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

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY JONES,

Defendant and Appellant.

F066161

(Super. Ct. No. BF118151B)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Jeffrey S. Kross, 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, Eric L. Christoffersen and Christina Hitomi Simpson, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Hill, P. J., Levy, J. and Detjen, J.

INTRODUCTION

Appellant Anthony Jones and his codefendant Wayne Deshown Perkins were convicted of first degree murder in connection with the 2007 shooting of Deondre McGruder. Jones was originally sentenced to life without the possibility of parole (LWOP) based on the jury's true finding on the special circumstance allegation that the murder was intentional and committed while Jones was an active participant in a criminal street gang within the meaning of Penal Code¹ section 190.2, subdivision (a)(22).²

In an unpublished opinion affirming the judgment, this court vacated Jones's LWOP sentence and remanded for resentencing because it appeared the trial court had been unaware of its discretion under section 190.5³ to choose a 25 year-to-life term since Jones was 17 years old at the time of the commission of the murder. (*People v. Perkins et al.* (May 18, 2012, F060071).)

At the resentencing hearing in October 2012, the trial court sentenced Jones to 25 years to life for his conviction of first degree murder with the gang special circumstance. The court also imposed a consecutive 25 year-to-life term for the gang-firearm enhancement (§ 12022.53, subs. (d) & (e)(1)). Thus, Jones received an aggregate prison term of 50 years to life.

¹ Further statutory references are to the Penal Code unless otherwise indicated.

² The jury also found that the murder had been committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b), and found true allegations that the defendants personally and intentionally discharged a firearm causing death within the meaning of section 12022.53, subdivision (d), and allegations that a principal discharged a firearm causing death within the meaning of section 12022.53, subdivisions (d) and (e) (i.e., the gang-firearm enhancement).

³ Section 190.5 provides, in relevant part: “(b) The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life.”

On appeal, Jones contends: (1) the trial court erred in imposing a consecutive 25 year-to-life term for the gang-firearm enhancement; and (2) the abstract of judgment must be corrected to reflect that restitution be joint and several with his codefendant Perkins. We agree with the second contention, which the People concede, and will direct the trial court to correct the abstract of judgment. In all other respects, the judgment will be affirmed.

BRIEF FACTUAL SUMMARY⁴

“Around 9:15 p.m. on February 13, 2007, gunshots were heard by residents of a house on Snapdragon Lane in Bakersfield. The residents described hearing two sets of gunshots, comprised of one or two gunshots followed by a brief pause and then a number of gunshots in quick succession. When the residents looked through their kitchen window, they saw the victim, later identified as Deondre McGruder, lying in the front yard. McGruder, who sustained multiple gunshot wounds, died from massive bleeding caused by a gunshot wound to the chest.

“A criminalist examined eight spent cartridge casings found at the scene and expressed the opinion that all eight were fired from the same firearm. The firearm was a .40-caliber Glock semiautomatic pistol, either the Glock Model 22 or the Glock Model 23.⁵ Police investigators also recovered one live round from the scene, but it was of a different caliber than that of the eight spent cartridge casings. Investigators found a piece of copper jacketing and a copper jacketed projectile at the scene, and another projectile was collected from the autopsy.

“Torino Jackson attributed the shooting to appellants [(i.e., Jones and Perkins)]. Jackson testified that sometime during the afternoon on February 13, 2007, Perkins came

⁴ The facts are excerpted from our unpublished opinion in the prior appeal, *People v. Perkins et al.*, *supra*, F060071, unnecessary heading omitted, footnote renumbered.

⁵ The murder weapon was never found.

to his house. Jones joined them later and they all hung out together on Jackson's front porch.

"After it got dark, Jackson's friend, Nyesha Hendrix, came to the house and drove Jackson and appellants back to her apartment. Eventually, the three men left the apartment and got into Hendrix's red, two-door Ford Escort and started driving around. Perkins was the driver, Jones sat in the front passenger's seat, and Jackson sat in the backseat. While they were driving around, Jackson was busy texting on his cell phone.

"Perkins eventually stopped the car on a residential street and got out with Jones, while Jackson stayed in the car. Jackson saw appellants walk towards a house close to where they parked. A few minutes later, appellants returned to the car and they started driving again.

"Soon after they started driving again, Jackson saw McGruder walking down the street. McGruder appeared to be talking to someone in another car. Jackson testified that, as they drove by McGruder, Perkins asked him, 'Watts up?' McGruder replied, 'All day, every day.' In a prior police interview, Jackson said McGruder addressed them first, asking 'Watts up?' Perkins responded by asking the same question. McGruder then said '[a]ll day, every day' and yelled 'South' as appellants' car passed by him.

