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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. PATRICK EVANS, Defendant and Appellant.	B330743 Los Angeles County Super. Ct. No. BA314873

APPEALS from judgment and orders of the Superior Court of Los Angeles County, Charlaine F. Olmedo, Judge. Vacated and remanded with directions.

Marta I. Stanton, 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, Assistant Attorney General, Shezad H. Thakor and Blake Armstrong, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Patrick Evans of murder and attempted murder and found true firearm and gang allegations. More than a decade later, this court granted Evans's petition for a writ of habeas corpus and reversed the conviction for attempted murder. On remand, the trial court dismissed the conviction, but it declined to resentence Evans fully. Two years later, the trial court granted the People's motion to dismiss the gang allegation and vacated the judgment, but it did not resentence Evans on the murder conviction or the firearm enhancement. On appeal, Evans contends the court erred by failing to resentence him fully, either in connection with his habeas petition or after granting the People's motion to dismiss. We vacate Evans's sentence and remand the case with directions to conduct a full resentencing.

FACTS AND PROCEDURAL BACKGROUND

1. *The convictions and original sentencing*

In 2009, a jury found Evans guilty of the second degree murder of Russell Connine (Pen. Code, § 187, subd. (a); count 1)[1] and the attempted murder of Carlos Renteria (§§ 664, 187, subd. (a); count 2).[2] The jury found true personal and principal gun use allegations (§ 12022.53, subds. (b)–(d), (e)(1); counts 1 & 2), and a gang allegation (§ 186.22, subd. (b)(1)(C); counts 1 & 2). The jury found not true the allegation that the attempted murder was committed willfully, deliberately, and with premeditation (§ 664, subd. (a)).

On count 1, the trial court sentenced Evans to 40 years to life, which included 25 years to life for the firearm enhancement.

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[1] Undesignated statutory references are to the Penal Code.

[2] The facts of the crimes are not relevant to this appeal. Therefore, we do not discuss them.

On count 2, the court sentenced Evans to 17 years plus 25 years to life. This Division affirmed the judgment of conviction on direct appeal in *People v. Evans* (Mar. 4, 2011, B216458) [nonpub. opn.]. The California Supreme Court denied review that year, and Evans's case became final. (See, e.g., *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465.)

2. *The habeas proceedings*

Over the ensuing years, Evans filed several state and federal habeas petitions. In response to one of those petitions, this Division issued an order to show cause whether the trial court erred by instructing the jury it could convict Evans of attempted murder under a kill zone theory. Tarik Adlai represented Evans in that matter.

On April 30, 2021, we issued an opinion concluding the kill zone instruction was prejudicial error under *People v. Canizales* (2019) 7 Cal.5th 591. Our disposition states: "Patrick Evans's petition for writ of habeas corpus is granted, and his conviction of count 2, attempted murder, is reversed." (*In re Evans* (April 30, 2021, B281093) [nonpub. opn.].)

The trial court held a "remittitur reversal hearing" on August 10, 2021. Neither Evans nor his habeas counsel, Adlai, received notice of the hearing or was present at it. However, Evans's appointed counsel for an upcoming *Franklin* hearing —Richard Pagliari—was present.[3]

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[3] At an earlier hearing, Pagliari told the court he did not represent Evans in connection with the habeas proceedings. The court told Pagliari to "ask your office to allow you to handle what we need to clean up pursuant to the remittitur." Pagliari agreed to "check with them." However, he denies ever being appointed to represent Evans in connection with that issue.

The trial court stated the hearing concerned a "housekeeping matter." The court explained the People had 60 days from the date of the remittitur to retry Evans for attempted murder. The People moved to dismiss the attempted murder count in lieu of retrying it. The court dismissed the count, but it did not otherwise resentence Evans. The court issued an amended abstract of judgment on August 23, 2021.

Sometime later, Evans learned from a guard that the prison had received the amended abstract of judgment. Evans contacted his habeas counsel, Adlai, who got in touch with Pagliari. Pagliari said he was at the August 2021 hearing but did not represent Evans in connection with any sentencing matters.

After conferring with Pagliari and requesting documents from the court, in December 2021, Adlai filed a "request for sentencing hearing after grant of habeas corpus." Counsel argued Evans was entitled to a full resentencing after this court granted his habeas petition. He asserted the August 10, 2021 "sentencing hearing" was invalid because Evans was not personally present.

A year and a half later—on June 22, 2023—the trial court issued a written order denying Evans's request. The court stated it did not resentence Evans in connection with his habeas petition, nor was it required to do so. The court noted our opinion reversed Evans's conviction on count 2 without remanding for resentencing, and the record of the August 2021 hearing confirms the trial court did not resentence Evans on count 1.

