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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

WALTER PEREIRA,

Defendant and Appellant.

B259910

(Los Angeles County  
Super. Ct. No. BA411388)

APPEAL from a judgment of the Superior Court of Los Angeles. Melissa N. Widdifield, Judge. Reversed.

William J. Capriola, 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, Assistant Attorney General, Victoria B. Wilson and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

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Walter Pereira contends that we should remand the case for resentencing because the trial court erroneously believed that it lacked discretion to strike a gang enhancement. We agree and remand for resentencing.<sup>1</sup>

## **BACKGROUND**

Since 2009, Pereira has been a member of the Drifters criminal street gang and bears its tattoos.<sup>2</sup> On May 25, 2013, he and fellow Drifters drove into the territory of Easy Riders, a rival gang that claimed territory bordering that of the Drifters. There they encountered a group of teenagers outside an elementary school. One of the teens, Ronald H., who is an associate of the Easy Riders, was wearing an Oakland Raiders cap (Easy Riders favor Raiders paraphernalia). Some of the Drifters shouted: “Drifters,” and demanded, “Where you from?” Pereira brandished his gun at Ronald as another Drifter demanded Ronald’s Oakland Raiders cap. When Ronald asked for the cap back, one of the Drifters punched Ronald in the face. Pereira and his cohorts then grabbed Ronald’s bicycle and, after forcing Ronald to empty his pockets, snatched his bus pass.

An information charged Pereira with second degree robbery (Pen. Code, § 211)<sup>3</sup> and further alleged that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)), that Pereira personally used a firearm (§ 12022.53, subd. (b)), and that a principal in the crime personally used a firearm (§ 12022.53, subds. (b) & (e)(1)).

A jury found Pereira guilty of robbery and found true the gang allegation, the allegation that Pereira personally used a firearm, and the allegation that a principal was armed with a firearm, a handgun.

At the sentencing hearing, the trial court expressed its belief that it had no discretion regarding sentencing on the enhancements. In denying Pereira’s motion for a

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<sup>1</sup> We do not address the firearm enhancements, because a trial court has no discretion to strike a firearm enhancement. (Pen. Code, § 12022.53, subd. (h).)

<sup>2</sup> Pereira’s moniker is “Criminal,” “S-Criminal,” or “Lil Criminal.”

<sup>3</sup> All statutory references are to the Penal Code unless otherwise indicated.

new trial, the court commented that the sentence that the court was “legally required to impose” was “harsh.” The court also remarked, in the same vein, that it questioned whether the required sentence was “appropriate.”

Then, before imposing the sentence, the trial court reiterated its belief that it had no discretion to strike any enhancements: “We’ve discussed this over and over again and Mr. Pereira, I think that you know the court doesn’t have any discretion or any leeway in the significant parts of the sentence in this case. The only discretion it has is with respect to the substantive offense, whether it be two years, three years, or five years. However, whereas here, the court finds there is sufficient evidence to support the gang allegation and the gun allegation, the court does not have any legal basis to strike those allegations. And the court is required to impose the enhancements. The sentence enhancements that are required by those statutes.”

The trial court sentenced Pereira to 22 years in prison: The low term of two years for the robbery conviction, a consecutive 10-year term for the gang allegation, plus one additional, consecutive 10-year term for one of the two firearm allegations. Pereira timely filed his notice of appeal.

## DISCUSSION

Pereira contends that remand for resentencing is required because the trial court erroneously believed that it lacked the discretion to strike the gang enhancement.<sup>4</sup>

We agree. Subdivision (g) of section 186.22 expressly gives the sentencing court the discretion to strike a gang enhancement: “Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section . . . in an unusual case where the interests of justice would best be served, if the court specifies

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<sup>4</sup> We reject the People’s contention that Pereira forfeited his claim that the trial court committed sentencing error. We also reject the People’s assertion that any sentencing error was harmless. The People rely on *People v. Courtney* (1985) 174 Cal.App.3d 1004, 1007, in which the defendant, who had engaged in a series of ever more serious crimes, entered a plea to the life-threatening offense of arson of an inhabited structure. In the case at bar, the trial court expressed its regret at not being able to choose a sentence more suitable to Pereira.

on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition.” (See *People v. Vega* (2013) 214 Cal.App.4th 1387, 1397 [“[T]he trial court retains the authority to strike [defendant’s] count 2 gang enhancement[s].”].)<sup>5</sup> Here, the trial court expressly stated that it had no discretion, believed the sentence was too harsh, and regretted its lack of authority to strike any of the enhancements. Because the court did have such discretion, the matter must be remanded for resentencing.

### **DISPOSITION**

This matter is remanded for a new sentencing hearing, wherein the trial court shall exercise its discretion in deciding whether the interests of justice would best be served by striking the gang enhancement.

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ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.

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<sup>5</sup> Pending before the Supreme Court is whether the Legislature’s enacting subdivision (g) of section 186.22 eliminates a trial court’s discretion under section 1385, subdivision (a), to dismiss or strike an enhancement alleged under section 186.22, subdivision (b). (*People v. Fuentes* (2014) 225 Cal.App.4th 1283, 1286, review granted Aug. 13, 2014, S219109.)