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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL HAYES,

Defendant and Appellant.

B265164

(Los Angeles County
Super. Ct. Nos. LA076671)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. Modified, and as modified, affirmed.

John Doyle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Michael Hayes appeals from a judgment imposing a previously suspended seven-year sentence. We modify the judgment to strike a one-year term imposed under Penal Code section 12022, subdivision (a)(1)¹ and affirm as modified.

BACKGROUND

On January 27, 2014, Hayes and an accomplice robbed a medical marijuana dispensary. The accomplice used a gun. Hayes struck one victim, rendering him unconscious. Based on these events, a felony complaint was filed on January 29, 2014 alleging that Hayes committed two counts of second degree robbery (§ 211) and two counts of false imprisonment by violence (§ 236).² On June 6, 2014, Hayes pleaded no contest to two counts of second degree robbery. Although the complaint did not allege a gun enhancement and Hayes did not admit one, the court imposed a seven-year sentence, which included a one-year term for a gun use enhancement under section 12022, subdivision (a)(1). The court suspended execution of the sentence and placed Hayes on five years' formal probation on the condition he serve 365 days in jail.

A new complaint alleging one count of possessing marijuana for sale (Health & Saf. Code, § 11359) was filed on February 4, 2015. At the preliminary hearing on the new charge, Officer Bernardo Barajas testified that, on January 9, 2015, he

¹ All further undesignated statutory references are to the Penal Code.

² Proceedings were suspended for almost two months after the trial court declared a doubt as to Hayes's mental competence. Hayes was found competent, and proceedings resumed.

saw Hayes engage in a hand-to-hand transaction with another man. The officer detained Hayes, who had three individually packaged bindles containing 10 grams of marijuana and \$306 in cash. Hayes, after being given his *Miranda*³ rights and saying he understood them, said he was taking the marijuana to a “guy at 7th and Linden.” Based on this evidence, Hayes was held to answer and his arraignment was scheduled. Hayes’s probation was revoked.

On May 26, 2015, the previously suspended seven-year sentence was then imposed. He was given 438 days of custody credit. Hayes was ordered to pay a \$300 restitution fine (§ 1202.4); a \$300 parole revocation fine, suspended (§ 1202.45); a \$40 court security fee (§ 1465.8); and a \$30 per count assessment fine (Gov. Code, § 70373).

DISCUSSION

Hayes’s counsel filed an opening brief under *People v. Wende* (1979) 25 Cal.3d 436, 441. After we requested briefing on the propriety of imposing a one-year term on a gun enhancement that was neither alleged nor admitted by Hayes, Hayes submitted supplemental briefing arguing that the one-year term should be stricken, and the People submitted a brief agreeing.

Due process requires a defendant be given notice of the charges and enhancements against him. (*People v. Jones* (1990) 51 Cal.3d 294, 317; *People v. Mitchell* (2011) 197 Cal.App.4th 1009, 1018.) Because the gun enhancement was never, on this record, alleged against Hayes and he did not admit it, we modify the order by striking the one-year term imposed under section 12022, subdivision (a)(1). (*Mitchell*, at pp. 1016-1017 [striking

³ *Miranda v. Arizona* (1966) 384 U.S. 436.

sentence imposed on an enhancement never alleged or admitted].)

DISPOSITION

The judgment is modified to strike the one-year term imposed under section 12022, subdivision (a)(1). The clerk of the superior court is directed to modify the abstract of judgment and to forward a modified abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is affirmed as modified.

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ALDRICH, Acting P. J.

We concur:

LAVIN, J.

GOSWAMI, J.*

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