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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.

ISMAEL TOVAR CARRANZA,

Defendant and Appellant.

A107949

(Contra Costa County
Super. Ct. No. 05-040321-2)

This appeal arises from a 1975 shooting at a Contra Costa County restaurant and a jury trial 28 years later, in which appellant Ismael Tovar Carranza was convicted of the first degree murder of his wife and the attempted murder of his wife’s sister. On appeal, he claims that his federal and state constitutional rights to a speedy trial were infringed. He also asserts several errors were made in his sentencing. We shall affirm the conviction, but remand the matter to the trial court to correct certain sentencing errors.

STATEMENT OF THE CASE

On February 27, 2004, the Contra Costa County District Attorney filed an information charging appellant with the September 1, 1975 murder of Rosemary Carranza (Pen. Code, §187–count one),¹ and the attempted murder of Linda Gutierrez (§§ 187/664–count two), accompanied by allegations that he used a personal firearm in each count (§ 12022.5, subd. (a)(1)).

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

Appellant filed a motion to dismiss the information on or about August 6, 2004, on the ground that the 28-year delay between the incident and trial amounted to a denial of the right to a speedy trial under the federal and state constitutions. The court denied the motion on August 17, 2004. On August 25, 2004, after a six-day trial, the jury found appellant guilty of first degree murder and attempted murder, and found the firearm allegations to be true. The trial court sentenced appellant on September 20, 2004, to an indeterminate life term on count one, with a consecutive term of five years for the firearm use enhancement to count one, and a concurrent term of not less than 20 years on count two, with a concurrent term of five years for the firearm use enhancement to count two. The court also imposed a \$2,400.00 restitution fine. Appellant received credit for 472 days served.

Appellant filed a notice of appeal on September 23, 2004.

STATEMENT OF THE FACTS

Appellant and Rosemary Carranza married in 1968 and, during their marriage, they had two daughters and a son. In 1975, however, they were in divorce proceedings. Appellant had abused Rosemary and, by August, they had lived apart for six months. About a month before the shooting, Rosemary's sister, Linda Gutierrez, heard appellant say of Rosemary, "If I can't have her, nobody can." Only one week before the shooting, custody of their three children was awarded to Rosemary. Appellant reacted angrily to the family court's ruling, shouting at the judge in English even though he had feigned not to know English. That weekend, he picked up his son for his visitation, but did not return him to Rosemary the following week.

On the evening of August 31, 1975, Rosemary, Linda, and their other sister Christine Rowell went out for a night of dancing. When they arrived in Antioch, they discovered the dance was at a different location, so they went to their cousin Irene's home for a beer instead. After an hour of talking and drinking, the three sisters headed home. None of them was drunk, but Christine was hungry, so they stopped for breakfast at Joe's Patio Restaurant in Brentwood. It was about 1:00 a.m. when the three women took a table in the restaurant. They ordered coffee, and Linda and Christine went to the

restroom in the bar area, which was separated from the restaurant by a wall and door. Christine lingered at the bar to cash a check.

During this time, appellant and his son had gone looking for Rosemary. The children's babysitter testified she was at Linda's house when appellant came looking for Rosemary. Appellant, however, testified that he went to his own house and spoke with a babysitter (not the one who testified) and then went to Rosemary's parents' house. Appellant did not find Rosemary and, according to his own testimony, he then went to Joe's Patio "to get some coffee" at around 1:00 a.m.

At the restaurant, Hector Martinez, a friend of Rosemary's brother, saw a Hispanic man peer through the window. The man—appellant—entered the restaurant three to five minutes later. The shooting began when Linda, who had just emerged from the bar area, made eye contact with appellant as he entered the restaurant. He shot her, and she fell to the ground. She heard more shooting, and when she looked up, saw appellant shoot her sister Rosemary four to five times. Another man, Gustavo Marquez, was also hit with a bullet. Appellant was still pointing a gun at Rosemary when Christine emerged from the bar area. Christine screamed at appellant, but he fled the restaurant. She tried to run after him but was restrained by Hector Martinez. Appellant drove away in a white Chevy pickup truck.

