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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.

ROBERT ANTHONY GROGAN,

Defendant and Appellant.

B296408

(Los Angeles County
Super. Ct. No. GA086514)

APPEAL from a judgment of the Superior Court of Los Angeles County, Suzette Clover, Judge. Reversed and remanded.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Robert Grogan was convicted of robbery, burglary, and false imprisonment. He was sentenced to state prison for a term of 25 years and 4 months, which included several firearm enhancements. In a prior appeal, we remanded the matter for the court to amend the abstract of judgment and exercise its discretion to strike prior prison term enhancements. While the case was on remand, Grogan filed a petition for resentencing under newly enacted Senate Bill No. 620 allowing trial courts to exercise their discretion to strike firearm enhancements. The trial court denied the petition on the mistaken ground that the case was already final.

Grogan now appeals, arguing the trial court erred in summarily denying his petition. Respondent concedes the trial court erred but argues that remand would be futile because the sentencing court clearly indicated it would have declined to strike the firearm enhancements. We disagree with respondent, and reverse to allow the trial court an opportunity to exercise its discretion on this matter.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was convicted of three counts of robbery (Pen. Code, § 211; counts 1–3),¹ one count of first degree burglary (§ 459; count 4), and two counts of false imprisonment (§ 236; counts 6–7).² The jury found true as to counts 1 through 3 that defendant personally used a firearm within the meaning of section 12022.53, subdivision (b), and was armed with a firearm within the meaning of section 12022, subdivision (a)(1). As to all

¹ All further statutory references are to the Penal Code.

² Count 5 was alleged only as to Grogan’s codefendant.

counts, the jury found true that defendant personally used a firearm within the meaning of section 12022.5, subdivision (a).

The trial court sentenced defendant to state prison for a term of 25 years and 4 months, consisting of the middle term of 4 years on count 1, plus 10 years for the firearm enhancement (§ 12022.5, subd. (a)); a 16-month term on count 2, plus 3 years, 4 months on the firearm enhancement (§ 12022.53, subd. (b)); a 16-month term on count 3, plus 3 years, 4 months on the firearm enhancement (§ 12022.53, subd. (b)); and 2 years for two prior prison term enhancements. The trial court stayed sentences on counts 4, 6, and 7, and other prior prison term findings.

Defendant timely appealed. On November 17, 2015, we affirmed the judgment in part. We remanded the matter to the trial court to correct errors in the abstract of judgment, and exercise its discretion to impose or strike certain prior prison term enhancements.

The trial court did not immediately act on the remand order. While the remand was pending, in 2017, the Legislature passed Senate Bill No. 620 amending the firearm enhancement statutes (§§ 12022.5, 12022.53) giving trial courts discretion to strike such enhancements. (*People v. Fox* (2019) 34 Cal.App.5th 1124, 1128, review granted July 31, 2019, S256298; *People v. Fuimaono* (2019) 32 Cal.App.5th 132, 134.)

While the remand was still pending, defendant filed a federal habeas corpus petition in the United States District Court. On January 2, 2019, defendant filed a petition for resentencing asking the trial court to exercise its discretion to strike or dismiss the firearm enhancements. On January 14, 2019, the district court issued an order for additional briefing, concluding that the abstract of judgment had not yet been

corrected as ordered by the Court of Appeal. On February 19, 2019, in response to the district court's order, the trial court amended defendant's abstract of judgment. The trial court then summarily denied the petition on the ground the case was final.

Defendant timely appealed from the trial court's denial of his petition.

DISCUSSION

The parties agree that the trial court erred in concluding the case was final such that it could not consider defendant's petition for resentencing on the firearm enhancement. (See *People v. Vela* (2018) 21 Cal.App.5th 1099, 1114 [sections 12022.5 and 12022.53 amended by Senate Bill No. 620 apply to all nonfinal judgments].) Defendant requests that we remand the matter to allow the trial court to exercise its discretion to strike the firearm enhancements. Respondent argues that remand is futile because the trial court "clearly indicated" at the sentencing hearing that it would not have stricken a firearm enhancement. We disagree with respondent on this point, and remand the matter.

"We begin by discussing the general standard for assessing when a remand is required for a trial court to exercise sentencing discretion. '[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to "sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion.' [Citation.] But if "the record shows that the trial

court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required.” ’ [Citation.] . . . [I]n assessing whether to remand a case for resentencing in light of Senate Bill 620 . . . a remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement.” (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

“The trial court need not have specifically stated at sentencing it would not strike the enhancement if it had the discretion to do so. Rather, we review the trial court’s statements and sentencing decisions to infer what its intent would have been. [Citations.]” (*People v. Jones* (2018) 32 Cal.App.5th 267, 274.) “[S]peculation about what a trial court might do on remand is not ‘clearly indicated’ by considering only the original sentence. This is the case when there is a retroactive change in the law subsequent to the date of the original sentence that allows the trial court to exercise discretion it did not have at the time of sentence.” (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110–1111.)

Here, respondent argues that the trial court clearly indicated it would have not have stricken the firearm enhancements because the court found that aggravating circumstances outweighed factors in mitigation. At sentencing, the trial court listed the aggravating factors—violence, “the threat of great bodily harm,” vulnerable victims, “a high degree of cruelty and callousness,” “multiple victims,” premeditation, and a “past pattern of criminal activity”—and stated, “Any factors in mitigation are outweighed by all of the factors of aggravation.” Respondent also argues the trial court’s imposition of consecutive

sentences and choice of the upper term for the firearm enhancement on count 1 demonstrates “there is no logical possibility the court would have chosen” to strike that enhancement.

We first observe that there are three firearm enhancements at issue here: the 10-year enhancement pursuant to section 12022.5, and the two 3-years-4-months enhancements pursuant to section 12022.53, subdivision (b). Although the trial court indicated a desire to impose the upper term on one enhancement, that is not a clear indication it would have done so on the other enhancements had it the discretion to do so. Second, the court’s finding that aggravating circumstances outweighed any factors in mitigation does not, by itself, meet the standard of a “clear indication” the trial court would not have stricken any of these enhancements had it the discretion to do so.

This was a complicated sentence with multiple moving parts. We remand so that the trial court may exercise its informed discretion on whether to strike or dismiss the firearm enhancements.³

DISPOSITION

The order denying defendant’s petition for resentencing is reversed, and the case is remanded for the trial court to consider

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³ Defendant’s request for judicial notice of the appellate record of his prior appeal is denied.

whether to strike one or more of the firearm enhancements imposed under sections 12022.5 and 12022.53.

RUBIN, P. J.

WE CONCUR:

BAKER, J.

KIM, J.