

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC SUAREZ,

Defendant and Appellant.

2d Crim. Nos. B278011, B278969
(Super. Ct. Nos. 2013039515,
2014035243)
(Ventura County)

Eric Suarez appeals judgments following conviction of second degree robbery with a finding that the crime was committed to benefit a criminal street gang (Case No. 2013039515), and second degree robbery with findings of a prior serious felony and strike conviction (Case No. 2014035243).¹ (Pen. Code, §§ 211, 186.22, subd. (b)(1), 667, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)² We strike the three year four

¹ The two cases have been consolidated on appeal.

² All statutory references are to the Penal Code unless stated otherwise.

month term imposed for the criminal street gang enhancement, but otherwise affirm.

FACTUAL AND PROCEDURAL HISTORY

(Case No. 2013039515.)

On December 31, 2013, the Ventura County District Attorney filed an information charging Suarez with street terrorism and two counts of second degree robbery. (§§ 186.22, subd. (a), 211.) The information also alleged that Suarez committed the robbery offenses to benefit the Colonia Chiques, a criminal street gang, and that he was a minor at the time he committed the offenses. (§§ 186.22, subd. (b)(1); Welf. & Inst. Code, § 707, subd. (a)(1).) The trial court later described the offenses as “a strong-arm robbery of somebody on the street, through threats and intimidation and threats of violence.”

On May 5, 2014, Suarez waived his constitutional rights and right to a preliminary hearing, and pleaded guilty to one count of second degree robbery. He also admitted the criminal street gang enhancement. In accordance with a negotiated plea agreement, the trial court struck the punishment for the street gang enhancement pursuant to section 1385, subdivision (c)(1).³ The court then suspended imposition of sentence and granted Suarez 60 months’ formal probation with terms and conditions that included 365 days’ confinement in county jail. The court also imposed various fines and fees, and awarded Suarez 317 days of presentence custody credit.

³ Section 1385, subdivision (c)(1) provides: “If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a).”

(Case No. 2014035243.)

On November 20, 2014, the Ventura County District Attorney filed an information charging Suarez with second degree robbery and misdemeanor resisting a police officer. (§§ 211, 148, subd. (a)(1).) The information also alleged that Suarez suffered a prior serious felony and strike conviction in Case No. 2013039515 and was placed on formal probation in that case. (§§ 667, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) This robbery also involved a strong-arm robbery of a pedestrian.

Following his arrest in the second case, a notice of probation violation was filed. Suarez denied the probation violation and pleaded not guilty to the charges in the second case. Suarez then waived his right to a jury trial and agreed to a court trial of the probation violation and the new charges. Following trial, the court found Suarez in violation of the terms and conditions of his probation and guilty of the charges in the second case. The court also found the special allegations true.

The trial court sentenced Suarez to an 11-year term for the robbery count in Case No. 2014035243, consisting of a three-year midterm, then doubled, plus a five-year term for the section 667, subdivision (a) enhancement. The court also imposed a 360-day term for the misdemeanor conviction, to be served concurrently.

With regard to the probation violation in Case No. 2013039515, the trial court revoked the grant of probation due to the new charges, imposed a one-year term for the robbery conviction, and three years four months for the previously struck street gang enhancement, to be served consecutively to the sentence in Case No. 2014035243. The total sentence for the two cases amounted to 15 years 4 months. The court also imposed

finer and fees, ordered victim restitution, and awarded Suarez 972 days of presentence custody credit.

Suarez appeals and contends that the trial court erred as a matter of law by imposing punishment for the previously-struck gang enhancement. The Attorney General concedes that Suarez may not be punished for an enhancement, the punishment of which was previously struck in the same case.

DISCUSSION

When permitted by law, the trial court may strike an enhancement allegation in the interest of justice. (§ 1385.) The enhancement is not nullified, however, by the court's act of leniency. (*People v. Quinones* (2014) 228 Cal.App.4th 1040, 1045 [armed enhancement that was struck at sentencing may be used to disqualify defendant from later resentencing pursuant to Three Strikes Reform Act of 2012].) Striking an enhancement for sentencing purposes in an earlier case does not negate the conviction or enhancement or change the nature of the original offense and its accompanying enhancement. (*People v. Shirley* (1993) 18 Cal.App.4th 40, 47 [great bodily injury enhancement that was struck at sentencing may be considered later to determine whether prior conviction was a serious felony within section 667, subdivision (a)].) An order striking a prior conviction allegation "simply embodies the court's determination that, "in the interest of justice" defendant should not be required to undergo a statutorily increased penalty which would follow from judicial determination of [the alleged] fact.'" (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 508.)

Here the trial court imposed punishment, however, for a gang enhancement in the same case in which it had struck punishment for the enhancement pursuant to a negotiated plea

agreement. (§ 1385, subd. (c)(1).) We assume that the error was due to a different trial judge revoking probation and imposing sentence. (Cal. Rules of Court, rule 4.452(3) [“Discretionary decisions of the judges in the previous cases may not be changed by the judge in the current case” including “striking the punishment for an enhancement”].) As the Attorney General properly concedes, imposition of sentence for the enhancement was improper.

DISPOSITION

We affirm the judgments, but strike the three year four month term imposed for the criminal street gang enhancement imposed in Case No. 2013039515.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Matthew P. Guasco, Judge

Superior Court County of Ventura

Christina Alvarez Barnes, under appointment by the Court of Appeal; California Appellate Project, 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, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.