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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DERRICK WRIGHT, Defendant and Appellant.	B282932 (Los Angeles County Super. Ct. No. TA139004)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael J. Shultz, Judge. Affirmed and remanded.

Paul Kleven, 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, Senior Assistant Attorney General, Shawn McGahey Webb and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Derrick Wright appeals from the judgment entered after a jury convicted him of assault with a semiautomatic firearm, driving or taking a vehicle without consent, possession of a firearm by a felon, and brandishing a firearm at a person in a motor vehicle. The jury also found true firearm and gang enhancement allegations.

Wright does not challenge his conviction. He asks that we vacate his sentence and remand for resentencing because (1) the trial court erroneously concluded it did not have discretion to impose concurrent sentences for his convictions in this case and his violation of probation in another case; (2) the trial court should have an opportunity to exercise discretion under amendments to Penal Code sections 12022.5, subdivision (c), and 667, subdivision (a), that give the court discretion to strike enhancements for firearm use and for prior serious felony convictions, respectively;[1] and (3) the trial court erred in imposing both the 10-year firearm enhancement under section 12022.5, subdivision (a), and the five-year gang enhancement under section 186.22, subdivision (b)(1)(B). We disagree with (1) but agree with (2) and (3). Therefore, we affirm the convictions and remand for resentencing.

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[1] Undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Wright Threatens His Neighbor with a Semiautomatic Firearm*

Wright was a member of a criminal street gang and lived in the same neighborhood as Keyon Morris. Gang members "jumped" Morris into the gang through an involuntary initiation beating. Morris initially participated in the gang's criminal activities, but eventually he tried to distance himself from the gang.

In October 2015 Wright approached Morris and told him to "put in work," which meant to commit crimes on behalf of the gang. From October 2015 to January 2016 Wright periodically confronted Morris about Morris's status in the gang and his need to participate in gang activity.

On January 4, 2016 Morris was driving his car near the neighborhood with his cousin in the passenger seat. He saw Wright driving a white car that had been reported stolen in November 2015. Wright followed Morris, and when Morris pulled over, Wright stopped next to him. Wright pointed a semiautomatic pistol at Morris, mimicked a recoil effect, and drove away.

Morris captured the incident on his cellphone video camera, and he showed the video to sheriff's deputies. In the video, an individual who looks like Wright points a gun from a white car at Morris and his passenger. Morris identified Wright from the video.

The deputies later found Wright sitting in the driver's seat of a parked white car. His DNA matched DNA from the trigger of the gun deputies found inside the car, but did not match the sample found on the cartridge.[2]

B. *The Jury Convicts Wright, and the Trial Court Sentences Him*

The People charged Wright with two counts of assault with a semiautomatic firearm (§ 245, subd. (b)), driving or taking a vehicle without consent (Veh. Code, § 10851, subd. (a)), two counts of possession of a firearm by a felon (§ 29800, subd. (a)(1)), and two counts of brandishing a firearm at an occupant of a motor vehicle (§ 417.3). The People alleged that Wright personally used a firearm during the assault within the meaning of section 12022.5, subdivision (a), and that Wright committed all but one of the crimes for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, under section 186.22, subdivision (b)(1). Finally, the People alleged Wright had a prior conviction for a felony that was a serious felony within the meaning of section 667, subdivision (a)(1), and a serious or violent felony within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12).

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[2] Wright, testifying in his defense at trial, denied he was present at the scene. He also denied he owned the gun sheriff's deputies found in the car when they stopped him. Wright also testified he believed he legally purchased the car from a man named Carlos.

The trial court dismissed one of the counts of possession of a firearm by a felon. The jury convicted Wright on all remaining counts and found true all of the firearm and gang allegations.

The trial court sentenced Wright to an aggregate prison term of 39 years four months on his convictions in this case. The court imposed concurrent nine-year terms for the two assault convictions, doubled under the three strikes law (§ 1170.12), plus 10 years for the firearm enhancement (§ 12022.5, subd. (a)) and five years for the gang enhancement (§ 186.22, subd. (b)(1)(B)). The court imposed an eight-month prison term on his conviction for taking a vehicle without consent, doubled under the three strikes law. The court also imposed a five-year term under section 667, subdivision (a)(1), for Wright's prior serious felony conviction.[3] On the probation violation, the court imposed a term of three years four months, so Wright's total prison term for both cases was 42 years eight months. Wright timely appealed.

