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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.

JUAN CARLOS DELGADO,

Defendant and Appellant.

B280909

(Los Angeles County
Super. Ct. No. BA416608)

APPEAL from an order of the Superior Court of Los Angeles County, Upinder S. Kalra, Judge. Reversed and remanded.

Juan Carlos Delgado, in pro. per; and Elana Goldstein, 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, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Juan Carlos Delgado (defendant) appeals following a resentencing hearing held by the trial court on February 8, 2017. The hearing occurred after this Court affirmed defendant's 2014 conviction but struck the true finding on a Penal Code¹ section 186.22 gang enhancement allegation and remanded the matter for resentencing. (*People v. Delgado* (Aug. 31, 2016, B261252 [nonpub. opn.].)

Defendant's counsel on appeal contends that because this case is not yet not final, the case must be remanded to permit the trial court to exercise the discretion provided by changes to the firearm enhancement statute effective January 1, 2018. Respondent agrees that the changes in the law apply retroactively to cases that are not yet final on January 1, 2018, but opposes remand on the ground that the record demonstrates that on remand, the trial court would not exercise its discretion to strike the firearm enhancement. The record does not demonstrate that remand would serve no purpose. Accordingly, we reverse the trial court's sentencing order and remand the matter for a new sentencing hearing.

PROCEDURAL SUMMARY

This case dates back to late 2014, when a jury convicted defendant of one count of assault with a semiautomatic firearm (§ 245, subd. (b)) and one count of being a felon in possession of a firearm (§ 29800, subd. (a)(1)). The jury found true the allegations that defendant personally used a firearm in the commission of the assault (§ 12022.5) and committed the assault for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)). After defendant waived a jury trial on the prior conviction allegations, the trial

¹ Further undesignated statutory references are to the Penal Code.

court found true the allegations that defendant had suffered a prior serious felony conviction (§ 667, subd. (a)) that qualified as a strike conviction under the Three Strikes law (§§ 667, subds. (b)–(i), 1170.12.) The trial court denied defendant’s motion to strike his prior conviction and sentenced defendant to a total term of 26 years 4 months in state prison. This term consisted of the low term of three years for the assault conviction, doubled to six years pursuant to the Three Strikes law, a consecutive four-year term for the firearm use enhancement, a consecutive five-year term for the prior serious felony conviction and a consecutive ten-year term for the gang enhancement. The court also imposed a consecutive eight-month term for the possession conviction, doubled to 16 months pursuant to the Three Strikes law.

In December 2014, defendant appealed from the judgment of conviction. We reversed the true finding on the gang enhancement allegation on the ground that there was insufficient evidence to support the finding and remanded the case to the trial court for resentencing.

On February 8, 2017, the trial court denied defendant’s motion to strike his prior conviction. The court sentenced defendant to total term of 20 years in state prison, consisting of the midterm of six years for the assault conviction, doubled to 12 years pursuant to the Three Strikes law, a consecutive five-year enhancement term for the prior serious felony conviction, and a consecutive three-year enhancement term for the firearm use allegation. The court imposed a term of eight months for the possession conviction, to run concurrently with the sentence for the assault.

The trial court imposed the same fines and assessments on resentencing that it had imposed at the initial sentencing hearing:

a \$280 restitution fine (§ 1202.4, subd. (b)); a \$280 parole revocation fine, stayed (§ 1202.45); a \$30 criminal conviction assessment for each count (Gov. Code, § 70373) and a \$40 court operations assessment for each count (§ 1465.8, subd. (a)(1)). Defendant received a total of 1,063 days of precommitment custody credit.

Defendant filed a timely notice of appeal following his resentencing. On October 4, 2017, after examining the entire record, appointed counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), and requested that this court independently review the record on appeal to determine whether any arguable issues exist. We sent a letter to defendant and his counsel, instructing counsel to send the record on appeal and a copy of the *Wende* brief to defendant. We also advised defendant he had 30 days in which personally to submit any ground of appeal, contention, or argument he wished us to consider. On October 19, 2017, defendant filed a supplemental brief.