3. *The recall and resentencing proceedings*

While Adlai's December 2021 request was pending, a California Department of Corrections and Rehabilitation (CDCR)

case records analyst sent the trial court a letter—dated November 15, 2022—informing the court the amended abstract of judgment "may be in error, or incomplete." The letter identified two issues. First, the abstract of judgment erroneously states Evans was sentenced on count 1 to both life with the possibility of parole and 25 years to life. Second, the abstract erroneously states the court imposed an "enhancement" under section 186.22. The letter noted that section 186.22 provides an alternative sentencing scheme, rather than an enhancement. The letter asked the court to review its records to determine if it should make a correction. The letter also reminded the court that, when the CDCR notifies it of an illegal sentence, the court may reconsider all of its sentencing choices.

More than six months later—on June 8, 2023—Evans's counsel for the *Franklin* hearing, Pagliari, filed in the trial court a "request for resentencing pursuant to Penal Code section [1172.1]."[4] Counsel attached to the request the CDCR's letter. According to the motion, Evans's case was still open "for purposes of resentencing" because "the issue with regards to the abstract of judgment" that the CDCR letter identified had not been corrected. The motion asked the court to dismiss the gang allegation based on Assembly Bill No. 333 (2021–2022 Reg. Sess.) (Assembly Bill 333), which amended section 186.22.

The trial court considered Evans's motion at a September 26, 2023 hearing. At the start of the hearing, the

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[4] The motion erroneously referred to former section 1170.03. Effective June 30, 2022, the Legislature renumbered former section 1170.03 to section 1172.1. (*People v. Braggs* (2022) 85 Cal.App.5th 809, 818.) For the sake of clarity, we refer only to section 1172.1 throughout this opinion.

court stated Evans had filed a "[section 1172.1] motion that . . . the People are going to . . . conced[e]." The prosecutor remarked, "After reviewing and discussing the defense motion with my supervisor, my office has decided not to retry Mr. Evans on the gang allegation. With that, the People submit." The prosecutor then moved to dismiss the gang allegation under section 1385. Evans's counsel—Pagliari—told the court he did not object. The court granted the People's motion, dismissed the gang allegation, and vacated "any judgment regarding" it.

Evans's counsel then asked the court to address the CDCR letter concerning errors in the abstract of judgment. Counsel and the prosecutor agreed the abstract of judgment should reflect that the sentence on count 1 is 15 years to life, rather than 25 years to life. The court ordered the abstract of judgment be corrected in that respect.

The court's minute order of the hearing states the following: "Matter is called for hearing pursuant to Penal Code § [1172.1]. The People concede and agree not to retry the gang enhancement allegation pursuant to Penal Code § 186.22. On People's motion the gang enhancement allegation . . . is dismissed pursuant to Penal Code § 1385. The judgment for Penal Code § 186.22 allegation is vacated."

4. *The notices of appeal*

Evans filed separate notices of appeal concerning the August 10, 2021 "remittitur reversal hearing," the June 22, 2023 order denying his request for resentencing, and the September 26, 2023 recall and resentencing hearing. We consider all three appeals together.[5]

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[5] Evans moved for permission to file a late notice of appeal concerning the August 10, 2021 hearing. We requested

DISCUSSION

Evans contends the trial court erred by failing to conduct a full resentencing at the September 2023 hearing. We agree.[6]

Courts generally lack jurisdiction to modify a defendant's sentence once execution of the sentence has begun. (See *People v. Karaman* (1992) 4 Cal.4th 335, 344 ["Under the general common law rule, a trial court is deprived of jurisdiction to resentence a criminal defendant once execution of the sentence has commenced."].) Section 1172.1 provides an exception to that general rule. (*People v. King* (2022) 77 Cal.App.5th 629, 636–637.) It states a trial court may, at any time upon the recommendation of the secretary of the CDCR or the district attorney, recall a defendant's sentence and resentence the defendant "in the same manner as if they had not previously been sentenced." (§ 1172.1, subd. (a)(1).) When resentencing a defendant under section 1172.1, the trial court must "consider postconviction factors" and "apply the sentencing rules of the Judicial Council and apply any changes in law that reduce sentences or provide for judicial discretion so as to eliminate disparity of sentences and to promote uniformity of sentencing." (*Id.*, subd. (a)(2), (5).)

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additional briefing from the parties and then granted the motion. We ordered Evans's counsel to submit a notice of appeal to the superior court, and we directed the clerk to accept the notice as timely filed.

[6] Because we agree with Evans that the court was required to conduct a full resentencing at the September 2023 hearing, we do not consider his arguments related to the trial court's failure to conduct a full resentencing in connection with his habeas petition.

