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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH FRANCIS BLAKE, Defendant and Appellant.	E085469 (Super.Ct.No. NO. SWF012339) OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge. Reversed and remanded with directions.

Kenneth H. Nordin, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Charles C. Ragland, Assistant Attorney General, Eric A. Swenson and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

The trial court found defendant and appellant Joseph Francis Blake ineligible for resentencing pursuant to Penal Code[1] section 1172.75 because the sentencing enhancement imposed for his having suffered one prior prison term (§ 667.5, subd. (b)) was imposed and stayed during his initial sentencing proceedings. On appeal, defendant argues the trial court erred in finding he was ineligible for a full resentencing hearing under section 1172.75 because his judgment includes a now-invalid prison prior and thus the court's order must be reversed. He also argues the court violated his constitutional right to be present when it denied him resentencing in his absence and on remand he has a right to be present at the resentencing hearing.

We agree that defendant is entitled to sentencing relief under section 1172.75 for prior prison term enhancements which were imposed and stayed. The California Supreme Court in *People v. Rhodius* (2025) 17 Cal.5th 1050, 1054 (*Rhodius II*) recently resolved the question of whether section 1172.75 applies to prior prison terms which were imposed and stayed, and held that "section 1172.75 entitles a defendant to resentencing if the underlying judgment includes a prior-prison-term enhancement that was imposed before January 1, 2020, regardless of whether the enhancement was then

[1] All future statutory references are to the Penal Code.

executed or instead stayed."[2] We therefore reverse the trial court's December 2023 order and remand for the trial court to recall defendant's sentence and hold a full resentencing hearing under section 1172.75, subdivision (d). We also agree that, absent a valid waiver of his presence, defendant is entitled to be present at his resentencing hearing on remand, which the People do not dispute. (*People v. Velasco* (2023) 97 Cal.App.5th 663, 673-674 (*Velasco*); § 1172.75, subds. (d)(3), (d)(5), & (e).)

II

PROCEDURAL BACKGROUND[3]

In March 2006, pursuant to a negotiated disposition, defendant pled guilty to attempted first degree murder (§§ 664, subd. (a), 187, subd. (a)). In addition, he admitted that he used a deadly weapon (§ 12022, subd. (b)) in the commission of the offense and caused great bodily injury (§ 12022.7, subd. (a)). He also admitted that he had suffered two prior strike convictions (§§ 667, subd. (e)(2)(A), 1170.12, subd. (c)(2)(A)) and one prior prison term (§ 667.5, subd (b)). In return, the remaining charges and enhancements were dismissed and defendant was sentenced to a negotiated aggregate term of 28 years to life as follows: 25 years to life for the attempted murder, plus three years for the great

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[2] See *People v. Rhodius* (2023) 97 Cal.App.5th 38, review granted Feb. 21, 2024, S283169 (*Rhodius I*); *People v. Christianson* (2023) 97 Cal.App.5th 300, review granted, Feb. 21, 2024, S283189 (*Christianson*), and *People v. Saldana* (2023) 97 Cal.App.5th 1270, review granted Mar. 12, 2024, S283547.

[3] The underlying factual background is not relevant to the issues raised on appeal. We therefore dispense with a statement of facts.

bodily injury enhancement; the court imposed and stayed the one year terms for the firearm enhancement and the prior prison term.

The Legislature subsequently amended the prior prison term enhancements to limit its application to certain enumerated violent sex offenses. The Legislature also enacted section 1172.75, to enable those serving time for now-invalid prison priors to be resentenced. In light of these changes, the California Department of Corrections and Rehabilitation (CDCR) identified defendant's case for possible resentencing.

The resentencing hearing occurred on December 21, 2023. The trial court found defendant ineligible for resentencing under section 1172.75 and denied defendant's request for a full resentencing hearing.[4] The court ordered the prior prison term stricken and an amended abstract of judgment. Defendant subsequently appealed.

III.

DISCUSSION

A. *Section 1172.75 Resentencing Hearing*

Defendant contends he is entitled to a full resentencing hearing pursuant to section 1172.75 regardless of whether the prior prison term enhancement (§ 667.5, subd. (b)) was imposed and stayed or imposed and executed because his judgment includes a now-invalid prior prison term. Pursuant to the California Supreme Court's

[4] No proceedings were held on the record. Rather, the trial court incorporated by reference the section 1172.75 eligibility hearing held earlier that day in *People v. Chlad*, case No. BAF002073.

recent decision in *Rhodius II*, *supra*, 17 Cal.5th 1050, we agree with defendant that he is entitled to a full resentencing hearing pursuant to section 1172.75, subdivision (d).