"Jackson testified that after this verbal exchange with McGruder, Perkins drove into a cul-de-sac and turned around. Perkins then stopped the car near where McGruder was walking and turned off the engine and lights on the car. Appellants both got out of the car, while Jackson remained in the back seat. Jones donned a ski mask, pulling it down so it covered his whole face.

"Jackson saw appellants start walking towards McGruder. He was not paying close attention, however, because he was still on his phone. Suddenly, Jackson heard gunshots and ducked down. He then peeked out and saw Perkins pointing a gun at McGruder. Jackson heard two sets of gunshots that night.

“When the gunshots ended, appellants returned to the car. As they were driving away, Jackson observed a silver gun on Jones’s lap. On direct examination, Jackson testified that there was no conversation during the drive back to Hendrix’s apartment, which took five to seven minutes. However, on cross-examination, Jackson testified that he remembered Jones saying that his gun had jammed. [¶] ... [¶]

“The parties stipulated that the Eastside Crips is a criminal street gang in Kern County, as the term ‘criminal street gang’ is defined under section 186.22. Bakersfield Police Officer Kyle Ursery testified as a gang expert and opined that appellants were active members of the Eastside Crips and that Jackson was an affiliate or associate of the gang. Ursery further opined that McGruder was affiliated with the Country Boy Crips, and testified that a longstanding rivalry existed between the East Side Crips and the Country Boy Crips. Presented with a hypothetical shooting based on the facts of this case, Ursery expressed the opinion ‘[t]hat it would, in fact, be in benefit of, at the direction of, and in furtherance of that particular gang.’”

DISCUSSION

I. The Gang-firearm Enhancement

Jones contends the trial court erred in imposing the consecutive 25 year-to-life gang-firearm enhancement for several reasons, none of which we find persuasive.

Section 12022.53 provides, in relevant part:

“(d) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a) [(e.g., Section 187 (murder))] ..., personally and intentionally discharges a firearm and proximately causes great bodily injury ... or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life.

“(e)(1) The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved:

“(A) The person violated subdivision (b) of Section 186.22.

“(B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d).

“(2) An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1 shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense. [¶] ... [¶]

“(h) Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section.”

In this case, it is important to note there were two *separate* section 12022.53 enhancements attached to the murder count. The first enhancement alleged that each defendant personally discharged a firearm within the meaning of section 12022.53, subdivision (d). The second enhancement alleged that each defendant was a principal in the murder and that at least one principal personally used a firearm within the meaning of section 12022.53, subdivisions (d) and (e)(1).

At the original sentencing hearing, the trial court struck the first enhancement as to both Jones and his codefendant Perkins, explaining:

“[T]he Court finds that the verdict of the jury with regard to the findings under ... Section 12022.53, Subdivision (d) with regard to the defendant personally discharging a firearm, that there is not substantial evidence to support that as to the Defendant Jones. And that by returning the verdict that the Defendant Jones personally discharged the firearm, that is inconsistent with their finding that Defendant Perkins discharged the firearm. [¶] ... [¶] So based on the finding of inconsistent verdicts and based on the finding of insufficiency of evidence, I do find it’s in the interest of justice to strike the enhancements in Count 1 as to both the defendants. *And those are the enhancements under ... Section 12022.53 Subdivision (d) only.*” (Italics added.)

The trial court made clear, both in its ruling and in its discussion with the parties preceding the ruling, that its ruling *left intact* the separate gang-firearm enhancement

alleged under section 12022.53, subdivisions (d) and (e)(1), which is at issue in the current appeal. Contrary to Jones's suggestion, this enhancement was sufficiently alleged and proved, and was not vitiated by the court's decision to strike the section 12022.53 subdivision (d) enhancements on the ground the jury's true findings constituted inconsistent verdicts. The record undisputedly discloses substantial evidence that Jones was a principal in the murder, he violated section 186.22, subdivision (b), and a coprincipal in the offense personally and intentionally discharged a firearm causing McGruder's death. Therefore, it was appropriate for the court to maintain the separate gang-firearm enhancement found true by the jury and we reject Jones's assertions to the contrary.

