

No. S138052

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

TUPOUTOE MATAELE,

Defendant and Appellant.

Orange County Superior Court

Case No. 00NF1347

Hon. James A. Stotler, Judge

On Automatic Appeal From A
Judgment and Sentence of Death

CAPITAL CASE

Appellant's Supplemental Reply Brief

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Argument

- 1. A limited sentencing remand is warranted to permit the trial court to exercise discretion to strike the firearm (Pen. Code, § 12022.5, subd. (a)) and prior serious felony (Pen. Code, § 667, subd. (a)(1)) enhancements.**

Appellant explained in the supplemental opening brief that a limited sentencing remand is warranted to permit the trial court to exercise discretion to strike the firearm and prior serious felony enhancements (Pen. Code, §§ 12022.5, subd. (a), 667, subd. (a)(1)) imposed on each of counts 2 and 3, conspiracy to commit murder and attempted premeditated murder, respectively. (Appellant's Supplemental Opening Brief ("SAOB") 5-13.)

Respondent agrees that Senate Bill Nos. 620 and 1393 apply retroactively to appellant's case, and thus he is entitled to the ameliorative benefits of the new sentencing laws. (Supplemental Respondent's Brief ("SRB") 9-10.)

Respondent argues that although appellant is entitled to the benefits of the new sentencing laws, remand is unnecessary because the court can infer that the trial court would not exercise its discretion in appellant's favor. (SRB 10-13.)

Respondent argues that the "trial court expressed an intent to impose additional time for the enhancements[,]" and thus the "court would not find that the interests of justice called for it to dismiss either enhancement." (SRB 12.) Respondent is mistaken.

First, respondent's argument that remand for resentencing is unnecessary cites lower appellate court decisions but only a single decision from this court: *People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*). (SRB 10-11.) In *Gutierrez*, the defendant requested that his case be remanded to the trial court for resentencing after this court decided *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. Rejecting the defendant's request, the court noted that the trial court indicated that it would not, in any event, have exercised its discretion to lessen the sentence and, thus, no purpose would be served in remanding for reconsideration. (*Gutierrez, supra*, 48 Cal.App.4th at p. 1896.) Here, respondent argues that there is no need to remand appellant's case, pointing to the court's remarks about (1) imposition of the five-year serious prior felony enhancement as to count 3, (2) consecutive sentencing on count 3, and (3) aggravating circumstances. (SRB 11-12.) *Gutierrez* is distinguishable from the instant case because there the trial court stated during the initial sentencing hearing that it would not have exercised its discretion to lessen the sentence even if it could do so. (*Gutierrez, supra*, 48 Cal.App.4th at p. 1896.) In contrast, here the trial court made no such observation.

Second, the trial court did not express a specific desire to impose the maximum possible sentence and, in fact, imposed the midterm of four years on the firearm enhancement as to counts 2 and 3. (RT 42:9426-9428; see SRB 11,

citing *People v. McVey* (2018) 24 Cal.App.5th 405 for the holding that “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*[,] italics added.)

Third, respondent agrees that at the time of sentencing in 2005, the trial court lacked authority to strike the firearm enhancement or the prior serious felony conviction enhancement. (SRB 9 [“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.”].)

This court recently held:

When being sentenced, a defendant is entitled to decisions made by a court exercising informed discretion. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) A court acting while unaware of the scope of its discretion is understood to have abused it. (*People v. Carmony* (2004) 33 Cal.4th 367, 378.)

(*People v. Tirado* (Jan. 20, 2022, S257658) __ Cal.5th __ [2022 WL 176141] [slip. opn. p. 5.] Since the scope of the trial court’s discretion now includes the power to strike the firearm enhancement or the prior serious felony conviction enhancement, or both, it cannot be said that the court was exercising informed discretion when appellant was originally sentenced in 2005.

Fourth, remand is necessary to afford appellant the full ameliorative benefits of the new laws. This is so because during a resentencing hearing on the issue whether to strike one or both of the enhancements, the trial court would consider appellant's post-sentencing conduct in prison. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 460 ["[W]hen a case is remanded for resentencing after an appeal, the defendant is entitled to 'all the normal rights and procedures available at his original sentencing' [citations], including consideration of any pertinent circumstances which have arisen since the prior sentence was imposed."]; *People v. Warren* (1986) 179 Cal.App.3d 676, 690 ["[P]ostoriginal sentencing behavior ... is relevant for consideration by the sentencing court in exercising its discretion to strike special circumstance findings pursuant to section 1385."]; see *People v. Jackson* (1987) 189 Cal.App.3d 113, 119.) A determination by this court that remand is unnecessary based on the record of the sentencing hearing in 2005 – i.e., almost two decades ago – would necessarily deprive appellant of a sentencing hearing where the full, ameliorative benefits of the new laws can be applied, thereby denying the due process right to a fundamentally fair sentencing hearing. (See *People v. Peterson* (1973) 9 Cal.3d 717, 726 [the defendant is entitled to a sentencing hearing that affords due process]; see *People v. Eckley* (2004) 123 Cal.App.4th 1072, 1080-1081 [court's reliance on inaccurate information provided by probation department and correctional authorities denied

defendant due process and required remand for new probation and sentencing hearing]; *Williams v. New York* (1949) 337 U.S. 241, 246-247; U.S. Const., 5th & 14th Amends.)

Finally, respondent suggests an alternate remedy should this court find “that the trial court did not clearly indicate how it would exercise its discretion ...” (SRB 13, fn. 2.) The remedy is to modify “the judgment to reflect the dismissal of the additional punishments under sections 667 and 12022.5.” (SRB 13, fn. 2, citing; *People v. Boyce* (2014) 59 Cal.4th 672, 729-730.) Appellant agrees with this remedy.

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Conclusion

For the reasons set forth in the supplemental brief and this reply brief, a limited remand is warranted to permit the trial court to consider whether to exercise the newly conferred sentencing discretion. Alternatively, the judgment should be modified to strike the firearm (Pen. Code, § 12022.5, subd. (a)) and prior serious felony (Pen. Code, § 667, subd. (a)(1)) enhancements imposed in connection with counts 2 and 3.

Respectfully submitted,

s/Stephen M. Lathrop
Stephen M. Lathrop

Attorney for Defendant/Appellant
Tupoutoe Mataele

Certificate of Compliance

I certify that this brief contains 1,087 words.

s/Stephen M. Lathrop
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Proof of Service

I, Stephen M. Lathrop, declare, that I am over the age of 18 years, not a party to the case, and am a member of the California State Bar. My electronic service address is lathrop126813@gmail.com. My business address is 904 Silver Spur Road #430, Rolling Hills Estates, CA 90274. I am familiar with the business practice for collecting and processing electronic and physical correspondence.

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Supreme Court of California

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(TUPOUTOE)

Case Number: **S138052**

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Date

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