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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. LEE DEREK LARSON, Defendant and Appellant.	B283801 (Los Angeles County Super. Ct. No. PA088591)

APPEAL from orders of the Superior Court of the County of Los Angeles, Cynthia L. Ulfig, Judge. Affirmed, in part, reversed, in part, and remanded with instructions.

David M. Thompson, 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, Scott A. Taryle, Supervising Deputy Attorney General, and David W. Williams, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Following the denial of his motion to suppress evidence, Lee Larson (defendant) pleaded no contest to first degree residential burglary. On appeal, he argues the trial court erred when it denied his suppression motion and when it ordered him to pay the cost of his defense without first finding he had the ability to pay.

We hold that the facts found by the trial court on the motion to suppress were supported by substantial evidence and, based on those facts, the trial court correctly concluded the arresting officer had a reasonable suspicion that defendant was involved in criminal activity. We therefore affirm the denial of the suppression motion. We further hold that the order requiring defendant to pay the cost of his defense must be reversed and remanded with instructions to determine whether defendant had the ability to pay.

In addition, we remand the matter for the limited purpose of allowing the trial court to exercise its resentencing discretion under newly-enacted Senate Bill 1393.

FACTUAL BACKGROUND[1]

On November 1, 2016, Los Angeles Police Officer Robert Sandoval was assigned to the Foothill Division. At approximately 4:45 a.m., he and his partner, Officer Nancy Escobar, received a call about a robbery and responded to an apartment located at 10059 Tujunga Canyon Drive. Ashley

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[1] Because the issues on appeal do not involve the facts of the charged crimes adduced at the preliminary hearing, we provide only a summary of those facts to provide context for the discussion that follows.

Stanman and Edward Testa[2] answered the door. Stanman, who appeared "scared" and was "shaking [and] crying a bit," explained that she had received a call from a friend, Christina Draag, asking if she could stay at Stanman's apartment for the night. Ten to 15 minutes later, Stanman responded to a knock on her door. When she opened the door, Draag and a man carrying a sawed-off shotgun came through the door. The man, later identified as defendant, had a bandana over his face and tattoos on his head and hands.

Defendant pointed the shotgun at Stanman and said, "'You snitched on my homeboy. You're Ashley.'" Stanman responded, "'You're looking for the wrong Ashley. I can show you my I.D.'" Defendant then demanded money and told Stanman, "'I'm from Toonerville, bitch.'"

Defendant "dragged" Stanman to the bedroom and tried to enter, but the door was locked. Testa, who was in the bedroom, yelled that he had just called the police. Defendant then took Stanman to the bathroom and made her lie face down, after which he and Draag fled the scene.

PROCEDURAL BACKGROUND

In a May 9, 2017, information, the Los Angeles County District Attorney charged defendant in count 1 with attempted first degree residential robbery in violation of Penal Code sections 664 and 211;[3] in count 2 with assault with a firearm in violation

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[2] Although the male who answered the door identified himself as Edward Testa, his real name was Luis Torres.

[3] All further statutory references are to the Penal Code unless otherwise indicated.

of section 245, subdivision (a)(2); in count 3 with false imprisonment by violence in violation of section 236; in count 4 with possession of a firearm by a felon in violation of section 29800, subdivision (a)(1); in count 5 with possession of a short-barreled shotgun in violation of section 33215; in count 6 with unlawful possession of ammunition in violation of section 30305, subdivision (a)(1); and in count 7 with first degree burglary, person present, in violation of section 459. The District Attorney alleged that defendant had committed the offenses in counts 1, 2, 3, and 7 for the benefit of, at the direction of, and in association with a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C). The District Attorney further alleged that defendant had suffered two prior felony convictions for which he served a prior prison term within the meaning of section 667.5 and had suffered two prior violent or serious felony convictions within the meaning of sections 667, subdivisions (b) through (j), and 1170.12.

