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

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER DOMINGO AGUIRRE,

Defendant and Appellant.

F067670

(Super. Ct. Nos. 13CM7025 &  
13CM7087)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kings County. Jennifer Lee Giuliani, Judge.

Robert L.S. Angres, 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 John G. McLean, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Gomes, Acting P. J., Kane, J. and Poochigian, J.

Defendant Christopher Domingo Aguirre pled guilty in two different cases and was sentenced to concurrent terms in the two cases. The trial court recalled the sentence and resentenced him to consecutive terms. On appeal, he contends (1) the resentencing resulted in an unauthorized greater sentence; and (2) the abstract of judgment does not conform to the oral pronouncement of judgment. We direct the trial court to correct the abstract of judgment, and we affirm the judgment as modified.

### **PROCEDURAL SUMMARY**

In case No. 13CM7025, defendant pled guilty to unlawful possession of a concealed dirk or dagger (Pen. Code, § 21310)<sup>1</sup> and admitted suffering a prior strike conviction within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), with the understanding he would be sentenced to a term of 32 months (the 16-month lower term, doubled pursuant to the Three Strikes law). He was released on bail.

Shortly thereafter, defendant was charged in case No. 13CM7087, in which he pled guilty to possession of a firearm by a felon (§ 29800, subd. (a)(1)), admitted the prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and admitted an allegation that he committed the offense while released on bail (§ 12022.1). The probation officer's report recommended a 16-month sentence (one-third the middle term, doubled pursuant to the Three Strikes law), plus a two-year on-bail enhancement, all to be served consecutively to the sentence in case No. 13CM7025.

The trial court sentenced defendant in both cases together. In case No. 13CM7025, the court imposed the stipulated 32-month term. In case No. 13CM7087, the court imposed a 16-month term (one-third the middle term, doubled pursuant to the Three Strikes law), plus a consecutive two-year term for the on-bail

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<sup>1</sup> All statutory references are to the Penal Code.

enhancement, for a total term of three years four months (40 months), to be served *concurrently* with the sentence in case No. 13CM7025.

The following occurred at the sentencing hearing:

“THE COURT: With regard to case [No.] 13CM7087 I’m going to order that you be denied probation and that you be sentenced to a period of 16 months in the California State Prison. I’m going to order that that will run concurrent with case [No.] 13CM7025. [¶] ... [¶] In addition to the 16 months the Court is also going to impose the 2-year out-on-bail enhancement, which will be a total of 3 years and 4 months....

“[DEFENSE COUNSEL]: And, again, the 3 years 4 months would run concurrent to the 32 months in [case No.] 13CM7025?

“THE COURT: Yes.”

Approximately one month later, the trial court recalled the sentence because the sentences in the two cases were required to run consecutively.<sup>2</sup> When the court resentenced defendant, it imposed the same sentences, but ordered that they be served consecutively, resulting in a longer sentence of six years.

At the resentencing hearing, the following occurred:

“THE COURT: ... It appears when we were before the Court previously, the Court imposed what is an illegal sentence.... [¶] ... [¶] What I attempted to do was to run your sentences in [case No.] 13CM7025 concurrent or together with [case No.] 13CM7087. Because the events took place and arose out of two different instances, the Court is precluded from running those sentences concurrent. In light of that I had to bring you back today— [¶] ... [¶]

“Because in [case No.] 13CM7025 there was a stipulated sentence of 32 months, the Court is exempt from having to state its reasons for imposition of the sentence on the record. [¶] So with regard to [case No.] 13CM7025, I am going to deny probation and sentence you to the

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<sup>2</sup> Section 667, subdivision (c)(6) provides: “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 the defendant consecutively on each count pursuant to subdivision (e).” (Italics added.) As the statutory language attests, this requirement is mandatory. (See *People v. Hendrix* (1997) 16 Cal.4th 508, 512-513.)

