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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN WANG,

Defendant and Appellant.

B263260

(Los Angeles County  
Super. Ct. No. KA044767)

APPEAL from an order of the Superior Court of Los Angeles County, Jack P. Hunt, Judge. Affirmed and remanded.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Kenneth C. Byrne and Shira Seigle Markovich, Deputy Attorneys General, for Plaintiff and Respondent.

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Pursuant to a September 2000 negotiated agreement, Steven Wang pleaded no contest to one count each of forcible rape, making a criminal threat and assault with a firearm and admitted related firearm and deadly weapon special allegations. Six other charges were dismissed. Wang was sentenced to an aggregate state prison term of 22 years. (The negotiated agreement specified he would be sentenced to at least 12 years, but no more than 26 years in state prison.)

In December 2014 the California Department of Corrections and Rehabilitation (CDCR) notified the trial court that Wang's sentence appeared to have been calculated incorrectly. In response the court set the matter for resentencing. On March 26, 2015 the court again sentenced Wang to 22 years in state prison, albeit arrived at in a different manner, and awarded 5,454 total days of custody credit, including 308 days of presentence credit, but leaving to the CDCR the calculation of any additional conduct credits accrued by Wang while in prison.

Wang appeals the trial court's resentencing decision, contending the court abused its discretion by imposing the upper term for assault with a firearm, thereby in effect leaving in place the original 22-year sentence, while ignoring Wang's successful rehabilitation during the intervening 14 years in prison. He also contends the trial court miscalculated his presentence custody credits. We affirm Wang's new sentence but, as recommended by the Attorney General, remand the case for the trial court to recalculate Wang's presentence custody credits.

### **PROCEDURAL BACKGROUND**

Wang was charged by information in November 1999 with one count of kidnapping to commit robbery (Pen. Code, § 209,

subd. (b)(1)),<sup>1</sup> two counts of forcible rape (§ 261, subd. (a)(2)), two counts of making criminal threats (§ 422), one count of assault with a firearm (§ 245, subd. (a)(2)) and three counts of forcible sexual penetration with a foreign object (§ 289, subd. (a)(1)) with special allegations alleging use of either a knife or a firearm during the commission of each offense (§§ 12022, subd. (b)(1), 12022.3, subds. (a) & (b), 12022.5, subd. (a)). Wang's former girlfriend was the victim of the crimes, which occurred on February 23, March 31 and May 30, 1999.

After originally pleading not guilty to each charge, on September 19, 2000 Wang pleaded no contest pursuant to a negotiated agreement to one count each of forcible rape, making a criminal threat and assault with a firearm and admitted the related firearm and deadly weapon enhancement allegations. The parties agreed the reporter's transcript of the preliminary hearing provided a factual basis for the plea. The remaining six counts were dismissed.

The plea form signed by Wang specified a sentencing range from 12 to 26 years in state prison "per [section] 667.6." (Section 667.6, subdivision (c), provides that, in lieu of the term provided in section 1170.1, a full, separate and consecutive term may be imposed for the violation of an offense specified in section 667.6, subdivision (e)—a listing that includes forcible rape.) At the sentencing hearing on February 21, 2001, the court imposed an aggregate state prison term of 22 years: the eight-year upper term for forcible rape, plus four years for the deadly weapon enhancement; a consecutive middle term of two years for making a criminal threat, plus one year for the deadly weapon

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<sup>1</sup> Statutory references are to this code.

enhancement; and a consecutive middle term of three years for the aggravated assault, plus four years for the firearm-use enhancement. The court ordered Wang to pay various statutory fines and fees and awarded him 308 days of presentence custody credit.

The court corrected its award of presentence custody credits on September 30, 2003 and amended the abstract of judgment to reflect a total of 633 days of presentence custody credit. On September 14, 2004, following receipt of a letter from Wang, the court again adjusted upward its award of presentence custody credits and amended the abstract of judgment to show a total of 738 days (642 actual days and 96 days of good time/work time credit).

On December 24, 2014 the CDCR wrote the trial court, inquiring whether it had correctly imposed full consecutive terms for each of the three counts in Wang's sentence. The CDCR also noted an inconsistency between the transcript of the sentencing hearing, on the one hand, and the minute order of the sentencing hearing and abstract of judgment, on the other hand, as to whether forcible rape or assault with a firearm had been identified as the principal term. On January 23, 2015 the trial court (the original sentencing judge) set the matter for resentencing.

