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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.

PROSPERO RAMIREZ
GUADARRAMA,

Defendant and Appellant.

G046312

(Super. Ct. No. 08ZF0020)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

Gordon S. Brownell, 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, A. Natasha Cortina and Heather M. Clark, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Prospero Ramirez Guadarrama was convicted of multiple counts, including two special circumstances murders, relating to a gang shooting. During sentencing, the court indicated that it had no discretion except to sentence defendant to life without the possibility of parole on each murder count. Defendant argues that under Penal Code section 190.5, subdivision (b),¹ the court had the discretion to sentence him to 25 years to life instead. Because the court's erroneous belief led to its sentencing decision, he argues he should be resentenced. The Attorney General agrees, as do we.

Defendant also argues that his sentence on one count of street terrorism (§ 186.22, subd. (a)) must be stayed pursuant to section 654. Again the Attorney General concedes the point, and we concur. We therefore remand the matter for resentencing.

I

FACTS

Due to the limited issues on appeal, we need not discuss the facts at any length. Defendant and his accomplices were members of the Walnut Street gang. They were involved in the shooting of three unarmed boys, two age 14 and one age 16, in a single incident targeting rival gang members. Defendant, who was not a shooter, was 16 years old at the time.

In count one, defendant was convicted of the first degree murder of Angel Secundino (§ 187, subd. (a)). The jury also returned true findings on the special circumstance allegations of multiple murder (§ 190.2, subd. (a)(3)) and gang-related murder (§190.2, subd. (a)(22)). Two enhancement allegations were also found true, first, that the murder was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), and second, that defendant vicariously discharged a firearm, proximately causing great bodily injury or death (§ 12022.53, subs. (d), (e)(1)).

¹ Subsequent statutory references are to the Penal Code.

In count two, defendant was convicted of the first degree murder of Gabriel Perez (§ 187, subd. (a)), and the same special circumstances and enhancements were found true as were found in count one. (§ 190.2, subd. (a)(3), (a)(22); § 186.22, subd. (b)(1), § 12022.53, subds. (d), (e)(1).)

In count three, defendant was convicted of the premeditated attempted murder of Fernando Garcia (§ 664, subd. (a), § 187, subd. (a)). The same enhancements found true on counts one and two were also found true here. (§ 186.22, subd. (b)(1), § 12022.53, subds. (d), (e)(1).)

In count four, defendant was convicted of street terrorism. (§ 186.22, subd. (a).)

At the sentencing hearing, defense counsel stated: “I understand the court has a certain amount of discretion, and I would ask that the court exercise some discretion and provide a sentence for [defendant] that is commensurate with his position being a non-shooter in this incident at the age of 16.” The court replied: “I don’t see the court has a whole lot of discretion. The only discretion the court has is whether there’s concurrent or consecutive sentencing in relation to three counts.”

The court then sentenced defendant, as to count one, to life without the possibility of parole for the special circumstances murder plus a consecutive term 25 years to life on the firearm enhancement. On count two, the court imposed the same sentence and related enhancement, to run concurrently with count one. On count three, the court sentenced defendant to life with the possibility of parole plus a consecutive term of 25 years to life for the firearm enhancement, to run concurrently with count one. On count four, the court imposed a sentence of two years to run concurrently with count one.

Defendant now appeals.

II DISCUSSION

Sentence on Counts One and Two

Defendant argues he is entitled to resentencing on counts one and two because the court was not aware it had the discretion to impose a lesser sentence of 25 years to life, rather than life without the possibility of parole, on each of the murder counts. The Attorney General agrees, and we concur, that the record reflects the court may have been unaware of its discretion. Therefore, resentencing is appropriate.

Section 190.5 is the relevant provision here. “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.*” (§ 190.5, subd. (b), italics added.)

Defendant was indeed convicted, in counts one and two, of first degree murder, and as to each count, the jury found two special circumstances true, multiple murder (§ 190.2, subd. (a)(3)) and gang-related murder (§190.2, subd. (a)(22)).

“Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to ‘sentencing decisions made in the exercise of the “informed discretion” of the sentencing court,’ and a court that is unaware of its discretionary authority cannot exercise its informed discretion. [Citation.]” (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.)

Here, there are such indications in the record. The probation report stated that life without the possibility of parole was mandated. The prosecutor’s sentencing

brief did not mention section 190.5, but instead indicated only that the maximum sentence for counts one and two was life without the possibility of parole. Defense counsel, according to the record, submitted no sentencing brief at all, and did not argue the court had discretion under section 190.5 to sentence defendant to 25 years to life instead.

Rather, defense counsel asked the court generally to exercise its discretion, due to defendant's age and his status as a non-shooter in the incident. The court's statement strongly suggests it did not believe it had such discretion: "I don't see the court has a whole lot of discretion. The only discretion the court has is whether there's concurrent or consecutive sentencing in relation to three counts."

This statement indicates to us that the court "proceeded with sentencing on the erroneous assumption it lacked discretion" (*People v. Brown, supra*, 147 Cal.App.4th at p. 1228.) Thus, defendant is entitled to resentencing on counts one and two.

Sentence on Count Four

Defendant also argues that his sentence on count four, the street terrorism count (§ 186.22, subd. (a)) must be stayed pursuant to section 654. The Attorney General concurs, as do we.

Section 654, subdivision (a) states: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 therefore bars multiple punishment when a defendant is convicted of two or more offenses that are incident to one objective. (*Neal v. State of California* (1960) 55 Cal.2d 11; *People v. Latimer* (1993) 5 Cal.4th 1203 [reaffirming *Neal*].)

“[Section 186.22, subd. (a)] has three elements: (1) ‘[a]ctive participation in a criminal street gang, in the sense of participation that is more than nominal or passive,’ (2) “‘knowledge that [the gang’s] members engage in or have engaged in a pattern of criminal gang activity,’” and (3) ‘the person “willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.” [Citation.]’ [Citation.]” (*People v. Mesa* (2012) 54 Cal.4th 191, 197 (*Mesa*).

In *Mesa* (which was decided after sentencing in this case occurred) the California Supreme Court held that section 654 precludes punishment for street terrorism (§ 186.22, subd. (a)) when a defendant is independently punished for the offense that satisfies the third element of the gang crime. (*Mesa, supra*, 54 Cal.4th at pp. 197-198.) As the Attorney General concedes, the only evidence of felonious conduct presented in this case was the underlying charged murders and attempted murder. Thus, under section 654, defendant’s sentence on count four must be stayed rather than run concurrently.

III

DISPOSITION

The convictions are affirmed, and the matter is remanded for resentencing in a manner consistent with this opinion.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.