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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.

DENNIS PATRICK MALAVASI,

Defendant and Appellant.

G046629

(Consol. with G046630)

(Super. Ct. Nos. 08NF3873,
10WF1505)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas M. Goethals, Judge. Affirmed.

Gregory Marshall, 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, Steve Oeting and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Dennis Patrick Malavasi appeals from post-conviction orders executing previously imposed state prison sentences in two separate cases which have been consolidated for the purpose of argument and opinion. Malavasi contends the trial court erroneously denied him placement in the county jail under The Criminal Justice Act of 2011 (hereafter Realignment Act). (Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 1; Pen. Code, §1170, subd. (h), (hereafter section 1170(h).)¹ This presents a pure question of statutory construction which we review de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) We find no error and affirm.

FACTS

The facts of the underlying offenses are not relevant to this appeal.

In January 2009, Malavasi was sentenced to four years in state prison in case No. 08NF3873 after he pled guilty to felony possession of methamphetamine (Health & Saf. Code, § 11377) and various misdemeanors, and admitted five prison prior conviction enhancements (§ 667.5, subd. (b)). At that time execution of the state prison sentence was suspended and he was placed on probation.

In August 2011, Malavasi was sentenced to six years in state prison in case No. 10WF1505 after a jury found him guilty of felony driving under the influence and driving with a blood alcohol of .08 or more, with a prior felony driving under the influence conviction within 10 years (Veh. Code, § 23550.5, subd. (a)), and the trial court found the five prison prior conviction enhancements were true. Again execution of the state prison sentence was suspended and he was placed on probation.

In February 2012, following a contested probation violation hearing, the trial court revoked Malavasi's probation in both cases, executed the previously imposed state prison sentences and ordered them to be served concurrently.

¹ All further undesignated statutory references are to the Penal Code.

DISCUSSION

“The Realignment Act ‘enacted sweeping changes to long-standing sentencing law,’ including replacing prison commitments with county jail commitments for certain felonies and eligible defendants.” (*People v. Clytus* (2012) 209 Cal.App.4th 1001, 1004, fn. omitted.) Malavasi contends the Realignment Act replaced prison commitments with county jail commitments for violations of Vehicle Code section 23550.5, subdivision (a). We are not persuaded.

Habitual driving under the influence offenders like Malavasi, with prior felony driving under the influence convictions within 10 years, may be punished “by imprisonment in the state prison or confinement in the county jail for not more than one year” (Veh. Code, § 23550.5, subd. (a).) If the sentencing judge selects state prison rather than county jail (as the sentencing judge did here) then he or she must impose a term of “16 months, or two or three years in the state prison *unless the offense is punishable pursuant to subdivision (h) of section 1170.*”² (§ 18(a), italics added.)

Malavasi contends violations of Vehicle Code section 23550.5, subdivision (a) are punishable pursuant to section 1170(h) because “the term is not specified in the underlying offense” (§ 1170, subd. (h)(1).) However, this contention ignores the immediately preceding language in the statute which limits its application to “a felony punishable pursuant to this subdivision.” (*Ibid.*) In other words, Malavasi assumes the very point to be decided and his interpretation is entirely circular.

Malavasi also contends Vehicle Code section 42000 makes violations of Vehicle Code section 23550.5, subdivision (a) punishable under section 1170(h) because “a felony . . . violation of any provision of this code shall be punished . . . by

² The italicized portion of section 18, subdivision (a) was not part of the statute in August 2011 when Malavasi was sentenced to prison in case no. 10WF1505. However, that fact is irrelevant because the Realignment Act applies to prison sentences imposed and suspended before, but executed after, the effective date of the Realignment Act. (*People v. Clytus, supra*, 209 Cal.App.4th at pp. 1004-1009.)

imprisonment pursuant to subdivision (h) of Section 1170” (Veh. Code, § 42000.) This contention ignores the limiting language “[u]nless a different penalty is expressly provided by this code” (*Ibid.*) And, of course, Vehicle Code section 23550.5, subdivision (a) does expressly provide a different penalty – namely “imprisonment in the state prison”

Finally, while the Legislature took care to add express section 1170(h) cross-references to some Vehicle Code offenses previously punishable “by imprisonment in the state prison,” Vehicle Code section 23550.5, subdivision (a) is not among them. (Compare Veh. Code, § 23550.5, subd. (a) with Veh. Code § 23550, subd. (a) [drunk driving with prior reckless driving conviction “punished by imprisonment pursuant to subdivision (h) of section 1170 of the Penal Code”].) We have no reason to think this was an inadvertent oversight by the Legislature. Rather, it makes sense that habitual felony drunk driving offenders like Malavasi should serve their sentences in state prison rather than in county jail, because of the recidivist and dangerous nature of their offenses.

For all of these reasons we conclude habitual drunk driving under Vehicle Code section 23550.5, subdivision (a) is punishable only by commitment to state prison, and not by commitment to the county jail pursuant to section 1170(h). Our conclusion is consistent with and supported by the recent decision on the very same issue in *People v. Guillen* (2013) 212 Cal. App. 4th 992. “Thus, by failing to include language in section 23550.5 authorizing punishment pursuant to Penal Code section 1170, subdivision (h), the Legislature intentionally excluded defendants convicted of that offense from eligibility for a county jail sentence.” (*Id.* at p. 994.)

It follows the trial court did not err in failing to consider county jail placement when executing the state prison sentences previously imposed on Malavasi, even though the offenses in case no. 08NF3873 might otherwise be subject to imprisonment in the county jail pursuant to section 1170(h). Obviously Malavasi cannot

be in two places at one time. So long as the sentence for one of the offenses requires a state prison commitment, the sentences for all offenses must be served in state prison.³

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

FYBEL, ACTING P. J.

IKOLA, J.

³ This conclusion is consistent with section 669, subdivision (d) as amended effective June 27, 2012 “[w]hen a court imposes a concurrent term of imprisonment and imprisonment for one of the crimes is required to be served in the state prison, the term for all crimes shall be served in the state prison, even if the term for any other offense specifies imprisonment in a county jail pursuant to subdivision (h) of section 1170.”