Filed 5/29/07

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JESSE FEYRER, Defendant and Appellant.	2d Crim. No. B192752 (Super. Ct. No. KA056346) (Los Angeles County)

Jesse Feyrer pleaded no contest to assault by means of force likely to produce great bodily injury (GBI), an offense punishable as either a felony or a misdemeanor ("wobbler"). (Pen. Code, § 245, subd. (a)(1).)[1] He also admitted an enhancement that he inflicted GBI in the commission of the offense. (§ 12022.7, subd. (a).) The trial court suspended imposition of sentence and placed him on probation. After an early termination of probation, Feyrer sought to reduce the offense to a misdemeanor and dismiss the action. (§§ 17, subd. (b), 1203.4, 1203.4a.) The trial court granted the motion to dismiss, but declined to reduce the offense to a misdemeanor because it believed a GBI enhancement made the offense a felony for all purposes.

Feyrer contends the trial court had discretion to reduce the offense to a misdemeanor despite the enhancement. We agree, and hold that a trial court may reduce

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

a wobbler to a misdemeanor (§ 17, subd. (b)(3)) despite the admission of such an enhancement. It is the trial court's call.[2] Accordingly, we reverse.

PROCEDURAL HISTORY

In March 2002, Feyrer assaulted his father. Feyrer was charged with assault by means likely to produce GBI, and it was alleged that he personally inflicted GBI in committing the offense. (§§ 245, subd. (a)(1), 12022.7, subd. (a).) Two days after the attack, Feyrer pleaded no contest to the assault and admitted the GBI allegation. In return, the trial court suspended imposition of sentence and placed him on five years formal probation including a condition that he serve 180 days in county jail. Feyrer had no prior criminal history.

Based on Feyrer's performance, the probation office sought an early termination of his probation in July 2005. In granting the motion, the trial court noted that Feyrer had "done a very good job" on probation. In May 2006, Feyrer petitioned to expunge his conviction by reducing his offense to a misdemeanor and dismissing the action. The trial court set aside Feyrer's plea, entered a plea of not guilty, and dismissed the complaint pursuant to sections 1203.4 and 1203.4a. The court, however, denied Feyrer's request to reduce the offense to a misdemeanor. The trial judge stated that he would "be inclined to probably reduce" the offense as a matter of discretion but declined to do so, concluding that the admission of a GBI enhancement made the offense a felony for all purposes.

DISCUSSION

Feyrer contends that the trial court erred in concluding that it lacked the discretion to reduce his offense to a misdemeanor pursuant to section 17, subdivision (b)(3). We agree.

Section 17, subdivision (b) provides, in relevant part: "When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or

---

[2] After a pitch, a batter once asked legendary umpire Bill Klem: "'. . . ". . . what was it, a ball or a strike?" And Klem says, "Sonny, it ain't nothing 'till I call it.". . . '" (Paumgarten, No Flag on the Play (Jan. 20, 2003) The New Yorker.)

imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: . . . [¶] (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor."

A section 245, subdivision (a)(1) assault can be punished either by imprisonment in state prison or by fine or imprisonment in the county jail.[3] Undisputedly, the trial court granted probation to Feyrer "without imposition of sentence" at the time of his plea and conviction. These factors bring the case within the statutory requirements of section 17, subdivision (b)(3).

This case involves "the important distinction, in probation cases, between orders suspending imposition of sentence and orders suspending execution of previously imposed sentences." (*People v. Howard* (1997) 16 Cal.4th 1081, 1087.) In *Howard*, the defendant was sentenced to four years in prison but execution of sentence was suspended when she was placed on probation. Upon revocation of probation, the defendant sought a reduction in her prison sentence from four to three years. The Supreme Court held that the trial court was required to impose the full four-year term.

The court reasoned that if the trial court had "originally suspended *imposition* of sentence before placing defendant on probation, the court unquestionably would have had full sentencing discretion on revoking probation. When the trial court suspends imposition of sentence, no judgment is then pending against the probationer, who is subject only to the terms and conditions of the probation." (*People v. Howard, supra,* 16 Cal.4th at p. 1087, citing § 1203.2, subd. (c), and Cal. Rules of Court, rule

---

[3] Section 245, subdivision (a)(1) provides: "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment."

435(b)(1)[4].) But, when a court actually sentences the defendant to a prison term, but suspends *execution* of that sentence during the probationary period, the "'. . . revocation of the suspension of execution of the judgment brings the former judgment into full force and effect . . .'" and "the sentencing judge must order that exact sentence into effect." (*Howard, supra,* at pp. 1087-1088.)

This distinction has been applied to a trial court's sentencing discretion under section 17, subdivision (b) in a factual situation that is the reverse of the instant case. In *People v. Wood* (1998) 62 Cal.App.4th 1262, the defendant pleaded guilty to multiple counts of forgery and, after a six-year prison term was imposed, the trial court suspended execution of the sentence and placed her on probation. (*Id.* at p. 1265.) Later, she sought early termination of probation and a reduction of her offenses to misdemeanors pursuant to section 17, subdivision (b). The trial court terminated probation, but refused to reduce the offenses. (*Id.* at p. 1266.) The Court of Appeal affirmed.

