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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID HERNANDEZ,

Defendant and Appellant.

C066646

(Super. Ct. No. SF079707A)

In October 2000, a jury convicted defendant David Hernandez of eight felonies and found true numerous sentence enhancements in connection with two gang-related shootings in October 1999. On count 4—attempted premeditated murder of Samuel Vasquez—(Pen. Code, §§ 187, subd. (a), 664)¹ defendant was sentenced to state prison for life with a minimum term of 15 years (§ 186.22, former subd. (b)(4) [now subd. (b)(5)]), plus 25 years to life for personal discharge of a firearm causing great bodily injury (§ 12022.53, subd. (d)). On the remaining counts, the trial

¹ Undesignated statutory references are to the Penal Code in effect at the time of defendant's October 26, 2000 conviction.

court imposed terms totaling 24 years eight months, all to run concurrent with the life term on count 4. Sentences on counts 3 (shooting at an occupied motor vehicle (§ 246)) and 5 (shooting from a motor vehicle (former § 12034, subd. (c) [now § 26100, subd. (c)]) were stayed pursuant to section 654. Defendant was awarded a total of 521 days of presentence credit (453 days of actual custody credit and 68 days of conduct credit) pursuant to section 2933.1.²

Defendant appealed to this court. In an unpublished opinion filed in August 2002, we affirmed the judgment in its entirety. (*People v. Hernandez* (Aug. 20, 2002, C037543) (*Hernandez I*).

Defendant filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of California. In January 2009, the District Court granted the petition in part, ordering count 4's finding of premeditation stricken and returning the case to state court for resentencing on that count. (*Hernandez v. McGrath* (E.D. Cal. 2008) 595 F.Supp.2d 1111, 1120, 1127-1132 [see subsequent history].)³

² The relevant 2010 amendment to section 2933 does not entitle defendant to additional conduct credit because he was committed for serious felonies. (Former § 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

³ The federal court found that defendant's Sixth Amendment right to confrontation was violated by a gang expert's opinion testimony based, in part, on statements from defendant's associate who was not called as a witness. The court found that there was "plenty" of evidence to support a conviction for attempted murder, but the constitutional error was not harmless

In October 2010, the trial court resentenced defendant on count 4 in accordance with the writ. Because the new count 4 term was less than the count 5 (shooting from a motor vehicle) term, the trial court stayed count 4 pursuant to section 654 and lifted the stay on count 5. The count 4 term is not at issue in this appeal.

On count 5, the trial court imposed the middle term of five years plus 25 years to life for personal discharge of a firearm causing great bodily injury (§ 12022.53, subd. (d)). The court also ordered that defendant serve a minimum of 15 years before becoming eligible for parole, pursuant to section 186.22, former subdivision (b)(4) (now subdivision (b)(5)).

Noting that defendant "has continually been in the custody of the Department of Corrections throughout his appearance here," the trial court stated it would "not be announcing actual time, good time."

Defendant contends, and the Attorney General concedes, the trial court erred in imposing a 15-year minimum term on count 5 because the underlying offense is not punishable by imprisonment for life. The parties agree that, on remand, the trial court must recalculate defendant's actual custody time in state prison and must correct the abstract of judgment by removing count 4's reference to premeditation. We remand for resentencing.

with regard to the finding of premeditation. (*Hernandez v. McGrath*, *supra*, 595 F.Supp.2d at p. 1132.)

FACTUAL BACKGROUND

The facts of defendant's crimes are set forth in the published opinion of the federal district court. (*Hernandez v. McGrath, supra*, 595 F.Supp.2d at pp. 1122-1125 [adopting facts from this court's opinion in *Hernandez I, supra*, C037643].) The facts are not at issue and need not be set forth in this opinion.

DISCUSSION

I. 15-year Minimum Term

Defendant contends, and the Attorney General concedes, the trial court erred in imposing a 15-year parole ineligibility term on count 5 pursuant to section 186.22, former subdivision (b)(4)). We accept the Attorney General's concession.

At the time of defendant's 1999 offenses, subdivision (b)(1) of section 186.22 provided: "Except as provided in paragraph (4), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of one, two, or three years at the court's discretion." (Stats. 1997, ch. 500, § 2, p. 3125.)

