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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DEWONE T. SMITH, Defendant and Appellant.	B278596 (Los Angeles County Super. Ct. No. BA337647)

APPEAL from an order of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Reversed.

Melanie K. Dorian, 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, Noah P. Hill and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

This case is before us a second time on direct appeal after we vacated Dewone Smith's sentence for custodial possession of a weapon, resisting an executive officer, and battery by gassing (Smith threw a mixture of feces and urine at officers). In 2010, the trial court sentenced Smith to 150 years to life for those crimes, committed in 2007. We issued our first opinion in 2012, in which we affirmed the trial court's judgment, but vacated Smith's sentence. The Supreme Court granted review and issued an opinion in 2013. After the Supreme Court issued its opinion and remittitur to us, we issued our own remittitur to the trial court on August 30, 2013.

After more than 20 continuances spanning more than three years and after repeatedly denying Smith's requests to be present for his sentencing proceedings, the trial court resentenced Smith to 25 years to life.

Because Smith had both statutory and constitutional rights to be present for his sentencing and other substantive hearings, and because the People have not shown that the trial court's error was harmless beyond a reasonable doubt, we reverse the trial court's order, vacate the sentence a second time, and remand the case for resentencing. In light of the trial court's three-year delay in resentencing we also order the trial court to transfer the case to a judge other than Judge Jose I. Sandoval for resentencing.

BACKGROUND

Based on an information filed June 27, 2008, a jury convicted Smith of custodial possession of a weapon (Pen. Code, § 4502, subd. (a)),[1] two counts of resisting an executive officer

[1] Statutory references are to the Penal Code unless otherwise specified.

(§ 69), and three counts of battery by gassing (§ 243.9, subd. (a)), crimes he committed while incarcerated in county jail. (*People v. Smith* (Feb. 24, 2012, B223181) [nonpub. opn.] at p. 2 (*Smith I*) affirmed in *People v. Smith* (2013) 57 Cal.4th 232 (*Smith II*).) Smith "admitted that four prior convictions alleged as strikes were his, but argued that three of them were not strikes within the scope of the 'Three Strikes' law. The trial court found that all four were strikes. [Smith] moved [under section 1385 and *People v. Superior Court* (*Romero*) 13 Cal.4th 497 (*Romero*)] to dismiss the strike findings. The court denied the motion and sentenced defendant to six consecutive third-strike terms of 25 years to life, for a total of 150 years to life in prison." (*Smith I*, *supra*, at pp. 5-6.)

We affirmed the judgment, but based on the trial court's abuse of discretion, we vacated Smith's sentence and remanded the case for resentencing.[2] (*Smith I*, *supra*, at p. 21.) "Based upon our review of the record, we conclude[d] that the trial court abused its discretion by failing to consider several very significant factors: [Smith]'s mental illness, the impropriety of [Smith]'s incarceration in the county jail at the time of the commitment offenses, the combined effect of [Smith]'s improper incarceration in county jail and mental illness, and the relatively minor nature of the commitment offenses. In addition, the court's comments indicate[d] it may have been unaware of the

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[2] In its minute order indicating its proposed sentence for Smith, the trial court stated that in *Smith I* we "ruled that the trial court may have abused its discretion." We did not. We ruled that the trial court *did* abuse its discretion. (*Smith I*, *supra*, at pp. 2 ["the trial court abused its discretion"], 13 ["we find that the trial court abused its discretion"], 21 ["we conclude that the trial court abused its discretion"].)

variety of ways in which it could exercise its discretion to impose something less than the sentence it admittedly found 'excessive.' " (*Ibid.*) "Accordingly, we remand[ed] for the trial court to reconsider [Smith]'s [*Romero*] motion and the court's sentencing decision in light of the factors and sentencing options" we discussed in our opinion. (*Ibid.*)

The Supreme Court granted Smith's petition for review to resolve a conflict among the Courts of Appeal about "whether section 148(a)(1) is a lesser included offense of section 69." (*Smith II*, *supra*, 57 Cal.4th at p. 239.) The Supreme Court issued its opinion on July 18, 2013 and its remittitur to the Court of Appeal on August 26, 2013. We remitted the case to the trial court on August 30, 2013.

