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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ASCENCION GOMEZ, Defendant and Appellant.	E083214 (Super.Ct.No. FSB11283) OPINION

APPEAL from the Superior Court of San Bernardino County. Ronald M. Christianson, Judge. (Retired Judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Brad J. Poore, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Charles C. Ragland, Assistant Attorney General, Arlene A. Sevidal and Andrew Mestman, Deupty Attorneys General, for Plaintiff and Respondent.

Defendant Ascencion Gomez appeals from the trial court's order denying his petition to recall his sentence under Penal Code[1] section 1170, subdivision (d)(1). We affirm.

STATEMENT OF THE CASE

On July 18, 1996, the People charged defendant by information with murder (count 1) and attempted murder (count 2) under sections 187, subdivision (a), 664/187, subdivision (a). As to both counts, the information also alleged that defendant personally used a handgun under section 12022.5, subdivision (a).

On January 31, 1997, a jury found defendant guilty as charged and found the enhancements true. The trial court sentenced defendant to 45 years to life in state prison.

On April 14, 2023, defendant filed a petition to recall his sentence under section 1170, subdivision (d)(1). The People filed its opposition to the motion. The trial court denied defendant's petition on January 26, 2024.

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

DISCUSSION

Defendant contends that the trial court "erred in denying [his] request for relief under . . . section 1170, subdivision (d), and the error violated [his] right to equal protections under the state and federal constitutions." (All caps omitted.)

A. PROCEDURAL BACKGROUND

In his petition, defendant argued that section 1170, subdivision (d)(1), "permits anyone who was under the age of 18 at the time of the crime and sentenced to life without parole (LWOP), to petition for resentencing after 15 years of incarceration." Defendant contended that under *People v. Heard* (2022) 83 Cal.App.5th 608 (*Heard*), this statutory right under section 1170 "extends to those sentenced to the functional equivalent of LWOP."

In its opposition, the People argued that defendant was "[i]neligible for [r]elief [b]ecause he was not [s]entenced to LWOP or a *de* [*f*]*acto* LWOP [s]entence." Moreover, the People noted that defendant had already received a parole hearing that demonstrated that he had not been sentenced to an LWOP term or its functional equivalent. Even assuming that defendant's sentence was the functional equivalent of an LWOP term, defendant had failed to demonstrate remorse or work toward rehabilitation as required under section 1170, subdivision (d)(2).

At the hearing on the petition, defendant argued that he had satisfied the requirements for relief under section 1170, subdivision (d), and *Heard*, *supra*, 83

Cal.App.5th 608, and therefore, he was entitled to have his sentence recalled and remanded for resentencing.

The prosecutor, however, argued that *Heard*, *supra*, 83 Cal.App.5th 608, was distinguishable because the defendant in *Heard* was sentenced to 103 years to life. Here, defendant was sentenced to 45 years to life. The prosecutor then indicated that defendant would be eligible for parole at the age of 59. Moreover, "[d]ue to the changes in . . . Section 3051, which contemplates youthful offender parole review, the defendant received his first parole hearing after serving 25 years . . . ." After further argument, the case was submitted.

At a hearing to rule on the submitted matter, the trial court denied defendant's petition after finding that his sentence of 45 years to life was not the functional equivalent of life without parole. In its written ruling, the trial court stated that under section 2933.1, defendant's parole eligibility date is in 2034, when he would be 53 years old. The court wrote that defendant was 15 years old when sentenced, and took judicial notice of the fact that the average expectancy for a 15-year-old male in 1997 was 59.4 years more, and thus, defendant's life expectancy at the date of his sentencing was 74 years. The court also determined that as of 2021, the life expectancy of a 40-year-old male is 76 years. Therefore, because defendant failed to present evidence showing that his life expectancy was any shorter, defendant's prison term making him eligible for parole at 53 years of age, or at least 59 years if he failed to earn conduct credits, was not the functional equivalent of an LWOP sentence.

