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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID A. GALVEZ, a minor,

Defendant and Appellant.

B294969

(Los Angeles County  
Super. Ct. No. KA070312)

Appeal from a postjudgment order of the Superior Court of the County of Los Angeles, Robert M. Martinez, Judge. Reversed and remanded for further proceedings.

Chris R. Redburn, 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, Noah P. Hill and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant David A. Galvez was convicted of two counts of gang-related murder and sentenced consecutively to life without the possibility of parole on each count, plus an additional 25-years-to-life gun use enhancement on each count. Following remand to allow the trial court to exercise its discretion whether to strike the gun use enhancements under Penal Code section 12022.53, subdivision (h),<sup>1</sup> the trial court did not strike the enhancements.

On appeal, defendant contends that the record of the hearing on his request to strike the enhancements shows that the trial court relied on speculation and failed to consider his youth offender status in deciding whether to strike the enhancements. According to defendant, the trial court suggested that he acted with a state of mind unsupported by the evidence and affirmatively stated that it did not want to convey a message or foster the perception that defendant's youth and impulsivity should be considered in ruling on the request to strike.

Because the record on appeal is ambiguous concerning whether the trial court relied on matters outside the record or adequately considered defendant's youth offender status in ruling on the request to strike, we remand for further proceedings to allow the trial court to consider whether to strike the enhancements under section 1385.

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

## II. FACTUAL BACKGROUND<sup>2</sup>

### A. *The Shootings*

Defendant was a member of the Pomona Sur Olive street gang. Pomona Sur Olive's main rival was the 12th Street Sharkies street gang, which also claimed territory in Pomona. One of defendant's gang associates, Jorge Hernandez, previously had been wounded in a drive-by shooting during which another Pomona Sur Olive gang member had been killed. Members of Pomona Sur Olive believed that the 12th Street Sharkies gang was responsible for the shootings.

On Sunday, March 20, 2005, at approximately 11:00 a.m., Daniel Gomez borrowed his father's black Honda. Gomez drove defendant and Hernandez to Washington Park, where defendant and Hernandez told him to stop. Gomez knew that Washington Park was the territory of the 12th Street Sharkies. Gomez saw two men in the park near a fence. The two men "threw up a gang sign," although Gomez did not know from what gang. Defendant exited the car, took out a short rifle, and walked up to the two men. Hernandez told defendant to shoot, and defendant shot one of the men, Naftali Flores, once. Defendant reentered the car and Gomez drove away.

Flores died at the scene from a gunshot wound to his right side. A .22-caliber bullet was recovered from his body. The Pomona Police Department also recovered a single .22-caliber

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<sup>2</sup> The factual background is taken from the unpublished opinion by a panel of this Division in *People v. Galvez* (Aug. 22, 2007, B194868 [nonpub. opn.]) which affirmed defendant's murder convictions and sentence.

shell casing from the scene. A wall near where Flores was shot was marked with 12th Street Sharkies gang graffiti and graffiti deprecating Pomona Sur Olive.

Gomez drove away from the park for a minute or so, until they passed a young man, Anthony Lopez, on a bicycle. Defendant and Hernandez again told Gomez to stop, and defendant again exited the car. The “guy” on the bike “threw up gang signs.” Defendant fired the rifle, and Gomez saw Lopez go down.<sup>3</sup> Defendant reentered the car and the trio fled back to Gomez’s house.

Lopez died at the scene from a gunshot wound to the head. A .22-caliber bullet was recovered from Lopez’s body. The police recovered three .22-caliber shell casings from the scene.

#### B. *The Sentence*

As noted, the trial court sentenced defendant to life without the possibility of parole on each of the two counts of special circumstance first-degree murder. The trial court also imposed an additional 25-years-to-life term on each count for the gun use enhancements. Characterizing the crimes as “a hunting trip” for people “to shoot and kill,” motivated only by “gang loyalties, ties, and distorted amusement,” the trial court found the crimes occurred in separate locations and at different times, and therefore ordered the sentences on the two murder counts to run consecutively. The trial court struck the gang enhancements.

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<sup>3</sup> An eyewitness saw a black car approach a young man on a bicycle. A man with a rifle exited the car. The witness heard shots and saw Lopez fall to the ground.

### III. POSTJUDGMENT PROCEEDINGS

#### A. *Initial Appeal*

On August 22, 2007, a panel of this Division affirmed defendant's judgment of conviction. In doing so, the court concluded, "defendant committed two particularly callous murders, taking the lives of two young men for no reasons other than gang loyalties and, in the trial court's words, defendant's own 'distorted amusement.'"

#### B. *Habeas Petition*

In 2015, defendant filed a petition for writ of habeas corpus in the trial court seeking a resentencing hearing under *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*).<sup>4</sup> The trial court granted the petition and conducted a sentencing hearing at which the court denied defendant's request for resentencing.

