**PEOPLE v. DAVIS**

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No. B223968.

*THE PEOPLE, Plaintiff and Respondent, v. DEVLIN S. DAVIS, Defendant and Appellant.*

Court of Appeals of California, Second District, Division Seven.

Filed December 7, 2011.

***Attorney(s) appearing for the Case***

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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

WOODS, Acting P. J.

Defendant Devlin S. Davis timely appealed from his conviction for first degree murder.[1](https://www.leagle.com/decision/incaco20111207033#fid1) The jury found true the gang and gun allegations. The court sentenced Davis to life without the possibility of parole (LWOP). Davis contends the sentence must be vacated and the matter remanded for the court to consider imposing a non-LWOP sentence under Penal Code section[2](https://www.leagle.com/decision/incaco20111207033#fid2) 190.5 because the record contains no discussion of the fact he was a juvenile when he committed the murder. We affirm.

**FACTUAL BACKGROUND**

On May 11, 2007, Matthew Warren, aged 17, was in the area of 80th Street and St. Andrews, where his grandfather lived. Warren was sitting in the front passenger seat of a Ford Explorer. Warren saw a black Suburban pass by a couple of times, which made him nervous. The Suburban stopped behind a dumpster, two to four feet from the Explorer, with its back end closer to the back of the Explorer. There were four people inside the Suburban. Warren saw an African American male (whom he later identified as appellant) get out of the driver's side of the Suburban. Appellant was wearing gloves; he ran and grabbed for something in his pants. Appellant then extended his arm straight out from his body holding a .38 caliber revolver, pointed and fired three times. Appellant said something like "L.A. Crip" and then returned to the Suburban.

Warren saw 18-year-old Bryant Tennelle get shot as Tennelle was walking across the street. Tennelle fell to the ground. Warren ran inside his grandfather's house to tell him to call 9-1-1. Warren returned to Tennelle and applied pressure to Tennelle's wound. Tennelle said he was tired and wanted to sleep.

Warren was afraid because the shooter's gun was a .38 caliber with six shots and only three shots had been fired. Warren made eye contact with the shooter and saw his eyes were reddish and "real low," suggesting the shooter was high or nervous.

Warren identified appellant as the shooter in a photo six-pack as "`an almost positive match.'" Warren did not notice co-defendant Starks because he was focused on appellant.

Arielle Walker, Tennelle's girlfriend, had been with Tennelle shortly before the shooting; when she heard shots, she ran to the corner of St. Andrews and saw Tennelle on the ground. Tennelle always wore a hat, and when Walker saw the hat on the ground, she realized Tennelle had been shot in the head. Walker took the hat with her and ran to Tennelle's house. As Walker approached the house, she saw Wallace Tennelle, Tennelle's father, a detective with the Los Angeles Police Department.

Walter Lee Bridges was walking down the street with Tennelle when Tennelle was shot. Bridges heard someone say, "Hey." Bridges turned and walked backwards because he saw the guy had a gun. The gunman approached quickly and fired; Bridges ran, heard four or five shots and saw a flash. Bridges described the shooter as African American, but he did not see the shooter's face clearly enough to identify the shooter.

Tennelle habitually wore a Houston Astros baseball cap. The cap was one of the logos of the Eight Trey Hoover Criminal Gangsters (Eight Trey Hoover). The shooting occurred in the heart of territory claimed by the Eight Trey Gangster Crips (Eight Trey Crips). The Eight Trey Hoover gang was a sub-group of the Eight Trey Crips; the two gangs had a friendly relationship. Appellant and Starks were members of the Blocc Crips gang. The Blocc Crips gang was a rival of the Eight Trey Crips and the Eight Trey Hoover gangs.

Joshua Henry, who had known Tennelle for five years, testified Tennelle was not a gang member and knew nothing about what colors and clothing not to wear. Tennelle wore a hat; Henry told Tennelle the hat was not appropriate to wear in certain areas because of gang connotations. Henry was in the area when Tennelle was shot and heard four shots. Henry saw Tennelle on the ground and realized Tennelle had been shot in the back of the head.

