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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Appellant,

v.

JULIAN SANCHEZ,

Defendant and Appellant.

E055757

(Super.Ct.No. RIF152809)

OPINION

APPEAL from the Superior Court of Riverside County. Richard John Hanscom, Judge. (Retired judge of the San Diego Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

Paul E. Zellerbach, District Attorney, Natalie M. Pitre, Deputy District Attorney, for Plaintiff and Appellant.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

This opinion constitutes this court's second time addressing this matter. In our first opinion, we directed the trial court to resentence defendant and appellant Julian

Sanchez. (*People v. Sanchez* (Sept. 14, 2011, E050510) [nonpub. opn.].) This second appeal concerns the resentencing hearing. In its opening brief, plaintiff and appellant Riverside County District Attorney's Office contends the trial court erred by selecting defendant's assault conviction (Pen. Code, § 245, subd. (a)(1))¹ for the principle sentencing term, rather than defendant's robbery conviction (§ 211). In its reply brief, the district attorney's office asserts only that the abstract of judgment must be amended. Pursuant to *People v. Wende* (1979) 25 Cal.3d 436, defendant's appellate counsel asks us to examine the record to determine if there are any issues deserving further briefing. We reverse defendant's sentence.

PROCEDURAL HISTORY

A. JURY TRIAL

A jury found defendant guilty of two counts of assault with a deadly weapon other than a firearm (§ 245, subd. (a)(1)), two counts of robbery (§ 211), and one count of actively participating in a criminal street gang (§ 186.22, subd. (a)(1)). In regard to the two assault convictions and two robbery convictions, the jury found true the enhancement allegations that defendant committed the offenses to benefit a criminal street gang. (§ 186.22, subd. (b)(1).) Defendant admitted suffering two prior convictions for (1) robbery, in California (§ 211); and (2) willful or intentional discharge of a weapon at or into a dwelling or any building used for public or business purposes, in Oklahoma (21 Okl. St. § 1289.17A). (E050510 Opn. at p. 2].)

¹ All further statutory references will be to the Penal Code unless otherwise indicated.

B. FIRST APPEAL

In the prior appeal, this court reversed the trial court's finding that defendant's Oklahoma conviction qualified as a serious felony and a strike. We held substantial evidence did not support the findings, because there was no evidence indicating defendant personally used the firearm. (E050510 Opn. at pp. 31, 34.) We directed the trial court to retry the serious felony and strike allegations related to the Oklahoma conviction. (*Id.* at p. 34.)

We also concluded the trial court erred by directing the sentences for the substantive offenses to run concurrently, but the sentences for the enhancements to run consecutively in counts 2, 3, and 4. (E050510 Opn. at p. 23.) We directed the trial court to clarify whether the sentences for counts 2, 3, and 4 were to be served concurrently or consecutively. (*Id.* at p. 34.)

C. RESENTENCING

Defendant's resentencing hearing occurred on February 24, 2012. At the resentencing hearing, the prosecutor presented an Oklahoma reporter's transcript reflecting defendant's guilty plea. The Oklahoma transcript reflects the following exchange:

“THE COURT: The Information alleges that on or about September the 8th of 2000, you willfully discharged a .357 revolver into a dwelling located at 615 West Oklahoma in Ponca City, Kay County, Oklahoma, which dwelling was occupied at the time by Kay Wheeler, her two children, and Jerry Ragan. Is that true?

“[Defendant]: Yes.”

The trial court in the instant case found the Oklahoma reporter's transcript was sufficient evidence to support a finding defendant personally discharged the firearm in the Oklahoma case, thus qualifying the prior Oklahoma conviction as a strike and a serious felony. The trial court stated defendant's sentences in counts 2, 3, and 4 should run concurrently to his sentence for count 1.² The trial court sentenced defendant to (1) 25 years to life, plus three years for the assault and enhancement convictions, and (2) 25 years to life, plus 10 years for the robbery and enhancement convictions. The trial court selected one of the assault convictions as the principle count.

The prosecutor argued that one of the two robbery convictions should be the principle count, since they carried the longer enhancement sentence. The trial court responded, "I see what you're saying is that the principle term, whatever you want to call the principal term, doesn't matter because the other ones, that second part takes effect. I don't know. At least that's what I think you're saying. It's a matter of operation of law. One says three, one says ten, they're concurrent on the three over—when the three is over, the ten takes over. Maybe that's correct. But I don't have to make that determination." The trial court retained count 1, an assault conviction, as the principle term. The trial court explained the enhancement in count 1 was running consecutively, while all the other enhancement sentences were to be served concurrently.

