In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MAO HIN,

Defendant and Appellant.

CAPITAL CASE

Case No. S141519

San Joaquin County Superior Court Case No. SF090168B
The Honorable Bernard J. Garber, Judge

SECOND SUPPLEMENTAL RESPONDENT'S BRIEF

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SUPPLEMENTAL STATEMENT OF THE CASE

As previously discussed in the original briefing, a jury convicted appellant of special-circumstance murder (count 1) and returned a verdict of death. (4 CT 1108-1114.) The jury also convicted appellant of several other offenses including, inter alia, two counts of robbery (counts 2 and 4) and five counts of attempted murder (counts 5 through 9). (4 CT 1115-1133.) And, as relevant here, the jury found to be true sentencing allegations under Penal Code section 12022.53, subdivisions (d) and (e) that each of the attempted murders had been gang related and that a principal had caused great bodily injury by personally and intentionally discharging a firearm.[1] (*Ibid*.)

After the trial court sentenced appellant to death for the special-circumstance murder, it imposed a lengthy prison sentence for the remaining offenses. In particular, the court sentenced appellant to the upper term of five years in prison for the robbery in count 4 and to consecutive terms of life in prison for each of the attempted premeditated murders in counts 5 through 9. (20 RT 5906-5908.) And the court imposed additional and consecutive terms of 25 years to life in prison under section 12022.53, subdivisions (d) and (e) on each of the attempted murders in counts 5 through 9. (*Ibid*.) The court also stayed execution of an upper-term sentence of five years for the robbery in count 2. (*Ibid*.)

[1] Subsequent statutory citations are to the Penal Code.

ARGUMENT

I. ALTHOUGH A RECENT REVISION OF SECTION 12022.53 APPLIES RETROACTIVELY, IT DOES NOT WARRANT REMAND FOR A NEW HEARING IN THIS PARTICULAR CASE

In his second supplemental opening brief, appellant asks this Court to remand the case so that the trial court may consider its newly conferred discretion to dismiss the additional prison terms that it had imposed under section 12022.53, subdivisions (d) and (e). This Court should deny appellant's request because the totality of the trial court's comments and other sentencing choices clearly indicate that it would decline to reduce his sentence.

A. The Recent Revision of Section 12022.53 Applies Retroactively to the Present Case

Section 12022.53 prescribes a series of sentencing enhancements related to the personal or gang-related use of a firearm in the commission of certain felonies. (§ 12022.53, subds. (b)-(e); see *People v. Garcia* (2002) 28 Cal.4th 1166, 1171.) As originally enacted, the statute provided that a court "shall not strike an allegation under this section or a finding bringing a person within the provisions of this sections." (§ 12022.53, former subd. (h); Stats. 1997, ch. 503, § 3.) But, long after the trial court imposed judgment in the present case, the Legislature revised the statute to provide that a court "may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (Stats. 2017, ch. 682, § 2.) The revision went into effect on January 1, 2018. (*People v. McDaniels* (2018) 22 Cal.App.5th 420; *People v. Chavez* (2018) 22 Cal.App.5th 663; see *People v. Camba* (1996) 50 Cal.App.4th 857, 865-866.)

The People do not dispute that the revision of section 12022.53 applies retroactively to cases that were not final as of the revision's

effective date. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679; see also *People v. Francis* (1969) 71 Cal.2d 66, 75-76; see generally *In re Estrada* (1966) 63 Cal.2d 740.) And the People do not dispute that the present case was not final when the revision went into effect. (See *People v. McDaniels*, *supra*, 22 Cal.App.5th at pp. 424-425.) As a result, the People do not dispute that the revision applies retroactively to the present case.

B. Remand Is Not Appropriate Because the Trial Court Clearly Indicated Through Its Comments and Other Sentencing Choices That It Would Decline to Dismiss the Firearm Enhancements

Although the revision of section 12022.53 applies retroactively, it does not require a new hearing in every instance. In particular, it does not require a new hearing if the trial court clearly indicated that it would decline to dismiss the firearm enhancements. (See *People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 425.) And, since the totality of the trial court's comments and other sentencing choices in the present case clearly indicate that it would decline to reduce appellant's sentence by dismissing the firearm enhancements, there is no need to remand the case for a new hearing.

This Court addressed a similar situation following the enactment of the Three Strikes law. Many trial courts initially believed that they did not have discretion under section 1385 to dismiss a prior-conviction allegation under the Three Strikes law unless the prosecution concurred. (See *People v. Fuhrman* (1997) 16 Cal.4th 930, 944-945.) This Court disabused the trial courts of such a belief in *People v. Superior Court* (*Romero*) 13 Cal.4th 497. But this Court noted that, even if a trial court had mistakenly believed that it lacked discretion, a new hearing would not be necessary on collateral review if "the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to

strike the allegations." (*Romero*, *supra*, at p. 530, fn. 13.) This Court subsequently observed that the same rule applies on direct appeal such that "remand is not required where the trial court's comments indicate that even if it had authority to strike a prior felony conviction allegation, it would decline to do so." (*Fuhrman*, *supra*, 16 Cal.4th at p. 944.)

Reviewing courts have considered a variety of circumstances in determining whether a sentencing court had clearly indicated that it would not dismiss a prior-conviction allegation under *Romero*. For example, in *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, the reviewing court considered the fact that the trial court's other sentencing choices had increased the defendant's aggregate prison term "beyond what it believed was required by the Three Strikes law." (*Id*. at p. 1896.) In *People v. Askey* (1996) 49 Cal.App.4th 381, the reviewing court considered the fact that, although the trial court had described the defendant's sentence as being "severe," it had also had described his prior convictions as having been for "overwhelmingly serious offenses" that had involved "different times, different places, [and] different victims." (*Id*. at pp. 385, 389.) And, in *People v. DeGuzman* (1996) 49 Cal.App.4th 1049, the review court considered the defendant's criminal history and the fact that there was "no hint in this record that the trial court ever entertained the slightest thought of leniency." (*Id*. at pp. 1054-1055.)

