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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRONE MIGUEL ALLEN,

Defendant and Appellant.

A106411

(San Francisco County
Super. Ct. Nos. 158066 & 161194)

I.

INTRODUCTION

This appeal follows trial convictions in two criminal cases, case numbers 158066 (the 066 action) and 161194 (the 194 action), a partial reversal on appeal by this court, the granting of a petition for review by our Supreme Court which was later dismissed, the granting of a petition for habeas corpus by the United States District Court, and, finally, resentencing by the trial court.

Appellant Tyrone Miguel Allen now appeals from the resentencing, contending the trial court erred in: (1) failing to recognize and exercise its discretion to consider a new sentence that was less than the aggregate state prison term previously imposed; (2) imposing a new restitution fine that increased his sentence beyond that originally imposed; (3) imposing a sentence for receiving stolen property, a crime for which he could not be sentenced in light of his conviction for burglary relating to the same

property; and (4) failing to dismiss his kidnapping conviction, as required by the federal court which had granted his earlier habeas corpus petition.

Respondent essentially concedes all of these errors, and therefore we reverse and remand.

II.

DISCUSSION

We begin our review of appellant’s present appeal by reciting from our prior partially published opinion in *People v. Allen* (June 11, 1997, A072610) (*Allen I*) the procedural history leading up to that prior proceeding in this court:

“Appellant’s multiple convictions followed the consolidation and trial of two criminal informations filed by the San Francisco County District Attorney’s Office. The first information (No. 158066, sometimes referred to herein as the ‘066 action’) charged appellant with first degree burglary (Count I) and receiving stolen property (Count II). Also included were allegations that appellant suffered a qualifying prior conviction within the meaning of the Three Strikes law based upon a 1985 voluntary manslaughter conviction, and that appellant also suffered a prior prison term resulting from a 1992 receiving stolen property conviction.

“.....

“A subsequent information was filed by the district attorney on September 11, 1995, charging appellant with new crimes alleged to have been committed by him while released on his own recognizance (OR release). The new information included charges of carjacking (Count I), kidnapping during the commission of a carjacking (Count II), attempted kidnapping during commission of a carjacking (Count III), kidnapping (Count IV), second degree robbery (Count V), and auto theft (Count VI). This second information (No. 161194, sometimes referred to herein as the ‘194 action’) also included sentencing enhancement allegations that appellant suffered prior conviction of a serious felony, that appellant suffered a prior prison term following his 1992 conviction for receiving stolen property (also alleged as a sentencing enhancement in the 066 action), and new enhancements based on the allegation that appellant committed the crimes

charged in the 194 action while on OR release. Also included was the allegation of appellant's qualifying prior conviction in 1985 within the meaning of the Three Strikes law.

“Over the ensuing months there was considerable law and motion activity relating to the second information, the details of which are not pertinent to this appeal, with the exceptions that the trial court granted appellant's motion to dismiss Count II in the 194 action (kidnapping in the commission of a carjacking), and granted respondent's motion to consolidate the 066 and 194 actions. As a result of amendments, counts in the 194 action which were presented to the jury at the commencement of trial included carjacking (Count I), kidnapping of a victim under the age of 14 (Count IV), second degree robbery (Count V), and auto theft (Count IV). However, the counts contained in the 066 action remained unchanged. Similarly, the sentencing enhancements and qualifying prior conviction previously recounted in both informations were unchanged and bifurcated upon appellant's request.

“On November 9, 1995, the jury returned its verdict finding appellant guilty as charged on all remaining counts in the 066 and 194 actions. Following presentation of evidence relating to the bifurcated sentencing enhancements and qualifying prior conviction later that same day, the jury also found true each and all of the alleged enhancements.

“Thereafter, the trial court sentenced appellant to an aggregate state prison term of 19 years, 4 months in the 066 action, calculated as follows: The court selected the carjacking count in the 194 action as the base term, and imposed the midterm of 5 years for this count. That term was doubled to 10 years as a result of the prior manslaughter conviction, and a consecutive term of 2 years was added based upon the OR enhancement. Appellant was sentenced to 16 months for the burglary conviction, to which the court added a 5-year serious felony enhancement and a 1-year prior prison term enhancement.