#### C. *Second Appeal*

On November 14, 2016, defendant filed a notice of appeal from the trial court's denial of his resentencing request. Following briefing on other issues, including defendant's request for remand to conduct a record development hearing under *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*), defendant filed with

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<sup>4</sup> The record copy of the unpublished opinion of a panel of this Division in *People v. Galvez* (Feb. 22, 2018, B279420 [unpub. opn.]) is missing several pages. We therefore grant the Attorney General's request for judicial notice of the entire opinion.

permission a supplemental brief arguing that under newly enacted section 12022.53, subdivision (h), effective January 1, 2018, he was entitled to a remand so the trial court could exercise its discretion to resentence him by striking the two 25-years-to-life gun use enhancements imposed on his original sentence.

On February 22, 2018, a panel of this Division issued an unpublished opinion that (1) held defendant's appeal from the trial court's order denying resentencing under *Miller, supra*, 567 U.S. 460 and the Eighth Amendment was moot; (2) denied defendant's request for remand to hold a record development hearing under *Franklin* as unnecessary due to the record developed in the habeas proceeding under *Miller*; and (3) conditionally reversed and remanded the order denying resentencing for the limited purpose of allowing the court to consider whether it was appropriate under the facts and circumstances of this case to exercise its discretion to strike the gun use enhancements under section 12022.53, subdivision (h).

D. *Hearing Under Section 12022.53, Subdivision (h)*

Following remand, defendant filed a brief in the trial court entitled "Defense Counsel's Brief and Exhibits Relevant to Sentenced Defendant and Youth Offender Parole Hearing (Pen.Code, secs. 1203.1, 3051, 4801, 12022.53, [subdivision] (h) and [*Franklin*, *supra*,] 63 Cal.4th 261.)" Notwithstanding the denial on appeal of his request to remand this matter for a record development hearing under *Franklin*, defendant asserted that his brief should be considered for purposes of completing "the current *Franklin* process." Defendant also argued that "[a]lthough[] this

court is considering the exercise of its discretion under [§]section 12022.53, subdivision (h) as to whether the gun use enhancements should be stricken, the court must consider [defendant's] age at the time of the incident and all that implies under the law." Defendant requested that the trial court strike the gun enhancements as to both counts.<sup>5</sup>

The District Attorney filed an opposition to defendant's section 12022.53, subdivision (h) request to strike the gun use enhancements, arguing that due to the circumstances of defendant's crimes, it would not further the interest of justice to strike those enhancements.

At the hearing on the motion to strike the gun use enhancements, defendant's counsel repeatedly argued that defendant's youth, immaturity, and "impulsivity" affected his judgment and made him more vulnerable to peer pressure and less culpable than his older gang-member accomplices. At one point, in response to the trial court's inquiry about the legal significance of the requested order striking the enhancements, defense counsel suggested that striking the gun use enhancements would send a message to the parole board that defendant's youth and impulsivity justified a reduction in his sentence. "I think the court exercising its discretion [to strike the enhancements] also *sends a message to the parole board that this was a young, impulsive person* who has responsibility but maybe there is an equitable difference, . . . . I think that is the significance. *It lets the parole board also . . . know that this*

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<sup>5</sup> Defendant attached to his brief his sentencing memorandum in support of his habeas petition under *Miller*, *supra*, 567 U.S. 460, with its voluminous exhibits, including articles about the diminished culpability of youth offenders.

*court—in reviewing the totality and the history of the circumstances of this case, [concluded] that . . . as a youthful offender, this young man wasn’t entirely the driving force here. And I think that is the message to the parole board and it’s something the parole board can consider. [¶] . . . [¶] . . . [I]t would—. . . send a very clear indication that this court recognizes that it can exercise its discretion and there were factors here that do mitigate in terms of what the law permits the court to do, that do mitigate and do argue for the court exercising its discretion.”* (Italics added.)

After hearing the arguments of counsel, the trial court found that striking the gun use enhancements would not be in the interest of justice, reasoning as follows: “The court has earlier expressed its views as to the crimes that were committed by [defendant], and that was in the writ of habeas corpus [proceeding] . . . . [¶] The court described [defendant’s] behavior as a hunt, a hunt to kill people. And *the court expressed wonder about what happened in the car after the first shooting but prior to the second one? Was there an appreciation of what happened? Was there laughter? Was there terror?* But [defendant], having assassinated one person only minutes earlier, gets out of the car again and killed someone. And after the second killing, *one wonders again what took place in the vehicle. High fives? Praise? An increase [in] respect for [defendant]?* [Defendant] was told to shoot. He walked right up to the person and put the gun to his head as he did in the second one. [¶] *Juveniles can be impulsive.* My own experience on the bench of 34 years and 10 years of practice before tells me that minors killing multiple people on different occasions doesn’t happen very often. [¶] I still don’t understand [the significance of] striking . . . the [gun] use



allegation . . . because he's still going to be eligible after 25 years of incarceration, whether [the sentence enhancements] are there or not. *And if it serves as a message from the court acknowledging his impulsivity and his youth, I don't want to be a party to participating in that perception . . . .* I don't see how the interest of justice is promoted by striking the personal use of a firearm to assassinate two individuals that were perceived to be possibly gang rivals. Two innocent persons[,] [including o]ne who was not even associated with any criminal street gang[,] lost their lives. [¶] . . . [¶] In any event, *the court does not find that the interest of justice will be promoted by the striking of the [gun] use allegations.*" (Italics added.)

