

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DARRELL KENNETH THOMAS,

Defendant and Appellant.

B283421

(Los Angeles County
Super. Ct. No. KA114239)

APPEAL from an order of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Remanded for resentencing.

Jason Szydlik, 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, Paul M. Roadarmel, Jr., and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Darrell Kenneth Thomas appeals from the order revoking his probation and sentencing him to an aggregate state prison term of four years four months for his underlying conviction of making criminal threats with a firearm enhancement. Thomas contends remand for resentencing is necessary to allow the trial court to exercise its discretion to strike the firearm enhancement under the recent amendment to Penal Code section 12022.5.¹ We affirm the order revoking probation and remand for the trial court to hold a new sentencing hearing.

FACTUAL AND PROCEDURAL BACKGROUND

1. Thomas's Conviction and Initial Sentence

In December 2016 Thomas went to the house of his ex-girlfriend Annette Limon's sister looking for his daughter. When the sister's husband came outside, Thomas removed an M4 rifle from the trunk of his car and said, "I'm going to put holes in [Limon] and the man she's seeing." When Limon learned of the incident, she notified police out of fear for her safety and the safety of her children with Thomas.

Shortly thereafter Thomas was charged in a felony complaint with one count of making a criminal threat. (§ 422, subd. (a).) The complaint specially alleged Thomas had personally used a firearm while making the threat. (§ 12022.5, subd. (a).) On March 16, 2017, pursuant to a negotiated agreement, Thomas pleaded no contest to making a criminal threat and admitted he had personally used a firearm during the commission of the offense. The trial court suspended imposition of the sentence and placed Thomas on five years of formal

¹ Statutory references are to this code.

probation with the condition he serve 365 days in county jail. The terms of probation also included an order Thomas have no contact with Limon.

2. The Motion To Revoke Probation and the Revocation Hearing

On June 1, 2017 the district attorney's office filed a motion requesting revocation of Thomas's probation, alleging he had violated the conditions of his probation by having repeated telephone contact with Limon.

A revocation hearing was held on June 14, 2017. Limon testified Thomas called her from jail 11 times between March 17 and May 20, 2017. She had also taken their children to visit Thomas in jail. Limon explained she was afraid of Thomas but maintained contact with him "to keep the peace because I knew he was getting out soon, and I didn't want any backlash." She also said she brought their children to see him so she could "see where he's at to just gauge if I take the kids to see him then the anger will diminish. Because I know he's going to get out eventually, and I don't want to be a dead body." Limon acknowledged Thomas had not threatened her when he was in jail, but he had gotten angry on some of their telephone calls.

Thomas testified in his own defense. He recalled being informed at his sentencing hearing that he was not to have any contact with Limon. However, he stated he continued to call her because he was concerned for his children, and Limon had never told him to stop contacting her. He testified he would comply with any future orders not to contact Limon.

3. The Revocation of Probation and Sentencing

The trial court found Thomas had violated the conditions of his probation. Prior to pronouncing the sentence the court stated, “Mr. Thomas, I’ve been doing this line of work now for over 33 years and I’ve seen a lot of crimes involving threats of violence and I’ve seen a lot of crimes involving the use of firearms and many times they’re in the context of domestic violence. You got a deal here, a sweetheart deal; and all you had to do was jump through some hoops. You failed to do that.”

The court initially stated it would sentence Thomas to an aggregate state prison term of six years: the middle term of two years for making criminal threats (§§ 422, subd. (a), 1170, subd. (h)(1)) plus the middle term of four years for the firearm enhancement (§ 12022.5, subd. (a)). After a discussion off the record and the court’s confirmation Thomas was eligible for probation or a suspended sentence pursuant to section 1203.06, the court amended its sentencing decision, sentencing Thomas to an aggregate state prison term of four years four months: the low term of 16 months for making criminal threats plus the low term of three years for the firearm enhancement.

