In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA ,

Plaintiff and Respondent,

v.

VALDAMIR FRED MORELOS,

Defendant and Appellant.

CAPITAL CASE

Case No. S051968

Santa Clara County Superior Court Case No. 169362
The Honorable Daniel E, Creed, Judge

THIRD SUPPLEMENTAL RESPONDENT'S BRIEF

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ARGUMENT

I. THIS COURT MAY REMAND FOR THE EXERCISE OF NEWLY CONFERRED DISCRETION ON THE FIREARM AND SERIOUS FELONY ENHANCEMENTS

Appellant's sentence is enhanced 15 years as a result of the imposition of one firearm (personal use) and two prior serious felony (assault with a deadly weapon and robbery) enhancements found true by the court. (3CT 638; 644-648, 658; RT 543-551.) Appellant correctly points out that the serious felony and firearm use enhancement statutes have been amended recently to provide for trial court discretion in their imposition that did not previously exist. (3SAOB 5.) While we do not expect the trial court to strike these enhancements, which are reflective of the seriousness of appellant's conduct and recidivism, we concur that the amended statutes confer discretion that was not available to the trial court to exercise and that the modifications apply to appellant's not yet final case.

A. The Firearm Enhancement

Senate Bill 620 went into effect on January 1, 2018. (Stats. 2017, ch. 682, §§ 1-2.) It amends Penal Code[1] sections 12022.5 and 12022.53 to grant discretion to the trial court pursuant to section 1385 to strike or dismiss firearm enhancements. When appellant committed his offenses and was sentenced for them, the enhancements were mandatory. Presently, "[t]he court may, in the interests of justice pursuant to Section 1385 and at the time

[1] Further undesignated references to section are to the Penal Code.

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." (§ 12022.5, subd. (c); see also § 12022.53, subdivision (h).)

We concur that the amendment applies to appellant under the principles set forth in *People v. Estrada* (1965) 63 Cal.2d 740. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1091 [given no evidence of prospective-only intent in the enactment, the ameliorative amendment applies to all cases not yet final]; accord, *People v. Robbins* (2018) 19 Cal.App.5th 660, 679.) Moreover, because the trial court did not make a statement establishing that it would have imposed the firearm enhancement as a matter of discretion even if the statute had not been mandatory, it cannot be said with certainty that remand is a futile act. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.) A limited remand to consider the newly conferred exercise of discretion is appropriate.

B. The Prior Serious Felony Enhancements

At the time appellant was sentenced, the court had no discretion to strike five-year prior serious felony enhancements pursuant to section 667, subdivision (a). Senate Bill 1393 went into effect on January 1, 2019, amending sections 667, subdivision (a), and 1385, subdivision (b), to confer on a trial court the discretion to strike or dismiss a prior serious felony conviction allegation in the interests of justice. (Stats. 2018, ch. 1013, §§ 1-2.)

Again applying *In re Estrada*, supra, 63 Cal.2d 740, courts have concluded that Senate Bill 1393 applies to cases, like this one, not yet final when the statute went into effect. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972-973.) Thus we concur that a limited remand is appropriate to permit the sentencing court to consider whether to exercise discretion to strike one or both of the prior serious felony priors.

II. OF THE PRIOR PRISON TERM ENHANCEMENTS UNDER SECTION 667.5, ONLY THE ONE-YEAR ENHANCEMENT MAY BE STRICKEN

Appellant contends that this Court should strike the stayed one-year prison prior allegation relating to his prior burglary conviction and imposed pursuant to section 667.5, subdivision (b). (3SAOB 10-11.) We agree that the one-year prior prison term imposed pursuant to subdivision (b) should be stricken as a result of an amendment applicable to sentences not yet final. However, we note that no such change has occurred with regard to the three-year prior prison term enhancement imposed pursuant to section 667, subdivision (a) relating to his prior conviction for assault with a deadly weapon.

A. Relevant Background

The amended information alleged that appellant had served two prior separate prison terms stemming from his convictions for assault with a deadly weapon (a serious felony) and burglary within the meaning of former section 667.5, subdivisions (a) and (b), respectively. (2CT 445-446.) Evidence of the prison priors was presented to the court and the allegations were found to be true. (3CT 537-538; 2RT 266-268, 325.)

With respect to the prison priors, the trial court stated the following at the sentencing hearing: "The priors under 667.5 (a), three years is stayed pursuant to 654. The second prior, 667.5 (b), one year is stayed pursuant to section 654. (2RT 550.)

The minute order reflects that a three-year section 667.5, subdivision (a) enhancement and a one-year section 667.5, subdivision (b) enhancement were imposed, but "stayed" pursuant to section 654. (3CT 638, 644-648, 658: 2RT 543-551.)

B. The Finding on the One-Year Prison Prior Should Be Stricken

Former section 667.5, subdivision (b) provided for a sentence enhancement of one year where the defendant previously served a prison term for an offense that was not for the same offense as a violent felony prior under subdivision (c) for which a five-year enhancement was imposed. A washout period also applied, so that if the defendant had been prison-free for five years after a prison prior, it would not be imposed. (Former § 667.5, subdivision (b).)

On October 8, 2019, the Governor signed Senate Bill 136 into law amending section 667.5, subdivision (b). That amendment, which became effective on January 1, 2020, removed the one-year enhancement for prior prison terms except when the offense underlying the prison prior constituted a sexually violent offense. (§ 667.5, subdivision (b); see also Stats. 2019, ch. 590, § 1 [Senate Bill No. 136]; Gov. Code, § 9600, subd. (a); *People v. Lopez* (2019) 42 Cal.App.5th 337, 340-341.)

