the additional prison priors because an unauthorized sentence may be corrected at any time. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.) Stated otherwise, if the trial court failed to impose or strike the four remaining prison priors at the original sentencing hearing, that was an unauthorized sentence the court was entitled to correct after our remittitur issued. (See generally *People v. Turrin* (2009) 176 Cal.App.4th 1200, 1205 [unauthorized sentence may be corrected at any time]; *People v. Langston* (2004) 33 Cal.4th 1237, 1241 [imposition of section 667.5, subdivision (b) enhancement is mandatory once prior prison term is found true; enhancement must either be imposed or stricken].)

There was, however, no unauthorized sentence for the trial court to correct. At the original May 11, 2015 sentencing hearing, the court imposed sentence on just one of Buchwitz's five prison priors and struck the remaining four prison priors. After the court said it would "add[] an additional one year for [the] prison prior in case PA059638," the court explained that the aggregate 12-year sentence was at "the level of the People's pretrial offer, but *I think when there is a maximum of 16 years based on all his priors, I think . . . 12 years is a very lengthy sentence for this offense, but an appropriate one.*" (Italics added.) The court therefore was aware of the remaining four prison priors but clearly did not intend to impose consecutive sentences on them. Instead, the court imposed one prison prior in case number PA059638 but struck the others (Case Nos. PA021403, PA027667, PA037966 & PA069262). Having thus imposed an *authorized* sentence which was thereafter not challenged on appeal by either the People or defendant or otherwise addressed

in our remittitur, the trial court had no jurisdiction to resentence Buchwitz on those prison priors.

In addition to striking the improperly imposed two prison priors, the trial court should also correct the minute order and abstract of judgment to reflect the sentence imposed on count 2, which was the midterm of two years, stayed, and not eight months. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; see also *People v. Sanders* (2012) 55 Cal.4th 731, 743 & fn. 13; *In re Ricky H.* (1981) 30 Cal.3d 176, 191.)

DISPOSITION

The judgment is reversed and the trial court is directed to strike the two 1-year prison priors imposed in case numbers PA027667 and PA037966. The clerk of the superior court is directed to prepare a corrected minute order and abstract of judgment reflecting these sentences as well as the two years imposed but stayed on count 2 and the two years imposed but stayed on count 3. The clerk of the superior court is directed to forward the corrected abstract of judgment to the Department of

Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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DHANIDINA, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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