Filed 9/26/13 P. v. Lendo CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ARELIO SOTO LENDO, Defendant and Appellant.	E058046 (Super.Ct.No. RIF76492) OPINION

APPEAL from the Superior Court of Riverside County. Charles J. Koosed, Judge. Reversed.

Marilee Marshall, 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, Laura A. Glennon, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Arelio Soto Lendo appeals from the superior court's order "granting" his motion under Penal Code section 1204 and imposing a 167-day sentence in lieu of

him paying the $5,000 restitution fine imposed in 1998. As discussed below, we order the superior court to move as expeditiously as possible to strike the sentence and credit defendant against the restitution fine with $30 for each day of the unauthorized sentence that he actually served.

PROCEDURE

On June 25, 1998, defendant pled guilty to attempted murder (Pen. Code, §§ 187, 664)[1] and two counts of assault with a knife by means likely to produce great bodily injury (§ 245, subd. (a)(1)), admitted with respect to the attempted murder that he inflicted great bodily injury (§ 12022.7, subd. (a)) and personally used a deadly weapon (§12022, subd. (b)(1)), and admitted a prior strike conviction (§ 667, subd. (e)(1)). On July 30, 1998, the trial court sentenced defendant to 18 years in prison and ordered him to pay a $5,000 restitution fine.

Defendant was due to be paroled in June of 2013. On December 21, 2012, he filed with the superior court an "Ex-Parte For The Disposition Of Fines Pursuant to P.C. § 1205(a)" with attached exhibits. Defendant wished to be paroled to Florida, where his sister offered him a place to stay and a job. Defendant asked the court to convert his $5,000 restitution fine to a jail sentence that he could serve concurrently with the remainder of his prison term, so he could be free to serve his parole in Florida.

Also on December 21, 2012, the superior court held an ex parte hearing on defendant's motion. The court "granted" defendant's motion, ruling that defendant could

[1] All section references are to the Penal Code unless otherwise indicated.

serve custody in lieu of paying the restitution fine, at the rate of $30 per day, or 167 days for the $5,000 balance. The court sentenced defendant to 167 days in county jail, to be served in state prison, consecutive to the current term.

This appeal followed.

On July 16, 2013, this court granted defendant's request for expedited appeal.

DISCUSSION

Defendant argues, and the People agree, that the superior court lacked jurisdiction under section 1205 to modify defendant's sentence from 1998.

Section 1205, subdivision (a) provides in pertinent part: "A judgment that the defendant pay a fine, with or without other punishment, may also direct that he or she be imprisoned until the fine is satisfied and may further direct that the imprisonment begin at and continue after the expiration of any imprisonment to which the defendant may have been sentenced. The judgment shall specify the term of imprisonment for nonpayment of the fine, which shall not be more than one day for each thirty dollars ($30) of the fine, nor exceed the term for which the defendant may be sentenced to imprisonment for the offense of which he or she has been convicted. A defendant held in custody for nonpayment of a fine shall be entitled to credit on the fine for each day he or she is held in custody, at the rate specified in the judgment."

However, section 1205, subdivision (a), does not apply to restitution fines, by the very terms of section 1205. (§ 1205, subd. (f) ["This section shall not apply to restitution fines and restitution orders."].) Since section 1205, subdivision (f), did not authorize the court below to impose imprisonment in lieu of payment of a restitution fine, the court

should have denied defendant's motion. The court therefore lacked jurisdiction to modify defendant's sentence by adding 167 days.

The question then is as to remedy. The People ask this court to remand the matter to the superior court so that it can strike the 167-day sentence. Defendant also asks this court to direct the superior court to strike the 167-day sentence, but also to provide him with equitable relief and credit him against the fine $30 for each day that he spent in custody after his proper release date of June 10, 2013.

We agree with defendant that this court has the equitable power to order that he be credited against his restitution fine with $30 per day that he spent in custody serving the unauthorized 167-day sentence. (See *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967.) We also agree that the interests of fairness and justice in this case are best served by doing so.

DISPOSITION

The trial court is directed to act as expeditiously as possible to strike the 167-day sentence and to credit defendant against the $5,000 restitution fine with $30 for each day he spent in custody serving the 167-day sentence.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

RICHLI
J.