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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

TRINIDAD RODRIGUEZ,

Defendant and Appellant.

B294523

Los Angeles County

Super. Ct. No. LA081391

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan K. Schneider, Judge. Affirmed.

Allison Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

## INTRODUCTION

Appellant Trinidad Rodriguez pled no contest to assault with a firearm (Pen. Code, § 245, subd. (a)(2))<sup>1</sup> and possession of a firearm by a felon (§ 29800, subd. (a)(1)) and admitted various prior conviction, gang, and gun use allegations. The trial court sentenced him to 19 years and four months in state prison. Following review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436, we affirm.

## PROCEDURAL BACKGROUND

A felony complaint charged Rodriguez with attempted murder (§§ 664/187, subd. (a); count one), attempted second-degree robbery (§§ 664/212.5, subd. (c); count two), assault with a firearm (§ 245, subd. (a)(2); count three), and possession of a firearm by a felon (§ 29800, subd. (a)(1); count four). The complaint further alleged Rodriguez personally used a handgun during the commission of counts one and two (§ 12022.53, subd. (b)); personally used a firearm during the commission of count three (§ 12022.5, subd. (a)); committed counts one through three for the benefit of a criminal street gang; (§ 186.22, subd. (b)(1)(B) [counts one and two]; § 186.22, subd. (b)(1)(C) [count three]); sustained a prior strike conviction (§§ 667, subd. (d), 1170.12, subd. (b)); and sustained a prior serious felony conviction (§ 667, subd. (a)(1)).

On October 7, 2015, in exchange for dismissal of all other counts and allegations, Rodriguez pled no contest to assault with a firearm (§ 245, subd. (a)(2); count three) and possession of a firearm by a felon (§ 29800, subd. (a)(1); count four). He also

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

admitted the prior strike and serious felony allegations, as well as the gang and gun use allegations attached to count three.

Pursuant to the plea agreement, the court sentenced Rodriguez to a determinate term of 22 years and four months, consisting of the upper term of four years on count three, doubled to eight years for the strike, a consecutive five-year term under section 667, subdivision (a), a consecutive five-year term under section 186.22, subdivision (b)(1)(C), a low term of three years under section 12022.5, and a consecutive one-third the midterm doubled (16 months total) on count four.

On May 31, 2017, the Department of Corrections and Rehabilitation (CDCR) filed a letter with the court, requesting clarification of the sentence, and indicating the five-year sentence under section 186.22, subdivision (b)(1)(C) was required to be 10 years. On July 24, 2017, the trial court conferred with counsel and stated it would implement the required change to the sentence without increasing the total, thus fashioning a remedy to effectuate the parties' intent. By agreement of the parties, Rodriguez withdrew his admission to the section 667, subdivision (a) allegation and the prosecutor dismissed it in the interest of justice. The trial court then modified the judgment to reflect a 10-year term for the gang enhancement.

On August 3, 2017, a first amended abstract of judgment was filed, reflecting a total sentence of 22 years and four months, consisting of the upper term of four years on count three, doubled to eight years for the strike, two consecutive five-year terms under section 186.22, subdivision (b)(1)(C), a low term of three years under section 12022.5, and a consecutive one-third the midterm doubled (16 months) on count four.

On August 22, 2017, the CDCR sent a second letter to the court indicating the two five-year terms imposed under section 186.22, subdivision (b)(1)(C) were not correct because the statute requires a single 10-year term. On August 25, 2017, a second amended abstract of judgment was filed replacing the two five-year terms with one 10-year term.

On June 18, 2018, the CDCR sent a third letter to the court, indicating that, pursuant to *People v. Le* (2015) 61 Cal.4th 416, the court was precluded from imposing both a gun enhancement under section 12022.5, subdivision (a) and a serious felony gang enhancement under section 186.22, subdivision (b)(1)(B) when the underlying offense qualified as a serious felony based solely on the gun use.<sup>2</sup>

On October 16, 2018, Rodriguez moved to dismiss counsel and proceed in pro per. The court advised him the current sentence was 22 years and four months, but the court intended to permanently stay the three-year section 12022.5, subdivision (a)(1) enhancement, so the total sentence would be reduced to 19 years and four months. Rodriguez said he understood, and the

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<sup>2</sup> The CDCR mischaracterized Rodriguez's gang enhancement as a serious felony enhancement under section 186.22, subdivision (b)(1)(B), when in fact Rodriguez did not plead to that enhancement, but rather to a violent felony enhancement under section 186.22, subdivision (b)(1)(C). We note the case holding courts are precluded from imposing both a violent felony gang enhancement under section 186.22, subdivision (b)(1)(C) and a gun enhancement under section 12022.5, subdivision (a) when the underlying offense qualifies as a violent felony based solely on the gun use is not *People v. Le*, *supra*, 61 Cal.4th 416, but rather *People v. Rodriguez* (2009) 47 Cal.4th 501.

trial court granted his motion to proceed in pro per. He then stated he had not signed a deal that included a 10-year gang enhancement. The court stated: “That’s all issues on appeal. Those are not issues that I am going to take up at this time.” The court corrected the sentence, nunc pro tunc, pursuant to the June 18, 2018, letter, and ordered the section 12022.5 enhancement stayed.

On December 20, 2018, a third amended abstract of judgment was filed, reflecting a total sentence of 19 years and four months, consisting of the upper term of four years on count three, doubled to eight years for the strike, a consecutive 10-year term under section 186.22(b)(1)(C), and a consecutive one-third the midterm doubled (16 months) on count four.

Rodriguez filed a timely notice of appeal, and we appointed counsel to represent him. On May 7, 2019, appellate counsel filed a brief raising no issues and asking us to review the record independently. (*Wende, supra*, 25 Cal.3d 436.) Rodriguez did not respond to our letter advising him of his right to file supplemental briefing.

## **FACTUAL BACKGROUND**

Rodriguez stipulated to a factual basis for the plea. On July 15, 2015, Mauro A. was unloading groceries from his car when Rodriguez approached him from behind and demanded his wallet and money. When Mauro turned around, Rodriguez was pointing a gun at his stomach. Mauro said he did not have anything and walked away. Rodriguez raised the gun in Mauro’s direction and pulled the trigger. Mauro heard a snap sound and thought no bullet was fired. Mauro went inside his home. Witnesses saw Rodriguez rummaging through Mauro’s car and heard a gunshot.

Rodriguez threw the gun down. Police arrested Rodriguez and seized the loaded gun.

### **DISCUSSION**

We have examined the entire record, and are satisfied no arguable issues exist in the appeal before us. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-279; *People v. Wende, supra*, 25 Cal.3d at p. 443.)

### **DISPOSITION**

The judgment is affirmed.

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CURREY, J.

WE CONCUR:

MANELLA, P. J.

WILLHITE, J.