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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS MAURICIO REYES,

Defendant and Appellant.

B284102

(Los Angeles County
Super. Ct. No. LA081621)

APPEAL from a judgment of the Superior Court of Los Angeles County, Susan M. Speer, Judge. Affirmed and remanded.

Adrian K. Panton, 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, Margaret E. Maxwell and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Carlos Reyes of shooting at an occupied vehicle (count 1), assault with a firearm (count 2), and discharging a firearm with gross negligence (count 3), and found true that defendant personally used a firearm. The trial court sentenced defendant on count 2 to a 14-year prison term, which included the 4-year high term for assault with a firearm and 10 year high-term for the firearm enhancement under Penal Code section 12022.5, subdivision (a).¹ The trial court imposed prison terms on counts 1 and 3, but stayed the sentences on those counts pursuant to section 654.

The only relief defendant seeks on appeal is a remand “for resentencing” on count 2 in light of Senate Bill No. 620 (Stats. 2017, ch. 682, § 1). The amended section 12022.5 became effective after the trial court sentenced defendant, and gives trial courts discretion “in the interest of justice” to strike or dismiss a firearm enhancement.² (§ 12022.5, subd. (c).) Respondent agrees, as do we, that remand for resentencing is appropriate because the amended section 12022.5 applies retroactively to cases, such as this one, that are not yet final.

Respondent, however, seeks to expand the scope of remand to “clarify” the trial court’s “ambiguous” oral pronouncement of sentence to count 1. We deny respondent’s invitation to do so because the People failed to object at the time the trial court

¹ All further statutory references are to the Penal Code.

² Section 12022.5, subdivision (c) provides: “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.”

orally pronounced sentence and thus the People have forfeited doing so now. Accordingly, we remand the matter to the trial court to exercise its sentencing discretion under section 12022.5, subdivision (c) and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We limit our statement of the facts to those relevant to this appeal.

On July 6, 2017, a jury convicted defendant of shooting into an occupied vehicle in violation of section 246 (count 1); assault with a firearm in violation of section 245, subdivision (a)(2) (count 2), and discharge of a firearm with gross negligence in violation of section 246.3, subdivision (a) (count 3). The jury also found true that defendant personally used a firearm within the meaning of sections 1203.06, subdivision (a)(1) and 12022.5, subdivision (a).

In its sentencing memorandum, the People contended defendant was ineligible for probation and recommended imposition of the high term on count 2 and the firearm enhancement, for a total prison term of 14 years. The People emphasized that defendant had threatened the victim with a similar make revolver two months before defendant committed the crimes for which he was tried. Those crimes involved defendant's shooting at the victim in a vehicle in a residential neighborhood, and then firing two more shots at a nearby location when the victim was attempting to flee defendant. The

People asserted because the shots occurred at three different locations, section 654³ did not apply.

Defendant also submitted a sentencing memorandum in which defendant sought probation, or in the alternative, the mid-term on count 2 (three years) and the firearm enhancement (four years), for a total prison term of seven years. Defendant further requested that the sentences on the remaining two counts be stayed under section 654. Defendant cited as mitigating factors prior threats by the victim directed at defendant and his family, and a custody dispute involving defendant's brother that was "at the heart of the conflict."

At the sentencing hearing on July 17, 2017, the trial judge announced its "tentative" sentence of 14 years and rejected defense counsel's mid-term recommendation and the People's request for consecutive sentences on the three counts. The trial court rejected defense counsel's contentions that the circumstances giving rise to the crime were unusual on the theory that they were based on the victim's provocation and were unlikely to reoccur. As factors militating against imposition of mid-term sentences, the trial court noted defendant's "attempted murder" by firing "three separate rounds within minutes and blocks of each other" in a residential neighborhood after threatening the victim with a similar make revolver two months

³ 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. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

earlier. The trial court also cited defendant's perjury at trial and escalating criminal record.

As to the People's request to run the sentences on all three counts consecutively, the trial court recognized that it was arguable whether "they're separate counts," but decided that section 654 applied because "they occurred in such a brief period of time and it was based upon the single objective to either kill or to shoot the victim in his face."

The trial court orally pronounced the following sentences:

—As to count 2: "The defendant is sentenced to the high term of four years in state prison";

—As to the special allegation under section 12022.5, subdivision (a): "Defendant is sentenced to the high term of 10 years in state prison for a principal term of 14 years";

—As to count 1: "The defendant is sentenced to the low term—I'm sorry, to the high term of *three* years in state prison. Sentence on this count is stayed 654" (italics added); and

—As to count 3: "The defendant is sentenced to the high term of three years in state prison. Sentence on this count is stayed 654."⁴

The prosecutor did not object to the trial court's oral pronouncement of a three-year sentence as to count 1 even though the high term for that count was seven years.

The minute order recorded the following: high term sentences on count 2 and the firearm enhancement, the trial court's "select[ion of] the low term of 3 years as to count 01"; and the three-year "upper term" on count 3. The minute order also

⁴ The trial court further stated, "All of these counts will remain permanently stayed once the term imposed on count II is served."

reported that the stay of the sentences in counts 1 and 3 pursuant to section 654 were “to become permanent upon the completion of the sentence imposed in count 02.” The abstract of judgment similarly reflects imposition of the four-year upper term for count 2 and 10-year upper term for the firearm enhancement, the three-year low term for count 1, and the three-year upper term for count 3 for a “TOTAL TIME” of 14 years.

Defendant filed a timely notice of appeal on July 17, 2017.

DISCUSSION

When the trial court sentenced defendant, section 12022.5, subdivision (c) did not give trial courts discretion to strike or dismiss the firearm enhancement.⁵ Effective January 1, 2018, the statute gives trial courts discretion to strike or dismiss the firearm enhancement “in the interest of justice pursuant to Section 1385.” (Stats. 2017, ch. 682, § 1.) The statute applies retroactively to defendant because his conviction was not final as of the effective day of the amendment, and he may benefit from a potential reduction in sentence. (See *People v. Robbins* (2018) 19 Cal.App.5th 660, 678.)

“Defendants are entitled to sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court.” (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) “A court which is unaware of the scope of its discretionary powers can no more exercise that ‘informed discretion’ than one whose sentence is or may have been based on misinformation regarding a

⁵ Previously, section 12022.5, subdivision (c) read: “Notwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section.”

material aspect of a defendant's record." (*Ibid.*) Thus, where a trial court has imposed a sentence in the belief that it lacked discretion to strike an enhancement, remand is necessary to permit the trial court to exercise its discretion. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.)

Respondent agrees that we should remand as to count 2 so that the trial court may exercise its discretion under the amended section 12022.5. Respondent, however, seeks remand for the additional purpose of seeking clarification of the trial court's ambiguous oral pronouncement of sentence on count 1.

Among other arguments, defendant contends the People forfeited seeking any such clarification. More specifically, the very ambiguity respondent asserts here was apparent at the time the trial court orally pronounced sentence on count 1 because three years was not the high term for count 1 despite the trial court's simultaneous statement that it was selecting the high term for that count. The prosecutor failed to object at that time. (*People v. Scott* (1994) 9 Cal.4th 331, 353 [defendant forfeited objection to the adequacy of the trial court's statement of reasons for discretionary sentencing choices during oral pronouncement of sentence by not objecting at that time].) As our Supreme Court has counseled, "Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention. As in other waiver cases, we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them." (*Ibid.*)

DISPOSITION

The matter is remanded to the trial court to exercise its sentencing discretion under section 12022.5, subdivision (c). The judgment is otherwise affirmed.

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BENDIX, J.

We concur:

JOHNSON, Acting P. J.

CURREY, J.*

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