Filed 6/8/10 P. v. Ramirez CA3

NOT TO BE PUBLISHED

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JORGE RAMIREZ, Defendant and Appellant.	C061148 (Super.Ct.No. 01F06412)

Defendant Jorge Ramirez appeals after resentencing on remand from a prior appeal. He contends that resentencing is again required because, in defendant's view, the court failed to recognize its discretion to impose a lesser term, and defense counsel was ineffective in not so objecting in the trial court. Defendant also claims the trial court miscalculated presentence custody credit, and the abstract of judgment needs correction.

We agree the court miscalculated credits and the abstract requires correction. Otherwise, we shall affirm the judgment.

FACTS AND PROCEDURAL HISTORY

The facts and procedural history of this case are set forth in is court's published decision in defendant's prior appeal. (*People v. Zarazua* (2008) 162 Cal.App.4th 1348 (hereafter *Zarazua I*).)

Thus, we need not once again recount them in detail. Suffice it to say that defendant and a fellow member of the Sureños criminal street gang fired gunshots at a car containing two members of the rival Norteños criminal street gang. Fleeing from the gunfire, the driver of the car drove away at high speed, failed to yield at a stop sign, and collided with a vehicle that was going through the intersection. The crash killed a three-year-old passenger in the innocent vehicle and injured two other persons in that vehicle. (*Zarazua I, supra,* 162 Cal.App.4th at p. 1352.)

Defendant was convicted of shooting at an occupied vehicle, two counts of attempted voluntary manslaughter of the Norteños gang members, and second degree murder of the three-year-old victim who died as a result of the ensuing crash, and the jury found firearm and gang-related enhancements to be true. (*Zarazua I, supra,* 162 Cal.App.4th at p. 1351.) Defendant was sentenced to a aggregate term of 22 years eight months, plus 40 years to life, in prison. (*Ibid.*)

Defendant appealed, and this court held the second degree murder and attempted voluntary manslaughter convictions had to be reversed due to instructional error, but affirmed the conviction for shooting at an occupied vehicle and concluded that the evidence was sufficient to support the enhancement that defendant's personal and intentional

discharge of a firearm proximately caused the death of the innocent three-year-old victim (Pen. Code, § 12022.53, subd. (d)). (*Zarazua I, supra,* 162 Cal.App.4th at p. 1351.) The matter was remanded to the superior court for retrial and resentencing. (*Id.* at pp. 1362-1363.)

On remand, the prosecutor moved for dismissal of the murder and attempted manslaughter charges. The court granted the motion and imposed an aggregate indeterminate prison term of 40 years to life, comprised of 15 years to life for shooting at an occupied vehicle for the benefit of a criminal street gang (Pen. Code, §§ 246/186.22, subd. (b)(4)(B)) and 25 years to life for the firearm enhancement (Pen. Code, § 12022.53, subd. (d)).

DISCUSSION

I

Defendant contends the trial court failed to recognize that it had discretion to strike the "gang enhancement" and to reduce count four, shooting at an occupied vehicle, to a misdemeanor. The People retort that those issues are forfeited by defendant's failure to have raised them in the trial court. Thus, defendant argues his trial attorney was ineffective for failing to raise the issues at resentencing.

For reasons that follow, we conclude the claims are forfeited and defendant has failed to show ineffective assistance of counsel.

A

A supplemental probation report recommended that defendant be resentenced to state prison for an aggregate term of 40 years to life, i.e., 15 years to life for shooting at an occupied vehicle for the benefit of a criminal street gang, plus 25 years to life

for discharging a firearm and causing great bodily injury or death. The probation report stated that defendant was ineligible for probation and even if eligible, probation would not have been recommended due to the "nature, seriousness and circumstances of the crime which warrant a State Prison commitment." For the shooting offense with the gang finding, the probation officer stated that felony "will result" in a term of 15 years to life. For the discharging a firearm enhancement, the probation officer stated that a consecutive term of 25 years to life was mandatory.

