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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOEL LOPEZ,

Defendant and Appellant.

B290344

(Los Angeles County
Super. Ct. No. PA087591)

APPEAL from an order of the Superior Court of Los Angeles County, Hilleri G. Merritt, Judge. Reversed and remanded.

Tyrone A. Sandoval, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Joel Lopez of assault with a deadly weapon. He was sentenced to 16 years in prison. On appeal, the parties agree that the case must be remanded to allow the trial court to (1) exercise its discretion whether to strike the five-year serious felony enhancements, and (2) either impose or strike the four one-year prior prison enhancements. Lopez also argues that remand is appropriate to consider whether to grant pre-trial diversion for mental health treatment under recently enacted Penal Code section 1001.36.¹ We reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

On November 14, 2016, while placed on an involuntary hold at a psychiatric hospital, Lopez tackled another patient, punching him and scratching the victim's face with a screw. Lopez was charged with assault with a deadly weapon (§ 245, subd. (a)(1).) The information alleged that that he served four prior prison terms (§ 667.5, subd. (b)), three prior serious felony convictions (§ 667, subd. (a)(1)), and three prior serious felonies within the meaning of the Three Strikes law (§§ 667, subd. (d), 1170.12, subd. (b)).

Lopez pled not guilty by reason of insanity. At trial, Lopez testified that he was paranoid and heard voices at the time of the assault. The jury convicted of him of assault, and the trial court entered a directed verdict on the sanity issue.

Lopez was sentenced to 16 years in state prison: the mid-term of three years doubled under the Three Strike law plus two five-year enhancements pursuant to section 667, subdivision (a)(1) for the prior serious felony convictions. Reasoning that

¹ All further statutory references are to the Penal Code.

Lopez “deserve[d] . . . mental health help” and in the interests of justice, the court exercised its discretion to strike two of Lopez’s prior felony convictions under the Three Strikes law. The court also stayed the prior prison term enhancements. Lopez timely appealed.

DISCUSSION

1. *The Court’s Discretion to Strike the Five-Year Enhancements*

Lopez argues remand is required to give the trial court an opportunity to exercise discretion conferred by Senate Bill No. 1393, which authorizes a trial court to strike a five year section 667, subdivision (a) sentencing enhancement if found to be in the interests of justice (§ 1385). The Attorney General concedes, and we agree that the changes in law worked by Senate Bill No. 1393 apply retroactively and that, on this record, Lopez is entitled to the remand he seeks.

At the time Lopez was sentenced, imposition of the section 667, subdivision (a)(1) five-year enhancement for sustaining a prior serious felony conviction was mandatory. (Former § 1385, subd. (b), amended by Stats. 2018, ch. 1013, § 2, eff. Jan. 1, 2019 [“This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667”].) After Lopez’s sentencing, the Governor signed Senate Bill No. 1393, which deletes the provision of section 1385 that makes imposition of a section 667 prior serious felony conviction enhancement mandatory (as well as related language in section 667 itself), thereby permitting trial courts to strike such enhancements when found to be in the interest of justice. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.)

§§ 1, 2.) The legislative changes made by Senate Bill No. 1393 took effect on January 1, 2019.

Senate Bill No. 1393 applies retroactively to defendant under the principles espoused in *In re Estrada* (1965) 63 Cal.2d 740 and *People v. Francis* (1969) 71 Cal.2d 66, 76. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972–973.) Because the record provides no clear indication the trial court would have refused to exercise in Lopez’s favor the discretion conferred by Senate Bill No. 1393, a limited remand is appropriate.

2. *In Resentencing Lopez, the Trial Court Must Strike or Impose the Prior Prison Enhancements*

Lopez admitted that he had served four prior prison terms within the meaning of section 667.5, subdivision (b). At sentencing, the trial court stayed the four one-year enhancements under this statute.

Section 667.5, subdivision (b) requires the trial court to enhance a defendant’s sentence by a consecutive one-year for each prior prison term served by the defendant where he or she was convicted of a felony within five years of completing that term. “Once the prior prison term is found true within the meaning of section 667.5(b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken.” (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) Thus, at resentencing, the trial court must either impose one or more of the prison terms required by section 667.5, subdivision (b) or strike any term not imposed.

3. *Lopez Should Be Considered for Relief Under Section 1001.36*

The parties submitted supplemental briefs on whether defendant is entitled to a conditional remand to allow the trial court to consider whether to refer defendant to mental health diversion.

Lopez contends that he is entitled to a pretrial hearing on diversion under recently enacted section 1001.36 because the Legislature intended the statute to apply to cases pending on appeal. As Lopez notes, the record shows that at the time he committed the assault, he was admitted to a psychiatric hospital and experiencing psychotic symptoms. Respondent counters that the language of subdivision (c) of section 1001.36 demonstrates that the Legislature intended the enactment to operate prospectively only, i.e., the enactment does not apply to cases such as this one in which there has already been a trial court adjudication.

Recently in *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), the Court of Appeal held that section 1001.36 applies retroactively. Our Supreme Court, in turn, has granted review of *Frahs*, and will have the final say on the matter. (*People v. Frahs* (Dec. 27, 2018, S252220).)² For now, we agree with *Frahs* that section 1001.36 applies retroactively.

² California Rules of Court, rule 8.1115(e)(1) [“Pending review and filing of the Supreme Court's opinion, unless otherwise ordered by the Supreme Court under (3), a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only.”].)

As in *Frahs*, Lopez's case is not yet final on appeal and the record affirmatively discloses that he appears to meet at least one of the threshold requirements. We will therefore remand to allow the trial court to determine whether defendant should be referred for mental health diversion under section 1001.36. (*Frahs, supra*, 27 Cal.App.5th at p. 791.)

DISPOSITION

The judgment is conditionally reversed and the matter is remanded to the trial court with directions to conduct a diversion eligibility hearing under section 1001.36 within 90 days from the remittitur. If the trial court determines that Lopez is not eligible for diversion, then the court shall reinstate the judgment.

If the trial court determines that Lopez is eligible for diversion but, in exercising its discretion, the court further determines diversion is not appropriate under the circumstances, then the court shall reinstate the judgment.

If the trial court determines that Lopez is eligible for diversion and, in exercising its discretion, the court further determines diversion is appropriate under the circumstances, then the court may grant diversion. If Lopez successfully completes diversion, the court shall dismiss the charges in accordance with section 1001.36, subdivision (e). If, however, Lopez does not successfully complete diversion, the trial court shall reinstate the judgment.

The sentence is reversed as well. If the trial court reinstates the judgment after considering diversion under section 1001.36, it should hold a resentencing hearing to consider whether to exercise its discretion to (1) strike Lopez's five-year sentencing enhancements under section 667, subdivision (a)(1),

and (2) either impose or strike the one-year prior prison terms under section 667.5, subdivision (b).

We also order the abstract of judgment corrected to accurately reflect that Lopez admitted three prior strike convictions.

RUBIN, P. J.

WE CONCUR:

MOOR, J.

KIM, J.