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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.

BARRICK YOUNG,

Defendant and Appellant.

B291756

(Los Angeles County  
Super. Ct. No. YA097437)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hector M. Guzman, Judge. Affirmed and remanded 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, Kenneth C. Byrne and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

## **INTRODUCTION**

Defendant and appellant Barrick Young was convicted of first degree burglary. He was sentenced to eight years for the burglary, plus 10 years for two prior serious felony convictions.

After Young was convicted, the Legislature enacted Penal Code section 1001.36,<sup>1</sup> which created a pretrial diversion program for defendants with mental disorders. While Young's case was pending on appeal, the Legislature also enacted amendments to sections 1385 and 667, subdivision (a), which gave trial courts discretion to dismiss sentencing enhancements for prior serious felony convictions.

At the time of Young's conviction, pretrial diversion for mental health treatment was not available, and trial courts had no authority to strike five-year enhancements for serious felony convictions. We reject Young's contention that section 1001.36 applies retroactively to his case but we agree sections 1385 and 667, subdivision (a) retroactively apply. Accordingly, we affirm his conviction but we remand with directions to the trial court to conduct a sentencing hearing at which it shall consider whether to strike either or both prior serious felony enhancements.

## **FACTUAL AND PROCEDURAL BACKGROUND**

On December 27, 2017 at approximately 12:15 a.m., Los Angeles County Sheriff's Deputy Raymond Zavala was dispatched to a residence to investigate a report of a prowler on private property. After he arrived, Zavala approached the detached garage and observed that the area around the door lock was broken and the door frame was cracked. Zavala also observed a shoe print on the door. Zavala entered the garage and

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<sup>1</sup> All further statutory references are to the Penal Code.

saw Young going through some boxes. After Zavala ordered Young to show his hands, Young took a glass pipe out of his front shirt pocket, placed it on a box in front of him, and then put up his hands. Young also had batteries, a lighter, and a charger in his other hand.

According to victim Walter White, neatly stored items in his garage had been strewn about the area by Young. White was the only person with access to the garage, and he did not give Young permission to enter. White testified the lighter, batteries, and charger did not belong to him.

Young testified he had been homeless for five months and, in the days leading up to December 27, he had been up for several days smoking methamphetamine. Young stated he entered the garage not to steal anything, but to sleep. He testified the items in the garage were strewn about because he was trying to hide his methamphetamine pipe. The batteries, charger, and lighter belonged to him. Young testified he sometimes heard voices, for which he was taking medication.

On May 16, 2018, after a bench trial, Young was convicted of one count of first degree burglary. (§ 459.) The court also found Young suffered two prior serious felony convictions (§ 667, subd. (a)(1)) and two strikes under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The court also found Young served five prior prison terms (§ 667.5, subd. (b)).

Sentencing was conducted on July 25, 2018. The court granted Young's *Romero*<sup>2</sup> motion as to one of the two strike priors. The court sentenced Young to an aggregate term of 18 years in prison, consisting of the middle term of four years for the

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<sup>2</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

burglary, doubled due to the prior strike, plus two five-year enhancements for two prior serious felony convictions. The court struck the five enhancements for Young’s five one-year prior prison terms.

Young timely appealed.

## **DISCUSSION**

### **I. Mental Health Diversion Is Not Retroactive**

Section 1001.36 authorizes pretrial diversion for defendants with qualifying mental disorders such as schizophrenia, bipolar disorder, and posttraumatic stress disorder. “[P]retrial diversion’ means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment.” (§ 1001.36, subd. (c).)

A trial court may grant pretrial diversion under section 1001.36 if the court finds: (1) defendant suffers from a qualifying mental disorder; (2) the mental disorder played a significant role in the commission of the charged offense; (3) a qualified mental health expert must opine that defendant’s symptoms will respond to treatment; (4) defendant consents to diversion and waives his or her speedy trial rights; (5) defendant agrees to comply with the treatment as a condition of diversion; and (6) defendant will not pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if he is treated in the community. (§ 1001.36, subds. (b)(1)(A)–(F).) Pretrial diversion is not available to defendants charged with murder, voluntary manslaughter, certain enumerated sex offenses, and certain offenses involving the use of weapons of mass destruction. (§ 1001.36, subds. (b)(2)(A)–(H).)

If the trial court grants pretrial diversion and the defendant performs “satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant’s criminal charges that were the subject of the criminal proceedings at the time of the initial diversion.” (§ 1001.36, subd. (e).)

Here, the record reflects Young has a history of mental health issues, including episodes of auditory hallucinations. Young testified he took medication to treat the auditory hallucinations and the probation report submitted to the court reflects Young previously received mental health treatment from the California Department of Corrections and Rehabilitation. Additionally, Young was not charged with any of the disqualifying offenses described above.