On September 6, 2013, department 125 forwarded our remittitur to department 129 for further action. The next action we can discern from the record is that the case was called in department 130 (because department 129 was dark) on September 3, 2014 and continued to September 18, 2014 in department 129. Resentencing was eventually continued until more than three years after we issued our remittitur:

- September 18, 2014: continued to September 24, 2014;
- September 24, 2014: continued to October 28, 2014;
- October 28, 2014: continued to November 5, 2014;
- November 5, 2014: continued to December 17, 2014;
- December 17, 2014: continued to January 23, 2015;
- January 23, 2015: set for status conference on March 4, 2015 and resentencing on March 18, 2015;
- March 4, 2015: March 18 resentencing advanced and vacated, matter continued to April 8, 2015;
- April 8, 2015: continued to May 19, 2015;

- May 19, 2015: continued to June 9, 2015;
- June 9, 2015: continued to June 19, 2015;
- June 19, 2015: continued to July 21, 2015;
- July 21, 2015: continued to September 10, 2015;
- September 10, 2015: continued to October 15, 2015;
- October 15, 2015: continued to November 24, 2015;
- November 24, 2015: continued to January 20, 2016;
- January 20, 2016: continued to February 25, 2016;
- February 25, 2016: continued to April 20, 2016;
- April 20, 2016: continued to May 24, 2016;
- May 24, 2016: continued to June 29, 2016.

On June 29, 2016, outside Smith's presence, the trial court heard testimony from Gwendolyn Vontoure, a nurse who treated Smith on April 11, 2006, when he was in administrative segregation. Smith had exposed himself to Vontoure and threatened to kill her upon his release. After Vontoure testified, the trial court heard Smith's *Romero* motion and informed the parties of its proposed sentence.

On October 12, 2016, the trial court reduced counts 2 through 6 (two counts of resisting an executive officer and three counts of battery by gassing) to misdemeanors and sentenced Smith to an indeterminate sentence of 25 years to life on count 1 (custodial possession of a weapon) and to six months each concurrent on counts 2 through 6.

DISCUSSION

A. Smith was Entitled to be Present for Resentencing

Smith was not present for any of the hearings the trial court held after we issued our remittitur. Smith contends and the People concede that Smith was entitled to be present at his

resentencing and that he did not waive that right. The People argue that the trial court's error was harmless.

Smith's counsel raised the issue repeatedly, beginning on September 24, 2014, telling the trial court that "Mr. Smith wants to be here and [section 977] seems to say that on sentencing and resentencing that the defendant must be here, should be present." The trial court responded: "Well, I'm ordered to [have him here] if I sentence him to more time; I'm certainly not going to do that." The trial court continued: "If you can show me some authority that says I must have him here I will comply, but I don't want to incur – I'm being dead frank with you, I don't want to incur the costs of all of that when I'm going to significantly reduce the sentence." And further: "My understanding is when somebody is in prison and I'm resentencing them on a remittitur if I'm increasing their sentence they must be here; if I'm not, and I'm substantially reducing his sentence, I don't believe I'm under any obligation to bring him here." The trial court wanted to "reduce the cost and services associated with" having Smith present in court for his sentencing.

The trial court discussed the issue with Smith's counsel again on November 24, 2015. The *People* raised the issue (in the context of potential Proposition 36 proceedings), explaining to the trial court that there was statutory language requiring "the defendant's presence unless there's a written waiver." The trial court wondered aloud whether "the statute would permit [Smith's counsel] to waive [Smith's] appearance." "Does it have to be written or may counsel waive his appearance," the trial court asked. Smith's counsel replied that he did not necessarily believe the defendant had to be present for resentencing. The trial court again explained that "[t]he defendant has to be here if I'm

increasing the sentence, but does not have to be here if I'm decreasing the sentence."

At the June 29, 2016 hearing where the trial court took Vontoure's testimony and heard Smith's *Romero* motion, the trial court noted multiple times that Smith was not present. The trial court made the same observation when it imposed sentence on October 12, 2016: "We are on the record in the matter involving Dewone Smith. He is not present before the court, currently serving a prison sentence but here on sentencing hearing and formalization of an order concerning a motion filed by defense counsel."

The fundamental premise behind the trial court's statement of the law reflects a foundational misunderstanding of the disposition of *Smith I*. To be clear, we *vacated* Smith's sentence. Our Supreme Court has clarified that remand for sentencing can take different forms. "[T]hat a sentencing *remand* necessarily entails a full *resentencing* [is] not correct." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 35 (*Buckhalter*).) A "reviewing court has the power, when a trial court has made a mistake in sentencing," for example, "to remand with directions that do not inevitably require all of the procedural steps involved in arraignment for judgment and sentencing." (*People v. Rodriguez* (1998) 17 Cal.4th 253, 258.)

