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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.

MIGUEL JOSE ALVARADO,

Defendant and Appellant.

G048073

(Super. Ct. No. 09NF0915)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed as modified and remanded for resentencing.

Kevin D. Sheehy, 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 Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

Miguel Jose Alvarado appeals from a judgment after the jury convicted him of attempted voluntary manslaughter, shooting at an occupied motor vehicle, and street terrorism, and found true street terrorism and firearm enhancement allegations. Alvarado argues there were four sentencing errors. The Attorney General agrees with three of Alvarado's claims but with respect to one of Alvarado's claims, it invites this court to impose a sentence on the street terrorism enhancement. We affirm the judgment as modified and remand for resentencing.

FACTS

On the afternoon of March 24, 2009, almost 18-year-old Alvarado, his twin brother Miguel Antonio Alvarado (Miguel), and Luis Hernandez, all known members of the "Monos" criminal street gang, drove a green Nissan Altima into rival gang territory. A red Mitsubishi Eclipse, occupied by "All West Coast" (AWC) criminal street gang members, arrived in the area. Alvarado, who was in the front passenger seat, directed Miguel, who was driving, to follow the Eclipse.

Off-duty police officer Robert Jaramillo and his cousin Anthony Hernandez saw the cars as they drove through a stop sign without stopping. Jaramillo parked his car behind a school where they could watch the scene unfold. Alvarado got out of the car, ran towards the Eclipse, and yelled, "Hey, motherfucker." Alvarado fired two or three gun shots at the Eclipse as the driver drove the car in reverse.

Within minutes, officers arrested Alvarado, Miguel, and Hernandez. A detective later interviewed Alvarado after advising him of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. When the detective asked Alvarado why he shot at the Eclipse, Alvarado responded, "Fuck those fools." Alvarado stated the AWC gang members threw bottles at them. He fired at the car three times because he had only three bullets.

Officers later searched Alvarado's house and found a loaded .357 handgun and numerous .22 caliber hollow point bullets. Alvarado claimed he was holding the gun for someone.

An amended information charged Alvarado¹ with willful, deliberate, and premeditated attempted murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a))² (count 1), shooting at an occupied motor vehicle (§ 246) (count 2), and street terrorism (§ 186.22, subd. (a)) (count 3). The information alleged Alvarado did the following: committed counts 1 and 2 for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)); personally discharged a firearm during the commission of count 1 (§ 12022.53, subd. (c)); and personally used a firearm during the commission of count 1 (§ 12022.5, subd. (a)).

At trial, the prosecutor offered the testimony of gang expert Michael Costanzo. After detailing his background, training, and experience, Costanzo testified concerning the culture and habits of traditional, turf-oriented criminal street gangs, and specifically Monos. He provided testimony that established Monos was a criminal street gang as statutorily defined. Based on his review of the case and investigation, he opined Alvarado, Miguel, and Hernandez were active participants in Monos at the time of the offenses.

The jury acquitted Alvarado of attempted murder but convicted him of the lesser included offense of attempted voluntary manslaughter (§§ 664, subd. (a), 192, subd. (a)). The jury also convicted him of the other counts and found true all the allegations.

¹ The information also charged Miguel and Hernandez. They pleaded guilty.

² All further statutory references are to the Penal Code.

The trial court denied Alvarado probation, explaining the case was not unusual (Cal. Rules of Court, rule 4.413) because Alvarado, who had a significant record of criminal violence, including five juvenile convictions, engaged in gang warfare in the middle of the afternoon on city streets. After weighing the five aggravating circumstances against the one mitigating circumstance, the court selected count 2 as the principal count and sentenced Alvarado to 22 years to life in prison as follows: count 2-the upper term of seven years and an indeterminate term of 15 years to life on the street terrorism enhancement; count 1-five years and six months, a consecutive 10-year term for the street terrorism enhancement (§ 186.22, subd. (b)(1)(C)), and a consecutive 10-year term for the firearm use enhancement (§ 12022.5, subd. (a)); and count 3-three years. Pursuant to section 654, the court stayed the sentences on count 1 and its related enhancements, and count 3. The court awarded Alvarado 1,423 days of actual credit and 213 days of conduct credit for a total of 1,636 days.

DISCUSSION

I. Count 2

A. Alternate Penalty Provision

Alvarado argues the trial court erred when it imposed both determinate and indeterminate sentences for count 2. The Attorney General agrees. We agree too.

