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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO VELEZ,

Defendant and Appellant.

B282843

(Los Angeles County  
Super. Ct. No. MA070041)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephen I. Goorvitch, Judge. Affirmed and remanded with instructions.

Stephanie L. Gunther, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Antonio Velez (defendant) appeals from the judgment entered after he was convicted of possession of methamphetamine for sale. Defendant challenges only his sentence, seeking retroactive application of Senate Bill No. 180, to vacate two sentence enhancements imposed under the recently amended Health and Safety Code section 11370.2.<sup>1</sup> Respondent agrees that the enhancements should be stricken. We affirm the judgment, but vacate the sentence and remand for resentencing.

### **BACKGROUND<sup>2</sup>**

After a jury trial, defendant was convicted of one count of possession for sale of methamphetamine in violation of section 11378, subdivision (a). For purposes of former section 11370.2, subdivision (a), the information alleged that defendant had suffered two prior convictions: a violation of section 11378, and a violation of section 11352, subdivision (a). It was also alleged that he had suffered four prior convictions resulting in prison terms within the meaning of Penal Code section 667.5, subdivision (b). Defendant admitted all the prior convictions and prison terms.

On May 24, 2017, the trial court struck two of the prison term prior convictions, and sentenced defendant to a total of 11 years in prison, comprised of the upper term of three years, plus three years for each of the two enhancements under section 11370.2, subdivision (a), and one year each for the two remaining prior prison term convictions. Defendant was given 592 days of combined presentence custody credit, and ordered to pay

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<sup>1</sup> All further statutory references are to the Health and Safety Code, unless otherwise indicated.

<sup>2</sup> To resolve defendant's challenges to the sentence, it is unnecessary to summarize the trial evidence.

mandatory fines and fees. Defendant filed a timely notice of appeal from the judgment.

### **DISCUSSION**

Defendant seeks retroactive application of Senate Bill No. 180, which became section 11370.2, effective January 1, 2018. (See Stats. 2017, ch. 677.) Defendant asks that we reverse the two three-year sentence enhancements imposed pursuant to section 11370.2, and that we remand the matter to the trial court for resentencing. Respondent agrees.

As amended, section 11370.2 applies only to prior felony convictions for a violation of section 11380; thus the enhancement no longer applies to prior convictions for violations of section 11378 or 11352. Absent evidence to the contrary, it is presumed the Legislature intended an amended statute reducing the punishment for a criminal offense to apply retroactively to defendants whose judgments are not yet final on the statute's operative date. (*People v. Brown* (2012) 54 Cal.4th 314, 323; *In re Estrada* (1965) 63 Cal.2d 740, 745.) Because the Legislature did not indicate that the amendments to section 11370.2 were intended to operate prospectively only, we agree that they must be applied retroactively, and that defendant's sentence may not be enhanced under that section due to prior convictions under section 11378 or 11352.

In sentencing defendant, the trial court expressed the opinion that an appropriate sentence would be no more or less than 11 years in prison. The court exercised its discretion to reject probation and jail custody and to strike two of the prior prison term allegations. As the trial court exercised discretion in imposing the original sentence, the court should be given the opportunity to reconsider all its discretionary sentencing choices in light of the changed circumstances. (See *People v. Calderon* (1993) 20 Cal.App.4th 82, 88.) Thus the sentence will be vacated

to permit the trial court to reconsider the entire sentence in accordance with the applicable statutes and rules, provided that the aggregate term does not exceed the original sentence. (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1256.)

**DISPOSITION**

The judgment of conviction is affirmed. The sentence is vacated and the trial court is directed to strike both three-year enhancements imposed pursuant to section 11370.2. The matter is remanded to permit the trial court to resentence defendant to a term not exceeding the original sentence.

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\_\_\_\_\_, J.  
CHAVEZ

We concur:

\_\_\_\_\_, Acting P. J.  
ASHMANN-GERST

\_\_\_\_\_, J.  
HOFFSTADT