#### IV. DISCUSSION

Defendant contends that the trial court abused its discretion when it refused to strike the gun use enhancements under section 12022.53, subdivision (h). According to defendant, the record of the hearing shows that the trial court first "demoniz[ed]" defendant, without evidence in the record, and then expressed a willingness to ignore his youth and impulsivity by stating that it did not want to send "a message" or otherwise "participate in the perception" that those factors influenced the court's decision on the request to strike.

A. *Legal Principles and Standard of Review*

Effective January 1, 2018, the Legislature amended section 12022.53, subdivision (h),<sup>6</sup> to provide trial courts with discretion to strike or dismiss section 12022.53 firearm enhancements “in the interest of justice pursuant to [s]ection 1385.” In exercising its discretion under section 1385, a trial court considers factors including the defendant’s rights, the interests of society, and individualized considerations pertaining to the defendant and his or her offenses and background. (*People v. Rocha* (2019) 32 Cal.App.5th 352, 359.) Among other things, “the court should consider the nature and circumstances of the defendant’s current crimes, the defendant’s prior convictions, and the particulars of his or her background, character, and prospects.” (*People v. Orabuena* (2004) 116 Cal.App.4th 84, 99.)

The denial of a motion to dismiss pursuant to section 1385 is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) A trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it. (*Id.* at p. 377) The trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review, absent the required showing of abuse of discretion. (*Id.* at pp. 376–377.)

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<sup>6</sup> Section 12022.53, subdivision (h) 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.”

The trial court's power under section 1385, "while broad, is by no means absolute." (*People v. Orin* (1975) 13 Cal.3d 937, 945.) Abuse of discretion may be shown where the court was not aware of the scope of its discretion pursuant to section 1385 or considered impermissible factors in exercising its power to strike or dismiss an enhancement. (*People v. Lee* (2008) 161 Cal.App.4th 124, 132; *People v. Orabuena, supra*, 116 Cal.App.4th at pp. 99–100.) "Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court." (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)

B. *Analysis*

Based on the trial court's statements during the hearing on the request to strike, it is unclear whether the trial court relied on matters outside the record or adequately considered defendant's age-related factors in ruling on that request. Initially, the court seemed to wonder about the conduct and mental state of defendant and his accomplices in their car prior to and following the second murder. Whether such wonder influenced the court's decision is not evident from the record, but the remarks at least suggest that the court may have relied upon matters that had not been proven at trial and were not otherwise reasonable inferences to be drawn from the trial evidence.

Also problematic are the trial court's comments to the effect that it did not want its ruling on the request to strike to "serve as a message from the court acknowledging [defendant's] impulsivity and his youth" and that the court did not "want to be a party to participating in that perception." Although, when read

in context, those comments may have been a direct response to defense counsel's arguments about sending "a message to the parole board," they are also susceptible to an interpretation that the court did not consider adequately the particulars of defendant's background, character, and prospects when ruling on the request to strike.

Because the record is ambiguous on whether the trial court considered matters outside the record or failed to give due consideration to defendant's youth in ruling on his request to strike the sentence enhancements, remand for further proceedings is appropriate.<sup>7</sup> Such a procedure will allow the court to articulate clearly the reasoning underlying its decision on the request to strike the enhancements in light of, among other appropriate factors, the trial evidence and defendant's age at the time he committed the offenses in issue.

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<sup>7</sup> In addition to requesting reversal based on the order denying his request to strike the gun use enhancements, defendant requests that we order the trial court to impose two *concurrent* 25-years-to-life sentences, instead of the consecutive sentences originally imposed. But that request for relief is beyond the scope of this appeal which, by definition, is limited to the one issue before the trial court on the remand under section 12022.53, subdivision (h), i.e., whether striking the gun use enhancements would be in the interest of justice.

## V. DISPOSITION

The order denying the request to strike the gun use enhancements under section 12022.53, subdivision (h) is reversed and remanded for the trial court to take into consideration all appropriate factors in determining whether to strike the enhancements in the interest of justice under section 1385.

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KIM, J.

We concur:

RUBIN, P. J.

MOOR, J.