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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. VIGEL JAMOL PATTERSON, Defendant and Appellant.	C083686 (Super. Ct. No. 15F04709)

Defendant Vigel Jamol Patterson was found guilty by jury of carjacking two people, evading police, and unlawfully possessing a firearm. The jury found true an enhancement that he personally used a firearm in the carjacking counts, and in bifurcated proceedings a jury found defendant was previously convicted of a serious felony.

On appeal, the parties agree a remand is necessary for consideration of dismissal of the firearm and prior serious felony enhancements. Additionally, defendant argues the trial court erred by not recognizing its discretion to sentence him concurrently for crimes

committed on the same occasion or arising under the same set of operative facts. We agree and remand for sentencing.

Defendant also contends the abstract of judgment incorrectly implies the trial court sentenced defendant's indeterminate and determinate terms to run consecutively, and he identifies multiple other errors on the abstract of judgment. While we agree there are multiple errors on the abstract of judgment, we conclude defendant's determinate sentence must run consecutive to his indeterminate sentence.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant approached J.T. and his wife, M.T., as they unloaded their car shortly after midnight. Defendant requested a ride, but J.T. refused. Defendant then pointed a gun at J.T. and demanded the car keys. Defendant ordered J.T. and M.T. into the car's front seats, and defendant got into the back seat. After driving about 12 miles, defendant ordered them to pull over and get out of the car. Defendant threatened the couple before driving away. The couple called 911 once defendant was out of sight.

A police officer located the stolen car. He activated his overhead lights, but defendant drove away. Defendant was eventually arrested following a lengthy pursuit. Sacramento police officers found a loaded handgun in the car.

A jury found defendant guilty of two counts of kidnapping in the course of a carjacking (Pen. Code, § 209.5, subd. (a); counts one and two),[1] evading a peace officer (Veh. Code, § 2800.2; count three), and unlawfully possessing a firearm (§ 29800, subd. (a)(1); count four). The jury found true the enhancement to the carjacking counts that defendant personally used a firearm. (§ 12022.53, subd. (b).) At a bifurcated trial, the jury found true an allegation of a prior serious felony conviction. (§§ 667, subds. (a) & (b)-(i), 1170.12.)

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

The trial court sentenced defendant to seven years to life for each carjacking count, each of which was doubled to 14 years to life as a second strike conviction, to be served consecutively. The court stated, "Count Two must run consecutive to Count One by virtue of Proposition 13's[2] amendment to Penal Code section 1170.12(a)(7). [¶] [I] think there is some inconsistency between Penal Code section 1170.12(a)(7) and Penal Code section 667(c)(7). That appears to be a drafting oversight. And it was my reading of the voters' intention that the crimes in Count One and Count Two must run consecutive, that the Court does not have the discretion to run them concurrently. [¶] If the Court did have the discretion to run them concurrently, the Court would have considered that . . . . [¶] In the fullness of time, he may change and be suitable for parole release. I would be inclined to give the parole board that discretion earlier rather than later by considering running Counts One and Two concurrent. The two counts were from the same occasion. But as I read the law, I do not have the discretion to consider that option."

In addition to the indeterminate sentence of 28 years to life, the court also sentenced defendant to a determinate sentence of 34 years: 20 years for the two firearm enhancements on the carjacking counts (10 years per count), 10 years for the prior serious felony conviction (five years for each carjacking count), and four years for evading. The trial court also sentenced defendant to four years in prison for unlawfully possessing a firearm, and two years for violating the terms of his probation from a previous case, to run concurrent to the sentence for evading.

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[2] The intended citation was to Proposition 36.

DISCUSSION

I

Senate Bill No. 620

On October 11, 2017, the Governor signed Senate Bill No. 620 (Stats. 2017, ch. 682, § 2). This bill amended sections 12022.5 and 12022.53, effective January 1, 2018, to allow the trial court discretion to dismiss a firearm enhancement imposed pursuant to this section. (§§ 12022.5, subd. (c), 12022.53, subd. (h).)

Defendant argues the amendment applies retroactively to his case. (AOB 27-28) The Attorney General agrees, and we agree with the parties. The amendment to sections 12022.5 and 12022.53 applies retroactively to cases not final on appeal. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) Unlike the court in *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, here, we cannot say "the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations." Accordingly, we shall remand for the trial court to determine whether to exercise its discretion to strike any or all firearm enhancements.