Calvin Abbott also heard gunshots that night; he heard three to five shots. Abbott dropped to the ground and then got up and peeked over a gate and saw a young man leaning against a tree; the gate was about 230 feet from an SUV. After the shots were fired, the man ran toward a black SUV and got in on the passenger side. Abbott noticed the man had a gun in his hand, but Abbott did not see the man fire the gun. In a photo lineup, Abbott identified appellant as the suspect who ran to the black vehicle, but he was not 100 percent sure of the identification.

Tennelle died of a gunshot wound to the head. Ballistics tests revealed the bullet fragment removed from Tennelle's head during the autopsy and the bullet recovered from the crime scene had been fired from a weapon found in the possession of Leonard Langley.

Langley's preliminary hearing testimony was read into evidence. On July 11, 2007, Langley was arrested for possession of a handgun. Langley did not want to speak with law enforcement because he was afraid for his safety if he was labeled a snitch. In a recorded interview, Langley told police that the gun he had been arrested with "had a murder on it." Langley said he had gotten the gun a week before he was arrested from "No Brains," a member of the Blocc gang. In a photo lineup, Langley identified co-defendant Starks as No Brains. When Langley bought the gun from Starks for $50, he did not know it was hot. Langley once belonged to the Nickerson Gardens gang, but he had been paralyzed in a shooting and no longer gang banged. Langley was concerned for his safety and the safety of his family.

Four days after the shooting, California Highway Patrol Officer Justin Barnthouse responded to a traffic accident at 11th and Harvard Avenue involving several vehicles. Barnthouse went into an alleyway where he saw a black Suburban with collision damage; he saw Starks getting out of the driver's side of the car. Starks, who had an outstanding warrant for his arrest, admitted driving the car. Starks's mother, said her son was living with her in April 2007 and drove his father's black Suburban.

Jessica Midkiff, Starks's girlfriend, testified she was present when the Suburban crashed. Midkiff started dating Starks in May 2007. Starks was very controlling, and he let her know that if she did not do what he asked, there would be consequences.

On May 10, 2007, Midkiff spent the night with Starks at the Desert Inn, a motel at Western and Imperial. Starks told her to drive to a location where two African American males got into the car; one was appellant. Starks sat in the front passenger seat; Midkiff believed appellant sat behind her in the back; the other person sat in the back.

As Midkiff drove, appellant tried to give her directions, but Starks told her not to listen. At Starks's direction, Midkiff headed toward downtown. Starks played a compact disc of "Crip" music. At appellant's request, one song was played three or four times; appellant said it was his favorite song. Appellant was acting really hyper and taunted the other rear seat passenger, "You never do any work." Starks told Midkiff to make a U-turn; she did so and parked by a wall. The men in the back seat wore "working gloves." Midkiff saw the butt of a black revolver, which appellant put into the front part of his pants, either in the waistband or pocket. Appellant and the other rear passenger got out of the car, went behind the car and disappeared around the corner. Midkiff asked Starks what he had gotten her into, and he told her to shut up. Appellant and the other man were gone for about a minute; Midkiff heard three or four shots ring out. Starks pulled her across him and got into the driver's seat.

Appellant and the other man returned to the car, and Starks drove off and then dropped the two men off. Before he was dropped off, appellant said he thought he "got" someone, but he did not know; he was still hyper and said he was "the man" and appeared to be proud. Starks told appellant to be quiet. When appellant was in the Suburban, he was jumpy and weird and said he did not know if he had hit anyone.

Between May and December 2007, Midkiff did not contact the police out of fear. After she was arrested, Midkiff identified appellant and Starks in photo six packs.

