

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY MCNEELY,

Defendant and Appellant.

B298163

(Los Angeles County
Super. Ct. No. LA084123-01)

APPEAL from a judgment of the Superior Court of Los Angeles County, Susan M. Speer, Judge. Reversed and remanded for resentencing.

Randall Conner, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Roberta L. Davis and Rama R. Maline, Deputy Attorneys General for Plaintiff and Respondent.

A jury convicted Anthony McNeely of assault with a semiautomatic firearm and dissuading a witness, among other crimes, and found specially alleged firearm enhancements true. On appeal we affirmed McNeely's convictions but remanded for resentencing due to sentencing errors. At the resentencing hearing McNeely's counsel requested the trial court appoint an investigator and/or a psychologist to report on the decline in McNeely's mental and physical health while in prison, factors his counsel argued were relevant to addressing a proper sentence. The trial court denied the request, ruling it lacked discretion to make such an order or to consider postconviction circumstances when imposing McNeely's new sentence. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Information, Verdict and Sentence

An information filed September 27, 2016 charged McNeely with making a criminal threat (Pen. Code, § 422, subd. (a)),¹ assault with a semiautomatic firearm (§ 245, subd. (b)), dissuading a witness from testifying (§ 136.1, subd. (a)(1)), preparing false documentary evidence (§ 134) and possession of a firearm by a felon (§ 29800, subd. (a)(1)). It was specially alleged McNeely had personally used a semiautomatic firearm in making the criminal threat and committing the aggravated assault (§ 12022.5, subd. (a)) and had been on bail at the time he committed the offense of dissuading a witness from testifying.²

¹ Statutory references are to this code.

² The information also charged McNeely with assault with a deadly weapon unrelated to the events that precipitated the other counts; the jury found McNeely not guilty of that offense.

At McNeely's trial with codefendant Julie Togiola, the jury found McNeely not guilty of making a criminal threat and preparing a false document, guilty of a lesser included offense of attempt to make a criminal threat and guilty of all other remaining charges relating to the September 27, 2016 incident; it also found true the special allegation McNeely had used a semiautomatic weapon in connection with the attempt to make a criminal threat and the assault with a semiautomatic firearm. The jury was not asked to, and did not, make any finding that McNeely had been on bail when he committed the offense of dissuading a witness.

At sentencing the court assumed McNeely had waived his right to a jury trial on the on-bail enhancement and made its own finding that the specially alleged on-bail enhancement was true. The court sentenced McNeely to an aggregate state prison term of 22 years four months: nine years for aggravated assault (the principal term), plus 10 years for the personal use of a firearm; a consecutive term of eight months (one-third the middle term) for dissuading a witness from testifying, plus two years for the on-bail enhancement; and a consecutive term of eight months (one-third the middle term) for possession of a firearm by a felon. The court stayed imposition of sentence on the attempt to make a criminal threat and the firearm enhancement alleged in connection with that count (§ 654).

2. *McNeely's Appeal*

On appeal we affirmed McNeely's convictions but remanded for resentencing based on two sentencing errors. (See *People v. Togiola* (July 31, 2018, B281918) [nonpub. opn.] First, because McNeely had not waived his right to a jury trial on the on-bail

enhancement, the court erred in making that finding and imposing the enhancement.

