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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS C. HERNANDEZ,

Defendant and Appellant.

B287629

(Los Angeles County  
Super. Ct. No. PA089118)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden Zacky, Judge. Affirmed.

Lindsey M. Ball, 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, Assistant

Attorney General, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

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Luis C. Hernandez appeals from a judgment convicting him of carjacking and sentencing him to 33 years in prison. He contends his sentence should be vacated and the case remanded to allow the trial court to decide whether to strike a 10-year firearm enhancement under Penal Code section 12022.53.<sup>1</sup> We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **1. *The Carjacking***

On June 29, 2017, in the early afternoon, Jose Larin washed the outside of his car at a self-serve carwash and then parked in a nearby alley to clean the inside of the car. Larin was seated inside the car cleaning the dashboard when Hernandez approached on the driver's side, pointed a gun at Larin's head, and threatened to kill Larin if he did not get out of the car. Larin got out of the car. Hernandez then got in the car and drove away.

### **2. *The Information***

The district attorney filed an information followed by an amended information charging Hernandez with carjacking (§ 215, subd. (a)) and alleging that Hernandez personally used a firearm in the commission of the crime (§ 12022.53, subd. (b)). The information also alleged that Hernandez had suffered a prior conviction of making a criminal threat (§ 422), constituting a strike under the Three Strikes law (§§ 667, subds. (b)-(j), 1170.12)

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<sup>1</sup> All undesignated section references are to the Penal Code.

and a serious felony (§ 667, subd. (a)), and had suffered four prior convictions, served prison terms for those offenses, and did not remain free from prison custody for a period of five years after the conclusion of each term (§ 667.5, subd. (b)).

### 3. *The Verdict and Sentencing*

A jury convicted Hernandez of carjacking and found that the firearm use allegation was true. Hernandez admitted the prior strike under the Three Strikes law and four prior prison terms under section 667.5, subdivision (b).

The trial court sentenced Hernandez on December 11, 2017. At that time, the court denied Hernandez's *Romero* motion to strike his prior strike (*People v. Romero* (1996) 13 Cal.4th 497). The court sentenced Hernandez to a total of 33 years in prison, consisting of the high term of nine years for carjacking, doubled to 18 years under the Three Strikes law, plus 10 years for the firearm enhancement (§ 12022.53, subd. (b)) and five years for the prior serious felony (§ 667, subd. (a)(1)). The court struck the four prior prison term enhancements in the furtherance of justice, pursuant to section 1385.

## DISCUSSION

At the time of Hernandez's sentencing in December 2017, the trial court had no authority to strike a firearm enhancement under section 12022.53. Former section section 12022.53, subdivision (h) expressly precluded striking such an enhancement. (Stats. 2010, ch. 711, § 5). As amended by Senate Bill 620 (2017-2018 Reg. Sess.), effective January 1, 2018,<sup>2</sup>

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<sup>2</sup> Statutes enacted at a regular session go into effect on January 1 of the following year. (Cal. Const., art. IV, § 8, subd. (c)(1).)

section 12022.53, subdivision (h) now gives the sentencing court the discretion to strike a firearm enhancement in furtherance of justice pursuant to section 1385.<sup>3</sup>

*In re Estrada* (1965) 63 Cal.2d 740 held that, absent evidence to the contrary, the court must presume the Legislature intended any statutory amendment mitigating punishment for a particular crime to apply retroactively to all defendants whose judgments were not yet final on the operative date of the amendment.<sup>4</sup> (*Id.* at pp. 747–748; see *Brown, supra*, 54 Cal.4th at p. 324 [*Estrada* “articulat[ed] the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments”].) The *Estrada* rule applies not only to amendments reducing the penalty for a crime, but also to amendments giving the court discretion to impose a lesser penalty. (*People v. Francis* (1969) 71 Cal.2d 66, 76.)

The *Estrada* rule applies here because section 12022.53, subdivision (h), as amended, gives the trial court the discretion to impose a lesser sentence by striking a firearm enhancement, and the amendment became effective before this case became final on appeal. There is no indication the Legislature intended the

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<sup>3</sup> As amended, section 12022.53, subdivision (h) states: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.”

<sup>4</sup> The *Estrada* rule is an exception to the general rule that penal statutes are presumed to operate prospectively only unless expressly stated otherwise. (§ 3; see *People v. Brown* (2012) 54 Cal.4th 314, 324 (*Brown*).)

amendments to apply prospectively only. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 712; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091.) The People concede that the *Estrada* rule applies and the amendment applies retroactively.

“Defendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citation.] A court which is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record.’ [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion. [Citations.]” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; see *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [“a remand is required unless the record shows that the sentencing court clearly indicated that it would not in any event have stricken the firearm enhancement”].)

The People contend the record clearly indicates that the trial court would not have stricken the firearm enhancement if it had the discretion to do so at the time of sentencing. We agree.

In denying Hernandez’s *Romero* motion, the trial court noted that Hernandez had suffered numerous prior convictions since 2003, including most recently several felonies (criminal threat, domestic violence, false imprisonment, and transportation of a controlled substance) and misdemeanors (exhibiting a deadly weapon, two domestic violence convictions, two driving under the influence convictions, and vandalism). The court noted that Hernandez had committed the current carjacking shortly after

being released on parole from his prior imprisonment for making a criminal threat, and stated that in light of his current and prior serious and/or violent felony convictions the court “cannot say that the defendant is outside the letter and the spirit of the Three Strikes law.” The court stated that Hernandez was “dangerous” and was “the type of guy . . . who needs to be taken off the streets,” and sentenced him to the high term of nine years, doubled to 18 years under the Three Strikes law as a result of the denial of the *Romero* motion.

The trial court’s sentencing decisions and comments clearly indicate an intention to impose a lengthy sentence. There is no reason to believe that having selected the high term of nine years and having denied the *Romero* motion, resulting in an additional nine years’ imprisonment after doubling under the Three Strikes law, the court would have stricken the 10-year firearm enhancement if it had the discretion to do so. Although the court struck the four one-year prior prison term enhancements under section 667.5, subdivision (b), the record makes it clear that the court would not have exercised its discretion to strike the firearm enhancement and that remand would be an idle act.

**DISPOSITION**

The judgment is affirmed.

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MICON, J.\*

We concur:

WILLHITE, Acting P. J.

COLLINS, J.

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