

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW LIKI FATU,

Defendant and Appellant.

B294178

(Los Angeles County
Super. Ct. No. NA090775)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed as modified.

David Dworakowski, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Matthew Liki Fatu pleaded nolo contendere to two counts of assault with a semiautomatic firearm, in violation of Penal Code section 245, subdivision (b).¹ The trial court sentenced Fatu to an aggregate prison term of 25 years, a prison term that includes a 10-year sentencing enhancement pursuant to section 12022.5, subdivision (a) for the personal use of a firearm in the commission of a felony, along with a four-year sentencing enhancement pursuant to section 186.22, subdivision (b)(1)(A) for committing a felony for the benefit of, at the direction of, or in association with a criminal street gang. On appeal, the parties do not dispute that: (1) the trial court erred in imposing the four-year enhancement under section 186.22, subdivision (b)(1)(A) because the underlying offense qualifies as a serious felony for the purposes of section 186.22, subdivision (b)(1)(B); and (2) section 1170.1, subdivision (f) barred the trial court from imposing *both* a 10-year enhancement under section 12022.5, subdivision (a) *and* a 5-year serious felony gang enhancement under section 186.22, subdivision (b)(1)(B). Because we agree with the parties on each of these points, we modify the judgment to reflect the serious-felony gang enhancement under section 186.22, subdivision (b)(1)(B); stay the enhancement; and affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

On March 13, 2012, an information charged Fatu with six counts of attempted murder, in violation of sections 664 and 187 (i.e., counts 1 through 6). On April 18, 2012, the trial court amended the information to add two counts of assault with a

¹ Further undesignated statutory references are to the Penal Code.

semiautomatic firearm in violation of section 245, subdivision (b) (i.e., counts 8 and 9).² Fatu thereafter pleaded nolo contendere to counts 8 and 9, admitted that he personally used a firearm for the purposes of section 12022.5, subdivision (a), and admitted that he committed a felony subject to the sentencing enhancement imposed by section 186.22, subdivision (b)(1)(A).

The trial court dismissed counts 1 through 6 pursuant to a plea negotiation and sentenced Fatu to an aggregate term of 25 years in state prison. With regard to count 8, the trial court imposed the upper term of nine years, along with the upper term of 10 years for the personal-use enhancement under section 12022.5, subdivision (a) and the upper term of four years for the gang enhancement under section 186.22, subdivision (b)(1)(A).³ The trial court also imposed a consecutive two-year prison term on count 9, which is one-third the mid-term for that offense.

On August 20, 2018, the Department of Corrections and Rehabilitation (CDCR) recommended that Fatu's sentence be recalled. The CDCR counseled that *People v. Le* (2015) 61 Cal.4th 416, 429 (*Le*) had "held that a trial court is precluded from imposing both an enhancement for personal use of a firearm under Section 12022.5(a)(1) and a serious felony gang enhancement under Section 186.22(b)(1)(B) when the offense

² The information charged another defendant with violating section 32 (i.e., count 7 of the information).

³ The trial court's initial abstract of judgment indicated that it had imposed a 10-year enhancement pursuant to "12022.5(A)PC." The trial court later entered an amended abstract of judgment, which clarified that section 12022.5, subdivision (a) authorized this enhancement.

qualifies as a serious felony solely because it involved firearm use.”

On November 28, 2018, the trial court ruled that the “original sentence imposed is legal.” The trial court apparently concluded that *Le* was inapposite because the sentencing enhancement had been imposed under subdivision (b)(1)(A) of section 186.22, rather than under subdivision (b)(1)(B) of that provision. Later that day, Fatu appealed the judgment and the trial court’s ruling regarding the legality of the sentence.

