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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

MICHAEL MOHAMMAD SABZEVAR,

Defendant and Appellant.

2d Crim. No. B289225
(Super. Ct. Nos. 2016015496, 2017021621)
(Ventura County)

Michael Mohammad Sabzevar appeals a postjudgment order denying his request to recall his sentence pursuant to Penal Code section 1170, subdivision (d)(1) (1170(d)(1)), which permits recall within 120 days of the date of commitment.[1] Appellant argues that the trial court abused its discretion because it did not

[1] Unless otherwise stated, all statutory references are to the Penal Code. The post-judgment order is appealable under section 1237, subdivision (b). (*People v. Loper* (2015) 60 Cal.4th 1155, 1166-1167.)

comprehend the full scope of its discretion under section 1170(d)(1). We affirm.

Procedural Background

On September 5, 2017, in case no. 2016015496 (case 1) appellant pleaded guilty to selling heroin. (Health & Saf. Code, § 11352, subd. (a).) He admitted one prior separate prison term (§ 667.5, subd. (b)) and two prior drug-related felony convictions within the meaning of former Health and Safety Code section 11370.2, subdivision (a) (section 11370.2(a)). In addition, he admitted that he had sold 14.25 grams or more of heroin. (§ 1203.07, subd. (a)(2); Health & Saf. Code, § 11352.5, subd. (2).)

On the same date in case no. 2017021621 (case 2), appellant pleaded guilty to possession of heroin for sale. (Health & Saf. Code, § 11351.) He admitted one prior separate prison term (§ 667.5, subd. (b)) and three prior drug-related felony convictions within the meaning of former section 11370.2(a). He also admitted that he had committed the present offense while out on bail on another felony offense (§ 12022.1, subd. (b)) and that he had offered to sell 14.25 grams or more of heroin. (§ 1203.07, subd. (a)(2); Health & Saf. Code, § 11352.5, subd. (2).)

Before appellant entered his pleas and admissions, he acknowledged in open court that in case 1 he could be sentenced to felony jail for 12 years and in case 2 he could be sentenced to felony jail for 16 years. But the trial court stated that as to both cases "the offer made [by the People] and accepted by [appellant] . . . as part of his consideration in entering his guilty pleas" is "a six year straight felony jail commitment with no mandatory supervision provisions in it."

Appellant was sentenced on October 3, 2017. The trial court said, "The Court's tentative commitment was six years of

felony jail with no mandatory supervision." In case 2 the court sentenced appellant to six years in jail calculated as follows: the two-year lower term for possession of heroin for sale plus three years for one drug-related prior felony conviction (former § 11370.2(a)) plus one year for the one prior prison term. (§ 667.5, subd. (b).) In case 1 the trial court imposed the lower term of three years for selling heroin and ordered it to run concurrently with the six-year term in case 2. In both cases, the trial court struck any remaining enhancements that would have resulted in additional jail time.

Appellant did not appeal the judgment, which therefore became final on Monday, December 4, 2017, the 60th day after he was sentenced. (See Cal. Rules of Court, rule 8.308(a); *People v. Barboza* (2018) 21 Cal.App.5th 1315, 1319.) On January 1, 2018, 28 days after the judgment had become final, an amendment of former section 11370.2(a) became effective. The amendment limited the application of the section's three-year enhancement to a prior felony conviction for violating Health and Safety Code section 11380 - using a minor in the commission of certain drug offenses. (Stats. 2017, ch. 677, § 1 (SB 180).)

Appellant's prior convictions do not qualify for enhancement under the amended statute. Thus, if appellant had been sentenced after January 1, 2018, a section 11370.2(a) three-year enhancement could not have been imposed. (*In re Estrada* (1965) 63 Cal.2d 740, 748 ["where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed"].) The amendatory statute here does not contain a saving clause. If appellant had timely filed an appeal so that the judgment was not final when the amendment became

effective, he also would have been entitled to the benefit of the reduced punishment. (*People v. Valdez* (2011) 193 Cal.App.4th 1515, 1524 ["'Under the *Estrada* rule, an amendatory statute lessening punishment is presumed to apply in all cases not yet reduced to final judgment as of the amendatory statute's effective date'"].)

On January 16, 2018, within 120 days after appellant's date of commitment, appellant filed a motion requesting that the trial court recall its sentence and resentence him based on amended section 11370.2(a). In supporting points and authorities, appellant argued that, pursuant to *Estrada*, the "penalty-reducing amendments to section 11370.2 apply retroactively to cases like appellant's that are not yet final as of the revised statute's effective date, January 1, 2018." But as discussed above, the judgment became final before the effective date.

