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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,

B341839

Plaintiff and Respondent,

(Los Angeles County
Super. Ct. No. KA102048)

v.

DEVELLE HOLMES,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County, Jacqueline H. Lewis, Judge. Affirmed as modified with directions.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Charles C. Ragland, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Steven D. Matthews and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

We resolve this appeal by memorandum opinion. (See Cal. Stds. Jud. Admin., § 8.1.)

Appellant Develle Holmes contends the trial court improperly imposed an upper term sentence at his Penal Code¹ section 1172.75 resentencing. He further contends the section 1202.4, subdivision (b) restitution fine imposed at his original sentencing and reimposed at his resentencing is no longer collectible and must be vacated pursuant to section 1465.9, subdivision (d). We reject Holmes's challenge to reimposition of the upper term sentence but agree the restitution fine must be vacated. Accordingly, we direct the trial court to modify the abstract of judgment by vacating the section 1202.4, subdivision (b) restitution fine. We affirm the judgment as so modified.

In 2014, a jury found Holmes guilty of one count of first degree burglary (§§ 459, 460, subd. (a)) in the presence of another person (§ 667.5, subd. (c)(21)) and one count of misdemeanor battery (§ 242). At a sentencing hearing on April 29, 2014, after finding prior conviction allegations to be true, the trial court imposed an aggregate term of 19 years in prison: the upper term of six years for the burglary, doubled to 12 years pursuant to the "Three Strikes" law (§§ 667, subds. (b)-(j), 1170.12, subds. (a)-(d)), plus a consecutive five-year term for a prior serious felony enhancement under section 667, subdivision (a)(1), and two consecutive one-year terms for prior prison term enhancements under section 667.5, subdivision (b). The court imposed a concurrent six-month term for the battery. In addition to other fines and assessments, the court imposed the minimum restitution fine of \$300 under section 1202.4, subdivision (b).

¹ Undesignated statutory references are to the Penal Code.

Effective January 1, 2020, Senate Bill No. 136 amended section 667.5, subdivision (b), to limit the enhancement to prior prison terms served for sexually violent offenses. (Sen. Bill No. 136 (2019-2020 Reg. Sess.); Stats. 2019, ch. 590, § 1.) In 2021, the Legislature enacted Senate Bill No. 483, which made Senate Bill No. 136's changes to the law retroactive and added former section 1171.1, now section 1172.75, to achieve this purpose. (Sen. Bill No. 483 (2021-2022 Reg. Sess.); Stats. 2021, ch. 728, § 3.) Section 1172.75 requires the court to resentence a defendant serving a term on a judgment that includes an invalid section 667.5, subdivision (b) enhancement.

On October 29, 2024, the trial court resented Holmes pursuant to section 1172.75. In addition to striking the invalidated section 667.5, subdivision (b) prior prison term enhancements, defense counsel urged the court to impose a lower-term sentence for the burglary and strike Holmes's prior strike conviction and the section 667, subdivision (a)(1) five-year enhancement. As required, the court struck the prior prison term enhancements, reducing Holmes's sentence by two years, but declined to make the other changes defense counsel advocated. The court imposed an aggregate term of 17 years in prison: the upper term of six years, doubled to 12 years because of the prior strike, plus a consecutive five-year term under section 667, subdivision (a)(1). The court also imposed a concurrent six-month term for the battery. The court noted Holmes "has fines and fees to pay which include[] a . . . \$280 restitution fine . . ." The court's minute order states, in pertinent part, "Fine/fees of \$461 remain as previously ordered and, if outstanding, are to be

collected by the Department of Corrections while the defendant is in prison or on parole.”²

On appeal, Holmes challenges the imposition of the upper term sentence at the resentencing hearing, arguing the court was required to apply the 2022 ameliorative changes to section 1170 that prohibit the imposition of an upper term unless the defendant stipulates to the aggravating circumstances supporting that term, or the prosecution proves the circumstances to a trier of fact beyond a reasonable doubt. (§ 1170, subd. (b)(2); Sen. Bill No. 567 (2021-2022 Reg. Sess.); Stats. 2021, ch. 731, § 1.3.) He notes that section 1172.75 requires a resentencing court to apply any “changes in law that reduce sentences.” (§ 1172.75, subd. (d)(2).)

