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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMAL DONELL WILLIAMS,

Defendant and Appellant.

B189671

(Los Angeles County  
Super. Ct. No. TA079493)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Kelvin D. Filer, Judge. Affirmed in part, reversed in part, and remanded.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves and Dane R. Gillette, Chief Assistant Attorneys General, Pamela C. Hamanaka, Assistant Attorney General, Margaret E. Maxwell and Robert David Breton, Deputy Attorneys General, for Plaintiff and Respondent.

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## **INTRODUCTION**

Appellant Jamal Donell Williams challenges his conviction of unlawfully driving or taking a vehicle and giving false information to a police officer on the grounds of instructional and sentencing error. We conclude the trial court was not required to instruct upon a violation of Penal Code section 499b as a lesser included offense of Vehicle Code section 10851, as taking a motor vehicle is no longer within the scope of Penal Code section 499b. We must remand for resentencing because the trial court imposed an upper term based on facts not found by the jury. Appellant's disproportionality claim is moot and was forfeited by his failure to raise it in the trial court.

## **BACKGROUND AND PROCEDURAL HISTORY**

A deputy sheriff spotted appellant driving a truck that had been reported stolen. Appellant told the deputy his name was Derrick Sinclair and the truck belonged to Julio Iglesias. Luis Magallenes testified that his truck was taken from him by appellant and codefendant Christopher Williams, who had a gun. Several of appellant's relatives testified for the defense that when appellant was driving the truck, he was accompanied by a "Mexican" man who appeared to be under the influence of drugs. One witness testified appellant asked the man if he could keep the truck to drive the witness to the home of appellant's mother. The man agreed, got out, and walked away.

A jury convicted appellant of unlawfully driving or taking a vehicle and giving false information to a police officer. The jury could not reach a verdict on a charge of carjacking.<sup>1</sup> The court declared a mistrial, and the charge was ultimately dismissed. Appellant admitted he previously suffered a serious or violent felony conviction and served two prison terms within the scope of Penal Code section 667.5, subdivision (b).

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<sup>1</sup> The jury made no findings regarding an allegation that a principal was armed in the commission of the Vehicle Code section 10851 violation. No explanation for this omission appears in the record.

Appellant was sentenced to a second strike prison term of eight years, which included two years for prior prison term enhancements.

## **DISCUSSION**

**1. The trial court was not required to instruct upon a violation of Penal Code section 499b as a lesser included offense of Vehicle Code section 10851.**

Appellant contends the trial court was required to instruct the jury sua sponte that joyriding, as defined in Penal Code section 499b, was a lesser included offense of driving or taking a vehicle, as defined in Vehicle Code section 10851. Had he committed his offense eleven years ago, his contention might have merit. However, Penal Code section 499b was amended in 1996 to apply only to bicycles, motorboats, and vessels. It no longer includes the taking of a car or truck.

Appellant acknowledges the amendment, but contends Penal Code section 499b still governs the taking of a motor vehicle. He bases his claim upon the final sentence in the following statement of legislative intent: “The legislative intent behind the amendments to Section 499b of the Penal Code, as set forth in Section 1 of this act, is to clarify and streamline existing law by deleting provisions in Section 499b of the Penal Code that are generally duplicative of provisions in subdivision (a) of Section 10851 of the Vehicle Code. These amendments to Section 499b of the Penal Code shall not be construed as evidencing a legislative intent to eliminate a crime.” (Stats. 1996, ch. 660, § 3, p. 3670.)

Appellant’s reliance on the final sentence is misplaced. The express intent of the 1996 amendment was to eliminate confusion and duplication by placing “joyriding” in a motor vehicle under the coverage of Vehicle Code section 10851 only. Excluding joyriding in a motor vehicle from the scope of Penal Code section 499b did not eliminate a crime; it simply left Vehicle Code section 10851 as the governing statute. The issue of whether the conduct should be deemed a misdemeanor or felony is encompassed by the wobbler status of the offense provided in Vehicle Code section 10851. It is thus a sentencing issue, not one of substantive guilt. Accordingly, it would have been

inappropriate to instruct the jury upon a lesser included offense.

**2. The imposition of an upper term necessitates a remand for resentencing.**

Citing *Blakely v. Washington* (2004) 542 U.S. 296, appellant contends the imposition of the upper term for unlawfully driving or taking a vehicle violated his right to a jury trial, in that it was based upon facts found by the court, not a jury. Appellant is correct. (*Cunningham v. California* (2007) 549 U.S. \_\_\_ [127 S.Ct. 856].) We vacate his sentence and remand for resentencing.

**3. Appellant forfeited his disproportionality claims.**

Appellant contends his eight-year prison sentence is grossly disproportional, and is in violation of the state and federal constitutional prohibitions on cruel and unusual punishment and double jeopardy. However, appellant forfeited these claims by failing to raise it in the trial court. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) In any event, his claim is mooted by the necessity for resentencing.

**DISPOSITION**

Appellant's sentence is vacated and the case is remanded for resentencing. In all other respects, the judgment is affirmed.

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BOLAND, J.

We concur:

COOPER, P. J.

FLIER, J.