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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY MCCOY,

Defendant and Appellant.

F061717

(Super. Ct. No. F10902298)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, William K. Kim and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Gomes, J. and Franson, J.

Anthony McCoy (appellant) was convicted by a jury of two counts of second degree robbery while armed with a deadly weapon. (Pen. Code, §§ 211, 12022, subd. (b)(1))¹, and two counts of making a criminal threat while armed with a deadly weapon (§§ 422, 12022, subd. (b)(1)). The robberies occurred on the same occasion against different victims. The court sentenced appellant under the “Three Strikes” law to 25 years to life for each robbery, the sentences to be served consecutively.

Appellant contends that the trial court erroneously believed consecutive sentences were required for the two robberies. We agree with appellant and, accordingly, reverse and remand for resentencing.

STATEMENT OF THE CASE AND FACTS

At 5:00 a.m. on April 29, 2010, Nongtharangsy Myfanglong, Anabell Rojas and Linda Green were working at an AM/PM market when appellant walked into the store. Green was stocking boxes and the other two employees were next to the cash registers. Appellant pointed a knife at Rojas, who was at the cash register, and said, “Bitch, give me the money.” Appellant held a knife in his right hand and pushed Rojas out of the way with his left. Myfanglong went towards Rojas and stood in front of her. Appellant told both of them not to move or he would cut them up. Myfanglong testified the man told them, don’t “move or I will cut you.” Appellant then grabbed money from the cash register, fled out the door and into a waiting vehicle.

The jury found appellant guilty of the robberies and criminal threats, and found true the weapon enhancement allegations. In a bifurcated proceeding, appellant admitted two prior strike felony convictions (§§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d), two prior serious felony convictions (§ 667, subd. (a)(1)), and five prior prison terms (§ 667.5, subd. (b)).

¹ All further statutory references are to the Penal Code unless otherwise stated.

The probation report prepared in anticipation of sentencing recommended the trial court sentence appellant to consecutive terms on all four counts, staying sentence pursuant to section 654 on the two counts of making a criminal threat. The report noted that the two robbery counts “are mandated to be served consecutively” and that consecutive sentences were required “[p]ursuant to PC 667(c)(7)/1170.12(a)(7),”

At sentencing, the trial court stated it had read the probation report and “It is the Court’s inclination to follow probation’s recommendation in this case, given the criminal history which is detailed in the probation report.” Defense counsel requested that the trial court strike one of appellant’s prior strikes because appellant was now 44 years old and, under the terms recommended by probation, he would be 129 years old before he could again receive probation. The prosecutor opposed defense counsel’s request, noting appellant’s lengthy and consistent criminal history, which began when appellant was a juvenile and dated back, as an adult, to 1984. As noted by the prosecutor, “[t]he only time the defendant was free of a crime or free of custody for more than two years was when he was actually serving time in prison.” The prosecutor also noted the current crime’s threat of violence, callousness, and evidence of planning, as well as the lasting effects of the crimes on one of the victims.

Before pronouncing sentence, in response to defense counsel’s request to strike a prior strike, the trial court discussed appellant’s lengthy criminal history and that, following appellant’s most recent prior conviction, the previous trial court had struck one of appellant’s prior strikes. As a result, appellant received a much shorter sentence and, within a week or so of being placed on parole for that offense, committed the current offenses. The trial court agreed with defense counsel that it was “unlikely” appellant would be able to serve his entire sentence, but “based upon his history, it is clear to the Court that if the Court gives him anything less than that, if he is given an opportunity to be out of custody, other persons will be victimized, either at gunpoint or at knife point. And I don’t believe that is fair to anyone.”

In imposing sentence, the trial court stated that the second count of robbery “is to run consecutive to the time to be served in [the first] count [of robbery] pursuant to law.”

APPLICABLE LAW AND ANALYSIS

At the outset, the People argue that appellant waived the issue of consecutive sentences on appeal because he did not object in the trial court. (See *People v. Scott* (1994) 9 Cal.4th 331.) But appellant argues that the trial court did not understand its discretion under section 667, subdivision (c), and *Scott* expressly exempts unauthorized sentences from its waiver rule. (*Scott, supra*, at p. 354 & fn. 17.) We will therefore address the issue on the merits.

Section 667, subdivision (c), governs sentencing of a defendant for a felony conviction when the People have pled and proved that the defendant has had one or more prior felony convictions. Subdivision (c)(6) and (7) of section 667 provides:

“(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 defendant consecutively on each count pursuant to subdivision (e). [¶] (7) 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.”

Under these provisions, consecutive sentencing is mandatory for convictions of any current felony (subdivision (c)(6)), or serious or violent felony (subdivision (c)(7)), that was “not committed on the same occasion, and not arising from the same set of operative facts.” (§ 667, subd. (c)(6) & (7); see *People v. Hendrix* (1997) 16 Cal.4th 508, 512-513.) By implication, consecutive sentences are not mandatory under these provisions if the current felonies are “committed on the same occasion” or “aris[e] from the same set of operative facts.” (*Id.* at p. 513.) Thus, if current felonies are either committed on the same occasion or arise from the same set of operative facts, the trial court has discretion to impose either concurrent or consecutive sentences. (*Id.* at p. 514.)