“The trial court also sentenced appellant to a concurrent 8-year midterm for the kidnapping conviction in the 194 action, which was doubled to 16 years as a result of the

manslaughter conviction. Appellant was sentenced to a doubled 6-year term on the robbery conviction in the 194 action, which was also ordered to run concurrently. A doubled 4-year term was imposed for the auto theft conviction in the 194 action, and an 8-month term was imposed for the conviction of receiving stolen property count in the 066 action. To the counts on which appellant was convicted in the 194 action, other than the carjacking count, the court added a total of 3 years for the OR enhancements, and ordered all of this additional time to be served concurrently with the 19 years, 4 months imposed.” (*Allen I* at pp. 2-4.)¹

That appeal resulted in a partial reversal by which we reversed appellant’s conviction for receiving stolen property, in light of his conviction for burglary, in the 066 action, and remanded the case for resentencing in light of that reversal and in order to allow the trial court to exercise its discretion in deciding whether to strike the enhancements alleged as to appellant’s prior “serious felony” conviction in 1985 for voluntary manslaughter, and a one-year prior prison term enhancement. (*Allen I* at p. 22.)

Review was then granted by our Supreme Court on September 17, 1997, S062860, and on March 15, 2000, the Supreme Court dismissed the petition without further action.

Appellant then filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California, Case No. C01-1150 VRW (PR), which writ was granted, thereby resulting in the reversal of appellant’s conviction for kidnapping. The case was remanded to state court for resentencing.

At resentencing, the trial court again sentenced appellant to an aggregate state prison term of 16 years 4 months, calculated as follows: 5 years for appellant’s conviction for carjacking (194 action), doubled for a total of 10 years. To this 10-year term, the court added a consecutive term of 1 year 4 months for the burglary conviction in action 066, to which it added 5 years for the serious felony enhancement alleged and found true in that case. All other counts to which sentences were assigned were ordered

¹ While appellant’s first appeal was pending, the sentence was recalled because of a mathematical error discovered by the Department of Corrections, and recalculated to a total sentence of 16 years 4 months, instead of 19 years 4 months.

to be served concurrently. This resulted in a total aggregate state prison term of 16 years 4 months. In doing so, the court remarked as follows: “It’s my decision that—I am not exercising my discretion. Count 1 [carjacking] is the principal term because it is the longest possible term. I don’t believe that I have any jurisdiction or discretion to change that sentence. So Count 1 is the principal term. And he is sentenced to the midterm of five years, doubled to ten years because of the defendant’s prior strike conviction.” The court also added \$200 restitution fines in each of the cases for a total fine of \$400.

As noted earlier, appellant raises three allegations of sentencing error on this appeal. First, he contends the trial court failed to recognize and exercise its discretion to consider a new sentence that was less than the aggregate state prison term previously imposed. Secondly, he claims the court was not authorized to impose a new restitution fine that increased the fine beyond that originally imposed. Thirdly, although stayed, the court erred in imposing a sentence for receiving stolen property, a crime for which he could not be sentenced in light of his conviction for burglary relating to the same property. Lastly, he contends the trial court did not dismiss his kidnapping conviction, as required by the federal court which had granted his earlier habeas corpus petition.

The Attorney General in his respondent’s brief concedes each and every contention except the last, asserting instead that the reversed kidnapping conviction has already been dismissed below.

We agree with appellant, order that appellant’s sentence of April 26, 2004, be vacated, and remand this matter to the trial court for resentencing. In so doing, the trial court is directed to conduct a new sentencing hearing, to consider whether to exercise its discretion with regard to the imposition of a new sentence, and to support whatever sentence is imposed by a statement of reasons to the extent required to do so by law. A restitution fine not exceeding that imposed originally in this case may be imposed. Upon resentencing the trial court is also directed to issue an order, which shall be explicitly reflected in the court’s minutes, dismissing the reversed kidnapping count.

III.

DISPOSITION

Appellant's sentence is vacated, and the case is remanded to the trial court for resentencing consistent with this opinion.

Ruvolo, J.

We concur:

Kline, P.J.

Lambden, J.