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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM LEONARD BURNES, Defendant and Appellant.	H045562 (Monterey County Super. Ct. Nos. SS100891A, SS102095A)

I. INTRODUCTION

Defendant William Leonard Burnes[1] was convicted of multiple felonies in two separate cases, Nos. SS100891A and SS102095A, and was sentenced to prison. He successfully petitioned for recall of his sentences in both cases after the electorate approved Proposition 36, the Three Strikes Reform Act of 2012, and Proposition 47, the Safe Neighborhoods and Schools Act. On resentencing, the trial court selected a principal term in each case and then calculated the remaining subordinate terms as one-third the middle term, for an aggregate term of 23 years eight months in prison.

On appeal, defendant contends that the trial court should have selected only one principal term between the two cases, and that all the remaining terms should have been

[1] Defendant is also referred to in the record as William Leonard Burnes, Jr., and William Leonard Ivy.

subordinate terms calculated at one-third the middle term. Under this calculation, defendant contends that his aggregate sentence should be 19 years. The Attorney General concedes the issue.

We will modify the judgment and affirm the judgment as modified.

II. BACKGROUND

A. *Case No. SS100891A (the Firearm Case)*

In 2010, in case No. SS100891A (the firearm case), defendant pleaded no contest to four felony counts, consisting of possession of a firearm by a felon (Pen. Code, former § 12021, subd. (a)(1), now § 29800, subd. (a)(1); count 1),[2] evading a peace officer (Veh. Code, § 2800.2, subd. (a); count 2), possession of ammunition by a prohibited person (former § 12316, subd. (b)(1), now § 30305, subd. (a)(1); count 3), and possession of a deadly weapon, metal knuckles (former § 12020, subd. (a)(1), now § 21810; count 4). (See *People v. Burnes* (2015) 242 Cal.App.4th 1452, 1454-1455 (*Burnes*).)[3] Defendant also pleaded no contest to seven misdemeanor counts, admitted that he had two prior strike convictions (§ 1170.12, former subd. (c)), and admitted that he had served five prior prison terms (§ 667.5, subd. (b)). (See *Burnes*, *supra*, at p. 1455.) In April 2011, the trial court sentenced defendant to a total prison term of 30 years to life. (*Ibid.*)

B. *Case No. SS102095A (the Escape case)*

In 2011, in case No. SS102095A (the escape case), defendant was convicted by plea of four felony counts, consisting of escape by a prisoner (§ 4532, subd. (b); count 1), furnishing escape equipment (§ 4535; count 2), receiving stolen property (§ 496, former subd. (a); count 3), and commercial burglary (§ 459; count 4). The allegation that defendant had a prior strike conviction was admitted or found true (§ 1170.12,

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

[3] On the court's own motion, we take judicial notice of the opinion in defendant's prior appeal.

subd. (c)(1)). Defendant was sentenced to 10 years in prison consecutive to the earlier firearm case.

C. *Petitions for Resentencing*

In 2012, "the California electorate approved Proposition 36, otherwise known as the Three Strikes Reform Act of 2012 (the Act) . . . . Before the Act's passage, the 'Three Strikes' law provided that a recidivist offender with two or more qualifying strikes was subject to an indeterminate life sentence if the offender was convicted for any new felony offense. [Citation.] The Act amended the Three Strikes law so that an indeterminate life sentence may only be imposed where the offender's third strike is a serious and/or violent felony or where the offender is not eligible for a determinate sentence based on other disqualifying factors. [Citations.] The Act also enacted section 1170.126, establishing a procedure for an offender serving an indeterminate life sentence for a third strike conviction that is not defined as a serious and/or violent felony to file a petition for recall of sentence. [Citation.]" (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 596-597, fn. omitted.)

In 2013, defendant filed a petition pursuant to section 1170.126 for recall of his sentence in the earlier firearm case in which he had been sentenced to 30 years to life. (*Burnes, supra*, 242 Cal.App.4th at pp. 1455, 1457.) The trial court denied the petition on the ground that defendant was ineligible for resentencing. (*Id.* at p. 1455.) This court reversed the trial court's order and remanded the matter for further proceedings. (*Id.* at pp. 1457, 1460.)

On January 11, 2018, the trial court held a combined hearing regarding: (1) defendant's section 1170.126 petition in the earlier firearm case, and (2) defendant's petition for recall of his sentence in the later escape case pursuant to section 1170.18, which was added as part of Proposition 47, the Safe Neighborhoods and Schools Act (see *People v. Gonzales* (2017) 2 Cal.5th 858, 863). The court granted defendant's section 1170.126 petition in the earlier firearm case, and it granted in part defendant's

section 1170.18 petition in the later escape case, reducing the count for receiving stolen property to a misdemeanor (§ 496, subd. (a); count 3). The court resentenced defendant as follows.

In the escape case (No. SS102095A), the trial court sentenced defendant to eight years eight months in prison. The sentence consists of six years (the upper term, doubled) on count 1, and two consecutive terms of 16 months (one-third the midterm, doubled) on counts 2 and 4. The court sentenced defendant to 30 days in county jail on count 3, with credit for time served.