We did not "remand for correction of sentencing errors." (*Buckhalter*, *supra*, 26 Cal.4th at p. 23.) We *vacated* the sentence. (*Smith I*, *supra*, B223181 at pp. 21-22.) When we did so, we "restor[ed] [Smith] to the same position as if he had never been sentenced at all." (*Buckhalter*, *supra*, 26 Cal.4th at p. 34; *Van Velzer v. Superior Court* (1984) 152 Cal.App.3d 742, 744.) It

was, therefore *not* accurate that the trial court was going to *reduce* a pre-existing sentence; there was no sentence to reduce.

Except under certain circumstances not relevant here, "in all cases in which a felony is charged, the accused *shall be personally present* at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial *when evidence is taken before the trier of fact*, and *at the time of the imposition of sentence*." (§ 977, subd. (b)(1), italics added.) "[T]he statutory requirement that a criminally accused be personally present in court applies to all proceedings where his presence bears a ' " 'reasonable, substantial relation to his opportunity to defend the charges against him.' " ' " (*People v. Thompson* (2016) 1 Cal.5th 1043, 1099.)

We agree with both Smith and the People that the trial court erred when it refused to allow Smith to be present for resentencing.

The People argue that the trial court's error was harmless. According to the People, the error is a state law error, and not an error implicating Smith's federal constitutional rights. The People argue that the error is reversible only if " ' "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error." ' " (Citing *People v. Davis* (2005) 36 Cal.4th 510, 532-533.) Smith points out, however, that in *Davis*, the Supreme Court stated that the defendant "had both a statutory and a constitutional right to be present" at the hearing at issue in that case, and ultimately expressly applied the test for prejudicial error that the United States Supreme Court set out in *Chapman v. California* (1967) 386 U.S. 18, 23: "[B]efore a federal constitutional error

can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

We agree with Smith. The trial court's failure to secure his presence at his resentencing implicates both his statutory and constitutional due process rights. Given that the People elicited substantial testimony related to whether he should be given an indeterminate sentence, the failure may have implicated his confrontation clause rights under both the federal and state constitutions as well. It is, therefore, the People's burden to show that the trial court's error was harmless beyond a reasonable doubt. (*People v. Simms* (2018) 23 Cal.App.5th 987, 998 (*Simms*).)

The People have not even attempted to show that the trial court's error was harmless beyond a reasonable doubt. Smith, on the other hand, pointed out a variety of ways that he was prejudiced by the trial court's error. At his original sentencing hearing, Smith had actively participated with his counsel and produced evidence regarding his background and mental illness, which we ordered the trial court to consider on remand. And given the arguments the People invoked in the trial court regarding the propriety of Smith's confinement in county jail at the time of the offenses, Smith could likely have shed a great deal of light on whether and how he was being treated or whether he was merely being observed for a competency determination after he had been ordered remanded to state prison.[3] "The trial court

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[3] Based on the record before us in *Smith I*, we were deeply concerned with Smith's continued incarceration in county jail after a trial court order that he be remanded to state prison "forthwith" to serve a state prison sentence. The impropriety of Smith's presence in county jail and Smith's inability to access

mental health treatment the state prison system could have provided him was a significant factor in our decision to vacate Smith's sentence, and we addressed that impropriety at length. (*Smith I*, *supra*, B223181 at p. 4.)

In the trial court, the People argued repeatedly and exhaustively both in writing and orally that "the appellate court opinion was incorrect when it stated that on June 20, 2007 'the defendant is ordered to be transported to state prison forthwith.' " The People based the argument on several things, including the reporter's transcript from June 20, 2007 (captioned "Resentencing State Prison"), in which the trial court admittedly never uttered the words "the defendant is ordered to be transported to state prison forthwith." Presumably, the People believe that the trial court's failure to say certain words on the record conflicts with the trial court's minute order, which says: "The defendant is ordered to be transported to state prison forthwith."

We find no conflict between the reporter's transcript and the trial court's order. And we find the People's argument to the trial court particularly disturbing in light of the fact that the reporter's transcript specifies—twice—that the trial court is sentencing Smith to a state prison sentence.

