Filed 12/8/06 P. v. Gomez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ENRIQUE RUDY GOMEZ,

Defendant and Appellant.

F049775

(Super. Ct. No. 1088068)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Donald E. Shaver, Judge.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Stan Cross and A. Kay Lauterbach, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Enrique Rudy Gomez challenges the sufficiency of the evidence supporting his conviction for the substantive offense of participating in a criminal street gang and the true finding on the gang enhancement. He also challenges his sentence on several grounds. We will remand for resentencing on the substantive gang offense conviction and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

In the early morning of November 17, 2004, Uriel Viramontes was walking from his home to the home of his employer. As he passed through Columbia Park, Viramontes saw a man on a bicycle and a man on foot. Viramontes did not know either man. Viramontes heard the man on the bicycle, Gomez, ask the man on foot whether the man knew Viramontes. Gomez then got off his bike and rushed Viramontes.

Gomez asked Viramontes who he was, where he lived, and "what [he] claimed." Viramontes told Gomez that he was not affiliated with any gang. Gomez then demanded that Viramontes hand over all his possessions. When Viramontes turned to look at the other person, Gomez struck Viramontes in the face. The blow hit Viramontes in the left eye, causing the area to bleed.

Viramontes fell to the ground, landing on his back. As Viramontes attempted to get up, he was told by Gomez he would stab Viramontes if he stood up. Before Viramontes could get up, Gomez sat on him and took a wallet and cellular phone from Viramontes. The wallet contained Viramontes's green card, Social Security card, and automatic teller machine card.

While Viramontes was still lying on the ground, Gomez walked back to his bicycle. Viramontes waited until Gomez was a safe distance away and then ran for his employer's house. As he ran away, Viramontes heard Gomez yell, "Yeah, you better run, you little bitch, puto Norte." The term "puto" means "sissy" or "homosexual" in Spanish. Viramontes understood "Norte" to be a gang reference.

Gomez was charged with one count of robbery, Penal Code section 211,[1] and one count of participating in a criminal street gang, section 186.22, subdivision (a). Appended to the robbery count was a section 186.22, subdivision (b)(1) gang enhancement allegation. A section 667.5, subdivision (b) prison prior was alleged as to both counts.

The jury convicted Gomez of both charges and found the gang enhancement true. The trial court found the prison prior allegation true.

The trial court imposed a term of imprisonment for the robbery conviction and a concurrent term for the gang offense. Terms also were imposed for the gang enhancement and the prison prior.

DISCUSSION

Gomez challenges the sufficiency of the evidence to support the gang offense and the gang enhancement. He also contends that imposition of the upper term of imprisonment by the trial court violates the holding of *Blakely v. Washington* (2004) 542 U.S. 296. Gomez further argues that if a term of imprisonment is imposed for the gang offense, section 654 operates to stay imposition of punishment for the gang enhancement. Finally, Gomez claims, and the People concede, there is an error in the abstract of judgment.

I. Sufficiency of the Evidence

The role of an appellate court in reviewing the sufficiency of the evidence is limited. The court must "'"review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] [¶] ... But it is

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[1] All further statutory references are to the Penal Code unless otherwise specified.

the *jury*, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt.'" (*People v. Sanchez* (1998) 62 Cal.App.4th 460, 468, quoting *People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139.)

We "'"presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 509; *In re Manuel G.* (1997) 16 Cal.4th 805, 822.) We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Green* (1997) 51 Cal.App.4th 1433, 1437.) "Before a judgment of conviction can be set aside for insufficiency of the evidence to support the trier of fact's verdict, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it. [Citation.]" (*People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1765.)

Gomez acknowledges that the evidence established he belonged to an unspecified Norteno gang, but contends the evidence had to establish that the specific subgroup of which he claimed to be a member, the Varrio West Side Turlock gang, was a criminal street gang. He also argues the evidence failed to establish that the Varrio West Side Turlock gang had a common membership consisting of three or more persons. Gomez's contention is premised on the theory that each Norteno affiliated subgroup should be treated as a separate criminal street gang for purposes of section 186.22. We reject this premise.

At trial expert testimony established that the Norteno gang uses the number "14," the letter "n," specific hand signs, and the color red to identify itself. The Norteno gang has claimed Columbia Park in Turlock as its "territory." In 2004 there were over 100 Norteno gang members in Turlock, whose primary crime-related activities consisted of assaults, drug deals, robberies, burglaries, drive-by shootings, and murders. Turlock Police Officer Steve Crawford, testifying as an expert on gangs, stated that Gomez was an active participant in the Norteno gang and a high-ranking member of that gang.

During his investigation of the Viramontes robbery, Crawford learned of a telephone call made by a jail inmate, Anthony Narcisco, asking someone to send a gang member named "Soldier" to intimidate a witness in his case. In a subsequent phone call, Narcisco learned that Soldier had "paid a visit" to the witness and had been arrested. Gomez's gang moniker is "Soldier" and no other gang member in Turlock uses that moniker.

Sureno and Norteno gang members are housed separately in the Stanislaus County Jail. In April 2005, Gomez was housed in the section reserved for the most notorious Norteno gang members. Gang members commonly have tattoos of their last name and gang identification. Gomez has a tattoo with an "I" and four dots, representing the number 14. He also has tattoos of his last name, the moniker "Soldier," and "T-14." The "T" stands for "Turlock" and the number 14 denotes the Nortenos.

Crawford testified that Gomez was aware of the Norteno gang's criminal activity because he participated in those activities. In 2000 Gomez was convicted of felony possession of narcotics for sale. Gomez also had knowledge of the criminal activities of other gang members, as evidenced by the written record of crimes committed by fellow gang members that was found in Gomez's cell on April 21, 2005.

