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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS BALISCAN REGALADO,

Defendant and Appellant.

B266688

(Los Angeles County
Super. Ct. No. MA058648)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Kathleen Blanchard, Judge. Reversed and remanded for resentencing.

William Hassler, 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, Assistant Attorney General, and Scott A. Taryle, Deputy Attorney General, for Plaintiff and Respondent.

In a trial by jury, defendant and appellant Dennis Baliscan Regalado was found guilty of assault with a firearm (Pen. Code, § 245, subd. (a)(2); count 3);¹ two counts of criminal threats (§ 422, subd. (a), counts 2 & 4); dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1), count 5); two counts of possession of a firearm by a felon with two priors (§ 29800, subd. (a)(1), counts 6 & 7); possession of ammunition (§ 30305, subd. (a)(1), count 8); and dissuading a witness from testifying (§ 136.1, subd. (a)(1), count 9). Appellant was originally sentenced to 113 years to life in prison.

On April 14, 2015, this court found that appellant's sentence violated California's prohibition against cruel or unusual punishment. (Cal. Const., art. I, § 17; *People v. Regalado* (Apr. 14, 2015, B255074) [nonpub. opn.].) We remanded the matter to the trial court for resentencing. (*People v. Regalado, supra*, B255074, at p. 2.)

On August 19, 2015, the trial court resentenced appellant to 39 years to life on count 3; a concurrent term of 39 years to life on count 2; and 25 years to life on count 9, for a total of 64 years to life. Appellant was awarded presentence custody and conduct credits of 1,663 days.

Appellant appeals, again arguing that his sentence amounts to cruel and unusual punishment.

PROCEDURAL BACKGROUND

At the resentencing hearing, the prosecutor recommended a sentence of 50 years to life, while defense counsel asked the trial court to revisit the *Romero*² motion and impose four to 24 years to life. The trial court noted that this court, in remanding the case, did not suggest that the trial court erred in denying the *Romero* motion and so would not reevaluate that decision. Instead, “[the appellate court] tasked [the trial court] with re-sentencing to something that is not the legal equivalent of life without the possibility of parole.” The trial court then pointed out that (1) appellant was 38 years old

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

“[s]o he certainly has got a lot of life expectancy left”; and (2) “as a third striker he is eligible to earn 20 percent off of his credit in terms of the good time/work time that he will receive as a third striker.”

After entertaining defense counsel’s argument, the trial court stated: “This is a case where [appellant] repeatedly victimized this victim in very serious ways. And it continued as he awaited trial with him attempting to dissuade her not only directing her not to come to court, but doing it in Tagalog so that it could evade the listeners on the phone. I see a very sophisticated pattern in how he carried this out. And given his criminal history, none of my original feelings or findings or discretion on this case has changed. It’s just a matter of I believe that I am going to have to rework the sentencing in order to comport with the Court of Appeals’ order, which I read as simply it can’t be the functional equivalent of life without the possibility of parole.”

With that in mind, the trial court resentenced³ appellant as follows: As to count 3 (§ 245, subd. (a)(2)), appellant was ordered to serve 25 years to life; as to the section 12022, subdivision (a), allegation, he was ordered to serve a consecutive term of the midterm of four years; and pursuant to section 667, subdivision (a), appellant was ordered to serve two consecutive five-year terms, for a total state prison commitment of 39 years to life. As to count 2, the sentence was identical, but the trial court ordered that it run concurrently. As to count 9, appellant was likewise ordered to serve a term of 25 years to life, to run consecutively to the time imposed in count 3 because it was a “totally different violation.” And as to count 9, the trial court struck the section 667, subdivision (a), allegations or the sentencing on that pursuant to section 1385. “So instead of consecutive 35 [years] to life sentence he’ll have a consecutive 25 to life sentence. In the end, that means that he’ll actually be serving two life terms with a combined minimum parole eligibility of 64 years in this case. As I said, he’s eligible to earn good time/work

³ The sentence on counts 2 through 8 remained unchanged in terms of what was imposed and stayed pursuant to section 654.

time at a rate of 20 percent off of that. Therefore, given his age I don't believe this is the functional equivalent—or the legal equivalent of life without the possibility of parole.”

DISCUSSION

Appellant contends that the trial court misunderstood the conduct credits available to third strike offenders. The People agree.

A defendant sentenced to an indeterminate life term under the “Three Strikes” law is not entitled to prison conduct credits for use against his mandatory indeterminate term of life imprisonment. (*In re Cervera* (2001) 24 Cal.4th 1073, 1080.) Yet the trial court imposed a sentence under the erroneous belief that appellant was eligible for 20 percent conduct credits for its indeterminate life sentence.⁴ It follows that the trial court did not understand its discretion and we must reverse the matter and remand the case for resentencing.⁵ (*People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1247–1248.)

Moreover, pursuant to Code of Civil Procedure section 170.1, subdivision (c),⁶ on our own motion and in the interest of justice, we direct that further proceedings be heard by a judge other than the one whose sentencing orders have been reviewed by this appellate court.

⁴ The parties dispute whether appellant is entitled to receive any good time/work time credits. That issue may be presented to the trial court at resentencing.

⁵ We do not adopt appellant's unsubstantiated contention that the trial court should be directed to resentence him to a term of no more than 10 years in prison.

⁶ Code of Civil Procedure section 170.1, subdivision (c), provides: “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.”

DISPOSITION

The judgment is reversed and the matter is remanded for resentencing. On remand, the case shall be assigned to a different judge.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
HOFFSTADT