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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

D073321

Plaintiff and Respondent,

v.

(Super. Ct. No. SCD269892)

JORDAN SCHUYLER ABT,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of San Diego County, David M. Rubin, Judge. Conditionally reversed, with directions.

Janice R. Mazur, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Christine Levingston Bergman, A. Natasha Cortina and Adrian R. Contreras, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Jordan Abt guilty of robbery (Pen. Code, § 211) and found true the allegation that he personally used a dangerous or deadly weapon (a knife) in the commission of the felony offense (Pen. Code, §§ 12022, subd. (b)(1), 1192.7, subd. (c)(23).)<sup>1</sup> The trial court found Abt had suffered one strike prior, one serious felony prior, and three prison priors. The court sentenced him to 10 years in prison, consisting of the following: four years for the robbery conviction (the two-year lower term, doubled for the strike prior); a consecutive one-year term for the personal use enhancement; and a consecutive five-year term for the serious felony prior conviction.

Abt raises three sentencing issues on appeal. First, he contends we should remand to allow the trial court the opportunity to grant him mental health diversion under statutes enacted after he was convicted. (See §§ 1001.35, 1001.36.) He maintains this ameliorative legislation applies retroactively and that he has made a showing sufficient to warrant remand. The retroactivity issue is pending before the California Supreme Court. (See *People v. Frahs* (2018) 27 Cal.App.5th 784, 791 (*Frahs*) [finding the statutes retroactive], review granted Dec. 27, 2018, S252220.) Pending further guidance from the Supreme Court, we conclude the diversion statutes apply retroactively. We further conclude Abt has made a showing of potential eligibility sufficient to warrant a remand for further proceedings.

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1 Further statutory references are to the Penal Code.

Second, Abt contends we should remand for resentencing because the trial court imposed the one-year personal use enhancement on the mistaken belief the enhancement is mandatory. The Attorney General agrees, as do we.

Finally, Abt contends we should remand for resentencing on the additional ground that, after he was sentenced, the Governor signed into law Senate Bill No. 1393, which gives trial courts the discretion to strike five-year serious felony prior enhancements. Abt and the Attorney General agree that Senate Bill No. 1393 applies retroactively, but the Attorney General argues remand is unnecessary because the trial court's comments during the sentencing hearing indicate the court would not have exercised its newly vested discretion favorably to Abt. We agree Senate Bill No. 1393 applies retroactively, and conclude remand is appropriate on this record.

Accordingly, as more fully set forth in the Disposition, we conditionally reverse the judgment to allow the trial court to conduct mental health diversion proceedings and, depending on the outcome of those proceedings, to resentence Abt.

## FACTUAL AND PROCEDURAL BACKGROUND

### *The Offense*

On November 29, 2016, loss prevention agents at a home improvement store observed Abt conceal electronic devices in his clothing and leave the store without paying. The agents followed Abt outside, where one of them stated loudly enough for Abt to hear that he was calling the police. Abt turned toward the agents, holding a multi-purpose tool with a knife blade exposed, and stepped toward them. A friend of Abt's,

whom the agents had also been monitoring inside the store, then pulled up quickly in a car. Abt got in, and they drove off. The items Abt took were worth \$67.74.

#### *Charges, Jury Verdict, and Priors*

The prosecution charged Abt with a single count of robbery (§ 211), and alleged he personally used a dangerous or deadly weapon in the commission of the felony offense (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23)). The prosecution further alleged Abt had suffered three prison priors (§§ 667.5, subd. (b), 668), one serious felony prior (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)), and one strike prior (§§ 667, subds. (b)-(i), 668, 1170.12).

The jury found Abt guilty and found the personal use allegation true. Following a bench trial, the court found all the alleged priors true.

#### *Sentencing*

Before proceeding to sentencing, the trial court requested a "psychiatric workup" on Abt based on "some of the things [the court] observed" during trial.

While the psychological evaluation was pending, Abt filed a sentencing memorandum requesting that the court strike his strike prior under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. Abt based his *Romero* motion (in part) on his claimed mental health issues. He also cited "psychological issues and addiction to methamphetamine" as mitigating factors.