California State Prison for a term of 32 months, which is the agreed upon term for that particular case.... [¶] ... [¶]

“With regard to the most recent case, that would be the case that you picked up while you were out on bail, and that is [case No.] 13CM7087, I have read, reviewed, and considered the probation officer’s report. The Court specifically followed that as far as the sentence the last time and is inclined to do the same; however, the sentence will run consecutive to [case No.] 13CM7025.

“I have reviewed the report including the criteria affecting probation, [defendant’s] history dating back to 2006. Although the Court understands that it is the position of [defendant’s] attorney that the Court has the ability to dismiss the out-on-bail enhancement, the Court is not inclined to do so. The Court believes that that is a serious offense, and if the Court could, the Court would run it consecutive [*sic*], but the Court is prohibited from doing so. [¶] I appreciate again for the record, [defendant] that you came before the Court after receiving the out-on-bail enhancement and the new allegation, and you admitted those, and you proceeded quickly through those, and the Court appreciates that. However, the Court is going to— upon review of the report, the Court is going to follow the recommendation and going to order that probation be denied, and that you be sentenced to the California State Prison for one-third of the mid-term which is 16 months, plus the two year enhancement for committing this offense while you were on your own recognizance pending sentence in the other case.”

## DISCUSSION

### **I. Greater Sentence upon Resentencing**

Defendant contends the trial court violated the double jeopardy clause and section 1170, subdivision (d)(1)<sup>3</sup> when it resentenced him to a greater sentence. He

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<sup>3</sup> Section 1170, subdivision (d)(1) provides: “When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison and has been committed to the custody of the secretary, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, *provided the new sentence, if any, is no greater than the initial sentence.* The court resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to

explains that the originally imposed term of 40 months could have been fashioned in a lawful manner at resentencing. He explains that in case No. 13CM7087, the resentencing court could have dismissed both the prior strike conviction and the on-bail enhancement in the interest of justice under section 1385, leaving only the eight-month term (one-third the two-year midterm).<sup>4</sup> If imposed consecutively, this eight-month term and the 32-month term from case No. 13CM7025 would have amounted to the originally imposed 40-month term.

Imposition of a more severe sentence following an appeal is generally barred, but “[t]he rule is otherwise when a trial court pronounces an unauthorized sentence. Such a sentence is subject to being set aside judicially and is no bar to the imposition of a proper judgment thereafter, even though it is more severe than the original unauthorized pronouncement.” (*People v. Serrato* (1973) 9 Cal.3d 753, 764, fn. omitted (*Serrato*), overruled on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; see also *People v. Craig* (1999) 66 Cal.App.4th 1444, 1448, 1449.) *Serrato* cited *In re Sandel* (1966) 64 Cal.2d 412 as an example in which there was no bar to a more severe sentence, stating: “*In re Sandel* ... grew out of a petition by a prisoner who attacked his confinement on several grounds, one of them being that the Adult Authority was treating his sentence for escape as consecutive to an earlier sentence, rather than concurrent, as the trial court had pronounced it. This court held that the trial court had no power to make the sentences concurrent in view of the statute which required a consecutive sentence, that the Adult Authority had no jurisdiction to correct the mistake of the trial court, that the sentence must be corrected judicially, and that this court had jurisdiction to

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promote uniformity of sentencing. Credit shall be given for time served.” (Italics added.)

<sup>4</sup> Section 1385, subdivision (a) provides in part: “The judge or magistrate may, either on his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.”

do so. This court then held that the sentence for escape be deemed consecutive.”  
(*Serrato, supra*, at p. 764.)

Defendant relies on *People v. Torres* (2008) 163 Cal.App.4th 1420 (*Torres*) and *People v. Mustafaa* (1994) 22 Cal.App.4th 1305. These cases held that when resentencing, a trial court may impose no more than the originally imposed sentence if it was a legal aggregate sentence imposed in an unauthorized manner. (*Torres, supra*, at pp. 1432-1433; *People v. Mustafaa, supra*, at pp. 1311-1312.)

