Filed 12/16/25 P. v. Stewart CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RICHARD BERT STEWART, Defendant and Appellant.	A169443 (Contra Costa County Super. Ct. No. 05009001751)

Penal Code section 1385, subdivision (a) affords courts discretion to dismiss actions in furtherance of justice (§1385, subd.(a).)[1] Section 1385, subdivision (c) directs courts to dismiss enhancements if dismissal is in furtherance of justice and not prohibited by voter initiative (§1385, subd. (c)(1)) and, in exercising that discretion, to weigh the offender's mitigating evidence in favor of dismissal. (§1385, sub.(c)(2).) Here we reject Richard Stewart's claims that the court abused the discretion afforded under these provisions in declining to dismiss the special circumstances findings attached to his 1991 multiple murder conviction. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The following is taken primarily from the Supreme Court's opinion *People v. Stewart* (2004) 33 Cal.4th 425. In 1991, Stewart was convicted of three counts of premeditated murder, possessing a concealable firearm by a

[1] All statutory citations are to the Penal Code.

felon or addict, and attempted arson. The jury also found true multiple murder and firearm use special circumstance allegations and returned death verdicts, later confirmed by the trial court, on each of the murder counts. Stewart admitted two prior prison term allegations under section 667.5, subdivision (b).

The victims were Stewart's mother, Gloria Pillow, his stepfather, Ardell Pillow, and their boarder, Murray Lucas. Stewart shot each of them in the head at close range and beat Ardell, inflicting multiple facial injuries. He also killed the family dog, apparently by strangulation, and left the kitchen stove gas burners on with the windows locked shut. Upon arrival, police also found newspapers arranged around an oil lamp leading to a cushion.

Stewart had recently been paroled at the time of the murders. He blamed Gloria for his imprisonment and complained that she and Ardell were alcoholics who embarrassed and treated him like an outcast. After his release from prison he obtained a handgun and test-fired it into a garage wall. Bullet fragments recovered from the three victims were consistent with ballistic evidence from the garage.

Stewart represented himself at the penalty phase, made a very brief opening statement, and rested without presenting any evidence. The prosecution submitted evidence of a litany of prior violent crimes: two armed robberies in 1981; a violent home invasion and attempted robbery the same year; a stabbing and a robbery in 1989; a threat against a potential witness in the murder trial; and the stabbing of a fellow jail inmate in 1990. The jury returned a verdict of death.

In considering whether to affirm that verdict, the trial court also took into account Stewart's California Youth Authority records reflecting a history of substance abuse dating from childhood, a broken home, an overly strict

father, and an alcoholic mother and stepfather. In addition, it considered guilt phase evidence that Stewart was under the influence of extreme mental or emotional disturbance when he shot the three victims and believed, however irrationally, that his conduct was justified.

The trial court explained its decision to confirm the jury's death verdict as follows: "[H]aving considered the totality of the evidence representing the factors in aggravation and mitigation, I am fully satisfied beyond a reasonable doubt that the aggravating circumstances far outweigh the mitigating circumstances. Indeed, without reference to any other factor in aggravation, the circumstances of the three cold-blooded and ruthless killings alone are sufficient for this court to conclude that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that a sentence of death is warranted."

The Supreme Court affirmed the judgment as to guilt and the special circumstances findings, but reversed the death penalty judgment due to jury selection errors. On remand, the trial court resentenced Stewart to three consecutive terms of life without the possibility of parole for the murders, reconfirmed the determinate terms for his other offenses, and stayed imposition of the two prior prison term enhancements.

As amended effective 2022, section 1172.75 retroactively invalidated most one-year prior prison term enhancements imposed under section 667.5 and, with exceptions not relevant here, required resentencing for affected defendants. (§1172.75, subds. (a), (c), (d); Stats 2021, ch. 728, § 3); Stats. 2022, ch. 58, §12.)[2] Upon this resentencing, the court "shall apply . . . any

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[2] It provides: "(a) Any sentence enhancement that was imposed prior to January 1, 2020, pursuant to subdivision(b) of Section 667.5, except for any enhancement imposed for a prior conviction for a sexually violent offense as defined in subdivision (b) of Section 6600 is legally invalid. [¶] . . . . (c) . . . If

other changes in law that reduce sentences or provide for judicial discretion so as to eliminate the disparity of sentences and to promote uniformity of sentencing" (§1172.75, subd. (d)(2)) and impose a lesser sentence than that originally imposed unless it finds by clear and convincing evidence that doing so would endanger public safety. (§1172.75, subd. (d)(1).)

