

No. S138052 - CAPITAL CASE

In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

TUPOUTOE MATAELE,
Defendant and Appellant.

Orange County Superior Court, Case No. 00NF1347
The Honorable James A. Stotler, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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INTRODUCTION

Appellant Tupoutoe Mataele's sentence included a four-year term for a weapon use enhancement and a five-year term for a serious felony prior enhancement. Since being sentenced in 2005, these enhancements have been amended and are now discretionary. Although these ameliorative changes apply retroactively, remand is not necessary because the trial court would not exercise its discretion and dismiss the enhancements.

ARGUMENT

THE AMENDMENTS MADE BY SENATE BILL NO. 620 AND SENATE BILL NO. 1393 APPLY RETROACTIVELY TO APPELLANT; REMAND IS UNNECESSARY BECAUSE THE COURT INDICATED INTENT NOT TO STRIKE THE ENHANCEMENTS

Mataele's sentence includes a firearm enhancement of four years imposed under Penal Code¹, section 12022.5, subdivision (a), and a serious felony prior enhancement of five years imposed under section 667, subdivision (a). Mataele requests a remand so the trial court may consider exercising its discretion granted by recent legislation to strike the enhancements. (Supp. AOB 8-12.) Mataele's request should be denied because the trial court's statements indicate that it would decline to reduce his sentence, so any such remand would be futile.

A. Sentencing

Mataele was convicted by jury of murder by means of lying in wait (§§ 187, subd. (a) & 190.2, subd. (a)(15) (count 1)), conspiracy to commit murder (§§ 182, subd. (1) & 187, subd. (a)

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

(count 2)), and willful, deliberate and premeditated attempted murder (§§ 664/187, subd. (a) & 664, subd. (a) (count 3)). The jury further found true that Mataele was personally armed with a firearm in the commission of all three counts (§12022.5, subd. (a)). (5 CT 1379-1386.) In a bifurcated hearing, the trial court found true Mataele's prior strike conviction (§§ 667, subds. (d) & (e)(1), & 1170, subds. (b) & (c)(1)), and prior serious felony conviction (§§ 667, subd. (a)(1) & 1192.7, subd. (c)). (6 CT 1443.)

On October 7, 2005, the trial court sentenced Mataele to death for murder with special circumstances (count 1). The court imposed and stayed 50 years to life for conspiracy, plus five years for the serious felony prior, and four years for the firearm allegation (count 2). It also imposed a life term for attempted murder, plus five years for the serious felony prior, and four years for the firearm use allegation (count 3). (42 RT 9426-9429.)

The trial court explained its reasoning with a tentative sentence:

Having read and considered the probation report, and denied the motion for modification, the court intends to impose the sentence of death in count 1.

And on count 2, in light of the strike, my intent, this is just tentative, folks, is to impose a sentence of 50 years to life. It is 25 to life, doubled because of the strike. And add a consecutive midterm four-year sentence because of the weapon allegation, that is the 12022.5 allegation. And add another five years because of the serious felony prior.

So the way I calculate count 2 would be a life sentence with a minimum term of 59 years, 50 for the conspiracy to commit murder, four for the weapon

allegation, midterm, and five for the serious prior felony.

And my intent would be to stay that sentence under 654 of the Penal Code.

And as to count 3, my tentative is to impose a life sentence plus a determinate term. And I think I have this right, I am now just starting to cogitate on this, I am not sure I can give another five years on that serious felony prior, so, [Prosecutor], you might want to proffer some instruction on that.

And I also think since I have stayed the sentence on count 2, I think if I have stayed the sentence on count 2, I can impose four years plus five. So my tentative would be to impose a life term on count 3, with an additional term of four years for the weapons use, and five years for the serious felony prior.

And that sentence would be consecutive to any other sentence as the life term on count 3. And the reason, of course, for the consecutive sentence is due to the egregious nature of the circumstances of this case.

And there are two separate victims, we have Danell Johnson, the subject of count 1, the victim of count 1, and we have John Masubayashi, the victim of count 3. So we have separate victims. Separate shots fired. Multiple attempts to kill Masubayashi.

(42 RT 9405-9407.)

The trial court invited argument from the attorneys. The prosecutor responded:

I do think, with regard to the invited comment on the 677(a) on count 3, I do think that's appropriate, particularly where you have multiple counts, and it has been imposed on say count 1 or count 2 with one victim, and you have a completely different and separate victim on count 3, I do think it is appropriate to impose it on both counts.

(42 RT 9407.)

The trial court responded:

All right. And since I am staying count 2 altogether pursuant to 654 of the Penal Code, then I think we can impose the four plus the five on count 3. That would be a life sentence with a - - that is a determinate term of nine years consecutive, and that's my intent.

(42 RT 9407-9408.)

B. Senate Bill No. 620 and Senate Bill No. 1393 changed existing law to give courts discretion to strike enhancements, and the changes apply retroactively

Under the law in effect at the time of Mataele's sentencing on October 13, 2005, trial courts had no authority to strike a weapon use enhancement or a prior serious felony conviction enhancement.

