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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON GREGORY FRIEND,

Defendant and Appellant.

G044473

(Super. Ct. No. 04HF1205)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed

Law Office of William J. Kopeny and William J. Kopeny for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Kevin Vienna and Meredith White, Deputy Attorneys General, for Plaintiff and Respondent.

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This is the second appeal in this case. Defendant Brandon Gregory Friend was convicted of two counts of vehicular manslaughter while intoxicated, one count each of causing great bodily injury while intoxicated and driving with an unlawful blood alcohol level, and hit and run causing injury; he also pleaded guilty to driving with a suspended license. The jury found true he caused bodily injury to more than one person, personally inflicted bodily injury to two different people, and fled the scene. The court sentenced him to a total of 16 years 4 months. (*People v. Friend* (Mar. 11, 2010, G039675) [nonpub. opn.], p. 2.) This included an eight-month sentence on count 5, hit and run causing death. We affirmed the judgment except we remanded the case for the trial court to resentence defendant on count 5, hit and run causing death (Pen. Code, § 20001, subds. (a), (b)(2); all further statutory references are to this code) and then stay it. (*People v. Friend, supra*, G039675, p. 2.)

On remand defendant asked the court to find that defendant's crimes were nonviolent, as applied to counts 3 and 4. The court refused to do so, stating that based on the first opinion its only power was to resentence on count 5. On that count the court sentenced defendant to two years and stayed it, making his aggregate sentence 15 years 8 months.

Defendant appeals the determination of his sentencing credits on two grounds. First, he argues, the court erroneously limited them to 15 percent under section 2933.1 because it treated his convictions for vehicular manslaughter while intoxicated as serious felonies based on the great bodily injury enhancements. He asks us to determine as a matter of law that no convictions for involuntary manslaughter are violent felonies as defined by section 667.5, subdivision (c) and thus credits would not be limited to 15 percent under section 2933.

He also raises a contingent argument, asserting that if the Attorney General relies on section 1192.8 as a basis for the limitation of the credits, it would violate ex post facto laws because the statute was amended in 2008, after defendant was sentenced.

But these arguments are not properly before us. As noted, our remand order was limited. We reversed the sentence on the conviction for hit and run causing death with instructions to resentence defendant and then stay the sentence. (*People v. Friend, supra*, G039675, p. 31.) As the trial court correctly noted, it had no authority to go beyond the order. “Upon issuance of a remittitur, the trial court’s jurisdiction with regard to the ‘remitted action’ is limited solely to the making of orders necessary to carry the judgment into effect. [Citations.]” (*People v. Ainsworth* (1990) 217 Cal.App.3d 247, 251-252.) Our remand order did not give the trial court the authority to reconsider any other portion of the sentence or of the conviction.

Further, “where a criminal defendant could have raised an issue in a prior appeal, the appellate court need not entertain the issue in a subsequent appeal absent a showing of justification for the delay.” (*People v. Senior* (1995) 33 Cal.App.4th 531, 538.) In that case the defendant was convicted of nine counts. In the first appeal he attacked the sentence for only two counts on the ground the court failed to set out the reasons for the sentence. The court affirmed the judgment but remanded for resentencing based on the ground the defendant raised. On remand, the court imposed the same sentence except for the disputed counts, after which the defendant again appealed the sentence as to those two counts only. The appellate court agreed with the defendant’s claim and again remanded for resentencing. On the second remand the court changed the sentence for the two disputed counts but imposed the same sentence as to the remaining counts. Finally, on the third appeal, the defendant challenged the sentence on three other counts, claiming the court erred in imposing “full consecutive mitigated terms of three years each” (*id.* at p. 533) under the mandatory provisions of section 667.6, subdivision (d) for convictions of forcible oral sex.

In holding the defendant waived his right to raise that issue on the third appeal, the court stated that “though California law prohibits a direct attack upon a conviction in a second appeal after a limited remand for resentencing . . . , we are not

aware of any statutory or decisional authority barring a defendant from raising a new substantive issue which, though technically encompassed in the . . . remand order, could have been raised in the previous appeal. [Citation.] We are convinced, however, that the California rule barring a direct attack upon a conviction after a limited remand is a corollary of the more expansive rule recognized under federal law requiring all available arguments to be raised in the initial appeal from the judgment.” (*People v. Senior, supra*, 33 Cal.App.4th at p. 535.) The court explained that the “rationale underlying the use of the waiver rule in the . . . cases [we just discussed] is equally applicable here.” (*Id.* at p. 537.) It is based on “various policy considerations, including the state’s ‘powerful interest in the finality of its judgments’ [citation], the protection of ‘scarce judicial resources’ [citation], and the recognition that ‘piecemeal litigation prevents the positive values of deterrence, certainty, and public confidence from attaching to the judgment.’ [Citation.]” (*Id.* at p. 538.)

