Court of Appeal, Third Appellate District - No. C081980

S252238

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JIMMY WAYNE BROWN, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

Filed 9/28/18 P. v. Brown CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JIMMY WAYNE BROWN, Defendant and Appellant.	C081980 (Super. Ct. No. 15F01062)

A jury convicted defendant Jimmy Wayne Brown of negligent discharge of a firearm (Pen. Code, § 246.3),[1] criminal threats (§ 422), being a felon in possession of a firearm (§ 29800, subd. (a)(1)), and animal abuse (§ 597, subd. (a)) with two strikes (§§ 667, subd. (e)(2), 1170.12, subd. (c)(2)) and a personal use of a firearm enhancement (§ 12022.5, subd. (a)(1)) on the animal abuse count. The trial court sentenced defendant to 25 years to life plus four years for the firearm enhancement.

Defendant now contends (1) his prior Colorado murder conviction cannot support a strike allegation because it does not constitute a serious or violent felony under California law; (2) the matter should be remanded to allow the trial court to exercise its

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[1] Undesignated statutory references are to the Penal Code.

discretion regarding whether to strike the firearm enhancements; and (3) a firearm enhancement cannot be applied to his three strikes sentence.

We conclude (1) the Colorado murder statute supports the strike allegation, (2) we will remand to allow the trial court to exercise its discretion regarding the firearm enhancements, and (3) a firearm enhancement can be applied to defendant's three strikes sentence. We will affirm the convictions and remand the matter to the trial court.

BACKGROUND

Because defendant's appellate arguments pertain only to his sentence, we need not discuss the details of his crimes.

The information included two strike allegations. One allegation pertained to a 1982 Colorado conviction for second degree murder (CRS § 18-3-103), and another pertained to a 1987 California conviction for voluntary manslaughter (§ 192). During the jury trial on the strike allegations, the prosecution provided the record for the Colorado murder conviction, but there was no evidence regarding the facts of the Colorado crime.

In sentencing defendant, the trial court declined the prosecution's request to impose three consecutive 25-year-to-life terms plus eight years, and instead imposed the following: 25 years to life on the animal abuse charge with a consecutive four-year term for a firearm enhancement; a concurrent 25 years to life for the criminal threats conviction; a concurrent 25 years to life for the negligent discharge of a firearm conviction; and a concurrent six years for being a felon in possession of a firearm. The trial court said it wanted defendant to have an opportunity for parole in his lifetime.

DISCUSSION

I

Defendant contends his prior Colorado murder conviction cannot support a strike allegation because it does not constitute a serious or violent felony under California law. We disagree.

Under California's three strikes law, a defendant's sentence is enhanced upon proof the defendant has been previously convicted of a strike: a "serious felony" as defined in section 1192.7, subdivision (c), or a "violent felony" as defined in section 667.5, subdivision (c). (§§ 667, subd. (f)(1), 1170.12, subd. (d)(1).) Murder qualifies as a strike in California because it is both a serious and violent felony. (§§ 667.5, subd. (c)(1), 1192.7, subd. (c)(1).)

" ' "In order for a prior conviction from another jurisdiction to qualify as a strike under the Three Strikes law, it must involve the same conduct as would qualify as a strike in California" ' [citation], and the statutory elements of the foreign crime must include all the elements of the California strike offense [citation]. 'There is, however, no guarantee the statutory definition of the crime in the other jurisdiction will contain all the necessary elements to qualify as a predicate felony in California.' [Citation.] Thus, if the foreign law can be violated in different ways, and ' "the record does not disclose any of the facts of the offense actually committed, the court will presume that the prior conviction was for the least offense punishable under the foreign law." ' [Citation.]" (*People v. Denard* (2015) 242 Cal.App.4th 1012, 1024.)

California defines murder as the killing of a human being with malice aforethought. (§ 187, subd. (a).) "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§ 188.) Implied malice contains a physical and mental component. (*People v. Guillen* (2014) 227 Cal.App.4th 934, 984.) " ' "The physical component is satisfied by the performance of 'an act, the natural consequences of which are dangerous to life.' [Citation.] The mental component is the requirement that the defendant 'knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life.' [Citation.]" [Citation.]' " (*People v. Bryant* (2013) 56 Cal.4th 959, 965.) In short, implied malice

requires a defendant's awareness of engaging in conduct that endangers the life of another. (*People v. Cravens* (2012) 53 Cal.4th 500, 507.)

Defendant was convicted of second degree murder in Colorado. When defendant was convicted in 1982, the relevant statute -- Colorado Revised Statute (CRS) section 18-03-103 -- stated in pertinent part: "(1) A person commits the crime of murder in the second degree if: [¶] (a) He causes the death of a person knowingly, but not after deliberation. [¶] . . . [¶] (2) Diminished responsibility due to lack of mental capacity or self-induced intoxication is not a defense to murder in the second degree." Under Colorado law, a person acts knowingly when "he is aware that his conduct is practically certain to cause the result." (CRS § 18-1-501(6).)