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[3] The court also imposed a concurrent term of three years on Wright's conviction for possession of a firearm by a felon, doubled under the three strikes law. The court also imposed and stayed under section 654 concurrent terms of three years on the convictions for brandishing a weapon, also doubled under the three strikes law, and a four-year gang enhancement on both convictions (§ 186.22, subd. (b)(1)(A)).

DISCUSSION

A. *The Trial Court Correctly Ruled It Had To Impose Consecutive Sentences on the Probation Violation and the Convictions in This Case*

1. *Relevant Proceedings*

In 2014 Wright was convicted of making a criminal threat (§ 422), possession of a firearm by a felon (§ 29800, subd. (a)(1)), and possession of ammunition (§ 30305, subd. (a)(1)). The trial court sentenced Wright to five years eight months in that case, but suspended execution of the sentence and placed him on probation for five years.

The trial court revoked Wright's probation because of his arrest in this case. On January 5, 2017 the court held a probation violation hearing, found Wright in violation of his probation, and sentenced him on the probation violation. Wright was incarcerated in the county jail while he awaited trial on the charges in this case, which ultimately began on April 27, 2017. The jury returned verdicts on May 4, 2017.

On May 31, 2017 the trial court sentenced Wright on his convictions in this case and resentenced Wright on his probation violation. At the sentencing hearing the trial court ruled that it had to resentence Wright and that section 667, subdivision (c), required the court to impose consecutive sentences for the probation violation and the current convictions. As a result, the trial court resentenced Wright on the probation violation to a consecutive term of three years four months. Wright argues that the trial court erred in concluding "consecutive sentencing on the probation violation was mandatory" and that the court actually

had discretion (which it did not exercise) to impose concurrent sentences.

2. *The Trial Court Did Not Have Discretion To Impose Concurrent Sentences*

Section 667, subdivision (c)(8), provides that "[a]ny sentence imposed pursuant to subdivision (e) will be imposed consecutive to any other sentence which the defendant is already serving . . . ." Wright argues the trial court erred in ruling it did not have discretion under section 667, subdivision (c)(8), to sentence him concurrently on this case and his probation violation. He argues that, because he was in county jail and not yet in state prison at the time of sentencing, he was not "already serving" a sentence under section 667. The People argue Wright was "already serving" a sentence at the time of sentencing on this case because he began serving a sentence on the prior case when the trial court lifted the stay of execution and sentenced Wright in that case.

The People are correct. At the time the trial court sentenced Wright on May 31, 2017, Wright was serving the sentence for his probation violation the court had imposed on January 5, 2017. (See *People v. Davis* (1996) 48 Cal.App.4th 1105, 1112-1113 [the trial court "correctly ordered mandatory consecutive sentences" because the term "'any other sentence which the defendant is already serving' includes a sentence previously imposed and not yet fulfilled, which . . . is subsequently executed"].) Therefore, because the court had sentenced Wright on his probation violation before the court sentenced Wright on his convictions in this case, Wright was "already serving" a sentence when the trial court sentenced him,

and the trial court correctly ruled it had no discretion under section 667, subdivision (c)(8), to impose concurrent sentences.

Wright argues that, even if he was already serving a sentence on May 31, 2017, he was serving it in county jail awaiting trial, not in prison, as required by section 667, subdivision (c)(8). But this does not change the fact that Wright was already serving another sentence. In *People v. Rosbury* (1997) 15 Cal.4th 206, on which Wright relies, the trial court, unlike the trial court here, did not impose a sentence for the probation violation before the court sentenced the defendant on the new charges. (*Id.* at p. 211.) At the time of sentencing in *Rosbury*, the defendant was on probation, but the court had not yet found the defendant had violated probation. (*Id.* at pp. 208-209.) In this context the Supreme Court stated: "No matter whether sentence was originally imposed or suspended, it does not begin to be served following probation revocation until the offender is 'delivered over to the proper officer' . . . . In this case, defendant did not begin to serve his sentence before he was committed to the sheriff's custody [citations], *and likely not until the sheriff delivered him to prison* . . . . We need not dwell further on this technical point, however—it suffices to say that, being on probation, defendant was not already serving his sentence for purposes of section 667, subdivision (c)(8)." (*Rosbury*, at p. 211, italics added.) This brief statement in dicta, unaccompanied by analysis, regarding what was "likely" does not take priority over the language of section 667, subdivision (c)(8). (Cf. *People v. Tovar* (2017) 10 Cal.App.5th 750, 759 ["'Supreme Court dicta generally should be followed, particularly where the comments reflect the court's considered reasoning'"]; *People v. Smith* (2002) 95 Cal.App.4th 283, 300 [dicta of the California Supreme Court

