Filed 9/25/18 P. v. Perrow 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. ELISE MICHELLE PERROW, Defendant and Appellant.	B281475 (Los Angeles County Super. Ct. Nos. KA108493 & GA087853)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed and remanded with directions.

Allen G. Weinberg, 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, and Jaime L. Fuster and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Elise Michelle Perrow appeals from her judgment of conviction on one count of inflicting corporal injury on a spouse or cohabitant (Pen. Code,[1] § 273.5, subd. (a)), three counts of assault with a deadly weapon (§ 245, subd. (a)), and one count of violating a domestic violence protective order (§ 273.6, subd. (a)). On appeal, Perrow challenges certain aspects of her sentencing, arguing that the trial court erred in failing to strike an on-bail enhancement, improperly imposed a domestic violence fund fee, and issued an unauthorized sentence in ordering her not to own or possess any deadly or dangerous weapons. We affirm the conviction, and remand the matter to the trial court.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Case No. KA108493

A. The Charges

In an amended information, the Los Angeles County District Attorney charged Perrow with one felony count of inflicting corporal injury on a spouse or cohabitant (§ 273.5, subd. (a)) [count 1], three felony counts of assault with a deadly weapon (§ 245, subd. (a)) [counts 2-4], and one misdemeanor count of disobeying a domestic violence court order (§ 273.6, subd. (a)) [count 5]. As to count 1, it was alleged that Perrow personally used a deadly and dangerous weapon in the commission of the offense within the meaning of section 12022, subdivision (b). As to counts 3 through 5, it was alleged that Perrow had been released from custody on bail at the time of the offenses in

---

1 All further statutory references are to the Penal Code.

violation of section 12022.1. Perrow pleaded not guilty to each count and denied the enhancement allegations.

B. December 5, 2014 Incident (Counts 1-2)

Perrow was involved in an on-again-off-again relationship with John McGee for about a year. On December 5, 2014, Perrow and McGee had an argument in front of McGee's house. McGee repeatedly asked Perrow to leave, but she refused. As the argument escalated, Perrow pushed and slapped McGee multiple times. At one point, Perrow grabbed a wooden board with screws that had been left in the front yard. Perrow swung the board at McGee and struck him in the head, causing him to bleed. Perrow also told McGee she was going to call the police and claim he had raped her. After making this threat, Perrow repeatedly punched herself in the face. She then went to her car and called 911, falsely reporting that she was the victim of an assault. After the police arrived on the scene and spoke to various witnesses, Perrow was arrested and taken into custody.

C. August 26, 2015 Incident (Counts 3-5)

On August 26, 2015, Perrow and McGee were involved in another argument at Perrow's house. When McGee tried to leave the house, Perrow blocked his path. McGee eventually ran out the front door and down the street. McGee saw one of Perrow's neighbors, Jessie Garcia, sitting in front of his house and asked Garcia for his help. As McGee was standing near Garcia, he saw Perrow driving her car toward him at a high rate of speed. Perrow drove her car onto the sidewalk and came within a few feet of McGee and Garcia. Both men had to jump out of the way to avoid getting hit. Perrow turned her car around and again drove on the sidewalk toward the two men, forcing them to jump

out of the way a second time. Perrow then made another U-turn with her car, but came to a stop when she hit a curb. At the time of the incident, a domestic violence protective order was in effect that prohibited Perrow from having any contact with McGee.

D. Verdict and Sentencing

The jury found Perrow guilty as charged on all counts. The jury also found true the allegation that Perrow personally used a deadly and dangerous weapon when she committed the offense in count 1. The parties stipulated that Perrow was released on bail when she committed the offenses in counts 3 through 5.

At the sentencing hearing held on March 2, 2017, the trial court imposed an aggregate term of six years in state prison, consisting of three years on count 1, consecutive terms of one year each on counts 3 and 4, and a consecutive term of one year on the personal-use-of-a-deadly-weapon enhancement in count 1. The court also imposed a concurrent term of 364 days in county jail on count 5. The court stayed a three-year term imposed on count 2 pursuant to section 654. The court also stayed a two-year term imposed on the on-bail enhancement under section 12022.1. The court ordered Perrow to pay various fines and fees, including a domestic violence fund fee of $500 pursuant to section 1203.097. The court further ordered Perrow to not own, use, or possess any deadly or dangerous weapons, including any firearms.