B. LEGAL BACKGROUND

Section 1170, subdivision (d)(1)(A), provides: "When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has been incarcerated for at least 15 years, the defendant may submit to the sentencing court a petition for recall and resentencing." Under its express terms, this resentencing opportunity is limited to juvenile defendants who have been sentenced to life without a parole term.

In *Heard*, *supra*, 83 Cal.App.5th 608, the court extended the reach of section 1170, subdivision (d). In that case, the trial court sentenced a minor to 23 years plus 80 years to life for two counts of attempted willful, deliberate, and premeditated murder, along with enhancements for committing the crime for the benefit of a criminal street gang and using a firearm and voluntary manslaughter. (*Heard*, at pp. 613-614.) Defendant filed a petition for resentencing under section 1170, subdivision (d), and the trial court concluded his sentence was not LWOP; therefore, defendant was statutorily ineligible for resentencing under section 1170, subdivision (d). (*Heard*, at pp. 621-622.)

The appellate court agreed that the trial court's ruling was correct as a matter of statutory interpretation. (*Heard*, *supra*, 83 Cal.App.5th at p. 626.) The court, however, concluded that denying juvenile offenders, who were sentenced to the functional equivalent of LWOP, the opportunity to petition for resentencing violates the constitutional guarantee of equal protection. (*Ibid.*) After examining the defendant's sentence, the court concluded, because the defendant would have to serve 103 years

before he was eligible for parole, the defendant's sentence was a de facto life without parole sentence. (*Id.* at p. 629.) The court was "unable to identify a rational basis for making juveniles sentenced to an explicitly designated life without parole term, but not juveniles sentenced to the functional equivalent of life without parole, eligible to petition for resentencing under section 1170, subdivision (d)(1). As a consequence, denying [the defendant] the opportunity to petition for resentencing under this provision violates his right to equal protection of the laws." (*Id.* at pp. 633-634, fn. omitted.)

C. ANALYSIS

In this case, defendant's appeal turns on the issue of whether his sentence of 45 years to life as a juvenile is the functional equivalent of LWOP. We hold that it is not.

Here, defendant was sentenced to 24 years to life—which is 58 years less than the sentence in *Heard*. Moreover, as acknowledged by the trial court, on February 25, 2021, after defendant served 25 years of his sentence and he was 39 years old, defendant received a parole suitability hearing pursuant to section 3051; section 3051 provides offenders under the age of 26 at the time of the controlling offense an opportunity for a youth offender parole hearing. (§ 3051, subds. (a) & (b).)

We find guidance on this issue in *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*). In *Franklin*, the defendant was convicted of a murder he committed when he was 16 years old; defendant was sentenced to 50 years to life in prison. (*Id.* at p. 268.) The defendant was entitled to parole consideration after 25 years under section 3051. (*Id.* at p. 269.)

In discussing its prior precedent that a 110-year sentence was the functional equivalent of LWOP, the *Franklin* court noted that defendant's life expectancy was a relevant factor in determining whether the sentence is the functional equivalent for a murderer. (*Franklin*, *supra*, 63 Cal.4th at pp. 275-276, quoting *Sumner v. Shuman* (1987) 483 U.S. 66, 83, ["there is no basis for distinguishing . . . between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy"].) The *Franklin* court continued, "we did not further elaborate what it means for a sentence to be the 'functional equivalent' of LWOP, and we left open how our holding should be applied in the case of a juvenile homicide offender." (*Franklin*, at p. 276.) Ultimately, the California Supreme Court concluded that the de facto sentence the defendant received (25 years to life) was not the functional equivalent of LWOP noting the defendant "does not argue that a life sentence with parole eligibility during his 25th year of incarceration, when he will be 41 years old, is the functional equivalent of LWOP. We conclude that such a sentence is not the functional equivalent of LWOP." (*Id.* at p. 279.)