"'should be followed where it demonstrates a thorough analysis of the issue or reflects compelling logic'"].) The actual holding of *Rosbury* was that the defendant "did not begin to serve his sentence before he was committed to the sheriff's custody" (*Rosbury*, at p. 211), and Wright was in the custody of the sheriff when he was tried, convicted, and sentenced on the charges in this case.

Wright also cites section 2900, subdivision (a), which provides that the "term of imprisonment fixed by the judgment in a criminal action commences to run only upon the actual delivery of the defendant into the custody of the Director of Corrections at the place designated by the Director of Corrections as a place for the reception of persons convicted of felonies." Section 2900, however, concerns custody credits. Wright does not explain why section 2900 applies to section 677, subdivision (c)(8). But the People provide a good explanation for why it does not: "To conclude that [Wright] was not already serving his sentence [on the probation violation] merely because he was in the custody of the county sheriff rather than the Department of Corrections and Rehabilitation would defeat the purpose of the Three Strike[s] law, as he was only in the custody of the sheriff because he was awaiting trial in the instant case, and would have otherwise been in state prison on [his probation violation] at the time of his sentencing hearing in this . . . case."

B. *Wright Is Entitled to a New Sentencing Hearing on the Enhancements for the Prior Serious Felony Conviction and Firearm Use*

On September 30, 2018 the Governor signed Senate Bill No. 1393, which amended sections 667 and 1385 effective

January 1, 2019 to give the trial court discretion to dismiss, in the interest of justice, five-year sentence enhancements under section 667, subdivision (a). (See Cal. Const., art. IV, § 8(c)(1).) Wright argues, the People concede, and we agree the new provisions will apply to defendants, like Wright, whose appeals will not be final on the law's effective date. (See *People v. Brown* (2012) 54 Cal.4th 314, 323 ["[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date," fn. omitted].) The People argue, however, remand is "unwarranted" because "the record provides a 'clear indication' the court would not have stricken the section 667, subdivision (a)(1), enhancement had it known of its discretion to do so," and "the trial court strongly indicated that it would *not* be in the furtherance of justice to reduce [Wright's] punishment for any reason."

The record, however, is not quite as clear as the People suggest. To be sure, the trial court did not show much leniency towards Wright. The court found eight aggravating circumstances, no mitigating circumstances, and referred to Wright as "one of the scariest, most dangerous [defendants] that I've seen in my seven and a half years or so on the bench." And the trial court sentenced Wright to the upper term on five of his seven convictions. On the other hand, the court, against the prosecutor's recommendation that the court "impose consecutive as opposed to concurrent sentences for all counts," imposed concurrent sentences on the two assault convictions and the two brandishing a firearm convictions, and ordered Wright to serve

the sentence on the conviction for possession of a firearm by a felon concurrently with the assault convictions. Under these circumstances, it is appropriate to remand the matter for a new sentencing hearing after January 1, 2019 to allow the trial court to exercise its discretion whether to dismiss the five-year enhancement under section 667, subdivision (a). (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081-1082; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427-428.)

Similarly, at the time of sentencing, section 12022.5, subdivision (c), prohibited the court from striking the firearm enhancements under that statute. (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1127.) The Legislature, however, has since amended section 12022.5, subdivision (c), to give the trial court discretion to strike firearm enhancements in the interest of justice. (See Sen. Bill No. 620 (2017-2018 Reg. Sess.) § 1.) Wright argues, the People concede, and we agree that section 12022.5, subdivision (c), as amended, applies to Wright. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) Because we must remand the matter for resentencing, the court will have an opportunity to exercise discretion in the first instance under amended section 12022.5, subdivision (c).

C. *The Imposition of a 10-Year Enhancement Under Section 12022.5 and a Five-year Enhancement Under Section 186.22, Subdivision (b), Was Unauthorized*

If on remand the trial court does not strike the enhancement under section 12022.5, the court cannot impose both that enhancement and the enhancement under section

186.22, subdivision (b)(1). Under section 1170.1, subdivision (f), the court can only impose the greater enhancement.