Rosemary was dead, but Linda was taken to the hospital. On the way, the ambulance driver heard Linda say, " 'My brother-in-law did it.' " The shooting left Linda paralyzed, confined to a wheelchair, and without the use of her kidneys or control of her bowels. Christine, Linda, and their mother did not see or hear from appellant or his son from the night of the shooting until the trial in 2004.

Appellant, however, testified at trial that he did not shoot anyone that night. He said he went to the restaurant and saw Rosemary dancing, but claimed that he saw people who "had knives in their hands, and they were going to come at me," so he quickly left. He left Contra Costa County that night with his son and went to a labor camp near Stockton, where he worked for a month or so before traveling to Mexico in September or

October of 1975. He asserted that he was not informed of his wife's death until a letter from her grandmother arrived in Mexico a month or two after he got there.

DISCUSSION

I. Right to a Speedy Trial

Based on the delay between the 1975 filing of a felony complaint and the 2004 trial, appellant asserts that his federal and state constitutional rights to a speedy trial were violated.

A. Trial Court Background

On September 2, 1975, the Contra Costa County District Attorney filed a felony complaint charging appellant with the murder of Rosemary Carranza, assault with a deadly weapon on Rosemary and her sister, Linda Gutierrez, and firearm use enhancements. The same day, an arrest warrant issued, but appellant had left Contra Costa County.

Appellant stayed briefly in Stockton, but went to Mexico in late 1975, and did not return to California until 1981. During the early 1980's, appellant went back and forth between the United States and Mexico, eventually settling in Dallas, Texas in 1984. In 1980, he was arrested in Iowa for speeding, but was released. In 1981, he went to Turlock, California for two weeks to look for work. In 1982, he went to Las Vegas, Nevada to look for work but, when he lost his travel money, he stayed in Oxnard, California for two to three weeks before going back to Mexico. In 1983, he picked apples in Malaga, Washington for several months before returning to Mexico. In 1984, appellant finally moved to Dallas where he purchased a house and worked under his own name, obtaining a Texas driver's license and eventually holding a job with the City of Dallas. He came to California in 1986 to close his son's bank account, but otherwise remained in Dallas. On a tip from a cousin in Mexico, appellant was arrested in Dallas, Texas on June 6, 2003, and was extradited to California in December of that year.

Appellant filed a motion to dismiss for prejudicial delay, which the trial court denied on February 2, 2004. Both the motion and the court's ruling focused solely on the

federal constitutional right to a speedy trial.² The court found that appellant had been a fugitive from justice for at least six years (when he was in Mexico from 1975 until 1981), and that state authorities had not been negligent in failing to apprehend him when he visited California for short periods of time, or in failing to find him in Texas. The court noted that appellant's claim was timely, but did not find enough prejudice to justify finding a violation: "Prejudice, I think the prejudice that's been discussed by the defendant is about what one would expect in a case of longevity. You know, I think I would have presumed that prejudice without hearing any evidence. We know memories change, people leave the area, people die, but I don't think the prejudice element is intended by the *Doggett* court or the *Barker* court to play a significant role unless everything else is even-Steven, and here it's not. Where someone has left to avoid suspicion or prosecution like this and left the jurisdiction, there'd have to be a greater degree of negligence before one looked to the prejudice elements. [¶] That's my take on the law, and for that reason, the motion's denied." Appellant was tried in August of 2004.

B. Legal Analysis

Appellant acknowledges that, in *People v. Martinez* (2000) 22 Cal.4th 750, 764 (*Martinez*), our Supreme Court held that, under California law, federal constitutional speedy trial rights do not attach merely upon the filing of a felony complaint. In *Martinez*, the court upheld a drunken driving conviction despite the passage of four years between the filing of the original felony complaint and trial. The defendant, who had not appeared for her first arraignment and was not rearrested for almost four years, could not claim a violation of the Sixth Amendment because, "[u]nder the high court's decision in [*United States v.*] *Marion* [(1971) 404 U.S. 307], the Sixth Amendment speedy trial guarantee begins to operate either on the filing of an indictment, information, 'or other

² The federal speedy trial right presumes prejudice from a long delay, but balances the prejudice against the justification for the delay, along with other factors. (See *Doggett v. United States* (1992) 505 U.S. 647, 651; *Barker v. Wingo* (1972) 407 U.S. 514, 530.)

formal charge,’ or when a suspect ‘has been arrested and held to answer.’ [Citation.]” (*Martinez*, at p. 761.) In California, a felony complaint is not a “formal accusation upon which a defendant may be brought to trial in the court with jurisdiction over prosecution of the offenses alleged,” and thus does not trigger federal Sixth Amendment speedy trial protections. (*Id.* at p. 764.)

