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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff and Respondent,

v.

EVERARDO LOPEZ,

Defendant and Appellant.

B280964

(Los Angeles County
Super. Ct. No. BA446926)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edmund Willcox Clarke, Jr., Judge. Affirmed in part, reversed in part and remanded with direction.

Eric E. Reynolds, 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, Steven E. Mercer and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Everardo Lopez appeals following his convictions for two counts of assault with a firearm and one count of possession of an unregistered firearm. The jury also found true that defendant personally used a firearm in the commission of the crimes and committed the crimes for the benefit of a criminal street gang. As part of defendant's sentence for the two assault counts, the court imposed additional time for both the serious felony gang and firearm enhancements. Defendant argues that, by punishing defendant for both enhancements, the trial court violated Penal Code section 1170.1, subdivision (f) because both enhancements were based on his single use of a firearm.¹ We agree, reverse, and remand for resentencing. We also reject the Attorney General's argument that upon resentencing the trial court has the discretion to impose a gang enhancement applicable to nonviolent, nonserious felonies.

FACTS AND PROCEDURAL BACKGROUND

Because the single issue on appeal is the lawfulness of the sentence, we need not describe the crime or trial in any detail. We observe only that in the context of a gang altercation, defendant confronted two victims and fired a shot into the ground that ricocheted and hit a nearby truck. A jury found defendant guilty of two counts of assault with a firearm (counts one and three) and one count of carrying an unregistered firearm (count two). On both assault counts, the jury found true that defendant personally used a firearm. As to all counts, the jury found true

¹ All subsequent statutory references are to the Penal Code.

that defendant committed the crimes for the benefit of a criminal street gang.

The trial court sentenced defendant to 16 total years in state prison. On count one, defendant received the midterm of three years, plus five years for the gang enhancement and four years for the gun enhancement. On count two, the court stayed the midterm of two years plus three years for the gun enhancement. On count three, defendant received one year (one-third the midterm sentence) plus one year and eight months for the gang enhancement and one year and four months for the gun enhancement.

DISCUSSION

Defendant's sole contention on appeal is that the simultaneous imposition of the firearm enhancement and the gang enhancements in each of counts one and three violated the prohibition in section 1170.1, subdivision (f) against the imposition of multiple firearm enhancements. The People acknowledge that the imposition and execution of these two enhancements was improper but they argue the trial court has the option on remand to impose a lesser included enhancement under section 186.22(b)(1)(A), the so-called general felony gang enhancement. We review the correctness of the sentence de novo. (*People v. Rosbury* (1997) 15 Cal.4th 206, 209.)

1. Firearm and Gang Enhancements: Applicable Rules

We begin our analysis by distinguishing the two types of enhancements present in this case. The first is set forth in section 12022.5, subdivision (a), which provides that any person who personally uses a firearm in the commission of a felony shall be punished in state prison for three, four, or ten years.

The second is contained in section 186.22, which prescribes various levels of sentence enhancement where the underlying offense was committed for the benefit of, at the direction of, or in association with any criminal street gang. Subdivision (b) provides that any such defendant:

“(b)(1) [e]xcept as provided in paragraphs (4) and (5), . . . shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows:

“(A) *Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court’s discretion.*

“(B) If the felony is *a serious felony*, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years.

“(C) If the felony is *a violent felony*, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years.” (Italics added.)

Pursuant to section 1192.7, subdivision (c)(8), most felonies committed while personally using a firearm become serious felonies. (§ 1192.7, subd. (c)(8).) Felonies involving the personal use of a firearm, where the People charge and prove specific allegations, for example that defendant used the firearm in a

drive-by shooting or in a sex crime, are considered violent felonies. (§ 667.5, subd. (c)(8).)

In the present case, defendant suffered a personal use of a firearm enhancement and a serious felony gang enhancement. The gang enhancement fell within the section 186.22(b)(1)(B) serious felony category solely because of defendant's personal use of a firearm.

Because this case involves the personal use of a firearm, a third statute, section 1170.1, also comes into play. That statute provides rules for determining the aggregate sentence when a person is convicted of multiple felonies or enhancements. Subdivision (f) states: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury." (§ 1170.1, subd. (f).) This statute is triggered here because defendant's personal use of a firearm is a predicate to both the gang enhancement (making it a serious felony under section 186.22, subdivision (b)(1)(A)) and the firearm enhancement under section 12022.5, subdivision (a).