The robbery of Viramontes benefited the Norteno gang because the victim's driver's license was found not in the possession of Gomez but another Norteno gang member. The robbery also served to intimidate residents of the Columbia Park area and strengthen the gang's control over that neighborhood.

The California Supreme Court has acknowledged that the Nortenos are a large criminal street gang, with numerous subgroups. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1121.) The evidence established that Gomez was part of the larger Norteno gang, regardless of whether he also claimed affiliation to one particular Norteno subgroup. (*In re Jose P.* (2003) 106 Cal.App.4th 458, 467-468.) As set forth in *Jose P.*, the evidence of gang activity satisfying the requirements of section 186.22 need not be

specific to a particular subgroup of a criminal street gang, but may be established by evidence of gang-related criminal activity by members of any of the affiliated subgroups. (*Jose P.*, at pp. 467-468.)

It is apparent that Gomez was acting as part of the larger Norteno gang when he robbed and assaulted Viramontes. The evidence was sufficient to support the section 186.22, subdivision (a) conviction and the section 186.22, subdivision (b)(1) true finding.

II. Section 654

At sentencing Gomez argued that concurrent terms should be imposed for the two substantive offenses of robbery and participating in a criminal street gang. The People agreed, stating that "active participation … is 654 to the gang enhancement." The trial court ordered that the terms imposed for counts 1 and 2 run concurrently.

Gomez argues on appeal that the term imposed for the offense of participating in a criminal street gang should have been stayed pursuant to section 654 because the term imposed on the robbery conviction was enhanced by the section 186.22, subdivision (b)(1) true finding.

There is a split of authority within the Courts of Appeal as to whether section 654 applies to any enhancements. The California Supreme Court to date has not resolved the issue. (*People v. Oates* (2004) 32 Cal.4th 1048, 1066, fn. 7; *People v. King* (1993) 5 Cal.4th 59, 78.) The issue is pending before that court in *People v. Palacios*, review granted May 11, 2005, S132144.

Section 654 prohibits multiple punishment for an indivisible course of conduct, even though it violates more than one statute. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) Multiple punishments may be imposed, however, where the defendant commits two crimes in pursuit of two independent, even if simultaneous, objectives. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.)

The substantive offense of robbery requires an intent to steal and permanently to deprive the owner of property. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.) Even

though the robbery was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1), the section 186.22, subdivision (a) offense requires a separate intent and objective from the underlying felony committed on behalf of a gang. (*In re Jose P., supra,* 106 Cal.App.4th at p. 471.)

Section 186.22, subdivision (a) is a "substantive offense whose gravamen is the *participation in the gang itself.*" (*In re Jose P., supra,* 106 Cal.App.4th at pp. 470-471.) This substantive offense punishes active gang participation where the defendant promotes or assists in felonious criminal conduct. The defendant must have the intent and objective to participate actively in a criminal street gang. (*People v. Herrera, supra,* 70 Cal.App.4th at p. 1467.)

In *People v. Herrera, supra,* 70 Cal.App.4th 1456, the trial court imposed a sentence for attempted murder, enhanced by a true finding under section 186.22, subdivision (b)(1), and also imposed a term for the section 186.22, subdivision (a) substantive offense. (*Herrera,* at p. 1462.) The appellate court struck the enhancement for the sole reason that it does not apply where the crime is punishable by life in prison. (*Id.* at p. 1465; § 186.22, subd. (b)(4).)

In *People v. Burnell* (2005) 132 Cal.App.4th 938, the appellate court addressed whether robbery was a necessarily included offense of section 186.22, subdivision (a). (*Burnell,* at pp. 944-946.) That court concluded that robbery was "not necessarily included in the offense of street terrorism under either the statutory test or the pleadings test." (*Id.* at p. 946.)

Section 186.22, subdivision (a) "requires a separate intent and objective from the underlying felony committed on behalf of the gang." (*People v. Herrera, supra,* 70 Cal.App.4th at p. 1468.) As such, section 654 does not preclude the imposition of punishment for both the robbery conviction and the section 186.22, subdivision (a) substantive offense. (*Herrera,* at p. 1468.)

III. Imposition of Upper Term Is Constitutional

Gomez contends the imposition of the upper term of imprisonment violates his constitutional rights as set forth in the holdings of *Blakely v. Washington*, *supra*, 542 U.S. 296 and *United States v. Booker* (2005) 543 U.S. 220. Contrary to his assertion, a jury determination is not required for the imposition of the upper term.

We first note that Gomez did not raise this objection at sentencing, even though he was sentenced more than one year after the issuance of the *Blakely* decision. The issue, therefore, is not cognizable on appeal. (*In re Seaton* (2004) 34 Cal.4th 193, 198.)

Regardless, the California Supreme Court decision in *People v. Black* (2005) 35 Cal.4th 1238 addressed the effect of *Blakely* and *Booker* on California's determinate sentencing law and concluded "that the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Black*, at p. 1244.)

IV. Remand for Resentencing

Gomez claims the trial court erred in imposing a five-year term for the section 186.22, subdivision (a) conviction because the maximum term that could have been imposed for this offense is three years. The People concede this point.

The parties disagree, however, on whether this case should be remanded for resentencing or this court should impose the upper or midterm specified in the statute. Under the circumstances, we will remand the matter to the trial court for resentencing on the count 2 conviction.

DISPOSITION

The sentence imposed for the section 186.22, subdivision (a) offense is vacated and the matter is remanded for resentencing as to that offense. The judgment is otherwise affirmed.

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CORNELL, J.

WE CONCUR:

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HARRIS, Acting P.J.

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DAWSON, J.