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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRUCE MICHAEL TERRY,

Defendant and Appellant.

G046116

(Super. Ct. No. 10NF3002)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Craig E. Robison, Judge. Affirmed as modified with directions.

William D. Farber, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Bruce Michael Terry pleaded guilty to assault by means of force likely to cause great bodily injury. (Pen. Code, § 245, subd. (a)(1); all statutory references are to the Penal Code.) He also admitted suffering two prior serious felonies within the meaning of section 667, subdivision (a), and serving two prison terms for those same felonies within the meaning of section 667.5, subdivision (b).

Terry contends the trial court erred by staying, rather than striking, the section 667.5, subdivision (b), enhancements. He also contends the abstract of judgment must be corrected to reflect he pleaded guilty to assault by means of force likely to produce great bodily injury rather than assault with a deadly weapon. The Attorney General concedes the errors. We accept the concessions, modify the judgment, and direct the trial court to prepare and forward a corrected abstract of judgment to correctional authorities.

I

FACTS AND PROCEDURAL BACKGROUND

On September 22, 2010, Terry punched Morris Bandy in the face with a closed fist at an Anaheim park. Bandy fell and struck his head on the concrete. He required hospitalization, insertion of catheter into his skull for bleeding, and stitches for his upper lip.

II

DISCUSSION

A. *Trial Court Erred by Staying Rather than Striking the Section 667.5, Subdivision (b), Enhancements*

As part of a negotiated plea agreement, Terry admitted suffering two prior serious felony convictions (§ 667, subd. (a)(1) [“any person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the

sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately”), and serving two prison terms as a result of those convictions (§ 667.5, subd. (b) [“the court shall impose a one-year term for each prior separate prison term” previously served “where the new offense is any felony for which a prison sentence . . . is imposed”]). The trial court imposed a five-year enhancement for each prior conviction under section 667, subdivision (a), and stayed sentencing for the section 667.5, subdivision (b), enhancements.

A court may not impose both section 667, subdivision (a), and section 667.5 subdivision (b), enhancements based on the same prior conviction. (*People v. Jones* (1993) 5 Cal.4th 1142, 1150 [interpreting section 667, subdivision (b), to provide when multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply].) Where a prior prison term is found true within the meaning of section 667.5, subdivision (b), “the trial court may not stay the one-year enhancement, which is mandatory unless stricken.” (*People v. Langston* (2004) 33 Cal.4th 1237, 1241; *Jones*, at p. 1153 [trial court directed to strike the section 667.5, subdivision (b), enhancement].) Additionally, the parties agreed here the section 667.5 subdivision (b), enhancements would be stricken under section 1385, subdivision (a) (“judge . . . may . . . in furtherance of justice, order an action to be dismissed”), if Terry pleaded guilty. The trial court’s failure to strike the section 667.5, subdivision (b), enhancement, resulted in an unauthorized sentence, and also constituted a violation of Terry’s plea agreement. (See *People v. Segura* (2008) 44 Cal.4th 921, 930-931 [negotiated plea agreement is a form of contract and acceptance of agreement binds the court and the parties to the

agreement].) We will modify the judgment (§ 1260 [appellate court “may . . . modify a judgment”]) to strike the section 667.5, subdivision (b), enhancements.

B. *The Abstract of Judgment Must Be Corrected*

Terry also contends the abstract of judgment must be corrected to reflect he pleaded guilty to assault by means of force likely to produce great bodily injury rather than assault with a deadly weapon. The information charged Terry with a violation of section 245, subdivision (a)(1), under the theory the assault was perpetrated by means of force likely to cause great bodily injury. (§ 245, subd. (a)(1) [“Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury”].) The transcript of the preliminary hearing reflects Terry used a closed fist against Bandy. Terry pleaded guilty to assault by means of force likely to produce great bodily injury. Terry’s factual basis statement accompanying the guilty plea does not mention a deadly weapon. The abstract of judgment, however, provides Terry was convicted of “[a]ssault with a deadly weapon.” The Attorney General concedes the abstract of judgment should be amended to reflect Terry was convicted of assault by means of force likely to cause great bodily injury. Accordingly, we will direct the trial court to amend the abstract of judgment.

III

DISPOSITION

The judgment is hereby modified (§ 1260) to strike the section 667.5 subdivision (b), enhancements. The trial court is directed to prepare an amended abstract of judgment reflecting the striking of the section 667.5, subdivision (b), enhancements, and also to indicate Terry was convicted of assault by means of force likely to produce great bodily injury rather than assault with a deadly weapon. The trial court is further

directed to forward certified copies of the amended abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.