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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ALBERT KINGSBERRY, Defendant and Appellant.	B227750 (Los Angeles County Super. Ct. No. KA058795)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles E. Horan, Judge. Affirmed.

Alex Green, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

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The trial court corrected a sentencing error — increasing defendant's term in state prison from an unauthorized four years to an authorized six years. Defendant appeals the more severe judgment. We affirm.

FACTS

In October 2002, the People filed an information charging Albert Kingsberry with one count of lewd act upon a child under the age of 14 years. (Pen. Code § 288, subd. (a).)[1] The triad of punishments prescribed by section 288, subdivision (a), is three, six or eight years.

On December 6, 2002, Kingsberry pleaded guilty to the charged offense. At his sentencing hearing on March 18, 2003, the trial court suspended imposition of sentence and placed Kingsberry on formal probation for a period of five years on condition that he serve 181 days in the county jail and that he not drink or possess any alcoholic beverage.

On September 4, 2007, the trial court found that Kingsberry had violated the alcohol-related conditions of his probation. The court revoked probation and imposed sentence. Kingsberry did not appeal. The trial court's minute order from September 4, 2007, states that Kingsberry was to be "[i]mprisoned in state prison for a total of 4 years" and that the court had imposed "the mid term of 4 years . . . ." The abstract of judgment filed the same day also indicates a four-year middle term. Both the court's minute order and the abstract of judgment reflect a $20 court security fee imposed pursuant to section 1465.8. The record before us on appeal does not include a copy of a reporter's transcript from the probation violation and sentencing hearing in September 2007.

In June 2010, almost three years after Kingsberry's sentencing, the California Department of Corrections and Rehabilitation (CDCR) sent a letter to the sentencing court informing the court that Kingsberry then had an "imminent release date," and that the CDCR had a concern whether the abstract of judgment on which it was acting was

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[1] All further section references are to the Penal Code.

The record on the current appeal does not directly disclose the facts of Kingsberry's offense. Comments found in a reporter's transcript from a court hearing in July 2010 indicate the offense involved Kingsberry's use of alcohol and a family member.

erroneous. The CDCR requested that the trial court review its case file to determine if a correction of Kingsberry's documented four-year sentence was required, and if so, to provide the CDCR with a modified abstract of judgment.

On July 15, 2010, the trial court heard arguments on whether it should resentence Kingsberry to a term of six years — the actual middle term prescribed under section 288, subdivision (a). During the hearing, the court acknowledged that the error as between the four years originally imposed and six years prescribed under section 288, subdivision (a), was its own. The court further stated that it could not "let an illegal sentence stay on the record," and that it had always been the court's intent to impose the "middle term" for Kingsberry's offense. In reply, Kingsberry's counsel argued that a three-year low term could be imposed to avoid an increase in Kingsberry's sentence. The court declined to accept the argument. At the conclusion of the hearing, it resentenced Kingsberry to the six-year middle term prescribed by section 288, subdivision (a). The court again imposed a $20 court security fee under section 1465.8.

Kingsberry appeals.

DISCUSSION

I. Imposition of a Longer Sentence After Finding the Original Sentence was Unauthorized

Kingsberry contends the trial court was prohibited from resentencing him to a term greater than that originally imposed. In other words, Kingsberry argues that either the four-year term he received in 2007 should stand or a lesser term authorized by law should be imposed, and that the six-year term imposed in 2010 should be set aside. We disagree.

There is no dispute that the four-year "middle" term imposed by the trial court in 2007 was not an authorized sentence because section 288, subdivision (a), prescribes no such term of imprisonment under its punishment triad. It has long been settled that, when a trial court imposes a sentence "not authorized by law" for the offense upon which the defendant is convicted, the sentence is "subject to judicial correction whenever the error [comes] to the attention of the trial court or a reviewing court." (*People v. Serrato* (1973)

9 Cal.3d 753, 763, disapproved on another ground in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.)

To avoid the rule that his unauthorized four-year sentence could be corrected by the trial court at any time, Kingsberry cites a different, long-recognized rule — based on double jeopardy principles under the California Constitution — that a trial court may not impose a greater sentence on a defendant on remand following an appeal. (See *People v. Henderson* (1963) 60 Cal.2d 482.) While Kingsberry's case does not arise in the context of resentencing in the trial court following an appeal, his argument implicitly proffers the proposition that the double jeopardy rule noted above should be applied when a trial court resentences a defendant after an unauthorized sentence is brought to the court's attention by the CDCR. The Supreme Court indicated in *People v. Serrato, supra,* 9 Cal.3d 753 that Kingsberry's position is ill-founded. There, the Supreme Court explained that the California Constitution's guarantee against double jeopardy precludes the imposition of a more severe sentence following an appeal, but "[t]he rule is otherwise when a trial court pronounces an unauthorized sentence. Such a sentence is subject to being set aside judicially and is no bar to the imposition of a proper judgment thereafter, even though it is more severe than the original unauthorized pronouncement." (*People v. Serrato*, at p. 764.)