In 2017, the Legislature enacted Senate Bill No. 620 (2017–2018 Reg. Sess.) (Stats. 2017, ch. 682, § 2, pp. 5104–5106) (Senate Bill No. 620), which amended sections 12022.5 and 12022.53 to provide that “[t]he court may, in the interest of justice pursuant to [s]ection 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (§ 12022.5, subd. (c); accord, § 12022.53, subd. (h); see *People v. Tirado* (2022) 12 Cal.5th 688.)

Shortly thereafter, in 2018, the Legislature enacted Senate Bill No. 1393 (2017–2018 Reg. Sess.) (Stats. 2018, ch. 1013) (Senate Bill No. 1393), which amended section 1385 to delete a provision barring the trial court from “strik[ing] any prior

conviction of a serious felony for purpose of enhancement of a sentence under Section 667.” (Former § 1385, subd. (b).) The effect of these laws was to give the trial court discretion to strike serious felony and firearm enhancements that had previously been mandatory. (See *People v. Johnson* (2019) 32 Cal.App.5th 26, 67-68.)

This Court has concluded that Senate Bill No. 1393 is an ameliorative change in sentencing law that applies retroactively to defendants whose judgments were not final. (*People v. Stamps* (2020) 9 Cal.5th 685, 699; *People v. Bell* (2020) 47 Cal.App.5th 153, 198.) Senate Bill 620 too has been found by courts to apply retroactively. (*People v. Robbins* (2018) 19 Cal.App.5th 660, 679; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) These changes apply retroactively to Mataele’s judgment of conviction, which was not final when the legislation became effective. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973 [judgment is final when the time has passed for petitioning for writ of certiorari in the U.S. Supreme Court].)

C. Remand is unnecessary

Notwithstanding the retroactive effect of Senate Bill 620 and Senate Bill 1393, remand to permit the court to exercise its discretion is not required 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 [the] . . . enhancement’ even if it had the discretion.” (*People v. Jones* (2019) 32 Cal.App.5th 267, 272-273 (*Jones*) quoting *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; see *People v. Gutierrez* (2014) 58

Cal.4th 1354, 1391.) To obviate the need for remand, it is not necessary that the trial court specifically stated at sentencing that it would not strike the enhancement even if it had the power to do so. (*Jones*, at p. 273.) In determining whether remand is necessary, this Court's task is to review the trial court's statements and sentencing decisions to infer what the court's intent would have been if it had the discretion to strike the enhancement. (See *id.* at pp. 273-275 [remand under Senate Bill No. 1393 not required in light of trial court's statements about the nature of defendant's current crimes and the facts of his felony prior, the court's expression of satisfaction in imposing a lengthy sentence, and the court's imposition of an upper-term sentence]; see also *People v. McVey* (2018) 24 Cal.App.5th 405, 419 [remand for trial court to consider whether to strike firearm enhancement under Senate Bill No. 620 unnecessary given trial court's findings on factors in aggravation and mitigation, its pointed comments on the record, and its choice of the highest possible term for the firearm enhancement].)

Here, remand for resentencing is unwarranted because the trial court's statements and sentencing choices indicate that it would not have exercised its discretion and dismissed the prior serious felony enhancement or the weapons use enhancement. The trial court made clear that it intended to impose the enhancements on count 3 based on the nature of the crimes and because it was imposing count 2 concurrent.

First, the court inquired with counsel if it could impose the enhancements on count 3. (42 RT 9406 ["I am not sure I can give

another five years on that serious felony prior, so, [Prosecutor], you might want to proffer some instruction on that.”].) The fact that the court sought confirmation of its discretion shows the desire that the enhancements remain. The prosecutor confirmed the court’s discretion, and it imposed the enhancements. (42 RT 9407.)

Second, the court expressed its intent that count 3 and the enhancements be served consecutively because it was having to stay count 2 per section 654. Since the court was required to stay count 2, it was particularly adamant about imposing both enhancements and sentence on count 3 consecutive. Therefore, on remand it would not choose to dismiss the enhancements.

Third, in explaining the aggravating factors to justify the sentence, the court described the crimes as “egregious.” (42 RT 9407.) The court also referenced that in attempting to murder Masubayashi, Mataele made multiple attempts. (42 RT 9407.) He pursued Masubayashi and fired at him multiple times in an attempt to kill him. The court’s statements show a remand would be futile.

The trial court’s statements and sentencing choices demonstrate the trial court would not sentence Mataele any differently on remand. The trial court expressed an intent to impose additional time for the enhancements. The court would not find that the interests of justice called for it to dismiss either enhancement. Since the totality of the trial court’s comments indicate that it would decline to reduce Mataele’s sentence by

dismissing the enhancements, there is no need to remand for a new hearing.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 sections 667 and 12022.5. (See *People v. Boyce* (2014) 59 Cal.4th 672, 729-730 (*Boyce*); *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 Mataele 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 Mataele 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

For the foregoing reasons, respondent respectfully requests that the judgment of the trial court be affirmed in its entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Century Schoolbook font and contains 1871 words.

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March 18, 2022

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