Consistent with the foregoing, the appellate court in *People v. McDaniels*, *supra*, 22 Cal.App.5th 420 recently observed that the retroactive revision of section 12022.53 would not warrant a new hearing if "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*Id*. at p. 425.) Applying that standard, the appellate court found that there was not a clear indication as to how the trial court would exercise its new discretion. For example, the trial court had

"expressed no intent to impose the maximum sentence." (*Id*. at p. 428.) "To the contrary, it imposed the midterm for being a felon in possession of a firearm, and it ran that term concurrently to the term for the murder. It also struck '[i]n the interest of justice' four prior convictions it had found true." (*Ibid*.)

Similarly, in *People v. Chavez*, *supra*, 22 Cal.App.5th 663, the appellate court found that remand was necessary because "the record does not clearly indicate the trial court would have declined to strike or dismiss the section 12022.53, subdivision (h) [*sic*] firearm enhancement if it had the discretion to do so at the time of Gonzalez's sentencing." (*Id*. at p. 713.) Indeed, the trial court "did not impose on Gonzalez the maximum sentence possible and, in particular, imposed a lower two-year term for his count 2 conviction for assault with a deadly weapon." (*Id*. at p. 714.) And the trial court did not make "any other statement clearly indicating that it would not have exercised discretion to strike or dismiss the section 12022.53, subdivision (h) [*sic*] enhancement even if it had the discretion to do so at the time of Gonzalez's sentencing." (*Ibid*.)

Here, unlike in *McDaniels* and *Chavez*, a new hearing is unwarranted because the trial court clearly indicated through the totality of its comments and other sentencing choices that it would decline to reduce appellant's sentence by dismissing the firearm enhancements. The court described the special-circumstance murder as being "cold" and "vicious." (20 RT 5891.) The court agreed with the jury that "the aggravating circumstances are so substantial in comparison with the mitigating circumstances, that it warrants death instead of life without parole." (20 RT 5892.) As to the attempted murders, the court described them as being "reprehensible offenses" in which appellant "was acting on defenseless and unarmed victims." (20 RT 5892.) And the court observed that it had "never seen a case with so many bullets fired." (20 RT 5903.)

Consistent with its comments, the court exercised its extant discretion to increase appellant's aggregate prison term far beyond what had been mandated under the former version of section 12022.53 in effect at the time of sentencing. For example, the court effectively quintupled appellant's aggregate prison term by choosing to impose consecutive rather than concurrent sentences for each of the attempted murders in counts 5 through 9. (20 RT 5906-5908; see § 669.) The court further increased appellant's prison sentence by selecting the upper term rather than the middle or lower terms for the robberies in counts 2 and 4. (20 RT 5905; see § 1170.) And, although the trial court was not actually authorized to impose the additional restrictions on parole eligibility in counts 5 through 9 under section 186.22, subdivision (c)(5), the court chose to add them to the additional terms under section 12022.53 instead of exercising its extant discretion to dismiss them in the interests of justice. (20 RT 5906-5908; see § 186.22, subd. (g) [permitting dismissal of section 186.22 enhancements in the interests of justice].) Indeed, the trial court chose to impose the maximum possible sentence on appellant, and it did not show any signs of leniency whatsoever.

Appellant nonetheless suggests that the trial court's comments and sentencing choices do not preclude the possibility that the court would chose to exercise leniency on remand by dismissing the firearm enhancements based on several supposedly mitigating factors. He points in particular to evidence that he had not been the actual shooter on Bedlow Drive and that he supposedly "did not initiate the incident or know that Kak was armed prior to the shooting." (SSOB 11-14.) He also refers to his "age and minimal prior offenses." (SSOB 14.) But the trial court was well aware of each and every one of these factors when it chose to impose the maximum possible sentence, which was far beyond what had been required

under section 12022.53. (See 20 RT 5899-5904.) There is no reason to doubt that the court would do the same on remand.

As a result, a new hearing is unnecessary because the trial court clearly indicated through the totality of its comments and other sentencing choices that it would decline to reduce appellant's prison sentence by dismissing the firearm enhancements.[2]

[2] In the event that this Court finds that the trial court did not clearly indicate how it would exercise its discretion, this Court could obviate the need to remand the case for a new hearing by modifying the judgment to reflect the dismissal of the additional punishments under section 12022.53. (See *People v. Boyce* (2014) 59 Cal.4th 672, 729-730; *People v. Banks* (2014) 59 Cal.4th 1113, 1154-1155, abrogated on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.) Indeed, the additional punishments serve no practical purpose so long as appellant remains sentenced to death. (See *Boyce*, *supra*, at p. 730; *People v. Cleveland* (2004) 32 Cal.4th 704, 770 (conc. opn. of Chin, J.).) Such a modification would be without prejudice to the trial court reconsidering its sentencing options and re-imposing the additional punishment in the unlikely event that appellant is relieved from the judgment of death. (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1256 ["trial courts are, and should be, afforded discretion by rule and statute to reconsider an entire sentencing structure in multi-count cases where a portion of the original verdict and resulting sentence has been vacated by a higher court"]; *People v. Hill* (1986) 185 Cal.App.3d 831, 834 [observing that "an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components"].)

CONCLUSION

The People respectfully ask this Court to deny appellant's request for a remand. The judgment should be affirmed.

Dated: June 1, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached SECOND SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 2,139 words.

Dated: June 1, 2018

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 1, 2018, at Sacramento, California.

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