On April 25, 2017, the parties stipulated that the preliminary hearing transcript in case number PA087509—which had been dismissed and refiled as the present case—could be used as if the hearing had been held in the present case.[4] On May 15, 2017, defendant filed a motion to dismiss under section 995 based on the denial of his section 1538.5 motion at the preliminary hearing. On June 16, 2017, the trial court heard and denied the

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[4] During the preliminary hearing in prior case number PA87509, defendant moved under section 1538.5 to suppress evidence. The trial court denied the motion. The denial of defendant's section 1538.5 motion during that preliminary hearing was the subject of defendant's motion to dismiss under section 995 in this case.

section 995 motion, finding that "there was reasonable suspicion for the officers to contact the defendant" and that the section 1538.5 motion "was properly denied at the preliminary hearing."

Following the denial of his section 995 motion, defendant pleaded no contest to burglary and admitted a gang allegation, a section 667, subdivision (a) prior serious felony conviction allegation, and a prior strike allegation. The trial court sentenced defendant to an aggregate prison term of 18 years and, inter alia, ordered him to pay $470 in attorney fees under section 987.8.

DISCUSSION

A. Suppression Motion

1. Background

As explained, defendant filed a motion to suppress evidence under section 1538.5. The prosecution filed an opposition to the motion.

At the January 25, 2017, preliminary hearing in prior case number PA87509, the trial court heard the following testimony on the suppression motion:

On November 1, 2016, Los Angeles Police Officer Jaime Balderas attended roll call prior to beginning his shift at 5:00 a.m. Detective Guerrero passed out a crime report and briefed the morning shift officers on the crime, explaining that earlier that morning two suspects using a gun committed a home invasion robbery at 10059 Tujunga Canyon Boulevard. According to the detective, the female suspect, Draag, entered the residence followed by an unknown male suspect wearing a mask that kept falling down, exposing tattoos on his face. The detective

described the male suspect as possibly white, with tattoos on his face and hands, using the moniker Sly Vicious.

Following roll call, Officer Balderas and his partner, Jacob Wood, went out on patrol in uniform in a marked patrol vehicle. Officer Wood drove with Officer Balderas in the passenger seat. Around 9:30 a.m., the officers were patrolling westbound on Wentworth Street near the intersection with Sherman Grove Avenue when they passed a burgundy Nissan Altima parked against the north curb of Wentworth facing west. The Altima had Maryland license plates and, by Officer Balderas's estimate, was parked a mile and a half from the scene of the home invasion robbery.[5]

As the officers drove by the Altima, Officer Balderas observed a white male, later identified as defendant, sitting in the driver's seat talking on the phone. The officer could see the left side of defendant's face and observed tattoos around his mouth, under his eye, and on his forehead.

The officers decided to approach the Altima because they were not sure if defendant was the suspect in the home invasion robbery; therefore, they were going to investigate. Officer Wood stopped the patrol car in what Officer Balderas described as a "bad area as far as tactics," with "crime patterns," individuals on parole and probation, and stolen vehicles. As the patrol car stopped, Officer Balderas saw defendant, while still on his phone, make a "furtive" movement toward the front of his seat. Officer Balderas immediately exited the patrol car in what he described as a movement simultaneous with defendant's furtive movement. Officer Wood exited the patrol car at the same time. Officers

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[5] Officer Balderas conceded that the location of the Altima could have been as far as 2.9 miles from the scene.

Balderas and Wood walked toward defendant in his parked Altima. Wanting to make sure defendant wasn't concealing anything under his seat or reaching for a weapon, Officer Balderas ordered defendant to "place his hands in view." When defendant complied with the command, Officer Balderas observed tattoos on defendant's hands.

When Officer Balderas saw the tattoos on defendant's hands, he began to believe defendant could be the suspect in the home invasion robbery.

Officer Wood directed defendant to exit the Altima and move to the rear of the vehicle. The officers handcuffed defendant, patted him down, and briefly questioned him about the ownership of the vehicle. Defendant explained that the Altima was a rental car and that the "paperwork" for the rental was in the glove box. Officer Wood asked defendant what his moniker was and defendant replied, "'Sly Vicious.'"