At the resentencing hearing on March 26, 2015, Wang's counsel argued for a new sentence of time served or, in the alternative, 20 years. The People urged the court to reimpose the original 22 year sentence.

The court again sentenced Wang to an aggregate state prison term of 22 years. Identifying assault with a firearm as the principal term, the court imposed the upper term of four years,

plus four years for the firearm-use enhancement; as authorized by section 667.6, subdivision (c), a full consecutive term of three years for forcible rape, plus 10 years for the deadly weapon enhancement; and a consecutive term of eight months (one-third the middle term) for making a criminal threat, plus four months (one third the middle term) for the deadly weapon enhancement on that count. The court awarded Wang 5,454 days of custody credit, 5,146 actual days in prison plus 308 days of presentence custody credit as originally awarded at the February 21, 2001 sentencing hearing. Determination of the proper number of conduct credits for Wang's time in prison was left to the CDCR.

## **FACTUAL BACKGROUND**

### *1. The Events Leading to Wang's Convictions*

As described in testimony given at Wang's preliminary hearing and the narrative portions of the probation and diagnostic reports, after Wang and Jane Doe had dated for several months, Jane Doe attempted to end the relationship. During an argument in this period, Wang slammed Jane Doe's head against a wall and then placed a gun to her head, threatening to kill her if she reported his actions to anyone. (This incident was the basis for the aggravated assault charge to which Wang pleaded no contest.)

Several months later, after Jane Doe had reaffirmed her intention to end her relationship with Wang, Wang began stalking her, monitoring her activities. Early on Sunday morning, May 30, 1999, after seeing Jane Doe with a male friend at a nightclub the previous evening, Wang forced his way into her car at knifepoint, threatened to kill her, stabbed her when she attempted to escape and then drove her to his home. At his home Wang barricaded his room so Jane Doe could not leave, raped her

twice, digitally penetrated her and repeatedly threatened to kill her. Jane Doe was finally able to call her mother using Wang's cell phone after he fell asleep. The mother notified the police, who responded to the scene and arrested Wang. Jane Doe was taken to USC Hospital for medical treatment. (These events were the bases for the charges of forcible rape and making a criminal threat to which Wang pleaded no contest.)

## *2. The March 26, 2015 Resentencing Hearing*

At the resentencing hearing Wang's counsel urged the court to impose a time-served sentence (approximately 16 years), emphasizing what was described as Wang's exemplary conduct while in prison. According to his counsel, Wang had not been disciplined at all while in custody, had enrolled in Bible study, earned an associate of arts degree from Lassen Community College, acquired a high level of computer literacy and shown extraordinary remorse for his past criminal conduct. In response, the prosecutor argued there was no reason for the court not to reimpose the original 22-year sentence, which, she started to explain, could be done consistently with the various sentencing statutes. The court, which had previously advised counsel it was familiar with the facts of the case, stated, "I know how to get to 22 years."

The court then stated, while it appreciated the good things Wang had done in prison, "this was a very aggravated case": "There were very, very bad things done to the victim, which I'm sure she is still suffering from." The court also noted Wang had shown no remorse at the time of the original sentencing. The court then imposed the 22-year sentence as described in the preceding section.

## DISCUSSION

### 1. *The Court Did Not Abuse Its Discretion in Sentencing Wang to an Aggregate 22-year Prison Term*

On appeal Wang argues the trial court abused its discretion by reimposing the original 22-year state prison sentence and, in particular, by selecting the upper term of four years on the aggravated assault count. There was no *Harvey* waiver permitting the court to consider the dismissed charges,<sup>2</sup> Wang argues; and the record does not show the trial court limited its sentencing decision to the facts underlying the three counts for which he was convicted. In addition, there was no evidence the victim was still suffering from Wang's crimes 16 years after they were committed, the primary reason articulated by the court for its sentencing decision.

#### a. *Standard of review*

Whether to impose the lower, middle or upper term is governed by section 1170, subdivision (b), which provides, "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected . . . ."

