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

THE PEOPLE,

Plaintiff and Respondent,

v.

TOMMY JACKSON NICHOLS,

Defendant and Appellant.

F061963

(Super. Ct. No. 1038145)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Donald E. Shaver, Judge.

A.M. Weisman, 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, Kathleen A. McKenna and Amanda D. Cary, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Cornell, J. and Dawson, J.

Tommy Jackson Nichols appeals following resentencing. We will modify the judgment by striking the parole revocation restitution fine and order that the abstract of judgment be amended to correct various errors, but otherwise affirm.

PROCEDURAL HISTORY

Nichols was convicted of first degree murder perpetrated during the commission of a robbery and involving the personal use and discharge of a firearm (count I — Pen. Code,¹ §§ 187, 190.2, subd. (a)(17), 12022.5, subd. (a), 12022.53, subds. (b), (c), (d) & (e)(1)); residential robbery involving the personal use and discharge of a firearm (counts III & IV — §§ 212.5, 12022.5, subd. (a), 12022.53, subds. (b), (c), (d) & (e)(1)); and false imprisonment involving the personal use of a firearm (count V — §§ 236, 12022.5, subd. (a); count VI — §§ 236, 12022.5, subd. (a), 12022.53, subd. (b)). All crimes were found to have been committed for the benefit of, at the direction of, or in association with the Pasadena Denver Lane Bloods criminal street gang (§ 186.22, subd. (b)(1)), and Nichols was found to have suffered two prior serious felony convictions that were also strikes (§ 667, subds. (a) & (d)) and to have served three prior prison terms (§ 667.5, subd. (b)).²

Nichols filed a motion for new trial. Following an evidentiary hearing, the trial court struck all gang enhancements, but otherwise denied the motion. Nichols was then sentenced, on count I, to life in prison without the possibility of parole (LWOP), plus 25 years to life pursuant to section 12022.53, subdivision (d), plus 10 years pursuant to section 667, subdivision (a). Sentence on count III was stayed pursuant to section 654.

¹ All statutory references are to the Penal Code.

² By prior order, we have judicially noticed the record in Nichols's previous appeal, case No. F055572.

Nichols was jointly charged and tried with Kevin Laquan Trice and Jermaine Michael Dean. They are not before us on, and the facts underlying the offenses are not pertinent to, the present appeal.

On counts IV, V, and VI, the court imposed concurrent terms of 25 years to life in prison, plus, on count IV, 25 years to life pursuant to section 12022.53, subdivision (d) and, on counts V and VI, one year four months pursuant to section 12022.5. In addition, the court imposed a \$10,000 restitution fine pursuant to section 1202.4, subdivision (b); imposed but suspended a \$10,000 parole revocation restitution fine pursuant to section 1202.45; imposed a \$20 court security fee pursuant to section 1465.8; ordered restitution of \$5,861.42 paid to the California Victim Compensation and Government Claims Board; and ordered restitution of \$236.04 paid to the City of Modesto. The court awarded 2,237 days of actual presentence custody credits.

On appeal, this court affirmed Nichols's convictions. As to counts I, III, and IV, however, we reversed the section 12022.53, subdivisions (c) and (d) enhancements for insufficiency of the evidence, and ordered that sentence be imposed on the section 12022.53, subdivision (b) enhancements that were alleged and found true as to those counts. We further struck the order of restitution to the City of Modesto. We vacated sentence and directed the trial court to resentence Nichols in accord with the views expressed in our opinion.

Upon remand, the trial court struck the section 12022.53, subdivision (d) enhancements on counts I, III, and IV, and instead imposed 10-year enhancements on those counts pursuant to subdivision (b) of that section. The court reimposed all fees and fines previously imposed, except that it struck the order of restitution to the City of Modesto. The court stated it did not need to affix additional credits, as the California Department of Corrections and Rehabilitation (CDCR) would do so. Nichols filed a timely notice of appeal.

