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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LEO SAMUEL HILL, JR.,

Defendant and Appellant.

H040009

(Santa Clara County

Super. Ct. No. 208258)

I. INTRODUCTION

In 1998, defendant Leo Samuel Hill, Jr. pleaded guilty to four felony offenses: two counts of assault by means of force likely to produce great bodily injury (Pen. Code, former § 245, subd. (a)(1);¹ counts 1 & 4), false imprisonment (§§ 236/237; count 2), and inflicting corporal injury on a cohabitant (§ 273.5, subd. (a); count 3). Defendant admitted that he personally used a deadly weapon in the commission of counts 3 and 4. (§§ 667, 1192.7, 12022, subd. (b)(1).) Defendant also admitted two prior felony convictions that qualified as strikes under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12): a conviction of voluntary manslaughter (former § 192, subd. (1)), and a conviction of “assault with personal infliction of great bodily injury and/or assault with personal use of a deadly weapon.”

¹ All further statutory references are to the Penal Code unless otherwise indicated.

At the sentencing hearing held in 2000, the trial court imposed an aggregate sentence of 55 years to life, which included consecutive sentences of 25 years to life for the assault charged in count 1 and the infliction or corporal injury on a spouse charged in count 3. Defendant thereafter appealed to this court, which affirmed his convictions and sentence.

In 2013, defendant filed a petition for writ of habeas corpus in the trial court, in propria persona. In the petition, defendant requested he be resentenced pursuant to Proposition 36, the Three Strikes Reform Act of 2012 (the Reform Act). The trial court construed his habeas petition to be a petition for recall of sentence (§ 1170.126) but denied the petition for two reasons: (1) defendant's prior conviction of voluntary manslaughter was a disqualifying prior offense under section 1170.12, subdivision (c)(2)(C)(iv)(IV), and (2) one of defendant's current felony convictions was "a felony in which the defendant personally used a dangerous or deadly weapon" and thus a serious felony under section 1192.7, subdivision (c)(23).

On appeal, defendant contends his prior conviction of voluntary manslaughter was not a disqualifying prior offense. Defendant also contends that although he had one disqualifying current conviction, he was entitled to be resentenced on the other counts. In a supplemental brief, defendant contends he was entitled to appointed counsel on his petition for recall of sentence.

We conclude that defendant's prior conviction of voluntary manslaughter as defined in former section 192, subdivision (1) was not a disqualifying offense under section 667, subdivision (e)(2)(C)(iv)(IV) or section 1170.12, subdivision (c)(2)(C)(iv)(IV), both of which apply to "[a]ny homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive." We further conclude that although defendant had two disqualifying current convictions, he was entitled to be resentenced on the other two felony counts under *People v. Johnson* (2015) 61 Cal.4th 674 (*Johnson*), which held that "an inmate is eligible for resentencing with

respect to a current offense that is neither serious nor violent despite the presence of another current offense that is serious or violent.” (*Id.* at p. 695.) Thus, we will reverse the order denying defendant’s petition for recall of his sentence. We do not reach the question of whether defendant was entitled to appointed counsel on his petition for recall of sentence, because that issue is now moot.

Appellate counsel has filed a petition for writ of habeas corpus, which this court ordered considered with the appeal. We have disposed of the habeas petition by separate order filed this day. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

II. BACKGROUND

A. *Underlying Case*²

Defendant’s current convictions arose from two separate incidents. During the first incident, which occurred in August of 1995, defendant punched his girlfriend in the face; later in the day, he cut her above the eye with a box cutter. During the second incident, which occurred in June of 1998, defendant punched his girlfriend in the eye and in the mouth, tackled her, and banged her head against a bedpost.

Defendant was subsequently charged with four felony offenses. Based on the second incident, defendant was charged with assault by means of force likely to produce great bodily injury (former § 245, subd. (a)(1); count 1) and false imprisonment (§§ 236/237; count 2). Based on the first incident, defendant was charged with inflicting corporal injury on a cohabitant (§ 273.5, subd. (a); count 3) and assault by means of force likely to produce great bodily injury (former § 245, subd. (a)(1); count 4). The information alleged that in the commission of count 3, defendant personally used a deadly weapon within the meaning of section 12022, subdivision (b)(1), and that in the

² The facts underlying defendant’s current convictions are taken from the prior opinion in *People v. Hill*, H022185 (Jan. 18, 2002) [nonpub. opn].

commission of count 4, defendant personally used a deadly weapon within the meaning of sections 667 and 1192.7.