The trial court did not explicitly state it was recalling Evans's sentence under section 1172.1. However, the court's actions at the September 2023 hearing make clear that it did. After announcing the People were conceding Evans's motion for recall and resentencing,[7] the court granted the prosecutor's motion to dismiss the gang allegation under section 1385. Assuming Evans's judgment of conviction was final at the start of the hearing—as the trial court believed it to be—the court had authority to grant the People's motion only if it first recalled Evans's sentence. (See *People v. Barraza* (1994) 30 Cal.App.4th 114, 121, fn. 8 [section 1385 "has never been held to authorize dismissal of an action after the imposition of sentence and rendition of judgment"]; *People v. Kim* (2012) 212 Cal.App.4th 117, 123 [section 1385 cannot be used to vacate a final judgment of conviction]; see also *People v. Sek* (2022) 74 Cal.App.5th 657, 666–667 [Assembly Bill 333 applies retroactively only to cases that are not yet final].) In other words, the fact that the trial court granted the People's motion to dismiss shows it first recalled Evans's sentence under section 1172.1.

By recalling Evans's sentence, the trial court effectively vacated the entire judgment, not just the portion related to the gang allegation. (See *People v. Arias* (2020) 52 Cal.App.5th 213, 219 (*Arias*) ["the recall of appellant's sentence effectively vacated his original sentence and commitment"]; *People v. Rogers* (2025) 108 Cal.App.5th 340, 360 [recall of a defendant's sentence "nullif[ies] the original sentence"]; see also *People v. Padilla*

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[7] Section 1172.1 does not allow a defendant to move for resentencing. (See § 1172.1, subd. (a)(1).) Therefore, we construe Evans's motion as a recommendation for the court to consider granting relief based on the recommendation of the CDCR.

(2022) 13 Cal.5th 152, 163 ["once a court has determined that a defendant is entitled to resentencing, the result is vacatur of the original sentence"].) Therefore, the court was required to resentence Evans on each count and enhancement "in the same manner as if [he] had not previously been sentenced." (§ 1172.1, subd. (a)(1); see *People v. Buycks* (2018) 5 Cal.5th 857, 893 [the "full sentencing rule" applies when a court recalls a sentence under former § 1170, subd. (d), a predecessor to § 1172.1].) The court also was required to apply changes in the law since the original sentencing. (See § 1172.1, subd. (a)(2).)

The trial court failed to comply with these requirements after it recalled Evans's sentence. The court dismissed the gang allegation, but it did not orally pronounce a sentence on the murder conviction or the firearm enhancement, even by reference to the original sentence. (See *People v. Mesa* (1975) 14 Cal.3d 466, 471 [rendition of judgment is an oral pronouncement]; *People v. Wilshire Ins. Co*. (1977) 67 Cal.App.3d 521, 532 [at sentencing, the court must orally pronounce the term of imprisonment]; *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1327 (*Crabtree*) [trial court erred by failing to pronounce sentence on a count before staying its execution].) Nor is there any indication that the court applied the changes to the law since the original sentencing. (§ 1172.1, subd. (a)(2).)

The Attorney General does not dispute that the trial court failed to resentence Evans fully at the September 2023 hearing. Instead, he argues the CDCR letter did not confer jurisdiction on the court to recall Evans's sentence in the first place. The Attorney General notes that section 1172.1 requires a recommendation for recall and resentencing from the secretary of the CDCR. (See § 1172.1, subd. (a)(1).) He asserts the CDCR

letter was not sufficient because it was signed by a case records analyst and merely identified potential typographical errors in the abstract of judgment. (See *People v. Magana* (2021) 63 Cal.App.5th 1120, 1122 [CDCR letter noting a clerical error in an abstract of judgment was not a recommendation for recall and resentencing].)

At the outset, the Attorney General's argument on appeal completely contradicts the People's position at the hearing on Evans's motion for recall and resentencing. The prosecutor did not object when the trial court announced the People were conceding the merits of the motion. Nor did she otherwise argue the court lacked jurisdiction to recall Evans's sentence. Instead, the prosecutor moved to dismiss the gang allegation. As we discussed, that request required the court first to recall Evans's sentence. Given the People's apparent concession of the issue below, we are perplexed by the Attorney General's argument on appeal that the court lacked jurisdiction to recall Evans's sentence.

Nevertheless, even assuming the Attorney General were correct about the CDCR letter, the trial court had jurisdiction to recall Evans's sentence. Section 1172.1 states a trial court may recall a defendant's sentence "at any time upon the recommendation of" the secretary of the CDCR or "the district attorney of the county in which the defendant was sentenced." (§ 1172.1, subd. (a)(1).) The prosecutor—who was acting as a representative of the district attorney of the county in which Evans was sentenced—moved to dismiss the gang allegation in response to Evans's request for resentencing. As we discussed above, the court had jurisdiction to dismiss the allegation only if it recalled Evans's sentence. Therefore, the prosecutor's motion

constituted an implicit recommendation that the court recall Evans's sentence. Because that recommendation came from a representative of the district attorney, it conferred jurisdiction on the court to recall Evans's sentence under section 1172.1.

