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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES WILLIAMS,

Defendant and Appellant.

E080369

(Super.Ct.No. FSB030957)

OPINION

APPEAL from the Superior Court of San Bernardino County. Alexander R. Martinez, Judge. Reversed with directions.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Charles C. Ragland, Assistant Attorney General, and Arlene A. Sevidal, Warren Williams, and Jon S. Tangonan, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In this appeal, defendant James Williams contends the trial court erred in failing to appoint counsel and in denying defendant a full resentencing hearing under Penal Code section 1172.75¹. We agree and reverse.

PROCEDURAL BACKGROUND

In 2002, a jury convicted defendant of second degree robbery (Pen. Code, § 211), vehicle theft (Vehicle Code, § 10851 subd. (a)), and evading a peace officer in a vehicle with disregard for safety (Vehicle Code, § 2800.2, subd. (a)). The jury found true as to the robbery count that a principal was personally armed with a firearm (Pen. Code, § 12022, subd. (d).) The jury also found true that defendant had two “strike” priors (Pen. Code, § 1170.12, subd. (a)-(d)) and a prison term prior (Pen. Code, § 667.5 subd. (b)). At sentencing, the trial court heard and denied defendant’s motion to dismiss one of his strike priors. The trial court then imposed the indeterminate sentence of 25 years to life on counts 1, 2, 3, running count 2’s sentence consecutive to count 1, but running count 3’s sentence concurrent to count 1, for a total sentence of 50 years to life. The trial court imposed a sentence of one year for defendant’s Penal Code section 12022, subdivision (d), enhancement and one year for his Penal Code section 667.5, subdivision (b), prior. The trial court ran both one-year sentences concurrent to the sentence in count 1.

¹ All further unlabeled statutory references are to the Penal Code.

In 2003, the trial court received correspondence from the Department of Corrections and Rehabilitation (CDCR) indicating that defendant's section 12022, subdivision (d), and section 667.5, subdivision (b), enhancements cannot be run concurrent, but can be stayed or stricken. In response, the trial court stayed defendant's section 12022, subdivision (d), and section 667.5, subdivision (b), enhancements.

Defendant appealed his conviction, and in 2006, this court remanded, requesting that the trial court stay the terms for the vehicle theft and evading police convictions pursuant to section 654, and to reconsider the entire sentence. At the resentencing, the trial court sentenced defendant to the indeterminate term of 25 years to life on count 1, stayed the sentences for counts 2 and 3, and, as it did at the original sentencing in 2002, imposed the two one-year enhancements (including for the prison prior) concurrently with the term for count 1.

On March 18, 2022, pursuant to correspondence received from the CDCR pointing out that defendant's section 12022, subdivision (d), enhancement was still being improperly run concurrent rather than consecutive to the indeterminate 25-year term, the trial court exercised its discretion under sections 12022, subdivision (f), and 1385, and struck the enhancement. Neither party appeared. Defendant's section 667.5, subdivision (b), prior was not addressed at this hearing and remained on the amended abstract of judgment filed by the trial court on April 4, 2022.

On June 27, 2022, the trial court received additional correspondence from the CDCR pointing out that defendant's section 667.5, subdivision (b), prior was still being

run concurrent rather than consecutive as required by statute. The correspondence also raised a concern regarding the computation of defendant's credits.

On June 28, 2022, defendant filed a motion for recall of sentence pursuant to section 1171.1². The trial court held a hearing on July 7, 2022, at which it considered the correspondence from the CDCR. As at the previous hearing, neither party appeared. The trial court struck defendant's section 667.5, subdivision (b), prior. In doing so, the trial court noted that the enhancement was now legally invalid under section 1172.75. The trial court ordered an amended abstract be prepared to reflect the trial court's order. A new abstract of judgment was filed on August 1, 2022. On August 1, 2022, defendant filed an opposition to the CDCR's letter dated June 10, 2022. In defendant's opposition, he specifically cites his request for relief under section 1172.75. On August 17, 2022, in a minute order, the trial court indicated it had read and considered defendant's August 1, 2022, correspondence and denied defendant's request.

On September 2, 2022, defendant filed a second motion requesting resentencing and modification of sentence pursuant to section 1172.75. In his motion, defendant specifically requests the trial court consider post-conviction factors as articulated in section 1172.75 subdivision (d)(3). In exhibit "E" of defendant's motion, he attaches 42 pages of documents related to activities post-conviction.

² Senate Bill No. 483 added section 1171.1 to the Penal Code (Stats. 2021, ch. 728), which was subsequently renumbered without substantive change as section 1172.75. (Stats 2022, ch. 58, §12, eff. June 30, 2022.) Although in the record, the parties and trial court reference section 1171.1, for clarity, this court will cite section 1172.75 throughout the opinion.

On November 2, 2022, defendant appeared for a resentencing hearing³. A public defender was present at the start of the hearing, but noted he was unaware if the public defender had been appointed. The public defender ultimately left the courtroom in the middle of the hearing, noting, “[c]oncerning, Mr. Williams, he is representing himself. I’m being called to S2.” The public defender made no statements on behalf of defendant during the hearing. The record is silent as to whether defendant signed a *Faretta*⁴ waiver. As such, we presume he did not.

At the hearing, the trial court noted that it had previously “deleted” defendant’s section 667.5, subdivision (b), prior stating, “[t]hat issue is no longer before us.” Defendant requested the trial court resentence him pursuant to section 1172.75; applying any new applicable laws or discretion afforded the trial court since his sentence was imposed. Defendant also requested the trial court readdress defendant’s motion to dismiss his strike prior. The trial court denied defendant’s requests stating the trial court had done everything it was required to do.

