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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ALBERTO PEREZ,

Defendant and Appellant.

B282214

(Los Angeles County
Super. Ct. No. BA434741)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norm Shapiro, Judge. Judgment of conviction affirmed; remanded for further proceedings.

John Lanahan, 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, Paul M. Roadarmel, Jr., Stephanie A. Miyoshi, and Kristen Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jose Alberto Perez was convicted in a bench trial of second degree murder with a firearm use enhancement, and assault with a firearm. Sentenced to 41 years to life in prison, Perez appeals. His sole contention is that the matter must be remanded to allow the trial court to exercise its discretion to strike or dismiss the firearm enhancement pursuant to recently amended Penal Code section 12022.53, subdivision (h).¹ We affirm Perez's conviction, but remand the matter to allow the trial court to exercise its discretion and determine whether to strike or dismiss the firearm enhancement.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of March 18, 2015, Perez shot and killed Yesenia Deleon in her bedroom, in front of her two young daughters. Deleon's daughters ran and asked Jose Rodriguez and others, who were sharing a meal on the front porch of the house, for help. Rodriguez led the two girls to a house next door. When defendant came outside with a shotgun, Rodriguez hid behind two parked cars. When Rodriguez told Perez to shoot him rather than another child who was nearby, Perez fired the gun at Rodriguez, but missed.²

After a bench trial, the court convicted Perez of second degree murder (§ 187, subd. (a)) and assault with a firearm (§ 245, subd. (a)(2)). The court also found Perez personally used a firearm in the commission of the murder (§ 12022.53, subd. (d)).

¹ All further undesignated statutory references are to the Penal Code.

² Because, at this juncture, the facts of the underlying offenses are not directly relevant to the issue presented on appeal, we do not further detail them here.

It sentenced Perez to 15 years to life in prison for the murder, plus a consecutive term of 25 years to life for the firearm enhancement, plus a consecutive one-year term for assault with a firearm, for a total of 41 years to life. It ordered victim restitution in an amount to be determined at a later hearing, and imposed a restitution fine, a suspended parole revocation restitution fine, a court operations assessment, and a criminal conviction assessment. Perez filed a timely notice of appeal.

DISCUSSION

The matter must be remanded to allow the trial court the opportunity to exercise its discretion pursuant to amended section 12022.53

When the trial court sentenced Perez in 2017, imposition of a section 12022.53 firearm enhancement was mandatory and the trial court lacked discretion to strike it. (See *People v. Franklin* (2016) 63 Cal.4th 261, 273; *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362–1363.) The trial court and the parties recognized this limitation at the sentencing hearing. Consequently, the trial court sentenced Perez to a consecutive 25-years-to-life term for his use of a firearm. (§ 12022.53, subd. (d).) Effective January 1, 2018, the Legislature amended section 12022.53, subdivision (h) to give trial courts authority to strike section 12022.53 firearm enhancements in the interest of justice. (Sen. Bill No. 620 (2017–2018 Reg. Sess.), Stats. 2017, ch. 682, § 2.)³

³ As amended, section 12022.53, subdivision (h) 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.”

Perez contends his case must be remanded to allow the trial court to exercise its discretion to strike the firearm enhancements, and the People agree. The parties are correct. The amendment to section 12022.53 applies to cases, such as appellant's, that were not final when the amendment became operative. (*People v. Watts* (2018) 22 Cal.App.5th 102, 119; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091; *People v. Brown* (2012) 54 Cal.4th 314, 323; *People v. Vieira* (2005) 35 Cal.4th 264, 305–306; *People v. Nasalga* (1996) 12 Cal.4th 784, 792; *In re Estrada* (1965) 63 Cal.2d 740, 745.) Remand is necessary to allow the trial court an opportunity to exercise its sentencing discretion under the amended statute. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) We express no opinion about how the court's discretion should be exercised.

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded to allow the trial court to exercise its discretion and determine whether to strike or dismiss the section 12022.53, subdivision (d) firearm enhancement pursuant to section 12022.53, subdivision (h).

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EDMON, P. J.

We concur:

EGERTON, J.

KALRA, J.*

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