The phrase ““same occasion”” in section 667, subdivision (c)(6) and (7), “refers at least to a close temporal and spatial proximity between the acts underlying the current convictions.” (Cf. *People v. Deloza* (1998) 18 Cal.4th 585, 595 (*Deloza*) [interpreting § 1170.12, subd. (a)(6) & (7)].) In *Deloza*, the defendant and an armed companion entered a furniture store, pointed the weapon at a salesperson and demanded money. The salesperson directed the defendant to an assistant manager, who opened the cash register. After taking the money, the defendant demanded and received the wallet from another salesperson and yanked a purse from a customer. The defendant was convicted of four counts of robbery and sentenced under the Three Strikes law to four consecutive terms of 25 years to life. (*Id.* at p. 589.) The Supreme Court held that, “[g]iven the close temporal and spatial proximity of defendant’s crimes against the same group of victims, they were clearly committed on the ‘same occasion.’” (*Id.* at p. 596.) “[T]he trial court therefore retained discretion to impose either concurrent or consecutive sentences.” (*Ibid.*)

The phrase “same set of operative facts” in section 667, subdivision (c)(6) and (7), means that the facts that support the elements underlying the first crime the defendant has committed overlap or necessarily unfold into the facts supporting the elements underlying the second or subsequent crimes. (*People v. Lawrence* (2000) 24 Cal.4th 219, 232-233.)

Here, the robberies of Rojas and Myfanglong occurred at the same location and unfolded essentially simultaneously. They thus occurred on the “same occasion” and encompassed the “same set of operative facts” for purposes of section 667, subdivision (c)(6) and (7), and consecutive sentencing on the two robberies is discretionary. As respondent acknowledges, the probation report was incorrect “to the extent it stated that consecutive terms were mandatory.”

Generally, when the record discloses that the trial court was unaware of its discretion or the scope of its discretion in sentencing, remand is required to allow the court to impose the sentence with the full awareness of its discretion. (*People v. Fuhrman* (1997) 16 Cal.4th 930, 944; *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn.

8.) “Defendants are entitled to ‘sentencing decisions made in the exercise of the “informed discretion” of the sentencing court,’ and a court that is unaware of its discretionary authority cannot exercise its informed discretion. [Citation.]” (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.)

We need not remand for resentencing, however, if the record demonstrates the trial court was aware of its sentencing discretion. (*People v. Belmontes, supra*, 34 Cal.3d at p. 348, fn. 8; *People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1523.) “Further, remand is unnecessary if the record is silent concerning whether the trial court misunderstood its sentencing discretion. Error may not be presumed from a silent record.” (*People v. Brown, supra*, 147 Cal.App.4th at p. 1229.) “[A] trial court is presumed to have been aware of and followed the applicable law.’ [Citations.]” (*People v. Martinez* (1998) 65 Cal.App.4th 1511, 1517.) Even if the trial court was unaware of its sentencing discretion, remand is unnecessary when the record clearly demonstrates the sentence would have been no different if the court had been aware of and properly exercised its discretion. (Cf. *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530, fn.13.)

Here, the probation report prepared in anticipation of sentencing noted, inter alia, that the two robbery counts “are mandated to be served consecutively” and that consecutive sentences were required “[p]ursuant to PC 667(c)(7)/1170.12(a)(7),” Section 667, subdivision (c) was not mentioned at sentencing, and at no time did the trial court state that it did not have discretion to sentence appellant concurrently. But the trial court did state that it had read the probation report and was inclined to follow probation’s recommendation in this case, given appellant’s criminal history detailed in the probation report. In declining to strike one of appellant’s prior strikes, the trial court stated that, based on appellant’s criminal history, “if the Court gives [appellant] anything less than [the sentence indicated] ... other persons will be victimized.” When sentence on the second robbery was subsequently imposed, the trial court stated it was to “run consecutive to the time to be served in Count One *pursuant to law*.” (Italics added.)

This perplexing record does not permit us to conclude that the trial court was aware of and exercised its sentencing discretion. Although we are tempted to conclude that the trial court would have imposed consecutive sentences in any event, the record is too equivocal for us to state that the trial court clearly would have reached the same result had it exercised informed discretion.

Under the circumstances, and particularly in light of the ambiguous and unclear record of the proceedings that resulted in appellant's sentence, we are compelled to remand the matter for resentencing. Because we are vacating the sentence, it is unnecessary to address appellant's claim that counsel was ineffective for failing to object to the sentence at trial.

DISPOSITION

The sentence is vacated and the matter is remanded for resentencing in accordance with the views expressed in this opinion. In all other respects, the judgment is affirmed.