Vincent Jones's preliminary hearing testimony was read into the record. When Jones was interviewed by police in 2007, he said the shooter was called "Baby Man" and was with the 11-Trey Blocc gang. Jones saw the shooter in the park with other gang members. Jones went up to the shooter and asked "`What's up?'" Jones brought up the shooting. Baby Man denied it. Baby Man said, "Man, I'm fixing to go to jail." Jones, who knew Baby Man from school, said Baby Man was 17 or 18 years old and his real name started with a "D." Detective Skaggs said that Jones identified a photograph of appellant as Baby Man.

In a recorded interview, appellant told Skaggs he was frightened and on ecstasy and "[h]e put me up to it." Appellant said he was picked up at 110th and Western and got into a car with Jennifer, No Brains (Starks) who was driving, and another person appellant could not remember. When appellant entered the car, he told Starks he wanted to fight Hoovers. Appellant thought he was going to a hotel room to have sex with "Old Girl." Appellant was under the influence of the drug so he listened to Starks while they rode up Normandie into what he thought was Hoover turf. The car pulled over, and Starks told appellant to get out and handed appellant a chrome .38. Appellant saw someone he wanted to fight because the guy was wearing an "HT" hat. Starks told appellant to do it, and appellant closed his eyes and started shooting in the air. Appellant fired three shots; it was the first time he had used a gun. Appellant was not trying to shoot at anyone and did not see anyone fall. Appellant saw people on the street in a black Expedition and felt bad and stupid afterwards. Appellant was wearing gloves because Starks told him to put them on and appellant did not want to mess up his hands.

Appellant told Skaggs he was a straight A student and when firing, he was not in his right mind; he only wanted to have friends and was trying to fit in. Appellant did not brag about the shooting and felt bad about it; Starks had called him a punk. Appellant did not know he had hit anyone until Skaggs told him he had. When appellant was in juvenile camp, someone told him he had shot a police officer's kid; appellant felt bad but could not take it back. Appellant had never hurt anyone before and just wanted to be liked; now he would never see his son be born, never go home again and would spend the rest of his life in jail. Photos taken from appellant's home showed he had tattoos in July 2009, which he did not have in photos before that date.

Skaggs put a recording device in a cell with appellant and Starks and recorded their conversations. Appellant called Starks "Brain" and asked if the "bitch" was talking. Starks responded, the "[b]itch ass be squealing." The individual that the men referred to as "the bitch" was later identified as Jessica. Appellant told Starks, "You got to get to that bitch, homie. You got to get to her. That's our way out, cuz." Starks told appellant, "There wouldn't have been a case if you wouldn't have said nothing." Appellant responded, "I know, cuz." Starks said they should not have been throwing gang signs. Starks said his plan was to get "that bitch statement kicked out." Appellant said his plan was to say he was retarded and could not read, but the police "know where I'm from" and "they saw my tattoos."

Officer Daniel Leon testified as the prosecution's gang expert and opined through a hypothetical the shooting was to benefit the Blocc Crips gang and the individual gang members by furthering the criminal activities of the gang, making citizens reluctant to cooperate with police for fear of gang retaliation and helping the gang maintain its territory.

Appellant did not testify. Starks testified he was out of town when the shooting took place.

On rebuttal, the general manager of the Desert Inn testified there was a registration card with the number of Starks's drivers license, showing a check-in date of May 10, 2007.

**DISCUSSION**

Appellant contends the LWOP sentence should be vacated and the matter remanded with directions for the trial court to consider imposing a non-LWOP sentence under section 190.5, subdivision (b) because the record contains no discussion of the fact he was a juvenile when he committed the crime.

***I. Relevant Facts***

The first degree murder of which appellant was convicted occurred on May 11, 2007. Appellant was 17 years old when he committed the murder.

The information alleged that appellant was 14 years or older when he killed Tennelle, pursuant to Welfare and Institutions Code section 602, subdivision (b), which applies to minors under the age of 18. (§ 190.5, subd. (a).) The information listed appellant's birthdate as February 14, 1990. The court reviewed the information prior to jury selection.