At the hearing on appellant's motion, the trial court noted that "the 60 days for appeal expired before the end of the year" so the judgment was final when the amendment became effective. The court continued, "[O]ur division [Division Six] and our court gave the [trial] court a right to resentence and impose terms and conditions on those cases when the court is being ordered to resentence people. [¶] . . . [A]lthough I understand the concept of *Estrada*, I'm not . . . the appellate court division, and I don't think I have the authority to just take that and decide this also applies on both grounds. One, that I can go back there [i.e., that *Estrada* applies so that appellant is retroactively entitled to the benefit of the reduced punishment] and, two, that I can resentence. [¶] . . . [T]he court did not impose all of the . . . priors in this case for a six-year term, and I'm still of the personal

opinion that a six-year term is appropriate, but I'm not going to go there until our appellate division tells me that this principle [the *Estrada* retroactivity principle] does apply, . . . and then when they do that I'm satisfied that I have the authority to resentence on all those things. [¶] So I'm not going to act as an appellate court and say I can do those things and then get to the second issue [whether the court can resentence appellant], which I agree is also debatable on certain terms and conditions. "

The trial court said it did not agree that *Estrada* applies here. Defense counsel replied: "[T]he Court thinks, 'Hey. I'm not going to resentence him. I don't think *Estrada* applies.' But I just wanted to make my position clear that I think the Court is wrong and that *Estrada* does apply." The trial court responded, "I believe the appellate court has to say, 'Judge Young, you're wrong. It [*Estrada*] does apply. You should have applied it, and I'm ordering you to resentence him.'" "I'm still of the opinion that the six-year sentence I imposed would have been appropriate."

Defense counsel protested, "I believe the Court is incorrect in stating that his sentence was final 60 days after. I disagree with that. I believe it isn't final until the 120 days, which is now."

Section 1170(d)(1) and Standard of Review

"[W]ithin the 120–day period [of section 1170(d)(1)], the court may recall a sentence on its own motion for any reason rationally related to lawful sentencing. The court may then impose any otherwise lawful resentence suggested by the facts available at the time of resentencing." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 456.) "Section 1170(d) is an exception to the common law rule that the court loses resentencing

jurisdiction once execution of sentence has begun. [Citations.]" (*Id*. at p. 455.)

"[U]nder section 1170(d), the court *may* recall and resentence *on its own initiative,* but *need* not do so . . . ." (*Dix v. Superior Court*, *supra*, 53 Cal.3d at p. 459.) A trial court's decision whether to recall a sentence "necessarily involves the exercise of discretion." (*Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1833.) We review the decision for abuse of discretion. (See *People v. Pritchett* (1993) 20 Cal.App.4th 190, 195.)

The Trial Court Did Not Abuse Its Discretion

In his opening brief appellant concedes: "The trial court was correct that given that appellant did not appeal, his case became final 60 days from the sentencing and therefore he was not entitled to a reduction of his sentence based on *Estrada*." But appellant argues: "[T]he court erred by conflating the issue of retroactivity of newly enacted ameliorative laws with resentencing statutory authority provided under section 1170(d). . . . [¶] . . . Appellant . . . sought a resentencing provided under section 1170(d) which is independent of *Estrada*." Therefore, "the trial court erred by concluding that the court did not have discretion to resentence appellant based on the amendments to section 11370.2."

Appellant in effect is contending that the trial court abused its discretion under section 1170(d)(1) because it did not comprehend the full scope of its discretion. "[I]f a trial court's decision . . . reflects an unawareness of the full scope of its discretion, it cannot be said the court has properly exercised its discretion under the law. [Citations.]" (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 25-26; see also *People v. Aubrey* (1998) 65

Cal.App.4th 279, 282 ["'an erroneous understanding by the trial court of its discretionary power is not a true exercise of discretion'"].)

"'[A]bsent a showing to the contrary, the trial court is presumed to have known and followed the applicable law and to have properly exercised its discretion. [Citation.]' [Citation.]" (*People v. Galvez* (2011) 195 Cal.App.4th 1253, 1264.) Appellant has not overcome this presumption by showing that the trial court was unaware of the full scope of its discretion under section 1170(d)(1). We interpret the court's remarks as indicating that it would not exercise its discretion to recall appellant's sentence because *Estrada* was inapplicable and a six-year term was appropriate. Appellant bargained for a six-year term, which could have been imposed under current law. Accordingly, we conclude that the trial court did not abuse its discretion.

Disposition

The order denying appellant's request to recall his sentence is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Bruce Young, Judge

Superior Court County of Ventura

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