II

Senate Bill No. 1393

The Governor signed Senate Bill No. 1393 which, effective January 1, 2019, amends sections 667, subdivision (a) and 1385, subdivision (b) to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony allegation for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the pre-2019 versions of these statutes, the court was required to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (§ 667, subd. (a)), and the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (§ 1385, subd. (b).)

Defendant filed a supplemental brief contending Senate Bill No. 1393 applies retroactively to his case. The People properly concede the matter. The statutory changes of Senate Bill No. 1393 apply retroactively to any case that is not final on January 1, 2019, under the rule of *In re Estrada* (1965) 63 Cal.2d 740. "The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not." (*People v. Conley* (2016) 63 Cal.4th 646, 657.)

The same inference of retroactivity applies when an amendment ameliorates the possible punishment. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308.) When a statutory amendment " 'vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty,' " there is "an inference that the Legislature intended retroactive application 'because the Legislature has determined that the former penalty provisions may have been too severe in some cases and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances.' " (*Ibid.*, quoting *People v. Francis* (1969) 71 Cal.2d 66, 76.)

Under the *Estrada* rule, as applied in *Francis* and *Lara*, we infer as a matter of statutory construction the Legislature intended Senate Bill 1393 to apply to all cases not yet final on January 1, 2019. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) Accordingly, we remand the matter to the trial court to determine whether to exercise its discretion to strike the two five-year enhancements.

III

Consecutive Sentences For The Carjacking Counts

Defendant argues the trial court mistakenly failed to recognize its discretion to impose concurrent terms as to the two carjacking counts. We agree.

Defendant was charged under both the legislative version of the three strikes law, section 667, subdivisions (b)-(i), and the initiative version of the three strikes law, section

1170.12. "In many respects, the two statutes are ' "virtually identical." ' " (*People v. Torres* (2018) 23 Cal.App.5th 185, 197 (*Torres*).) " 'Both versions of the statute were substantially revised by Proposition 36, enacted by the voters on November 6, 2012 . . . .' " (*Id*. at p. 197.) Proposition 36 amended section 1170.12, subdivision (a)(7), which concerns consecutive sentencing for multiple current serious and/or violent crimes, but it did not make corresponding changes to the previously identical statute, section 667, subdivision (c)(7). (*Torres*, at p. 197.) The issue raised by defendant's appeal is whether amendments to section 1170.12, subdivision (a)(7), now require the trial court to sentence the carjacking counts consecutively.

Before the enactment of Proposition 36, our Supreme Court addressed whether, under section 667, subdivisions (c)(6) and (c)(7), a trial court has discretion to impose concurrent sentences in cases where there are current convictions for more than one serious or violent felony. (*People v. Hendrix* (1997) 16 Cal.4th 508, 511-512 (*Hendrix*).)

Section 667, subdivision (c)(6) provides: "If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e)." The court in *Hendrix* concluded that subdivision (c)(6) applies to *any* felony conviction " "not committed on the same occasion, and not arising from the same set of operative facts.' " (*Hendrix*, *supra*, 16 Cal.4th at p. 512.) The court continued, "By implication, consecutive sentences are not mandatory under subdivision (c)(6) if the multiple current felony convictions are 'committed on the same occasion' or 'aris[e] from the same set of operative facts.' " (*Id*. at pp. 512-513.)

The court in *Hendrix* then analyzed section 667, subdivision (c)(7), which provides: "If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law." The court observed

subdivision (c)(7) "applies when there is more than one current serious or violent felony." (*Hendrix, supra,* 16 Cal.4th at p. 513.) Since "[t]he most logical meaning of the reference to 'paragraph (6)' in subdivision (c)(7) is that it refers to subdivision (c)(6)," the court concluded, " 'more than one serious or violent felony as described in paragraph (6)' refers to multiple current convictions for serious or violent felonies 'not committed on the same occasion, and not arising from the same set of operative facts.' " (*Ibid.*) "Thus, when a defendant is convicted of two or more current serious or violent felonies 'not committed on the same occasion, and not arising from the same set of operative facts,' not only must the court impose the sentences for these serious or violent offenses consecutive to each other, it must also impose these sentences 'consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.' By implication, consecutive sentences are not mandated under subdivision (c)(7) if all of the serious or violent current felony convictions are 'committed on the same occasion' or 'aris[e] from the same set of operative facts.' " (*Ibid.*)

