

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCO REYES MARTINEZ,

Defendant and Appellant.

G049551

(Super. Ct. No. FCH08031)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County,
Stanford E. Reichert, Judge. Affirmed.

Alan S. Yockelson, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney
General, Arlene A. Sevidal and Sean M. Rodriguez, Deputy Attorneys General, for
Plaintiff and Respondent.

* * *

Defendant was convicted of attempted murder. (Pen. Code, §§ 664, 187, subd. (a).)¹ The jury found it to be true that defendant committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(4)(A)), and that a principal used a firearm, discharged a firearm, and discharged a firearm causing great bodily injury (§ 12022.53, subds. (b)-(d)). The court sentenced defendant to the midterm of seven years on the attempted murder, plus a consecutive 25 years to life sentence for the discharge of a firearm causing great bodily injury. The court imposed, but stayed, the following enhancements: Thirty-two years to life for benefiting a criminal street gang, 20 years for the discharge of a firearm, and 10 years for the use of a firearm.

On appeal, this court held in an unpublished opinion (*People v. Martinez* (May 28, 2010, G042123)) that the evidence was insufficient to support the gang enhancement. After remand, defendant filed a petition for writ of habeas corpus in the superior court, arguing that his gun enhancements also needed to be stricken on the basis that they were dependent on the gang enhancement. The People conceded the issue, and the superior court granted the petition and transferred the case back to the original trial judge for resentencing.

The original trial judge struck the firearm enhancements and resentenced defendant, without taking additional evidence, to the upper term of nine years to life. Defendant appealed. He raises a single issue on appeal, whether the court was bound to its original determination that the midterm of seven years to life was the appropriate sentence.

¹

All statutory references are to the Penal Code.

FACTS

Because the parties have not provided us with a record of the facts underlying the present case, and because the issue raised on appeal does not require a review of the factual record, we only provide a brief summary of the facts. The victim, affiliated with the gang Chino Sinners, was shot in an alley as he and two compatriots were walking. The shooter was one of two individuals that defendant had called to “[g]o and handle the Chino Sinner fools.” The two individuals arrived, one of whom shot the victim. The victim survived the shooting and later reported he heard the shooter yell out “South Side Pomona” at the time of the shooting. Defendant drove the assailants away from the scene after the shooting.

DISCUSSION

Defendant acknowledges the general rule that “upon remand for resentencing after the reversal of one or more subordinate counts of a felony conviction, the trial court has jurisdiction to modify every aspect of the defendant’s sentence on the counts that were affirmed, *including the term imposed as the principal term.*” (*People v. Navarro* (2007) 40 Cal.4th 668, 681 (*Navarro*), italics added.) Defendant contends, however, that the principal term may only be modified where, on remand, the court has additional circumstances to consider that could not previously have been considered.

In support of this argument, defendant notes that section 1170, subdivision (b), states, “[T]he court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.” In other words, a defendant cannot be punished twice by having the same fact contribute both to an enhancement as well as a selection of the upper term. From this, defendant deduces that, on remand, the principal term may only be augmented where an enhancement has

been stricken that previously prevented the court from considering pertinent facts as contributing to the principal term. Here, defendant argues, the stricken enhancement did not free up additional facts because there was no evidence he was in a gang and he did not personally shoot the victim. Thus defendant concludes the court is bound by its original sentencing.

We conclude the rule is broader than defendant would have it. The principal case to address this issue is *People v. Burbine* (2003) 106 Cal.App.4th 1250 (*Burbine*), which was quoted approvingly in our high court's *Navarro* decision. In *Burbine* the defendant was convicted of one count of continuous sexual abuse of a child and two counts of committing a lewd act on a child. (*Burbine*, at p. 1254.) The defendant in *Burbine* was sentenced to the midterm of 12 years for the continuous sexual abuse count and two consecutive terms of two years for each lewd act, resulting in an aggregate sentence of 16 years. (*Ibid.*) In a first appeal, the court reversed one of the lewd act convictions and remanded the case for resentencing. (*Ibid.*) On remand, the defendant argued, as does defendant here, "that the trial judge was precluded from reconsidering his original decision to impose the middle term on the continuous sexual abuse count, which had been designated as the principal term of appellant's sentence." (*Id.* at p. 1255.) The trial court disagreed and sentenced defendant to the upper term of 16 years on the continuous sexual abuse count, and 6 years on the lewd conduct charge, but ordered it to run concurrently, for, once again, an aggregate sentence of 16 years. (*Id.* at p. 1255.) The defendant appealed.

The court affirmed, holding "that on remand following the reversal of a felony count for which a subordinate term had been imposed, neither lack of jurisdiction nor res judicata bars the trial court from reconsidering its prior sentencing choices made under the normal rules of felony sentencing, including imposing a higher term for the principal, or base, term, so long as the total prison term for all affirmed counts does not exceed the original aggregate sentence." (*Burbine, supra*, 106 Cal.App.4th at p. 1253.)