The information also alleged that defendant had two prior felony convictions that qualified as strikes under the Three Strikes law (§§ 667, subs. (b)-(i), 1170.12): a prior conviction for voluntary manslaughter (former § 192, subd. (1)), and a prior conviction of “assault with personal infliction of great bodily injury and/or assault with personal use of a deadly weapon.” The information further alleged that defendant’s voluntary manslaughter conviction qualified as a prior serious felony conviction (§ 667, subd. (a)).

On December 14, 1998, defendant pleaded guilty to all four felony charges, and he admitted the two deadly weapon allegations, the two strike allegations, and the prior serious felony allegation.

At the sentencing hearing held on September 7, 2000, the trial court imposed an aggregate sentence of 55 years to life after denying defendant’s *Romero* motion. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) The trial court imposed a term of 25 years to life for the assault charged in count 1, a concurrent term of 25 years to life for the false imprisonment charged in count 2, a consecutive term of 25 years to life for the infliction of corporal injury on a spouse charged in count 3, and a consecutive five-year term for the prior serious felony conviction allegation (§ 667, subd. (a)). The trial court stayed the term for the assault charged in count 4 pursuant to section 654, and struck the term for the deadly weapon use allegation (§ 12022, subd. (b)) associated with count 3.

Defendant appealed from his convictions and sentence. This court affirmed the judgment in an unpublished opinion filed on January 18, 2002. (See fn. 2, *ante*.)

B. Petition for Recall of Sentence

On February 11, 2013, defendant filed a petition for writ of habeas corpus in the trial court, in propria persona. Defendant requested to be resentenced pursuant to the Reform Act. He alleged that his current convictions were for assault with a deadly

weapon, infliction of corporal injury on a spouse, and false imprisonment, but he did not list his prior convictions. He contended that under the Reform Act, his current convictions did not qualify for “three strikes enhancements” and his prior convictions did not disqualify him from resentencing.

In a written order dated February 12, 2013, the trial court construed defendant’s habeas petition to be a petition for recall of sentence brought pursuant to section 1170.126. The trial court denied the petition for two reasons. First, the trial court found that defendant’s prior conviction of voluntary manslaughter was a disqualifying “homicide offense” under section 1170.12, subdivision (c)(2)(C)(iv)(IV). Second, the trial court found that one of defendant’s current assault convictions was “a felony in which the defendant personally used a dangerous or deadly weapon” and thus a serious felony under section 1192.7, subdivision (c)(23).

After defendant filed a notice of appeal from the denial of his petition, we appointed counsel to represent him in this court.

III. DISCUSSION

A. Prior Conviction of Voluntary Manslaughter

Defendant contends the trial court erred by finding that his prior conviction of voluntary manslaughter (former § 192, subd. (1)) was a disqualifying prior offense. Under section 667, subdivision (e)(2)(C)(iv)(IV) and section 1170.12, subdivision (c)(2)(C)(iv)(IV), a defendant is not eligible for resentencing if his or her prior convictions include “[a]ny homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive.”

Defendant reads the above-referenced statutes as providing that prior convictions for homicide offenses disqualify a defendant from resentencing *only* if the homicide offenses are “defined in Sections 187 to 191.5.” Thus, defendant asserts that his prior conviction of voluntary manslaughter, which was defined in former section 192,

subdivision (1), is not a disqualifying prior offense. Defendant reads the phrase “including any attempted homicide offense,” which is set off with commas, as equivalent to a parenthetical phrase.

The Attorney General reads the above-referenced statutes as providing that prior convictions for *all* homicide offenses disqualify a defendant from resentencing. The Attorney General contends that the phrase “defined in Sections 187 to 191.5, inclusive” modifies only the phrase “including any attempted homicide offense.” The Attorney General argues that because there is no crime of attempted voluntary manslaughter (see *People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332), the phrase “defined in Sections 187 to 191.5 inclusive” must apply only to the “subset of ‘any attempted homicide offense.’ ”