The court explained why subdivisions (c)(6) and (c)(7) of section 667 are not duplicative. "Subdivision (c)(6) mandates consecutive sentencing for *any* current felony convictions not committed on the same occasion, and not arising from the same set of operative facts. Consecutive sentencing is not mandated under subdivision (c)(6) if the current felony convictions are committed on the same occasion or arise from the same set of operative facts." (*Hendrix, supra,* 16 Cal.4th at p. 513.) Under subdivision (c)(7), any two serious or violent felonies not committed on the same occasion and not arising from the same set of operative facts must be sentenced consecutive to each other—per the requirements of (c)(6)—and " 'consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.' " (*Hendrix,* at pp. 513-514.)

Proposition 36 did not amend the language of subdivisions (c)(6) or (c)(7) of section 667, but it did make the following changes to the language of section 1170.12, subdivision (a)(7), which we set out here along with subdivision (a)(6), for context: "(a) Notwithstanding any other provision of law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more *prior serious and/or violent* felony convictions, as defined in subdivision (b), the court shall adhere to each of the following: [¶] . . . [¶] (6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section. [¶] (7) If there is a current conviction for more than one serious or violent felony as described in ~~paragraph (6) of this~~ subdivision **(b)**, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law."[3] (§ 1170.12, subd. (a)(6) & (7), as amended by Prop. 36, § 4, eff. Nov. 6, 2012, boldface and strike out added.)

In *Torres*, Division One of the First District Court of Appeal examined how Proposition 36's amendment to section 1170.12 affected the trial court's discretion to impose concurrent sentences for serious or violent felonies committed on the same occasion or arising from the same set of operative facts. (*Torres*, *supra*, 23 Cal.App.5th at pp. 196-203.) The court first set out in detail the Supreme Court's reasoning in *Hendrix*. (*Torres*, at pp. 197-199.) The court then observed Proposition 36 did not amend section 1170.12, subdivision (a)(6), and therefore it concluded, "this subdivision continues to apply to *any* current felony convictions (including serious and/or violent felonies) and requires consecutive sentencing where the felonies (including serious and/or

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[3] Section 1170.12, subdivision (b), defines "serious and/or violent" felony for purposes of the three strikes law.

violent felonies) were not committed on ‘ “the same occasion” ’ or did not arise from ‘ “the same set of operative facts.” ’ ” (*Torres*, at pp. 200-201, quoting *Hendrix, supra*, 16 Cal.4th at p. 512.) Because section 1170.012, subdivision (a)(6), continues to apply to *any* current felony convictions, “The courts also retain discretion to impose concurrent sentences for felonies (including serious and/or violent felonies) committed on the same occasion or arising from the same set of operative facts.” (*Torres*, at p. 201, citing *Hendrix*, at pp. 513-514.)

Regarding section 1170.12, subdivision (a)(7), *Torres* explains, by replacing the subdivision’s reference to subdivision (a)(6)’s same occasion/same operative facts clause with a reference to subdivision (b), Proposition 36 changed the *triggering* language of the subdivision such that subdivision (a)(7) now applies any time a defendant is convicted of multiple serious or violent felonies. (*Torres, supra*, 23 Cal.App.5th at p. 201.) But Proposition 36 made no change to the *directive* portion of section 1170.12, subdivision (a)(7), which “requires a court to impose the sentences for serious and violent felonies ‘consecutive to the sentence for *any other conviction* for which the defendant may be consecutively sentenced in the manner prescribed by law.’ ” (*Torres*, at p. 201 quoting § 1170.12, subd. (a)(7); *Hendrix, supra*, 16 Cal.4th at pp. 513-514.)

