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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.

VICTOR TORRES,

Defendant and Appellant.

B282426

(Los Angeles County
Super. Ct. No. BA451597)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig Richman, Judge. Affirmed and remanded with directions.

Tracy L. Emblem, 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, Paul M. Roadarmel, Jr. and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Victor Torres of assault with a semi-automatic firearm and negligent discharge of a firearm, and found true the allegation that defendant had personally used a firearm under Penal Code section 12022.5, subdivision (a).¹ On appeal, defendant contends that legislation effective January 1, 2018, ending the statutory prohibition on a trial court's ability to strike a firearm enhancement (see §§ 12022.5 & 12022.53), applies and requires a remand for a new sentencing hearing. Respondent concedes and we agree that remand is required for the exercise of the trial court's discretion to decide whether to strike the firearm enhancement under the new legislation. Accordingly, we affirm and remand.

FACTS AND PROCEDURAL BACKGROUND

On October 15, 2016, at approximately 5:00 p.m., Cesar Centano and his brother, Harvin, had just exited a van when defendant walked up to them. Defendant asked them what neighborhood they were from. Harvin replied that he was from Nicaragua. Defendant then asked them if they had "Shorty" with them, and tried to look inside the van. Cesar told defendant to stop looking in the van. Defendant punched Cesar twice and threw him to the ground.

Defendant left, and Harvin and Cesar headed toward their family's apartment. Harvin and Cesar were standing in the courtyard with their cousin when defendant returned with a gun. He pointed the gun first at Cesar and then at the cousin. Defendant then fired the gun once in the air. Some other individuals called to defendant to leave, and he ran off.

The police responded to the scene and found a .22 caliber casing where the shooting occurred. Based on a description of the

¹ All further statutory references are to the Penal Code.

suspect as a Hispanic male with a speech impediment and possible cleft lip, an officer familiar with local gang members suspected that defendant was involved: defendant had scarring on his face and his speech was impaired. When Cesar and Harvin were independently shown six-pack photographic arrays with defendant's photo, they identified defendant as the shooter.

Six weeks later, the police took defendant into custody. Defendant asked a detective why he was being arrested. The detective responded that the warrant was for assault with a deadly weapon. Defendant replied, "I didn't shoot nobody."

The information charged defendant with assault with a semi-automatic firearm (§ 245, subd. (b); count 1) and discharging a firearm with gross negligence (§ 246.3; count 2). It was further alleged that defendant had personally used a firearm in the commission of count 1 (§ 12022.5), had committed count 2 for the benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)), and had suffered a prior prison term and a serious felony conviction (§§ 667.5, subd. (b) & 667, subd. (a)(1)). Defendant pled not guilty and denied the allegations.

At trial, both Cesar and Harvin identified defendant in court as the perpetrator. The jury found defendant guilty of both counts. The jury further found the firearm allegation true and the gang enhancement not true. In a bifurcated trial, the court found the prior prison term and felony conviction allegations true. Defendant was sentenced to 22 years and four months comprised of the following: on count one, the court imposed the mid-term of six years doubled to 12 years due to the strike plus four years for the firearm enhancement; on count two, the court imposed a consecutive term of eight months (one-third the midterm) doubled to 16 months due to the strike; and with respect to the prior prison term, a five-year sentence was imposed. Defendant timely appealed.

DISCUSSION

Defendant's sentence included the midterm of four years for the firearm enhancement under section 12022.5, subdivision (a). At the time of defendant's sentencing (in May 2017), section 12022.5 specified that "[n]otwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (Former § 12022.5, subd. (c).)

Effective January 1, 2018, as a result of the enactment of Senate Bill No. 620, the prohibition against striking a firearm enhancement was eliminated. Now, section 12022.5 provides that "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.5, subd. (c).)

The parties filed supplemental briefing on the applicability of amended section 12022.5 to defendant's case. Defendant argued that the new legislation applies to all cases not yet final where a firearm enhancement was imposed at sentencing, and that we should remand the case to permit the trial court to exercise the discretion it now has to strike the firearm enhancement. Respondent concedes that the amendment to section 12022.5 applies retroactively to nonfinal judgments and remand is appropriate.

We agree with the parties that in defendant's case, remand to the trial court for the exercise of its discretion is appropriate. The case is not yet final. Under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), when the Legislature has amended a statute to reduce the punishment for a particular offense, we assume, unless there is evidence to the contrary, that the Legislature

intended the amended statute to apply “to all defendants whose judgments are not yet final on the statute’s operative date.” (*People v. Brown* (2012) 54 Cal.4th 314, 323.) The *Estrada* rule has been applied to statutes governing penalty enhancements (*People v. Nasalga* (1996) 12 Cal.4th 784, 792) and to situations where the amendment “vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty” (*People v. Francis* (1969) 71 Cal.2d 66, 76).

The amendments made by Senate Bill No. 620 do not specify that the change applies only to crimes committed on or after a particular date. Nor do the amendments contain any other indication of legislative intent contrary to the *Estrada* rule. Consequently, the amendments apply to defendants whose judgments were not yet final on January 1, 2018. Accordingly, under the new legislation, the case must be remanded to give the court an opportunity to exercise its discretion.

DISPOSITION

The judgment is affirmed. The cause is remanded to the trial court for the limited purpose of exercising its discretion under Penal Code section 12022.5, subdivision (c) and, if appropriate following exercise of that discretion, resentencing defendant accordingly.

RUBIN, ACTING P. J.

WE CONCUR:

GRIMES, J.

HALL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.