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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON SHEPHERD,

Defendant and Appellant.

B297076

(Los Angeles County
Super. Ct. No. BA449310)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed as modified.

Kathy R. Moreno, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters and Susan Sullivan Pithey, Assistant Attorneys General, and Marc A. Kohm and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

This appeal raises only one issue and it is uncontested: Should defendant and appellant Brandon Shepherd's two prior prison enhancements be stricken under recent amendments to Penal Code¹ section 667.5, subdivision (b). These amendments became effective on January 1, 2020, and apply a prior prison enhancement to a prior prison term only for a "sexually violent offense."

The parties contend, and we agree, that these amendments to section 667.5, subdivision (b) are retroactive as to judgments not yet final as of their effective date. Our decision will not be final as of January 1, 2020, an observation conceded by respondent. The parties also agree that neither of defendant's prior prison terms was for a "sexually violent offense." Accordingly, section 667.5, subdivision (b), as amended, compels striking defendant's prior prison enhancements.

FACTUAL AND PROCEDURAL BACKGROUND

We set forth only those facts pertaining to the issue of whether defendant's prior prison terms should be stricken.

On January 18, 2019, a jury found defendant guilty of first degree murder (§ 187, subd. (a)), attempted premeditated murder (§§ 664, 187, subd. (a)), two counts of being a felon in possession of a firearm (§ 29800, subd. (a)(1)), and one count of felony possession of ammunition (§ 30305, subd. (a)(1)). The jury also found true gang and firearm allegations. The trial court thereafter found true under section 667.5, subdivision (b), that defendant had served two prior prison terms resulting from two burglary convictions (§ 459).

¹ All statutory citations are to the Penal Code unless otherwise indicated.

On March 26, 2019, the trial court imposed the high term of three years for a felon in possession of a firearm and one-third the midterm for the second count of possession of a firearm and for possession of ammunition. The court imposed the gang enhancement on each count. Significant to this case, the trial court imposed two one-year enhancements for the prior prison terms. The total determinate sentence was 12 years four months. The trial court also imposed a 75-year-to-life indeterminate sentence.

The trial court refused to strike the gun use or firearm enhancements. The trial court also refused to run any portion of defendant's sentence concurrently.

Defendant timely appealed.

DISCUSSION

Under current law which applied at the time of defendant's sentencing, section 667.5, subdivision (b) imposes a one-year sentence enhancement for each prior prison or county jail term served by the defendant. Senate Bill No. 136 amends section 667.5, subdivision (b) to impose the enhancement only if the prior prison or jail term was served "for a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code." (Stats. 2019, ch. 590, § 1.)²

² Welfare and Institutions Code section 6600, subdivision (b) provides, " 'Sexually violent offense' means the following acts when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as

These amendments became effective on January 1, 2020.
(See Cal. Const., art. IV, § 8, subd. (c)(2).)

Absent evidence to the contrary, we presume the Legislature intended amendments to statutes that reduce punishment “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, citing *In re Estrada* (1965) 63 Cal.2d 740, 742–748.)

Our decision in this appeal will not be final for at least 30 days from issuance of this opinion, which will be after January 1, 2020, when the amendments to section 667.5 take effect. (Cal. Rules of Court, rule 8.366(b)(1).) Thus, the amendments to section 667.5, subdivision (b) will apply retroactively to defendant. (See *People v. Lopez* (2019) 42 Cal.App.5th 337, 341–342 (*Lopez*) [applying Senate Bill No. 136 retroactively when appeal not final by January 1, 2020].)

Defendant served prior prison terms for burglary, which is not a sexually violent offense under Welfare and Institutions Code section 6600, subdivision (b). We therefore strike defendant’s prior prison enhancements under the above-referenced amendments to section 667.5, subdivision (b).

The parties do not request remand for resentencing, nor is remand warranted. The trial court imposed the high term when it could do so; refused to strike either the gun or firearm

defined in subdivision (a): a felony violation of Section 261, 262, 264.1, 269, 286, 287, 288, 288.5, or 289 of, or former Section 288a of, the Penal Code, or any felony violation of Section 207, 209, or 220 of the Penal Code, committed with the intent to commit a violation of Section 261, 262, 264.1, 286, 287, 288, or 289 of, or former Section 288a of, the Penal Code.”

enhancements; and declined to run defendant's sentences concurrently. (*Lopez, supra*, 42 Cal.App.5th at p. 342 ["Because the trial court imposed the maximum possible sentence, there is no need for the court to again exercise its sentencing discretion"].)

DISPOSITION

The judgment is modified to strike the one-year enhancements under Penal Code section 667.5, subdivision (b). The judgment is otherwise affirmed. The trial court shall forward the modified abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.