The other change pertinent here was to section 1385, which authorizes courts to dismiss enhancements on their own or the prosecutor's motion if dismissal furthers justice and is not prohibited by an initiative statute. (§1385, subds. (a), (c); Stats. 2018, ch. 1013.) As amended effective 2022, section 1385, subdivision (c) requires courts exercising this discretion to "consider and afford great weight to evidence offered by the defendant to prove that any of [enumerated] mitigating circumstances . . . are present. Proof of the presence of one or more of these circumstances weighs greatly in favor of dismissing the enhancement, unless the court finds that dismissal of the enhancement would endanger public safety." (§1385, subd.(c)(2); Stats. 2021, ch. 721, §1.) The enumerated mitigating factors include mental illness (§1385, subd. (d)(2)(D)) and prior victimization or childhood trauma (§1385, subd. (d)(2)(E).)

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the court determines that the current judgment includes an enhancement described in subdivision (a), the court shall recall the sentence and resentence the defendant. . . . . [¶] (d)(1) 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. [¶] (2) The court shall apply the sentencing rules of the Judicial Council and 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."

In 2023 the court held a hearing to strike Stewart's two one-year prior prison term enhancements and impose a new sentence pursuant to the amended section 1172.75. Stewart asked the court to exercise its discretion under section 1385, subdivision (c) to strike his multiple murder special circumstances findings in furtherance of justice. In support, he provided extensive new evidence of a childhood marked by severe physical, sexual, and psychological abuse and neglect; in utero alcohol exposure; a substance use disorder beginning in childhood; post-offense conduct including substantial rehabilitation efforts; and his youthful age, intoxication, and diminished state of mind when he killed Murray and the Pillows. He urged that this new evidence, afforded the weight mandated by section 1385, subdivision (c), warranted dismissal of the special circumstance findings.

The People opposed the petition. The People contended Stewart's prior prison term enhancements were beyond the purview of section 1172.75 because, having been stayed rather than imposed, their dismissal would not produce the "lesser sentence" specified in subdivision (d)(1). Alternatively, the People argued the section 1385, subdivision (c) mandate to weigh mitigating factors in favor of dismissing enhancements did not apply also to special circumstances findings. Finally, the People asserted that the mitigating factors were greatly outweighed by the heinous nature and circumstances of Stewart's crimes, the fact that he committed them while on parole, and his history of violent offenses.

At the hearing, the court questioned counsel about how the fact that Stewart committed the murders over 30 years ago affected its application of current sentencing law. It observed that section 1385.1, enacted by Proposition 115 effective 1990, prohibited it from dismissing special circumstances findings for crimes committed after its enactment but not for

those which, like Stewart's, predated it.[3] (See *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298 [retroactive application of section 1385.1 violates rule against ex post facto legislation], overruled on other grounds in *Collins v. Youngblood* (1990) 497 U.S. 37, 42–52.) In this context, the court pressed counsel on whether section 1172.75, subdivision (d)(2)'s directive to apply ameliorative laws at resentencing required it to give Stewart's mitigating evidence enhanced weight under section 1385, subdivision (c)(2). "[I]n this case, you're asking me actually to ignore a non-ameliorative law—because of ex post facto, and I think we have an agreement on that—but in the process apply a very closely-related ameliorative law. [¶] So it would seem that this doesn't fit, in some ways, what the legislature had in mind because we're talking about, sort of, the grand scheme of the changes in sentencing laws. But this was—but the law that you want me to apply was specifically excluded shortly after he was sentenced. [¶] So is it really application of the ameliorative laws if, for example, the recent changes to 1385 don't apply to a special circumstances finding [made after 1990]?" Putting it another way, the court questioned whether the 2022 amendments to section 1385 "are ameliorative as they relate to Mr. Stewart because they don't apply to special circumstances cases except by chance of timing and him coming before me on this case and ex post facto."

The court also noted that applying section 1385, subdivision (c) in Stewart's situation would not serve the legislative goal expressed in section 1172.75, subdivision (d)(2) of eliminating disparity and promoting uniformity

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[3] Section 1385.1 provides that "[n]otwithstanding Section 1385 or any other provision of law, a judge shall not strike or dismiss any special circumstance which is admitted by a plea of guilty or nolo contendere or is found by a jury or court as provided in Sections 190.1 to 190.5, inclusive."

in sentencing. The court reached this conclusion presumably because special circumstances findings imposed after 1990 cannot be dismissed: "uniformity of sentences and disparity –… that would be not accomplished by applying the 1385(c) [factors] in this case." In this vein, the court continued, "[s]o it seems like 1172.75 (d)(2) is not where I would be going to strike if I were—if I am to strike the special circumstances. It would really arise out of (d)(3)."[4] Disagreeing, Stewart's counsel maintained that, as this was a "full" resentencing hearing, the court was independently required by Supreme Court precedent to apply all ameliorative laws applicable to Stewart at resentencing.