The broad discretion given the trial court by section 1170 is subject to review for an abuse of discretion. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "The trial court's sentencing discretion must be exercised in a manner that is not

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<sup>2</sup> A *Harvey* waiver (*People v. Harvey* (1979) 25 Cal.3d 754) allows the court to consider dismissed charges during sentencing.

arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an ‘individualized consideration of the offense, the offender, and the public interest.’” (*Ibid.*) A trial court abuses its discretion “if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision.” (*Ibid.*; see *People v. Willover* (2016) 248 Cal.App.4th 302, 323.) Subject to certain exceptions, “a trial court is free to base an upper term sentence upon any aggravating circumstance that (1) the court deems significant and (2) is reasonably related to the decision being made.” (*People v. Moberly* (2009) 176 Cal.App.4th 1191, 1196; see *Sandoval*, at p. 848; Cal. Rules of Court, rules 4.408(a), 4.421.)

b. *Wang’s sentencing claim has been forfeited*

The Attorney General argues Wang forfeited his arguments regarding selection of the upper term for assault with a firearm and reimposition of the aggregate 22-year state prison term by failing to object to the trial court’s reasons for its resentencing decision. We agree, at the very least with respect to Wang’s claims the trial court lacked an evidentiary basis for its discussion of the victim’s continued suffering and may have improperly considered the aggravated nature of the crimes alleged in the dismissed charges when imposing the upper term on the assault charge and the overall sentence of 22 years.

“Ordinarily, an appellate court will not consider a claim of error if an objection could have been, but was not, made in the lower court. [Citation.] The reason for this rule is that ‘[i]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.’” (*People v. French* (2008)



43 Cal.4th 36, 46.) This forfeiture (waiver) doctrine applies to claims the trial court failed to properly make a discretionary sentencing choice. (*People v. Scott* (1994) 9 Cal.4th 331, 356 [“complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal”]; see *People v. Tillman* (2000) 22 Cal.4th 300, 303 [People’s failure to object to trial court’s failure to state on the record its reasons for not imposing a restitution fine forfeited claim on appeal].) As the Supreme Court explained in *Scott*, “[T]he waiver doctrine should apply to claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular cases, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons. [¶] . . . Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court’s statement of reasons are easily prevented and corrected if called to the court’s attention. As in other waiver cases, we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them.” (*Scott*, at p. 353; see *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1372 [“Ortiz waived, and cannot challenge on appeal, any error by the trial court in not citing adequate aggravating factors for imposing the upper three-year term for count 3 because he did not object below to his sentence on that ground”].)

Wang contends he did not forfeit his claim because his counsel's argument for a lower sentence made it clear to the trial court he objected to reimposition of the 22-year term. That argument ignores entirely the reason express objections are required—to allow the trial court to correct errors when they are called to its attention. Simply requesting a different sentence, however forcefully that request may be made, deprives the trial court of that opportunity. Wang's corollary argument—that the court's rejection of his counsel's argument for a lower sentence demonstrates any objection would have been futile—is similarly misguided. If the trial court had, in fact, been relying on improper factors in reaching its decision, nothing in the record indicates it would not have reconsidered that decision, and perhaps agreed that a lower term was appropriate, if its error had been addressed by Wang's counsel.

*c. The trial court acted well within its discretion*

Wang was entitled at resentencing to ask the trial court to consider the positive aspects of his conduct while in prison. (See, e.g., *Dix v. Superior Court* (1991) 53 Cal.3d 442, 460 [“it is well settled when a case is remanded for resentencing after an appeal, the defendant is entitled to ‘all the normal rights and procedures available at his original sentencing’ [citations], including consideration of any pertinent circumstances which have arisen since his prior sentence was imposed”]; *Van Velzer v. Superior Court* (1984) 152 Cal.App.3d 742, 744; see also *People v. Jackson* (1987) 189 Cal.App.3d 113, 119.) His counsel presented that information, and the trial court acknowledged it when discussing the reasons for its resentencing decision. The court's conclusion Wang's postconviction conduct did not outweigh the aggravated nature of the three serious offenses to which Wang had pleaded

guilty was well within its discretion. Reweighing those factors is not the proper function of an appellate court. (*People v. Scott, supra*, 9 Cal.4th at p. 355 [appellate court cannot “reweigh valid [sentencing] factors bearing on the decision below”]; *People v. Jordan* (1986) 42 Cal.3d 308, 317 [the Court of Appeal “erred when it reweighed the circumstances in mitigation rather than limiting its review to whether the sentencing court abused its statutory discretion”].)

2. *The Matter Must Be Remanded for Recalculation of Wang’s Custody Credits*

In calculating Wang’s custody credits, the trial court used the original 308-day figure for presentence custody credits from the February 2001 sentencing hearing, apparently overlooking the two corrections that had been made in 2003 and 2004. Wang contends, the People concede and we agree a remand is required to enable the trial court to recalculate his custody credits.

**DISPOSITION**

The matter is remanded to the trial court to recalculate Wang’s presentence custody credits. In all other respects the March 26, 2015 resentencing order is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

KEENY, J.\*

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