In *People v. Rodriguez* (2009) 47 Cal.4th 501, 508–509 (*Rodriguez*), the Supreme Court explained the proper application of section 1170.1, subdivision (f) in this setting. In *Rodriguez*, a jury found the defendant guilty of three counts of assault with a firearm and further found that he personally used a firearm (§ 12022.5, subd. (a)) and committed the assaults to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)). (*Rodriguez*, at

p. 504.) The trial court relied upon the firearm findings to conclude that each assault was a “violent felony” within the meaning of section 667.5, subdivision (c)(8), which elevated the punishment associated with the gang enhancement from two-to-four years to 10 years.² (*Rodriguez*, at p. 505; see § 186.22, subds. (b)(1)(A) & (b)(1)(C) [gang enhancements].) The trial court imposed both the section 12022.5, subdivision (a) firearm enhancement and the violent felony gang enhancement. (*Rodriguez*, at p. 506.)

The Supreme Court reversed, holding that the trial court’s imposition of both enhancements violated section 1170.1, subdivision (f). (*Rodriguez*, *supra*, 47 Cal.4th at p. 504.) The court observed that defendant became eligible for the 10-year gang enhancement only because he was charged with and proven guilty of the section 12022.5 firearm enhancement (the firearm finding qualified his offense as a violent felony). (*Rodriguez*, at p. 509.) The Supreme Court concluded that the *Rodriguez* defendant’s “firearm use resulted in additional punishment not only under section 12022.5’s subdivision (a) . . . but also under section 186.22’s subdivision (b)(1)(C). . . . Because the firearm use was punished under two different sentence enhancement provisions, each pertaining to firearm use, section 1170.1’s subdivision (f) requires imposition of ‘only the greatest of those enhancements’ with respect to each offense”: the 10–year gang enhancement. (*Rodriguez*, at p. 509.) The *Rodriguez* Court accordingly held that the trial court’s imposition and execution of

² The *Rodriguez* defendant personally used a firearm in a drive-by shooting, which qualified the offense for the 10-year violent felony gang enhancement. (See §§ 186.22, subd. (b)(1)(C); 667.5, subd. (c)(8).)

the section 12022.5 firearm enhancement violated section 1170.1, subdivision (f), and remanded the matter for resentencing to allow the trial court to restructure its sentencing choices. (*Ibid.*)

The Supreme Court reiterated this holding in *People v. Le* (2015) 61 Cal.4th 416 (*Le*), where the jury found defendant guilty of assault with a automatic firearm and found true personal use firearm and gang enhancements.³

2. Defendant’s Sentence Violated Section 1170.1

Here, defendant’s personal use of a firearm likewise qualified him for both the firearm and the serious felony gang enhancements. Thus, imposition of the terms for both the personal use and the serious felony gang enhancements violated section 1170.1, subdivision (f), since both terms were based on defendant’s use of a firearm. The People acknowledge the point.

³ The gang enhancement in *Le* was pleaded in general terms, without identifying whether the felony was serious or violent. (*Le, supra*, 61 Cal.4th at p. 424.) The *Le* defendant argued that his assault with a semi-automatic firearm qualified as a violent felony under section 667.5, subd. (c). (*Ibid.*) Because the People sought a five-year felony gang enhancement at sentencing rather than the ten-year violent felony gang enhancement, the court assumed the People categorized the offense as a serious felony. (*Ibid.*, citing § 186.22, subd. (b)(1)(B) [five year enhancement for serious felonies].) The court acknowledged the dispute and stated that nevertheless, “under the facts of this case, the crime would qualify as a serious felony solely because it involved firearm use.” (*Le*, at p. 425.) The court concluded even if defendant’s conviction were treated only as a serious felony, section 1170.1, subdivision (f) still prohibited multiple enhancements. (*Le*, at pp. 425–429.)

**3. The Court May Not Resentence Defendant to
Both the Firearm and the “General Felony”
Gang Enhancements**

Defendant asks this court to reverse and remand for resentencing. The People agree that we should remand for resentencing, but argue this court should direct the trial court to exercise its discretion to resentence defendant with both the firearm enhancement and the general felony gang enhancement. The general felony enhancement applies to gang enhancements where the underlying felony is neither serious nor violent. (§ 186.22, subd. (b)(1)(A).) The People assert that the general felony gang enhancement is a lesser and included enhancement of the serious felony gang enhancement (subd. (b)(1)(B)) to which defendant was originally sentenced.