Following some further discussion of related but distinguishable case authority, the court struck the stayed prior prison term enhancements under section 1172.75 but declined to strike the special circumstances findings. It explained: "I wish the law was more settled by the time it got to us, but that's not the nature of these statutes, or judicial process, frankly. [¶] So all that said, taking into account both the significant trauma as it relates to the crimes, and the fact that Mr. Stewart was pro per and didn't present any evidence at sentencing, I do still think it's important to look at what the jury found and what the[trial] [c]ourt considered, noting that what the [trial] [c]ourt considered was not as fully informed as it should have been. And in

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[4] Section 1172.75, subdivision (d)(3) authorizes the court to consider circumstances and events that occurred after the defendant's conviction: "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."

looking at the nature of the offenses, including what followed and which was also charged with, I believe, attempted arson, and the third victim, at this time, I am not willing to strike the special circumstance."

Stewart filed this timely appeal.

DISCUSSION[5]

A. Section 1385, subdivision (c)

As previously noted, courts conducting resentencing proceedings under section 1172.75 are required to apply "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).) Stewart contends the court mistakenly believed this provision *prohibited* it from applying section 1385, subdivision (c) because, as best we understand his argument, applying it to only those special circumstances findings made before Proposition 115's 1990 effective date would not serve the legislative purpose of bringing uniformity to criminal penalties. Stewart maintains this was error because "the Legislature never intended subdivision (d)(2) of section 1172.75 to be a limitation on resentencing once a court recalls [a] sentence." While we have no quarrel with the quoted statement, his argument is unpersuasive.

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[5] In its respondent's brief, the Attorney General initially argued that Stewart was ineligible for relief because section 1172.75 authorizes the dismissal only of executed, not stayed, enhancements. The Supreme Court recently rejected that view in *People v. Rhodius* (2025) 17 Cal.5th 1050, holding that section 1172.75 authorizes dismissal of prior prison term enhancements whether they were executed or stayed. (*Id.* at p. 1054.) In view of that holding, the Attorney General has appropriately withdrawn its contrary argument. Stewart, likewise, has withdrawn the factually mistaken claim in his opening brief that the court did not, in fact, strike his prior prison term enhancements.

First, this argument is based on a misreading of the record. The court invited the parties to explore whether, in the rare case of a request to strike pre-Proposition 115 special circumstances findings, section 1385, subdivision (c) could be considered ameliorative and therefore made applicable by section 1172.75, subdivision (d)(2). In this context, the court observed, "it *seem*[*ed*] like" section 1172.75, subdivision (d)(2) "is not where [it] *would* be going [] *if*" it was to strike the special circumstances findings; if it did, it would look instead to the postconviction factors identified in subdivision (d)(3).[6] (Italics added.) Read fairly and in its context of the discussion in the hearing, this hypothetical observation reflects the court's thoughts as it explored the statutory interpretation issues with counsel. The statement was not a legal conclusion or ruling. Indeed, when the court *did* state its ruling at the end of the hearing it expressly considered pre-offense factors relevant under sections 1172.75, subdivision (d)(2) and 1385, subdivision (c)(2), but made no mention of the section 1172.75, subdivision (d)(3) postconviction factors. The record simply does not show that the court believed section 1172.75, subdivision (d)(2) *prohibited* it from applying section 1385, subdivision (c) to Stewart's request to strike the special circumstances findings.

" ' "For an appeal to engage the consideration of an appellate court, it must be brought up on a record which, in addition to being otherwise formally sufficient, shows the error calling for correction. Such error is never presumed but must be affirmatively shown, and the burden is upon the appellant to present a record showing it, any uncertainty in the record in that respect being resolved against him." ' " (*People v. Green* (1979) 95 Cal.App.3d 991, 1001; *People v. $17,522.08 United States Currency* (2006) 142 Cal.App.4th 1076, 1084.) Stewart cannot make that showing.

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[6] See footnote 4, *ante,* for the text of subdivision (d)(3).

Second, and in any event, it does not matter whether the court believed section 1172.75, subdivision(d)(2) somehow prohibited it from applying section 1385, subdivision (c) because the latter provision was inapplicable for a different reason: it expressly encompasses only the dismissal of enhancements, not special circumstances.[7] (§ 1385, subds.(c)(1), (c)(2).) As explained in a different context in *People v. Burke* (2023) 89 Cal.App.5th 237, 243 (*Burke*), "[s]ubdivision (c) of section 1385 expressly applies to the dismissal of an 'enhancement.' (§1385, subd.(c)(1).) 'Ordinarily words used in a statute are presumed to be used in accordance with their established legal or technical meaning. [Citation.] The term 'enhancement' has a well-established technical meaning in California law. [Citation.] 'A sentence enhancement is "an additional term of imprisonment added to the base term." ' [Citations.]" (*Id.* at p. 243 [holding prior convictions under Three Strikes law are not "enhancements" within the meaning of section 1385, subdivision (c)]; see also Cal. Rules of Court, rule 4.405(5) [" 'Enhancement' means an additional term of imprisonment added to the base term"]; *Ghent v. Superior Court* (1979) 90 Cal.App.3d 944, 953 [distinguishing enhancements from special circumstances allegations on the basis of their respective consequences].)