Before January 2020, section 667.5, subdivision (b), permitted enhancements for any prior prison term for a felony. (Stats. 2018, ch. 423, § 65.) Effective January 1, 2020, the Legislature amended subdivision (b) to limit prior prison term enhancements to sexually violent offenses. (Stats. 2019, ch. 590, § 1.) The Legislature made this change retroactive by adding section 1171.1 (Stats. 2021, ch. 728, § 3), which was later renumbered to section 1172.75 without substantive change. (Stats. 2022, ch. 58, § 12.)

Under section 1172.75, "[a]ny sentence enhancement that was imposed prior to January 1, 2020, pursuant to subdivision (b) of [s]ection 667.5," except for enhancements for certain sexually violent offenses, "is legally invalid." (§ 1172.75, subd. (a).) Section 1172.75 also provides that, if a prior prison term enhancement becomes invalid under the section, a trial court "shall recall the sentence and resentence the defendant" (§ 1172.75, subd. (c)), and, in doing so, "shall apply . . . any other changes in law that reduce sentences or provide for judicial discretion so as to eliminate disparity of sentences and to promote uniformity of sentencing." (§ 1172.75, subd. (d)(2).) Here, defendant's judgment included one stayed prison prior.

Hence, a defendant serving a term for a judgment that includes a now-invalid enhancement is entitled to resentencing. (§ 1172.75, subds. (a), (c).) To facilitate the process, the statute directs the CDCR to "identify those persons in their custody currently serving a term for a judgment that includes an enhancement described in subdivision (a)."

(*Id.*, subd. (b).) Upon receiving that information, the sentencing court must "review the judgment and verify that the current judgment includes a sentencing enhancement described in subdivision (a)." (*Id.*, subd. (c).) "If the court determines that the current judgment includes an enhancement described in subdivision (a), the court shall recall the sentence and resentence the defendant." (*Ibid*.) The statute provides separate deadlines for identification, review, and resentencing of "individuals . . . currently serving a sentence based on the enhancement" and "all other individuals." (*Id.*, subds. (b)(1), (2), (c)(1), (2).)

Section 1172.75, subdivision (d), sets forth detailed instructions for resentencing once a sentence has been recalled. As relevant here, subdivision (d) specifies: "Resentencing pursuant to this section shall result in a lesser sentence than the one originally imposed as a result of the elimination of the repealed enhancement, unless the court finds by clear and convincing evidence that imposing a lesser sentence would endanger public safety. Resentencing pursuant to this section shall not result in a longer sentence than the one originally imposed." (*Id.*, subd. (d)(1).) The trial court must "apply the sentencing rules of the Judicial Council" as well as "any other 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. (d)(2).) In addition, the court may "consider postconviction factors, including, but not limited to, the disciplinary record and record of rehabilitation of the defendant while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced

the defendant's risk for future violence, and evidence that reflects that circumstances have changed since the original sentencing so that continued incarceration is no longer in the interest of justice." (*Id.*, subd. (d)(3).)

After analyzing our decision in *Rhodius I*, the legislative history of section 1172.75, and the meaning of the words "imposed" and "lesser," the Supreme Court concluded that section 1172.75, subdivision (a), "is most naturally read to mean that a covered enhancement is invalid if it was 'imposed' before January 1, 2020, not just if it was 'imposed *and* executed.' " (*Rhodius II*, *supra*, 17 Cal.5th at p. 1063, italics in original.) The court explained that the statute refers to enhancements that are "imposed," not "imposed and executed," while recognizing that the word " 'impose' " is sometimes " 'employed as shorthand' " in sentencing laws to refer to the class of enhancements that are " 'imposed and *then* executed.' " (*Rhodius II*, at p. 1059, citing *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1125 (*Gonzalez*), italics in original.) The court determined whether the Legislature had used the term "impose" in this "shorthand" and examined *Gonzalez*, and found "[a]lthough *Gonzalez* explains that the meaning of the word 'imposed' may vary depending on context, its interpretation of the word as it appears in the statute there at issue holds no real lessons for understanding the meaning of 'imposed' as it appears in section 1172.75(a)—a provision with markedly different wording, structure, and purpose." (*Rhodius II*, at p. 1059.)

The Supreme Court rejected the Attorney General's central argument that "reading section 1172.75(a)'s reference to 'imposed' enhancements to mean enhancements that

were imposed and executed is the only way to harmonize that provision with the statute's instructions for resentencing in section 1172.75, subdivision (d)," specifically the reference to " 'this section shall result in a lesser sentence than the one originally imposed' " in subdivision (d) of section 1172.75. (*Rhodius II*, *supra*, 17 Cal.5th at p. 1060.)

