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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHNNY BURGOS,

Defendant and Appellant.

B256504

(Los Angeles County
Super. Ct. No. LA067011)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph A. Brandolino, Judge. Affirmed as modified with directions.

Marcia C. Levine, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Allison H. Chung, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Johnny Burgos, appeals after he was resentenced. We strike the one-year Penal Code section 667.5, subdivision (b)¹ prior prison term enhancement to count 2. We affirm in all other respects.

II. BACKGROUND

On November 3, 2011, a jury convicted defendant of lewd conduct with a minor (§ 288, subd. (a)) (count 2) and child molestation with a prior conviction (§ 647.6, subds. (a), (c)) (count 3). The jury found true allegations that defendant had: sustained three prior convictions within the meaning of sections 667, subdivisions (b) through (i) and 1170.12; sustained two prior serious felony convictions within the meaning of section 667, subdivision (a)(1); and served one prior separate prison term within the meaning of section 667.5, subdivision (b). On January 24, 2012, defendant was sentenced to 35 years to life in state prison. On appeal, we affirmed defendant's convictions, but remanded for resentencing. (*People v. Burgos* (Nov. 22, 2013, B238795) [nonpub. opn.]) Upon remittitur issuance, the trial court resentenced defendant pursuant to section 667.71 as to count 2 as follows: 25 years to life, tripled (§§ 667, subds. (b)-(i), 1170.12); plus 10 years for 2 prior serious felony convictions (§ 667, subd. (a)(1)); plus 3 years for a prior separate prison term (§ 667.5, subd. (a)); plus 1 year for a prior separate prison term (§ 667.5, subd. (b)) which was stayed. As to count 3, defendant was sentenced to 25 years to life, which was tripled. (§§ 667, subds. (b)-(i), 1170.12.) Also, on count 3, defendant received one year for a prior separate prison term. (§ 667.5, subd. (b).) The indeterminate terms imposed as to counts 2 and 3 were ordered to run concurrently.

¹ Further statutory references are to the Penal Code except where otherwise noted.

III. DISCUSSION

First, defendant challenges the imposition of the one-year section 667.5, subdivision (b) prior prison term enhancement on count 3. Before analyzing defendant's argument, it bears emphasis that in defendant's prior appeal we ordered the trial court to do exactly as it did. In reference to count 3, we ordered, "Upon remittitur issuance, the trial court is to exercise its discretion . . . and either impose or strike the one-year enhancement." (*People v. Burgos, supra*, B238795.) The trial court was obligated to faithfully abide by our remittitur as it did. (*People v. Bryant* (2014) 60 Cal.4th 335, 374, fn. 6 ["The law of the case doctrine states that when, in deciding an appeal, an appellate court "states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal"]; *Hampton v. Superior Court* (1952) 38 Cal.2d 652, 656 ["[T]he trial court has no discretion but to enter the judgment called for."].)

Defendant argues that counts 2 and 3 were ordered to run concurrently. Thus, he argues the count 3 prior prison term enhancement cannot be ordered to run consecutively to the tripled 25 years to life indeterminate term. Defendant relies upon *People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1311. Here is the issue posited in *Mustafaa*: "Mustafaa asserts the trial court erred in imposing consecutive terms for the gun-use enhancements in counts I and V, while imposing concurrent terms for the robbery convictions in the same counts. He is correct. [¶] The sentencing court selected as the principal term the eight-year term consisting of the three-year midterm for the robbery conviction in count III plus the five-year upper term personal gun-use enhancement attached to that count. The court then considered the terms it had imposed for the convictions in counts I and V and determined to impose the terms for these robbery convictions concurrently, but to impose the terms for the corresponding personal gun-use enhancements attached to those counts consecutively. This was error." (*Id.* at p. 1309.)

Mustafaa is inapposite. In *Mustafaa*, defendant was sentenced under section 1170.1, subdivision (a). The trial court imposed concurrent sentences for two robbery convictions while imposing consecutive terms for the gun-use enhancements in the same counts. (*People v. Mustafaa, supra*, 22 Cal.App.4th at p. 1309.) The Court of Appeal held the sentence was unauthorized because the gun-use enhancements specifically attached to the robbery offenses and could not be imposed as subordinate terms of their own. (*Id.* at p. 1311; accord, *People v. Phong Bui* (2011) 192 Cal.App.4th 1002, 1016.) Here, defendant received two indeterminate terms which were imposed under section 1168, subdivision (b), not section determinate sentences pursuant to sections 1168, subdivision (a) and 1170.1, subdivision (a). Because the terms were indeterminate, the prior prison term enhancement attached to each count. (*People v. Williams* (2004) 34 Cal.4th 397, 401-405 [§ 667, subd. (a)(1) five-year prior serious felony conviction enhancement]; *People v. Thomas* (2013) 214 Cal.App.4th 636, 640 [Health & Saf. Code, § 11370.2 prior conviction enhancement]); *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1562 [prior prison term enhancement].) No error occurred in connection with the count 3 prior prison term enhancement.

However, the trial court could not impose *both* a three-year (§ 667.5, subd. (a)) and one-year (§ 667.5, subd. (b)) prior separate prison term enhancement on count 2. The jury found true only one prior separate prison term enhancement allegation. Because section 667.5, subdivision (a) applied to count 2, section 667.5, subdivision (b) did not apply. (§ 667.5, subd. (b) [“Except where subdivision (a) applies”]; *People v. Brewer* (2014) 225 Cal.App.4th 98, 104.) The one-year section 667.5, subdivision (b) enhancement to count 2 must be stricken. (See *People v. Jones* (1993) 5 Cal.4th 1142, 1153; *People v. Perez* (2011) 195 Cal.App.4th 801, 805; *People v. Harris* (1994) 22 Cal.App.4th 1575, 1585; but see *People v. Brewer, supra*, 225 Cal.App.4th at p. 104 [impose and stay under Cal. Rules of Court rule 4.447]; *People v. Walker* (2006) 139 Cal.App.4th 782, 794, fn. 9 [same]; *People v. Lopez* (2004) 119 Cal.App.4th 355, 364 [same].)

IV. DISPOSITION

The Penal Code section 667.5, subdivision (b) enhancement to count 2 is stricken. The sentence is affirmed in all other respects. Upon remittitur issuance, the clerk of the superior court is to prepare an amended abstract of judgment and deliver a copy to the Department of Corrections and Rehabilitation.

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TURNER, P.J.

We concur:

KRIEGLER, J.

GOODMAN, J.*

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