In their opening statements, both the prosecutor and defense counsel stated appellant was 17 when the shooting occurred. Appellant's tape-recorded interview with detectives on January 14, 2008, was played for the jury. During the interview, appellant stated he was 17 years old. During her testimony, Midkiff referred to appellant being 16 or 17 years old. In closing argument, defense counsel again stated appellant "was a couple of months past age 17" at the time of the shooting.

At the sentencing hearing, defense counsel did not inform the court that appellant was under 18 when he committed the offense and did not ask the court to consider that fact under section 190.5, subdivision (b) when imposing sentence. Defense counsel never filed a sentencing memorandum.

The People's sentencing memorandum listed seven circumstances in aggravation, including appellant's status on felony probation in a juvenile case at the time he committed the murder, and no circumstances in mitigation. Although the memorandum did not specifically mention appellant's age or the fact he was a juvenile when he committed the crime, it cited section 190.5, subdivision (b)[3](https://www.leagle.com/decision/incaco20111207033#fid3) and stated, "this Court has the discretion to sentence the defendant to 25-years-to-life vs. LWOP for the substantive count of murder with a special circumstance finding." (Italics omitted.) The People urged the court to impose an LWOP sentence rather than a 25-years-to-life sentence, arguing the latter would not be justice.

The People's sentencing memorandum stated the offenses for which juvenile petitions had been sustained included battery, weapon possession, and exhibiting a deadly weapon.

At the sentencing hearing, the court stated that no probation report had been prepared, but proposed to proceed with the hearing. The parties agreed that when the probation report became available, they could request modifications, if necessary, at a later hearing, and agreed to proceed with the sentencing hearing.

In his victim impact statement, the victim's father, Detective Wallace Tennelle, shared his anger and grief over his son's murder. Tennelle stated, "I know that it's within your power to, you have the discretion regarding sentencing. I know that you can possibly sentence him under the juvenile sentencing or adult sentencing." Tennelle also stated that because appellant "felt man enough to pull the trigger and kill someone just to prove to his homeboys and his buddies that he is the man, and I think that he should be sentenced to a man's sentence." Tennelle asked the court to sentence appellant "to the adult sentence of life without."

Before imposing sentence, the trial court stated, "I want everybody to understand the sentencing in this matter is nothing personal, but it is as a result of a fixed set of criteria that is established by the California Penal Code, and the court will do its best to interpret that code during the course of this sentencing." The court denied probation and stated, "in its discretion, [the court] elects, under the mandate of Penal Code section 190.5(b), to sentence the defendant to the state prison of the state of California for life without the possibility of parole." The court stated that sentence reflected the court's consideration and weighing of the mitigating and aggravating factors as set out in rules[4](https://www.leagle.com/decision/incaco20111207033#fid4) 4.423 (a) and (b) and 4.421 (a) and (b). The court determined there were no mitigating factors and also imposed a consecutive term of 25 years to life for the firearm enhancement.

***II. The court understood its sentencing discretion.***

Appellant contends this case is controlled by *People v. Ybarra* (2008) [166 Cal.App.4th 1069](https://www.leagle.com/cite/166%20Cal.App.4th%201069), 1093-1094, in which the court stated: "Even `discretionary decisionmaking' is subject to `some level of review, however deferential.' Since the record explicitly shows a lack of meaningful argument by counsel about the facts and the law and implicitly shows a belief by the court and counsel alike that an LWOP term was mandatory if the special circumstance were not stricken, our deferential review shows that a remand for resentencing in light of the factors in section 190.3 and the circumstances in aggravation and mitigation in rules 4.421 and 4.423, respectively, is imperative. So we will vacate the sentence and remand to the trial court with directions." (Citation omitted.)