The court explained: "Reading section 1172.75, subdivision (d)(1) in context, we are not persuaded that the reference to a 'lesser sentence' necessarily imports any assumptions about whether the section 667.5(b) enhancement was imposed and executed or simply imposed. The premise of the argument is that a 'lesser' sentence must mean a sentence that inevitably results in less time served than the original sentence—in other words, a shorter operative sentence, setting aside any component of the sentence that had been stayed. It is of course true, as the Attorney General emphasizes, that in the typical case involving an executed enhancement, to order a 'lesser' sentence will mean ordering a shorter one. But we see no obvious reason why a trial court cannot also comply with the instruction to order a 'lesser' sentence in a case in which a section 667.5(b) enhancement was stayed rather than executed.' " (*Rhodius II*, *supra*, 17 Cal.5th at p.1060, italics omitted.)

The court further elaborated: " 'The reference to a 'lesser' sentence is reasonably understood to mean, as a general matter, that courts must lessen the burdens of the sentence relative to 'the one originally imposed as a result of the elimination of the repealed enhancement' (§ 1172.75, subd. (d)(1))—in other words, the new sentence must

eliminate the adverse effects flowing from the now-invalid section 667.5(b) enhancements. In the typical case in which a defendant who is serving a longer term of imprisonment because of a repealed enhancement that was imposed and executed, to eliminate adverse effects of the section 667.5(b) enhancement will indeed mean imposing a shorter (unstayed) sentence relative to the enhanced one. But where the burdens of a section 667.5(b) sentence enhancement are different, what it means to impose a 'lesser' sentence may differ as well. As the Court of Appeal explained in *Christianson*, when a sentence is stayed, the trial court retains the ability to 'lift the stay and impose the term under certain circumstance[s], such as if an alternately imposed term is invalidated. [Citation.] Thus, a stayed sentence enhancement remains as part of the judgment and continues to carry the potential for an increased sentence in certain circumstances, and removal of the stayed enhancement does provide some relief to the defendant by eliminating that potential.' " (*Christianson*, *supra*, 97 Cal.App.5th at p. 312, review granted; see also, e.g., *Gonzalez*, *supra*, 43 Cal.4th at p. 1129, 77 [staying § 12022.53 firearm enhancements made them " 'readily available should the section 12022.53 enhancement with the longest term be found invalid on appeal' "].) We see no reason why subdivision (d)(1) of section 1172.75 cannot be read to allow for the possibility that, in a case involving stayed enhancements, a trial court may comply with the instruction to impose a 'lesser' sentence by ordering a sentence that affords such relief." (*Rhodius II*, *supra*, 17 Cal.5th at p. 1061, italics omitted.)

The Supreme Court summarized that the text of section 1172.75, subdivision (d)(1) does not show "the Legislature was concerned exclusively with the elimination of enhancements that had already been executed," and explained "other features of the statute" point against that conclusion. (*Rhodius II*, *supra*, 17 Cal.5th at p. 1061.) These features include wording of section 1172.75, subdivision (a), specifically the word "any," which, the court found demonstrates the Legislature intended the law to have a "broad sweep." (*Rhodius II*, at p. 1061.) The court noted, " ' "read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' " '[Citations.]." (*Ibid*.) Other features the court noted were "the statute's structure and practical operation," the legislative history of the statute, and the purpose of the statute. (*Ibid*.)

In sum, the Supreme Court concluded that section 1172.75, subdivision (a), applies "to enhancements that were imposed as part of the defendant's original judgment, regardless of whether the enhancement was stayed or executed. If the enhancement is no longer authorized under the current version of section 667.5(b), section 1172.75(a) renders the enhancement invalid. And the retroactive invalidation of the previously imposed enhancements in turn mandates resentencing under section 1172.75, according to the procedures set forth therein." (*Rhodius II*, *supra*, 17 Cal.5th at p. 1068.)

Here, defendant's judgment includes a prior prison term that the sentencing court imposed but stayed punishment on before January 1, 2020. The prior prison term was not for a sexually violent offense. At the December 2023 section 1172.75 hearing, the

resentencing court denied defendant's request for a full resentencing hearing. Thus, pursuant to *Rhodius II*, the matter must be reversed and remanded with directions to the court below to hold a full resentencing hearing.

A. *Right to be Present at Resentencing Hearing*

Defendant also argues the trial court violated his constitutional right to be present when it denied him resentencing in his absence and that on remand he has a right to be present at the resentencing hearing pursuant to section 1172.75. The People do not address the issue and thus implicitly concede defendant has a right to be present at the resentencing hearing.