Second, the court erred in imposing one-third the middle term for the offense of dissuading a witness. We explained section 1170.15 required the court, if it elected to impose consecutive sentences, to impose a full consecutive term of imprisonment for the felony of dissuading a witness. (See *People v. Togiola, supra*, B281918, citing § 1170.15 “[n]otwithstanding subdivision (a) of Section 1170.1, which provides for the imposition of a subordinate term for a consecutive offense of one-third the middle term of imprisonment, if a person is convicted of a felony, and of an additional felony that is a violation of Section 136.1 or 137 and that was committed against the victim of, or a witness or potential witness with respect to, or a person who was about to give material information pertaining to, the first felony . . . , the subordinate term for each consecutive offense that is a felony described in this section shall consist of the full middle term of imprisonment for the felony for which a consecutive term of imprisonment is imposed”.) Observing the trial court had the discretion to impose concurrent or consecutive sentences (§ 669, subd. (a) [unless otherwise specified, trial court has discretion to sentence concurrently or consecutively]), we declined the Attorney General’s request to modify the sentence by imposing a full consecutive subordinate term for dissuading a witness and remanded the matter to the trial court to exercise its discretion whether to impose a concurrent or consecutive sentence on that count. (*People v. Togiola, supra*, B281918; see *People v. Woodworth* (2016) 245 Cal.App.4th 1473, 1478-1479 [nothing in section 1170.15 mandates consecutive sentences for a

section 136.1 offense; trial court retains discretion under section 669 to impose concurrent sentence for that offense].)

In addition, we noted the Legislature had then recently passed, and the Governor had signed, Senate Bill No. 620, effective January 1, 2018, amending section 12022.5 to give discretion to the trial court to strike a firearm enhancement in the interest of justice. (*People v. Togiola, supra*, B281918, citing § 12022.5, subd. (c).) We explained the court would have the opportunity at resentencing also to consider whether to strike the firearm-use enhancements.

3. *The Resentencing Hearing*

McNeely did not appear at the resentencing hearing. His retained counsel reported his client was currently in a wheelchair after suffering a heart attack while in prison and was taking psychotropic medication for a mental illness. McNeely's counsel requested the court appoint an investigator and a psychologist to report on the significant postconviction decline in McNeely's mental and physical health, mitigating factors he argued the court should consider in exercising its sentencing discretion.

The People objected to McNeely's counsel's request for an investigator and psychologist and consideration of postconviction evidence, asserting the court's remand order limited the court's discretion to the questions whether to impose concurrent or consecutive sentences and whether to strike the firearm-use enhancements and did not permit consideration of postconviction conduct in mitigation.

The trial court agreed with the People, stating, "I don't believe this defendant is entitled to a full [section] 1170(d)(1)

resentencing.^[3] . . . This really is just a minor correction to an illegal sentence. . . . Any factors in mitigation that have occurred since the defendant was originally sentenced can be brought to the attention of the parole board. . . . It would be, I think, a waste of judicial resources and county funds to appoint all of these experts to consider things that have occurred in state prison since he was sentenced. Those are things for the parole board, I think, to consider, not for this court.”

Proceeding directly to sentencing, the court struck the on-bail enhancement allegation; imposed a full consecutive two-year term for dissuading a witness; declined to strike the firearm-use enhancements in the interest of justice; and, considering the aggravating and mitigating factors identified in the original sentencing hearing, sentenced McNeely to an aggregate state prison term of 21 years eight months, eight months less than his original sentence.⁴

³ Section 1170, subdivision (d), authorizes a trial court in certain circumstances, including on the recommendation of the secretary of the Department of Corrections and Rehabilitation, to “recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if they had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence.” It authorizes the court to consider “postconviction factors” when imposing the new sentence, including “evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate’s risk of future violence.”

⁴ The court imposed nine years for the aggravated assault (the principal term), plus 10 years for the personal use of a firearm; a consecutive term of two years for dissuading a witness from testifying; and a consecutive term of eight months (one-third

DISCUSSION

“[W]hen part of a sentence is stricken on review, on remand for resentencing ‘a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.’” (*People v. Buycks* (2018) 5 Cal.5th 857, 893; accord, *People v. Bell* (2020) 48 Cal.App.5th 1, 24 [upon appellate court’s striking of a section 667.5, subdivision (b), prior prison term enhancement, “the trial court is entitled to reconsider appellant’s entire sentence”]; *People v. Acosta* (2018) 29 Cal.App.5th 19, 26 [on remand for resentencing “the trial court will have “jurisdiction to modify every aspect of [appellant’s] sentence””].)

