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

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM MATTHEW LOLLIS,

Defendant and Appellant.

F068129

(Super. Ct. No. F13902514)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Houry A. Sanderson, Judge.

Kim Malcheski and Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Jeffrey Grant, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant William Matthew Lollis was convicted of making criminal threats, resisting an executive officer, multiple counts of attempting to dissuade a witness, and

multiple counts of violating a protective order. It also was found true that Lollis had a prior conviction for a serious felony and had served prior prison terms. The trial court imposed multiple terms consecutively and the total term of imprisonment imposed was 92 years four months.

Lollis contends his sentence must be vacated and the matter remanded for resentencing because: (1) the trial court erroneously believed consecutive sentences were required for the attempting to dissuade a witness convictions; (2) defense counsel rendered ineffective assistance at sentencing; and (3) a term of 92 years four months is cruel and unusual punishment.

The People concede the trial court erroneously believed consecutive sentences were mandatory and agree the matter must be remanded for resentencing.

FACTUAL AND PROCEDURAL SUMMARY

A resolution of the issues presented in this appeal is not dependent upon the particular facts of the offenses. Therefore, we provide only a brief summary of the offenses.

On March 17, 2013, at 9:55 p.m., Feness Flores called 911 after receiving several threatening voicemails from Lollis stating he was going to kill her, kill her children, and kill the father of the children. The responding officer, Caroline Ponce, obtained an emergency protective order and went to serve it on Lollis.

Lollis would not come out of his house. He threatened to kill the officers and the K-9 officer that were present. Detective David Wilkin went to the back of the house in an attempt to apprehend Lollis. Wilkin used his baton to move the curtains blocking a broken window; Lollis grabbed the baton and pulled, which resulted in the glass shards cutting Wilkin. Eventually, officers took Lollis into custody and Ponce served the protective order on him.

While in jail awaiting trial, Lollis made numerous phone calls to Flores. Over the course of the numerous phone calls, Lollis discouraged Flores from assisting in his

prosecution. Lollis repeatedly asked Flores not to press charges; stated he was a vengeful person; told Flores to stay away from the courtroom; and instructed Flores to write a letter stating she had fabricated her accusations against him.

Lollis was convicted of 42 counts; the People dismissed count three. Lollis was convicted of making criminal threats (count 1, Pen. Code¹ § 422); resisting an executive officer (count 2, § 69); attempting to dissuade a witness (counts 4–14 & 16–23, § 136.1, subd. (b)(2)); and attempting to dissuade a witness by threat of force (count 15, § 136.1, subd. (c)(1)). In a bifurcated proceeding, it also was found true that Lollis had a prior serious felony conviction and had served prior prison terms.

Sentencing took place on September 24, 2013. The trial court imposed a sentence of four years, double the midterm, for the count 1 offense. An additional five years was imposed for the prior serious felony conviction, however, the trial court struck the prior prison term enhancements in the interest of justice. For count 2, the trial court imposed a term that was double one-third the midterm. On the remaining felony counts, the trial court imposed consecutive terms of double the midterm. For the misdemeanor counts, the trial court sentenced Lollis to time in the county jail, with credit for time served. The total prison term imposed was 92 years four months.

DISCUSSION

Lollis contends the trial court erroneously believed it lacked discretion to impose concurrent terms of imprisonment for the convictions on counts 4 through 23 and that the trial court erred by failing to state reasons for imposing consecutive terms. In a related argument, Lollis contends trial counsel rendered ineffective assistance at sentencing. Lastly, Lollis contends the imposition of a term of imprisonment of 92 years four months constitutes cruel and unusual punishment.

¹ References to code sections are to the Penal Code unless otherwise specified.

I. Consecutive Sentences Not Mandated

The probation report recommended imposition of consecutive terms, pursuant to section 1170.15, for each violation of section 136.1. The probation report does not indicate that imposition of consecutive terms is discretionary with the trial court. The People maintained at sentencing that section 1170.15 mandated consecutive terms for each violation of section 136.1. The trial court and prosecutor engaged in an exchange about the terms of imprisonment to be imposed, with the trial court stating, “the balance of the counts [§ 136.1] would have to be full consecutive ... term.” Finally, when imposing sentence, the trial court stated all the convictions for violating section 136.1 would be “middle term of four years consecutive pursuant to 1170.15.”

Lollis contends the matter must be remanded to the trial court for resentencing because the trial court did not understand it had discretion on whether or not to impose consecutive terms for the section 136.1 convictions. The People concede the issue.