DISCUSSION

Respondent concedes, and we agree, that “the [trial] court lacked discretion to impose the section 186.22, subdivision (b)(1)(A) enhancement,” and that we should “modify [Fatu’s] sentence to reflect a section 186.22, subdivision (b)(1)(B) enhancement.” “While 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).” (See *People v. Francis* (2017) 16 Cal.App.5th 876, 883 (*Francis*), italics omitted.) In turn, subdivision (b)(1)(B) provides that “the person shall be punished by an additional term of five years” if “the felony is a serious felony, as defined in subdivision (c) of Section 1192.7.” (§ 186.22, subd. (b)(1)(B).) Count 8 qualifies as a serious felony for the purposes of section 1192.7, subdivision (c) because Fatu’s conviction on that count establishes that he committed an assault with a semiautomatic firearm. (See § 1192.7, subd. (c)(31) [“As used in this section, ‘serious felony’ means any of the following: [¶] . . . assault with a . . . semiautomatic firearm . . . in violation of Section 245”]; see also *Francis*, *supra*, 16 Cal.App.5th at pp. 883–884 & fn. 8

[observing that the defendant’s conviction for assault with a semiautomatic firearm qualified as a serious felony under, *inter alia*, section 1192.7, subdivision (c)(31)].) Thus, the trial court could not impose a sentencing enhancement under section 186.22, subdivision (b)(1)(A).

The trial court could not impose a sentencing enhancement under section 186.22, subdivision (b)(1)(B) either. Section 1170.1, subdivision (f) provides in pertinent part that “[w]hen 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.” (§ 1170.1, subd. (f).) The Supreme Court has held that “section 1170.1, subdivision (f) also precludes a trial court from imposing both a firearm enhancement under section 12022.5, former subdivision (a)(1),⁴ and a gang enhancement under section 186.22, subdivision (b)(1)(B), in connection with a single offense” if “both enhancements . . . depend on [the] defendant’s firearm use” (See *Le, supra*, 61 Cal.4th at pp. 419–420.)

In this case, section 12022.5, subdivision (a)’s 10-year enhancement could be imposed only if Fatu “personally use[d] a firearm in the commission of a felony or attempted felony” (§ 12022.5, subd. (a).) Likewise, as noted above, section 186.22, subdivision (b)(1)(B) is applicable because Fatu was convicted of assault with a semiautomatic firearm. Consequently, section 1170.1, subdivision (f) barred the trial court from imposing a

⁴ The *Le* Court interpreted former section 12022.5, subdivision (a)(1), which “did not differ from the current statute in any significant respect.” (*Le, supra*, 61 Cal.4th at p. 420 & fn. 2.)

five-year sentencing enhancement under section 186.22, subdivision (b)(1)(B).

Lastly, respondent concedes, and we agree, that the trial court's error should be remedied as follows: (1) modify the judgment to impose an enhancement under section 186.22, subdivision (b)(1)(B) (instead of under subdivision (b)(1)(A)); and (2) stay that enhancement. "[I]t is appropriate for us to modify the sentence on appeal" instead of reversing and remanding for resentencing because "the trial court imposed the maximum possible sentence" on count 8.⁵ (*Francis, supra*, 16 Cal.App.5th at p. 887 [modifying the judgment in the manner described in this textual paragraph].)

DISPOSITION

The judgment is modified as follows: The gang enhancement imposed on count 8 under Penal Code section 186.22, subdivision (b)(1)(A), is modified to reflect an enhancement under subdivision (b)(1)(B) of section 186.22. The section 186.22, subdivision (b)(1)(B) enhancement is stayed. As modified, the judgment is affirmed.

Upon the issuance of our remittitur, the trial court is directed to prepare a corrected minute order consistent with the views expressed in this opinion, amend the abstract of judgment, and send certified copies of the amended abstract of judgment to the Department of Corrections and Rehabilitation. The clerk of

⁵ Respondent does not argue that we should allow the trial court to modify Fatu's sentence on count 9 in order to compensate for the loss of the enhancement imposed under section 186.22, subdivision (b)(1)(A). Thus, we do not address that issue.

the court is directed to send a copy of the opinion and remittitur to the Department of Corrections and Rehabilitation. (See *Francis, supra*, 16 Cal.App.5th at p. 888, citing Cal. Rules of Court, rule 8.272(d)(2).)

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.