Shooting at an occupied motor vehicle (§ 246) is by itself punishable by a term of three, five, or seven years in prison. Generally, when a defendant commits a felony for the benefit of and with the specific intent to promote a criminal street gang, a trial court may impose a prison term for the felony and enhance the sentence with a prescribed term of years. (§ 186.22, subd. (b).) But when a defendant shoots at an occupied motor vehicle for the benefit of and with the specific intent to promote a criminal street gang, the penalty is life imprisonment with a minimum term of no less than 15 years. (§ 186.22, subd. (b)(4)(B).) As the California Supreme Court stated in *People v. Brookfield* (2009) 47 Cal.4th 583, 591 (*Brookfield*), the “life term does *not* . . .

constitute a sentence *enhancement*, because it is not imposed *in addition* to the sentence for the underlying crime . . . ; rather, it is an *alternate penalty* for that offense.” (*People v. Jones* (2009) 47 Cal.4th 566, 572 (*Jones*) [violation of § 246 for benefit of and with specific intent to promote criminal street gang punishment 15 years to life].)

Based on section 186.22, subdivision (b)(4), and *Brookfield* and *Jones*, the trial court erred in sentencing Alvarado to a determinate term of seven years in addition to the indeterminate term of 15 years to life on count 2. Thus, we strike the seven-year term on count 2. Alvarado’s sentence on count 2 is 15 years to life.

B. Cruel and Unusual Punishment

Alvarado contends his indeterminate term of 15 years to life on count 2 is cruel and unusual punishment on its face and as applied in violation of the federal and state constitutions. The Attorney General replies Alvarado forfeited appellate review of this issue because Alvarado did not object on this ground at the sentencing hearing. Alvarado does not claim he raised this issue below. Instead, Alvarado responds he did not forfeit appellate review of the issue because it would have been futile to raise the issue based on the then state of the law, and it is an important issue of first impression on fundamental constitutional rights that may be raised for the first time on appeal. We agree with the Attorney General.

Alvarado cites to *Miller v. Alabama* (2012) 567 U.S. ___, 132 S.Ct. 2455 [mandatory life imprisonment without parole for juveniles violates Eighth Amendment], *Graham v. Florida* (2010) 560 U.S. 48 [life without parole for juvenile who did not commit homicide violates Eighth Amendment], and *Roper v. Simmons* (2005) 543 U.S. 551 [Eighth Amendment prohibits capital punishment for juvenile offenders], to argue the law at the time of the sentencing hearing did not support the argument he advances now. As support for his claim he cites to *People v. Sandoval* (2007) 41 Cal.4th 825, 837, footnote 4. It is true, as *Sandoval* states, that a claim is not forfeited if there is an unforeseeable change in the law that trial counsel could not have anticipated, but the

cases Alvarado relies on were decided *before* his sentencing hearing. And he cites to no case that supports his contention his claim would have been futile as a matter of law. He could have certainly argued the rationale of those cases should be extended to prohibit a sentence of 15 years to life with the possibility of parole.

As to his second claim, a defendant's failure to contemporaneously object that his sentence constitutes cruel and unusual punishment forfeits that claim on appellate review. (*People v. Gamache* (2010) 48 Cal.4th 347, 403; *People v. Mungia* (2008) 44 Cal.4th 1101, 1140-1141; *People v. Wallace* (2008) 44 Cal.4th 1032, 1096; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 997; *People v. Burgener* (2003) 29 Cal.4th 833, 886-887; *People v. Vallejo* (2013) 214 Cal.App.4th 1033, 1045; *People v. Norman* (2003) 109 Cal.App.4th 221, 229-230.) A claim a sentence is cruel and unusual is forfeited on appeal if it is not raised in the trial court because the issue often requires a fact-bound inquiry. (*People v. Russell* (2010) 187 Cal.App.4th 981, 993 [type of issue that should be raised in trial court because trial judge after hearing evidence in better position to evaluate mitigating circumstances and determine their impact on constitutionality of sentence]; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27; *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8.) Alvarado's additional claims this is an important issue of first impression and involves a fundamental constitutional right are equally unpersuasive.