Defendant argues Colorado's definition of murder permits a much broader mental state than the California definition of murder. He also argues that in California, voluntary intoxication reduces murder to involuntary manslaughter by negating malice. (See, e.g., *People v. Ochoa* (1998) 19 Cal.4th 353, 423.) Because voluntary intoxication cannot negate second degree murder in Colorado, defendant concludes his murder conviction could have been committed in such a way as to constitute involuntary manslaughter in California.

Colorado originally defined murder in terms of malice, but in 1977 adopted the suggestion of the Model Penal Code and substituted the term "knowingly" in its definition of second degree murder. (*People v. Mingo* (Colo. 1978) 584 P.2d 632, 633.) Under this definition, "the prosecutor must establish two factors to prove second-degree murder. The first is that death was more than merely a probable result of defendant's actions; and the second is that the defendant was aware of the circumstances which made death practically certain." (*Ibid.*) "The first element is objective; the second is subjective. [Citation.]" (*Mata-Medina v. People* (Colo. 2003) 71 P.3d 973, 978.)

While no California court has published a decision regarding the relationship between this definition of murder and California's, there is a decision addressing whether

another state's Model-Penal-Code-influenced definition of murder constitutes murder in California. In *People v. Martinez* (1991) 230 Cal.App.3d 197, the trial court denied the prosecution's motion to reinstate a prior murder special circumstance charge based on the defendant's 1980 Texas murder conviction, and the People appealed. (*Id.* at p. 199.) The Court of Appeal said: "Under Penal Code section 19.02, subdivision (a)(1) of Vernon's Texas Codes Annotated, 'A person commits [murder] if he . . . intentionally or knowingly causes the death of an individual.' " (*Martinez*, at p. 203.) Texas's definition of murder was taken from the Model Penal Code. (*Martinez*, at p. 203.) According to the Court of Appeal, the commentary to the Texas murder statute said the use of the terms "knowingly" and "intentionally" was not intended to introduce novel concepts to the definition of murder, "but, rather, define the traditional mens rea concept of malice in more precise and comprehensible language." (*Id.* at p. 204) An intentional killing was the same as express malice murder. (*Id.* at pp. 204-205.) The court in *Martinez* held that "a knowing killing under Texas law would be one where a defendant is aware of the nature of the defendant's conduct, or is aware of the circumstances surrounding that conduct, and is further aware that death of another person is reasonably certain to result from that conduct." (*Id.* at p. 205.) Thus, this mental state and California's definition of implied malice "both focus on the subjective awareness, or knowledge, of the defendant. In Texas, a defendant knowingly causes the death of another, and thus commits murder, when the defendant is subjectively aware that death is 'reasonably certain to result' from the defendant's conduct. In California, a defendant kills another human being with implied malice, and likewise commits murder, when the defendant is subjectively aware of the life-threatening risk involved in the defendant's conduct. [Citation.]" (*Ibid.*) A knowing killing in Texas accordingly fit the California definition of implied malice murder. (*Id.* at pp. 205-206.) Because the Texas murder conviction constituted murder as defined in California, the Court of Appeal reversed the trial court's order and directed it to enter a new order granting the prosecution's motion. (*Id.* at p. 206.)

The defendant in *Martinez* was subsequently convicted of first degree murder with the prior murder special circumstance and sentenced to death. (*People v. Martinez* (2003) 31 Cal.4th 673, 678 (*Martinez*).) The centerpiece of his automatic appeal was an attack on whether the prior Texas murder conviction could support the prior murder special circumstance, which the Supreme Court concluded was barred by the law of the case doctrine. (*Ibid.*) But the Supreme Court added that the Court of Appeal's determination regarding the Texas and California definitions of murder did not manifestly misapply existing law and the relevant law was not clarified by intervening decisions. (*Martinez,* at p. 683.) The Supreme Court nevertheless examined the merits of the defendant's claim "in some depth to demonstrate that no manifest misapplication of law occurred here." (*Ibid.*)

The defendant in *Martinez* argued the Texas definition of murder was broader than California's because "a Texas defendant could be convicted of murder if he merely intentionally or knowingly committed the act causing death, whether or not his act and intent were mitigated by his voluntary intoxication, unreasonable self-defense, or other justification or excuse." (*Martinez, supra*, 31 Cal.4th at p. 684.) The Supreme Court rejected this argument. "Thus, the absence of imperfect self-defense or voluntary intoxication is not an *element* of the offense of murder to be proved by the People. Instead, these doctrines are 'mitigating circumstances,' which may reduce murder to manslaughter by negating malice. [Citation.] The defendant is obliged to 'proffer some showing on these issues sufficient to raise a reasonable doubt of his guilt of murder.' [Citation.] The problem with defendant's analysis is that it merely shows that it was conceivable he could have mounted a defense of voluntary intoxication, imperfect self-defense, or other mitigating circumstance, had he been tried in California rather than Texas, and had he chosen to defend rather than plead guilty. But because of his guilty plea, we have no way of knowing whether a successful defense to murder could have been raised." (*Id.* at p. 685, italics in original, remaining italics omitted.) Because the

defendant pleaded guilty to both knowingly and intentionally killing his victim, the crime necessarily constituted implied malice murder in California. (*Id.* at p. 688.)