The court continued, that although the issue the defendant sought to raise in the third appeal “was technically embraced in our remand order, which reopened for the court’s consideration all components of the aggregate sentencing scheme, . . . all of the factual predicates upon which defendant’s present contention rests were available at the time of defendant’s initial appeal.” (*People v. Senior, supra*, 33 Cal.App.4th at p. 538.) Because there was “no apparent justification” for the failure to raise the issue in the first appeal, the defendant was not entitled to ““two bites at the appellate apple”” [citation].” (*Ibid.*)

That rationale bars defendant’s appeal here. The same factual basis was present in the first appeal and defendant does not argue any “significant change” in the law or facts. (*People v. Senior, supra*, 33 Cal.App.4th at p. 538.) His ex post facto claim is not relevant because section 1192.8 is not the basis for the Attorney General’s argument.

Furthermore, this issue was raised at the original sentencing hearing when defense counsel argued the findings of great bodily injury under section 12022.7 should be stricken or dismissed and there should not be a finding there was a violent felony because “it dramatically changes any credits that a person may get . . . .”

Defendant attempts to provide justification for omitting it, asserting, without record references, that the findings of great bodily injury “did not appear to actually affect the sentence” the first time, because the court made no finding as to whether credits were imposed on the basis defendant had committed a serious felony. But the record shows the contrary. The court found “this qualifies as violent, that is for the purposes of credits, which would be 15 percent.”

Defendant also claims *Senior* does not apply because this is an illegal sentence, which can be challenged at any time. But his reliance on *People v. Scott* (1994) 9 Cal.4th 331 is misplaced. There, when the trial court failed to spell out the basis on which sentencing decisions were made, defense counsel did not object. The court held this constituted a waiver of the issue. (*Id.* at p. 353.)

The defendant argued his claim was not waived because the sentence was unauthorized. In rejecting the argument (*People v. Scott, supra*, 9 Cal.4th at p. 356), the court noted an “‘unauthorized sentence’ concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal. [Citations.] . . . [¶] . . . [A] sentence is generally ‘unauthorized’ where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is ‘clear and correctable’ independent of any factual issues presented by the record at sentencing” (*id.* at p. 354).

Our case does not fall within that exception. First, *Scott* plainly states that the waiver rule applies when a party fails to preserve a claim of error in the trial court. (*People v. Scott, supra*, 9 Cal.4th at pp. 348, 351.) Here, defense counsel argued the

issue in the trial court, thus preserving the issue for appeal. For whatever reason, however, in the original appeal, in which defendant advanced many arguments and issues, including three sentencing claims, credits was not one of them. Thus, the issue is not failure to give the trial court the opportunity to correct the alleged error, it is the absence of that argument in the first appeal.

Moreover, defendant's claims, as the trial court found, demonstrate that the real issue is not a sentencing question but a substantive argument dealing with whether the Legislature intended that involuntary manslaughter would never be considered a violent felony. That sentencing may secondarily derive from it does not protect it from the rule of *Senior*.

Citing *People v. Rosas* (2010) 191 Cal.App.4th 107, defendant conclusorily and incorrectly maintains *Senior* is distinguishable from our case. In *Rosas*, an initial appeal resulted in affirmance of the convictions with a remand for resentencing. At the new sentencing hearing, the court ordered reduced fines but the abstract of judgment erroneously reflected the higher amount imposed in the original sentence. On appeal after resentencing defendant challenged, among other things, the abstract of judgment that incorrectly reflected the reduced fines. The Attorney General argued that the defendant could not raise that argument in the second appeal because it had not been argued in the first appeal and thus the court lacked jurisdiction to consider the question.

We held the defendant could appeal the amount of the fines because they were "not severable from the sentencing issues that were sent back to the trial court upon the first appeal." (*People v. Rosas, supra*, 191 Cal.App.4th at p. 117.) Defendant argues the same is true here because, since the sentence was changed, "that triggered a requirement to recalculate the credits – which thus squarely presented the question whether or not the defendant had been convicted of a category of crime that precluded more than 15[ percent] credit." That is not correct. All it did was require a new arithmetical calculation; it presented no substantive issue. Further, in *Rosas* the opinion

in the first appeal remanded the matter for resentencing on all counts; it was not a limited remand as here.

We decline to rule on defendant's argument in the reply brief that he received ineffective assistance of counsel. First, we do not address claims initially raised in a reply brief. (*People v. Lewis* (2008) 43 Cal.4th 415, 536, fn. 30.) Further, when the reasons for counsel's action or failure to act are not in the record, as here, we cannot consider the issue. Such a claim "is more appropriately decided in a habeas corpus proceeding. [Citations.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) And such a petition has already been filed here.

#### DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.