Alvarado's remedy is to file a petition for writ of habeas corpus challenging his sentence. (*People v. Wingo* (1975) 14 Cal.3d 169, 183; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 291.) Thus, Alvarado's claim his sentence, 15 years to life with the possibility of parole, for the attempted voluntary manslaughter he committed just 54 days short of his 18th birthday is forfeited for failing to raise the issue in the trial court.³

³ The parties spend a considerable amount of time discussing *People v. Perez* (2013) 214 Cal.App.4th 49, 57 [difference between LWOPs and long sentences with eligibility for parole if some meaningful life expectancy when offender is eligible for parole], a case from another panel of this court where the court rejected an

II. Count 1

Relying on *People v. Rodriguez* (2009) 47 Cal.4th 501 (*Rodriguez*), Alvarado asserts the trial court erred in imposing a 10-year term for the street terrorism enhancement (§ 186.22, subd. (b)(1)(C)), and a consecutive 10-year term for personal use of a firearm enhancement (§ 12022.5, subd. (a)), as to count 1. The Attorney General agrees the court erred in imposing a 10-year term for the street terrorism enhancement but argues this court should impose a five-year term on the street terrorism enhancement. Alvarado disagrees. As we explain below, we agree with the parties the 10-year term on the street terrorism enhancement must be stricken. We decline the Attorney General’s invitation to impose a five-year term on the street terrorism enhancement.

Section 186.22, subdivision (b), provides: “Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: [¶] (A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court’s discretion. [¶] (B) If the felony is a *serious* felony, as defined in subdivision (c) of [s]ection 1192.7, the person shall be punished by an additional term of five years. [¶] (C) If the felony is a *violent* felony, as defined in subdivision (c) of [s]ection 667.5, the person shall be punished by an additional term of 10 years.” (Italics added.)

Eighth Amendment challenge by a 16-year-old defendant who had been sentenced to a term of 30 years to life in prison. Because of our holding, we need not discuss that case’s applicability to this case.

In *Rodriguez*, defendant gang member fired five to six shots at three rival gang members. (*Rodriguez, supra*, 47 Cal.4th at p. 504.) The jury found defendant guilty of three counts of assault with a firearm, and as to each count made findings under two sentencing enhancement statutes: (1) he personally used a firearm under section 12022.5, subdivision (a); and (2) he committed a “violent felony,” as defined by section 667.5, subdivision (c), to benefit a criminal street gang under section 186.22, subd. (b)(1)(C). (*Rodriguez, supra*, 47 Cal.4th at p. 505.) For each separate assault count, the trial court imposed enhancements under both sentencing statutes. (*Ibid.*)

The Supreme Court reversed the trial court’s sentence on the basis of section 1170.1, subdivision (f), which provides: “When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. *This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury.*” (*Rodriguez, supra*, 47 Cal.4th at pp. 508-509, italics added.)

The Supreme Court reasoned that defendant received two enhancements for his use of a firearm against each victim: one enhancement under section 12022.5, subdivision (a), and another enhancement under section 186.22, subdivision (b)(1)(C). (*Rodriguez, supra*, 47 Cal.4th at p. 508.) “Because two different sentence enhancements were imposed for defendant’s firearm use in each crime,” the Supreme Court concluded that “section 1170.1[,] subdivision (f)[,] requires that ‘only the greatest of those enhancements’ be imposed.” (*Rodriguez, supra*, 47 Cal.4th at pp. 508-509.) In other words, the “defendant’s firearm use resulted in additional punishment not only under section 12022.5’s subdivision (a) (providing for additional punishment for personal use of a firearm) but also under section 186.22’s subdivision (b)(1)(C), for committing a violent felony as defined in section 667.5, subdivision (c)(8) (by personal use of firearm)

to benefit a criminal street gang. Because the firearm use was punished under two different sentence enhancement provisions, each pertaining to firearm use, section 1170.1's subdivision (f)[,] requires imposition of 'only the greatest of those enhancements' with respect to each offense." (*Rodriguez, supra*, 47 Cal.4th at p. 509.) The court remanded the matter to the trial court to restructure the sentence so as not to violate section 1170.1, subdivision (f). (*Rodriguez, supra*, 47 Cal.4th at p. 509.)

The Attorney General concedes that pursuant to *Rodriguez*, the trial court erred in imposing a 10-year term for the street terrorism enhancement under section 186.22, subdivision (b)(1)(C), because use of a firearm was the only aspect of the crime making it a violent felony. Thus, the court could not impose a 10-year term for the personal use of a firearm enhancement under section 12022.5, subdivision (a), and a 10-year term for the street terrorism enhancement under section 186.22, subdivision (b)(1)(C), punished as a violent felony because Alvarado used a firearm (§ 667.5, subd. (c)(8)). Thus, we strike the 10-year term on the street terrorism enhancement, punished as a violent felony, as to count 1.