DISCUSSION

I. *The abstract of judgment must be corrected to delete the stricken order of restitution to the City of Modesto.*

Although the trial court followed our direction to strike the order of restitution to the City of Modesto, the abstract of judgment included that restitution order. “When there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls. [Citations.]” (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1367, fn. 3; see also *People v. Mitchell* (2001) 26 Cal.4th 181, 185-186; *People v. Zackery* (2007) 147 Cal.App.4th 380, 387-388.) Accordingly, as Nichols claims and the Attorney General concedes, the abstract of judgment must be amended to correct the erroneous inclusion of the stricken order.

II. *The parole revocation restitution fine must be stricken.*

While not specifically mentioned at the resentencing hearing, the section 1202.45 fine was imposed originally, and so was included in the trial court’s blanket reimposition of all fees and fines previously imposed.³ Relying on *People v. Oganessian* (1999) 70 Cal.App.4th 1178 (*Oganessian*) and a number of other cases, Nichols now says that because he was sentenced to LWOP with no determinate term(s), the fine should be stricken. Based on her reading of *People v. Brasure* (2008) 42 Cal.4th 1037 (*Brasure*), the Attorney General disagrees. She reasons that, in addition to the LWOP term, Nichols’s sentence included three concurrent terms of 25 years to life, which technically rendered him eligible for parole. Although as a practical matter it makes no difference to Nichols, we conclude the fine — already suspended by operation of statute — was improperly imposed in this case and must be stricken.

³ Because the original sentence was vacated and the fine imposed anew, we see no impediment to Nichols challenging imposition of the parole revocation restitution fine on this appeal although he did not do so in case No. F055572. The Attorney General does not claim otherwise.

Section 1202.45 provides, in pertinent part: “In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall ... assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional parole revocation restitution fine ... shall be suspended unless the person’s parole is revoked.” A “case,” for purposes of section 1202.45, is “a formal criminal proceeding, filed by the prosecution and handled by the court as a separate action with its own number.” (*People v. Soria* (2010) 48 Cal.4th 58, 64-65.)

In *Oganesyan, supra*, 70 Cal.App.4th 1178, the defendant was sentenced, on count 1, to an indeterminate term for second degree murder plus an additional four-year term for a firearm use enhancement. On count 2, he was sentenced to LWOP plus 10 years, for first degree special-circumstance murder with a firearm use enhancement. Although the trial court imposed a restitution fine pursuant to section 1202.4, the People claimed it erred by omitting the section 1202.45 fine. The defendant agreed that if the fine applied to him, the trial court had a jurisdictional duty to impose it. He argued section 1202.45 did not apply, however, because he received a sentence of LWOP. The Court of Appeal agreed. (*Oganesyan*, at pp. 1181-1182.)

The appellate court found the issue to be one of statutory interpretation, subject to the standard principles of review applicable to such matters. (*Oganesyan, supra*, 70 Cal.App.4th at pp. 1182-1183.) Applying those principles, the court concluded: “When there is no parole eligibility, the [section 1202.45] fine is clearly not applicable. The statutory language itself is clear, the additional restitution fine is only imposed in a ‘case’ where a sentence has been imposed which includes a ‘period of parole.’ [Citation.] Simply stated, the ... legislative intent which can be derived from the language of the statute is clear; if there is no parole eligibility, no section 1202.45 fine may be imposed.” (*Id.* at p. 1183.)

The appellate court acknowledged that under the portion of the sentence imposing a term of 15 years to life for second degree murder plus the additional firearm use enhancement, the defendant conceivably could be eligible for parole. Nevertheless, it rejected the People's argument that this therefore was a case in which a sentence had been imposed that included a period of parole. (*Oganesyan, supra*, 70 Cal.App.4th at pp. 1183-1184.) The court reasoned: "[T]he language of section 1202.45 indicates that the overall sentence is the indicator of whether the additional restitution fine is to be imposed. Section 1202.45 indicates that it is applicable to a 'person ... whose sentence includes a period of parole.' At present, defendant's 'sentence' does not allow for parole. When we apply a commonsense interpretation to the language of section 1202.45 [citations], we conclude that because the sentence does not presently allow for parole and there is no evidence it ever will, no additional restitution fine must be imposed." (*Id.* at p. 1185.)

