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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. TONY EUGENE SCALLY, Defendant and Appellant.	B238803 (Los Angeles County Super. Ct. No. TA103013)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary R. Hahn, Judge. Affirmed.

Joanna Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Tony Eugene Scally appeals from the judgment entered following resentencing on remand in case No. TA103013 in accordance with directions given in this court's nonpublished opinion in *People v. Scally et al.* (June 13, 2011, B217402). The trial court sentenced Scally to 15 years in state prison. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*[1]

a. *The robbery*.

Just before 6:00 a.m. on September 29, 2008, Claudia Arce, who worked at the Astro Coin Laundromat (Laundromat) on South Figueroa and 102nd Street in Los Angeles, parked her van in the lot there, opened the Laundromat and went to the office. A couple of minutes later, a customer, Austin Philip, came in to do his laundry. Arce was still in the office when three more men, one of whom was tall and wearing all black, one of whom was wearing a blue jacket and a third, who was wearing a ski mask, walked in.

The three men asked Philip, " 'Where's the lady that runs the house?' " Philip didn't know that Arce was in the office. Arce, however, who had seen the man with the ski mask, had gone to the very back of the office. After the man in the jacket looked through the office window, he yelled out, " 'She's in there.' " The three men then started knocking on the office door.

Speaking through the window, Arce asked the men what they wanted. They ordered her to open the door and when she refused, the tall man pulled out a revolver, pointed it at Arce and told her that if she didn't open the door he would shoot. Arce agreed to give the men money, but still refused to open the door. This made the man in the ski mask angry and he kicked in the door. Meanwhile, Philip had run out the Laundromat's back door.

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[1] The facts have been taken from the court's opinion in *People v. Scally et al.*, *supra*, B217402.

Once they were inside the office, the men demanded that Arce give them the money from the cash register. She opened the register and they took the money. The men then shoved her into a small hallway and ordered her to open a locked cabinet. Because she didn't have a key, Arce broke the lock on the cabinet with a hammer. The men took the money from the cabinet, then ordered Arce to open the change machines. When she was unable to do so because she did not have the keys, the men threw Arce back into the office and left the Laundromat.

A few seconds later, Arce went out to the parking lot and saw someone driving away in her van. A young man, or " 'kid,' " standing on the corner asked Arce if she had seen his brothers. Arce then called the police. The young man left before they arrived.

Los Angeles Police Officer Travis Curtin responded to Arce's call. As he was interviewing her, Arce suddenly pointed to a young man walking down 102nd Street and said, " 'That's him over there. He's the one.' " The "kid," who turned out to be Michael S., was taken into custody.

When Los Angeles Police Department Detective Alejandro Garcia arrived at the scene, he recognized Michael S. from former encounters. There was a faded gray Toyota Camry parked in the middle of the street and when Garcia went to check it, he noted that the ignition had apparently been "punched."

Inside the Laundromat, the robbery had been captured by a surveillance camera. Garcia viewed the tape and identified the suspected robbers as Scally, William Gates and Jonathan Hosea.[2] Both Arce and Philip identified photographs of Scally as those of the man who had the gun.

When police later searched Gates's house, they discovered in his bedroom a belt with an " 'H' " buckle and two pieces of paper containing gang graffiti relating to the Hoover Criminals gang.

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[2] Although Scally and Gates were charged and tried together, the trial court utilized separate juries because each of them had made extra-judicial statements incriminating the other. Accordingly, some evidence was presented only to the Gates jury while some was presented only to the Scally jury.

A tape recording was made of a telephone call Scally made from the jail a few days after his arrest. During the conversation, Scally mentioned his accomplices and said something about having someone offer Arce money to " 'drop the charges.' "

b. *Gang evidence*.

Los Angeles Police Officer Michael Knoke was assigned to the Southeast Gang Enforcement Detail and was familiar with the Hoover Criminals Gang. The gang, which has been around since the 1970's and has nearly 1,000 members, began as part of the Crips gang. However, in the mid-1990's, its members "broke away" from the Crips and began to call themselves the Hoover Criminals. Their primary activities include "murders, drive-by shootings, drug trafficking, burglaries and robberies." Scally, Gates, Hosea and Michael S. are all members of the Hoover Criminals. It was Knoke's opinion that the robbery of the Laundromat had been committed for the benefit of, in association with and at the direction of the Hoover Criminals gang.

c. *Disposition of the matter.*

The jury found Scally guilty of robbery (Pen. Code, § 211), during which he or a principal used a firearm (Pen. Code, § 12022.53, subd. (a)(4)), and that he committed the offense for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)).[3]

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[3] " 'Section 182.22, subdivision (b)(1) imposes additional punishment when a defendant commits a felony for the benefit of, at the direction of, or in association with a criminal street gang. To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity. [Citations.]' (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.) The gang statute . . . requires two further elements: evidence of a felony committed 'for the benefit of, at the direction of, or in association with any criminal street gang,' and evidence the felony was committed 'with the specific intent to promote, further, or assist in any criminal conduct by gang members.' " (*People v. Scally et al.*, *supra*, B217402, italics omitted.)

d. *The modification and resentencing.*

The trial court imposed the mid-term of 3 years for Scally's conviction of robbery (Pen. Code, § 211) and 10 years each for the findings that he or a principal used a firearm during the offense (Pen. Code, § 12022.53, subd. (e)) and that the robbery was committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)).