Defendant timely filed a notice of appeal on December 14, 2022.

SUMMARY OF FACTS

We omit a summary of the facts underlying defendant’s conviction because they are not relevant to the issue raised on appeal.

³ The record is unclear whether defendant’s motion triggered the setting of a resentencing hearing or the CDCR identified defendant as eligible for section 1172.75 relief and forwarded this information to the trial court. However, the triggering event is irrelevant to this court’s decision.

⁴ *Faretta v. California* (1975) 422 U.S. 806.

DISCUSSION

Senate Bill No. 483 added section 1171.1 to the Penal Code (Stats. 2021, ch. 728), which was subsequently renumbered without substantive change as section 1172.75. (Stats 2022, ch. 58, § 12, eff. June 30, 2022.) Section 1172.75, subdivision (a), states that “[a]ny sentence enhancement that was imposed prior to January 1, 2020, pursuant to subdivision (b) of Section 667.5, except for any enhancement imposed for a prior conviction for a sexually violent offense . . . is legally invalid.” (§ 1172.75, subd. (a).)

Section 1172.75, subdivision (b), instructs the CDCR to identify those persons in their custody currently serving a term for a judgment that includes an enhancement under section 667.5, subdivision (b), (excluding sexually violent offenses) and provide such information to the sentencing court that imposed the enhancement. (§ 1172.5, subd. (b).) Subsequently, the sentencing court “shall review the judgment and verify that the current judgment includes a sentencing enhancement described in subdivision (a).” (§ 1172.5, subd. (c).) “If the court determines that the current judgment includes an enhancement described in subdivision (a), the court shall recall the sentence and resentence the defendant.” (§ 1172.5, subd. (c).)

Section 1172.75 sets out specific instructions for resentencing. (§ 1172.5, subd. (d)(1)-(5).) Of relevance are subdivisions (d)(2), (d)(3), and (d)(5). Subdivision (d)(2) requires the trial court to “apply the sentencing rules of the Judicial Council and apply any other changes in law that reduce sentences or provide for judicial discretion so as to eliminate disparity of sentences and to promote uniformity of

sentencing.” (§ 1172.5, subd. (d)(2).) In providing the trial court guidance, subdivision (d)(3) provides, “[t]he court may consider postconviction factors, including, but not limited to, the disciplinary record and record of rehabilitation of the defendant while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the defendant’s risk for future violence, and evidence that reflects that circumstances have changed since the original sentencing so that continued incarceration is no longer in the interest of justice.” (§ 1172.5, subd. (d)(3).) Section 1172.75, subdivision (d)(5), requires, “[t]he court shall appoint counsel.” (§ 1172.75, subd. (d)(5).)

“By its plain terms, section 1172.75 requires a full resentencing, not merely that the trial court strike the newly ‘invalid’ enhancements.” (*People v. Monroe* (2022) 85 Cal.App.5th 393, 402 (*Monroe*); see *People v. Buycks* (2018) 5 Cal.5th 857, 893 [“when 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’ ”].)

Here, as argued by defendant, and conceded by the People, defendant is entitled to counsel and a full resentencing hearing pursuant to section 1172.75, subdivisions (c) and (d)(1)-(5). On August 29, 2006, the trial court resentenced defendant following the issuance of a remittitur. At the resentencing, the trial court sentenced defendant to the indeterminate term of 25 years to life on count 1. The trial court imposed and executed the sentence on all remaining counts, allegations, and priors, including defendant’s

section 667.5, subdivision (b), prior and ordered the respective sentences run concurrent to the sentence imposed in count 1.⁵

The abstract of judgement, filed on September 7, 2006, demonstrates defendant is a qualifying inmate under section 1172.75, subdivision (b). (§ 1172.5, subd. (b).) Further, acting in propria persona, defendant filed two motions requesting resentencing pursuant to section 1172.75. The trial court also recognized defendant's eligibility when it struck defendant's section 667.5, subdivision (b), prior on July 7, 2022, citing section 1172.75. Section 1172.75 does not allow for the trial court to unilaterally strike invalid enhancements that were imposed and executed and deny defendant a full resentencing hearing. (*Monroe, supra*, 85 Cal.App.5th at p. 402.) Instead, section 1172.75 requires the trial court to appoint counsel and entitles defendant to a full resentencing hearing where the trial court "shall apply the sentencing rules of the Judicial Council and apply any other changes in law that reduce sentences or provide for judicial discretion so as to eliminate disparity of sentences and to promote uniformity of sentencing." (§ 1172.5, subds. (d)(2), (d)(5).) Thus, the trial court erred in believing that striking the section 667.5, subdivision (b), prior fulfilled the trial court's obligations under section 1172.75.

⁵ On August 29, 2006, the trial court erred in running defendant's section 667.5, subdivision (b), prior concurrent instead of consecutive to his sentence in count 1 as required under section 667.5 subdivision (b). Given the potential prejudice this error could impart on defendant, we treat defendant's section 667.5, subdivision (b), prior as if the trial court had imposed and executed the sentence to run consecutive to count 1 as legally required.

DISPOSITION

The trial court's denial of defendant's request for a full resentencing hearing under section 1172.75 is reversed. The trial court is directed to appoint counsel for defendant and conduct a resentencing hearing pursuant to section 1172.75.

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McKINSTER
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.