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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.

OSCAR HUMBERTO HERNANDEZ,

Defendant and Appellant.

B236822

(Los Angeles County
Super. Ct. No. BA368555)

APPEAL from a judgment of the Superior Court of Los Angeles County, Fred N. Wapner, Judge. Reversed in part, modified in part, affirmed in part, and remanded with directions.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, Oscar Humberto Hernandez, of: three counts of second degree robbery (Pen. Code,¹ § 211); firearm possession by a felon (former § 12021, subd. (a)(1), see now § 29800, subd. (a)(1), eff. Jan. 1, 2012); and short-barreled shotgun possession (former § 12020, subd. (a)(1), see now § 33215, eff. Jan. 1, 2012). The jury found defendant personally used a firearm (§ 12022.53, subd. (b)) and acted for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). Defendant was sentenced to 30 years, 8 months in state prison.

II. BACKGROUND

Defendant, a gang member, robbed three unarmed victims at gunpoint. Defendant used a shotgun. A co-perpetrator was armed with a revolver. Because the issues on appeal are limited to sentencing error and to defendant's search warrant motion, we do not detail the facts underlying the convictions.

III. DISCUSSION

A. Search Warrant

Defendant filed a pretrial motion to quash and traverse a search warrant. Defendant argued there was no probable cause for the issuance of the search warrant. Defendant sought to have the warrant affidavit unsealed. The trial court, following an in camera hearing, determined: there were sufficient grounds to maintain the confidentiality of an informant; sealing a portion of the affidavit was necessary to avoid revealing the

¹ All further statutory references are to the Penal Code except where otherwise noted.

informant's identity; and there was a fair probability contraband or evidence of a crime would be found in the place searched pursuant to the warrant. (*People v. Galland* (2008) 45 Cal.4th 354, 363-364; *People v. Hobbs* (1994) 7 Cal.4th 948, 972.) Defendant has requested that we independently review the sealed search warrant and the transcript of the in camera hearing to determine whether the trial court's findings were erroneous. (See Ct. App. Second Dist., Local Rules, rule 1(2), Sealed and in camera hearings; *People v. Hobbs, supra*, 7 Cal.4th at pp. 975-977; *People v. Martinez* (2005) 132 Cal.App.4th 233, 241-242.) We have reviewed those records. Defendant's motions were all properly denied.

B. Sentencing

Defendant contends, the Attorney General concedes and we agree it was error to sentence defendant to 10 years under section 186.22 in counts 4 and 5. Neither firearm possession by a felon (former § 12022, subd. (a)(1)) nor possession of a short-barreled shotgun (former § 12020, subd. (a)(1)) is a violent or serious felony. (§§ 667.5, subd. (c), 1192.7, subd. (c).) Therefore, the sentencing range was two, three or four years in the trial court's discretion. (§ 186.22, subd. (b)(1)(A).) Upon remittitur issuance, defendant must be resentenced on the gang finding.

C. Fees

The trial court orally imposed a \$40 court security fee (§ 1465.8, subd. (a)(1)) and a \$30 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)). However, the trial court failed to orally impose those fees *as to each count*. (*People v. Castillo* (2010) 182 Cal.App.4th 1410, 1415, fn. 3 [Gov. Code, § 70373, subd. (a)(1)]; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866 [§ 1465.8, subd. (a)(1)]; see *People v. Alford*

(2007) 42 Cal.4th 749, 758, fn. 6.) The orally pronounced judgment must be modified to so require. The abstract of judgment is correct in this respect and need not be amended.

IV. DISPOSITION

The sentence is reversed insofar as defendant was sentenced to 10 years under Penal Code section 186.22 in counts 4 and 5. Upon remittitur issuance, defendant must be resentenced on the gang finding. The oral pronouncement of judgment is modified to reflect that the \$40 court security fees (Pen. Code, § 1465.8, subd. (a)(1)) and the \$30 court facilities fees (Gov. Code, § 70373) were imposed as to each count for a total of \$200 and \$150 respectively. In all other respects, the judgment is affirmed.

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TURNER, P.J.

We concur:

KRIEGLER, J.

FERNS, J.*

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