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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(San Joaquin)

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THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID WILLIAM HEBERT,

Defendant and Appellant.

C078997

(Super. Ct. No. MF037541A)

Defendant David William Hebert contends the trial court improperly sentenced him on enhancements for both his prior serious felony conviction and his prior prison term because both are based on the same conviction. Specifically, the five-year

enhancement under Penal Code section 667, subdivision (a),<sup>1</sup> and the one-year enhancement under section 667.5, subdivision (b), may not both be imposed because both enhancements are based on the same 2001 prior conviction. In addition, the parties contend that with regard to a 2007 prior conviction, the trial court erred by not imposing a one-year enhancement under section 667.5, subdivision (b). We agree and order the trial court to stay the one-year enhancement for the 2001 prior conviction and remand the matter to the trial court to impose or exercise its discretion to strike the one-year enhancement for the 2007 prior conviction.

### ***Factual Summary and Procedural History***

On various occasions when defendant's son was between the ages of five and seven years old, defendant forced his son to orally copulate him, touched his son's penis and forced his son to touch his penis, and forced his son to watch as he performed sexual acts on dolls.

Defendant was charged with multiple sex offenses: a sex crime with a child 10 years of age or younger (count 1; § 288.7, subd. (b)); lewd acts upon a child (counts 2 and 3; § 288, subd. (a)); annoying and molesting a child (count 4; § 647.6, a misdemeanor); assault with a deadly weapon (count 5, § 245, subd. (a)(1)); and criminal threats (count 6, § 422).

A jury convicted defendant of counts 1 through 4 and acquitted defendant of counts 5 and 6. In bifurcated proceedings, the court found a strike prior (§§ 667, subds. (b)-(i), 1170.12 [2001 robbery]), a prior serious felony (§ 667, subd. (a) [2001 robbery]), and two prior prison terms (§ 667.5, subd. (b) [for the 2001 robbery conviction

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

and for the 2007 second degree burglary and receiving stolen property convictions]) to be true.<sup>2</sup>

The court sentenced defendant to state prison to serve an aggregate term of 56 years to life.

Defendant appeals.

### *Analysis*

Citing *People v. Jones* (1993) 5 Cal.4th 1142, defendant contends the one-year punishment imposed for the prior prison term (§ 667.5, subd. (b)) served for the 2001 robbery must be stricken because five years was imposed for the same underlying offense (§ 667, subd. (a)). *Jones* held a single prior conviction cannot be the basis for both a five-year enhancement pursuant to section 667, subdivision (a), and a one-year enhancement pursuant to section 667.5, subdivision (b). *Jones* remanded the matter to the trial court, directing it to strike the one-year enhancement. (*Jones*, at pp. 1150, 1153.) Following *Jones*, defendant's 2001 robbery conviction cannot be the basis for both the five-year and one-year enhancements.

Although the People agree both a five-year enhancement and a one-year enhancement may not be imposed based on the same prior conviction, the People argue the remedy is to stay, rather than to strike, the one-year punishment. We conclude the proper remedy is to stay the one-year enhancement.

In *People v. Lopez* (2004) 119 Cal.App.4th 355, the court noted *Jones, supra*, 5 Cal.4th 1142 “did not actually discuss whether striking the unused enhancement finding was the appropriate remedy.” (*Lopez*, at p. 364.) Citing California Rules of Court, rule 4.447, *Lopez* concluded that “[t]he correct procedure would have been to impose a

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<sup>2</sup> A prior prison term allegation for a 2009 drug conviction was dismissed.

sentence on the barred enhancement, but then stay execution of that sentence.” (*Ibid.*) *People v. Walker* (2006) 139 Cal.App.4th 782 agreed the correct disposition was to impose and then stay execution of the duplicative one-year enhancement. (*Id.* at p. 794, fn. 9; accord *People v. Brewer* (2014) 225 Cal.App.4th 98, 104.) We shall order the one-year punishment imposed for the prison term served for the 2001 robbery conviction stayed.

Although not raised by defendant on appeal, the People contend the trial court imposed an unauthorized sentence when it did not impose the one-year enhancement for defendant’s prior prison term served for his 2007 second degree burglary and receiving stolen property convictions. The People argue this court should impose the one-year term, arguing the record clearly reflects the trial court’s intent to sentence defendant to the maximum allowed. In the alternative, the People argue remand is required for the trial court to impose one year for the 2007 prior prison term or exercise its discretion and strike it (§ 1385). In his reply brief, defendant requests remand to allow the trial court to exercise its discretion, arguing the People are speculating as to how the trial court would exercise its discretion. Although this issue was not raised at trial, this error results in an unauthorized sentence that may be challenged for the first time on appeal. (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391-392.) We conclude remand is appropriate to permit the trial court to exercise its discretion.

#### DISPOSITION

The judgment is modified to stay the execution of the one-year punishment imposed for the prison term served for the 2001 robbery conviction. The matter is remanded to the trial court to impose or exercise its discretion to strike the one-year punishment for the prior prison term served for the 2007 second degree burglary

and receiving stolen property convictions. In all other respects, the judgment is affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
HOCH, J.

We concur:

\_\_\_\_\_/s/\_\_\_\_\_  
BLEASE, Acting P. J.

\_\_\_\_\_/s/\_\_\_\_\_  
DUARTE, J.