

NOT TO BE PUBLISHED

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Glenn)

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR CHAVERA,

Defendant and Appellant.

C080904

(Super. Ct. No. 15NCR10435)

A jury found defendant Hector Chavera guilty of being a felon in possession of tear gas. (Pen. Code, § 22810, subd. (a).)¹ Defendant admitted allegations that he had served four prior prison terms. (§ 667.5, subd. (b).) The trial court sentenced defendant to an aggregate term of seven years in county jail, consisting of three years on the

¹ Further undesignated statutory references are to the Penal Code.

possession of tear gas offense, plus four consecutive one-year sentences for the prior prison terms.

On appeal, defendant contends the trial court erred in sentencing him to seven years because a violation of section 22810, subdivision (a) is a misdemeanor. The People concede the error. After oral argument, we ordered the record augmented. The documents we received reflect that the trial court resentenced defendant to time served, as a misdemeanor, while the instant appeal was pending. We solicited supplemental briefing from the parties as to whether the trial court's action had rendered the instant appeal moot. As we will explain, we conclude that it has; accordingly, we will dismiss the appeal as moot.

DISCUSSION

I

The Substantive Claim on Appeal

In light of the limited issue on appeal, we dispense with a recitation of the facts underlying defendant's conviction. It suffices to say that defendant was charged and convicted of being an ex-felon in possession of tear gas in violation of section 22810, subdivision (a). Although the charge was classified as a felony in the complaint, later deemed an information, and the punishment was proffered to be "16-2-3," the charge itself is a straight misdemeanor, not a wobbler.

Section 22810 initially explains that purchase, possession, and use of tear gas are not prohibited by law if used solely for self-defense purposes, "subject to" certain "requirements." These requirements include subdivision (a) of section 22810, which provides in relevant part that: "No person convicted of a felony . . . shall purchase, possess, or use tear gas or any tear gas weapon." The applicable penalty is not set forth in that subdivision.

Section 22810, subdivision (a) is the provision under which defendant was charged. The jury was instructed that to find him guilty it needed to find that defendant knowingly “owned/purchased/received/possessed/used” tear gas, and that he had previously been convicted of a felony. No other requirements, such as any need to prove self-defense or the absence of self-defense, are set forth.

Section 22810, subdivision (g)(1), on the other hand, criminalizes the *misuse* of tear gas, specifying that “any person who uses tear gas . . . except in self defense” is guilty of a wobbler, setting forth the possible penalties for such misuse of tear gas--either felony or misdemeanor--within that same subdivision.

Subdivision (g)(1) of section 22810 is not the subdivision under which defendant was charged. This subdivision does not require that defendant be a felon, but it does require that the tear gas was misused, i.e., used in a manner not consistent with self-defense. Although defendant’s conduct certainly seems to fit within this section, he was inexplicably not charged with this particular crime. The jury did not find him guilty of this crime. Nevertheless, it appears the trial court originally sentenced him with this crime in mind.

The applicable penalty for a violation of section 22810, subdivision (a) is contained in section 22900, which punishes unauthorized possession of tear gas with “imprisonment in the county jail for not exceeding one year or by a fine not to exceed two thousand dollars (\$2,000), or by both that fine and imprisonment.” (§ 22900.)

At sentencing, the probation report recommended an upper term sentence of three years for the violation, and the People agreed. Defense counsel asked only for “the Court to consider suspending a substantial amount of time.” The trial court imposed sentence as recommended, the upper term of three years, and imposed consecutive one-year enhancements for each of the four prior prison terms.

Because the maximum possible term of imprisonment for unlawful possession of tear gas under section 22810, subdivision (a) is one year in county jail, the trial court erred in imposing a three-year sentence for that offense. Further, because possession of tear gas is a misdemeanor, the trial court erred in imposing the prior prison term enhancements. A sentence enhancement under section 667.5, subdivision (b) is only appropriate where “the new offense is [a] felony.” (§ 667.5, subd. (b).) Accordingly, defendant must be resentenced to a misdemeanor sentence. Although the parties agreed with this conclusion in their briefing, appellate defense counsel requested oral argument for the announced purpose of requesting publication of our resulting opinion, arguing that this error and resulting illegal sentence was likely to occur in other cases.

II

Subsequent Events and Mootness

At oral argument, the appellate attorneys suggested subsequent events had occurred in the trial court while this appeal was pending, including possibly defendant’s resentencing. The attorneys were unclear as to the specifics. This court’s own records reflected a limited remand on May 12, 2016, for the trial court to consider bail pending appeal. On our own motion, after oral argument, we ordered the record augmented to reflect any subsequent hearings in the trial court concerning this case. The augmented record reflects that on May 17, 2016, the trial court resentenced defendant to time served, as a misdemeanor, and released him from custody on this case.²

We ordered supplemental briefing from the parties, asking whether the trial court’s purported correction of defendant’s unauthorized sentence rendered the instant appeal moot. The Attorney General’s supplemental brief argues that the resentencing was proper, because the trial court retained jurisdiction to correct defendant’s unauthorized

² Apparently defendant had a custody hold in place from Butte County.

sentence, citing *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1424 and *People v. Nelms* (2008) 165 Cal.App.4th 1465, 1472, among other cases. She concludes the appeal is moot, and argues against publication.

Appellate defense counsel's briefing attempts to distinguish *Nelms*, but seems to agree that *Ramirez* provides that the trial court retains jurisdiction to correct an unauthorized sentence. Counsel does not take a clear position on mootness, but "has no disagreement" with our concluding that the resentencing is valid and consequently this appeal is moot. Counsel does, however, continue to argue for publication.

We agree with the authorities cited by the parties that the trial court retained jurisdiction to correct this unauthorized sentence of seven years in prison on a misdemeanor charge while defendant's case was on appeal. Were we to decide this case on appeal, we would remand for resentencing. However, because defendant had already been resentenced and released on this misdemeanor conviction, we can provide no relief. Defendant does not argue that there are "disadvantageous collateral consequences" to his original unauthorized sentence such that we should decline to consider his case moot, see *People v. Ellison* (2003) 111 Cal.App.4th 1360, 1368-1389, and we see no such unresolved consequences here. Consequently, we will dismiss defendant's appeal as moot.

Although we decline to publish our opinion in this case, as we do not feel it meets the relevant criteria pursuant to California Rule of Court 8.1105, subdivision (c), we note that our conclusion that section 22810, subdivision (a) is a misdemeanor is not subject to debate. Defendant was charged, tried, convicted, and sentenced to seven years in prison for a misdemeanor charge which was incorrectly designated a felony from the charging document forward. We expect that this error will not recur.