We see no reason to come to a different conclusion regarding the Colorado murder statute at issue here. As with knowing murder in Texas and implied malice murder in California, in order to be convicted of second degree murder in Colorado, a defendant must have been found to knowingly cause the death of the victim and be subjectively aware that death is a reasonably certain result of that conduct. Defendant's contention that voluntary intoxication cannot negate second degree murder in Colorado cannot stand in light of the Supreme Court's holding in *Martinez* that the absence of voluntary intoxication or imperfect self-defense is not an element of the crime of murder. Defendant is also incorrect that voluntary intoxication can negate implied malice murder. A killing committed while voluntarily intoxicated to the point of unconsciousness is involuntary manslaughter rather than murder. (*People v. Ochoa, supra,* 19 Cal.4th at p. 423.) But "voluntary intoxication is irrelevant to proof of the mental state of implied malice or conscious disregard" (*People v. Timms* (2007) 151 Cal.App.4th 1292, 1300), and, accordingly, "voluntary intoxication is no longer admissible to negate implied malice. [Citation.]" (*Id.* at p. 1298.)

We conclude a conviction for second degree murder in Colorado satisfies the definition of second degree murder under an implied malice theory in California. The strike finding for the Colorado murder conviction is sound.

II

Defendant next contends the matter should be remanded to allow the trial court to exercise its new discretion regarding whether to strike the firearm enhancements. The Attorney General agrees the change in the law applies to this case, but argues remand is unnecessary given the many aggravating factors.

As relevant here, Senate Bill No. 620 (2017-2018 Reg. Sess.) provided that effective January 1, 2018, section 12022.5 is amended to permit the trial court to strike an

enhancement for personally using a firearm. The new provision states as follows: "The 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. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 1; § 12022.5, subd. (c).) Prior to this amendment, an enhancement under section 12022.5 was mandatory and could not be stricken in the interests of justice. (See former § 12022.5, subd. (c) (Stats. 2010, ch. 711, § 5); *People v. Felix* (2003) 108 Cal.App.4th 994, 999.)

The amendment to section 12022.5 applies retroactively to cases not final on appeal. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) When a trial court is unaware of sentencing discretion, the appropriate remedy is to remand for the trial court to exercise its discretion. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) In the case of Senate Bill No. 620, a remand is required unless 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. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 427-428.) Contrary to the Attorney General's argument, we conclude the record does not support such a finding. The trial court did not sentence defendant to the maximum term, rejecting the prosecutor's argument for such a sentence. Accordingly, we will remand to allow the trial court to exercise its discretion.

III

Defendant further asserts that a firearm enhancement cannot be applied to his three strikes sentence. Specifically, he claims the trial court was not authorized to impose a four-year consecutive term for the firearm enhancement in addition to the 25-year-to-life term for the animal abuse count under the three strikes law.

If a defendant is convicted of a serious or violent felony and has two or more sustained strike allegations, the sentence is calculated as the greater of: "(i) Three times

the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior serious and/or violent felony convictions. [¶] (ii) Imprisonment in the state prison for 25 years. [¶] (iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046." (§ 667, subd. (e)(2)(A).) Defendant was sentenced under (ii), which he asserts does not provide for the imposition of a separate determinate term for the gun enhancement. He is wrong.

Defendant's argument overlooks the opening sentence of section 667, subdivision (e), which states: "For purposes of subdivisions (b) to (i), inclusive, *and in addition to any other enhancement or punishment provisions which may apply*, the following shall apply where a defendant has one or more prior serious and/or violent felony convictions . . . ." (Italics added.) By its own terms the three strikes scheme does not supersede or override any enhancement, including the challenged firearm enhancement in this case.

The case cited by defendant does not support his position. In *People v. McKee* (1995) 36 Cal.App.4th 540, disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 593-595, 600 fn. 10, the court held that a subordinate term could be doubled when a single strike was sustained because the three strikes law was not an enhancement but an alternative sentencing scheme. (*McKee*, at pp. 546-547.) That case neither addresses nor supports defendant's claim.

In his reply brief, defendant argues that status enhancements like the challenged firearm enhancement apply to three strikes sentences only when sentenced under (iii) above, and do not apply to his 25-year-to-life sentence under (ii). But the case he cites, *People v. Dotson* (1997) 16 Cal.4th 547, does not support his point, and in fact supports the opposite conclusion. Construing the language of what was then subdivision (c) and is now subdivision (e), the California Supreme Court said: "Subdivision (c) provides that

the indeterminate life term must be imposed 'in addition to any other enhancements or punishment provisions which may apply.' This language clearly prescribes that terms of enhancement, including the five-year enhancement under section 667(a), be imposed in addition to the indeterminate term. 'It is difficult to interpret the language of the statute in any other manner.' [Citations.]" (*Dotson,* at p. 554.)

The trial court correctly imposed the term for the firearm enhancement consecutive to the indeterminate term under the three strikes law.

DISPOSITION

The convictions are affirmed and the matter is remanded to allow the trial court to determine whether to exercise its discretion to strike the section 12022.5 enhancements.

/S/
MAURO, J.

We concur:

/S/
ROBIE, Acting P. J.

/S/
MURRAY, J.