On December 6, 2017, we granted appointed counsel's motion for leave to withdraw the *Wende* brief and file an opening brief. On February 9, 2018, we ordered defendant's supplemental brief stricken on the ground that defendant was represented on appeal again following the striking of the *Wende* brief and vacating its submission.²

² On January 25, 2018, defendant filed a letter on his behalf seeking clarification of the record. Because defendant is being represented by counsel, we denied permission to file defendant's letter.

FACTUAL SUMMARY

The following factual summary is taken from our opinion in *People v. Delgado, supra*, B261252 (Opinion).

“Approximately 10:00 p.m. on September 23, 2013, Elias Paxtor and Juana Barrera were sitting in Paxtor’s car, parked in the driveway of Barrera’s home near the intersection of Arapahoe and Washington west of downtown Los Angeles. Paxtor, who was sitting in the driver’s seat, had turned off the car’s engine and headlights and had rolled down the driver’s side window.” (Opn., pp. 2-3.)

“Appellant and another person rode up to the car on bicycles. Appellant approached the driver’s side window, and his companion went to the passenger side, where Barrera was sitting. Appellant put a gun to Paxtor’s head and asked him if he belonged to a gang. Paxtor responded that he did not belong to any gang. Still pointing the gun at Paxtor’s head, appellant demanded that Paxtor hand over everything in his wallet. As Paxtor started to pull out his wallet, he told appellant he did not have any money. Appellant and the other man then abruptly left, riding away on their bicycles.” (Opn., p. 3.)

“The entire interaction lasted 15 to 30 seconds. Angered by the incident, Paxtor began following appellant in his car and called the police. Paxtor followed appellant for about an hour. During this time, he dropped Barrera off at her house and resumed his pursuit of appellant. As he continued to follow appellant, he dialed 911 multiple times and saw appellant apparently commit a similar assault on another man. After appellant had left again, Paxtor spoke to the man, who told Paxtor appellant had demanded money.” (Opn., p. 3.)

“Paxtor saw appellant point his gun at someone else in front of a Laundromat. Appellant went inside the Laundromat with his bicycle. Police arrived, arrested appellant in the Laundromat, and recovered a loaded semi-automatic handgun hidden in a laundry basket.” (Opn. p. 3.)

Los Angeles Police Officer Kenny Talbert testified as the prosecution’s gang expert. “Officer Talbert served in the Olympic Division’s gang enforcement unit for four years. During that time, he interacted with appellant at least 15 times, and appellant identified himself as a member of the Playboys in about half of those encounters. . . . The officer identified appellant’s Playboys gang tattoos and opined that gang tattoos on the face constitute a claim of gang affiliation, signifying a ‘deeper involvement’ in the gang.” (Opn., p. 4.) Officer Talbert conceded that there were no field identification (FI) cards for appellant dated after 2012. “He further recognized that appellant’s association with other Playboys gang members noted on the FI cards was limited to contacts with his own brothers, who were documented Playboys gang members, and one incident in which appellant was associating with Playboys member Jose Gomez on December 27, 2010.” (Opn., p. 5.)

DISCUSSION

When the trial court resentenced defendant in February 2017, the court imposed an enhancement term of three years pursuant to section 12022.5, subdivisions (a) and (d). At the time defendant was sentenced, section 12022.5 expressly provided that a trial court could not strike “an allegation under the section or a finding bringing a person within the provisions of this section.” (§ 12022.5, subd. (c).)

On October 11, 2017, the Governor signed Senate Bill 620, which amended section 12022.5 to strike the language of

subdivision (c) prohibiting striking the enhancement and in its place providing: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (Stats. 2017, ch. 682, §§ 1-2.) Senate Bill 620 does not contain an urgency clause. (*Ibid.*) Thus, it went into effect on January 1, 2018. (See *People v. Camba* (1996) 50 Cal.App.4th 857, 865-866 [operative date is “January 1 of the year following” enactment].)

Defendant contends, and respondent agrees, that the change to section 12022.5 applies to any judgment that is not final on January 1, 2018, including this case. We agree.

