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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL LEWIS,

Defendant and Appellant.

E055569

(Super.Ct.No. FVI900076)

OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, Judge. Affirmed as modified; remanded for resentencing.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steven T. Oetting, Tami Falkenstein Hennick and Ifeolu E. Hassan, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant and defendant Michael Lewis appeals from the sentence imposed on remand for resentencing following our opinion in *People v. Lewis* (Aug. 23, 2011, E051058) (nonpub. opn.) (*Lewis I*).

In our original opinion in this appeal, we addressed two contentions: (1) that Penal Code section 654¹ bars imposition of unstayed sentences on both count 1 and count 4, for possession of a firearm by a convicted felon and for receiving stolen property, consisting solely of the same firearm; and (2) that the amendments to sections 667 and 1170.12 enacted pursuant to the Three Strikes Reform Act of 2012 apply to defendant and mandate that on remand, the trial court reduce his sentence from 25 years to life to a lesser determinate term. We agreed with defendant and directed the superior court to impose sentence pursuant to sections 667, subdivision (e)(2)(C), and 1170.12, subdivision (c)(2)(C), and to stay imposition of sentence on either count 1 or count 4 pursuant to Penal Code section 654.

The California Supreme Court granted review, and following its decision in *People v. Conley* (2016) 63 Cal.4th 646, transferred the cause back to this court with directions to vacate our prior opinion and to reconsider the cause pursuant to that opinion. Accordingly, we now vacate our opinion filed on April 26, 2013, in *People v. Lewis* (2013) 216 Cal.App.4th 468 and reconsider the Three Strikes Reform Act issue pursuant to *People v. Conley*.

¹ All statutory citations refer to the Penal Code unless another code is specified.

BACKGROUND

In *Lewis I, supra*, E051058, we reversed the conviction on count 3, possession of ammunition by a convicted felon (§ 12316, subd. (b)(1)), and remanded for further proceedings on count 3 and for resentencing on counts 1 and 4. In count 1, defendant was convicted of being a convicted felon in possession of a firearm (former § 12021, subd. (a)), and in count 4, defendant was convicted of receiving or possessing stolen property (§ 496, subd. (a)). The trial court had sentenced defendant, under the three strikes law (§§ 667, subd. (c)(6), 1170.12, subd. (a)(6)), to consecutive terms of 25 years to life on counts 1 and 4, believing that it had no discretion to do otherwise. We held that the court did have the discretion to impose either concurrent or consecutive terms.

Our remand order directed the district attorney to determine, within 30 days after the opinion became final, whether to retry defendant on count 3. The remand order further stated: “If the district attorney elects not to retry defendant on count 3, the court shall dismiss count 3 and hold a new sentencing hearing within 30 days following the district attorney’s election, to determine whether to impose consecutive or concurrent sentences on counts 1 and 4.” (*Lewis I, supra*, E051058.)

The district attorney elected not to retry defendant, and the court dismissed count 3. At the resentencing hearing, the court again imposed consecutive sentences of 25 years to life on counts 1 and 4.

Defendant filed a timely notice of appeal.

DISCUSSION

I.

SECTION 654 BARS IMPOSITION OF SENTENCE

ON BOTH COUNT 1 AND COUNT 4

Section 654, subdivision (a), provides in relevant part that “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” At its simplest, “section 654 proscribes double punishment for multiple violations of the Penal Code based on the ‘same act or omission.’” (*People v. Siko* (1988) 45 Cal.3d 820, 822.)

In this case, the same firearm was the subject of both count 1 and count 4—that is, defendant was convicted of illegally possessing the firearm both because of his status as a convicted felon and because he knew that the firearm was stolen. In *Lewis I, supra*, E051058, we rejected defendant’s claim that section 654 bars imposition of sentence on both count 1 and count 4. We based our opinion primarily on *In re Hayes* (1969) 70 Cal.2d 604. We noted that a similar issue was then under review in *People v. Jones* (2012) 54 Cal.4th 350 (*Jones*), review granted Mar. 24, 2010, S179552.

On June 21, 2012, after the parties had filed their briefs in this case, the Supreme Court issued its opinion in *Jones, supra*, 54 Cal.4th 350. *Jones* involved a convicted felon who was found with a loaded firearm concealed in the door panel of the car he was driving. The firearm was not registered to him. (*Id.* at p. 352.) The court held that the defendant could be punished only once for the three crimes of which he was convicted

based on the single physical act of possessing a single firearm: possession of a firearm by a felon, carrying a readily accessible concealed and unregistered firearm, and carrying an unregistered loaded firearm in public. (*Id.* at pp. 352, 360.) The court confirmed that “[s]ection 654 prohibits multiple punishment for a single physical act that violates different provisions of law.” (*Id.* at p. 358.) It overruled *In re Hayes, supra*, 70 Cal.2d 604, and held that “a single possession or carrying of a single firearm on a single occasion may be punished only once under section 654.” (*Jones*, at pp. 357-358, 360.)

We directed the parties to submit supplemental briefing as to the effect, if any, of *Jones, supra*, 54 Cal.4th 350, on this case. The parties agree that *Jones* and section 654 preclude imposition of sentence on both count 1 and count 4, and we concur. We will remand the cause for resentencing, with directions to stay the sentence imposed on either count 1 or count 4.²

² Our determination that defendant’s sentence must be modified to stay the sentence imposed on count 1 or count 4 obviates the need to address the contention raised in defendant’s opening brief, i.e., that despite our holding in *Lewis I, supra*, E051058, the trial court continued to believe that it had no discretion to impose concurrent rather than consecutive terms on counts 1 and 4. It similarly renders defendant’s petition for writ of habeas corpus (*In re Lewis*, E056109) moot. We have addressed the petition by separate order.

II.

