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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DIANJEI QUISHUN THOMAS, Defendant and Appellant.	B280895 (Los Angeles County Super. Ct. No. KA103170)

APPEAL from a judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Reversed with directions.

Cynthia L. Barnes, 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, David E. Madeo, and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Dianjei Quishun Thomas committed robberies and other crimes when he was 17 years old. The district attorney charged him with these crimes in adult criminal court, and Thomas was convicted upon his plea of no contest. His sentence included a 10-year prison term for his personal use of a firearm during the robberies. (Pen. Code, § 12022.53, subd. (b).)

Before Thomas's judgment became final, two statutory changes took effect which, if applied retroactively, potentially ameliorate his punishment: (1) the electorate passed the Public Safety and Rehabilitation Act of 2016 (Proposition 57), which eliminated a prosecutor's authority to file criminal charges against a juvenile directly in adult court; and (2) the Legislature amended Penal Code section 12022.53, subdivision (h), to permit courts to strike or dismiss a firearm enhancement in furtherance of justice.

We conclude that these changes apply retroactively to Thomas and, therefore, conditionally reverse the judgment with the directions set forth below.

FACTUAL AND PROCEDURAL SUMMARY

In 2013, the district attorney filed an information charging Thomas with two counts of robbery (counts 1 and 2; Pen. Code, § 211), one count of attempted robbery (count 3; Pen. Code, §§ 664 & 211), and one count of carrying an unregistered loaded firearm (count 4; Pen. Code, § 25850, subd. (a)). The information further alleged that Thomas, in committing the robberies, personally used a firearm within the meaning of Penal Code section 12022.53, subdivision (b). Thomas pleaded no contest to the charges and admitted the firearm allegation.

The court sentenced Thomas to 17 years 10 months in prison based in part on the court's belief that the prison sentences on counts 2 and 3 had to run consecutively to the sentence on count 1.

The sentence included a 10-year prison term imposed for the firearm enhancement under Penal Code section 12022.53, subdivision (b).

Thomas appealed and, in an unpublished opinion filed in May 2016, we held that the court had discretion to impose concurrent sentences on counts 2 and 3, and reversed the judgment "so the court may 'impose sentence with full awareness of its discretion.' "[1] (*People v. Thomas* (May 24, 2016, B259783) [nonpub. opn.], quoting *People v. Fuhrman* (1997) 16 Cal.4th 930, 944.)

At a sentencing hearing held in December 2016, the court ordered the sentence on count 2 to run concurrently to the sentence on count 1, imposed consecutive sentences on counts 3 and 4, and again imposed the 10-year sentence on the firearm enhancement. The revised total prison term is 14 years 4 months.

Thomas timely appealed.

DISCUSSION

I. Retroactivity of Proposition 57

On November 8, 2016, the California voters passed Proposition 57, which became effective the next day. (See Cal. Const., art. II, § 10, subd. (a).) As a result, minors can now be tried in adult court, if at all, " 'only after a juvenile court judge conducts a transfer hearing to consider various factors such as the minor's maturity, degree of criminal sophistication, prior delinquent history, and whether the minor can be rehabilitated.' " (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 305-306 (*Lara*), quoting *People v. Vela* (2017) 11 Cal.App.5th 68, 72 (*Vela*), review granted

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[1] We have granted Thomas's request that we take judicial notice of the record and our unpublished opinion in his prior appeal, case No. B259783.

July 12, 2017 and vacated on other grounds Feb. 28, 2018, S242298.) If the juvenile court does not transfer the case to adult court and thereafter adjudicates the petition in the juvenile court, the court may declare the minor a ward of the court based on a finding that the minor committed the alleged offenses. (Welf. & Inst. Code, §§ 602 & 725, subd. (b).) In that event, the court does not impose the punishment applicable to adults who violated the same statute; instead, it makes a dispositional order intended to treat and rehabilitate the minor. (See Welf. & Inst. Code, §§ 725, 727, 730, 731 & 1700; *People v. Smith* (2003) 110 Cal.App.4th 1072, 1080.) In determining an appropriate dispositional order, the court must consider, among other relevant material, the age of the minor, the circumstances and gravity of the minor's offense, and the minor's previous delinquent history. (Welf. & Inst. Code, § 725.5.)