Section 667.5, subdivision (b) now provides, in relevant part:

> [W]here the new offense is any felony for which a prison sentence or a sentence of imprisonment in a county jail under subdivision (h) of Section 1170 is imposed or is not suspended, in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term for a sexually violent offense as defined in subdivision (b) of Section 660 of the Welfare and Institutions Code.

(§ 667.5, subdivision (b).)

The recently amended statute, which reduces punishment, does not have a savings clause and there is no indication of limited retroactivity. Thus, current section 667.5, subdivision (b) applies retroactively to a defendant, like appellant, whose judgment is not yet final. (*People v. Brown* (2012) 54 Cal.4th 314, 323; *In re Estrada*, *supra*, 63 Cal.2d 740, 742; see *People v. Buycks* (2018) 5 Cal.5th 857, 882 ["'The rule in *Estrada* has been applied to statutes governing penalty enhancements"']; *Estrada, supra,* 63 Cal.2d at p. 748 [for a non-final conviction, "where the amendatory statute mitigates punishment and there is no savings clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed"]; see also *People v. Vieira* (2005) 35 Cal.4th 264, 306 ["for the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed"].) Appellant's prior is not a sexually violent offense under Welfare and Institutions Code, section 6600, subdivision (b). (Welf. & Inst. Code, § 6600, subd. (b); *Lopez, supra,* 42 Cal.App.4th at pp. 340-341.)

Since Senate Bill No. 136 applies retroactively to appellant whose judgment is not yet final, and his prior offense does not qualify as a prison prior under the recently-amended section 667.5, subdivision (b), this Court should strike appellant's one-year prior prison term enhancement.

C. The Stayed Three-Year Prison Term Prior Should Not Be Stricken

Section 667.5, subdivision (a) provides for "enhancement of prison terms for new offenses because of prior prison terms." Subdivision (a) provides, now as it did when appellant committed murder: "Where one of the new offenses is one of the violent felonies specified in subdivision (c), in addition to and consecutive to any other prison terms therefor, the court shall impose a three-year term for each prior separate prison term served by the defendant where the prior offense was one of the violent felonies specified in subdivision (c). However, no additional term shall be imposed under this subdivision for any prison term served prior to a period of 10 years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction.

California Rules of Court, rule 4.447[2] provides for a stay of an enhancement when "an enhancement that otherwise would

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[2] The rule provides, as relevant, "A court may not strike or dismiss an enhancement solely because imposition of the term is prohibited by law or exceeds limitations on the imposition of multiple enhancements. Instead, the court must: (1) Impose a sentence for the aggregate term of imprisonment computed without reference to those prohibitions or limitation; and (2) Stay

have to be either imposed or stricken is barred by an overriding statutory prohibition. In that situation—and that situation only—the trial court can and should stay the enhancement." (*People v. Lopez* (2004) 119 Cal.App.4th 355, 365.) "This rule is intended 'to avoid violating a statutory prohibition or exceeding a statutory limitation, while preserving the possibility of imposition of the stayed portion should a reversal on appeal reduce the unstayed portion of the sentence." (*Id.* at p. 364; see also *People v. Brewer* (2014) 225 Cal.App.4th 98, 104 [application to lesser of two enhancements].) The present situation well illustrates the reason for the rule of court. The enhancement pursuant to section 667.5, subdivision (a) must be imposed if the related section 667, subdivision serious felony enhancement is not imposed and should not be stricken in any event. It should remain stayed so that it may be imposed if the section related section 667 enhancement is imposed on remand, but later invalidated.

Appellant relies on this Court's opinion in *People v. Jones* (1993) 5 Cal.4th 1142, 1152, stating the holding as "where the section 667.5, subdivision (a) enhancement arises from the same conviction, only the greater applies, and the proper remedy is to strike the lesser enhancement." (3SAOB 11.) But that portion of the opinion dealing with the remedy is inconsistent with, and may have been superseded by, the rules. First, we note that

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execution of the part of the term that is prohibited or exceeds the applicable limitations. The stay will become permanent once the defendant finishes serving the part of the sentence that has not been stayed."

Jones, at p. 1152 addresses the relationship between section 667 and section 667.5, subdivision (b), not subdivision (a). Second the opinion applies only section 654 analysis and makes no mention of the Rules of Court. When appellant's offense was committed and when *People v. Jones* was penned, former rule 447 provided that "no finding of an enhancement shall be stricken or dismissed because imposition of the term is either prohibited by law or exceeds limitations on . . . the imposition of multiple enhancements." (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1128.)

Rule 4.447 was given its present number and amended effective in 2001 (and again in 2007) to make it even clearer that it applies generally to enhancements "prohibited by law," not only to those that ran afoul of the double the base term rule and like numerical limitations on length of sentence. We can find no citations with approval to *Jones* on this remedy point by this Court after the amendment to the rule and must conclude the rule reflects the modern view applicable to the present case. (See *People v. Gonzalez*, *supra*, 43 Cal.4th at pp. 1129-1130 [discussing the present practice of staying, rather than striking prohibited enhancements, to preserve the possibility of imposition of the stayed portion should a reversal on appeal reduce the unstayed portion of the sentence].)

CONCLUSION

For the reasons set forth above, the stayed one-year prison prior term enhancement may be stricken, but the stayed three-year prison prior term enhancement must not be stricken, and a limited remand should be ordered to allow the trial court to consider its exercise of discretion as to the firearm and serious felony enhancements.

Dated: August 24, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **THIRD SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Century Schoolbook font and contains 2,227 words.

Dated: August 24, 2020

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 24, 2020, at San Francisco, California.

J. Espinosa
Declarant

*/s/ **J. Espinosa***
Signature

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