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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

DONNY YASHAWN EARP,

Defendant and Appellant.

F064149

(Super. Ct. Nos. VCF245599B,
VCF250337)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Jean M. Marinovich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Poochigian, Acting P.J., Detjen, J. and Franson, J.

Two separate informations charged appellant, Donny Yashawn Earp, with various felony offenses and alleged several gun use and prior prison term enhancements. Earp pled no contest to several of the counts and admitted one gun use enhancement after the trial court gave an indicated sentence of 18 years.

On appeal, Earp argues the trial court's failure to take his admission to one of the firearm use allegations requires vacating that part of his sentence. We remand for further plea proceedings on the firearm use allegation. And we agree with Earp's contention that the abstract of judgment must be corrected to accurately reflect one of his offenses. In all other respects, we affirm the judgment.

PROCEDURAL BACKGROUND¹

Earp was charged on December 6, 2010, in case number VCF245599 (Case A) with two counts of Penal Code section 211², residential robbery of L.G. (count 1) and S.G. (count 2); two counts of section 459, burglary of a vehicle (count 3) and burglary of a commercial building (count 4); and section 484e, subdivision (d), theft by access card (count 5). The complaint alleged that in the commission of counts 1 and 2, Earp personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (b) and (c). It was further alleged as to count 3 that Earp personally used a firearm within the meaning of section 12022.5, subdivision (a). Finally, it was alleged as to all counts that Earp had previously served prior prison terms within the meaning of section 667.5, subdivision (b). Earp pleaded not guilty to all charges and denied all special allegations.

On March 24, 2011, Earp was charged in case number VCF250337 (Case B) with section 459, second degree commercial burglary (count 1); section 484e, subdivision (d),

¹ The facts relating to Earp's convictions are not at issue and therefore we do not recite them.

² All further statutory references are to the Penal Code.

theft by access card (count 2); and section 496, subdivision (a), receiving stolen property (count 3). It was further alleged as to all counts that Earp had previously served prior prison terms within the meaning of section 667.5, subdivision (b). Earp pled not guilty to all charges and denied all special allegations.

On May 10, 2011, pursuant to a negotiated plea, Earp withdrew his not guilty plea in both cases. The prosecutor stated the terms of the plea agreement as follows:

“In case [A], the People are offering Count 1, the home-invasion robbery in concert, which is a three, six, nine. The special allegation of the 12025(c) will be reduced to 12025.3(b).³ We would ask for a Harvey on Count 2. ¶ We are asking for a plea to Counts 3 and 4. At the time of sentencing the People will dismiss Count 5. In addition, the Court will take a plea on three prison priors and sentence the defendant to two of those prison priors for a total term of 18 years. ¶ In case [B], the People are asking a plea to Count 1, at the time of sentencing the People will dismiss Counts 2 and 3, and I believe the Court’s going to run the VOP case concurrent to the 18 years.”

Earp then acknowledged the terms of the plea agreement and pled no contest in case A, to count 1, home invasion robbery; count 3, second degree burglary of a vehicle; and count 4, second degree commercial burglary. Earp admitted discharge of a firearm (§ 12022.53, subd. (b)) in count 1, plus three prior prison term allegations in count 1. In case B, Earp pled no contest to second degree commercial burglary in count 1. In exchange, the People agreed to a term of 18 years, and agreed to dismiss the remaining counts at sentencing.

On June 2, 2011, the trial court sentenced Earp to 18 years in state prison in case A, in relevant part, as follows:

“[A]s to Count 1, [Earp] is committed to state prison for the midterm of six years, with an additional consecutive two years for the 667.5(b) allegations, and additional and consecutive ten years for the 12022.53(b) for a total of

³ The prosecutor incorrectly referred to section 12022.53, subdivision (c) as “12025(c)” and section 12022.53, subdivision (b) as “12025.3(b).”

18 years. [¶] ... [¶] Count 3, he's committed to state prison for two years and an additional and consecutive ten years for the 12022.53(b) allegation, for a total of 12 years....[¶] Count 4, he's committed to state prison for two years.... That's also to run concurrent to count 1."

In case B, the trial court imposed the midterm of two years to run concurrent to the sentence imposed in case A.