In *Torres*, the defendant was convicted of attempting to dissuade a witness and of making criminal threats. After the prosecutor erroneously informed the trial court that the upper term sentence for criminal threats was seven years, the trial court imposed a seven-year sentence. (*Torres, supra*, 163 Cal.App.4th at pp. 1424, 1426.) The court also dismissed the gang enhancements, stating it was an “unusual case” because the defendant was youthful, had never been in jail before, and apparently had not engaged in any previous gang-related activity. (*Id.* at p. 1426.)

When a letter from the Department of Corrections informed the trial court that the upper term for criminal threats was three years, not seven, the trial court resentenced the defendant. But this time, the court imposed a gang enhancement it had previously dismissed, sentencing the defendant to seven years to life. (*Torres, supra*, 163 Cal.App.4th at pp. 1427, 1428.)

On appeal, we held that “under these circumstances,” double jeopardy principles prevented the trial court from resentencing the defendant to a longer sentence than originally imposed. (*Torres, supra*, 163 Cal.App.4th at pp. 1432-1433.) We reasoned that “the aggregate sentence of seven years imposed on [the] defendant at the original sentencing hearing could have been lawfully achieved [at resentencing] by imposing the mid term of two years [for criminal threats] plus the consecutive [gang] enhancement term of five years; *it did not fall below the mandatory minimum sentence and was therefore not a legally unauthorized lenient sentence.* The one unauthorized component

of the sentence originally imposed by the court was not lenient—it was in fact more severe than that authorized (the correct upper term for [criminal threats] being three years rather than seven).” (*Id.* at p. 1432, italics added.)

But we also noted that a greater sentence does not violate the prohibition against double jeopardy when the trial court’s original sentence “demonstrated legally unauthorized leniency that resulted in an aggregate sentence that fell below that authorized by law.” (*Torres, supra*, 163 Cal.App.4th at p. 1432.)

In the present case, the trial court’s original sentence demonstrated legally unauthorized leniency because it was less than the mandatory minimum sentence that would have resulted by imposing consecutive sentences. Defendant argues that the resentencing court could have fashioned the original sentence of 40 months by dismissing both the prior strike conviction and the on-bail enhancement pursuant to section 1385. In *Torres*, however, the trial court had dismissed the enhancement as part of its *original* sentence because it found “unusual circumstances.” (*Torres, supra*, 163 Cal.App.4th at p. 1433.) But in this case, the trial court did *not* originally find that justice required dismissal of the prior strike conviction or the on-bail enhancement. In fact, the court expressly refused to dismiss the on-bail enhancement and, thus, we can infer that it felt the same way about the prior strike conviction. On resentencing, the trial court could not have reached the original aggregate sentence without finding that it was in the interest of justice to dismiss the prior strike conviction and the on-bail enhancement. Nothing in *Torres* or any other case requires a trial court to dismiss enhancements or prior strike convictions under section 1385 for the purpose of imposing the original aggregate sentence if it is not in the interest of justice to do so. A dismissal under section 1385 is an exercise of the trial court’s discretion that includes consideration of a number of factors. Absent the court’s exercise of that discretion, the mandatory minimum sentence was six years. We conclude the imposition of a greater sentence to fix the original

legally unauthorized sentence did not violate the double jeopardy clause or section 1170, subdivision (d).

## **II. Correction of Abstract**

The parties agree that the abstract of judgment fails to properly reflect the six-year sentence orally pronounced by the trial court at resentencing. We shall order amendment of the abstract. (See *People v. Zackery* (2007) 147 Cal.App.4th 380, 385 [“Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls.”]; *People v. Mitchell* (2001) 26 Cal.4th 181, 185-186; *People v. Mesa* (1975) 14 Cal.3d 466, 471.)

### **DISPOSITION**

The trial court is directed to amend the abstract of judgment to reflect the total sentence of six years (not six years two months) imposed by the trial court. As so modified, the judgment is affirmed.