In *Lara*, *supra*, 4 Cal.5th 299, our Supreme Court considered "whether this requirement of a transfer hearing before a juvenile can be tried as an adult applies to [the] defendant even though he had already been charged in adult court before Proposition 57 took effect." (*Id*. at p. 306.) The court concluded that the transfer hearing provision of Proposition 57 applied retroactively and that the defendant was therefore entitled to such a hearing. (*Id*. at p. 309.)

The *Lara* court relied on *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), which established a presumption of retroactivity when a statute is amended to reduce the punishment for a prohibited act. The *Estrada* rule, the court explained, " 'rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.' " (*Lara*, *supra*, 4 Cal.5th at p. 308.) Although Proposition 57 did not reduce the punishment for any particular crime, "it ameliorated the possible

punishment for a class of persons, namely juveniles," and "the same inference of retroactivity should apply." (*Ibid.*)

Although the defendant in *Lara*, unlike Thomas, had only been *charged* in adult court and had not yet been *convicted* when Proposition 57 was passed, *Lara*'s reasoning applies to all persons whose judgments were not yet final when the initiative became effective. (See *Lara*, *supra*, 4 Cal.5th at pp. 307-308.) Indeed, the *Lara* court relied on and approved of the Court of Appeal's decision in *Vela*, *supra*, 11 Cal.App.5th 68, which held that Proposition 57 applied retroactively to a defendant who had been convicted of crimes before Proposition 57 passed. (See *Lara*, *supra*, 4 Cal.5th at p. 311 [" 'we infer that the electorate intended the possible ameliorating benefits of Proposition 57 to apply to every minor to whom it may constitutionally apply' "], quoting *Vela*, *supra*, 11 Cal.App.5th at p. 81.)

Although the *Vela* court held that Proposition 57 applied retroactively, it rejected the defendant's argument that he was entitled to an unconditional reversal: "The jury's convictions, as well as its true findings as to the sentencing enhancements, will remain in place. Nothing is to be gained by having a 'dispositional hearing,' or effectively a second trial, in the juvenile court." (*Vela*, *supra*, 11 Cal.App.5th at p. 81.) The court then set forth the following remedy: The defendant's conviction was "conditionally reversed" and the juvenile court was directed "to conduct a juvenile transfer hearing" pursuant to Welfare and Institutions Code section 707; "[w]hen conducting the transfer hearing, the juvenile court shall, to the extent possible, treat the matter as though the prosecutor had originally filed a juvenile petition in juvenile court and had then moved to transfer [the defendant's] cause to a court of criminal jurisdiction. ([Wel. & Inst. Code,]§ 707, subd. (a)(1).) If, after conducting the juvenile transfer hearing, the court determines that it would have transferred [the defendant] to a court of criminal

jurisdiction because he is 'not a fit and proper subject to be dealt with under the juvenile court law,' then [the defendant's] convictions and sentence are to be reinstated. ([Wel. & Inst. Code,]§ 707.1, subd. (a).) On the other hand, if the juvenile court finds that it would *not* have transferred [the defendant] to a court of criminal jurisdiction, then it shall treat [his] convictions as juvenile adjudications and impose an appropriate 'disposition' within its discretion." (*Vela*, *supra*, 11 Cal.App.5th at p. 82.)

In *Lara*, the Supreme Court acknowledged that *Vela*'s remedy may be "somewhat complex," but concluded that it is "readily understandable" and that the courts can implement it "without undue difficulty." (*Lara*, *supra*, 4 Cal.5th at p. 313.) In light of *Vela* and *Lara*, Thomas is entitled to a similar remedy.[2]

II. Retroactivity of Amendment to Penal Code Section 12022.53, Subdivision (h).

At the time of Thomas's sentencing, the trial court was required to impose the firearm enhancements under Penal Code section 12022.53. (Former Pen. Code, § 12022.53, subd. (h); *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090 (*Woods*).)[3] While this

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[2] *Lara* was decided after the Attorney General filed the respondent's brief in this case. We invited the Attorney General to file a supplemental brief discussing the effect of *Lara* on this case. The Attorney General filed a supplemental brief and concedes that, in light of *Lara* and that court's approval of the remedy in *Vela*, Proposition 57 applies to Thomas and that the judgment should be conditionally reversed.

