

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE POLK,

Defendant and Appellant.

B281672

(Los Angeles County
Super. Ct. No. BA450316)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard S. Kemalyan, Judge. Affirmed in part and remanded with directions.

Rachel Varnell, 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, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Following his conviction on a single count of attempted murder, appellant Joe Polk was sentenced to 25 years to life pursuant to the “Three Strikes” law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(e)),¹ plus 25 years to life for a firearm enhancement (§ 12022.53, subd. (d)), plus 10 years for two prior felony convictions (§ 667, subd. (a)(1)). Sentences on two other firearm enhancements under section 12022.53 also were imposed but stayed. Appellant contends (1) that the trial court abused its discretion in denying his motion to strike his prior strike convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, and (2) that the matter should be remanded for the trial court to exercise its discretion under Senate Bill No. 620 (2017-2018 Reg. Sess.) whether to strike the firearm enhancements. For the reasons stated below, we conclude the trial court did not abuse its discretion in denying appellant’s *Romero* motion. However, we will remand the matter for the trial court to exercise its discretion whether to strike the firearm enhancements. Accordingly, we affirm the conviction, vacate the sentence and remand for resentencing.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY²

On September 11, 2016, appellant fired multiple shots at Warren Kelly, hitting Kelly in the left arm and right leg. Kelly was hospitalized for three days and required surgery to have two

¹ All further statutory citations are to the Penal Code.

² Because appellant raises only sentencing issues, we summarize the evidence supporting the jury’s verdict.

metal rods inserted into his arm. At the hospital, both Kelly and his fiancée -- who was present at the shooting -- identified appellant as the shooter and selected his picture from a photographic sixpack.

On October 17, 2016, appellant was charged by information with attempted murder (§§ 187, subd. (a), 664). It was alleged that appellant personally and intentionally discharged a handgun causing great bodily injury (GBI) (§ 12022.53, subd. (d)), personally and intentionally discharged a handgun (§ 12022.53, subd. (c)), personally used a handgun (§ 12022.53, subd. (b)), and personally inflicted GBI (§ 12022.7, subd. (a)). It was further alleged that appellant had suffered two prior strike convictions within the meaning of the Three Strikes law and two prior serious felony convictions.

A jury convicted appellant of attempted murder and found true the firearm and GBI allegations. Appellant waived his right to a jury trial on the prior conviction allegations, and the trial court found them to be true.

Prior to sentencing, appellant filed a *Romero* motion to strike the strike convictions. After the trial court denied the motion, it sentenced appellant to a total term of 60 years to life in state prison, consisting of 25 years to life on count 1, under the Three Strikes law, plus 25 years to life for the section 12022.53, subdivision (d) firearm/GBI enhancement, plus a mandatory five years each for the two section 667, subdivision (a)(1) prior felony conviction enhancements. The court imposed and stayed a 20-year term for the section 12022.53, subdivision (c) handgun enhancement; a 10-year term for the section 12022.53, subdivision (f) handgun enhancement; and a three-year term for

the section 12022.7, subdivision (a) GBI enhancement. Appellant timely appealed.

DISCUSSION

Appellant challenges his sentence, arguing (1) that the trial court abused its discretion in not striking his prior strike convictions, and (2) that the matter should be remanded for the trial court to exercise its discretion whether to strike the section 12022.53 firearm enhancements.

A. *Prior Strike Convictions*

Appellant contends the court abused its discretion in denying his motion to strike his prior strikes. “[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, . . . the court in question must consider whether, in light of the nature and circumstances of [the defendant’s] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.) “[A] trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances,” such as where the resulting sentence is ““arbitrary, capricious or patently absurd”” under the specific facts of a particular case. (*People v. Carmony* (2004) 33 Cal.4th 367, 378.)

Appellant’s prior strikes consisted of convictions for forcible rape in 1993 and in 1995. Following his 1995 conviction, appellant was sentenced to 38 years in state prison and released

on parole in 2014. In denying appellant's *Romero* motion, the trial court acknowledged that the strike priors were approximately 22 and 24 years old. It noted however that "[a]lthough old, the prior convictions are serious and violent felonies and the present offense did involve the use of a handgun." The court found that "the defendant has not led a crime-free life since the convictions" because "[h]e was out of custody less than one and a half years before the present offense." It further found that drugs and alcohol were not involved in the present offense, and the victim was not armed.