² Counts 1 and 4 were assault convictions. Counts 2 and 3 were robbery convictions.

The prosecutor and defense attorney asked the trial court whether defendant's enhancement sentences were to be served consecutively to their associated base terms or whether the enhancement sentences were to be served concurrently with their associated base terms. The trial court then reviewed this court's prior opinion, and repeated our conclusion that the sentences were confusing as to counts 2, 3, and 4. The trial court stated, "So I'm saying that the enhancements are to be concurrent." The trial court then clarified, "I'm saying that the sentences on Counts 2, 3, [and] 4 . . . are concurrent with Count 1." The trial court explained that the enhancements should be served consecutively to their associated base terms, but "run concurrently with all other enhancements."

The attorneys and the court then engaged in the following discussion:

Defense Counsel: "So what I see is 25 to life plus three [for the enhancement], plus ten [for the prior convictions], that's to be run concurrent with Count 2, which is 25 to life plus ten [for the enhancement], which is concurrent with Count 3, which is 25 to life plus ten [for the enhancement], with Count 4, 25 to life plus three [for the enhancement]."

"THE COURT: You may be right. Now I see what you're saying because you have to look at the total term of enhancement. So the total enhancement on Count 1, because it has the two nickel priors, is ten plus three, or 13. So no enhancement on any of the other charges is greater, so then there's no more time. They're less."

“[Prosecutor]: But I think by default, by running Counts 2 and 3 concurrent and the time imposed with those counts, by default Counts 2 or 3 becomes automatically the primary term or the principal term.

“THE COURT: Well, but—okay. Let someone else figure that out. At any rate, I am—I am making the enhancements as I’ve ordered. The [section] 667(a), and [that] is twice, five years, that goes with Count 1[, which is an assault conviction]. Also the enhancement on Count 1 is three years for the [section] 186.22(b) [enhancement]. Count 2, the enhancement is ten years. That’s concurrent with Count 1. Count 3 is ten-year enhancement concurrent. Count 4, three-year enhancement concurrent. Okay. That’s it. I’m not going to—I believe that’s correct.”

The prosecutor asked the trial court if defendant’s sentence was “25 to life plus 13 years.” The following exchange occurred:

“THE COURT: Each count is 25 to life plus whatever.

“[Prosecutor]: But did the court make the determination?

“THE COURT: Plus—on Count 1 plus 13, right, ten and the nickel priors plus three.

“[Prosecutor]: Now, are you saying that it’s not 25 to life plus ten—plus ten from [the] nickel priors because of Count 2?

“THE COURT: I’m saying Count 2 is 25 to life plus ten for the gang enhancement, but the nickel priors are used again.

“[Defense Counsel]: Right.

“THE COURT: That’s what I’m saying.

“[Prosecutor]: Okay. Thank you.

“THE COURT: That’s what I’m saying.”

Abstracts of judgment dated March 1, 2012, reflect defendant must serve an indeterminate term of 25 years to life and a determinate term of 13 years. Abstracts of judgment dated May 15, 2012, also reflect defendant must serve an indeterminate term of 25 years to life and a determinate term of 13 years.

DISCUSSION

A. DISTRICT ATTORNEY’S APPEAL

1. *APPELLANT’S OPENING BRIEF*

In the district attorney’s opening brief, it asserts the trial court imposed an unlawful sentence by selecting count 1, an assault conviction, as the principle term, when the robbery sentences involve longer terms. The district attorney relies on the rule, “The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements.” (§ 1170.1, subd. (a).) In its opening brief the district attorney contends defendant’s sentence should be 25 to life for the robbery conviction, plus 10 years for the enhancement, plus 10 years for the prior convictions. Thus, defendant’s sentence would be an indeterminate term of 25 years to life and a determinate term of 20 years.

2. *RESPONDENT’S BRIEF*

Defendant faults the district attorney’s reliance on section 1170.1, arguing defendant was sentenced pursuant to the “Three Strikes” law, and therefore section 1170.1 is irrelevant. Nevertheless, defendant concedes the trial court imposed an

unauthorized sentence, and defendant ultimately arrives at the same mathematical point: For the two robbery convictions, defendant was eligible for an indeterminate term of 25 years to life plus a 20-year determinate term, and for the assault convictions, defendant was eligible for an indeterminate term of 25 years to life plus a 13-year determinate term.