[3] At the time the court sentenced Thomas in December 2016, Penal Code, section 12022.53, subdivision (h) provided: "Notwithstanding [Penal Code] Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (Stats. 2010, ch. 711, § 5.)

appeal was pending, the Legislature amended subdivision (h) of that statute to provide that "[t]he court may, in the interest of justice pursuant to [Penal Code] Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (Pen. Code, § 12022.53, subd. (h); Stats. 2017, ch. 682, § 2.)[4]

The *Estrada* rule, discussed in the preceding section, applies to amendments that do not *necessarily* reduce a defendant's punishment but which give the trial court discretion to impose a lesser sentence. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76.) Courts that have considered whether the amendment to Penal Code section 12022.53, subdivision (h), applies retroactively have concluded that it does. (See *Woods*, *supra*, 19 Cal.App.5th at p. 1091; *People v. Robbins* (2018) 19 Cal.App.5th 660, 679.) In *Woods*, the court explained that the amendment "necessarily reflects a legislative determination that the previous bar on striking firearm enhancements was too severe, and that trial courts should instead have the power to strike those enhancements in the interest of justice. Moreover, because there is nothing in the amendment to suggest any legislative intent that the amendment would apply prospectively only, we must presume that the Legislature intended the amendment to apply to every case to which it constitutionally

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[4] Under Penal Code section 1385, the court may, on its own motion or upon the prosecutor's motion, strike particular enhancement allegations against a defendant. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 508; *People v. Thomas* (1992) 4 Cal.4th 206, 209.) Although a "defendant has no right to make a motion . . . under [Penal Code] section 1385," the defendant "does have the right to 'invite the court to exercise its power by an application to strike a count or allegation of an accusatory pleading, and the court must consider evidence offered by the defendant in support of his assertion that the dismissal would be in furtherance of justice.' " (*People v. Carmony* (2004) 33 Cal.4th 367, 375.)

could apply, which includes this case." (*Woods*, *supra*, 19 Cal.App.5th at p. 1091.) We agree.

The Attorney General concedes that the amendment to Penal Code section 12022.53, subdivision (h) applies retroactively to Thomas, but contends that a further sentencing hearing is unnecessary because "the trial court expressly refused to strike the gun enhancement" during the prior resentencing hearing. The Attorney General relies on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, which held that a resentencing hearing at which the court could exercise discretion to strike an allegation was unnecessary when "the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations." (*Id.* at p. 1896.)

Here, the Attorney General refers to the trial court's comments regarding the "serious" and "dangerous" nature of Thomas's robberies, and its statements that "[t]he idea of striking the gun allegations is just so far off the chart," and that it was "not. . . within the court's consideration of even striking a gun allegation." At the time of sentencing, however, the court did not have the authority to strike a gun enhancement allegation. It is possible, as the Attorney General asserts, that the court was expressing its view that it would not strike a gun enhancement if it had the authority to do so; but it is also possible that the court was aware that it could not strike the gun enhancements and would not, therefore, consider it. Because the record does not "clearly indicate[]" that the court will decline to exercise its discretion to strike the allegations, we reject the Attorney General's argument. Moreover, as our Supreme Court has explained in a similar situation, because striking a gun enhancement was not possible at the time of Thomas's sentencing hearing, he "never enjoyed a full and fair opportunity to marshal and present the case supporting

a favorable exercise of discretion." (*People v. Rodriguez* (1998) 17 Cal.4th 253, 258.) Thomas is entitled to that opportunity.

Accordingly, if the juvenile court determines that the cause would have been transferred to adult court pursuant to Welfare and Institutions Code section 707, the adult court should have the opportunity to exercise its discretion to strike the firearm enhancements.[5]

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[5] The parties did not raise any issue concerning the retroactivity and applicability of the recent amendment to Penal Code section 12022.53, subdivision (h). Pursuant to Government Code section 68081, we directed the parties to file supplemental briefs addressing the issue. We have received and considered such briefs.

DISPOSITION

The judgment is conditionally reversed. The juvenile court shall hold a hearing pursuant to Welfare and Institutions Code section 707 no later than 90 days from the filing of the remittitur or, for good cause, within a reasonable time thereafter. If the juvenile court declines to transfer Thomas to adult court, it shall treat his convictions in adult court as juvenile adjudications and make an appropriate disposition.

If, however, the juvenile court transfers Thomas to adult court, the adult court shall have an opportunity to exercise its discretion to strike or dismiss the firearm enhancement pursuant to Penal Code section 12022.53, subdivision (h). If the court declines to exercise its discretion in this manner, the judgment and sentence shall be reinstated; if the court strikes or dismisses the firearm enhancements, the court shall pronounce judgment based on the new sentence.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.

CHANEY, J.

BENDIX, J.*

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