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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

SALVADOR VELGARA,

Defendant and Appellant.

2d Crim. No. B276781
(Super. Ct. No. 2014038252)
(Ventura County)

Salvador Velgara appeals from the judgment entered after pleading guilty to two counts of street gang coercion of persons under 18 years old (counts 1 & 2; Pen. Code, § 186.26, subds. (a) & (d)¹, conspiracy to commit a felony (count 3; § 182, subd. (a)(1)), and two counts of assault with force likely to produce great bodily injury (counts 4 & 5; § 245, subd. (a)(4)). Appellant admitted that counts 4 and 5 were committed for the

¹ Unless otherwise stated, all statutory references are to the Penal Code.

benefit of a criminal street gang (§186.22, subd. (b)(1)) and admitted a prior strike conviction (§§ 667, subds. (c)(1) & (e)(1), 1170.12, subds. (a)(1) & (c)(1)). The trial court sentenced appellant to seven years four months state prison. We reverse and remand for resentencing because the trial court imposed a three-year gang enhancement on count 1 even though no gang enhancement was charged or admitted on that count.

The preliminary hearing transcript and probation report reflect that appellant was arrested on August 15, 2014 for carrying a loaded .45 caliber handgun in a vehicle. (§ 25400.) Appellant was a member of The Boyz (aka TBZ) criminal street gang. The handgun was reported stolen in an April 2014 residential burglary in which two handguns, tactical ballistic vests, ammo, and a digital camera were taken.

On August 23, 2014, a Ventura County deputy sheriff served a search warrant on appellant's Piru residence. During the search, appellant's sister said that appellant lived in San Fernando with his girlfriend, and that appellant used the Piru residence as a mailing address.

On October 31, 2014, officers executed a second search warrant at appellant's San Fernando residence and found methamphetamine, 32 Xanax pills, a digital scale, firearms, a brick of marijuana, and photos and a video of appellant conducting a gang initiation in which new gang members were "jump[ed] in" The Boyz criminal street gang.

Appellant moved to quash the second warrant on the ground that it was based on stale information and issued without probable cause. (§ 1538.5.) The magistrate denied the motion. After appellant was bound over to superior court, he entered a

change of plea in case no. 2014038252 and three other cases: case nos. 2014025169, 2014033452, and 2015007222.²

Sentencing Error

The May 2, 2016 Amended Felony Information, the felony disposition statement, the change of plea transcript, and the probation report indicate that no gang enhancement was charged or admitted on count 1 for street gang coercion (§ 186.22, subd. (a)). At the July 26, 2016 sentencing hearing, the trial court imposed a 16-month low term on count 1 (§ 186.22, subd. (a)), plus a three-year gang enhancement (§ 186.22, subd. (b)(1)) for a sentence of 52 months state prison on count 1. On counts 2

² In case no. 2014025169 appellant pled guilty to carrying a concealed and loaded firearm in a vehicle (§ 25400, subd. (a)(1)).

In case no. 201433452 appellant pled guilty to possession of methamphetamine for sale (count 1; Health & Saf. Code, § 11378) while personally armed with a firearm (§ 12022, subd. (c)) and while on bail (§ 12022.1, subd. (b)), possession of a controlled substance while armed with a loaded operable firearm (count 2; Health & Saf. Code, § 11370.1, subd. (a)), possession of marijuana for sale (count 3; Health & Saf. Code, § 11359), possession of a firearm by a felon (count 4; § 29800, subd. (a)(1)), possession of an assault weapon (count 5; § 30605, subd. (a)), and destroying and concealing evidence (count 6; § 135). On count 5 appellant admitted a prior strike conviction (§§ 667, subds. (c) & (e)(1), 1170.12, subds. (a)(1) & (c)(1)).

In case no. 2015007222 appellant pled guilty to unlawful taking or driving a vehicle (Veh. Code, § 10851, subd. (a)), operating a chop shop (Veh. Code, § 10801), and street terrorism (§ 186.22, subd. (a)). Appellant also admitted a prior strike conviction. (§§ 667, subds. (c)(1) & (e)(1), 1170.12, subds. (a)(1) & (c)(1).)

through 5, appellant was sentenced to 40 months state prison. The trial court stated that the total aggregate sentence was “7 years, 4 months.” The July 26, 2016 sentencing minute order reflects that no gang enhancement was imposed on count 1 but states that the total aggregate sentence in case no. 2014038252 is seven years four months. The abstract of judgment reflects an aggregate sentence of four years eight months.

Where there is a discrepancy between the oral pronouncement of judgment and the sentencing minute order or the abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.) Here, however, the trial court erroneously imposed a three-year gang enhancement on count 1 that was not charged or admitted when the change of plea was entered. We accordingly reverse the judgment in case no. 2014038252 and remand for resentencing consistent with the negotiated plea.³ (See, e.g., *People v. Collins* (1978) 21 Cal.3d 208, 215-216.)

³ Appellant has filed a petition for writ of habeas corpus (B281656) alleging that he was denied effective assistance of trial counsel because counsel failed to renew the motion to suppress evidence in case nos. 2014033452 and 2014038252 before the change of plea was entered in superior court. (See § 1538.5, subd. (i); *People v. Lilienthal* (1978) 22 Cal.3d 891, 896-897.) In a separate order, filed concurrently with this opinion, we have denied the petition for writ of habeas corpus.

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YEGAN, ACTING P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Bruce A. Young, Judge

Superior Court County of Ventura

Laurie A. Thrower, 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, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Viet H. Nguyen, Deputy Attorney General, for Plaintiff and Respondent.