DISCUSSION

I. GUN USE ENHANCEMENT

Earp was charged in case A, count 3, with second degree vehicle burglary (§ 459), and it was further alleged that he personally used a firearm during the commission of the offense, in violation of section 12022.5, subdivision (a)⁴. Earp contends that the trial court's sentence of a concurrent 10-year term for a section 12022.53, subdivision (b) gun use enhancement in case A, count 3, was improper for several reasons: (1) the plea "agreement did not include an admission to the gun enhancement attached to count 3"; (2) Earp "did not admit the gun enhancement attached to count 3"; and (3) second degree burglary (§ 459) is not a qualifying offense under section 12022.53, subdivision (b). !(AOB 6, 10-11)! Respondent agrees, as do we.

A sentence enhancement is "an additional term of imprisonment added to the base term" and, as such, must be admitted in open court or found true by a trier of fact before a defendant can be sentenced on it. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 898; see also *People v. Bryant* (1992) 10 Cal.App.4th 1584, 1593-1595 ["if the allegation is not pleaded or proven, sentence cannot be imposed thereon."], citing *People v. Hernandez* (1988) 46 Cal.3d 194, 197; § 1170.1, subd. (e) ["All enhancements shall be

⁴ Section 12022.5, subdivision (a) provides that "any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense."

alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact”].)

Here, Earp was not charged with a section 12022.53, subdivision (b) enhancement in case A, count 3. Nor is there any indication in the record that Earp either admitted a section 12022.53, subdivision (b) gun use enhancement or any other gun use enhancement in connection with count 3, or that it was otherwise proven. The trial court therefore erred when it imposed a concurrent 10-year prison term on a section 12022.53, subdivision (b), enhancement on count 3.

The parties differ, however, on the proper remedy. Earp contends that the term must be stricken and the abstract of judgment corrected to delete reference of the unauthorized term. Respondent agrees that the term must be stricken, but contends that the case must be remanded to the trial court for further plea proceedings only on the actual allegation that was contained in count 3, case A. We agree with respondent.

In support of their position, the People cite *People v. Bryant, supra*, 10 Cal.App.4th 1584, in which the defendant did not effectively admit enhancement allegations when he changed his plea to no contest to the substantive offenses although apparently that had been the intent. (*Id.* at pp. 1593-1594.) It determined that the proper remedy was to remand for further plea proceedings: “Since the error consisted of the trial court’s failure to take admissions to the section 208, subdivision (d) and section 667.8, subdivision (a) allegations, findings on those allegations should be reversed and the matter remanded for further plea proceedings as to those allegations only.” (*Id.* at p. 1598.)

The appellate court determined that such a remand was not prohibited by the constitutional protection against double jeopardy: “[T]he double jeopardy clause applies only if there has been some event, such as acquittal, which terminated the original jeopardy. [Citation.] Here, there has been no such event with regard to the section 208, subdivision (d) and section 667.8, subdivision (a) allegations, nor would permitting

further proceedings as to those allegations, under the circumstances of this case, allow the prosecutor a ‘second bite of the apple.’” (*People v. Bryant, supra*, 10 Cal.App.4th at p. 1597, fn. omitted.)

We agree that the situation in this case is analogous to *People v. Bryant, supra*, 10 Cal.App.4th 1584, and remand the matter for further proceedings and resentencing on the allegation attached to case A, count 3, only.

II. ABSTRACT OF JUDGMENT

Earp contends and respondent agrees that the abstract of judgment incorrectly states the charged offense in case A, count 4, a violation of section 459, as second-degree burglary “of vehicle” instead of second-degree commercial burglary. We agree and will order an amended abstract of judgment be prepared to correct this error. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [appellate courts that have assumed jurisdiction over a case may order correction of abstracts of judgment that do not accurately reflect judgment].)

DISPOSITION

The judgment is reversed and the matter is remanded for further plea proceedings as to the section 12022.5, subdivision (a) gun use enhancement attached to case A, count 3. Earp shall be resentenced following the plea proceedings upon remand. The trial court is directed to then prepare an amended abstract (1) eliminating reference to section 12022.53, subdivision (b) on form CR-290, section 2, count A3; (2) to reflect, if any, the enhancement to that count; and (3) to correct count A4 in section 1 to accurately reflect that the crime was second degree commercial burglary. In all other respects, the judgment is affirmed.