Section 186.22, subdivision (b)(1), "provides different levels of enhancement for the base felony if that felony is 'committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . .' (§ 186.22, subd. (b)(1).) If the base felony qualifies as a violent felony under the list of felony crimes contained in section 667.5, then 'the person shall be punished by an additional term of 10 years.' (§ 186.22, subd. (b)(1)(C).) If the base felony qualifies as a serious felony under the list of felony crimes contained in section 1192.7, then 'the person shall be punished by an additional term of five years.' (§ 186.22, subd. (b)(1)(B).) If the base felony qualifies neither as serious or violent, then 'the person shall be punished by an additional term of two, three, or four years at the court's discretion.' (§ 186.22, subd. (b)(1)(A).) Section 186.22, subdivision (b)(1)'s three sentence provisions, therefore, reflect the intention to impose progressively longer sentence enhancements based on the severity of the felony categorized across three tiers." (*People v. Le* (2015) 61 Cal.4th 416, 422-423.)

There are limits, however, on the trial court's authority to impose sentence enhancements under section 186.22, subdivision (b)(1). Section 1170.1, subdivision (f), provides that, "[w]hen two or more enhancements may be imposed for . . . using . . . a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense." In *People v. Le*, *supra*, 61 Cal.4th 416 the Supreme Court held that assault with a semiautomatic firearm qualifies as a serious felony under section 1192.7, subdivision (c), "solely because it involve[s] a

firearm," and a conviction "based on section 245, subdivision (b), could not be enhanced for use of a firearm both under section 12022.5, subdivision (a), and section 186.22, subdivision (b)(1). Rather, section 1170.1 required that only the greater of the two enhancements . . . could be imposed." (*Id.* at p. 425.)

As the People concede, Wright's case is indistinguishable from *People v. Le*. Wright and the defendant in *Le* were convicted of the same offense, assault with a semiautomatic firearm under section 245, subdivision (b). The trial court in this case and the trial court in *Le* imposed enhancements under both section 12022.5, subdivision (a), and section 186.22, subdivision (b)(1)(B). Significantly, "without the element concerning the use of a semiautomatic firearm, the conduct would constitute a simple assault" and "would not qualify for the additional five-year enhancement under section 186.22, subdivision (b)(1)(B) . . . ." (*People v. Le*, *supra*, 61 Cal.4th at p. 427.) Therefore, the trial court erred in imposing enhancements under both section 186.22, subdivision (b)(1), and section 12022.5, subdivision (a), and we must remand the matter for resentencing to allow the court, if it does not strike the firearm enhancement, to impose the greater enhancement.[4]

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[4] If the court imposes an enhancement under section 12022.5, subdivision (a), the court cannot impose an enhancement under either section 186.22, subdivision (b)(1)(A), or section 186.22, subdivision (b)(1)(C). (See *People v. Rodriguez* (2009) 47 Cal.4th 501, 509 ["[b]ecause the firearm use was punished under two different sentence enhancement provisions [section 12022.5 and section 186.22, subdivision (b)(1)(C)], 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"]; *People v. Francis* (2017) 16 Cal.App.5th

DISPOSITION

The judgment of conviction is affirmed. This matter is remanded with directions for the trial court to resentence Wright after January 1, 2019 and exercise its discretion whether to strike the five-year enhancement under section 667, subdivision (a)(1), for Wright's prior serious felony conviction, the firearm enhancement under section 12022.5, subdivision (a), or both. If the trial court does not strike the firearm enhancement under section 12022.5, subdivision (a), the trial court is also directed to impose only the greater enhancement under section 12022.5, subdivision (a), and section 186.22, subdivision (b)(1)(B).

SEGAL, J.

We concur:

ZELON, Acting P. J. FEUER, J.

876, 882, 883 [because section 186.22, subdivision (b)(1)(A), "unambiguously excludes violent and serious felonies, that enhancement may not be appended to a serious or violent felony," and "[w]hile there is discretion embedded *within* subdivision (b)(1)(A) for felonies falling within that provision, a trial court has no discretion to impose a term under subdivision (b)(1)(A) for a felony that falls under (B) or (C)"].)