The prosecution filed a sentencing memorandum noting Abt is absolutely ineligible for probation due to his strike prior, and requesting a 12-year sentence.<sup>2</sup>

Forensic psychiatrist Valerie Rice filed a report of her findings on her evaluation of Abt. Her review of Abt's treatment records revealed "a history of 'bipolar schizoaffective,' " a prior diagnosis of "psychotic disorder," and a prior determination that he was "mentally incompetent." Rice found "[i]t was not possible to effectively interview" Abt due to his "abnormal mental state" and "paranoid and grandiose" "thought content." Her diagnostic impression of Abt included "[u]nspecified schizophrenia spectrum and other psychotic disorders," and "[s]timulant use disorder (methamphetamine)." Dr. Rice concluded:

"Clearly he does suffer from a severe mental illness characterized by ongoing psychosis. . . . Certainly, he would need to continue taking psychiatric medications and be monitored closely by a psychiatrist. . . . He would benefit from a treatment program, which would target both his mental illness and substance abuse problems. Unfortunately, it appears that he has been referred to such programs on multiple occasions, but has failed to maintain participation in such programs.

"In my opinion, it is extremely unlikely that he would be able to comply with conditions of probation. It is also extremely unlikely that he would be able to comply with any treatment recommendations. He needs to be continued to be treated for his mental health issues and substance abuse problems in a highly structured, highly monitored environment. I believe that, if released in the community, he would pose a substantial danger to others in the community due to his mental health and substance abuse issues."

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<sup>2</sup> The prosecution proposed 12 years based on the following: six years for the robbery conviction (the midterm of three years, doubled for the strike prior); one year for the personal use enhancement; and five years for the serious felony prior. The prosecution proposed staying the three 1-year prison priors.

The probation officer filed a report detailing Abt's extensive criminal history, which consisted primarily of misdemeanors and drug offenses, but also included a felony conviction for assault with a deadly weapon on a peace officer (§ 245, subd. (c)).<sup>3</sup> Abt's probation records reflected multiple diagnoses of schizoaffective disorder as recently as June 2016, and a commitment to Patton State Hospital in 2013. The report detailed Abt's history of poor performance on probation, parole, and in drug and mental health treatment programs.

The probation officer noted Abt was absolutely ineligible for probation due to his strike prior, but added she would not have recommended probation anyway in light of his "history of continued drug abuse, failure to stay in treatment, and his propensity towards violence when high on methamphetamine . . ." Instead, the probation officer initially recommended a 10-year sentence based on the six-year middle term for the robbery conviction, three 1-year terms for the prison priors, and a "mandatory" one-year term for the personal use enhancement. She revised her recommendation to 14 years when she realized she had overlooked the five-year serious felony prior.<sup>4</sup>

With respect to Abt's mental health status, the probation report concluded:

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3 According to the probation report, the strike/serious felony prior conviction arose from Abt recklessly evading police and crashing into a patrol car (narrowly missing a police officer who had exited the vehicle) while driving under the influence of methamphetamine.

4 The probation officer reached 14 years by adding the five-year serious felony prior enhancement to her original 10-year recommendation, and staying one of the one-year prison priors on the basis it was duplicative of the serious felony prior.

"The defendant undoubtedly suffers from mental illness for which psychotropic medication is necessary. From 2004 up until his arrest in 2017, the defendant has received numerous referrals to drug and mental health treatment programs. He was unable to stay engaged in most services for any significant period of time despite encouragement, guidance, drug testing, and medication."

At the hearing initially set for sentencing, the court, "[o]ut of an abundance of caution," granted defense counsel's request for a competency evaluation. The court ultimately found Abt competent.

At the sentencing hearing, defense counsel noted Abt faced a maximum exposure of 19 years, but asked the court to "consider the low term" and "strik[e] the strike . . . so that he can move on." The court responded, "I understand that. It's just something the math in this case is with or without the strike. There's . . . the 5-year [serious felony] prior. There's not a lot to be done here." Defense counsel then suggested the court reduce the felony robbery conviction to a misdemeanor burglary conviction. The court appreciated counsel's "creativity," but explained, "Even if I could, I wouldn't under the circumstances . . . ."

