

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

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| PEOPLE OF THE STATE OF CALIFORNIA, |] | |
| |] | NO. H023838 |
| Plaintiff and Respondent, |] | |
| |] | (SANTA CLARA CO. |
| vs. |] | SUPERIOR COURT |
| |] | NO. 208944) |
| MICHAEL RAY JOHNSON, |] | |
| |] | |
| Defendant and Appellant. |] | |
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APPELLANT'S PETITION FOR REHEARING

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA
HONORABLE RISE J. PICHON, JUDGE PRESIDING

SIXTH DISTRICT APPELLATE PROGRAM

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MICHAEL RAY JOHNSON

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| _____ |] | |

INTRODUCTION

Appellant has contended that the trial court erred in holding that it had no discretion to impose concurrent sentences in this case. (AOB 4-10.) This court held that the issue was waived since: (1) there was no objection in the trial court; and (2) the issue was not raised on appellant's prior appeal. (Opinion, pp. 6-8.) Rehearing is required as to both of these conclusions.

In his opening brief, appellant offered two reasons as to why the failure to object in the trial court did not bar appellate review of his contention. (AOB 5-6.) The court's opinion makes no mention of appellant's arguments. Thus, rehearing must be granted.

In holding that appellant's contention has been waived due to the failure to raise it in a predecessor appeal, this court conceded that the point was "not mentioned by the parties," (Opinion, p. 7.) As a result, rehearing is mandated by Government Code section 68081.

I. REHEARING IS REQUIRED SINCE THIS COURT HAS FAILED TO ADDRESS APPELLANT'S ARGUMENTS REGARDING THE RULE OF *PEOPLE v. SCOTT* (1994) 9 CAL.4TH 331.

This court held that appellant's claim of sentencing error was waived under *People v. Scott, supra*, 9 Cal.4th 331 since he failed to object in the trial court. (Opinion, pp. 6-7.) In so holding, the court failed to address appellant's arguments to the contrary. As found in appellant's opening brief, the arguments are as follows:

"At the outset, appellant notes that he did not object to the trial court's view that consecutive sentences were mandated. However, this omission does not constitute a forfeiture of his appellate claim. This is so for two reasons.

"First, claims of sentencing error are waived by a failure to object only when the issue concerns "the manner in which the trial court exercise[d] its sentencing discretion" (*People v. Scott* (1994) 9 Cal.4th 331, 356.) Here, the trial court asserted that it had no discretion to exercise. Thus, since a pure issue of law is raised, a trial court objection is not required. (*People v. Aguirre* (1997) 56 Cal.App.4th 1135, 1139; waiver of sentencing error "only occurs when the alleged error involved an exercise of discretion;" see also *In re Justin S.* (2001) 93 Cal.App.4th 811, 814-815; probation condition could be challenged for the first time on appeal since it involved a pure question of law.)

"Second, an "unauthorized sentence" can be challenged

on appeal without the benefit of an objection in the trial court. (*Scott, supra*, 9 Cal.4th at p. 354.) An “unauthorized sentence” includes a judgment which can be challenged for the first time via a habeas petition. (*Ibid.*) The instant error can be raised by way of a habeas petition. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8; “[w]here a court may have been influenced by an erroneous understanding of the scope of its sentencing powers, habeas corpus is a proper remedy to secure reconsideration of the sentence imposed. [Citations.]”) Thus, appellant’s claim is properly before this court.” (AOB 5-6.)

It is interesting to note that the quoted arguments were apparently persuasive to the People since they made no waiver argument. (See RB 4-7.) Thus, this court should grant rehearing in order to address appellant’s arguments.

II. INsofar AS THE PARTIES WERE NOT GIVEN AN OPPORTUNITY TO BRIEF THE POSSIBLE APPLICATION OF THE RULE OF *PEOPLE v. SENIOR* (1995) 33 CAL.APP.4TH 531, REHEARING IS MANDATED.

In holding that appellant’s appellate argument is barred by the rule of *People v. Senior, supra*, 33 Cal.App.4th 531, this court conceded that the point was “not mentioned by the parties,” (Opinion, p. 7.) Given this circumstance, rehearing is required pursuant to Government Code section 68081 which provides:

“Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter

through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party." (Emphasis added.)

As the emphasized language indicates, this court is mandated to grant rehearing. Thus, this court must grant rehearing and provide the parties with an opportunity to brief the issue.

CONCLUSION

For the reasons expressed above, rehearing should be granted.

Dated: January __, 2003

Respectfully submitted,

DALLAS SACHER
Attorney for Appellant,
MICHAEL RAY JOHNSON

CERTIFICATE OF COUNSEL

I certify that this brief contains 1064 words.

DALLAS SACHER
Attorney for Appellant,
MICHAEL R. JOHNSON

PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 100 N. Winchester Blvd., Suite 310, Santa Clara, California 95050. On the date shown below, I served the within APPELLANT'S PETITION FOR REHEARING to the following parties hereinafter named by:

X Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Clara, California, addressed as follows:

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I declare under penalty of perjury the foregoing is true and correct. Executed this ___ day of January, 2003, at Santa Clara, California.

Sue Yarbrough