We are not persuaded to reach a different double jeopardy conclusion based upon Kingsberry's reliance on *People v. Mustafaa* (1994) 22 Cal.App.4th 1305 (*Mustafaa*) and *People v. Torres* (2008) 163 Cal.App.4th 1420 (*Torres*). Kingsberry's argument does not convince us that the double jeopardy model fits his case.

In *Mustafaa*, the trial court imposed concurrent terms for two robbery convictions, but two consecutive terms for the gun use enhancements on the two convictions. The Court of Appeal found the trial court had imposed a "legal aggregate sentence," but that it had fashioned the sentence in an unauthorized manner because the gun use enhancements were not separate crimes and could not be imposed as separate subordinate terms on their own account. That is, the term for a robbery conviction and the term for an attached gun

use enhancements had to be consistent with each other. (*Mustafaa*, *supra*, 22 Cal.App.4th at pp. 1311-1312.)

In a discussion apparently for the trial court's guidance at resentencing, the Court of Appeal in *Mustafaa* then discussed the double jeopardy rule barring a greater sentence following an appeal and stated that the rule applied "because the trial court had imposed a *legal aggregate sentence* [at the time of the original sentencing], only fashioning it in an unauthorized manner. . . ." As a result, the court held that on remand the court was prohibited from imposing a total sentence more severe than the legal sentence originally imposed. (*Mustafaa*, *supra*, 22 Cal.App.4th at pp. 1311-1312, italics added.)

In *Torres*, a jury found the defendant guilty of dissuading a witness (count 1) and making a criminal threats (count 3), with gang findings attached to both counts. At sentencing, the trial court sentenced defendant to an "upper" term of seven years for the criminal threats. The court imposed and stayed the midterm for the dissuading count and struck both gang findings. In sum, the court imposed an *aggregate* term of seven years. Approximately one year later, the CDCR advised the trial court that the upper term for a criminal threat conviction was not seven years, but three years. The trial court then recalled its original sentence and resentenced defendant to an indeterminate life term for the dissuading offense with an attached gang enhancement, with an express seven-year minimum term in custody. (*Torres, supra*, 163 Cal.App.4th at pp. 1424-1428.) On appeal, defendant argued that the trial court's imposition of a more severe sentence after the CDCR disclosed the unauthorized sentence violated both double jeopardy and section 1170, subdivision (d) (hereafter section 1170(d)). The Fifth District Court of Appeal agreed.

This was the Fifth District's reasoning: "Here, the *aggregate sentence* of seven years imposed on defendant at the original sentencing hearing could have been lawfully achieved by imposing the mid term of two years on count three [for criminal threats] plus the consecutive enhancement term of five years; it did not fall below the mandatory minimum sentence [for defendant's convictions] and was therefore not a legally unauthorized lenient sentence. The one unauthorized component of the sentence

originally imposed by the court was not lenient — it was in fact more severe than that authorized (the correct upper term for [for criminal threats] being three years rather than seven). Principles of double jeopardy as well as [section 1170(d)], require that under these circumstances the trial court may not impose a sentence longer than originally imposed. Thus, the trial court erred in imposing a sentence of seven years to life after it recalled defendant's [original, legal aggregate] sentence of seven years in prison. . . . On remand, the trial court may not impose a total [aggregate] sentence greater than seven years in prison." (*Torres*, *supra*, 163 Cal.App.4th at pp. 1432-1433, italics added.)

The overriding rule to be drawn from *Mustafaa*, *supra*, 22 Cal.App.4th 1305 and *Torres*, *supra*, 163 Cal.App.4th 1420 is this: once a trial court sentences a defendant to a legal, aggregate sentence, the constitutional guarantee against double jeopardy attaches and prohibits the court from thereafter resentencing the defendant to a greater sentence. This rule does not fit within the framework of Kingsberry's case because the trial court did not impose a legal sentence — aggregate or otherwise — at the time of the original sentencing hearing in September 2007. Accordingly, the court retained the power in July 2010 to recall its original unauthorized sentence, with no bar to the imposition of a lawful sentence even though it was more severe. (See *People v. Serrato*, *supra*, 9 Cal.3d at p. 764; see, e.g., *People v. Cunningham* (2001) 25 Cal.4th 926, 1044-1045 [restating and affirming the rule that an unauthorized sentence may be corrected at any time when it is brought to a court's attention].)

This leaves Kingsberry's statutory argument under section 1170(d). Kingsberry contends section 1170(d) establishes a statutory bar precluding the trial court from resentencing him to a greater sentence. His argument again relies on *Torres*, *supra*, 163 Cal.App.4th 1420, which we discussed above. Our reading of section 1170(d) is not the same as Kingsberry's reading of the statute.