Special circumstances, in contrast, do *not* add an additional period of incarceration to the base term for an underlying crime. Rather, they are facts or sets of facts that, if proven, *change* the underlying crime from one punishable by 25 years to life to one that must be punished by death or life imprisonment without the possibility of parole. As such, special

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[7] It is hornbook law that court of review will not disturb a ruling given for the wrong reasons if it is correct under any theory. (See *People v. Zapien* (1993) 4 Cal.4th 929, 976, superseded on another point by section 190.41.)

circumstances are "*sui generis*—neither a crime, an enhancement, nor a sentencing factor." (*People v. Garcia* (1984) 36 Cal.3d 539, 552, overruled on other grounds as recognized in *People v. Lee* (1987) 43 Cal.3d 666, 676.) Multiple courts have distinguished enhancements from other alternative sentencing schemes on this basis to conclude that statutes which, like special circumstances findings, increase the penalty for the underlying crime itself are not enhancements. (See *People v. Olay* (2023) 98 Cal.App.5th 60, 64–69 (*Olay*) [prior convictions under Three Strikes law are not enhancements within meaning of section 1385, subdivision (c)]; *Burke, supra,* 89 Cal.App.5th at pp. 242–244 [same]; *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 898–899 [alternate sentencing scheme increasing penalty for underlying crime when committed for or with a criminal street gang is not an enhancement].)

This reasoning applies with equal force here, and compels the conclusion that section 1385, subdivision (c) was inapplicable to Stewart's request to dismiss the special circumstances findings. Although Stewart disagrees with this analysis on the strength of one comment in a legislative committee report on Senate Bill 81, the comprehensive discussion of the provision's legislative history in *Olay, supra,* 98 Cal.App.5th at pp. 67–69 teaches otherwise.[8]

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[8] Stewart asserts in a supplemental opening brief that a more recent law directing courts to consider all pertinent post-sentencing circumstances makes section 1385, subdivision (c) applicable here. (See §1171, subdivision (c) (Stats.2024, ch. 964; Assem. Bill No. 2483 (2023–2024 Reg. Sess.) §2, eff. Jan. 1, 2025.) We decline to address in the first instance the meaning and effect of a law that did not exist at the time of the resentencing hearing and express no view on the outcome should Stewart later raise the new legislation in the superior court.

B. Section 1385, subdivision (a)

Alternatively, Stewart contends the court abdicated its discretionary authority under subdivision (a) of section 1385 to dismiss special circumstances findings "in the furtherance of justice." (See *People v. Williams* (1981) 30 Cal.3d 470, 488–489 [holding in pre-Proposition 115 case that section 1385 provided discretion to dismiss special circumstances finding where defendant was sentenced to life without possibility of parole], superseded by statute as stated in *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 348.)[9] He bases this solely on the court's comment in ruling that "it's important to look at what the jury found and what the [trial c]ourt considered. . . ," extrapolating from this that the court "acted as a reviewing court" rather than exercising its own discretionary judgment. Again, he misreads the record.

At the hearing, the court commented on the "considerable evidence" put before it that Stewart "experienced significant trauma directly relating to this incident that was essentially the cause—well, was the cause for the murder"—evidence it knew the original court never saw because Stewart, representing himself, presented none at the penalty phase. Stewart's attorney expressly acknowledged this at the hearing, noting that "this court has significant additional information before it that shows, not only the prior trauma and the substance use disorder, but how [they] were connected to each other and how they were connected to the offense." In stating its ruling, the court expressly factored in that new evidence as well as "what the jury found," "what the [c]ourt considered," and the "nature of the offenses,

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[9] We assume without deciding that section 1385, subdivision (a) would apply to such requests made by the defendant rather than the court or prosecutor, as the provision specifies.

including what followed." On this record we are satisfied the court complied with its responsibility to "consider and weigh all the evidence and argument and make a reasoned choice." (*Gardner v. Superior Court* (1986) 182 Cal.App.3d 335, 339.)

DISPOSITION

The order is affirmed.

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Moorman, J. *

WE CONCUR:

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Brown, P. J.

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Streeter, J.

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