The court denied Abt's *Romero* motion "for a variety of reasons, including the number of convictions he has, the length of time between the first conviction and the current conviction, the frequency of them, and [the assault with a deadly weapon on a peace officer] itself is of a nature that . . . would really . . . reduce the Court's discretion to strike that strike."

The court found Abt ineligible for probation, but added that "even if probation were allowed, it would not be appropriate in that he doesn't seem to be amenable." The

court was "mindful" that "there does need to be some component of mental health here," but not via probation because "[w]e can't manage him locally" inasmuch as "[w]e don't have the resources for him . . . ."

The court then "move[d] on to the question of what is this case . . . really worth?" The court recalled that pretrial plea negotiations involved a six-year sentence, and the probation officer initially recommended a 10-year sentence before realizing she had overlooked the serious felony prior. The court then explained:

"The Court, when it read the [probation] report originally, thought 10 years was fair. The Court continues to think that 10 years is fair, is the right, just result based on what the Court heard. [¶] . . . [¶] . . . And just the interest of justice in terms of, I think, a term over 10 years in this case would not be . . . fair, would not reflect the conduct that occurred here, even with his record. So the Court picks 10 years."

The court explained how it arrived at 10 years. The court began with the lower term of two years (doubled to four years for the strike prior) on the robbery conviction. The court deemed the lower term appropriate in light of the "significant . . . mental health component" and the fact that most of Abt's "long record" is "misdemeanor conduct." The court then added "the mandatory consecutive of 1 year" for the personal use enhancement. Finally, the court added "the serious felony prior, which is a consecutive 5 years." The court imposed, but stayed, the prison priors.

After the court pronounced sentence, Abt requested to be released on bail, pending appeal. The court denied the request "[u]nder all of the circumstances confronting the Court, namely, he's now a sentenced prisoner looking at double digits, namely, 10 years, his record, [and] his noncompliance when he was on probation . . . ."

## DISCUSSION

### *I. Mental Health Diversion*

Abt contends the newly enacted mental health diversion statutes apply retroactively and that he has made a showing of potential eligibility sufficient to warrant a remand. We agree.

#### *A. The Diversion Legislation*

Effective June 27, 2018—after Abt was sentenced—the Legislature added two new sections to the Penal Code (§§ 1001.35, 1001.36) that authorize trial courts to grant "pretrial diversion" to defendants diagnosed with qualifying mental disorders. (See Stats. 2018, ch. 34, § 24.) "Section 1001.36 gives trial courts the discretion to grant pretrial diversion if the court finds: (1) a qualified mental health expert has recently diagnosed the defendant with a qualifying mental disorder; (2) the mental disorder was a significant factor in the commission of the charged offense; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and waives his or her speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety if treated in the community." (*People v. Cawkwell* (2019) 34 Cal.App.5th 1048, 1053; § 1001.36, subd. (b)(1)(A)-(F).)<sup>5</sup>

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5       Shortly after section 1001.36 was enacted, it was amended to (1) eliminate diversion eligibility for defendants charged with certain offenses; (2) allow the trial court "[a]t any stage of the proceedings" to "require the defendant to make a *prima facie* showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion"; and (3) to

If the court grants pretrial diversion, "[t]he defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources" for "no longer than two years." (§ 1001.36, subds. (c)(1)(B) & (c)(3).) If the defendant performs "satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion." (§ 1001.36, subd. (e).)

#### B. *Retroactivity*

Abt contends the mental health diversion statutes apply retroactively to his case under precedent holding that ameliorative amendments to criminal statutes generally apply retroactively, absent a contrary expression of legislative intent. (See *In re Estrada* (1965) 63 Cal.2d 740, 745; *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 307.) The Attorney General counters that, by its own terms, section 1001.36 does not apply retroactively because it provides for "*pretrial* diversion" (§ 1001.36, subd. (c), italics added), and Abt's case is *posttrial*.<sup>6</sup> We agree with Abt.