Section 1170.1 establishes a three-step sentencing protocol, one step of which is to determine whether to impose consecutive or concurrent sentences. (*People v. Rodriguez* (2012) 207 Cal.App.4th 204, 211–212.) Section 1170.1, subdivision (a) specifies that if a consecutive term is imposed, the consecutive term is to be one-third the midterm. Section 1170.15 creates an alternative sentencing scheme to 1170.1 and provides that if a consecutive term is imposed for violations of section 136.1, the consecutive term is the full midterm instead of one-third the midterm. (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1834.)

A trial court has broad discretion in choosing whether to impose consecutive or concurrent terms. (*People v. Monge* (1997) 16 Cal.4th 826, 850.) As the People concede, the language of section 1170.15 does not mandate that consecutive terms be imposed, only that when consecutive terms are imposed for convictions of violating section 136.1, the term imposed must be the full midterm. The trial court appears to not have understood that it had discretion on whether to impose consecutive terms, although

the trial court did note Lollis's extensive criminal history and his repeated failure to heed the order prohibiting him from contacting the victim, Flores.

It also is unclear whether the trial court understood that consecutive terms may be mandated by section 667, subdivision (c)(6), which provides that "[i]f 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" Section 667, subdivision (c)(6) applies to any current felony conviction. (*People v. Hendrix* (1997) 16 Cal.4th 508, 512.)

Although Lollis was convicted of multiple felonies, and thus is subject to section 667, subdivision (c)(6), the probation report does not address this subdivision. This subdivision also was not addressed at sentencing. Consequently, we cannot infer that the trial court made a determination, or was relying upon, section 667, subdivision (c)(6), in imposing consecutive sentences.

If there is an error in the application of section 1170.15, the wiser course is to remand for resentencing. (*People v. Evans* (2001) 92 Cal.App.4th 664, 670.) Therefore, we will vacate the sentence and remand the matter for resentencing. On remand, the trial court shall determine whether concurrent or consecutive terms for the subordinate offenses shall be imposed, taking into account the provisions of section 667, subdivision (c)(6), and section 1170.15, bearing in mind that even if consecutive sentences are not mandated, the trial court retains the discretion to impose consecutive sentences. (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1140–1141.)

II. Ineffective Assistance of Counsel Claim

Lollis contends his trial counsel rendered ineffective assistance of counsel because counsel failed to challenge the prosecutor's assertion, and the trial court's apparent belief, that section 1170.15 mandated consecutive sentences and also failed to request that the trial court articulate its reasons for imposing consecutive sentences. Because the matter must be remanded for the trial court to make a determination as to whether or not

section 667, subdivision (c)(6) mandates consecutive sentences, and if not to affirmatively exercise its discretion on whether to impose concurrent or consecutive sentences, we need not address defense counsel's performance at sentencing.

III. Cruel and Unusual Punishment Claim

Lollis argues that a sentence of 92 years four months constitutes cruel and unusual punishment. Specifically, Lollis contends the sentence is "grossly disproportionate" to the crime. He also contends the sentence is "legally unauthorized." He is mistaken.

The sentence is not, as Lollis claims "legally unauthorized." As discussed in part I, *ante*, the trial court has discretion to impose concurrent or consecutive sentences pursuant to section 1170.15; section 667, subdivision (c)(6) mandates consecutive sentences under certain circumstances. If consecutive sentences are mandated, or imposed by an exercise of the trial court's discretion, the term of 92 years four months is not "legally unauthorized."

Additionally, the sentence is not disproportionate. Lollis claims his sentence is disproportionate when compared to sentences imposed for offenses such as murder, rape, or robbery. The flaw in this argument is that Lollis's sentence is based on the 22 current convictions, plus his criminal history, which includes three prior felony convictions. The "commission of a single act of murder, while heinous and severely punished, cannot be compared with the commission of multiple felonies." (*People v. Cooper* (1996) 43 Cal.App.4th 815, 826.) As the trial court stated at sentencing:

"... your record is the reason why you are here, sir. You have a lengthy criminal history backing up to the time when you were a juvenile. Up to that time and through now you have violated numerous times by picking up another strike, meaning back in 1995 the residential burglary. By picking up felony and misdemeanor domestic violence charges that you were convicted of. Numerous probation and parole violations. Giving false information to a police officer. Resisting arrest. These are all in your record. I cannot see [any] reason to give you anything other than the recommendation by Probation."

Certainly, Lollis's sentence for 22 felonies is not disproportionate in light of an appellate court's affirmation of a sentence of 25 years to life under Three Strikes for a petty theft offense. (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1431–1433.)

In any event, the sentence is being vacated and the matter is being remanded for resentencing, at which time the trial court will impose a new sentence.

DISPOSITION

The sentence is vacated; the convictions are affirmed. The matter is remanded for resentencing.

HILL, P. J.

WE CONCUR:

DETJEN, J.

PEÑA, J.