Officer Balderas opened the glove box and saw "small white pills just loosely scattered throughout the glove box." The "identifiers" on the pills indicated that they were Lorazepam, a controlled substance. The officer recovered a total of 12 pills, but did not locate a prescription bottle. Defendant admitted he did not have a prescription for the pills, which he claimed were Tylenol. When he searched the glove box, Officer Balderas also saw and recovered from the passenger seat a balaclava or ski mask.

Officer Balderas advised defendant he was under arrest for possession of a controlled substance and the officers were entitled to search the entire vehicle. Defendant said, "okay," but volunteered that "he had some embarrassing items inside the

[Altima]." During his search of the vehicle, Officer Balderas recovered a loaded, sawed-off 12-gauge shotgun in the trunk.

After hearing the foregoing evidence, the trial court denied the suppression motion, explaining: "I don't think the stop was actually effectuated until after all the events [defense counsel described], but I do think within five hours of this crime, within let's say three miles of where it occurred, seeing someone who fit the description, first with the facial tattoos - - whether or not they knew the specific parts of the face isn't that [significant]. There's only so many places you can put a tattoo. Asking someone to put their hands out isn't a detention or stop. He did. He showed his hands. [¶] [Officer] Balderas put in his report there was furtive movement. [Defense counsel] indicat[ed] that the chronology is off. [Officer] Balderas kept saying it was simultaneous, and acknowledged in the report the way it is written, yes, it is chronological, but all these things happened at once, upon seeing the facial tattoos as well as hand tattoos, talking about a time and place that's rather proximate to this, so I don't think that the stop actually was effectuated until after they made these observations and after that was determined. [¶] Based on everything I've heard, not only do I not think there was a violation of his constitutional rights, I think these officers would have been actually derelict in their duties had they seen these particular factors of time and location everywhere they were found and not investigated. [¶] There was reasonable, articulable suspicion that crime had been afoot, and so based on the totality of the circumstances I've heard, there is no violation. [¶] The [section] 1538.5 motion is denied."

2. Standard of Review

"The denial of a suppression motion may be challenged by an appeal from the judgment entered after defendant's guilty or no contest plea. (§ 1538.5, subd. (m); *People v. Walker* (2012) 210 Cal.App.4th 1372, 1379-1380 [152 Cal.Rptr.3d 424].) '"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. (*People v. Leyba* (1981) 29 Cal.3d 591, 596-597 [174 Cal.Rptr. 867, 629 P.2d 961]; *People v. Lawler* (1973) 9 Cal.3d 156, 160 [107 Cal.Rptr. 13, 507 P.2d 621].)" (*People v. Glaser* (1995) 11 Cal.4th 354, 362 [45 Cal.Rptr. 2d 425, 902 P.2d 729]; accord, *People v. Redd* (2010) 48 Cal.4th 691, 719 [108 Cal.Rptr.3d 192, 229 P.3d 101].)' (*People v. Corrales* (2013) 213 Cal.App.4th 696, 699-700 [152 Cal.Rptr.3d 667].)" (*People v. Leath* (2013) 217 Cal.App.4th 344, 350.)

"If there is conflicting testimony, [the appellate court] must accept . . . the version of events most favorable to the People, to the extent the record supports [it]." (*People v. Zamudio* (2008) 43 Cal.4th 327, 342 (*Zamudio*).)

3. Legal Principles

"Police contacts with individuals may be placed into three broad categories ranging from the least to the most intrusive: consensual encounters that result in no restraint of liberty whatsoever; detentions, which are seizures of an individual that are strictly limited in duration, scope, and purpose; and formal arrests or comparable restraints on an individual's liberty.

[Citations.]" (*In re Manuel G.* (1997) 16 Cal.4th 805, 821 (*Manuel G.*).)

