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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

LEGEND BROOKS,

Defendant and Appellant.

2d Crim. No. B294596
(Super. Ct. No. TA137685)
(Los Angeles County)

In an unpublished opinion, we affirmed Legend Brooks' convictions of assault with a firearm and possession of a firearm by a felon. (*People v. Brim et al.* (Oct. 2, 2018, B275782) [nonpub. opn.].) We remanded the matter to allow the trial court to exercise its newly-established discretion under Senate Bill No. 620 to impose the firearm use enhancement (Pen. Code, § 12022.5, subd. (a))¹, or to strike it in the interest of justice. (§ 1385.) The trial court entered a minute order declining to strike the enhancement before the remittitur issued and outside

¹ All further statutory references are to the Penal Code.

the presence of the parties or their counsel. Appellant contends the judgment on resentencing must be reversed because the trial court lacked jurisdiction and because he had a constitutional and statutory right to be present with counsel, at the resentencing hearing. Respondent correctly concedes the error. We agree and remand the matter for resentencing.

Facts

In the unpublished opinion filed October 2, 2018, we affirmed appellant's convictions of assault with a firearm (§ 245, subd. (b)) and possession of a firearm by a felon. (§ 29800, subd. (a)(1).) We remanded the matter for resentencing because the jury found true a sentence enhancement allegation that appellant personally used a firearm in the assault, (§ 12022.5, subd. (a)), and Senate Bill No. 620 (2017-2018 Reg. Sess.) had recently granted the trial court discretion to dismiss the enhancement in the interest of justice. On November 6, 2018, the trial court filed a minute order in which it acknowledged having read our opinion and declined to exercise its discretion to strike the firearm use enhancement. Neither party had an opportunity to address the issue or to be present before the trial court filed its minute order. Our remittitur issued on February 21, 2019.

Discussion

Appellant contends the trial court erred because it lacked jurisdiction when it filed its minute order. We agree. The filing of a notice of appeal transfers jurisdiction to the appellate court until a remittitur issues. (*People v. Saunoa* (2006) 139 Cal.App.4th 870, 872.) After a remittitur issues, jurisdiction is transferred back to the trial court. (*Id.*) Until a remittitur issues, however, the trial court lacks jurisdiction to conduct any proceeding that may alter the judgment being appealed. (*People*

v. Awad (2015) 238 Cal.App.4th 215, 223-224.) Here, the trial court filed its minute order before the remittitur issued. It lacked jurisdiction to do so. Remand for resentencing is required.

Appellant further contends the trial court erred in conducting the resentencing hearing outside the presence of the parties. Again, he is correct. Sentencing and resentencing after a remand are critical stages of a criminal proceeding at which the defendant has a right to be present. (*People v. Doolin* (2009) 45 Cal.4th 390, 453 [sentencing is a critical stage]; *People v. Rouse* (2016) 245 Cal.App.4th 292, 300 [section 1170.18 resentencing is a critical stage].) As the court concluded in *People v. Rocha* (2019) 32 Cal.App.5th 352 (*Rocha*), “it is ‘manifestly unfair’ to permit the trial court to decide how to exercise its new discretion under section [12022.5, subdivision (a)] without affording [appellant] and his counsel the opportunity to make an argument if they so desire.” (*Id.* at p. 359.) Remand is necessary “to ensure proceedings that are just under the circumstances, namely, a hearing at which both the People and [appellant] may be present and advocate for their positions.” (*Id.* at p. 360.)

Appellant urges us to rest our decision on constitutional grounds. We decline to do so. As our Supreme Court held in *People v. Rodriguez* (1998) 17 Cal.4th 253, 260, section 1260 establishes the appellate courts’ power to order a remand and to direct “such further proceedings as may be just under the circumstances.” (§ 1260.) This statutory authority allows us to order that, on remand, the trial court conduct a hearing at which the parties are present to advocate their positions. (*Rodriguez, supra*, at p. 260.) Because the issues may be resolved on narrower grounds, we need not resolve the

constitutional issue. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1102; *Rocha, supra*, 32 Cal.App.5th at p. 357.)

Disposition

The judgment on resentencing is reversed. The matter is remanded with directions to the trial court to decide, at a hearing at which appellant has the right to be present with counsel, whether it will exercise its discretion to strike the firearm use enhancement under section 12022.5, subdivision (a).

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YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Allen J. Webster, Jr., Judge

Superior Court County of Los Angeles

Heather L. Beugen, 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, Susan Sullivan Pitney, Supervising Deputy
Attorney General, Idan Ivri, Deputy Attorney General, for
Plaintiff and Respondent.