In sum, section 1170.12, subdivision (a)(6), continues to apply to *all* felonies, and courts retain discretion to sentence multiple current felonies--including serious and/or violent felonies--committed on the “same occasion” or arising from the “same set of operative facts” concurrently. “[S]ection 1170.12, subdivision (a)(7) now applies whenever there are multiple serious and/or violent felony convictions, whether or not they were committed on the ‘same occasion’ or did not arise from the ‘same set of operative facts.’ And the sentences for those serious and/or violent felonies (imposed either consecutively or concurrently as required or allowed under section 1170.12, subdivision (a)(6)), must ‘run consecutive *to the sentence for any other offense, whether felony or misdemeanor, for which a consecutive sentence may be imposed*.’ ” (*Torres*,

supra, 23 Cal.App.5th at p. 201, quoting *Hendrix, supra*, 16 Cal.4th at p. 518 (conc. opn. of Mosk, J.).)

Finally, *Torres* noted "that no reference was made in the voting materials or the initiative measure to *Hendrix* and its progeny, which had been controlling on the issue of consecutive and concurrent sentencing under the Three Strikes law for more than a decade. We therefore discern no intent to overrule these decisions, and as we have explained, Proposition 36, while enlarging the *additional* consecutive sentencing requirement as to *other* convictions set forth in section 1170.12 subdivision (a)(7), otherwise leaves section 1170.12, subdivision (6) and (7), consistent with the basic sentencing principles articulated in those cases." (*Torres, supra*, 23 Cal.App.5th at p. 202, fn. 9.)

We find the analysis in *Torres* persuasive. We therefore conclude the trial court was mistaken in opining it had no discretion under the three strikes law to impose concurrent sentences on the carjacking counts, and we vacate the sentence and remand for resentencing.[4] Because there are multiple counts and discretionary decisions at play, the trial court may consider the entire sentencing scheme and reconsider all sentencing choices. (See *People v. Hill* (1986) 185 Cal.App.3d 831, 834.)

We observe the trial court at sentencing found the carjacking counts "were from the same occasion." On remand, the court has discretion to impose concurrent sentences for the carjacking counts, under section 1170.12, subdivision (a)(6), provided no other statute requires consecutive sentences. But under section 1170.12, subdivision (a)(7), the

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[4] We note the Attorney General's description of the court's decision in *Torres* as "reasonable" and consider that characterization as supporting our decision. But we do not agree with defendant that the Attorney General's failure to sufficiently address defendant's arguments on appeal amounted to acquiescence. (See *In re Marriage of Davies* (1983) 143 Cal.App.3d 851, 854 ["[S]ince the appellant has the affirmative burden to show error whether or not the respondent's brief has been filed, the respondent's failure to file does not require an automatic reversal"].)

sentences for evading police and unlawful possession of a firearm must run consecutive to the sentence the court imposes under section 1170.12, subdivision (a)(6) for the carjacking counts.[5]

IV

Abstract of Judgment

The parties agree the abstract of judgment contains multiple errors. On remand, the trial court should ensure the errors described below are not repeated.

The abstract of judgment for the determinate sentence states evading and vandalism are "serious" felonies and unlawful possession of a firearm is a "violent" felony. They are not. (§§ 1192.7, subd. (c); 667.5, subd. (c).) The determinate sentence abstract also lists 30 years of enhancements under sections 12022.53, subdivision (b) and 667, subdivision (a), but those enhancements were imposed on the indeterminate sentences and should be listed on the abstract of judgment for the indeterminate sentence. Section 7 of the determinate sentence abstract is not checked, despite the existence of an additional indeterminate term on a separate abstract. Due to the above-listed errors, sections 6 and 8 of the determinate sentence abstract do not reflect the correct figures. On the abstract of judgment for the indeterminate term, section 7 is not checked, and the second page of form CR-292 is not included with the first page of the abstract.

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[5] Defendant argues in his supplemental brief the abstract of judgment should be amended because it could be erroneously interpreted to require defendant to serve the determinate term consecutive to the indeterminate term. Because we conclude the sentences for evading and unlawful possession of a firearm must run consecutive to the sentence for carjacking, we reject this claim.

DISPOSITION

The matter is remanded for resentencing in a manner consistent with the exercise of discretion described by this opinion and preparation and service of an accurate abstract of judgment. The judgment is otherwise affirmed.

/s/
Duarte, J.

We concur:

/s/
Mauro, Acting P. J.

/s/
Renner, J.