Although appellant asserts that *Martinez* is wrong, we are bound by the opinion of our Supreme Court. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) In the present case, as only a felony complaint was filed against appellant in 1975, we cannot recognize a claim under the federal constitutional right to a speedy trial.

Appellant also contends that his state constitutional speedy trial rights, which *are* triggered by the filing of a felony complaint, were violated because the 28-year delay prevented him from calling certain witnesses, presenting a mental defense, and obtaining blood-alcohol evidence from Linda Gutierrez. We disagree.

The California Constitution guarantees that “[t]he defendant in a criminal cause has the right to a speedy public trial” (Cal. Const., art. I, § 15, cl. 1.) The filing of a felony complaint triggers this state constitutional speedy trial right, but “absent violation of a statutory speedy trial provision, a showing of specific prejudice is required to establish a violation of our state Constitution’s speedy trial right.” (*Martinez, supra*, 22 Cal.4th at p. 756.) The statutory speedy trial rights outlined in sections 1381 to 1389.8 are “ ‘supplementary to and a construction of’ the state constitutional speedy trial guarantee. [Citations.]” (*Martinez*, at p. 766.) Under section 1382, these rights attach only when a defendant is “held to answer.”³ In California, “ ‘the phrase “holding to answer” is generally accepted to refer in a technical sense . . . to the decision of a

³ Section 1382, subdivision (a), provides in relevant part that a court shall dismiss the action “[w]hen a person has been held to answer for a public offense and an information is not filed against that person within 15 days [¶] . . . [or] . . . when a defendant is not brought to trial within 60 days of the defendant’s arraignment on an indictment or information, or reinstatement of criminal proceedings [following an adjudication of competency to stand trial or following a mistrial].”

magistrate to bind a defendant over for trial following a preliminary hearing.’ ”
(*Martinez*, at p. 762 [distinguishing phrase’s technical meaning in California from looser meaning under federal speedy trial jurisprudence].)

In this case, appellant was never bound over after a preliminary hearing by a magistrate, and therefore his statutory speedy trial rights are not implicated. The only question then is whether the delay violated the broader protections of the state constitutional right.

“Because the state constitutional speedy trial right is self-executing and broader than its statutory implementation, a defendant may claim a violation of the state Constitution’s speedy trial right based on delay not covered by any statutory speedy trial provision. [Citation.] Thus, a defendant charged with a felony may predicate a claimed speedy trial violation on delay occurring after the filing of the complaint and before the defendant was held to answer the charge in superior court. In this situation, when the claimed speedy trial violation is not also a violation of any statutory speedy trial provision, this court has generally required the defendant to affirmatively demonstrate that the delay has prejudiced the ability to defend against the charge. [Citation.]”
(*Martinez, supra*, 22 Cal.4th at p. 766.) In this situation, “a court must weigh ‘the prejudicial effect of the delay on defendant against any justification for the delay.’ [Citations.] No presumption of prejudice arises from delay after the filing of the complaint and before arrest or formal accusation by indictment or information [citation]; rather, the defendant seeking dismissal must affirmatively demonstrate prejudice. [Citation.]” (*Id.* at pp. 766-767.)

“As the threshold question of whether a defendant has established prejudice occasioned by the delay is clearly a factual matter to be resolved by the trial court, its decision on that point will not be overturned by an appellate court if supported by substantial evidence.” (*Shleffar v. Superior Court* (1986) 178 Cal.App.3d 937, 945 (*Shleffar*), citing *People v. Hill* (1984) 37 Cal.3d 491, 499.) Moreover, “speculation about prejudice because potential witnesses’ memories have failed or because witnesses

and evidence are now unavailable is insufficient to discharge defendant's burden. [Citation.]" (*Shleffar*, at p. 946.)

