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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.

JASON ZARR HABER,

Defendant and Appellant.

B279289

(Los Angeles County
Super. Ct. No. PA085800)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daniel B. Feldstern, Judge. Judgment of conviction affirmed; sentence vacated and remanded for further proceedings.

Jamie Lee Moore, 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, Shawn McGahey Webb and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jason Zarr Haber appeals from the judgment entered after a jury found him guilty of possessing methamphetamine for sale. He contends that a three-year sentence enhancement imposed pursuant to former section 11370.2 of the Health and Safety Code¹ must be stricken, and the matter remanded for resentencing, in light of recent amendments to the law. The People concede the point, and we agree. Therefore, we affirm the judgment of conviction, but order the sentence vacated and the matter remanded for resentencing.

BACKGROUND

In June 2016, the People charged Haber with possession of methamphetamine for sale. (§ 11378.) The information alleged, as the basis for a section 11370.2 three-year enhancement, that Haber had suffered a prior conviction for violation of section 11378. It further alleged that Haber had served four prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).

In October 2016, a jury convicted Haber of the offense.² Haber admitted suffering a prior conviction for violating section 11378, within the meaning of section 11370.2.

Before sentencing, the trial court dismissed two of the Penal Code section 667.5, subdivision (b) prior conviction allegations on the prosecutor's motion, because those two priors

¹ All further undesignated statutory references are to the Health and Safety Code.

² Because the facts regarding the underlying offense are not relevant to the issue presented on appeal, we do not recite them here.

had “washed out.”³ The prosecutor also indicated that the two remaining prior convictions alleged for purposes of Penal Code section 667.5, subdivision (b) were “actually the same commitment,” and therefore supported imposition of only one enhancement. Haber admitted serving those two remaining prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).

The trial court sentenced Haber to the midterm of two years for the offense, plus a three-year enhancement pursuant to former section 11370.2, for a total of five years. It struck the two remaining Penal Code section 667.5, subdivision (b) allegations. It imposed a restitution fine, a suspended parole revocation restitution fine, a criminal conviction assessment, a court operations assessment, and a laboratory analysis fee and related penalty assessment.

Haber timely filed a notice of appeal. Appellate counsel initially filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, raising no issues and asking this court to independently review the record for arguable issues. In October 2017, the

³ Penal Code section 667.5, subdivision (b), requires imposition of a one-year enhancement for each of a defendant’s prior felony convictions that resulted in a separate term of imprisonment, when the defendant commits another felony within five years of release from custody. (See *People v. Langston* (2004) 33 Cal.4th 1237, 1241; *In re Preston* (2009) 176 Cal.App.4th 1109, 1115.) The five-year period is sometimes referred to as the “washout” period. (See *People v. Langston*, at p. 1241.) Because Haber’s release from custody for two of the prior felony convictions occurred more than five years prior to this offense, they were “washed out” and thus necessarily dismissed.

Governor signed Senate Bill No. 180, which amended section 11370.2, effective January 1, 2018. We granted Haber's subsequent request to withdraw his *Wende* brief and file a supplemental brief addressing the amendment's impact.

DISCUSSION

The three-year enhancement imposed pursuant to former section 11370.2 must be stricken and the matter remanded for resentencing

When Haber was sentenced, section 11370.2, subdivision (c) provided that any person convicted of violating section 11378 was subject to a consecutive three-year enhancement if he or she had a prior conviction for one of twelve enumerated offenses, including violating section 11378. (§ 11370.2, former subd. (c); *People v. Millan* (2018) 20 Cal.App.5th 450, 454.) Effective January 1, 2018, the Legislature amended section 11370.2 to eliminate all but one offense — use of a minor as an agent in a drug offense, in violation of section 11380 — from the list of qualifying priors. (§ 11370.2, subd. (c); *People v. Millan*, at p. 454.) It is undisputed that Haber has a prior conviction for violating section 11378, but not for violating section 11380.

Haber contends that, in light of the amendment to section 11370.2, the three-year enhancement must be stricken and the matter remanded for resentencing. The People concede the point, and we agree. Under amended section 11370.2, subdivision (c), Haber is not subject to the three-year enhancement because he has not suffered a qualifying prior conviction. The amendment to section 11370.2 applies to cases, such as appellant's, that were not final when the amendment became operative. (*People v. Millan, supra*, 20 Cal.App.5th at pp. 455–456.) Under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), we assume that, absent

contrary evidence, an amendment reducing punishment for a crime applies retroactively to all nonfinal judgments. (*Id.* at p. 745; *People v. Brown* (2012) 54 Cal.4th 314, 323; *People v. Vieira* (2005) 35 Cal.4th 264, 305–306.) The *Estrada* rule has been applied to penalty enhancements. (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.) Senate Bill No. 180 does not reflect an intent that the amendment apply prospectively only. The amendment “lessens punishment for a person . . . whose prior convictions no longer qualify for the three-year . . . section 11370.2, subdivision (c) enhancement. Rather than being subjected to a three-year enhancement for each prior conviction, such persons are no longer subject to *any* enhanced punishment . . .” (*People v. Millan, supra*, at pp. 455–456.) It is undisputed that Haber’s case was not final when the amendment became effective. (*People v. Vieira*, at pp. 305–306 [judgment is not final, for purposes of retroactivity analysis, until time for petitioning United States Supreme Court has expired]; *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465.) Accordingly, *Estrada* applies. (*People v. Millan*, at p. 456.)

The People contend that the trial court should “be given the opportunity to resentence appellant and impose an enhanced term based on his admission that he served four prior prison terms.” The People are correct that the matter must be remanded for resentencing, but are incorrect that the court could impose four Penal Code section 667.5, subdivision (b) enhancements. As discussed, the trial court dismissed two of the convictions alleged as the basis for Penal Code section 667.5, subdivision (b) enhancements. The prosecutor also explained that the two remaining priors did not result in a separate term of imprisonment, and therefore only one Penal Code section 667.5,

subdivision (b) enhancement could be imposed. Therefore, the only discretion available to the trial court would be to impose a single Penal Code section 667.5, subdivision (b) enhancement.

On remand, the court must be given the opportunity to reconsider its discretionary sentencing choices in light of changed circumstances, including whether to impose one Penal Code section 667.5, subdivision (b) enhancement. “When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.]” (*People v. Hill* (1986) 185 Cal.App.3d 831, 834; *People v. Calderon* (1993) 20 Cal.App.4th 82, 88; see *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1259.)

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated and the matter is remanded for resentencing. On remand, the trial court is directed to strike the section 11370.2 enhancement. The aggregate sentence imposed on remand may not exceed the original sentence.

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EDMON, P. J.

We concur:

LAVIN, 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.