"Unlike a detention, a consensual encounter between a police officer and an individual does not implicate the Fourth Amendment. It is well established that law enforcement officers may approach someone on the street or in another public place and converse if the person is willing to do so. There is no Fourth Amendment violation as long as circumstances are such that a reasonable person would feel free to leave or end the encounter. [Citations.]" (*People v. Rivera* (2007) 41 Cal.4th 304, 309.) It follows that "[c]onsensual encounters require no articulable suspicion of criminal activity. [Citations.]" (*Ibid.*)

"Whether a seizure has taken place is to be determined by an objective test . . . ." (*People v. Celis* (2004) 33 Cal.4th 667, 673.) "'[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.'" (*Manuel G., supra,* 16 Cal.4th at p. 821, quoting *Florida v. Bostick* (1991) 501 U.S. 429, 439.) "Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled. [Citations.]" (*Ibid.*)

"The law is well-established that in order to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime

has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience [citations], to suspect the same criminal activity and the same involvement by the person in question. The corollary to this rule, of course, is that an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith. [Citations.]" (*People* v. *Loewen* (1983) 35 Cal.3d 117, 123.)

4. Analysis

a. The parties' assertions.

On appeal, defendant contends that Officers Balderas and Wood had no articulable facts supporting a reasonable suspicion that he was involved in criminal activity. Defendant argues Officer Balderas had no factual basis for approaching defendant or ordering him to display his hands because he was legally parked and not engaged in any suspicious activity.[6] Defendant points to Officer Balderas's testimony that, when he first saw defendant sitting in his car, he had no hunch that defendant

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[6] Defendant also contends for the first time on appeal that the search of the glove box was unlawful. We agree with the Attorney General that defendant forfeited the issue by failing to raise it in the trial court. (See *People v. Williams* (1999) 20 Cal.4th 119, 129, 136 [defendants who are moving to suppress evidence must inform prosecution and court of "the specific basis for their motion" and "'[t]he scope of issues upon review must be limited to those raised during argument'"].)

might be the suspect in the home invasion robbery. Instead, defendant asserts, Officers Balderas and Wood "were bent on harassing [defendant] because he had tattoos on his face." Defendant also argues that Officer Balderas's observation of defendant making a "furtive movement" and the area's high crime rate could not, by themselves, create reasonable suspicion.

The People argue the officers' contact with defendant began as a consensual encounter, which does not require reasonable suspicion. According to the People, once Officer Balderas exited his vehicle, he had "a specific and reasonable suspicion necessary to support the limited detention involved in ordering [defendant] to show his hands." The People point to (1) defendant's "furtive movement," (2) Officer Balderas's knowledge of the recent home invasion robbery and the description of the suspect, (3) Officer Balderas's testimony that the officers were in a "bad area," and (4) Officer Balderas's testimony that he and Officer Wood "weren't sure [defendant] was [the robber] or not, so [they] were just going to investigate."

b. Officer Balderas had reasonable suspicion to support his order that defendant place his hands outside his car.

We agree with the People that the officers' initial decision to approach defendant, including their arrival on the scene and decision to stop near defendant's car, fell within the scope of a consensual encounter. As we explain below, we also agree with the People that reasonable suspicion supported any subsequent limited detention which may have occurred when Officer Balderas ordered defendant to "place his hands in view" after he

and Officer Wood exited their patrol car and approached defendant's car.[7]

(i) Officer Balderas had a suspicion that defendant was the home invasion robbery suspect.

Officer Balderas's testimony was ambiguous on an important point: when he developed a suspicion that defendant might be the suspect in the home invasion robbery. On direct examination, Officer Balderas testified that after he saw defendant and his facial tattoos, he and Officer Wood decided to approach defendant's vehicle because they "still weren't sure

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[7] We assume without deciding that Officer Balderas's order to defendant to place his hands outside his car constituted a seizure for Fourth Amendment purposes. (See, e.g., *Manuel G.*, *supra*, 16 Cal.4th at p. 821 [circumstances establishing a seizure may include, inter alia, "the presence of several officers" and "the use of language . . . indicating that compliance with the officer's request might be compelled"]; *United States v. Enslin* (9th Cir. 2003) 327 F.3d 788, 795-796 [order by two armed marshals that defendant show his hands constituted a seizure under Fourth Amendment, although "[t]he obligation placed upon [defendant] to reveal his hands for officer safety during the search for a fugitive was *de minimis* and thus constitutionally reasonable"]; but see *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1238 ["Officer Luke's order to Frank to remove his hands from his pockets did not transform the consensual encounter into a detention. We are sensitive to the delicate balance between Fourth Amendment rights and a police officer's safety"].)