The Attorney General’s proposed reading of the statutory language at issue “fails to account for the use of the two commas to create a parenthetical phrase.” (*Dow v. Lassen Irrigation Co.* (2013) 216 Cal.App.4th 766, 783 (*Dow*)). “While not controlling, punctuation is to be considered in the interpretation of a statute. [Citations.]” (*Duncanson-Harrelson Co. v. Travelers Indem. Co.* (1962) 209 Cal.App.2d 62, 66 (*Duncanson-Harrelson*)). In both section 667, subdivision (e)(2)(C)(iv)(IV) and section 1170.12, subdivision (c)(2)(C)(iv)(IV), the drafters used commas to set off the phrase “including any attempted homicide offense,” indicating it “should be read as a parenthetical clause.” (*Duncanson-Harrelson, supra*, at p. 66.) Had the drafters intended the meaning that the Attorney General advances, there would have been no need for the comma following the phrase “including any attempted homicide offense.” Since the drafters included that comma, “we need to give it meaning if we can. We do that by reading the phrase set off by commas as a parenthetical phrase.” (*Dow, supra*, at p. 783.) Thus, we read both section 667, subdivision (e)(2)(C)(iv)(IV) and section 1170.12, subdivision (c)(2)(C)(iv)(IV) as providing that a defendant is not eligible for resentencing if his or her prior convictions include “[a]ny homicide offense . . . defined in

Sections 187 to 191.5, inclusive.” Since defendant’s prior convictions include voluntary manslaughter, a homicide offense that is defined in former section 192, subdivision (1), his prior conviction of voluntary manslaughter does not disqualify him from resentencing under the Reform Act.

B. Current Disqualifying Conviction

Defendant contends the trial court erred by finding that the assault charged in count 4, in which defendant personally used a deadly weapon, rendered him ineligible for resentencing on the other counts.

After briefing in this matter was completed, the California Supreme Court held, in *Johnson, supra*, 61 Cal.4th 674, that “the presence of a conviction of a serious or violent felony does not disqualify an inmate from resentencing with respect to a current offense that is neither serious nor violent.” (*Id.* at p. 679.) We asked the parties for supplemental briefing concerning the effect of *Johnson* on the issues in this case.

The parties appear to agree that under *Johnson*, defendant is entitled to be resentenced on count 1 (assault by means of force likely to produce great bodily injury) and count 2 (false imprisonment). The parties also appear to agree that defendant is not entitled to be resentenced on count 3 (inflicting corporal injury on a cohabitant) or count 4 (assault by means of force likely to produce great bodily injury) because he admitted deadly weapon allegations as to those two offenses. We agree that under *Johnson*, defendant’s convictions on counts 3 and 4 do not prevent him from being resentenced on counts 1 and 2.³

C. Appointment of Counsel

The clerk of the superior court mailed defendant the trial court’s written order denying his petition on February 12, 2013. It appears that no information about

³ Although defendant is eligible for resentencing on those counts, he may be found unsuitable. (See *Johnson, supra*, 61 Cal.4th at p. 682; § 1170.126, subd. (f).) We express no opinion on whether defendant is suitable.

defendant's appellate rights was included with the trial court's written order. Defendant mailed a notice of appeal from prison on July 20, 2013; the notice of appeal was filed on July 25, 2013. Defendant was appointed counsel by this court after his notice of appeal was filed.

In the respondent's brief, the Attorney General argued that defendant was barred from obtaining relief on appeal because his notice of appeal was not timely filed.⁴ The Attorney General pointed out that defendant filed his notice of appeal more than 60 days after the order was filed and served by mail.

Defendant thereafter filed a supplemental opening brief, in which he contended that he was entitled to appointed counsel on his petition for recall of sentence, under the state and federal constitutions, because he made a prima facie showing of eligibility for resentencing. Defendant alternatively argued that the trial court had a duty to advise him that he had the right to appeal and of the applicable "time deadlines of an appeal."

Defendant also filed an application for relief from default for failure to file a timely notice of appeal. This court issued an order granting defendant relief from default on March 2, 2015. After this court issued that order, the Attorney General withdrew the claim that defendant was barred from obtaining relief on appeal.

We need not decide whether defendant had the right to appointed counsel on his petition for recall of sentence, because that issue has become moot. By obtaining relief from default for failure to file a timely notice of appeal, defendant obtained the result that he alleges he would have been provided had he been represented by counsel: an effective notice of appeal.

⁴ Initially, the Attorney General also argued that the order denying defendant's petition for recall of his sentence was not an appealable order, but after the California Supreme Court issued its opinion in *Teal v. Superior Court* (2014) 60 Cal.4th 595, the Attorney General withdrew that argument.

IV. DISPOSITION

The order denying defendant's petition for writ of habeas corpus, construed as a petition for recall of sentence brought under Penal Code section 1170.126, is reversed and remanded for further proceedings.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

GROVER, J.

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