In the firearm case (No. SS100891A), the trial court sentenced defendant to 15 years in prison. The sentence consists of six years (the upper term, doubled) on count 1; three consecutive terms of 16 months (one-third the midterm, doubled) on counts 2, 3, and 4; and consecutive terms of one year each for the five prison priors. The court stated that sentencing on the misdemeanors would remain the same. The court ordered the sentence in this case to be served consecutive to the sentence in the escape case.

III. DISCUSSION

On appeal, defendant contends that the trial court erred when resentencing him by designating one principal term in each case. He argues that there should be only one principal term for both cases, and that all the remaining terms should be calculated at one-third the middle term. Specifically, defendant contends that in the earlier firearm case, the trial court should have imposed sixteen months (one-third the midterm, doubled) instead of six years (the upper term, doubled) on count 1, possession of a firearm by a felon (former § 12021, subd. (a)(1)), which would have resulted in a total prison term of 19 years for both cases. Defendant requests that the case be remanded for resentencing.

The Attorney General concedes that the trial court should have selected only one principal term between the two cases. The Attorney General argues, however, that

remand is not necessary, and that this court should direct defendant's sentence to be modified as requested by defendant.

We find the Attorney General's concession of error appropriate.

"If the sentencing court imposes consecutive terms, subdivision (a) of section 1170.1 specifies the normal method for calculating the overall prison term." (*People v. Nguyen* (1999) 21 Cal.4th 197, 201 (*Nguyen*).) Under that method, "[t]he principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes . . . . The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed . . . ." (§ 1170.1, subd. (a).)

Generally, when a defendant is sentenced under the Three Strikes law to a determinate term that is "twice the term otherwise provided" (§ 1170.12, subd. (c)(1)), "the principal term/subordinate term methodology of section 1170.1" still applies and, "consistent with that methodology, the trial court [must] compute[] subordinate terms by doubling one-third of the middle term for each such offense" (*Nguyen*, *supra*, 21 Cal.4th at p. 207; see *id.* at p. 200; accord, *People v. Sasser* (2015) 61 Cal.4th 1, 11, 14).

Significantly, the principal term/subordinate term methodology applies "when any person is convicted of two or more felonies, *whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a different court*, and a consecutive term of imprisonment is imposed . . . . " (§ 1170.1, subd. (a), italics added.) In other words, "multiple consecutive determinate terms must be combined into a single, 'aggregate term of imprisonment for all [such] convictions' (§ 1170.1, subd. (a)) that merges all terms to be served consecutively and complies with the rules for calculating aggregate terms (e.g., one-third the base term for subordinate terms . . . (*ibid.*)), *whether or not the consecutive terms arose from the same or different proceedings* (*ibid.*; see also § 669; Cal. Rules of Court, rule 4.452)." (*In re Reeves* (2005) 35 Cal.4th 765, 772-773, italics added.)

In this case, the trial court selected two principal terms – one in the firearm case and one in the escape case. However, the court was required to combine the multiple consecutive determinate terms from both cases "into a single, 'aggregate term of imprisonment' " that "complies with the rules for calculating aggregate terms[,]e.g., one-third the base term for subordinate terms," regardless of the fact that the terms arose from two different cases. (*In re Reeves*, *supra*, 35 Cal.4th at pp. 772-773; see § 1170.1, subd. (a).) The court, therefore, should have selected only one principal term for both cases, rather than one principal term in each case.

Regarding which term should be selected as the principal term, "[t]he principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes." (§ 1170.1, subd. (a).) In the firearm case, the trial court selected the term for possession of a firearm by a felon (former § 12021, subd. (a)(1), now § 29800, subd. (a)(1); count 1) as the principal term, imposing the upper term of three years doubled. In the escape case, the trial court designated the term for escape by a prisoner (§ 4532, subd. (b); count 1) as the principal term, also imposing the upper term of three years doubled. "If two terms of imprisonment have the same punishment, either term may be selected as the principal term." (Cal. Rules of Court, rule 4.452(a)(2).) In that situation, the trial court has discretion in selecting the principal term among the two equal terms. (*People v. Chagolla* (1983) 144 Cal.App.3d 422, 433, fn. 1.) The Attorney General contends that, as between the two six-year terms imposed by the trial court, the record reflects that the court would have chosen the term for escape by a prisoner, rather than possession of a firearm by a felon, as the principal term "in order to effectuate the terms of [defendant's] plea bargain in [the escape case]." Although defendant does not specifically address this argument by the Attorney General, defendant does agree that the term for possession of a firearm by a felon should have been treated as a subordinate term with a sentence of 16 months, not as a principal term with a sentence of 6 years. We will modify the sentence accordingly.

IV. DISPOSITION

The judgment is modified to reflect in case No. SS100891A a consecutive term of 16 months (one-third the middle term, doubled) on count 1, possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)), for an aggregate term of 19 years in case Nos. SS100891A and SS102095A. As so modified, the judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

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