Here, as provided *ante*, the trial court determined that as of 2021, the life expectancy of a 40-year-old male was 76 years. Here, defendant is eligible for parole at 53 years of age, or at least 59 years if he fails to earn conduct credits, way before his natural life expectancy. Contrary to the defendant in *Heard*, defendant would not be serving "a term of years with a parole eligibility date that falls outside [his] natural life expectancy" of 74 years. (*Heard*, *supra*, 83 Cal.App.5th at p. 617.)

Nonetheless, in support of his appeal, defendant cites *People v. Contreras* (2018) 4 Cal.5th 349 (*Contreras*). In *Contreras*, the California Supreme Court established the criteria that a trial court must employ so that a sentence imposed on a *nonhomicide* juvenile offender does not constitute the functional equivalent of a life sentence without the possibility of parole as prohibited under *Graham v. Florida* (2010) 560 U.S. 48, and *People v. Caballero* (2012) 55 Cal.4th 262.

In *Contreras*, the California Supreme Court held sentences of 50 years to life and 58 years to life for *nonhomicide* offenses committed by two 16-year-old defendants violated the Eighth Amendment. (*Contreras*, *supra*, 4 Cal.5th at p. 356.) Hence, the court directed the trial court on remand to consider "'any mitigating circumstances of defendants' crimes and lives, and the impact of any new legislation and regulations on appropriate sentencing.'" (*Id.* at p. 383.) The Supreme Court acknowledged its holding in *Franklin* that 25 years to life was not the functional equivalent of LWOP. (*Contreras*, at p. 359.) The *Contreras* court, however, rejected the People's proffered "life expectancy" test as the bright line arbiter of whether a sentence is the functional equivalent of LWOP. (*Id.* at pp. 358-379.) It did so because that test would in and of itself potentially inject discriminatory treatment for persons based on their life expectancy noting that women often live longer than men and certain groups live longer than others. (*Id.* at pp. 361-363.)

Turning to the specific sentences imposed in its case, the *Contreras* court concluded the term of 50 years to life would not allow a juvenile offender to rejoin

society for a "sufficient period to achieve reintegration as a productive and respected member of the citizenry." (*Contreras*, *supra*, 4 Cal.5th at p. 368.) The court further concluded a 50-year-to-life sentence for a juvenile—that contemplates returning defendant to society in his late sixties or early seventies—would deny the defendant the incentives to change going forward and has an attenuated relationship to any penological goals for nonhomicide offenders. (*Id.* at pp. 368-369.) Further, the conclusion that this sentence was a functional equivalent of an LWOP sentence was consistent with conclusions reached in other states. (*Id.* at p. 369 [citing examples of sentences of 50 years, 45 years to life, 75 years with parole eligibility at 52.5 years, 57 years with a possible reduction to 50 years].)

In this case, defendant received a parole hearing at the age of 39, and will be eligible for parole again at the age of 53 years, or at least 59 years if he fails to earn conduct credits—decades before the end of his natural life expectancy. Thus, he is not serving a sentence like the 103-year-to-life sentence given to the defendant in *Heard*. Moreover, we note that the *Contreras* limitation of 50 years to life for *nonhomicide* offenses fails to provide us with relevant guidance for this case wherein defendant was convicted of *homicidal* offenses—murder and attempted murder. Nevertheless, we also conclude the potential for defendant's release at the age of 53 or 59 years is fundamentally different than a release in his late sixties or into his seventies. This release date gives defendant the opportunity to rejoin society for a sufficient period to achieve reintegration as a productive and respected member of the citizenry. It also provides an

incentive to change for the better while he is in prison and is in line with the penological goals for sentencing murderers. The *Franklin* court's conclusion that 25 to life for a homicide defendant was not the functional equivalent of LWOP supports our conclusion as well. Thus, we agree with the trial court that this sentence is not the functional equivalent of LWOP.

Therefore, we find that the trial court properly denied defendant's petition for recall of his sentence.

DISPOSITION

The trial court's order is affirmed.

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McKINSTER
Acting P. J.

We concur:

MILLER
J.

FIELDS
J.