The People’s contention turns on the meaning of section 186.22, subdivision (b). We review this issue of statutory construction de novo. (*People v. Francis* (2017) 16 Cal.App.5th 876, 882 (*Francis*).) In *Francis*, Division Three of this court addressed this very issue. We adopt their analysis in concluding that the trial court cannot resentence defendant to the general felony gang enhancement. In *Francis*, the defendant was convicted of assault with a semiautomatic firearm, and the jury found personal use of a firearm and serious felony gang enhancements to be true. (*Id.* at pp. 880–881.) At sentencing, the parties conceded that the serious-felony gang enhancement was barred by section 11710.1, subdivision (f). (*Ibid.*) However, the prosecution argued and the trial court agreed that under *Le*, the court had discretion to impose the general felony gang enhancement. (*Ibid.*) Defendant appealed his sentence for the

personal use of a firearm and general gang enhancements. (*Id.* at p. 881.)

To determine the lawfulness of the sentence, Division Three analyzed the sentencing scheme for gang-related crimes. (*Francis, supra*, 16 Cal.App.5th at p. 882.) The court explained how section 186.22 assigned *mandatory* penalties for gang related offenses, with shorter prison terms of two, three, or four year for basic felonies, and greater prison time for serious and violent felonies (5 and 10 years, respectively). (*Id.* at p. 883.) Citing the Supreme Court authority we discussed above, the *Francis* court observed, “Each penalty is mandatory. (*Le, supra*, 61 Cal.4th at p. 423 [subd. (b)(1) enhancements ‘are mandatory—all three provisions specify that the additional punishment “shall” be imposed’].) The penalty applicable to a given felony is not a matter of prosecutorial charging discretion or a sentencing choice available to the trial court. In this way, subdivision (b) establishes mutually exclusive ‘methods for punishing felons whose crimes were committed for the benefit of a criminal street gang.’ ([*People v. Lopez, supra*, 34 Cal.4th at p. 1004].)” (*Francis*, at p. 884.)

Giving effect to the Legislature’s use of “shall” in the statute, the *Francis* court concluded: “The statutory language is clear and unambiguous. Accordingly, it requires no interpretation or construction. Subdivision (b)(1) applies to every gang crime except those designated in subdivisions (b)(4) and (b)(5). Subdivision (b)(1)(A) applies to all remaining eligible felonies ‘[e]xcept as provided in subparagraphs (B) and (C).’ Subdivision (b)(1)(B) provides that ‘a serious felony . . . shall be punished by an additional term of five years.’ Subdivision (b)(1)(C), in turn, provides that ‘a violent felony . . . shall be

punished by an additional term of 10 years.’ While there is discretion embedded *within* subdivision (b)(1)(A) for felonies falling within the provision, a trial court has no discretion to impose a term under subdivision (b)(1)(A) for a felony that falls under subdivisions (B) or (C). Here, defendant was convicted of a serious felony. As such, the STEP Act [section 186.22] required the court to impose a gang enhancement under subdivision (b)(1)(B)—regardless of whether section 1170.1, subdivision (f), would ultimately limit it. The act did not authorize the court to impose an enhancement under subdivision (b)(1)(A).” (*Francis, supra*, 16 Cal.App.5th at pp. 883–884.)

We likewise conclude that the trial court does not have discretion to resentence defendant to the general felony gang enhancement because the felony at issue is a serious felony, for which the statute prescribes mandatory punishment exclusively under section 186.22(a)(1)(B). Thus, on remand, the trial court may not impose an enhancement under section 186.22(a)(1)(A).

DISPOSITION

We reverse the judgment in part. We remand for the trial court to resentence defendant. (See *Rodriguez, supra*, 47 Cal.4th at p. 509 [remanded for resentencing, where defendant originally sentenced to midterm, to give the trial court “an opportunity to restructure its sentencing choices in light of our conclusion that

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the sentence imposed here violated section 1170.1's subdivision (f)"].) In all other respects, the judgment is affirmed.

RUBIN, Acting P. J.

WE CONCUR:

GRIMES, J.

DUNNING, J.*

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