[defendant] was [the home invasion robbery suspect] or not, so we were just going to investigate."

On cross-examination, Officer Balderas testified as follows:

"Q But would it be fair to say that when you saw [defendant], the left side of his face with the tattoos and the facial piercings, that you got a hunch that [defendant] might be the male suspect that you were advised of regarding the home invasion robbery?

"A No, still not yet, until I saw his hands outside the [car] window. Then that's when I started to believe it possibly could be him, or related."

To the extent that Officer Balderas's two statements are conflicting, we "must accept . . . the version of events most favorable to the People . . . ." (*Zamudio*, *supra*, 43 Cal.4th at p. 342.) That version is Officer Balderas's statement that he and Officer Wood "still weren't sure [defendant] was [the home invasion robbery suspect] or not, so we were just going to investigate." This testimony, together with inferences reasonably drawn from it, indicates the officers had a suspicion that defendant might be the home invasion robbery suspect – although they weren't sure of that fact – and they intended to investigate the possibility by approaching defendant's vehicle.

(ii) Officer Balderas's suspicion was reasonable.

As Officer Wood stopped the patrol car, Officer Balderas, aware that the officers were in a "bad area as far as tactics," saw defendant making what Officer Balderas described as a furtive movement with his hands toward the front of his seat. Officer Balderas then immediately exited his vehicle and ordered

defendant to show his hands. Once Officer Balderas saw defendant's hand tattoos, his partner ordered defendant to exit the Altima and the officers detained him.

Defendant argues Officer Balderas's belief that the location was a "bad area" and his observation of defendant making a "furtive movement" did not give rise to a reasonable suspicion that defendant was the male suspect involved in the home invasion robbery.

Yet Officer Balderas was aware of several circumstances which, viewed together, created reasonable suspicion justifying his order that defendant display his hands. Officer Balderas knew about the home invasion robbery carried out earlier that morning. He knew the suspect was a male, possibly white, with tattoos on his head and hands. Officer Balderas had just located a white male with visible tattoos on his head sitting in a parked car a few miles away from the home invasion robbery and he was not sure if this was the person who committed the crime. Officer Balderas, moreover, saw defendant make a furtive movement just as Officer Balderas and his partner drove past him. In addition, Officer Balderas was aware that he and his partner were in a "bad area as far as tactics," with "crime patterns," individuals on parole and probation, and stolen vehicles. Under these circumstances, Officer Balderas had reasonable suspicion to justify ordering defendant to show his hands. The trial court therefore properly denied the section 1538.5 motion.

B. Attorney Fee Order

Defendant contends the trial court erred when it ordered him to pay $470 in attorney fees under section 987.8. According to defendant, because the trial court failed to give him the notice

and hearing on his ability to pay required by that section, the fee order must be reversed. The Attorney General concedes that defendant was entitled to a hearing on his ability to pay, but argues the matter should be remanded for the required hearing.

Section 987.8, subdivision (b) provides: "If a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court or upon the withdrawal of the public defender or appointed private counsel, *the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof.* The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings. The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided." (Italics added.)

We agree that defendant was entitled to a hearing under section 987.8 to determine his present or future ability to pay all or a portion of the cost of his defense.[8] (See *People v. Flores*

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[8] Section 987.8, subdivision (g) defines ability to pay as follows: "'Ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant's present financial position. [¶] (B) The defendant's reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernible future financial position. Unless the court finds unusual circumstances, a defendant sentenced to state prison, or

(2003) 30 Cal.4th 1059, 1068-1069.) The attorney fee order therefore is reversed and remanded to the trial court with instructions to hold the required hearing on defendant's ability to pay.

C. Senate Bill 1393

After this matter was submitted for decision, we granted defendant leave to file a supplemental brief addressing Senate Bill 1393, which the Governor signed on September 30, 2018. The People filed a supplemental responding brief.