In the present case, appellant argues five points of prejudice: (1) the third shooting victim, Gustavo Marquez, was not available at trial; (2) a witness to the shooting, Claudio Martinez, was deceased by the time of trial; (3) the forensic pathologist who performed the autopsy was not available to testify; (4) Linda Gutierrez's blood alcohol level on the night of the shooting was not available; and (5) the passage of time made a "mental defense" nearly impossible "because it would have been difficult to have a healthcare professional evaluate his mental state 28 years after the shooting."

The trial court found the prejudice was "about what one would expect in a case of longevity." As previously noted, however, the court appeared to be focusing on the federal constitutional standard of prejudice, and we do not interpret its ruling as a finding of actual prejudice under the California constitutional standard. Moreover, any finding of actual prejudice on the part of the trial court would not have been supported by substantial evidence. (See *Shleffar*, *supra*, 178 Cal.App.3d at p. 945.) That is because the alleged prejudice is based purely on speculation.

For example, appellant makes no suggestion that Gustavo Marquez or Claudio Martinez would have provided testimony that would make a difference to his defense. There was overwhelming testimony at trial—including that of Linda Gutierrez, Christine Roswell, and the ambulance driver—that appellant, who admitted being at the restaurant that night, had committed the offenses. In addition, appellant offers no reason why the testimony of the forensic pathologist would have made any difference; nor does he offer more than speculation regarding whether a blood alcohol test was ever performed on Linda Gutierrez, or how such a test would have made a difference to his defense.

Finally, appellant has not shown how he could have been prejudiced with respect to any alleged mental defense. Moreover, even if we assume from appellant's testimony about seeing people with blades threatening to attack him and that evidence of such a defense might have been available at the time of the offenses, appellant's flight and six-year absence from the United States was the true cause of any alleged prejudice in this

regard. (See *Martinez, supra*, 22 Cal.4th at pp. 766-767 [court must weigh prejudicial effect of delay on defendant against any justification for delay].)

Because appellant has not affirmatively demonstrated that the delay in prosecution prejudiced his ability to defend against the charges in this case, we find his speedy trial claim to be without merit. (See *Martinez, supra*, 22 Cal.4th at p. 766.)

II. *Concurrent Sentences on Counts One and Two and Enhancements*

Appellant contends that, under the law in effect when he committed the instant offenses, all other terms should have been concurrent to the indeterminate sentence of life in prison on count one. Specifically, he claims the trial court improperly sentenced him to a consecutive term on the gun use enhancement to count one. He also avers that the record does not clearly reflect that the term for the gun use enhancement to count two is to run concurrently to count one. According to appellant, the abstract of judgment should therefore be amended to reflect both that the sentences in counts one and two are to run concurrently, and that the terms for the enhancement to counts one and two are to run concurrent to the life sentence in count one. Respondent agrees.

At the sentencing hearing, the trial court specifically stated that the gun use enhancement in count two should run concurrent to count one. However, the abstract of judgment does not clearly reflect this sentence. Also at sentencing, the trial court enhanced the sentence of life in prison on count one by “the consecutive term of at least 5 years” for the weapon use.

In 1975, when these offenses occurred, the Indeterminate Sentence Law was in effect. (See Historical and Statutory Notes, 50C West’s Ann. Penal Code (2005 ed.) foll. § 1170, p. 158.) At that time, former section 12022.5 provided that the sentence for a firearm use enhancement “shall commence upon expiration or other termination of the sentence imposed for the crime of which he is convicted and shall not run concurrently with such sentence.” (See Deering’s California Penal Code, Appendix of Selected Penal Provisions of Other Codes Including Enactment Through the End of the Regular Session of the 1973-74 Legislature (1975 ed.), p. 594.) However, former section 3056 provided

that “[a] term of life imprisonment expires or terminates only upon death or pardon, and not upon parole.”

