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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.

JESSE RODRIGUEZ,

Defendant and Appellant.

B291210

(Los Angeles County
Super. Ct. No. BA460930)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen Marcus, Judge. Affirmed in part, vacated in part, and remanded with directions.

Tyrone A. Sandoval, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Christopher G. Sanchez, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted appellant Jesse Rodriguez of assault with a deadly weapon. The trial court sentenced him to a total of 22 years in prison and imposed various assessments and fees. On appeal, appellant argues: (1) his six prison term enhancements must be stricken because the felony convictions underlying them have been reduced to misdemeanors; (2) this matter must be remanded for the trial court to exercise its discretion under Senate Bill No. 1393 (2017-2018 Reg. Sess.; SB 1393) whether to strike his enhancement for a prior serious felony conviction; and (3) the trial court violated his right to due process by imposing the assessments and fees without determining his ability to pay.

The attorney general concedes -- and we agree -- that appellant's prison term enhancements must be stricken, and that the trial court must exercise its discretion whether to strike the serious felony enhancement. We therefore vacate the sentence and remand for a full resentencing hearing. We conclude appellant forfeited his challenge to the trial court's assessments and fees, but nothing prevents him from requesting a hearing on his ability to pay on remand.

BACKGROUND

The Los Angeles County District Attorney charged appellant with one count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).¹ As relevant here, the

¹ Undesignated statutory references are to the Penal Code.

information alleged appellant personally inflicted great bodily injury during the commission of the crime (§ 12022.7, subd. (a)), and had suffered two prior strike convictions (§ 667, subds. (b)-(i)), two prior serious felony convictions (§ 667, subd. (a)(1)), and seven prior prison term sentences (§ 667.5, subd. (b)).

A jury found appellant guilty and found true the great bodily injury enhancement. In a bifurcated proceeding, the trial court found true the prior conviction allegations. At sentencing, the court struck one of appellant's prior strike convictions under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. It sentenced appellant to a total of 22 years in prison: the high term of four years for the current offense, doubled to eight years for having one prior strike conviction (§ 667, subd. (e)(1)), plus three years for the great bodily injury enhancement, five years for the prior serious felony conviction, and six years for six prior prison terms. The court declined to impose a seventh prison term enhancement, and noted the enhancement for the prior serious felony was "mandatory." The court also imposed a \$30 criminal conviction assessment (Gov. Code, § 70373), a \$40 court operations assessment (§ 1465.8), a \$400 restitution fine (§ 1202.4, subd. (b)), and a stayed \$400 parole revocation restitution fine (§ 1202.45).

Appellant timely appealed, contesting various elements of the trial court's sentence. On appellant's motion, we have taken judicial notice of his successful applications to reduce his six prior felony convictions underlying his enhancements under section 667.5, subdivision (b), to misdemeanors.

DISCUSSION

A. Prison Term Enhancements under Section 667.5, subdivision (b)

Appellant contends his six one-year enhancements under section 667.5, subdivision (b), must be stricken because his felony convictions underlying each enhancement were reduced to misdemeanors under Proposition 47. Respondent agrees.

Among other elements, a sentence enhancement under section 667.5, subdivision (b), requires proof that the defendant was previously convicted of a felony. (*People v. Tenner* (1993) 6 Cal.4th 559, 563.) “Approved by the voters in 2014, Proposition 47 . . . reduced the punishment for certain theft- and drug-related offenses, making them punishable as misdemeanors rather than felonies.” (*People v. Page* (2017) 3 Cal.5th 1175, 1179.) Under Proposition 47, persons who have completed their sentences for qualifying felonies may apply to have their convictions designated as misdemeanors. (§ 1170.18, subd. (f).) And where, as here, a defendant has successfully utilized this procedure to reduce his underlying felony convictions to misdemeanors before his judgment for the instant offense has become final, his enhancements under section 667.5, subdivision (b), must be stricken. (*People v. Buycks* (2018) 5 Cal.5th 857, 889-890, 896 (*Buycks*).)

The parties agree, as do we, that this case must be remanded for a full resentencing, at which the trial court will be able to modify every aspect of the sentence. (See *Buycks, supra*, 5 Cal.5th at p. 893 [“when part of a sentence

is stricken on review, on remand for resentencing ‘a full resentencing as to all counts is appropriate’].) The court’s sentence on remand will be “subject only to the requirement that [appellant] may not receive an aggregate sentence greater than that previously imposed.” (*People v. Baldwin* (2018) 30 Cal.App.5th 648, 657, 658.)

B. Serious Felony Enhancement under Section 667, Subdivision (a)(1)

As noted, the trial court imposed a five-year enhancement under section 667, subdivision (a)(1), based on appellant’s prior serious felony conviction, noting this enhancement was “mandatory.” On appeal, appellant contends, and respondent agrees, that under SB 1393, the matter must be remanded to permit the trial court to exercise its newly enacted discretion whether to strike that enhancement in the interests of justice.

At the time of appellant’s sentencing, section 1385, subdivision (b), prohibited trial courts from striking enhancements under section 667. (See former § 1385, subd. (b) [“This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667”].) Effective January 1, 2019, SB 1393 eliminated this prohibition, permitting courts to exercise discretion to strike such enhancements. (*People v. Williams* (2019) 37 Cal.App.5th 602, 604.) SB 1393 applies retroactively to nonfinal judgments, such as appellant’s. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) Thus, at resentencing, the trial court

will be able to exercise its newly granted discretion whether to strike the relevant enhancement.

C. Challenge to the Assessments and Restitution Fines

Appellant challenges the trial court's imposition of the assessments and restitution fines. Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), he argues the court violated his right to due process by imposing them without determining his ability to pay.

Before the trial court, appellant neither objected to the assessments and fines nor requested a hearing on his ability to pay. He argues the issue is not forfeited on appeal because he could not have anticipated the new constitutional rule announced in *Dueñas*, which had not yet been decided when he was sentenced. Our colleagues in Division Eight recently addressed this issue and concluded that failure to object in the trial court resulted in forfeiture; we agree with their analysis and holding. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155.) Nothing foreclosed appellant from requesting a hearing on his ability to pay below. As *Frandsen* points out: “*Dueñas* was foreseeable. *Dueñas* herself foresaw it.” (*Frandsen, supra*, at p. 1154.) Accordingly, appellant forfeited his contention by failing to raise it below. (See *id.* at p. 1155.) Nevertheless, on remand, he will be able to request a hearing on his ability to pay.

DISPOSITION

The conviction is affirmed. The sentence is vacated, and the matter is remanded for resentencing consistent with this opinion. The trial court shall prepare an amended abstract of judgment and send a certified copy to the Department of Corrections and Rehabilitation.

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MANELLA, P. J.

We concur:

WILLHITE, J.

CURREY, J.