The language presently found in section 1170(d), or materially similar language, has been part of the Determinate Sentencing Law (DSL) since the legislation's enactment in the 1970's. (See Stats. 1976, ch. 1139, § 273, pp. 5140-5141.) The DSL was enacted with the intent to eliminate disparity in sentencing and promote more uniform sentences

by having a defendant's sentence fixed by statute in proportion to the seriousness of his or her offense as determined by the Legislature, to be imposed by a trial court with specified discretion. (§ 1170, subd. (a)(1).) In other words, the DSL marked our state's return to a sentencing scheme under which trial judges sentence defendants to pre-fixed terms of imprisonment. A sentence in a particular case may still vary, i.e., be longer or shorter, as trial judges still have the discretion, depending upon the circumstances of the crime, to choose between a fixed triad of punishments. This is where, in our view, section 1170(d) comes into the picture.

Section 1170(d) provides: "When a defendant subject to the [DSL] has been sentenced to . . . the state prison and has been committed to the custody of the [CDCR], the court may, within 120 days of the date of the commitment on its own motion, or at any time upon the recommendation of the [CDCR] or the Board of Parole Hearings, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, *provided the new sentence, if any, is no greater than the initial sentence*. . . ." (Italics added.) Interestingly, there is little, if any, case law in the last 40 years on the meaning of this language in the context of resentencing following the discovery of an unauthorized sentence. This said, we do not believe a trial court's power to correct an unauthorized sentence is limited by section 1170(d).

Section 1170(d) appears to be a safe harbor provision for use when a trial court, within a 120-day period after committing a defendant to state prison, or at any time upon a recommendation from an official with the CDCR or the Board of Parole Hearings, comes to believe that an original *lawful* sentence is too severe. In such a situation, the trial court may recall the sentence and commitment previously ordered, and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is not greater than the initial sentence. However, this does not mean a trial court is divested of power to correct an unauthorized sentence by imposing a greater sentence. Long-followed case law holds that a trial court has authority to correct an unauthorized sentence whenever the error comes to the attention of

the trial court (*People v. Serrato*, *supra*, 9 Cal.3d at pp. 763-764), and the Supreme Court has not retreated from this rule in the years following the enactment of the DSL. (See, e.g., *People v. Cunningham*, *supra*, 25 Cal.4th at pp. 1044-1045.) Moreover, because an unauthorized sentence is said to be void because it was imposed in excess of the court's jurisdiction (see, e.g., *People v. Scott* (1994) 9 Cal.4th 331, 354), it follows that such a sentence is subject to attack at any time. We conclude that the cases recognizing a trial court's power to correct an unauthorized sentence remain in place without regard to any restriction in section 1170(d). In our view, that section only applies when a trial court recalls a *legal* sentence and then resentences the defendant.

II. The Probation Report

Kingsberry contends his new sentence must be vacated because the trial court did not obtain a current probation report before resentencing. We disagree.

Kingsberry claims that: when a defendant is resentenced after an appeal, and the sentencing court "has discretion to alter the length of the defendant's imprisonment," the court "must obtain a new, updated probation report, including information regarding the defendant's behavior while incarcerated during the pendency of [the] appeal, before proceeding with the resentencing." (He cites in support *People v. Brady* (1984) 162 Cal.App.3d 1, 7; § 1203, subd. (b)(1); and *People v. Bohannon* (2000) 82 Cal.App.4th 798, 808-809 [the mandatory duty to obtain a probation report is invoked under section 1203, subdivision (b)(1), when a defendant is "technically eligible" for probation, that is, even when he is presumptively ineligible and must show unusual circumstances for a grant of probation].) Kingsberry acknowledges the parallel rule that obtaining a new probation report is discretionary, not mandatory, if a defendant is not eligible for probation at the time of resentencing (see *People v. Bullock* (1994) 26 Cal.App.4th 985, 989). But, citing section 1203, subdivision (e)(5), he argues this rule is not applicable to him because he was "eligible for probation if the court found unusual circumstances."

Again, we find the "after appeal" cases cited by Kingsberry unhelpful. There is nothing in the record to suggest that a report was not prepared for his original sentencing hearing in March 2003. The court ordered another report to be prepared at the time of a probation violation hearing in August 2006. In September 2007, another report was prepared. At that time, the court imposed an unauthorized four-year sentence. In July 2010, after Kingsberry had been in custody for three years, the court corrected the unauthorized sentence by resentencing him to a proper term prescribed in section 288, subdivision (a).