At that time, subdivision (b)(4) of section 186.22 provided: "Any person who violates this subdivision in the

commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served." (Stats. 1997, ch. 500, § 2, p. 3125.)

Also at that time, former subdivision (d) (now subdivision (g)) of section 186.22 provided: "Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition." (Stats. 1997, ch. 500, § 2, p. 3126.)

In *People v. Montes* (2003) 31 Cal.4th 350 (*Montes*), the Supreme Court held that the 15-year minimum term applies where the underlying felony itself provides for a term of life imprisonment, not where the felony provides for a determinate term and the defendant receives a 25-year-to-life enhancement pursuant to former section 12022.53, subdivision (d). (*Montes*, at pp. 353, 359-362.)

In this case, the trial judge acknowledged that the punishment for a violation of former section 12034 "is not life in prison. It's the enhancement that has life in prison. So I suppose that means I impose a determinate term." However, after the prosecutor explained that section 12022.53, subdivision (d),

enhanced the term to 25 years to life, the trial judge responded, "So I'm going to impose the 15 calendar years. Okay. And in the grand scheme of things, I think that's to the defendant's benefit actually." Defense counsel agreed.

Under *Montes*, the trial court erred in applying section 186.22, former subdivision (b)(4), to the determinate term in count 5. (*Montes, supra*, 31 Cal.4th at pp. 353, 359-362.) On remand, the trial court shall impose "an additional term of one, two, or three years at the court's discretion." (Stats. 1997, ch. 500, § 2, p. 3125 [§ 186.22, former subd. (b)(1)].) Alternatively, if the court finds that this is "an unusual case where the interests of justice would best be served" (Stats. 1997, ch. 500, § 2, p. 3126 [§ 186.22, former subd. (d)]) the court may "strike the additional punishment" (*ibid.*) pursuant to current section 186.22, subdivision (g). If the court chooses the latter, it shall specify on the record and enter into the minutes the circumstances indicating that the interests of justice would best be served by that disposition. (§ 186.22, subd. (g).)

II. Custody Credits

Defendant contends, and the Attorney General concedes, the trial court erred when it expressly declined to calculate defendant's actual custody credits. We accept the Attorney General's concession.

"When, as here, an appellate remand results in modification of a felony sentence during the term of imprisonment, the trial

court must calculate the *actual time* the defendant has already served and credit that time against the 'subsequent sentence.' [Citation.] On the other hand, a convicted felon once sentenced, committed, and delivered to prison is not restored to presentence status, for purposes of the sentence-credit statutes, by virtue of a limited appellate remand for [resentencing]. Instead, he remains 'imprisoned' [citation] in the custody of the Director 'until duly released according to law' [citation], even while temporarily confined away from prison to permit his appearance in the remand proceedings. Thus, he cannot earn good behavior credits under the formula specifically applicable to persons detained in a local facility, or under equivalent circumstances elsewhere, 'prior to the imposition of sentence' for a felony. [Citations.] Instead, any credits beyond *actual custody time* may be earned, if at all, only under the so-called worktime system separately applicable to convicted felons serving their sentences in prison." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 23.)

Under *Buckhalter*, the trial court correctly refused to calculate defendant's "good time," but its refusal to calculate his "actual time" prior to resentencing was error. The Attorney General acknowledges that the error, which resulted in a legally invalid sentence, is cognizable on appeal notwithstanding defense counsel's failure to object. (*People v. Scott* (1994) 9 Cal.4th 331, 357-358.)

The parties disagree as to the amount of credit to which defendant had become entitled as of the October 2010 resentencing. It is not necessary to resolve their dispute. Because the case again must be remanded, the trial court will have the opportunity to calculate defendant's "actual time" credits in the first instance, as of the new resentencing date.

III. Abstract of Judgment

Defendant contends, and the Attorney General concedes, the amended abstract of judgment filed in November 2010 erroneously referred to defendant's count 4 conviction as being for attempted murder with premeditation. We agree with the parties.

Because the element of premeditation was stricken as a result of the federal habeas proceeding, and defendant was resentenced on count 4 for attempted murder without premeditation, the abstract of judgment should be corrected to omit the reference to premeditation.

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated and the matter is remanded to the trial court for resentencing consistent with this opinion.

BUTZ, J.

We concur:

BLEASE, Acting P. J.

MAURO, J.