Relying in part on the *Howard* case, the *Wood* court held that a trial court may not reduce a felony to a misdemeanor under section 17, subdivision (b)(3) when it has imposed and suspended execution of sentence at the time it granted probation. (*People v. Wood, supra,* 62 Cal.App.4th at p. 1267.) In cases where sentence was not imposed as in the instant case, however, there is no previously chosen sentence to impose and, upon termination or revocation of probation, the court retains discretion to choose any sentence initially permitted by statute, including the selection of a misdemeanor sentence for a wobbler.

Although the offense of assault by means of force likely to produce GBI is a wobbler, Feyrer's plea also included the admission of a GBI enhancement that can only attach to an underlying felony.[5] Respondent contends that the combination of these two

---

[4] Now rule 4.435(b)(1).

[5] Section 12022.7, subdivision (a) provides: "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years."

elements resulted in a plea of no contest to a straight felony. Respondent argues that the offense standing alone is a wobbler, but acceptance of the admission of the GBI enhancement eliminated the trial court's discretion to later declare the offense to be a misdemeanor. (See *People v. Superior Court (Feinstein)* (1994) 29 Cal.App.4th 323, 329-330 [court has no authority to reduce straight felony to a misdemeanor].) Respondent also asserts that, by advising Feyrer of the potential state prison sentence that could result from his plea, the court was indicating that it considered the offense to be a felony.

Unquestionably, the plea bargain was sufficient to support later imposition of a state prison sentence for the offense, and to add an additional three years to the sentence for the GBI enhancement. But, preserving the possibility of a later felony sentence does not eliminate the court's discretion to impose a misdemeanor sentence as permitted by section 17, subdivision (b). It is settled that "where the offense is alternatively a felony or misdemeanor (depending upon the sentence), and the court suspends the pronouncement of judgment or imposition of sentence and grants probation, the offense is regarded a felony for all purposes until judgment or sentence" when it may be declared to be a felony or a misdemeanor in the discretion of the court. (*People v. Esparza* (1967) 253 Cal.App.2d 362, 364-365; see also *People v. Glee* (2000) 82 Cal.App.4th 99, 103.) And, if the court declares the offense to be a misdemeanor, any enhancement applicable only to felonies, such as section 12022.7, is simply not imposed and ceases to have any significance. (*People v. Kunkel* (1985) 176 Cal.App.3d 46, 55.)

Without citation of authority, Feyrer also argues that his offense was declared to be a misdemeanor when the court suspended imposition of sentence and "sentenced" him to probation. The argument has no merit. When the court suspends imposition of sentence, and the defendant is ordered to serve jail time as a condition of probation, the imposition of jail time is not a judgment and does not render the crime a misdemeanor. (*People v. Glee, supra,* 82 Cal.App.4th at pp. 103-105; see also *People v. Balderas* (1985) 41 Cal.3d 144, 203.)

Generally, when the trial court fails to exercise or misunderstands the scope of its discretion, a remand is required to allow the court to make a decision based on a full awareness of its discretion. (*People v. Fuhrman* (1997) 16 Cal.4th 930, 944; *People v. Sotomayor* (1996) 47 Cal.App.4th 382, 389-391.) Here, Feyrer argues that a remand is unnecessary because the trial court stated that it would "be inclined to probably reduce" the offense if it thought it had discretion to do so. Although this statement is an indication of the court's views, it is equivocal and, under the circumstances at the time, hypothetical. Therefore, we must remand the matter to the trial court to exercise its discretion within the parameters of section 17, subdivision (b).

CONCLUSION

The sentencing judge's decision to either "stay execution of sentence" or "suspend imposition of sentence" is not simply a question of semantics. It can, and often does, have profound implications for the defendant. When *execution* is stayed, judgment is imposed. If the grant of probation is later revoked and not reinstated, the term of imprisonment previously selected cannot be modified. (Cal. Rules of Court, rule 4.435(b)(2).)[6] If the offense is a wobbler, it must remain a felony. But, if as in the instant case, *imposition* of sentence is suspended, judgment is not imposed and the trial court retains jurisdiction over the case. (§§ 1203, subd. (a), 1203.2, subd. (c), 1203.3, subd. (a); Cal. Rules of Court, rule 4.435(b)(1).) This includes the power to impose judgment and sentence or modify the terms and conditions of probation in the event of a violation, and to grant reduction of a wobbler offense to a misdemeanor and dismiss the case.

DISPOSITION

The trial court's May 17, 2006, order denying Feyrer's motion to reduce the offense of assault by means likely to produce GBI to a misdemeanor is vacated and the cause remanded. On remand, the trial court shall conduct a hearing and determine

---

[6] Although the trial court cannot later modify the term of imprisonment when "execution" of sentence is suspended, it can return defendant to a grant of probation on such terms and conditions as are otherwise authorized. (§ 1203.3, subd. (a).)

whether, in its discretion, the offense should be reduced to a misdemeanor pursuant to section 17, subdivision (b)(3). In all other respects the May 17, 2006, order is affirmed.

CERTIFIED FOR PUBLICATION.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

Wade D. Olson, Temporary Judge*

Superior Court County of Los Angeles

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters, Supervising Deputy Attorney General, J. Michael Lehmann, Deputy Attorney General, for Plaintiff and Respondent.

* (Pursuant to Cal. Const., art. VI, § 21.)