We reviewed our files to determine whether the People had filed either a petition for rehearing (Cal. Rules of Court, rule 8.268(b)) or a motion to recall the remittitur (Cal. Rules of Court, rule 8.272(c)) in *Smith I*, both means by which the People could have sought to have our error corrected if our opinion was erroneous. The People filed neither a petition for rehearing nor a motion to recall the remittitur.

Moreover, it appears that the People's argument (and the trial court's order) was based on documents showing that Smith was being held for a competency determination in another matter and disproportionately on the deputy district attorney's speculation about the logistics of what happens after a defendant is referred for a competency determination. We are very

may, or may not, have chosen to believe what [Smith] might have said, if he said anything, but we cannot conclude beyond a reasonable doubt that his presence at the hearing would not have affected the outcome." (*Simms*, *supra*, 23 Cal.App.5th at p. 998.)

Because we are reversing the trial court's sentencing order and vacating Smith's sentence, we will not address Smith's remaining merits arguments.

B. Transfer to a Different Judge

Smith requests pursuant to Code of Civil Procedure section 170.1, subdivision (c) that on remand, his case be assigned to a different judge for resentencing. We agree that the case should be transferred to a different trial judge and will order the transfer.

Code of Civil Procedure section 170.1, subdivision (c) states: "At the request of a party or on its own motion an appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court." "The power of the appellate court to disqualify a judge under Code of Civil Procedure section 170.1, subdivision (c), should be exercised sparingly, and only if the interests of justice require it." (*Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 303.) "An appellate court need not find actual bias in order to invoke Code of Civil Procedure section 170.1, subdivision (c)." (*People v. LaBlanc* (2015) 238 Cal.App.4th 1059, 1079.) "Mere

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concerned, therefore, that the People's failure to either request that we correct our opinion or to produce evidence regarding the way in which it contends we were incorrect may have invited further error by the trial court.

judicial error does not establish bias and normally is not a proper ground for disqualification." (*Ibid.*)

After our remittitur, this case languished in the trial court for more than three years before Smith was resentenced. That is true even though the only felony for which Smith was ultimately resentenced was punishable by *two, three, or four years* had the trial court exercised its discretion in any number of ways. (§ 4502, subd. (a).)

Smith's counsel repeatedly and fervently objected to the trial court's delay. On November 5, 2014, Smith's counsel asked the trial court: "The court indicated no further continuances?" The trial court responded: "Noted. I think I made plain as I said to counsel what I may expect from them in supporting their positions and we'll go forward on [December 17, 2014]."

On January 23, 2015, Smith's counsel explained that he wanted "to make it clear for the record, I'm ready to go, I oppose the people's continuance for any reason whatsoever. . . . I'm ready to go and I object to any further continuances." Later that same hearing, Smith's counsel again asked the trial court: "And the court's indicating no further continuances?" "That's right," the trial court responded. "We need to get to the bottom of this. I'm happy to accommodate both counsel, but we need to have this hearing. I appreciate that, counsel. Thank you."

On May 19, 2015, Smith's counsel explained, "Your honor, just for the record this has got to be the last continuance. [¶] . . . [¶] Because Mr. Smith is threatening me with habeas on a whole bunch of other things and we've gone way past that."

On September 10, 2015, Smith's counsel pleaded with the trial court to stop continuing Smith's sentencing because "we are now at the point where the system is still failing [Smith]. We

have had continuance after continuance and some of them are justified because of personal issues with the court, but the system is failing him again. He cannot simply get sentenced." "I suggest the court indicate we shouldn't have any more continuances," Smith's counsel requested. "We're simply sentencing Mr. Smith." The trial court responded that it understood.

The three-year delay between remittitur and resentencing here was unconscionable. The record does not disclose the cause of the vast majority of the more-than-20 continuances. But unless the trial court had already determined when it first started continuing resentencing in this case that it was going to sentence Smith to more than the length of the continuances (taken together with whatever custody and other credits Smith was entitled to), then the delay had the very real possibility of implicating Smith's liberty rights. We will grant Smith's request to be resentenced before a different trial judge.

DISPOSITION

The sentence is vacated and the matter is remanded to the trial court for resentencing. Defendant is entitled to be present at that hearing. On remand, the trial court is ordered to assign the case to a judge other than Judge Jose I. Sandoval for resentencing consistent with this opinion and our opinion in No. B223181.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

BENDIX, J.

CURREY, J.*

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