

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL ZATARAIN, JR.,

Defendant and Appellant.

B280905

(Los Angeles County
Super. Ct. No. SA090495)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kathryn A. Solorzano, Judge. Affirmed as modified and remanded.

Tracy J. Dressner, 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, Scott A. Taryle and Colleen M. Tiedemann, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found Manuel Zatarain, Jr. guilty of first degree murder (Pen. Code, § 187, subd. (a))¹ and found true allegations that he personally discharged a firearm causing death (§ 12022.53, subd. (d)), and that he committed murder for the benefit of a street gang (§ 186.22, subd. (b)(1)(C)).

Zatarain contends the trial court erred when it imposed and stayed a 10-year sentence for the gang enhancement because the appropriate punishment was a minimum parole term of 15 years. He also argues we should remand the matter for resentencing to allow the trial court to exercise its discretion under new legislation which ended the statutory prohibition on a trial court's ability to strike the firearm enhancement in this case. The Attorney General agrees.

We remand for resentencing and order the abstract of judgment modified, but otherwise affirm the judgment as modified.

BACKGROUND²

After trial by jury, Zatarain was convicted as indicated in the outset of this opinion. The trial court sentenced Zatarain to a total term of 50 years to life, comprised of 25 years to life for first degree murder, plus an additional and consecutive 25 years to life for the firearm enhancement pursuant to section 12022.53, subdivision (d). The trial court imposed and stayed a 10 year

¹ All further statutory references are to the Penal Code.

² Because the facts established at trial are not relevant to the issues raised on appeal, we do not provide a statement of facts underlying the convictions.

term for the gang enhancement pursuant to section 186.22, subdivision (b)(1)(C).

Zatarain filed a timely notice of appeal.

DISCUSSION

I. We Remand so the Trial Court May Exercise its Discretion to Strike the Firearm Enhancement

We agree with the parties that this case must be remanded for resentencing pursuant to section 12022.53, subdivision (h). At the time Zatarain was sentenced, the trial court was prohibited from striking the firearm enhancement imposed in this case under section 12022.53, subdivision (h). Indeed, the trial court advised Zatarain of its sentencing limitations on the record. With respect to the firearm enhancement, the trial court told Zatarain, “The next sentence is the consecutive 25 years to life for the gun. And the reason I’m taking the time to say this -- and I think it’s very important for me to say this, and I’m trying to do it more and more when I sentence people to a tremendous amount of time in custody -- you need to understand that I’m not sitting up here deciding what the sentence is. These decisions have already been made by the legislature.”

On January 1, 2018, Senate Bill No. 620 (SB No. 620) took effect, which amends section 12022.53, subdivision (h), to remove the prohibition against striking the gun use enhancements under this and other statutes. The amendment grants the trial court discretion to strike or dismiss an enhancement imposed under section 12022.53. (Stats. 2017, ch. 682, § 2.)

The discretion to strike a firearm enhancement under section 12022.53 may be exercised as to any defendant whose conviction is not final as of the effective date of the amendment. (See *In re Estrada* (1965) 63 Cal.2d 740, 742–748; *People v. Brown* (2012) 54 Cal.4th 314, 323.) Here, there is no dispute Zatarain’s appeal was not final when SB No. 620 went into effect on January 1, 2018. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305 [“a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal”]; *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 [“[a] judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired”]; see also *Bell v. Maryland* (1964) 378 U.S. 226, 230 [“[t]he rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it”].) Accordingly, we remand to allow the trial court the opportunity to exercise its newly granted discretion under subdivision (h) of section 12022.53. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 257.)

On remand, the court may exercise its discretion under section 12022.53, subdivision (h), to strike the firearm enhancement. In addition, the trial court has discretion to strike only the punishment for the enhancement. (§ 1385, subdivision (a); *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1443–1446.) “In determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant’s criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant

consideration.” (Cal. Rules of Court, rule 4.428(b).) If the trial court exercises its discretion to strike only the punishment, the gun enhancement will remain in the defendant’s criminal record.

II. The 10-Year Gang Enhancement Must be Stricken

Zatarain contends, and the Attorney General concedes, that the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C), should be stricken. We agree.

In *People v. Lopez* (2005) 34 Cal.4th 1002, the question before our Supreme Court was “whether a first degree murder committed for the benefit of a gang is subject to the 10-year enhancement in section 186.22(b)(1)(C) or whether such a murder falls within that subdivision’s excepting clause and is governed instead by the 15-year minimum parole eligibility term in section 186.22(b)(5).” (*Id.* at p. 1006.) It held that first degree murder, which is punishable for a term of 25 years to life, is governed under the “plain language” of section 186.22, subdivision (b)(5), which applies when the felony is “‘punishable by imprisonment in the state prison for life.’” (*Id.* at pp. 1007, 1011.) Given this holding, it is clear Zatarain’s first degree murder conviction qualified for a gang enhancement under section 186.22, subdivision (b)(5), and not section 186.22, subdivision (b)(1)(C). Accordingly, we strike the 10-year enhancement imposed under section 186.22, subdivision (b)(1)(C), and order the abstract of judgment to be modified to reflect a 15-year minimum parole eligibility term under section 186.22, subdivision (b)(5).

DISPOSITION

The judgment is modified to strike the section 186.22, subdivision (b)(1)(C) 10-year enhancement, and instead, impose a 15-year minimum parole eligibility date under section 186.22, subdivision (b)(5), on the first degree murder count. The matter is remanded to the trial court to exercise its discretion under section 12022.53, subdivision (h). The judgment is otherwise affirmed as modified.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.