II. Case No. GA087853

On January 25, 2013, Perrow was charged with one count of identity theft in violation of section 530.5, subdivision (a). She pleaded no contest to that charge and was placed on five years of felony probation with conditions. On June 24, 2015, based on the

charges filed in Case No. KA108493, Perrow was found to be in violation of the terms of her probation, and her probation was revoked. On March 2, 2017, the trial court sentenced Perrow to two years in state prison to run concurrently with her sentence in Case No. KA108493.

DISCUSSION

I. Failure to Strike the On-Bail Enhancement

At the sentencing hearing, defense counsel initially asked the trial court to stay the imposition of the section 12022.1 on-bail enhancement. The prosecutor opposed the request, arguing that the enhancement was mandatory under subdivision (b) of the statute and could not be stayed. Defense counsel then asked the court to strike the enhancement in light of the evidence in the case and the aggregate sentence being imposed. The court indicated that it believed it could stay the enhancement, and added, "I'll let the Court of Appeals [sic] deal with that. The 2-year out on bail will be stayed."

On appeal, Perrow asserts that the on-bail enhancement should have been stricken rather than stayed because the trial court evinced a desire to strike the enhancement but mistakenly believed it lacked the discretion to do so. The Attorney General agrees that the trial court failed to recognize it had the discretion to strike the enhancement and requests the matter be remanded for resentencing. We conclude the trial court erred in declining to exercise its discretion under section 1385, and remand the matter to the trial court to strike the on-bail enhancement.

Section 12022.1 provides that when a defendant who is on bail pending adjudication of a "primary offense" felony is convicted of a "secondary offense" felony, he or she "shall be

subject to a penalty enhancement of an additional two years. . . ." (§ 12022.1, subd. (b).) Under section 1385, the trial court generally has discretion "to strike or dismiss an enhancement" or "to strike the additional punishment for that enhancement in the furtherance of justice." (§ 1385, subd. (c).) In *People v. Meloney* (2003) 30 Cal.4th 1145 (*Meloney*), the California Supreme Court held that the trial court has discretion to strike an on-bail enhancement pursuant to section 1385. (*Id.* at pp. 1154-1156.) The Court also concluded that the case should be remanded for resentencing because it appeared the trial court was unaware of its authority under section 1385 when it imposed the two-year enhancement pursuant to section 12022.1. (*Id.* at p. 1165.)

In this case, prior to imposing and staying the on-bail enhancement, the trial court stated that it considered Perrow's aggregate six-year sentence to be "an adequate amount of time." When defense counsel requested that the on-bail enhancement be stricken in light of the sentence being imposed, the court responded that it believed the enhancement could be stayed. As in *Meloney*, *supra*, 30 Cal.4th at p. 1165, the trial court "never clearly declined to exercise [its] discretion" to strike the on-bail enhancement under section 1385, and "on the record before us it appears that the court was unaware of its authority to do so." However, it is also apparent from the record that the trial court believed the imposition of an additional two-year term under section 12022.1 was not warranted given Perrow's aggregate sentence, and that the court would have struck the enhancement had it been aware of its authority to do so. Accordingly, on remand, the trial court is directed to strike the two-year on-bail enhancement pursuant to section 1385.

II. Imposition of the Domestic Violence Fund Fee

Perrow next contends, and the Attorney General concedes, that the trial court erred in imposing a domestic violence fund fee of $500 pursuant to section 1203.097. We agree. Subdivision (a) of the statute provides, in pertinent part, that "[i]f a person is granted probation for a crime" involving domestic violence, "the terms of probation shall include . . . [a] minimum payment by the defendant of a fee of five hundred dollars ($500). . . ." (§ 1203.097, subd. (a)(5)(A).) Here, the fee was improperly imposed because it is applicable only to defendants who are placed on probation, and Perrow was sentenced to prison for her domestic violence offense. (*People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1520 [trial court erred in imposing a section 1203.097 restitution fine because defendant "was sentenced to prison and the fine is to be imposed only when a defendant is 'granted probation'"].) The domestic violence fund fee imposed on Perrow must therefore be stricken.