Generally, amendments to the Penal Code do not apply retroactively. (See § 3.) The California Supreme Court has recognized an exception for amendments that reduce the punishment for a specific crime. (See *People v. Brown* (2012) 54 Cal.4th 314, 323-324.) Courts presume that the Legislature intended those amendments to apply retroactively to all nonfinal judgments. (*Id.* at p. 323; accord, *In re Estrada* (1965) 63 Cal.2d 740, 745.) This exception applies to amendments that give the trial court discretion to impose a lower sentence. (See *People v. Francis* (1969) 71 Cal.2d 66, 75-76.) In addition to a judicial presumption of retroactive intent, the following language of the amendment demonstrates that the Legislature intended the amendment to apply retroactively to nonfinal judgments: “The authority provided by this subdivision applies to any *resentencing* that may occur pursuant to any other law.” (§ 12022.5, subd. (c) [*italics added*].)

Defendant and respondent part ways on whether the trial court would exercise its newly granted discretion to strike defendant's firearm enhancement. Defendant contends trial counsel should be given the "opportunity to advocate for [defendant] and provide a reasoned theory for why it would be appropriate for the court to consider striking . . . the enhancement." Respondent maintains the trial court's comments at the February 8, 2017 resentencing hearing discussed below demonstrate that the trial court would not exercise its discretion to strike the enhancement and so remand would serve no purpose.

"Defendants are entitled to sentencing 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 material aspect of a defendant's record. [Citation.]" (*Ibid.*) Thus, where a trial court imposes a sentence in the belief that it lacks 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 relies on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*) to argue this case is an exception to the general rule requiring remand. Respondent maintains that under the reasoning of *Gutierrez*, we can and should deny remand because it would serve no purpose in light of the trial court's comments at the resentencing hearing. Respondent's reliance on *Gutierrez* is misplaced.

The defendant in *Gutierrez* sought a remand following the California Supreme Court's decision in *People v. Superior Court*

(*Romero*) (1996) 13 Cal.4th 497 clarifying that trial courts have discretion under the Three Strikes law to strike prior convictions in the interests of justice. The *Gutierrez* court explained that remand would serve no purpose because “the trial court indicated that it would not, in any event, have exercised its discretion to lessen the sentence. It stated that imposing the maximum sentence was appropriate. It increased appellant’s sentence beyond what it believed was required by the three strikes law, by imposing the high term for count 1 and by imposing two additional discretionary one-year enhancements.” (*People v. Gutierrez, supra*, 48 Cal.App.4th at p. 1896.) Thus, in *Gutierrez*, the trial court had considered, at least hypothetically, whether it would exercise its discretion. The trial court also imposed the maximum possible sentence. Neither action occurred in this case.

The trial court did not comment on any hypothetical exercise of potential future discretion. Here, the trial court stated in part, “I came up with an over all number because of the conduct that [defendant] engaged in at the time, the type of behavior and lifestyle he was living, his criminal record, and *pursuant to the sentencing rules that I have to follow.*” (Italics added.) Further, the court did not impose the maximum possible sentence. For example, the court elected to change defendant’s sentence on the possession conviction from a consecutive term to a concurrent one. Significantly, the trial court reduced the term for the firearm enhancement from the original term of four years to the low term of three years; the court stated defendant’s firearm use “did not appear to be in an aggravated manner.” Prior to the enactment of Senate Bill 620, the court could not have reduced the sentence for that enhancement further.

We cannot say that the trial court's comments demonstrate that the trial court would not have exercised its discretion to strike defendant's firearm enhancement rather than merely reduce it, if the trial court had had that discretion at the time of the resentencing hearing. Accordingly, this case is remanded for the trial court to decide whether to strike the firearm enhancement.

DISPOSITION

The trial court's order sentencing defendant is reversed, and this matter is remanded for further proceedings.

NOT TO BE PUBLISHED.

BENDIX, J.*

We concur:

Chaney, Acting P. J.

Johnson, J.

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