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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

PATRICK MARION MARSHALL,

Defendant and Appellant.

B285386

(Los Angeles County
Super. Ct. No. BA435692)

APPEAL from a judgment of the Superior Court of Los Angeles County, Fred Wapner, Judge. Judgment of conviction affirmed, sentence vacated, and remanded for resentencing.

Law Office of G. Martin Velez and G. Martin Velez for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stacy S. Schwartz and Christopher G.

Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Patrick Marion Marshall appeals from a judgment convicting her of robbery and assault.¹ She contends that (1) this matter should be remanded to allow the trial court to decide whether to strike firearm enhancements under Penal Code sections 12022.5 and 12022.53;² and (2) the trial court committed an error in sentencing, which should be corrected on appeal by reducing her sentence. The People agree with the first contention and agree that the court committed a sentencing error, but argue that the proper remedy is to remand the matter for resentencing by the trial court.

We conclude that the matter must be remanded to allow the trial court to (1) decide whether to exercise its discretion to strike the firearm enhancements, (2) correct the sentence for assault, and (3) resentence Marshall fully aware of its sentencing discretion. We therefore affirm the judgment of conviction, vacate the sentence, and remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Robbery and Assault*

On March 4, 2015, Marshall and a man named Roger visited the apartment of Brian Hunter and Danielle Banks.

¹ Marshall was a man at the time of the offenses but identified as a woman at the time of trial, using the name “Priscilla Marshall.”

² All undesignated section references are to the Penal Code.

Hunter had occasionally purchased marijuana from Marshall. When Marshall and Roger were inside the apartment and seated at a table with Hunter, Hunter offered to light up some marijuana. Marshall then pulled out a handgun, pointed it in Hunter's face, asked if Hunter wanted to be shot in the knee caps, and stated that he wanted "everything, all the money."

Marshall told Roger to take a laptop that was on the table. Roger placed the laptop in a backpack. Hunter stated that he did not have anything and that Marshall could take whatever he wanted. Marshall then pointed the gun at Banks and asked Hunter how much he loved Banks. Marshall pulled back the slide of the pistol, allowing a round to fall to the floor. Hunter fled from the apartment out the front door. Marshall and Roger chased after Hunter as far as the front door, but then turned and ran out through the back patio. Hunter called 911 using a neighbor's phone and later discovered that some of his video equipment was missing.

2. The Information

On February 8, 2016, the district attorney filed an information charging Marshall with first degree residential robbery (§ 211; count one) and assault with a semiautomatic firearm (§ 245, subd. (b); count two). The prosecutor alleged that Marshall personally used a firearm in the commission of the robbery (§ 12022.53, subd. (b)) and personally used a firearm in the commission of the assault (§ 12022.5, subd. (a)). The prosecutor further alleged that Marshall had suffered a prior conviction of assault with a firearm (§ 245, subd. (a)(2)), constituting a strike under the three strikes law (§§ 667, subds. (b)-(j), 1170.12) and a serious felony (§ 667, subd. (a)), and had suffered five prior convictions, serving prior prison terms for

those offenses, and did not remain free of prison custody for a period of five years after the conclusion of each term (§ 667.5, subd. (b)). ~

On January 18, 2017, the district attorney amended the information by changing count two to assault with a firearm (§ 245, subd. (a)(2)).

3. *The Verdict and Sentencing*

The jury convicted Marshall of both counts and found that the allegations of firearm use were true. Marshall admitted the prior strike conviction and the five prior convictions and prison terms, and the trial court found that those allegations were true.

On August 24, 2017, the trial court sentenced Marshall to a total of 27 years in prison, consisting of the middle term of six years on count two as the base count, doubled to 12 years under the three strikes law, plus four years for the firearm enhancement (§ 12022.5, subd. (a)); 16 months on count one (one-third of the middle term), doubled to 32 months under the three strikes law, plus three years, four months for the firearm enhancement (§ 12022.53, subd. (b)); and five years for the prior serious felony (§ 667, subd. (a)(1)). The court imposed and stayed a one-year term for the prior prison term related to the prior serious felony (§ 667.5, subd. (d)) and struck the remaining four prior prison terms pursuant to section 1385.