We also reject Jones's claim that the imposition of the gang-firearm enhancement constituted an impermissible dual use of his gang participation, which was also used to sentence him to 25 years to life for his conviction of murder with the gang special circumstance pursuant to section 190.5.⁶ *People v. Brookfield* (2009) 47 Cal.4th 583 (*Brookfield*), on which Jones relies, is inapposite. *Brookfield* involved an accomplice to a gang-related shooting who did not personally use or discharge a firearm during the commission of the offense. (*Brookfield, supra*, 47 Cal.4th at p. 590.) Tasked with interpreting the language of section 12022.53, subdivision (e)(2), the California Supreme Court confirmed that dual punishment under sections 186.22 and 12022.53 cannot be imposed in the absence of a finding that the defendant personally used and/or intentionally discharged a firearm within the meaning of subdivision (b), (c), or (d) of section 12022.53.

The full text of section 12022.53, subdivision (e)(2) is as follows: "An enhancement for participation in a criminal street gang pursuant to Chapter 11

⁶ Even without the gang special circumstance, defendant would face a mandatory minimum term of 25 years to life for first degree murder. (§ 190, subd. (a).)

(commencing with Section 186.20) of Title 7 of Part 1 shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense.” Jones’s gang participation was established for purposes of section 186.22, subdivision (b) and thus triggered the application of section 12022.53, subdivision (e)(1). However, the trial court’s sentence was based upon section 190.2, subdivision (a)(22), not section 186.22 or any other provision contained in “Chapter 11 of Title 7” of the Penal Code. (§ 12022.53, subd. (e)(2).) Section 190.2 falls within chapter 1 of title 8 of the code. As such, the limitation set forth in section 12022.53, subdivision (e)(2), which the court addressed in *Brookfield*, does not apply here. We decline Jones’s invitation to extend *Brookfield*’s holding beyond its statutory context to find error in this case.

Jones also contends “the spirit of *Miller v. Alabama* (2012) 567 U.S. ____ [132 S.Ct. 2455, 183 L. Ed. 2d 407] (*Miller*) precludes sentencing a seventeen-year-old African American male defendant to a sentence of 50 years to life, which statistically is tantamount to a sentence of life without possibility of parole.” This is so, Jones asserts, because “a recent study shows the current life expectancy of an African American male is 67.5” and he “would not *first* be eligible for parole until he was 67 years old.”

In *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*), the United States Supreme Court held: “The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide [the defendant] with some realistic opportunity to obtain release before the end of that term.” (*Id.* at p. 82.)

In *Miller, supra*, 132 S.Ct. 2455, the court subsequently added that the reasoning in *Graham* “implicates any life-without-parole sentence imposed on a juvenile,” including a sentence imposed upon a juvenile convicted of murder. (*Id.* at pp. 2465-

2466.) A state is not required to guarantee eventual freedom, but must provide meaningful opportunity to obtain release based upon the defendant's demonstrated maturity and rehabilitation. (*Id.* at pp. 2468-2469.)

In *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*), the California Supreme Court reviewed the 110 years-to-life sentence imposed on a juvenile convicted of three counts of attempted murder. *Caballero* held that *Graham* and *Miller* compelled the conclusion that a sentence of 110 years to life is the functional equivalent of a life without parole sentence and therefore unconstitutional. (*Caballero, supra*, 55 Cal.4th at p. 268.)

The sentence imposed here is not comparable to the 110-year sentence in *Caballero*, which far exceeded the defendant's life expectancy or the life expectancy of any person in the United States. Given the realistic possibility of release during Jones's lifetime, the sentence is not unconstitutional under *Graham* and *Miller*. (See *People v. Gonzales* (2001) 87 Cal.App.4th 1, 17 [50 years-to-life sentence not cruel and unusual punishment for 14 year old convicted of aiding and abetting gang-related murder].)

II. Correction of Abstract of Judgment

We agree with the parties the abstract of judgment should be corrected to reflect that the section 1202.4, subdivision (f) restitution order is joint and several as to Jones and Perkins. (*People v. Neely* (2009) 176 Cal.App.4th 787, 800.)

We have observed another error in the abstract of judgment requiring correction. Specifically, it incorrectly reflects the 25 year-to-life gang-firearm enhancement, discussed *ante*, was imposed under section "12022.53(B)(E)(1)." Accordingly, the abstract of judgment must also be corrected to reflect the enhancement was imposed under section 12022.53, subdivisions (d) and (e)(1).

DISPOSITION

The trial court is directed to prepare a corrected abstract of judgment to properly reflect that: (1) the 25 year-to-life gang-firearm enhancement was imposed under section 12022.53, subdivisions (d) and (e)(1); and (2) the section 1202.4, subdivision (f) restitution order is joint and several as to appellant Anthony Jones and his codefendant Wayne Deshown Perkins. The trial court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.