We also reject the Attorney General's contention that Evans forfeited his right to a full resentencing by failing to raise the issue in the trial court. Generally, a defendant must raise an issue in the trial court to preserve it on appeal. However, that general rule does not apply to an unauthorized sentence, which a defendant may challenge on appeal despite not objecting below. (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

Here, the trial court recalled Evans's sentence, which effectively vacated his entire sentence. (See *Arias, supra*, 52 Cal.App.5th at p. 219.) However, it never pronounced a new sentence on the murder conviction and firearm enhancement. The court's failure to do so resulted in an unauthorized sentence. (See *Crabtree, supra*, 169 Cal.App.4th at p. 1327 [court "committed unauthorized sentencing error" by failing to pronounce a sentence on a count before ordering it stayed].)

Even if the forfeiture rule applied, we would exercise our discretion to consider the issue on the merits in order to forestall an inevitable ineffective assistance of counsel claim.[8] (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [appellate courts have discretion to consider issues not preserved for review];

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[8] To establish ineffective assistance of counsel, a defendant must show " '(1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant.' " (*People v. Johnson* (2015) 60 Cal.4th 966, 979–980.)

People v. Monroe (2022) 85 Cal.App.5th 393, 399–400 (*Monroe*) [declining to apply forfeiture rule where defendant failed to object to the lack of full resentencing under section 1172.75].) Because the trial court imposed the maximum lawful sentence, there was no downside to asking the court to conduct a full resentencing after it dismissed the gang allegation. On the other hand, the potential benefit to Evans was significant. Since the original sentencing, the Legislature has granted trial courts discretion to strike firearm enhancements under section 1385 and mandated that courts generally give great weight to certain mitigating circumstances when exercising that discretion. (See Sen. Bill Nos. 620 (2017–2018 Reg. Sess.) (Stats. 2017, ch. 682, § 2), 81 (2021–2022 Reg. Sess.) (Stats. 2021, ch. 721, § 1).) Because at least one of those mitigating circumstances applies to Evans's case—the application of the firearm enhancement "could result in a sentence of over 20 years" (§ 1385, subd. (c)(2)(C))—there is a reasonable probability a full resentencing would have resulted in a more favorable sentence. Under these circumstances, Evans's counsel should have requested a full resentencing and his failure to do so prejudiced Evans. Therefore, to the extent the forfeiture rule applies, we exercise our discretion to overlook it.

To summarize, the trial court had jurisdiction to recall Evans's sentence under section 1172.1, either by way of the CDCR's letter or the district attorney's recommendation. By granting the People's motion to dismiss the gang allegation, the trial court implicitly recalled Evans's sentence under section 1172.1. (Cf. *People v. Humphrey* (2020) 44 Cal.App.5th 371, 378, 380 [trial court did not recall defendant's sentence where it "did not change [his] sentence whatsoever"].) After recalling the sentence, the court was required to resentence Evans "in

the same manner as if [he] had not previously been sentenced." (§ 1172.1, subd. (a)(1).) For whatever reason, the court failed to comply with that requirement.

Where, as here, the defendant did not receive a full resentencing to which he was entitled, the proper disposition is to remand for a full resentencing. (See *Monroe*, *supra*, 85 Cal.App.5th at p. 402 [remanding case for resentencing where the defendant was entitled to, but did not receive, a full resentencing under section 1172.75]; *People v. Saldana* (2023) 97 Cal.App.5th 1270, 1278–1279 [same]; see also *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228 ["when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing"].) Accordingly, we remand the case for the trial court to resentence Evans in accordance with section 1172.1. In doing so, the court must "consider postconviction factors" and apply "any changes in law that reduce sentences or provide for judicial discretion so as to eliminate disparity of sentences and to promote uniformity of sentencing." (§ 1172.1., subd. (a)(2), (5).) When resentencing Evans on remand, the court may not reinstate the gang allegation it dismissed under section 1385.

Because we are ordering the trial court to conduct a full resentencing on remand, Evans's arguments regarding the court's failure to conduct a full resentencing in connection with his habeas petition are moot. Therefore, we dismiss his appeals of the court's actions on August 10, 2021 and June 22, 2023. (See *People v. Armas* (2024) 107 Cal.App.5th 350, 353 [an appeal

becomes moot and should be dismissed when the court's ruling would not have practical effect or provide effective relief].)

DISPOSITION

We vacate Patrick Evans's sentence and remand the matter for the trial court to conduct a full resentencing consistent with this opinion. We dismiss as moot Evans's appeals of the court's actions on August 10, 2021 and June 22, 2023.

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EGERTON, Acting P. J.

We concur:

ADAMS, J.

HANASONO, J.