At resentencing, defense counsel renewed the argument rejected in the prior appeal, i.e., that the shots defendant fired were not the proximate cause of the minor's death, and asked the court to impose a lesser gun enhancement. Defense counsel argued that the jury never considered the firearm enhancement attached to the shooting at an occupied vehicle absent the murder charge, which was reversed in the prior appeal, and that the erroneous instructions on the murder count likely affected the jury's finding. Suggesting that a new trial on the enhancement might be appropriate, defense counsel made policy arguments about access to firearms and costs of incarceration. Counsel claimed defendant had matured since the offense and complained that a codefendant had refused to agree to a package deal which carried determinate sentences.

The prosecutor responded by asserting, among other things, that the court did not have discretion to modify the firearm enhancement and that the court was required to impose 40 years to life because the gang and gun enhancements had been upheld in the prior appeal.

The trial court stated it had read the probation report and the letter submitted in support of defendant. The court "wrestl[ed] with" defense counsel's argument that it had discretion with respect to the gun enhancement, but concluded it could not grant a new trial or vacate the jury's finding. The court commented the case was "sad" for the three-year-old victim as well as defendant, who was very young at the time of the offense, had no significant prior criminal history, appeared to have changed since the offense, and could not take advantage of a package plea proposal for a determinate term because a codefendant refused to accept the proposal.

Noting the state's laws punishing teenagers who use guns were meant for the current offenses, which had tragic consequences, the court said that it was "bound and obligated to impose sentence as the law mandates." For count four (shooting at an occupied vehicle for the benefit of a criminal street gang), a term of 15 years to life was imposed. For the gun enhancement, a term of 25 years to life was imposed. The prosecutor moved to dismiss the murder and manslaughter charges in view of the sentence imposed, and the court granted the motion.

B

Defendant concedes his trial attorney did not ask the court to strike the "gang enhancement" or to reduce count four to a misdemeanor. Acknowledging these omissions forfeit the claims of sentencing error (*People v. Scott* (1994) 9 Cal.4th 331, 352-353 & fn. 16), defendant nonetheless asserts in his appellate briefs that we have discretion to address the merits of his contentions

and, in any event, we must do so because, by not raising the issues, his attorney deprived defendant of his right to the effective assistance of counsel.

We conclude defendant has failed to establish that his counsel's performance was deficient or that defendant suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 [80 L.Ed.2d 674, 693, 696]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

Penal Code section 246 states in pertinent part: "Any person who shall maliciously and willfully discharge a firearm at an . . . occupied motor vehicle . . . is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for three, five, or seven years, or by imprisonment in the county jail for a term of not less than six months and not exceeding one year." (Further section references are to the Penal Code unless otherwise specified.) Thus, a violation of section 246 is known as a "wobbler" because it may be punished as either a felony or misdemeanor.

At oral argument in this court, defendant's appellate counsel backed away from her contention that defendant's trial counsel was ineffective for failing to ask the trial court to reduce defendant's conviction to a misdemeanor pursuant to section 17, which states in part: "(b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] (1) After a judgment imposing a punishment other than imprisonment in the state prison."

In response to questions by this court, defendant's appellate counsel first acknowledged that to have asked the trial court to reduce the crime to a misdemeanor would have been a "very long shot" that "probably would have been unrealistic." When we asked whether, under the facts of this case, the trial court would have abused its discretion by reducing the crime to a misdemeanor, counsel replied "that may well be." When we then asked whether it would have been "absurd" to reduce the crime to a misdemeanor, meaning that defendant would have been incarcerated for less than a year for a gang-related shooting that resulted in the death of an innocent three-year-old, counsel replied: "I agree, perhaps I should not even have mentioned that argument because it takes away from the stronger argument that the judge [had the discretion to strike what counsel characterizes as the gang enhancement]." We construe appellate counsel's responses as a concession that defendant cannot establish ineffective assistance of trial counsel for failure to ask the trial court to reduce the crime to a misdemeanor, when there was no realistic chance that the court would have done so.

We therefore turn to defendant's claim that his trial counsel was ineffective for failing to ask the court to strike, for purposes of sentencing, the criminal street gang finding.

