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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DANIEL RAY MILLER, Defendant and Appellant.	D073471 (Super. Ct. No. SCD267804)

APPEAL from an order of the Superior Court of San Diego County, Jay M. Bloom, Judge. Affirmed.

Elisabeth A. Bowman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Craig H. Russell, Deputy Attorneys General, for Plaintiff and Respondent.

This is an appeal following the 2018 revocation of probation and the execution of a previously suspended seven-year prison term, which was imposed in 2017. The appeal

does not challenge the revocation of probation, but instead, contends the we should remand the case for resentencing to permit the trial court to consider striking the serious felony prior conviction (Pen. Code,[1] § 667, subd. (a)(l)) in light of Senate Bill No. 1393,[2] which was effective January 1, 2019.

As we will discuss *post*, Senate Bill No. 1393 is retroactive to cases not final on appeal. In the present case, judgment was entered in 2017 when a prison sentence was imposed, but the execution stayed. The judgment was not appealed. Thus, the judgment imposing the prison term sentence was final well before the effective date of Senate Bill No. 1393. We will deny the request to vacate the sentence and remand the case for resentencing. Given there is no challenge to the probation revocation, we will affirm.

FACTUAL BAKGROUND[3]

Daniel Ray Miller pleaded guilty to one count of assault with a deadly weapon (§ 245, subd. (a)(1)) and admitted a prior serious felony conviction (§ 667, subd. (a)(l)). In April 2017, the court sentenced Miller to a determinate term of seven years in prison but suspended the execution of the sentence and granted probation on various terms and conditions. Miller did not appeal the sentence or the guilty plea.

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1 All further statutory references are to the Penal Code unless otherwise specified.

2 On September 30, 2018, the Governor signed Senate Bill No. 1393 which, on January 1, 2019, amended sections 667, subdivision (a) and 1385, subdivision (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.)

3 This appeal does not challenge the conviction or the revocation of probation. Accordingly, we have omitted a discussion of the facts of the offense or the factual basis for the probation revocation.

In January 2018, the court revoked Miller's probation and ordered the previously imposed sentence to be executed. Miller filed a timely appeal after the probation revocation.

DISCUSSION

This appeal from the probation revocation does not challenge the revocation or the sentence originally imposed in 2017. Rather, it only seeks resentencing to allow the trial court to exercise its newly acquired discretion to strike the serious felony prior conviction under Senate Bill No. 1393. However, although the amendment to section 1385 will be deemed retroactive, it only applies to judgments, which were not final on appeal at the time the legislation took effect (January 1, 2019). The judgment was imposed in this case in April 2017, and never appealed by Miller. Thus, the actual judgment was final before the effective date of Senate Bill No. 1393. Miller is not entitled to relief under that legislation.

The parties agree that Senate Bill No. 1393 should be given retroactive effect under *In re Estrada* (1965) 63 Cal.2d. 740. It is retroactive to cases which were not final on appeal on January 1, 2019. (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 306-308; *People v. Garcia* (2018) 28 Cal.App.5th 961, 972.) Thus, the issue in this case is whether Miller's "judgment" was final prior to January 2019.

There are basically two methods of granting probation in a felony case. In one, the most commonly used method, the court suspends *the imposition* of sentence and grants probation. In such circumstance, judgment has not been entered and will not be

entered until probation is completed or revoked. (*People v. Howard* (1997) 16 Cal.4th 1081, 1087.)

The other method of addressing probation is illustrated by this case. Here, the trial court did not suspend imposition of sentence. The court imposed a sentence (seven years) but suspended *the execution* of that sentence and granted probation. At that point, the court entered judgment. (*People v. Mora* (2013) 214 Cal.App.4th 1477, 1482.) Where the defendant fails to timely appeal the judgment, it becomes final within 60 days. (Cal. Rules of Court, rule 8.308(a).)

On this record, it is clear that the judgment in this case was final by mid-2017. A purported appeal from a 2018 probation revocation and execution of the suspended sentence did not change the final nature of the 2017 judgment. Senate Bill No. 1393 and its amendment to section 1385 do not apply to this case.

DISPOSITION

The order revoking probation is affirmed and the request to remand for resentencing is denied.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.