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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.

LEONDRE BANNER,

Defendant and
Appellant.

B285813

(Los Angeles County
Super. Ct. No.
TA142962)

APPEAL from judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed as modified and remanded.

John L. Staley, 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, Margaret E. Maxwell,
Supervising Deputy Attorney General, Gregory B. Wagner,
Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Leondre Banner guilty of conspiracy to commit murder (Pen. Code, § 182, subd. (a)(1)¹ [count 1]), willful, deliberate, and premeditated attempted murder (§§ 664/187, subd. (a) [count 2]), and shooting at an occupied motor vehicle (§ 246 [count 3]). As to counts 1–3, the jury found that the crimes were committed to promote, further, and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(C)) and that a principal personally and intentionally discharged a firearm in commission of the offenses (§ 12022.53, subds. (c) & (e)(1)).²

Banner admitted that he suffered two prior serious and/or violent felony convictions within the meaning of the three strikes law (§ 667, subds. (b)–(i); § 1170.12, subds. (a)–

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The jury found Banner not guilty of felon in possession of a firearm (§ 29800, subd. (a)(1) [count 4]), and found not true the allegations in counts 1–3 that Banner personally and intentionally discharged a firearm (§ 12022.53, subd. (c)).

(d)), and two serious felony convictions within the meaning of section 667, subdivision (a).

Banner received a sentence of 100 years to life, consisting of 75 years to life in count 1 (25 years to life, tripled as a third strike), plus a 20-year enhancement under section 12022.53, subdivisions (c) and (e)(1), and an additional 5-year enhancement under section 667, subdivision (a). The trial court stayed sentence in counts 2 and 3 pursuant to section 654 without imposing a specific prison term in either count.

Banner contends the cause must be remanded to allow the trial court to consider exercising its discretion under section 1385 to strike the section 12022.53, subdivisions (c) and (e)(1) firearm use enhancements under recently enacted section 12022.53, subdivision (h). (Senate Bill No. 620 (2017-2018 Reg. Sess.)) The Attorney General agrees, and also separately contends that: (1) the trial court erred by staying sentence in counts 2 and 3 without first selecting specific prison terms in each count; (2) the abstract of judgment incorrectly reflects a sentence of 25 years to life in count 1; and (3) the abstract of judgment incorrectly identifies the applicable sentencing provisions under the three strikes law.

We agree with the Attorney General's position in all respects and remand for the trial court to: (1) impose sentence in counts 2 and 3 prior to staying sentence in those counts consistent with section 654; (2) correct the abstract of judgment to reflect a sentence of 75 years to life in count 1;

(3) correct the abstract of judgment to reflect that Banner was sentenced under sections 667, subdivisions (b)–(i), and 1170.12 (a)–(d) of the three strikes law; and (4) consider whether to exercise its discretion to strike the firearm enhancements imposed under section 12022.53, subdivisions (c) and (e)(1), pursuant to section 12022.53, subdivision (h). In all other respects, the judgment is affirmed.

DISCUSSION³

Sentences Stayed Pursuant to Section 654

The trial court failed to pronounce sentence in counts 2 and 3 prior to staying the sentences in those counts pursuant to section 654.

Section 654, subdivision (a) provides: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” However, it is well-settled law that the trial court must impose sentence in all counts before staying the execution of any sentence as necessary to prevent multiple punishment. (See *People v. Alford* (2010) 180 Cal.App.4th 1463, 1466, 1470.)

³ Because the facts are not in dispute and the parties solely raise issues related to sentencing, we omit a statement of facts from the opinion.

We therefore remand the matter to the trial court to impose sentence in counts 2 and 3 before staying those sentences consistent with section 654.

Errors in the Abstract of Judgment

The trial court orally pronounced a sentence of 75 years to life (25 years to life tripled pursuant to the three strikes law) in count 1. The abstract of judgment incorrectly reflects a sentence of 25 years to life. The abstract of judgment also incorrectly identifies the applicable sentencing provisions under the three strikes law. We order the abstract of judgment corrected to reflect the trial court's oral pronouncement (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [when oral pronouncement and abstract of judgment conflict the court's pronouncement controls]), and to reflect that Banner was sentenced under sections 667, subdivisions (b)–(i), and 1170.12 (a)–(d) of the three strikes law.

Firearm Enhancements

Banner contends, and the Attorney General concedes, that the trial court now has discretion under recently enacted Senate Bill No. 620 to strike the section 12022.53, subdivisions (c) and (e)(1) firearm enhancements in counts 1–3. Banner requests that the case be remanded to allow the trial court to exercise its discretion to strike the firearm

enhancements, because the court lacked the power to do so at the time of sentencing.

When Banner was charged, convicted, and sentenced, section 12022.53, subdivision (c), mandated that “any person who, in the commission of a [specified] felony . . . personally and intentionally discharges a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 20 years.” (Former § 12022.53, subd. (c).) Former section 12022.53, subdivision (e), subjected any person who was a principal in an offense where it had been pled and proved that the person violated section 186.22, subdivision (b), and a principal in the offense committed an act specified in section 12022.53, subdivision (c), to the same punishment. After Banner was convicted, but before the cause was final on appeal, the Governor signed Senate Bill No. 620, which amends former section 12022.53, subdivision (h), to permit the trial court to strike a firearm enhancement as follows: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (Stats. 2017, ch. 682, § 1.)

At the time of sentencing, the trial court did not have discretion to strike the firearm use findings under section 12022.53, subdivisions (c) and (e)(1). We therefore remand the matter to the trial court to exercise its discretion under Senate Bill No. 620 to either strike or impose the section

12022.53, subdivision (c) and (e)(1) firearm use
enhancements within the confines of section 1385.

DISPOSITION

The cause is remanded for the trial court to: (1) impose sentence in counts 2 and 3 prior to staying sentence in those counts consistent with section 654; (2) correct the abstract of judgment to reflect a sentence of 75 years to life in count 1; (3) modify line 8 of the abstract of judgment to indicate that Banner was sentenced under sections 667, subdivisions (b)–(i) and 1170.12, subdivisions (a)–(d) of the three strikes law; and (4) consider whether to exercise its discretion to strike the firearm enhancements imposed under section 12022.53, subdivisions (c) and (e)(1), pursuant to sections 12022.53, subdivision (h). The trial court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

MOOR, J.

We concur:

BAKER, Acting P.J.

JASKOL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.