Young contends he should be considered for mental health diversion under section 1001.36 because his case is not yet final on appeal. He relies on the reasoning in *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), which held that section 1001.36 applies retroactively. More recently, the court in *People v. Craine* (2019) 35 Cal.App.5th 744 (*Craine*), rejected the reasoning in *Frahs* and held section 1001.36 does not apply retroactively to a defendant who has been tried and sentenced. Our Supreme Court has granted review of *Frahs*, and will have the final say on the matter. (*People v. Frahs*, review granted Dec. 27, 2018, S252220.) Except for expressing our agreement with the *Craine* court’s careful and correct analysis, we have nothing to add. We will follow *Craine* and reject Young’s contention.

## **II. Discretionary Dismissal of The Five-Year Enhancements Is Retroactive**

While this case was pending on appeal, the Legislature enacted amendments to sections 1385 and 667, subdivision (a) giving trial courts discretion to dismiss punishment for prior serious felony convictions. The amendments, which became operative on January 1, 2019, are retroactive to cases not yet final on appeal. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972.) A remand is required in such cases unless the record shows it would not have exercised its discretion to lessen the sentence at the time of sentencing. (*People v. Johnson* (2019) 32 Cal.App.5th 26, 69.)

The People acknowledge the amendments are retroactive to Young's case, but contend the case should not be remanded because the court "clearly indicated" it would not have struck the prior felony enhancements even if it had the discretion at the time of sentencing. The crux of the People's argument is that the court did not exercise its discretion to impose the low term on the burglary conviction, and only struck one of two of Young's prior strikes. The People also point to the court's comment that there was "no question" that a life term would be warranted in Young's case. We are not convinced.

With respect to the court's comments, the People quote a small portion of a fuller statement that, in proper context, reveals the court was sympathetic to Young. The court began its statement with a caveat that, "[i]f you look at Mr. Young's record, just the cold facts, in my mind there's no question he warrants the life term. He has a number of serious offenses in the past, and once again, he faces another serious conviction." The court then explained that although some might be surprised the court

only imposed a determinate 18-year sentence, “I have seen Mr. Young in court. I’ve listened to him. He has always been respectful at every court appearance. He has expressed remorse.” The court commented it was “somewhat of a sad situation because I honestly do feel he is trying, but he always seems to put himself in a position where he’s back in court facing significant time . . . [¶] . . . the other reasons why I showed mercy, is that there are these stretches of time where [Mr. Young] doesn’t seem to be getting himself in any serious trouble, but he always seems to be somewhat on the edge of falling off and back into trouble.” The court also observed that Mr. Young’s crimes had decreased in severity since “the very beginning,” when he used a weapon and was involved in some serious and violent offenses. The court stated it was impressed with Mr. Young’s humility, respect for the court, and desire to change. In other words, the court made clear that while *on paper* Mr. Young’s criminal history could justify a more severe sentence, the court believed mercy and leniency were warranted based on a closer analysis of Mr. Young’s record and due consideration of his more positive attributes. We therefore cannot definitively conclude the court would not have fashioned a more lenient sentence, or perhaps have structured the sentence in a different way to maximize parole consideration, if it had had the discretion to do so.

In any event, it is undisputed that the court had no discretion at the time of Young’s sentencing and was compelled to impose two five-year enhancements for two prior serious felony convictions. Neither did the People nor Mr. Young’s trial counsel have an opportunity to present arguments related to the amended provisions. Accordingly, Mr. Young and his counsel did not have a “ ‘full and fair opportunity to marshal and present the

evidence supporting a favorable exercise of discretion.’ ”  
(*People v. Rocha* (2019) 32 Cal.App.5th 352, 358, citing *People v. Rodriguez* (1996) 17 Cal.4th 253, 258.) Thus, we will remand the case for the trial court to conduct a new sentencing hearing to determine whether to exercise its discretion to strike Young’s prior felony enhancements.

### **DISPOSITION**

The case is remanded for the trial court to conduct a new sentencing hearing to consider whether to exercise its newly authorized discretion under amended sections 1385 and 667, subdivision (a), to dismiss the prior serious felony enhancements.

In all other respects, the judgment is affirmed.

BIGELOW, P. J.

I concur:

GRIMES, J.



**People v. Young**  
**B291756**

STRATTON, J., concurring in part and dissenting in part:

I dissent only from the majority's holding that section 1001.36 does not apply retroactively. I would adopt the view of *People v. Frahs* (2018) 27 Cal.App.5th 784, review granted, *People v. Frahs* (December 27, 2018, S252220) and hold that section 1001.36 applies retroactively to all judgments not yet final on appeal.

STRATTON, J.