DISCUSSION

The Case Must Be Remanded for Resentencing

A. *The Firearm Enhancements*

At the time of Marshall's sentencing in August 2017, the trial court had no authority to strike a firearm enhancement under sections 12022.2 or 12022.53. Former section 12022.5,

subdivision (c) expressly precluded striking a firearm enhancement under section 12022.5, and former section 12022.53, subdivision (h) expressly precluded striking a firearm enhancement under section 12022.53. (Stats. 2010, ch. 711, §5). As amended by Senate Bill 620 (2017-2018 Reg. Sess.), effective January 1, 2018,³ section 12022.5, subdivision (c) and section 12022.53, subdivision (h) now give the sentencing court the discretion to strike a firearm enhancement in the interest of justice pursuant to section 1385.⁴

In re Estrada (1965) 63 Cal.2d 740 held that, absent evidence to the contrary, the court must presume the Legislature intended any statutory amendment mitigating punishment for a particular crime to apply retroactively to all defendants whose judgments were not yet final on the operative date of the amendment.⁵ (*Id.* at pp. 747–748; see *Brown, supra*, 54 Cal.4th at p. 324 [*Estrada* “articulat[ed] the reasonable presumption that

³ Statutes enacted at a regular session go into effect on January 1 of the following year. (Cal. Const., art. IV, § 8, subd. (c)(1).)

⁴ As amended, sections 12022.5, subdivision (c) and 12022.53, subdivision (h) both state: “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.”

⁵ The *Estrada* rule is an exception to the general rule that penal statutes are presumed to operate prospectively only unless expressly stated otherwise. (§ 3; see *People v. Brown* (2012) 54 Cal.4th 314, 324 (*Brown*).)

a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments”].) The *Estrada* rule applies not only to amendments reducing the penalty for a crime, but also to amendments giving the court discretion to impose a lesser penalty. (*People v. Francis* (1969) 71 Cal.2d 66, 76.)

The *Estrada* rule applies here because section 12022.5, subdivision (c) and section 12022.53, subdivision (h), as amended, give the trial court the discretion to impose a lesser sentence by striking firearm enhancements, and the amendment became effective before this case became final on appeal. There is no indication the Legislature intended the amendments to apply prospectively only. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) The People concede the *Estrada* rule applies and the amendments apply retroactively.

“Defendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citation.] 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 material aspect of a defendant’s record.’ [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) The People here do not contend the trial court would have declined to strike the firearm enhancements if it had the discretion to strike the enhancements at the time of sentencing.

Accordingly, the trial court must be given the opportunity to decide whether to exercise its discretion under sections 12022.5, subdivision (c) and 12022.53, subdivision (h), as amended. On remand, the court may reconsider the total sentence and impose a new sentence, subject to the limitation that the new sentence cannot exceed the original sentence. (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1245 [directed the trial court to correct a sentencing error, stating, “the court may reconsider the total sentence, and fashion a new sentence, so long as the new aggregate, non-stayed term does not exceed the original seven-year sentence”]; *People v. Savala* (1983) 147 Cal.App.3d 63, 68–69 [“defendant’s prison term cannot be viewed as a series of separate independent terms, but rather must be viewed as one prison term made up of interdependent components . . . ¶] [w]hen we ordered the court to set aside the first judgment and to resentence defendant the court was entitled to reconsider all of its sentencing choices, subject only to the limitation that defendant not be sentenced to a greater aggregate term than the first sentence”].)

B. *The Assault Sentence*

Section 245, subdivision (a)(2) provides a sentencing range of two, three, or four years for assault with a firearm, so the middle term is three years. The trial court mistakenly imposed a middle term of six years for Marshall’s assault with a firearm conviction.⁶ This was error, and the sentence was unauthorized. (*People v. Roth* (2017) 17 Cal.App.5th 694, 702–703 [“ ‘a sentence is generally “unauthorized” where it could not lawfully be

⁶ Assault with a semiautomatic firearm, alleged in the original information, carries a middle term of six years. (§ 245, subd. (b).)

imposed under any circumstance in the particular case,’ and ‘commonly occurs where the court violates mandatory provisions governing the length of confinement’ ”], quoting *People v. Scott* (1994) 9 Cal.4th 331, 354.)

As with the firearm enhancements, we believe the trial court should be given the opportunity to resentence Marshall fully aware of its sentencing discretion. The court may reconsider the total sentence and impose a new sentence, subject to the limitation that the new sentence cannot exceed the original sentence. (*People v. Lai, supra*, 138 Cal.App.4th at p. 1245; *People v. Savala, supra*, 147 Cal.App.3d at pp. 68–69.)

DISPOSITION

The judgment of conviction is affirmed, the sentence is vacated, and the matter is remanded for resentencing in accordance with the views expressed in this opinion.

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MICON, J.*

We concur:

MANELLA, P. J.

COLLINS, J.

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