In *Frahs, supra*, 27 Cal.App.5th 784 (rev. gr. December 27, 2018, No. S252220), the Fourth District, Division Three, held that section 1001.36 applies retroactively to all nonfinal judgments. (*Id.* at p. 791.) The California Supreme Court has granted review in

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make certain technical changes (e.g., changing the phrase "*played a significant role*" to "*was a significant factor*" [italics added]). (Stats. 2018, ch. 1005 (Sen. Bill No. 215), § 1, eff. Jan. 1, 2019.) These amendments have no bearing on the issues in this appeal.

<sup>6</sup> We grant the Attorney General's request that we take judicial notice of certain legislative history materials and dictionary definitions.

*Frahs*. Because our Supreme Court will soon have the final word, we will keep our discussion brief. Suffice to say, our court has followed *Frahs*, and we continue to find its reasoning persuasive. (See *People v. Aguayo* (2019) 31 Cal.App.5th 758, 760 (*Aguayo*) ["we conclude the mental health diversion legislation applies retroactively"], rev. gr. May 1, 2019, No. S254554.)<sup>7</sup> Accordingly, we conclude the mental health diversion statutes apply retroactively to Abt's case.

### C. *Sufficient Showing of Eligibility to Warrant Remand*

The Attorney General contends that even if the mental health diversion statutes apply retroactively, remand would be futile because Abt would not be able to establish he is eligible for diversion. The record does not support this contention sufficiently to preclude remand.

The Attorney General argues Abt would be unable to obtain "the opinion of a qualified mental health expert" that his "symptoms . . . would respond to mental health treatment." (§ 1001.36, subd. (b)(1)(C).) In support, the Attorney General cites Dr. Rice's observations that "it is extremely unlikely that [Abt] would be able to comply with conditions of probation" or "any treatment recommendations." The Attorney General also cites Abt's history of "fail[ing] to complete" mental health and substance abuse

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<sup>7</sup> We certified our opinion in *Aguayo*, *supra*, 31 Cal.App.5th 758 for partial publication. Our *conclusion* that the mental health diversion statutes apply retroactively appears in the published portion; however, our *analysis* supporting this conclusion appears in the unpublished portion. The California Supreme Court granted review in *Aguayo* on an unrelated issue.

treatment programs. We are not persuaded that Dr. Rice's observations in these regards necessarily preclude the trial court from finding diversion appropriate.

The Attorney General's reliance on Dr. Rice's observations about probation are misplaced because Abt is not asking for a grant of probation. And although Dr. Rice observed Abt may have difficulty complying with "treatment recommendations," she also observed he "needs to be continued to be treated for his mental health issues and substance abuse problems in a highly structured, highly monitored environment." The trial court is better situated than we to determine in the first instance the suitability and availability of mental health treatment options.

The Attorney General also argues Abt would be unable to persuade the trial court that he "will not pose an unreasonable risk of danger to public safety . . . if treated in the community." (§ 1001.36, subd. (b)(1)(F).) In support, the Attorney General cites the fact the court has "*implicitly* concluded on three occasions" (italics added) that Abt *would* pose a danger—when denying his *Romero* motion, when indicating the court would not grant Abt probation even if he were eligible, and when denying bail pending appeal.

We will leave it to the trial court on remand to make explicit any such finding. On a full record, the trial court is better situated than we to determine whether the mental health treatment options available under the applicable diversion program will adequately protect public safety while Abt is being treated. In this vein, Abt represents in his reply brief that he is seeking only inpatient treatment.

We express no view on whether Abt ultimately will be able to make a *prima facie* showing of eligibility on remand. Nor do we express any view on how the trial court should exercise its discretion if the court finds him eligible. We grant remand merely to afford Abt the opportunity to make the required showing, and for the trial court to exercise its newly vested discretion.