DEFENDANT MUST PETITION TO BE RESENTENCED

UNDER SECTION 667, SUBDIVISION (e)(2)(C)

While the appeal was previously pending, voters passed Proposition 36, the Three Strikes Reform Act of 2012 (hereafter the Reform Act or the act). The Reform Act became effective on November 7, 2012. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C), 1170.126.)³ We granted defendant’s request for supplemental briefing on the effect of the act.

Under the three strikes law as it existed before the passage of the Reform Act, a defendant with two or more strike priors who was convicted of any new felony would receive a sentence of 25 years to life. (Former § 667(e)(2)(A).) As amended, section 667 now provides that a defendant who has two or more strike priors is to be sentenced pursuant to paragraph 1 of section 667(e)—i.e., as though the defendant had only one strike prior—if the current offense is not a serious or violent felony as defined in

³ For convenience, we will dispense with the use of “subdivision” in referring to statutes. We will also refer solely to section 667(e) in discussing the Reform Act, omitting reference to the substantially identical section 1170.12(c). However, the analysis applies to both sections 667 and 1170.12.

section 667.5(c) or section 1192.7(c), unless certain disqualifying factors are pleaded and proven.⁴ (§§ 667(d)(1), (e)(2)(C).)

⁴ Section 667(e)(2)(C) provides that second strike sentencing does not apply if the prosecution pleads and proves any of the following:

“(i) The current offense is a controlled substance charge, in which an allegation under Section 11370.4 or 11379.8 of the Health and Safety Code was admitted or found true.

“(ii) The current offense is a felony sex offense, defined in subdivision (d) of Section 261.5 or Section 262, or any felony offense that results in mandatory registration as a sex offender pursuant to subdivision (c) of Section 290 except for violations of Sections 266 and 285, paragraph (1) of subdivision (b) and subdivision (e) of Section 286, paragraph (1) of subdivision (b) and subdivision (e) of Section 288a, Section 311.11, and Section 314.

“(iii) During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.

“(iv) The defendant suffered a prior serious and/or violent felony conviction, as defined in subdivision (d) of this section, for any of the following felonies:

“(I) A ‘sexually violent offense’ as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.

“(II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289.

“(III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288.

“(IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive.

“(V) Solicitation to commit murder as defined in Section 653f.

“(VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245.

“(VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418.

“(VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death.”

The Reform Act also provides a procedure which allows a person who is “presently serving” an indeterminate life sentence imposed pursuant to the three strikes law to petition to have his or her sentence recalled and to be sentenced as a second strike offender, if the current offense is not a serious or violent felony and the person is not otherwise disqualified. The trial court may deny the petition even if those criteria are met, if the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126(a)-(g).) Accordingly, under section 1170.126, resentencing is discretionary even if the defendant meets the objective criteria (§ 1170.126(f), (g)), while sentencing under section 667(e)(2)(C) is mandatory, if the defendant meets the objective criteria.

The parties agree that neither defendant’s current offenses—possession of a firearm by a convicted felon and receiving stolen property—nor his two strike priors, disqualify him for resentencing pursuant to section 667(e)(2)(C).⁵ Defendant contends, therefore, that upon remand for resentencing, the trial court must sentence him pursuant to section 667(e)(2)(C). He contends that section 667(e)(2)(C) is an ameliorative sentencing statute which presumptively applies to all criminal judgments which were not yet final as of its effective date, and that there is nothing in the language of the Reform

⁵ Defendant’s strike prior in San Bernardino County case No. SCR51536 is for robbery with no enhancements. (§ 211.) His second strike prior in Los Angeles County case No. NA00841, is for robbery with an enhancement for personal use of a firearm. (§§ 211, 12022.5.) Neither such offense disqualifies him for sentencing pursuant to section 667(e)(2)(C).

Act which overcomes the presumption. The Attorney General contends that section 667(e)(2)(C) applies prospectively only, i.e., to defendants who are first sentenced on or after November 7, 2012. She contends that it does not apply to defendant because he is “presently serving a third strike sentence” within the meaning of section 1170.126(a), and that his only remedy is to petition for relief under that statute.

In our original opinion, we agreed with defendant and directed the trial court to resentencing defendant according to section 667(e)(2)(C) on remand. Thereafter, in *People v. Conley, supra*, 63 Cal.4th 646, the California Supreme Court held that the Reform Act does not authorize automatic resentencing of eligible defendants whose judgments were not yet final on the effective date of the act. (*Conley*, at pp. 661-662.) Rather, such defendants must petition for resentencing as provided for in section 1170.126(b). (*Conley*, at pp. 661-662.) Accordingly, because defendant’s appeal was pending on the effective date of the Reform Act, his only recourse is to petition for resentencing.⁶

⁶ Section 1170.126(b), provides that inmates “serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12 upon conviction, whether by trial or plea, of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7, may file a petition for a recall of sentence, *within two years after the effective date of the act that added this section or at a later date upon a showing of good cause . . .*” (Italics added.) More than two years have elapsed since the effective date of section 1170.126. However, because the question of defendant’s right to automatic resentencing has remained unresolved until now, we direct the trial court to find that good cause exists to permit defendant to file a petition with one year after this opinion becomes final.

DISPOSITION

The cause is remanded. The superior court is directed to (1) hold a resentencing hearing within 30 days after finality of this opinion, (2) stay imposition of sentence on either count 1 or count 4 pursuant to Penal Code section 654, and (3) issue an amended abstract of judgment reflecting the sentence as modified and to provide a copy of the amended abstract to the parties and to the Department of Corrections and Rehabilitation within 30 days after resentencing.

The superior court is also directed to accept for filing a petition submitted by defendant pursuant to Penal Code section 1170.126 on or before one year after this opinion becomes final.

The judgment is otherwise affirmed.

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McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.