“This rule is justified,” the court explained, “because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components.” (*Id.* at p. 1258.) The court further explained, “[W]e endorse the notion that trial courts are, and should be, afforded discretion by rule and statute to reconsider an entire sentencing structure in multicount cases where a portion of the original verdict and resulting sentence has been vacated by a higher court. Moreover, to suggest otherwise would potentially encourage trial courts to take into account the likelihood of certain counts surviving appeal — a sentencing algorithm which might unnecessarily lead to longer original sentences.” (*Ibid.*)

Defendant tries to distinguish *Burbine* by arguing that his sentence was not “one term made up of interdependent components.” (*Burbine, supra*, 106 Cal.App.4th at p. 1258.) Defendant contends we should inquire whether “the invalid portion of the sentence infected other portions.” (*People v. Savala* (1983) 147 Cal.App.3d 63, 66 (*Savala*), disapproved on another ground in *People v. Foley* (1985) 170 Cal.App.3d 1039, 1048-1049. In *Savala*, after the Court of Appeal had ruled that a firearm enhancement had been wrongly used in calculating defendant’s aggregate sentence, the trial court, upon resentencing, adjusted the base sentence upward to match the original aggregate sentence. (*Savala*, at p. 65.) The defendant in *Savala* appealed on similar grounds, and the court affirmed.

“We conclude that defendant’s aggregate prison term cannot be viewed as a series of separate independent terms, but rather must be viewed as one prison term made up of interdependent components. The invalidity of some of those components necessarily infects the entire sentence. To hold otherwise would be to hold that a trial court may not decline to aggravate the sentence for an otherwise aggravated crime due to the overall length of the sentence to be imposed. We decline to so circumscribe a trial court’s sentencing discretion. “Mandatory, arbitrary or rigid sentencing procedures invariably lead to unjust results. Society receives maximum protection when the penalty,

treatment or disposition of the offender is tailored to the individual case. Only the trial judge has the knowledge, ability and tools at hand to properly individualize the treatment of the offender. Subject always to legislative control and appellate review, trial courts should be afforded maximum leeway in fitting the punishment to the offender.”

[Citations.] [¶] When defendant’s contention is properly viewed it is clear that he is attempting to retain the favorable aspects of the prior judgment while jettisoning the unfavorable aspects. [Citation.] Appellate courts have consistently refused to sanction such efforts. [Citations.] In sentencing defendant in the first instance the trial court made an error which affected the entire sentencing scheme devised. When we ordered the court to set aside the first judgment and to resentence defendant the court was entitled to reconsider all of its sentencing choices, subject only to the limitation that defendant not be sentenced to a greater aggregate term than the first sentence.” (*Savala*, 147 Cal.app.3d at pp. 68-69, fn. omitted.)

While it is true that *Savala* cited section 1170, subdivision (b), as an example of how the components of an aggregate term are interdependent (*Savala, supra*, 147 Cal.App.3d at pp. 68-69, fn. omitted), the court did not, as defendant would have it, restrict the notion of interdependence to circumstances where section 1170, subdivision (b), originally precluded a court from considering a pertinent fact in determining the base sentence. The court was simply using that as an example of how components of a sentence can be interdependent. Instead, the broader focus for both the *Savala* court and the *Burbine* court was on the need to afford the trial court maximum flexibility, and on the reality that the increased prison term an enhancement provides is an important factor in considering the overall fairness of the aggregate prison term, and that where the enhancement is stricken, the trial court’s discretionary calculus is thrown off and must be recalculated. As the *Savala* court stated, “In conclusion, we hold that defendant was not sentenced to a series of separate independent prison terms but was sentenced to an overall aggregate term. In making its sentencing choices in the first instance the trial court

undoubtedly considered the overall prison term to be imposed and was influenced in its choices by the length of the enhancements.” (*Savala*, at p. 70.)

As another court has remarked on this topic, “A judge’s subjective determination of the value of a case and the appropriate aggregate sentence, based on the judge’s experiences with prior cases and the record in the defendant’s case, cannot be ignored. A judge’s subjective belief regarding the length of the sentence to be imposed is not improper as long as it is channeled by the guided discretion outlined in the myriad of statutory sentencing criteria.” (*People v. Stevens* (1988) 205 Cal.App.3d 1452, 1457.) In other words, it is perfectly valid for a trial court to consider the aggregate length of the sentence in deciding which base term to impose, and where a reviewing court issues a decision that would reduce the aggregate length, that is a sufficient change of circumstances to permit the trial court to revisit the base term. Because that was the case here, we reject defendant’s contention that the trial court was bound by its initial discretionary determination that the midterm was appropriate on the attempted murder charge.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.