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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.

CESAR VELAZQUEZ RODRIGUEZ,

Defendant and Appellant.

G045911

(Super. Ct. No. 07CF1045)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. Reversed and remanded.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Kevin Vienna, Deputy Attorney General, for Plaintiff and Respondent.

* * *

A jury convicted Cesar Velazquez Rodriguez of various drug and weapons offenses. In a prior appeal, we remanded two of the convictions. Rodriguez contends the trial court committed reversible error on remand by resentencing him in his absence. The Attorney General concedes the error. We accept the concession and will remand for resentencing.

I

FACTS AND PROCEDURAL HISTORY

A jury convicted Cesar Velazquez Rodriguez of possessing methamphetamine for sale, possessing cocaine for sale, being a felon in possession of a firearm and ammunition, and cultivating marijuana. The court imposed consecutive 16-month terms for possessing methamphetamine (count 1) and possessing a firearm (count 5). In *People v. Rodriguez* (July 29, 2009, G039986 [nonpub. opn.]), we remanded for limited resentencing, explaining: “[R]emand is required for the trial court to consider whether to impose consecutive or concurrent sentences on count one for defendant’s methamphetamine possession and on count five for his possession of a firearm, and to state its reasons if it imposes consecutive sentences. The evidence is consistent with these offenses occurring in the close temporal and spatial proximity that permits concurrent sentencing” The disposition portion of our opinion read: “The judgment is affirmed with directions for a limited remand for the trial court to consider whether to impose consecutive or concurrent sentences on counts one and five and, if it imposes consecutive sentences, to state its reasons for doing so.”

The remittitur issued on October 20, 2009. Rodriguez was never brought to court for a resentencing hearing. A minute order dated October 30, 2009, provides in relevant part, “The court makes nunc pro tunc entry under count 5 to clarify sentence to

read as follows; The crimes and their objectives were predominantly independent of each other. [¶] Copy of minute order forwarded to all [a]ttorney[s].”¹ The minute order describes the proceeding as “Chambers Work,” neither Rodriguez nor his trial counsel attended the proceeding, and no court reporter was present. The minute order did not mention count 1.

II

DISCUSSION

Trial Court Erred by Resentencing Rodriguez in His Absence

Rodriguez contends the trial court erred by resentencing him in his absence. The Attorney General agrees the court prejudicially erred by resentencing defendant because Rodriguez was not present and did not waive his right to appear at his resentencing hearing with his attorney. (See *People v. Mora* (2002) 99 Cal.App.4th 397, 398-399.) We accept the concession and remand the case for resentencing on counts 1 and 5 at a hearing conducted in Rodriguez’s and counsel’s presence.²

¹ The court apparently did not mail the minute order to Rodriguez or his lawyer. We granted Rodriguez relief to file a late notice of appeal. (*In re Benoit* (1973) 10 Cal.3d 72, 87–88.)

² Of course, defendant may choose to waive his presence. (Pen. Code, § 1193.)

III

DISPOSITION

The consecutive terms imposed for counts 1 and 5 are reversed, and the trial court is directed to conduct a resentencing hearing in the presence of defendant and his counsel to consider whether to impose consecutive or concurrent sentences on counts one and five and, if it imposes consecutive sentences, to state its reasons for doing so.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.