## II. *Personal Use Enhancement*

Although the sentence enhancement for personally using a deadly or dangerous weapon in the commission of a felony purports to be mandatory (§ 12022, subd. (b)(1)),<sup>8</sup> the courts have held that trial courts retain discretion to strike the enhancement in the interests of justice. (*People v. Jones* (2007) 157 Cal.App.4th 1373, 1378-1379, 1381-1382; see § 1385.) Abt requests that we remand for resentencing because the trial court's reference to the enhancement as "mandatory" during the sentencing hearing indicates the court may have misunderstood it retained the discretion to strike the personal use enhancement.<sup>9</sup> (See *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228 ["Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption 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."].) The Attorney General agrees remand for resentencing is appropriate. So do we.

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<sup>8</sup> Section 12022, subdivision (b)(1) states: "A person who personally uses a deadly or dangerous weapon in the commission of a felony . . . *shall* be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense." (Italics added.)

<sup>9</sup> The probation report also characterized the enhancement as "mandatory."

### III. *Serious Felony Prior*

Abt contends we should remand for resentencing for an additional reason: to allow the trial court the opportunity to exercise its newly vested discretion to strike the five-year serious prior felony enhancement. We agree.

When the trial court sentenced Abt to a consecutive five-year term under section 667, subdivision (a) for his serious felony prior conviction (assault with a deadly weapon on a peace officer), the court was required to impose this term.<sup>10</sup> (§§ 667, former subd. (a)(1), 1385, former subd. (b).) But while this appeal was pending, the Governor signed into law Senate Bill No. 1393, which amended sections 667 and 1385 to give trial courts discretion to strike or dismiss five-year serious felony prior enhancements in the "furtherance of justice." (See Stats. 2018, ch. 1013, §§ 1-2; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) The new law took effect on January 1, 2019, and we have held it applies retroactively to all nonfinal judgments. (See *People v. Jimenez* (2019) 32 Cal.App.5th 409, 426; see *Garcia*, at p. 971.)

The Attorney General concedes these legislative amendments apply retroactively, but contends remand is "unwarranted because the trial court clearly indicated that it would not have dismissed the enhancement even if it had discretion to do so." (Bolding and capitalization omitted.) (See *People v. McVey* (2018) 24 Cal.App.5th 405, 419 [holding remand futile when trial court applied upper term to sentence for firearm enhancement citing several aggravating factors that far outweighed mitigating factors and

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<sup>10</sup> The trial court acknowledged this when it stated "[t]here's not a lot to be done here" in light of "the 5-year [serious felony] prior."

stated upper term was the "only appropriate sentence"].) In support, the Attorney General cites the fact the trial court denied Abt's *Romero* motion and stated it would have denied Abt probation even were he not absolutely ineligible. We are not persuaded.

Although the trial court was not as lenient as it theoretically could have been, nor was it as harsh as it could have been. Abt faced a potential 19-year sentence. The probation officer recommended a 14-year sentence, and the prosecutor recommended a 12-year sentence. Yet, the trial court exhibited leniency by imposing only a 10-year sentence. In doing so, the court recognized the "significant . . . mental health component" and the fact that most of Abt's "long [criminal] record" is "misdemeanor conduct." We cannot say with the certainty required to deny a remand for resentencing that the trial court would not have exercised its newly vested discretion in fashioning an even more lenient sentence.

Accordingly, we conclude Abt is entitled to a remand for resentencing to allow the trial court the opportunity to exercise its newly vested discretion with respect to imposing the five-year serious prior felony enhancement. We express no view on how the trial court should exercise its discretion.

## DISPOSITION

The judgment is conditionally reversed. The cause is remanded to the trial court with directions to conduct a diversion eligibility hearing under section 1001.36.

If the court determines Abt qualifies for diversion under section 1001.36, the court may grant diversion. If Abt successfully completes diversion, the trial court shall dismiss the charges in accordance with section 1001.36, subdivision (e).

However, if the court determines Abt does not qualify for diversion, or if the court grants diversion but Abt does not successfully complete it, the court shall reinstate the judgment of conviction and resentence Abt. At any such resentencing, the trial court is directed to consider whether to exercise its discretion in connection with the personal use and serious felony prior enhancements. Upon resentencing, the trial court is directed to issue a new abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.