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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE VIRGEN,

Defendant and Appellant.

B280387

(Los Angeles County
Super. Ct. No. TA123599)

APPEAL from an order of the Superior Court of Los Angeles County, Laura R. Walton, Judge. Affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Jose Virgen appeals from a postjudgment order denying his petition for recall of sentence and resentencing. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2102, Virgen was charged in an information with shooting at an inhabited dwelling (Pen. Code, §§ 246, 12022.5, subd. (a), count 1), recklessly evading a pursuing officer (Veh. Code, § 2800.2, subd. (a), count 2) and carrying a concealed firearm in a vehicle (Pen. Code, § 25400, subd. (a)(1), count 3). As to count 1, the information specially alleged the offense was committed in association with, and for the benefit of, a criminal street gang (Pen. Code, § 186.22, subds. (b)(1)(C) & (4)) and a principal was armed with a firearm in the commission of the offense (Pen. Code, § 12022, subd. (a)(2).) The information further specially alleged Virgen had previously served two separate prison terms for felonies. Virgen pleaded not guilty and denied the special allegations.

In May 2013, Virgen entered a negotiated plea of no contest to shooting at an inhabited dwelling and admitted he had personally used a firearm to commit the offense within the meaning of Penal Code section 12022.5, subdivision (a).

In accordance with the plea agreement, the trial court imposed a sentence of nine years, consisting of the middle term of five years for shooting at an inhabited dwelling plus four years for the firearm-use enhancement and dismissed the remaining counts and special allegations.

In October 2016, Virgen petitioned for recall of sentence and resentencing on various grounds, among them that because

he was 20 years old at the time of the offense,¹ he was entitled to resentencing as a youth offender under Penal Code section 3051. In November 2016, the trial court summarily denied the petition, mistakenly concluding the provision applies only to juvenile offenders who are 17 years old or younger. Virgen filed a timely notice of appeal.

DISCUSSION

We appointed counsel to represent Virgen on appeal. After examination of the record counsel filed an opening brief in which no issues were raised.

On May 25, 2017, we advised Virgen he had 30 days within which to submit any contentions or issues he wished us to consider. On June 13, 2017, we received a 20-page hand printed supplemental brief, which included the petition for recall and resentencing as an exhibit. Virgen argues his petition should have been granted because he qualified under Penal Code section 3051 for a “youth offender parole hearing” and because imposition of the four-year Penal Code section 12022.5, subdivision (a) enhancement was unlawful pursuant to Penal Code section 654, barring multiple punishments for the same act or omission in that firearm-use is an element of the offense of shooting at an inhabited dwelling.

Virgen’s claims are without merit. Penal Code section 3051 does not apply to him because it enables persons who have been convicted of a crime before attaining the age of 23 years and for which they have been sentenced to a determinate term to have a

¹ Virgen’s birth date is November 22, 1991. The date of the offense was June 13, 2012.

youth offender parole hearing during their 15th year of incarceration “unless previously released pursuant to other statutory provisions.” (Pen. Code, § 3051, subd. (b)(1).) Virgen was sentenced to a determinate term of nine years, and thus would no longer be incarcerated at the time of the hearing he seeks.

Virgen is correct that the imposition of the Penal Code section 12022.5, subdivision (a) firearm-use enhancement would ordinarily be considered an unauthorized sentence where, as here, personal use of a firearm is an essential element of the underlying offense (see *People v. Ross* (1994) 28 Cal.App.4th 1151, 1156). However, because Virgen agreed to the four-year enhancement as part of a plea bargain, resulting, to his benefit, in the dismissal of two additional counts and enhancements, he is foreclosed from challenging the sentence on appeal. (See *People v. Hester* (2006) 22 Cal.4th 290, 295 [“defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process”]; accord *People v. Cuevas* (2008) 44 Cal.4th 374, 383.) For the same reason, Virgen is precluded from challenging the imposition of the enhancement on the ground it violates Penal Code section 654.²

We have examined the entire record and are satisfied Virgen’s appellate attorney has fully complied with the responsibilities of counsel and no arguable issue exists. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-284 [120 S.Ct. 746, 145 L.Ed.2d 756]; *People v. Kelly* (2006) 40 Cal.4th 106, 118-119; *People v. Wende* (1979) 25 Cal.3d 436, 441-442.)

² At the court’s request, the parties provided supplemental briefing addressing the issue.

DISPOSITION

The order is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

BENSINGER, J.*

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