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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID ISAAC LOZOYA,

Defendant and Appellant.

B282367

(Los Angeles County
Super. Ct. No. VA123733)

APPEAL from a judgment of the Superior Court of Los Angeles County. Olivia Rosales, Judge. Affirmed in part, reversed in part for resentencing, and conditionally reversed in part with directions.

Robert F. Somers, 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, Steven E. Mercer and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

David Isaac Lozoya (appellant) contends he received ineffective assistance of counsel because he was advised to admit a nonexistent attempted murder strike prior. We agree. His admission and the true finding of the nonexistent attempted murder strike prior are stricken, and the nine years of his sentence attributable to that strike prior are reversed. The matter is remanded for resentencing.

The parties agree this case must be remanded for the additional reason that the trial court must be given an opportunity to exercise its discretion under Penal Code section 12022.53, subdivision (h)¹ and decide whether to strike one or all of appellant's firearm enhancements.² Accordingly, we conditionally reverse the firearm enhancements and remand the matter to the trial court to exercise its discretion. If the trial court exercises its discretion to not strike any of the firearm enhancements, then the trial court's decision to impose them shall be reinstated.

FACTS

Case No. VA021379

In the 1990's, appellant was charged with three counts of attempted murder. (§§ 664/187, subd. (a).) The second count was amended to allege the offense of assault with a deadly weapon or by any means of force likely to produce great bodily injury

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

² Effective January 1, 2018, section 12022.53, subdivision (h) was amended by Senate Bill No. 620 (SB 620).

(former § 245, subd. (a)(1)).³ Appellant pleaded guilty to that amended count, and the other two attempted murder counts were subsequently dismissed. The abstract of judgment incorrectly stated that appellant was convicted of attempted murder. In 1996, the abstract of judgment was amended to reflect the conviction under former section 245, subdivision (a)(1).

The Current Case

Appellant was charged with two counts of attempted murder (§§ 664/187, subd. (a)(2)). The information alleged firearm enhancements (§ 12022.53, subds. (b)-(d)). With respect to priors, it alleged a serious or violent felony conviction in 1995 for attempted murder in case No. V0A21379 (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), and four prison terms (§ 667.5, subd. (b)). He entered a plea of not guilty and denied all of the special allegations.

After the initial trial, the jury was hopelessly deadlocked and the trial court declared a mistrial.

The prosecutor elected to retry the case. Two counts of assault with a firearm (§ 245, subd. (a)(2)) were added to the allegations as lesser included offenses of attempted murder. In addition, firearm enhancements as to those lesser included

³ If appellant committed assault with a deadly weapon, it would be a serious felony and count as a strike. If, however, he committed assault by any means of force likely to produce great bodily injury, it would not be a strike. (*People v. Gallardo* (2017) 4 Cal.5th 120, 125.) Prior to its amendment 2011, former section 245, subdivision (a)(1) contained both prohibitions. The amendment put “the prohibitions against assault ‘with a deadly weapon’ and assault by any means of force likely to produce great bodily injury’ into different subdivisions. [Citation.]” (*Gallardo, supra*, at p. 125, fn. 1.)

offenses were added pursuant to section 12022.5, subdivision (a) (personal use of a firearm) and section 12022.7, subdivision (a) (use of a firearm causing great bodily injury). The jury convicted appellant on both counts of assault with a firearm, and it found true the related firearm allegations.

Subsequently, the parties convened for a trial on the priors. Defense counsel announced that appellant wanted to forego a trial. Appellant admitted a prior conviction in case No. VA021379 for attempted murder (§§ 664/187, subd. (a)), a serious felony under the “Three Strikes” law (§ 667, subd. (a)(1), 1170.12, subds. (a)-(d)). He also admitted that four of his prior offenses were priors for purposes of section 667.5, subdivision (b). Defense counsel joined the admissions.