Relying on *People v. Salas* (2001) 89 Cal.App.4th 1275 at pages 1281 to 1282, this court determined that where " '[Penal Code] section 186.22 [the gang enhancement] has been found to be applicable, in order for section 12022.53 to apply, it is necessary only for a principal, not the accused, in the commission of the underlying felony to personally use the firearm; *personal* firearm use by the accused is not required under these specific circumstances. However, as a consequence of this expanded liability under section 12022.53, subdivision (e), the Legislature has determined to preclude the imposition of an additional enhancement under section 186.22 in a gang case unless the accused *personally* used the firearm.' " (*People v. Scally et al.*, *supra*, B217402, italics in original.)

The court continued: "Here, the trial court imposed the firearm enhancement but the only finding was that a principal had used a firearm. Therefore, [Penal Code] section 12022.53, subdivision (e)(2) precludes imposition of the additional term specified in section 186.22, subdivision (b). Scally asks us to remand [the matter] so the trial court can decide whether to stay imposition of the 10-year gang enhancement or, in its discretion, strike the finding entirely. However, as the [People] point[] out, 'the trial court imposed a middle-term sentence rather than an upper-term sentence for the robbery. The trial court should therefore be permitted on remand to reconsider its sentence for the robbery offense.' . . . [¶] Therefore, we deem it appropriate to remand this matter so the trial court may consider restructuring Scally's sentence." (*People v. Scally et al.*, *supra*, B217402.)

At proceedings held on November 11, 2011, the trial court indicated that the Court of Appeal had directed it to "resentence [Scally] on everything." The trial court indicated that it had given Scally "a break last time and [given] him the middle term because [it

had] imposed the gang enhancement, which the Court of Appeal said [it could not] do. [¶] Because of that, . . . probation [was] denied" and the trial court sentenced Scally "to the high term of five years for the robbery." The court stated: "Your background, prior convictions [and] prior prison term justif[y] the upper term of five years. [¶] Plus [I am imposing] the upper term of ten years for the Penal Code section 12022.53 allegation, the gun use, for a total of 15 years state prison." The trial court stayed the Penal Code section 186.22 finding.

The trial court awarded Scally presentence custody credit for 1,145 days actually served and 171 days of conduct credit, for a total of 1,316 days. The court then ordered Scally to pay a $200 restitution fine (Pen. Code, § 1202.4, subd. (b)), a stayed $200 probation revocation fine (Pen. Code, § 1202.45), a $40 court security fee (Pen. Code, § 1465.8, subd. (a)) and a $30 criminal conviction assessment (Gov. Code, § 70373).

Scally filed a timely notice of appeal on January 17, 2012.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed July 25, 2012, the clerk of this court advised Scally to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider.

On August 6, 2012, Scally filed a letter brief in which he asserted that he is being "double punished." He questions why "[i]f everything else was affirmed[,] . . . is the judge able to reconsider [his] sentence on the robbery [when the] robbery wasn't the issue, or topic of discussion?" Scally continued: "Instead of taking the 10 years off my time as the court[] instructed [the judge] to do[,] he imposed another 2 years on something he already had a chance to do at [the] original sentencing hearing. It seems like a[n] abuse of discretion on the judge[']s behalf. He said he gave me a break [the first] time, but how is that so, when he over sentenced me? I would really like the court[] to reconsider my robbery sentence and impose the 3 years instead of the 5 years, since it

was already given to me and [is] being served. . . . I feel as though [I']m being subjected to double jeopardy . . . ."

Because the trial court erred in imposing the Penal Code section 186.22, subdivision (b) 10-year enhancement, this court remanded the matter so that the trial court could stay or strike the term. However, since at the original sentencing proceeding the trial court imposed only the middle term rather than the upper term on the robbery because it had also imposed the 10-year enhancement, this court determined that, on remand, the trial court could reconsider the sentence in its entirety. This court stated that "[it] deem[ed] it appropriate to remand this matter so [that] the trial court [could] consider restructuring Scally's sentence." (*People v. Scally et al., supra*, B217402.)

Moreover, such a "restructuring" does not amount to double jeopardy. " 'The double jeopardy bar protects against a second prosecution for the same offense following an acquittal or conviction, and also protects against multiple punishment for the same offense. [Citations.]' [Citation.]" (*People v. Seel* (2004) 34 Cal.4th 535, 542.) "[S]entencing determinations 'do not place a defendant in jeopardy for an "offense[.]" ' " (*Ibid*.) " 'The Double Jeopardy Clause "does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." [Citation.] Consequently, it is a "well-established part of our constitutional jurisprudence" that the guarantee against double jeopardy neither prevents the prosecution from seeking review of a sentence nor restricts the length of a sentence imposed . . . after a defendant's successful appeal. [Citations.]' [Citation.]" (*Ibid*.)

Here, since the trial court was required to reduce Scally's sentence by 10 years, it properly exercised its discretion when it increased his sentence for robbery by two years. Under the circumstances presented, imposition of the increased term for Scally's conviction of robbery was neither improper nor unfair.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.