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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

ADRIAN MARTINEZ,

Defendant and Appellant.

B254675

(Los Angeles County
Super. Ct. No. BA356326)

APPEAL from a judgment of the Superior Court of Los Angeles County. Edmund Willcox Clarke, Jr., Judge. Affirmed as modified.

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Yun K. Lee and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

This is defendant Adrian Martinez’s second appeal from the judgment entered following a jury trial that resulted in his conviction of first degree murder, attempted premeditated murder and two counts of shooting at a motor vehicle.¹ In the prior case, we affirmed the judgment of conviction, but remanded for resentencing on the murder and attempted murder counts (counts 1 and 2, respectively) because an additional 15–year gang enhancement (Pen. Code, § 186.22, subd. (b)(5)) had been improperly imposed on those counts (*People v Martinez* (Apr. 10, 2013, B235518) [nonpub.opn.]). On remand, the trial court sentenced defendant to 15 years to life on count 2 (attempted premeditated murder). In this case, defendant contends, and the People concede, that this was an unauthorized sentence. We agree and modify the sentence on count 2. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The facts are set forth in detail in our prior opinion. It is sufficient to state that defendant and Joshua Galindez were members of the criminal street gang known as Cypress Park. On May 1, 2009, defendant was the driver when his passenger, a fellow gang member, fired multiple shots at a pickup truck driven by E.R., who was not injured. The next day, Victor Solis and G.V. were passengers in a car driven by J.M. J.M. was parked in front of G.V.’s home. After G.V. got out of the car, defendant approached. He kicked J.M.’s car and said, “This is Cypress Park.” When Galindez appeared suddenly, defendant yelled something along the lines of, “Shoot these fools.” Galindez fired multiple shots, fatally wounding Solis.

¹ Defendant and co-defendant Joshua Galindez were jointly charged with first degree murder (count 1), attempted premeditated murder (count 2) and shooting at an occupied vehicle (count 3); enhancements were also alleged. A jury found both defendants guilty of the substantive offenses. As to defendant Martinez, it found true Penal Code section 186.22 gang enhancements as to all counts, but found the firearm use enhancements not true. All future undesignated statutory references are to the Penal Code.

Defendant's original 75-year sentence was comprised of:

- **Count 1 (first degree murder of Solis):** 40 years to life (25 years to life for first degree murder, plus a consecutive 15 years for the gang enhancement);
- **Count 2 (attempted premeditated murder of J.M.):** a consecutive 15 years to life (15 years to life for attempted premeditated murder, plus a stayed 15-year term for the gang enhancement);
- **Count 3 (shooting at an occupied motor vehicle [May 1]):** 20 years (five years for shooting at a vehicle, plus a consecutive 15 years for the gang enhancement);
- **Count 4 (shooting at an occupied motor vehicle [May 2]):** stayed pursuant to section 654.

In the prior appeal, we found the sentences on counts one and two were unauthorized and remanded for resentencing. We explained: “Where the sentence for an underlying offense is an indeterminate term, the punishment for any gang allegation found true in connection with that offense is not an additional determinate term under section 186.22, subdivision (b)(1)(C), but a minimum term before parole eligibility of 15 years pursuant to section 186.22, subdivision (b)(5). (*People v. Lopez* (2005) 34 Cal.4th 1002, 1010-1011.) This rule applies even where it will have no practical effect, such as in the case of indeterminate terms for offenses that by definition already carry minimum terms of 15 years or greater. (See *id.* at p. 1009 [discussing first and second degree murder].) The trial court therefore improperly imposed additional 15-year enhancements for the gang allegations found true in connection with convictions on counts 1 and 2, both of which by law required indeterminate terms.” (*People v. Martinez, supra*, B235518 [at pp. 18-19].)

On remand, the trial court sentenced defendant to a total of 55 years to life in prison, including 15 years to life on count 2. Defendant timely appealed. As we shall explain, the sentence imposed on count 2 was unauthorized.

The sentence for attempted premeditated murder is an indeterminate term of life in prison with the possibility of parole. (§ 664, subd. (a); *People v. Campos* (2011) 196 Cal.App.4th 438, 447.) Generally, a person sentenced to life in prison with the possibility of parole must serve at least seven years before being paroled. (§ 3046, subd. (a)(1); *People v. Jefferson* (1999) 21 Cal.4th 86, 95.) But, where, as here, a section 186.22, subdivision (b)(1) gang enhancement is also found true, a person convicted of attempted premeditated murder must serve at least 15 years before being considered for parole. (§ 3046, subd. (a)(2) [person imprisoned for life may not be paroled until he has served greater of seven years or minimum term established by other provision of law]; § 186.22, subd. (b)(5) [“any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served”]; *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1404-1405; *Campos*, at p. 447.) We modify the judgment accordingly.

DISPOSITION

The judgment is modified to strike the 15-year-to-life term imposed on count 2 and impose in its place a term of life with the possibility of parole with a 15-year minimum parole eligibility term in accordance with section 186.22, subdivision (b)(5). In all other respects, the judgment is affirmed. The trial court will prepare a new abstract of judgment reflecting the change of sentence and transmit the abstract to the California Department of Corrections and Rehabilitation.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.