Defendant asserts the matter should be returned to the trial court with directions to hold another sentencing hearing. Defendant notes the trial court failed to apply the prior conviction sentences to each count. (See *People v. Williams* (2004) 34 Cal.4th 397, 405 [“[U]nder the Three Strikes law, section 667(a) enhancements are to be applied individually to each count of a third strike sentence.”].) Defendant also asserts the trial court could choose to strike defendant’s strike priors as they pertain to the two robbery convictions (counts 2 and 3), thus permitting the assault sentence in count 1 to remain the “principle term.” Defendant further argues the court could again impose an “aggregate sentence of 38 years to life for Count One.”

Defendant’s overall point appears to be that the trial court needs to exercise its discretion in sentencing defendant for the third time, and this is not a matter to be fixed by the appellate court. Defendant requests we reverse his sentence in its entirety and remand the matter to the trial court “with directions to impose any lawful sentence within its discretion.”

3. *APPELLANT’S REPLY BRIEF*

In the district attorney’s reply brief, it concedes defendant is correct about a principle term not being required for a Three Strikes sentence. However, the district

attorney asserts the matter does not need to be remanded for resentencing. The district attorney asserts the trial court made the correct sentencing choices, and only the abstract of judgment is incorrect. The district attorney asserts this court should modify the abstract of judgment to reflect an indeterminate term of 25 years to life plus a determinate term of 20 years.

The district attorney highlights the trial court's comment, "I see what you're saying is that the principle term, whatever you want to call the principal term, doesn't matter because the other ones, that second part takes effect. I don't know. At least that's what I think you're saying. It's a matter of operation of law. One says three, one says ten, they're concurrent on the three over—when the three is over, the ten takes over. Maybe that's correct. But I don't have to make that determination." The district attorney asserts the trial court created confusion by using the words "principle term" and not running the shorter sentences concurrent to the longest sentence; however, the district attorney asserts the trial court ultimately created a sentence that was intended to be 25 years to life plus 20 years, and therefore only the abstract of judgment needs to be amended.

4. *ANALYSIS*

The flaw with the district attorney's reasoning is that the trial court never pronounced defendant's sentence as 25 years to life plus 20 years. The only time the trial court tallied defendant's sentence, it said: "So the total enhancement on Count 1, because it has the two nickel priors, is ten plus three, or 13. So no enhancement on any of the other charges is greater, so then there's no more time. They're less." This

statement by the trial court reflects a belief that defendant's maximum determinate sentence would be 13 years. However, later in the hearing, the trial court said, "I'm saying Count 2 is 25 to life plus ten for the gang enhancement, but the nickel priors are used again." This second statement reflects a belief that defendant's determinate term would be 20 years.

Thus, while the district attorney and appellate defense counsel both agree defendant is eligible for a sentence of 25 to life plus 20 years, it is unclear if the trial court intended to impose a 20-year determinate sentence or if it wanted to impose the 13-year determinate sentence. "[A] court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts." (*In re Candelario* (1970) 3 Cal.3d 702, 705.) "Clerical error, however, is to be distinguished from judicial error which cannot be corrected by amendment. The distinction between clerical error and judicial error is 'whether the error was made in rendering the judgment, or in recording the judgment rendered.' [Citation.]" (*Ibid.*)

We cannot correct the trial court's error by amending the abstract of judgment because the error involved in this case is not merely clerical. Rather, the trial court did not clearly pronounce the sentence it intended to impose. As a result, we will reverse defendant's sentence and direct the trial court to resentence defendant. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 509 [reversal of sentencing order is appropriate remedy where trial court's error may affect a discretionary sentencing decision].)

B. DEFENDANT'S WENDE APPEAL

We appointed counsel to represent defendant on appeal. After examining the record, counsel filed a brief raising no arguable issues and requesting that this court conduct an independent review of the record pursuant to *People v. Wende, supra*, 25 Cal.3d at page 436. Nevertheless, defendant's counsel directed this court's attention to the possibility of one appellate argument: Is the finding defendant personally used a firearm during the Oklahoma offense supported by substantial evidence? This court notified defendant on June 11, 2012, that he had 30 days within which to submit, by supplemental brief, any grounds for appeal. To date, we have received no response from defendant. We have independently examined the entire record and have determined that no arguable issues exist, taking into consideration that we have reversed defendant's sentence. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-284; *People v. Kelly* (2006) 40 Cal.4th 106, 113-119; *People v. Wende, supra*, 25 Cal.3d at p. 441.)

DISPOSITION

The sentence is reversed. The trial court is directed to resentence defendant. In all other respects, the judgment is affirmed.

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MILLER
J.

We concur:

MCKINSTER
Acting P. J.

KING
J.