Effective January 1, 2019, Senate Bill 1393 amends Penal Code sections 667 and 1385 to give the trial court discretion to dismiss, in furtherance of justice, five-year prior serious felony enhancements under section 667, subdivision (a), subsection (1). Defendant and the People agree the law will apply to parties, like defendant, whose appeals are not final on the law's effective date. We agree as well.

"'[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption that it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to "sentencing decisions made in the exercise of the 'informed

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to county jail for a period longer than 364 days . . . shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense. [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors that may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant."

discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion.' [Citation.]" (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*) [remanding for resentencing in light of Senate Bill 620, which vests courts with discretion to strike or dismiss firearm enhancements].)

A remand is not required, however, if "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the previously mandatory] enhancement." (*McDaniels*, *supra*, 22 Cal.App.5th at p. 425; accord, *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081 [remand is required when "the record does not 'clearly indicate' the court would not have exercised discretion to strike the firearm allegations had the court known it had that discretion"].)

The People argue remand for resentencing under Senate Bill 1393 is unwarranted because the trial court clearly indicated it would not have dismissed the enhancement. To support this assertion, the People state that, "at the time of the plea, the court alerted counsel to the fact that no section 667, subdivision (a), enhancement had been alleged in the information." The People suggest the court intended to "ensure[ ] that the information could be properly amended, and that the enhancement would therefore survive an appeal." But the record shows only the following exchange:

> THE COURT: What 667(A) is [defendant] admitting? I don't have one on the information.
>
> [DEPUTY D.A.]: Let me see. It should – I see the 667.5(B), we'll have to amend the information, your Honor, I think there's been a mistake where they forgot to allege that.

THE COURT: Well, since this is the time of the plea, you might want to amend it, if you want me to take an admission to it.
[DEPUTY D.A.]: Yes.
THE COURT: What is that, please?
[DEPUTY D.A.]: People are amending the information to add two charges that have been alleged as his prior strikes to also allege that they are violations of the 667(A) five-year priors.

We conclude the statements by the trial court do not indicate that the court would not have exercised its discretion to strike the five-year prior serious felony enhancement. They do not suggest the court considered whether it would exercise its discretion regarding the enhancement in a hypothetical situation where that discretion existed. The court did not say anything about whether it might strike the enhancement, let alone clearly indicate that it would not.

The People also argue defendant may not raise the issue of Senate Bill 1393 because he did not obtain a certificate of probable cause. A certificate of probable cause is not required. (See *People v. Hurlic* (2018) 25 Cal.App.5th 50, 53 [criminal defendant who pleads guilty or no contest with agreed-upon sentence may challenge sentence on appeal without obtaining a certificate of probable cause "when the defendant's challenge to the agreed-upon sentence is based on our Legislature's enactment of a statute that retroactively grants a trial court the discretion to waive a sentencing enhancement that was mandatory at the time it was incorporated into the agreed-upon sentence"].)

In addition, the People argue defendant's request for resentencing under Senate Bill 1393 is not "ripe" because the new

law does not become effective until January 1, 2019. Aside from the pending effective date, however, the People point to nothing that would prevent the trial court from exercising the discretion provided by Senate Bill 1393 on remand. Indeed, the People concede that "[i]f Senate Bill 1393 goes into effect before [defendant's] judgment becomes final, then . . . [Senate Bill 1393] would apply to him retroactively." The People also acknowledge that "[defendant's] conviction should not become final until after January 1, 2019."

Accordingly, we remand the case to allow the trial court, on or after January 1, 2019, to consider whether to exercise its discretion to dismiss the five-year enhancement in the interest of justice.

DISPOSITION

The order denying the motion to suppress is affirmed. The order awarding attorney fees is reversed and remanded with instructions to conduct further proceedings under section 987.8 to determine defendant's ability to pay all or a portion of the cost of his defense. The matter is also remanded for the limited purpose of allowing the trial court, on or after January 1, 2019, to consider whether to exercise its discretion under Senate Bill 1393.

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JASKOL, J.*

We concur:

BAKER, Acting P. J.

MOOR, J.

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