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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.

JEAN PIERRE CASTELLANOS,

Defendant and Appellant.

G047858

(Super. Ct. No. 07HF0954)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Craig E. Robison, Judge. Affirmed as modified.

Gerald J. Miller, 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, A. Natasha Cortina and Melissa Mandel, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Jean Pierre Castellanos appeals the trial court’s denial of a postjudgment motion to correct an allegedly unauthorized sentence. We affirm the court’s denial of defendant’s requested relief, but modify the judgment to strike rather than stay a sentencing enhancement.

## FACTS

In a prior opinion, we affirmed defendant’s conviction. (*People v. Castellanos* (June 19, 2009, G041065) [nonpub. opn.].) As discussed therein, defendant became involved in a violent encounter after a night of drinking alcoholic beverages at a pool hall. The fight culminated when defendant stabbed one of the combatants with a pocket knife, resulting in the victim’s death. A jury convicted defendant of voluntary manslaughter (Pen. Code, § 192, subd. (a))<sup>1</sup> and found it to be true that defendant personally used a deadly weapon in the commission of his crime (§ 12022, subd. (b)(1)).

The court sentenced defendant to 11 years in state prison, which is the upper term for voluntary manslaughter. (§ 193, subd. (a) [“3, 6, or 11 years”].) The court chose “that term, because of the use of the deadly weapon. [¶] And the court having used that, the jury’s findings pursuant to . . . section 12022[, subdivision] (b)(1) is stayed.” The court noted it had “considered all the factors . . . both in mitigation and aggravation.”

In October 2012, defendant (in pro. per.) filed a motion seeking to correct his allegedly unauthorized sentence. The court denied the motion as procedurally defective. Upon the filing of a renewed motion, the court again denied the motion as

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All statutory references are to the Penal Code.

procedurally improper (due to an invalid proof of service) and substantively without merit.<sup>2</sup>

## DISCUSSION

According to defendant, the sentencing court was obligated to impose the one year enhancement provided for by section 12022, subdivision (b)(1), which states that “[a]ny person who personally uses a deadly or dangerous weapon in the commission of a felony . . . *shall be punished* by an additional and consecutive term of imprisonment . . . in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense.” (Italics added.) Defendant reasons that if the court had complied with its supposed obligation to impose this one year enhancement, the court could not have then imposed the upper term for voluntary manslaughter based on defendant’s use of a deadly weapon. (§ 1170, subd. (b) [“the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law”]; *People v. Moberly* (2009) 176 Cal.App.4th 1191, 1197.) In sum, by his own reckoning, defendant should have received seven years in prison (the middle term of six years for voluntary manslaughter, plus an additional year for the weapon enhancement) rather than 11 years in prison (the upper term for voluntary manslaughter).

So long as it struck the enhancement, the court was allowed to rely on defendant’s use of a weapon as a basis for imposing the upper term sentence of 11 years in prison. In exercising its discretion to impose the lower, middle, or upper term on a particular count, “the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision.” (Cal.

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<sup>2</sup>

The Attorney General does not defend the court’s ruling that improper service of the motion was provided. We therefore address the merits of defendant’s motion.

Rules of Court, rule 4.420(b); see § 1170, subd. (b).) “[A] fact charged and found as an enhancement may be used as a reason for imposing the upper term *only if the court has discretion to strike the punishment for the enhancement and does so*. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.” (Cal. Rules of Court, rule 4.420(c), italics added.)

The court had discretion to strike the section 12022, subdivision (b)(1), use of a deadly weapon enhancement. (*People v. Jones* (2007) 157 Cal.App.4th 1373, 1378-1383.) It does not appear that the court had authority to stay the imposition of sentence on the enhancement. (See *People v. Lopez* (2004) 119 Cal.App.4th 355, 364 [“The trial court has no authority to stay an enhancement, rather than strike it — not, at least, when the only basis for doing either is its own discretionary sense of justice”].) The most reasonable inference from the record is that the court either misspoke in staying the enhancement or overlooked the need to strike rather than stay the enhancement.

Defendant’s position is based solely on the court “staying” rather than “striking” the section 12022, subdivision (b)(1), use of a deadly weapon enhancement. As defendant states in his reply brief, “the court was required to either *impose or strike*, rather than merely *stay* the enhancement . . . .”

Thus, the mistake committed by the sentencing court was staying rather than striking the enhancement. The court did not err by imposing an 11 year prison term. Defendant is not entitled to a reduction in his sentence from 11 to seven years. As explained in the Attorney General’s brief, “[i]f the trial court erred by staying rather than striking the enhancement, the remedy is for this Court to strike the enhancement on appeal.” This remedy is appropriate because it fixes the sentencing error while simultaneously vindicating the court’s decision to impose an 11 year term in state prison rather than a seven year term (or some other lesser term). It is unnecessary to modify the abstract of judgment, as it already omits any mention of the enhancement.

## DISPOSITION

The postjudgment order denying defendant's requested relief is affirmed. The judgment is modified to strike (rather than "stay") the section 12022, subdivision (b)(1) enhancement.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.