People v. Walker (1976) 18 Cal.3d 232, confronted this problem of statutory construction. Our Supreme Court explained: “section 12022.5 does not define a crime or offense; hence the term of imprisonment it provides does not merge or run concurrently with the life term as provided by section 669. [Citation.] Defendant would thereby be sentenced to life imprisonment *plus* a consecutive term of five years to life, providing a prison sentence theoretically extending beyond death. While there is no bar to the imposition of such a sentence one could never serve it. [Citation.]” (*Walker*, at p. 243, fn. omitted.) Construing section 12022.5 “ ‘as favorably to the defendant as its language and the circumstances of its application may reasonably permit,’ ” the court held that “a firearm-use finding pursuant to section 12022.5 can be given no effect in the case of a defendant sentenced to life imprisonment upon conviction of the basic crime in the perpetration of which he used the firearm.” (*Id.* pp. 243-244, fn. omitted.)

Accordingly, under the law in effect in 1975, the trial court should have ordered the term for the gun use enhancement to count one to run concurrent to the term for count one. Moreover, the abstract of judgment does not clearly reflect the court’s order that the term for the gun use enhancement to count two was to run concurrent to the term for count one. For these reasons, we shall order the trial court to amend the abstract of judgment to rectify these errors and ambiguities.

III. *Presentence Conduct Credits*

Appellant contends the matter must be remanded because the trial court erroneously failed to award him the presentence conduct credits to which he was entitled under the law in effect at the time the offense was committed. Respondent counters that appellant agreed at sentencing that the trial court did not have to compute the conduct credits, but instead left it to the Board of Prison Terms, and because appellant has not presented any evidence that the Board of Prison Terms did not calculate any such credits owed, there is no need for a remand.

At the sentencing hearing, after awarding appellant 472 days of custody credit, the court stated: “As to any other credit, work time or good time, I believe under the indeterminate sentencing that applies here for the 1975 period of time for the crime the—formerly the Adult Authority, now known as the Board of Prison Terms, would make all those calculations and the Department of Corrections will provide information to them, and I don’t believe that there’s any determination that needs to be made by this court as to good time; it’s just a calculation.” Defense counsel responded, “I believe that’s correct, your Honor,” and the prosecutor “[s]ubmitted” the matter. After imposing sentence, the court stated: “As I previously indicated on the record, I calculate the credit for time served as 472 days, and I leave to the Department of Corrections any further calculations that are necessary.”

Based on this record, we find that appellant agreed at sentencing that the Board of Prison Terms would calculate any conduct credits. Appellant has not provided us with a sufficient record to determine whether the Board of Prison Terms has or has not awarded appellant conduct credits.⁴ Accordingly, we will not remand the matter to the trial court on this issue.

IV. *Restitution Order*

At sentencing, the trial court imposed a \$2,400 restitution fine, pursuant to section 1202.4. Appellant contends this fine must be stricken because section 1202.4 was not in effect in 1975. Respondent agrees.

Section 1202.4 “did not affect the rights of individuals until January 1, 1984, the operative date of the act and cannot retroactively be applied to any offense occurring

⁴ We also observe that there is some question whether appellant is even entitled to conduct credits under the Indeterminate Sentence Law, which was in effect when he committed the offenses (though *not* when he was in pre-trial custody). (See *People v. Sage* (1980) 26 Cal.3d 498, 509, fn. 7 [“felons sentenced to prison terms under the Indeterminate Sentence Law after January 1, 1948, were not entitled to credits The right of prison inmates to earn conduct credits was restored as part of the determinate sentence law, operative July 1, 1977, and persons then in prison could earn conduct credits only from and after that date”].)

before that date.” (*People v. Palomar* (1985) 171 Cal.App.3d 131, 136; accord, *People v. Vega-Hernandez* (1986) 179 Cal.App.3d 1084, 1090-1091 & fn. 10.)

Because appellant, who committed his offenses in 1975, was not subject to the provisions of section 1202.4, we shall strike the restitution order.

DISPOSITION

The restitution order is stricken and the matter is remanded to the trial court with directions to prepare an amended abstract of judgment that omits the restitution order, and that reflects the terms for the gun use enhancement to counts one and two are to run concurrent to the term on count one, and to serve a certified copy of the amended abstract of judgment on the California Department of Corrections. In all other respects, the judgment is affirmed.

Kline, P.J.

We concur:

Lambden, J.

Richman, J.