At sentencing, the trial court imposed a total of 18 years in prison on the first count as follows: the midterm of three years for violating section 245, subdivision (a)(2), doubled to six years due to the true finding on the strike prior in case No. VA021379; the midterm of four years for violating section 12022.5, subdivision (a); three years for violating section 12022.7, subdivision (a); and five years for the section 667, subdivision (a)(1) enhancement based on the true finding on the alleged serious prior felony conviction in case No. VA021379. With respect to the second count, the trial court imposed four years and four months in prison as follows: one year (one-third the midterm) for violating section 245, subdivision (a)(2), doubled to two years due to the strike prior in case No. VA021379; one year and four months (one-third the midterm) for violating section 12022.5, subdivision (a); and one year (one-third the midterm) for violating section 12022.7, subdivision (a). The trial court struck

the one-year section 667.5, subdivision (b) enhancements. The total sentence was 22 years 4 months.

This appeal followed. Subsequently, he filed a petition for writ of habeas corpus in case No B288217.⁴

DISCUSSION

I. Ineffective Assistance of Counsel.

“To establish ineffective assistance of counsel, a defendant must show that (1) counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel’s failings, the result would have been more favorable to the defendant.” (*People v. Scott* (1997) 15 Cal.4th 1188, 1211.) If a record sheds no light on the reasons for an attorney’s actions, ineffective assistance of counsel is properly addressed in connection with a petition for habeas corpus rather than on appeal. The exception to the rule is that the issue can be addressed on appeal when there is no satisfactory explanation for what the attorney did. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.)

Here, there is no satisfactory explanation for defense counsel’s failure to discover the amended abstract in case No. VA021379 (*In re Brown* (2013) 218 Cal.App.4th 1216, 1223 (*Brown*) [criminal defense counsel must carefully investigate all defenses of fact and law available to his or her client]), and his

⁴ We have concurrently considered appellant’s petition for writ of habeas corpus with this appeal. It raises the same ineffective assistance of counsel argument being advanced on appeal. Because effective relief can be granted on appeal, the petition for writ of habeas corpus has been rendered moot.

subsequent failure to advise appellant not to admit a nonexistent attempted murder strike prior. Moreover, appellant was prejudiced because the nonexistent strike prior resulted in the doubling of the base terms on both counts and also the imposition of a five-year enhancement.⁵

Appellant's admission and the true finding that appellant suffered the alleged attempted murder prior in case No. VA021379 must be stricken. In addition, the nine years of appellant's sentence attributable to the strike prior must be stricken. On remand, the trial court shall sentence him accordingly. (*Brown, supra*, 218 Cal.App.4th at p. 1229; *People v. Williams* (1996) 50 Cal.App.4th 1405, 1414.)

Appellant requests that we prohibit the prosecution from correcting or amending the information to allege that he suffered a prior in case No. VA021379 with respect to his conviction under former section 245, subdivision (a)(1). Also, he requests that we instruct the trial court that it should not impose an aggregate sentence that exceeds the original sentence. We decline. If the prosecutor amends the information or the trial court imposes an aggregate sentence that exceeds the original sentence, and if appellant believes there was resulting error, he can seek appellate relief at that time.

⁵ On the first count, appellant's sentence was doubled from three years to six years. On the second count, it was doubled from one year to two years. As a result, appellant received four extra years due to the doubling of the base terms. With the five year enhancement, the strike prior caused a total of nine years to be added to appellant's sentence.

II. Firearm Enhancements.

Section 12022.53, subdivision (h) was amended by SB 620 and now reads in part: “The 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 in this subdivision applies to any resentencing that may occur pursuant to any other law.”

Because appellant’s judgment was not yet final when SB 620 took effect, the amendment applies to appellant. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091.) Consequently, “remand is appropriate in this case to allow the trial court to exercise its discretion as to whether to strike the firearm enhancement[s].” (*Id.* at p. 1091.)

The parties agree this matter must be remanded so the trial court can exercise the discretion provided for by section 12022.53, subdivision (h).

DISPOSITION

Appellant’s admission and the true finding of the attempted murder strike prior in case No. VA021379 are stricken. The nine years of appellant’s sentence attributable to that strike prior are reversed. The matter is remanded to the trial court for resentencing.

The firearm enhancements are conditionally reversed. They are remanded to the trial court to determine whether to strike any of those enhancements. If the trial court does not strike any of those enhancements, then the trial court's decision to impose them shall be reinstated.

In other respects, the judgment is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