In *Brasure, supra*, 42 Cal.4th 1037, the trial court sentenced the defendant to death on count 1, stayed execution of sentence on four other counts pursuant to section 654, and imposed an aggregate determinate prison term of two years eight months on the remaining counts. (*Brasure*, at p. 1049.) The California Supreme Court disagreed with the defendant's claim the section 1202.45 fine was unauthorized. The court stated:

"... Defendant here, in addition to his death sentence, was sentenced ... to a determinate prison term under section 1170. Section 3000, subdivision (a)(1) provides that such a term 'shall include a period of parole.' Section 1202.45, in turn, requires assessment of a parole revocation restitution fine '[i]n every case where a person is convicted of a crime and whose sentence includes a period of parole.' The fine was therefore required, though by statute and the court's order it was suspended unless and until defendant was released on parole and his parole was revoked. [Citation.]

"[*Oganesyan*], upon which defendant relies, is distinguishable as involving no determinate term of imprisonment imposed under section 1170, but rather a sentence of life without the possibility of parole for first degree special circumstance murder and an indeterminate life sentence for

second degree murder. [Citation.] As in *Oganesyan*, to be sure, defendant here is unlikely ever to serve any part of the parole period on his determinate sentence. Nonetheless, such a period was included in his determinate sentence by law and carried with it, also by law, a suspended parole revocation restitution fine. Defendant is in no way prejudiced by assessment of the fine, which will become payable only if he actually does begin serving a period of parole and his parole is revoked.” (*Brasure*, *supra*, 42 Cal.4th at p. 1075.)

We find ourselves perplexed by the manner in which *Brasure* distinguished *Oganesyan*, and its lack of discussion of *Oganesyan*’s reliance on the overall sentence as the indicator of whether a section 1202.45 fine is to be imposed. Within the context of section 1202.45, either a sentence does not include a period of parole if at least one component precludes parole (as in *Oganesyan*), or we consider the sentence components individually (as in *Brasure*). If the sentence components are considered individually, it seems logical that there should be no difference between a sentence of life (or a term of years to life) *with* the possibility of parole and a determinate term. The literal language of section 1202.45 would appear to apply to each, and section 3000, subdivision (a)(1) specifies that both determinate and indeterminate prison sentences are to include a period of parole or other supervision unless waived or otherwise provided.⁴

Nevertheless, the California Supreme Court has drawn a distinction between indeterminate sentences with the possibility of parole and determinate terms (*Brasure*, *supra*, 42 Cal.4th at p. 1075), and we are bound by its holding (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). Under *Brasure* and *Oganesyan*, Nichols was not subject to a section 1202.45 fine on count I because his sentence thereon did not

⁴ Section 3000, subdivision (a)(1) provides, in pertinent part: “The Legislature finds and declares that the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship.... A sentence resulting in imprisonment in the state prison pursuant to Section 1168 or 1170 shall include a period of parole supervision or postrelease community supervision, unless waived, or as otherwise provided in this article.”

include a period of parole, or on counts IV, V, and VI because he was sentenced thereon to indeterminate terms.⁵ Accordingly, the judgment must be modified to strike the parole revocation restitution fine.

III. *The trial court should have recalculated Nichols's actual custody credits.*

The trial court recognized that Nichols was entitled to additional custody credits, but believed CDCR would calculate and award them. However, in *People v. Buckhalter* (2001) 26 Cal.4th 20, the California Supreme Court held that when a trial court modifies a defendant's sentence upon remand, that court is obliged, in its new abstract of judgment, to credit the defendant with all actual days he or she has spent in custody, whether in jail or prison, up to that time. (*Id.* at pp. 23-24, 37, 41.) Accordingly, as Nichols claims and the Attorney General concedes, the trial court should have recalculated Nichols's actual credits, and the abstract of judgment should have reflected the actual time Nichols had served from his arrest through the date of resentencing.