Holmes’s challenge fails, however, because subdivision (d)(4) of section 1172.75 provides that a court must comply with the heightened factfinding requirements for aggravating factors before imposing an upper term, “[u]nless the court originally imposed the upper term.” (§ 1172.75, subd. (d)(4), italics added.) In *People v. Brannon-Thompson* (2024) 104 Cal.App.5th 455, 458, the Third District held that subdivision (d)(4) thus “carves out an exception to the general rule that all ameliorative changes to the law must be applied at a section 1172.75 resentencing.” “Most courts” have followed *Brannon-Thompson*, holding “that, under section 1172.75, the [trial] court can reimpose an upper term

² It is not clear from the record why the court indicated the section 1202.4, subdivision (b) restitution fine was \$280 and not the statutory minimum of \$300 imposed at the original sentencing hearing. In the respondent’s brief, the Attorney General states it is “plausible that [Holmes] had already paid \$20 of the fine.”

sentence, even if at resentencing a jury or judge has not found the facts underlying the aggravating circumstances true beyond a reasonable doubt, so long as the trial court that originally sentenced the defendant imposed an upper term.” (*People v. Dozier* (2025) 116 Cal.App.5th 700, 705.) We agree with these courts.³

Here, the court reimposed the upper term first imposed at Holmes’s original sentencing. Thus, pursuant to subdivision (d)(4) of section 1172.75, the court had no obligation to apply the heightened factfinding requirements in the recently amended version of section 1170, subdivision (b). Holmes’s challenge to the upper term therefore fails.

We agree with Holmes that the section 1202.4, subdivision (b) restitution fine must be vacated. Effective January 1, 2025, after Holmes’s resentencing, the Legislature amended section 1465.9 to add subdivision (d), which provides, “Upon the expiration of 10 years after the date of imposition of a restitution fine pursuant to Section 1202.4, the balance, including any collection fees, shall be unenforceable and uncollectible and any portion of a judgment imposing those fines shall be vacated.” (Assem. Bill No. 1186 (2023-2024 Reg. Sess.); Stats. 2024, ch. 805, § 1.) The court originally imposed the restitution fine at the April 29, 2014 sentencing hearing, more than 10 years ago, and it

³ In *People v. Gonzalez* (2024) 107 Cal.App.5th 312, the Sixth District reached the opposite conclusion. Our Supreme Court recently granted a petition for review that presents the question over which *Brannon-Thompson* and *Gonzalez* split. (See *People v. Eaton* (Mar. 14, 2025, C096853) [nonpub. opn.], review granted May 14, 2025, S289903.) Holmes urges us to follow *Gonzalez*. As stated above, we agree with *Brannon-Thompson*.

must be vacated, as it is unenforceable and uncollectible pursuant to section 1465.9, subdivision (d).

The Attorney General argues Holmes forfeited his challenge to the restitution fine by not objecting to its reimposition at the resentencing hearing. We reject this argument, as Holmes seeks to have the fine vacated under a statutory amendment enacted *after* his resentencing. The Attorney General next asserts that the amendment does not apply retroactively to Holmes's restitution fine. We also reject this assertion because under section 1465.9, subdivision (d)'s plain terms, "On January 1, 2025, when the [amendment] became effective, [Holmes]'s restitution fine was rendered uncollectible and unenforceable." (See *In re Mattison* (2025) 115 Cal.App.5th 1062, 1069 [applying the amendment to a restitution fine imposed in 2008].) Finally, the Attorney General maintains Holmes may not "benefit" from section 1465, subdivision (d), because the court reimposed the restitution fine at the October 2024 resentencing, restarting the 10-year period for enforceability and collectability. The Attorney General cites no authority supporting the proposition that an inmate who receives the benefit of a section 1172.75 resentencing loses the benefit of section 1465.9, subdivision (d), and we are aware of none.

DISPOSITION

The trial court is directed to vacate the restitution fine imposed under section 1202.4, subdivision (b), and forward an amended abstract of judgment to the California Department of

Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED

M. KIM, J.

We concur:

BENDIX, Acting P. J.

WEINGART, J.