On this record, we find no abuse of discretion. The trial court considered relevant factors and properly exercised its discretion in denying appellant's *Romero* motion.

B. *Firearm Enhancements*

Section 12022.53 provides sentence enhancements for the use of firearms in the commission of felonies. Prior to the enactment of Senate Bill No. 620, a trial court could not strike these enhancements. (See former § 12022.53, subd. (h) ["Notwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section."].) However, effective January 1, 2018, Senate Bill No. 620 replaced the prohibition on striking section 12022.53 firearm enhancements with the following: "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." (§12022.53, subd. (h).)

The Attorney General concedes that Senate Bill No. 620 applies retroactively to nonfinal judgments, such as appellant's. Generally, where the trial court is unaware of the scope of its discretion during sentencing, the appropriate remedy is to remand the case for the court to exercise that discretion. (See *People v. Deloza* (1998) 18 Cal.4th 585, 599-600 [case remanded for resentencing where "trial court misunderstood the scope of its discretion to impose concurrent sentences for defendant's current convictions, and erroneously believed consecutive sentences were mandatory"].) Because Senate Bill No. 620 was not in effect at the time of sentencing, the trial court lacked discretion to strike the section 12022.53 firearm enhancements. In light of the retroactive effect of Senate Bill No. 620, the trial court must be afforded the opportunity to exercise its newly granted discretion.

Citing *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*), respondent argues that remand would be an idle act, as the record demonstrates that the trial court would not have exercised its discretion to lessen the sentence. (See *Romero*, *supra*, 13 Cal.4th at p. 530, fn. 13 [no remand for resentencing required where "the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations"].) According to respondent, for the same reasons the trial court denied appellant's *Romero* motion, "no reasonable court would exercise its discretion to strike [the] firearm enhancement[s]." We disagree.

Section 1385 authorizes the trial court to strike or dismiss both prior strike convictions and firearm enhancements. (See *Romero*, *supra*, 13 Cal.4th 497 at pp. 529-530 ["section 1385(a) does permit a court acting on its own motion to strike prior felony

conviction allegations in cases brought under the Three Strikes law”]; § 12022.53, subd. (h) [“court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement”].) It provides that a court may strike an enhancement “in furtherance of justice.” (§ 1385, subds. (a), (c)(1).) However, “[a]s the Legislature has provided no statutory definition of this expression, appellate courts have been faced with the task of establishing the boundaries of the judicial power conferred by the statute as cases have arisen challenging its exercise.” (*People v. Orin* (1975) 13 Cal.3d 937, 945.) We cannot say that the factors that would lead a court to decline to strike a prior strike are necessarily identical to those that might militate in favor of declining to strike a firearm enhancement. In short, the fact that the trial court denied appellant’s *Romero* motion does not conclusively establish that the trial court also would have declined to strike the firearm enhancements under section 12022.53.

Respondent’s reliance of *Gutierrez, supra*, 48 Cal.App.4th 1894, is misplaced. There, the appellate court considered whether appellant’s Three Strikes sentence should be vacated and the matter remanded for resentencing because during the pendency of the appeal, our Supreme Court held that trial courts have the authority under section 1385 to strike a prior strike conviction. (*Id.* at p. 1896.) The appellate court concluded “no purpose would be served in remanding,” as the record established that the trial court would not, in any event, have exercised its discretion to lessen the sentence by striking the prior strike. The appellate court noted that the trial court had stated that imposition of the maximum sentence was appropriate. “It increased appellant’s sentence beyond what it believed was

required by the three strikes law, by imposing the high term for count 1 and by imposing two additional discretionary one-year enhancements.” (*Ibid.*) In contrast, here, the trial court did not state that imposition of the maximum term was appropriate. Nor did it impose additional discretionary sentence enhancements.

In sum, the record does not conclusively show that the trial court would not, in any event, have exercised its discretion to strike any of the firearm enhancements under section 12022.53. Accordingly, we will vacate the sentence and remand the matter for the trial court to exercise its discretion whether to strike the firearm enhancements. We express no opinion how the court should exercise its discretion on remand.

DISPOSITION

The conviction for attempted murder is affirmed, the sentence is vacated, and the matter remanded for resentencing consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.