III. Order Prohibiting Ownership, Use, or Possession of Deadly or Dangerous Weapons

At the sentencing hearing, the trial court ordered Perrow "not [to] own, use, or possess any deadly or dangerous weapons, including firearms." The abstract of judgment also includes an order similarly stating, "Do not own[,] use/possess dangerous/deadly weapons." On appeal, Perrow contends the trial court exceeded its sentencing authority in issuing the order. She asserts that, while the court could have advised her that she was prohibited from possessing firearms as a convicted felon, its order went beyond a mere advisement and exposes her to additional punishment by way of contempt. She also argues that the order is unduly overbroad by prohibiting the possession of

dangerous or deadly weapons beyond firearms. The Attorney General, on the other hand, claims that the order is advisory only, and that to the extent it is ambiguous, the trial court can clarify or modify its terms on remand.

We conclude the trial court's order prohibiting Perrow from owning, using, or possessing any dangerous or deadly weapons was unauthorized. Section 29800, subdivision (a) prohibits any person previously convicted of a felony from owning, purchasing, receiving or possessing a firearm. (§ 29800, subd. (a)(1).) When a person has been convicted of a felony, section 29810 requires the trial court to provide notice of the restrictions regarding firearms at the time of sentencing. (§ 29810, subd. (a)(2).) However, section 29800, subdivision (a) applies only to firearms, and does speak to any other "deadly" or "dangerous" weapons. Thus, as set forth in the court's order, the prohibition on owning or possessing "any deadly or dangerous weapons" is both vague and overbroad, and appears to apply to a variety of lawful items, such as kitchen utensils and common tools, that could conceivably cause death or bodily injury. Indeed, the court's minute order specifically states that "knives" are among the prohibited weapons.

Additionally, it is not clear from the record that the trial court intended for its order to be advisory only, as the Attorney General contends. When the order is considered in the context of the entire sentencing hearing, it appears the prohibition on possessing any deadly or dangerous weapons was intended to be mandatory and could expose Perrow to punishment for contempt if she ever owns, uses, or possesses weapons other than firearms at any time in the future. The record reflects the court issued the order immediately after it imposed various statutory fees and fines on Perrow and directed her to provide DNA samples and

fingerprints for law enforcement identification. The court never indicated that it was acting pursuant to section 29810 in issuing the order, or that its intent was to advise Perrow of the statutory restrictions on firearm possession based on her felony convictions.

Accordingly, while Perrow may be prosecuted and convicted of a felony in the future if she ever "owns, purchases, receives, or has in possession or under custody or control any firearm" (§ 29800, subd. (a)(1)), the trial court's order prohibiting her from owning, using, or possessing any deadly or dangerous weapons constitutes an unauthorized sentence and must be stricken. (*People v. Smith* (2001) 24 Cal.4th 849, 852 [unauthorized sentence may be corrected at any time regardless of whether an objection was raised in the trial court].) On remand, the trial court should instruct Perrow that, as a convicted felon, she is prohibited from owning or possessing any firearms, ammunition, or ammunition feeding devices in accordance with section 29810.

IV. Clerical Error in the Minute Orders

Lastly, Perrow asserts that the minute orders in Case No. KA108493, including the minute order from the sentencing hearing, incorrectly state that she was charged in count 5 with a felony offense instead of a misdemeanor. The Attorney General concedes the error. In count 5, Perrow was charged with and convicted of a misdemeanor offense for disobeying a domestic violence protective order in violation of section 273.6, subdivision (a). The minute orders must therefore be corrected to reflect that the offense charged in count 5 was a misdemeanor rather than a felony. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 ["'a court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts'"].)

DISPOSITION

The conviction is affirmed and the matter is remanded to the trial court. On remand, the trial court is directed to (1) strike the two-year on-bail enhancement imposed pursuant section 12022.1; (2) strike the $500 domestic violence fund fee imposed pursuant to section 1203.097; (3) strike the order prohibiting Perrow from owning, using, or possessing any deadly or dangerous weapons; and (4) provide Perrow with notice of the restrictions regarding firearms pursuant to section 29810. The trial court further is directed to correct the minute orders in Case No. KA108493 to reflect that Perrow was charged in count 5 with a misdemeanor offense, not a felony.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.