Although the Attorney General requests that the trial court be required to calculate the proper number of custody credits, we do not believe a remand is needed under the circumstances of the present case. We recognize there is a difference between clerical

⁵ Although Nichols's sentence included determinate enhancements, "enhancements are not convictions. [Citations.]" (*People v. Manning* (1992) 5 Cal.App.4th 88, 91.) They "do not define a crime but merely impose an additional punishment to that which accompanies the criminal offense itself. [Citation.]" (*People v. Harvey* (1991) 233 Cal.App.3d 1206, 1231; see Cal. Rules of Court, rule 4.405(3).) They cannot be imposed "separately from the underlying crime." (*People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1310.) Thus, in Nichols's case, the determinate enhancements "were not separate crimes and cannot stand alone. Each one is dependent upon and necessarily attached to its underlying felony." (*Id.* at p. 1311.) Just as a felony and its attendant enhancement cannot be separated so that, for instance, a concurrent term may be imposed for one while a consecutive term is imposed for the other (*ibid.*; accord, *People v. Bui* (2011) 192 Cal.App.4th 1002, 1016), so too they cannot be separated so that a period of parole is included in a sentence by virtue of the enhancement when parole is precluded by the conviction itself (see *People v. Jenkins* (2006) 140 Cal.App.4th 805, 809, 819).

error, which can be corrected by amendment of the abstract of judgment, and judicial error, which cannot. (*In re Candelario* (1970) 3 Cal.3d 702, 705.) “An amendment that substantially modifies the original judgment or materially alters the rights of the parties, may not be made by the court under its authority to correct clerical error, ... *unless the record clearly demonstrates that the error was not the result of the exercise of judicial discretion.* [Citations.]” (*Ibid.*, italics added.)

Here, the trial court exercised no discretion in deciding not to award additional credits; it had no discretion to exercise in that regard. Instead, it simply erred by believing CDCR would calculate and award the additional credits to which, it implicitly recognized, Nichols was entitled. Under the circumstances, and since the parties agree Nichols is entitled to a total of 3,269 actual days of credit, remanding the matter to the trial court would serve no purpose but to waste limited judicial resources. Accordingly, we will direct amendment of the abstract of judgment to reflect the correct number of actual custody days.

IV. The abstract of judgment must be corrected to reflect imposition of a 10-year enhancement on count IV.

The trial court followed our directions and, instead of section 12022.53, subdivision (d) enhancements, which carried terms of 25 years to life, imposed section 12022.53, subdivision (b) enhancements, which carried 10-year determinate terms. With respect to count IV, although the abstract of judgment reflects an enhancement imposed pursuant to subdivision (b) of section 12022.53, it erroneously shows a term of 25 years to life. As Nichols claims and the Attorney General concedes, we may order correction of this clerical error. (*In re Candelario, supra*, 3 Cal.3d at p. 705.)

DISPOSITION

The judgment is modified to reflect the striking of the parole revocation restitution fine imposed pursuant to Penal Code section 1202.45. As so modified, the judgment is affirmed.

The trial court is directed to cause to be prepared an amended abstract of judgment that (1) deletes the order of restitution to the City of Modesto, (2) deletes the parole revocation restitution fine imposed pursuant to Penal Code section 1202.45, (3) reflects Nichols's receipt of 3,269 days of actual custody credits, and (4) reflects imposition of 10 years with respect to the Penal Code section 12022.53, subdivision (b) enhancement on count IV. The trial court is further directed to cause to be transmitted certified copies of the amended abstract of judgment to the appropriate authorities.