Section 186.22, subdivision (b) states in part: "(b)(1) 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: [¶] . . . [¶] (3) The court shall select the sentence enhancement which, in the court's discretion, best serves the interests of justice and shall state the reasons for its choice on the record at the time of the sentencing in accordance with the provisions of subdivision (d) of Section 1170.1. [¶] (4) *Any person who is convicted of a felony enumerated in this paragraph 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, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of*: [¶] (A) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 3046, if the felony is any of the offenses enumerated in subparagraph (B) or (C) of this paragraph. [¶] (B) *Imprisonment in the state prison for 15 years, if the felony is* a home invasion robbery, in violation of subparagraph (A) of paragraph (1) of subdivision (a) of Section 213; carjacking, as defined in Section 215; *a felony violation of Section 246*; or a violation of Section 12022.55. [¶] (C) Imprisonment in the state prison for seven years, if the felony is extortion, as defined in Section 519; or threats to victims and witnesses, as defined in Section 136.1." (Italics added.)

Here, the court imposed an indeterminate term of 15 years to life pursuant to section 186.22, subdivision (b)(4)(B), italicized above.

Section 186.22, subdivision (g) says in part: "Notwithstanding any other law, the court may strike the additional punishment for the *enhancements* provided in this section . . . in an unusual case where the interests of justice would best be served[.]" (Italics added.)

The People appear to concede section 186.22, subdivision (g) gave the trial court discretion to strike the indeterminate term specified by section 186.22, subdivision (b)(4)(B). We question the premise. (See *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900, fn. 6; see also *People v. Jones* (2009) 47 Cal.4th 566, 578; *People v. Jefferson* (1999) 21 Cal.4th 86, 101; compare *People v. Torres* (2008) 163 Cal.App.4th 1420, 1422, 1424, 1433.) Nonetheless, we will assume for purposes of discussion that the trial court had discretion to strike the gang finding if the interest of justice would have been served by doing so.

Contrary to defendant's arguments otherwise, we do not interpret the trial court's comments during sentencing as an indication that it believed it had no discretion to strike the gang finding and that it would have done so if it could have done so. In assessing the interests of justice, a trial court considers not only defendant's background but also society's interests. All too often, gang warfare results in the injury or death of an innocent bystander; the gang warfare here resulted in the death of an innocent three-year-old and the injury to two others. In light of the facts of this case,

we assume (absent a convincing showing to the contrary, which defendant has not made) the trial court would not have stricken the gang finding because it would have been an abuse of discretion to do so. Indeed, had the trial court expressed such an inclination, the prosecution surely would not have moved to dismiss the murder and manslaughter charges.

In sum, defendant has not demonstrated ineffective assistance of counsel because he is unable to establish it is reasonably probable that he would have received a lesser sentence if his trial counsel had asked the court to strike the gang finding.

II

Defendant contends, and the People concede, the trial court (relying on the probation report's erroneous calculation of actual days in presentence custody) awarded too few actual days of custody credit. The time that defendant served from his initial arrest on July 29, 2001, to the date of resentencing on January 30, 2009, amounts to 2,743 actual days, rather than 2,741 awarded by the court.[1] (Pen. Code, §§ 2900.1, 2900.5, subds. (a), (d); *People v. Buckhalter* (2001) 26 Cal.4th 20, 23, 30-31.)

Defendant also contends, and the People concede, he is entitled to 168 days of conduct credit (15 percent of 1,126 days spent in custody from July 29, 2001, to and including August 27, 2004, the initial judgment and sentencing date). (Pen. Code, §§ 2933.1, subd. (c), 667.5, subd. (c)(22), 12022.53).

---

[1] The error probably resulted from failing to recognize leap year days in 2004 and 2008.

We accept the People's concessions and will order the judgment modified to reflect the proper days of presentence custody credit.

III

Defendant contends, and the People concede, the jail booking and classification fees must be stricken from the abstract of judgment because the trial court expressly stated such fees would not be imposed. (Gov. Code, § 29550.2, subd. (a) [jail booking and classification fees need not be imposed if a defendant has no ability to pay them].) We accept the People's concession and will order said fees stricken from the abstract of judgment.

DISPOSITION

The judgment is modified to specify 2,743 days of actual custody credit and 168 days of conduct credit, for a total of 2,911 days of presentence custody credit. As modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect the modification and to strike the jail booking and classification fees erroneously included in the original abstract. The trial court is further directed to send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

SCOTLAND, P. J.

We concur:

SIMS, J.

ROBIE, J.