Kingsberry is correct that the trial court openly stated at the time of the July 2010 resentencing hearing that it was resentencing him as if from scratch, with the low, middle and high terms all being under consideration. Still, we simply do not agree that the resentencing involved in Kingsberry's current case had to be treated in the same as a resentencing after an appeal. Had Kingsberry been properly sentenced to a six-year middle term in September 2007, there would be no issue, and he would have been remanded to the custody of the CDCR to start serving a six-year sentence. We see little reason why the belated discovery of the unauthorized four-year middle term should give Kingsberry a second bite at the sentencing apple complete with a new probation report.

Assuming we are incorrect, and that a probation report was statutorily mandated, we find the failure to obtain such a report was harmless. On this issue, *People v. Dobbins* (2005) 127 Cal.App.4th 176 is instructive. In *Dobbins*, the Third District held that a failure to obtain a new probation report before ordering the execution of a suspended 16-month sentence at a probation violation hearing did not require "automatic" reversal, but was to be addressed under the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 834-836. (*Dobbins*, *supra*, 127 Cal.App.4th at p. 182.) The Third District then reviewed the record, found it was not reasonably probable that the defendant would have been granted probation had a new report been obtained, and affirmed the order for execution of the 16-month sentence. (*Id.* at pp. 182-183.)

In Kingsberry's current case, the trial court sentenced him to an unauthorized four-year term in September 2007, roughly three years prior to his resentencing. Although no formal, supplemental report was obtained prior to his resentencing in July 2010, personal information was presented at the hearing by Kingsberry's own direct statements as well as by his counsel. The trial court then recounted its decision to revoke probation and impose a state prison sentence in September 2007, indicating that the offense had an alcohol component and the probation violation was significant in that it involved a failure to obey alcohol-related conditions of probation. After listening to the arguments in mitigation offered by Kingsberry's counsel, the court expressly stated that it had "refamiliarized" itself with the original probation report, which we understand to mean the report underpinning its 2007 sentencing decision,[2] and then sentenced Kingsberry to a statutorily authorized middle term sentence of six years. We see nothing in the record on appeal to persuade us that it is reasonably probable that a disposition more favorable to Kingsberry would have been secured in the event a new probation report had been prepared.

III. The Court Security Fee

Kingsberry contends the trial court erred in imposing the $20 court security fee under section 1465.8 in July 2010 because the fine was not enacted until after he was convicted. We disagree.

Section 1465.8, subdivision (a)(1), provides: "To ensure and maintain adequate funding for court security, a fee . . . *shall be imposed on every conviction* for a criminal offense . . . ." (Italics added.)

In *People v. Alford* (2007) 42 Cal.4th 749 (*Alford*), the Supreme Court ruled that the court security fee imposed under section 1465.8 is not a criminal penalty. Thus, it is not subject to the statutory prohibition against retroactive application of a newly enacted penal law. (See § 3.) In short, the court ruled that the imposition of the court security fee does not violate the statutory prohibition against ex post facto laws. In the course of its

[2] The 2007 report recommended that Kingsberry be sentenced to state prison "in view of his continued alcohol consumption and refusal to submit verification of four A.A. meetings per week . . . ."

decision, the court stated, using the parlance of the language of section 1465.8, that the court security fee could be applied when a "*conviction*" occurred after the fee's effective date, regardless of the date the offense was *committed*. (*Alford*, *supra*, 42 Cal.4th at p. 754.)

In Kingsberry's current case, it is undisputed that his *conviction* by plea occurred before the effective date of section 1465.8. The respective dates are December 2002 and August 2003. It is also undisputed that the date of Kingsberry's original sentencing hearing on his conviction occurred before the effective date of section 1465.8. The respective dates are March 2003 and August 2003. It goes without saying that no court security fee under section 1465.8 was imposed at the time of the original sentencing hearing in March 2003, when the trial court placed Kingsberry on probation. A court security fee was imposed at the time the trial court sentenced Kingsberry to state prison in September 2007. He did not appeal the fee at that time.

The issue presented in Kingsberry's current case is whether the trial court properly imposed the fee prescribed by section 1465.8 at the time it sentenced Kingsberry to state prison in July 2010, and, by extension, in September 2007. Stated another way, the issue is whether a trial court may impose the court security fee under section 1465.8 at the time of a defendant's *sentencing*, even though the date of his or her *conviction* was prior to the effective date of the fee. This issue was not addressed in *Alford*.

We must give a sensible interpretation to section 1465.8. In the trial court, fees are not ordinarily imposed upon a defendant upon his or her "conviction." The ordinary procedure is conviction, followed by a sentencing hearing at which the trial court fixes the appropriate punishment, including applicable fees. Accordingly, we interpret section 1465.8, subdivision (a)(1), to read as follows: "To ensure and maintain adequate funding for court security, a fee . . . shall be imposed [at the time of sentencing] on every conviction for a criminal offense. . . ." Accordingly, we find the trial court correctly imposed the fee in Kingsberry's case. And, because the fee is not a punishment it is not otherwise invalid.

DISPOSITION

The judgment is affirmed.

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BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.