That does not end our inquiry however. Although the Attorney General concedes the trial court erred in imposing a 10-year term under section 186.22, subdivision (b)(1)(C)'s *violent* felony provision, the Attorney General relies on *People v. Vega* (2013) 214 Cal.App.4th 1387 (*Vega*), to contend this court should impose a five-year term under section 186.22, subdivision (b)(1)(B)'s *serious* felony provision.⁴

⁴ This issue is currently pending before the California Supreme Court in *People v. Le* (2012) 205 Cal.App.4th 739, review granted July 25, 2012, S202921 [This case presents the following issue: Does section 1170.1, subdivision (f), as interpreted by *Rodriguez, supra*, 47 Cal.4th 501, preclude a trial court from imposing both a firearm use enhancement under section 12022.5, subdivision (a), and a gang enhancement under section 186.22, subdivision (b)(1)(B), when the offense is a serious felony as a matter of law?]

The Attorney General relies on the fact attempted voluntary manslaughter is a “serious” felony as defined in section 1192.7, subdivision (c)(1) and (39). The Attorney General asserts the trial court could have sentenced Alvarado to the five-year term under section 186.22, subdivision (b)(1)(B), because attempted voluntary manslaughter is a serious felony by itself, and without relying on the fact he personally used a firearm, which is another basis for making the offense a serious felony under section 1192.7 (§ 1192.7, subd. (c)(8) [serious felony “any felony in which the defendant personally uses a firearm”]).

The Attorney General’s reliance on *Vega, supra*, 214 Cal.App.4th 1387, is misplaced. In that case, the jury convicted defendants of two counts of attempted voluntary manslaughter and one count of shooting at an occupied vehicle. The jury found true defendant committed the offenses for the benefit of a criminal street gang (10 years), he personally used a firearm (four years), and he inflicted great bodily injury (sentence stayed). (*Id.* at p. 1389.) The *Vega* court distinguished *Rodriguez* and held attempted voluntary manslaughter was still a violent felony as defined in section 667.5, subdivision (c), because defendant inflicted great bodily injury on the victim. (*Id.* at p. 1395.) In other words, the trial court did not rely on the use of the firearm to impose the firearm use and street terrorism enhancements. (*Ibid.*) Here, the prosecutor did not allege and the jury did not find Alvarado inflicted great bodily injury as to count 1, and thus *Vega* is of no assistance here.

Although Alvarado was convicted of a serious felony, attempted voluntary manslaughter, when he fired the gun at the men in the car, we decline the Attorney General’s invitation to impose a five-year term on the street terrorism enhancement in the first instance. Again, we strike the 10-year term on the street terrorism enhancement, punished as a violent felony, as to count 1, and following *Rodriguez*, remand the matter to the trial court to restructure its sentencing choices in light of our conclusion the sentence imposed here violates section 1170.1, subdivision (f).

III. Custody Credits

Alvarado claims the trial court erred because it should have awarded him two additional days of actual credits. The Attorney General again agrees, as do we.

A defendant is entitled to actual custody credit for “all days of custody” in county jail and residential treatment facilities, including partial days. (§ 2900.5, subd. (a); *People v. Smith* (1989) 211 Cal.App.3d 523, 526.) Calculation of custody credit begins on the day of arrest and continues through the day of sentencing. (*People v. Bravo* (1990) 219 Cal.App.3d 729, 735.) A defendant is also entitled to conduct credits under section 4019.

Officers arrested Alvarado on March 24, 2009, and the trial court sentenced him on February 15, 2013. Both parties agree, as do we, Alvarado was in custody for 1,425 days, not 1,423 days. Both parties also agree Alvarado is entitled to 213 days of conduct credit, the amount of days the court awarded him. Thus, Alvarado is entitled to 1,425 days of actual credit and 213 days of conduct credit for a total of 1,638 days of presentence credit.

DISPOSITION

The judgment is affirmed as modified as follows:

1. We strike the seven-year term on count 2. Alvarado’s sentence on count 2 is 15 years to life.
2. We strike the 10-year term on the street terrorism enhancement as to count 1.
3. Alvarado is entitled to 1,425 days of actual credit and 213 days of conduct credit for a total of 1,638 days of presentence credit.

The judgment is affirmed in all other respects. We remand the matter for resentencing.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

MOORE, J.