DISCUSSION

At the time of Thomas’s probation revocation and sentencing, imposition of the firearm enhancement pursuant to section 12022.5 was mandatory. In October 2017 the Legislature passed Senate Bill No. 620, which took effect on January 1, 2018. Section 12022.5, subdivision (c), now provides, “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 by this

subdivision applies to any resentencing that may occur pursuant to any other law.”² Thomas argues that, because his sentence was not final at the time Senate Bill No. 620 came into effect, remand is necessary for the court to exercise its newly enacted discretion to strike the firearm enhancement.³

The Attorney General acknowledges section 12022.5, subdivision (c), as amended, applies retroactively to Thomas and other defendants whose sentences were not final before those provisions came into effect. (See *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507 [“the Legislature, in enacting Senate Bill 620 has made it clear it intended and expected that its provisions would be applied to all cases pending at the time it became effective”]; accord *People v. Woods* (2018) 19 Cal.App.5th 1080, 1091.) However, relying on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, the Attorney General argues remand is not warranted in this case “because no reasonable court would exercise its new discretion to strike appellant’s firearm enhancement.”

As we recently explained in *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081, “In *Gutierrez*, while the appeal was pending in the Court of Appeal, the Supreme Court in a different case held that trial courts have discretion to strike a serious or violent felony conviction under the three strikes law. [Citation.] The Court of Appeal in *Gutierrez* held that resentencing was

² Senate Bill No. 620 also added identical language to Section 12022.53, which imposes sentence enhancements of 10, 20, or 25 years to life for personally using a firearm during commission of certain specified felonies. (§ 12022.53, subd. (h).)

³ Thomas does not appeal the trial court’s finding of a probation violation or the revocation of probation.

required ‘unless the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations.’” In *Billingsley* the Attorney General made the same argument he makes here—that remand for resentencing due to the enactment of Senate Bill No. 620 would be futile because no reasonable court would strike the firearm enhancement. We rejected that argument, holding the record did not “‘clearly indicate’ the court would not have exercised its discretion to strike the firearm allegations had the court known it had the discretion.” (*Billingsley*, at p. 1081.) While we acknowledged the trial court in *Billingsley* had suggested it would not strike the firearm allegation even if it had the discretion to do so, we held such a statement was not determinative because “the court was not aware of the full scope of the discretion it now has under the amended statute. “‘Defendants are entitled to sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that ‘informed discretion’ than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record.’”” (*Ibid.*)

For these same reasons we find remand for resentencing is necessary here. The trial court in this case did not “clearly indicate” it would not have stricken the firearm enhancement if it had the discretion to do so. The court did not express an intent to impose the maximum possible sentence. To the contrary, the court indicated a desire to impose a more lenient sentence: After initially pronouncing a middle term sentence for the underlying offense and the enhancement, the court reconsidered and

imposed the minimum sentence possible at the time. In the absence of any clear indication the court would not have stricken the firearm enhancement, remand is necessary. (See *People v. Billingsley*, *supra*, 22 Cal.App.5th at p. 1082; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427-428 [holding no “clear indication of an intent by the trial court not to strike one or more of the firearm enhancements”]; cf. *People v. Saavedra* (2018) 24 Cal.App.5th 605 [holding remand for resentencing under newly amended section 12022.53 would be futile when court imposed maximum possible sentence and stated defendant was “a serious danger to society”]; *People v. McVey* (2018) 24 Cal.App.5th 405 [holding remand futile when trial court applied high term to sentence for firearm enhancement citing several aggravating factors that far outweighed mitigating factors and stated high term was the “only appropriate sentence”].)

DISPOSITION

The order revoking probation is affirmed. The sentence is vacated in its entirety, and the matter remanded to allow the trial court to conduct a new sentencing hearing to determine whether to exercise its discretion to strike the firearm enhancement previously imposed under section 12022.5, subdivision (a).

PERLUSS, P. J.

We concur:

SEGAL, J.

WILEY, J.*

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