As previously stated, "Section 1172.75, subdivision (d)(1), states that the resentencing 'shall result in a lesser sentence than the one originally imposed as a result of the elimination of the repealed enhancement, unless the court finds by clear and convincing evidence that imposing a lesser sentence would endanger public safety,' and further, resentencing 'shall not result in a longer sentence than the one originally imposed.' " (*People v. Garcia* (2024) 101 Cal.App.5th 848, 855.) The resentencing court must apply "any other changes in law that reduce sentences or provide for judicial discretion" and "may consider postconviction factors, including, but not limited to, the disciplinary record and record of rehabilitation of the defendant while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the defendant's risk for future violence, and evidence that reflects that

circumstances have changed since the original sentencing so that continued incarceration is no longer in the interest of justice." (§ 1172.75, subds. (d)(2) & (d)(3).)

By its own terms, section 1172.75 ensures the defendant's "right to be present, represented by counsel, and present evidence at the hearing." (*People v. Montgomery* (2024) 100 Cal.App.5th 768, 773 (*Montgomery*), review granted May 29, 2024, S284662; see § 1172.75, subds. (d)(3), (d)(5), & (e).) Additionally, the California and federal constitutions guarantee the defendant's right to be personally present at all critical stages of criminal proceedings, including sentencing and resentencing. (See *Velasco*, *supra*, 97 Cal.App.5th at pp. 673-674 [§ 1172.75 proceeding]; *People v. Santos* (2024) 100 Cal.App.5th 666, 677, review granted May 29, 2024, S284341 (*Santos*) [same].)

A defendant's statutory and constitutional right to be present at resentencing "may be waived." (*Velasco*, *supra*, 97 Cal.App.5th at p. 673; accord, *Santos*, *supra*, 100 Cal.App.5th at p. 677.) Such a waiver must be voluntary, knowing and intelligent. (See *Santos*, at p. 677; see also § 977, subd. (b) [providing for waiver of defendant's right to be present at sentencing].) "[D]efense counsel may waive the defendant's presence, 'but only if there is evidence that the defendant consented to the waiver. [Citations.] At a minimum, there must be some evidence that the defendant understood the right he was waiving and the consequences of doing so.' " (*Santos*, at pp. 677-678; see § 977, subd. (b)(2), (b)(2)(A)-(B).)

" 'Under the federal Constitution, error pertaining to a defendant's presence is evaluated under the harmless-beyond-a-reasonable-doubt standard set forth in *Chapman*

v. California (1967) 386 U.S. 18, 23 . . . . [(*Chapman*)]' [Citations.] 'Under that standard, the error "may be deemed harmless only if we can conclude beyond a reasonable doubt that the deprivation did not affect the outcome of the proceeding.' " " (*Santos*, *supra*, 100 Cal.App.5th at p. 678; accord, *Velasco*, *supra*, 97 Cal.App.5th at p. 674.)

Here, no proceedings were held on the record, and there is no indication defendant was present at the resentencing hearing. In addition, nothing in the record on appeal indicates defendant waived his right to be present. Proceeding with resentencing under these circumstances was contrary to defendant's constitutional and statutory rights. (See *Montgomery*, *supra*, 100 Cal.App.5th at p. 773; *Velasco*, *supra*, 97 Cal.App.5th at pp. 673-674; see also § 1172.75, subds. (d)(5), (e).)

These errors were not harmless. (See *Santos*, *supra*, 100 Cal.App.5th at p. 678, citing *Chapman*, *supra*, 386 U.S. at p. 23.) At defendant's resentencing hearing, no proceedings were held on the record. Rather, the trial court incorporated by reference the section 1172.75 eligibility hearing held earlier that day in *People v. Chlad*, case No. BAF002073. Defendant was not present, and he did not have the opportunity to present any argument or evidence. (See *Velasco*, *supra*, 97 Cal.App.5th at p. 674 [the defendant's absence from resentencing not harmless error because he "was not able to present evidence of any of [section 1172.75's postconviction] factors"].) We conclude defendant's inability to be present at his hearing and to have counsel present such evidence and arguments was not harmless beyond a reasonable doubt. (See *Chapman*, at

p. 23.) Therefore, defendant is entitled to a full resentencing hearing, including the opportunity to be present at the hearing and to offer postconviction evidence. (See *Velasco*, at p. 674.)

IV.

DISPOSITION

The trial court's December 2023 order denying relief under section 1172.75 is reversed. The matter is remanded to the trial court with directions to recall defendant's sentence and hold a full resentencing hearing under section 1172.75, subdivision (d) in defendant's presence, unless a valid waiver to be present is obtained from defendant.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

MILLER
J.