A “defendant’s postconviction behavior and other possible developments remain relevant to the trial court’s consideration upon resentencing.” (*People v. Bullock* (1994) 26 Cal.App.4th 985, 990; accord, *Dix v. Superior Court* (1991) 53 Cal.3d 442, 460 [“it is well settled that when a case is remanded for resentencing after an appeal, the defendant is entitled to ‘all the normal rights and procedures available at his original sentencing’ [citations], including consideration of any pertinent circumstances which have arisen since the prior sentence was imposed”]; Cal. Rules of Court, rule 4.410 [identifying the prevention of reoffending as one of the “general objectives of sentencing”].)

That sentencing discretion includes the inherent authority to order a report or appoint experts to assist the court in considering appropriate sentencing factors. (See *People v.*

the middle term) for possession of a firearm by a felon. Pursuant to section 654, the court stayed imposition of sentence on the attempt to make a criminal threat and the firearm enhancement alleged in connection with that count.

Stuckey (2009) 175 Cal.App.4th 898, 913 [“the court always has the power to appoint its own experts to assist the court, if the need arises”; at sentencing that authority is derived not from Evidence Code section 730 or the federal or state Constitutions, but from the court’s inherent power to facilitate the administration of justice]; *People v. Bullock, supra*, 26 Cal.App.4th at p. 989 [“[s]ection 1203, subdivision (g), confers discretion upon the trial court to decide whether a probation report should be provided for a probation-ineligible defendant”].)

Ordinarily, we would review a court’s discretionary sentencing choices for abuse of discretion (*People v. Sandoval* (2007) 41 Cal.4th 825, 847; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 976-977) and assume the trial court understood the scope of its discretion. (See *People v. Fuhrman* (1997) 16 Cal.4th 930, 944-946 [remand for resentencing not required when record is silent on whether court understood its discretion]; *People v. Lee* (2017) 16 Cal.App.5th 861, 867 [if the record is silent on the court’s awareness of its discretionary authority in sentencing, we presume the court understood the scope of its discretion and affirm].)

Here, however, the record plainly shows the court did not understand the full extent of its sentencing discretion. Although the court correctly distinguished the matter before it from a section 1170, subdivision (d), recall of sentence, that distinction did not mean the court lacked the authority to order a report, appoint experts or consider postconviction conduct (see *People v. Bullock, supra*, 26 Cal.App.4th at p. 990; *Dix v. Superior Court, supra*, 53 Cal.3d at p. 460), nor did our remand prohibit the court from considering postconviction conduct at resentencing. Indeed, we remanded for resentencing precisely to allow the trial court to

exercise its full discretion in making sentencing choices after we corrected its original sentencing errors.

Given the trial court’s fundamental misunderstanding of its authority in resentencing McNeely, it is impossible to forecast how it would have ruled on his counsel’s request for appointment of experts if it had appreciated the full scope of its sentencing discretion. Accordingly, a further remand for resentencing is necessary. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [when record affirmatively shows the court misunderstood its discretion, remand is required unless the record also affirmatively reflects ““the trial court would not have exercised its discretion even if it believed it could do so””]; see also *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 [“[d]efendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record”]; *People v. Morrison* (2019) 34 Cal.App.5th 217, 224 [same].)⁵

⁵ Although the court stated appointment of an investigator and psychologist would be a waste of resources, the record indicates that opinion was based on the court’s erroneous conclusion that postconviction evidence was solely a matter for the parole board to consider and not relevant to resentencing.

DISPOSITION

We reverse the judgment and remand for a resentencing hearing. On remand the trial court is to address McNeely's request for the appointment of an investigator and/or psychologist and consider all relevant information presented, including postconviction evidence, in exercising its full sentencing discretion.

PERLUSS, P. J.

We concur:

FEUER, J.

RICHARDSON, J.*

* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.