Generally, a trial court is presumed to have understood the scope of its discretion and to have sentenced the defendant accordingly. (See *People v. Fuhrman* (1997) [16 Cal.4th 930](https://www.leagle.com/cite/16%20Cal.4th%20930), 944.) Only "where the record affirmatively discloses that the trial court misunderstood the scope of its discretion" is remand for resentencing proper. (Italics omitted.) (*Ibid.*) Appellant asserts the matter must be remanded for resentencing because at the sentencing hearing, there was no meaningful argument regarding the discretion conferred on the court on the basis of his age. In addition, appellant notes the trial court never discussed any sentencing criteria, never mentioned appellant's age and referred to the mandate of section 190.5, subdivision (b). Even though appellant notes the People's sentencing memorandum mentioned the court's discretion under section 190.5 to sentence appellant to 25 years to life rather than LWOP, appellant suggests the prosecutor hid appellant's age from the court. The only reason for the prosecutor to cite that section was that appellant was a juvenile at the time he committed the murder.

In *Ybarra,* the trial court announced it intended to follow the recommendation in the probation officer's report and asked the parties if they wished to be heard. (*People v. Ybarra, supra,* 166 Cal.App.4th at p. 1093.) Defense counsel asked the court to strike the special circumstances; the court denied the request and imposed an LWOP term. (*Ibid.*) Noting the trial court had no inherent power to strike the special circumstances, the Court of Appeal reasoned, "Consequently, the silence of the sentencing hearing record about [defendant's] age is suggestive of a lack of awareness by the court and counsel alike of the discretion that section 190.5, subdivision (b) confers to impose on a youthful offender a 25 year-to-life term instead of an LWOP term." (*Ibid.*)

The court noted that both the probation report and the defendant's testimony at trial showed he was 17 years old at the time he committed the murder and that the record of the sentencing hearing was silent "about that" (his age). (*People v. Ybarra, supra,* 166 Cal.App.4th at p. 1088.) In addition, the probation report did not mention section 190.5 subdivision (b), but noted the defendant had committed murder pursuant to section 190.2, subdivision (a)(22). (*Id.* at p. 1093.) The court reasoned: "Despite that statutory preference [for LWOP], section 190.5, subdivision (b) requires `a proper exercise of discretion in choosing whether to grant leniency and impose the lesser penalty of 25 years to life for 16- or 17-year-old special circumstance murderers. The choice whether to grant leniency of necessity involves an assessment of what, in logic, would mitigate or not mitigate the crime. The factors listed in [former] rules 421 and 423, implementing the determinate sentencing law, do not lose their logical relevance to the issue of mitigation merely because this is not a determinate sentencing matter.'" (Fns. omitted.) (*Id.* at p. 1089.)

In contrast to *Ybarra,* in the case at bar, there is no issue about striking the special circumstances, and, although there was no discussion about appellant's age per se at the sentencing hearing, the record shows the court was aware of both appellant's age and its discretion under section 190.5, subdivision (b).

Appellant's age was mentioned in the information, by defense counsel in his opening and closing arguments, by the prosecutor during his opening statement, during appellant's interview with police, and in Midkiff's testimony. Moreover, the victim's father referred to sentencing appellant as a juvenile. The People's sentencing memorandum cited section 190.5, subdivision (b), indicating the prosecutor was aware of the court's sentencing discretion; the memorandum stated the court had a choice of imposing 25 years-to-life or LWOP and urged the court to impose an LWOP term. Even though the court referred to the mandate of section 190.5, it also stated that it elected to impose an LWOP sentence and that the sentence reflected the court's consideration and weighing of the mitigating and aggravating factors; something it would not have to do if it thought imposing an LWOP term was mandatory. We have no doubt the court was aware of appellant's age and understood its sentencing discretion.

**DISPOSITION**

The judgment is affirmed.

ZELON, J. and JACKSON, J., concurs.

**FootNotes**
1. Appellant was tried with co-defendant Derrick Starks before separate juries.

2. Unless otherwise noted, all statutory references are to the Penal Code.

3. That subdivision provides that the maximum penalty for a juvenile who was 16 or 17 when a special circumstance first degree murder was committed is life imprisonment without the possibility of parole, or, at the discretion of the court, a term of 25 years-to-life.

4. All rule references are to the California Rules of Court.