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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RICARDO ANGEL ESPANA, Defendant and Appellant.	H046062 (Santa Clara County Super. Ct. No. C1361295)

In 2016, defendant Ricardo Angel Espana pleaded no contest to attempted murder (Pen. Code, §§ 664, subd. (a), 187),[1] shooting at an inhabited dwelling (§ 246), and assault with a firearm (§ 245, subd. (a)(2)). Defendant admitted two firearm enhancements (§ 12022.53, subds. (a), (b)) and a prior serious felony conviction enhancement (§ 667, subd. (a)). In March 2018, the trial court sentenced defendant to the agreed-upon term of 34 years eight months in prison. The trial court denied defendant's request for a certificate of probable cause.

On appeal, defendant argues that we should reverse the judgment and remand the matter back to the trial court so that it may exercise its discretion to dismiss his firearm or prior serious felony conviction enhancements in light of Senate Bill Nos. 620 and 1393. As we explain, we agree and reverse the judgment.

[1] Unspecified statutory references are to the Penal Code.

BACKGROUND

1. *The Crimes*[2]

On June 13, 2013, San Jose Police Department officers responded to a drive-by shooting. The victim, who suffered a broken nose, chipped tooth, and a pellet through his right eye, told officers that he was shot by several suspects driving a black vehicle. Prior to the shooting, the victim heard the suspects shout "Norte."

That same evening, officers responded to another shooting. The victim told officers that he was seated in his car when suspects in a dark-colored car pulled up next to him and shot twice into his car. A car matching the description of the suspects' car was found on a nearby freeway, and defendant was identified as the driver. Defendant and another man, his codefendant, were arrested following a high-speed chase. Both defendant and his codefendant were identified as active members of the Norteño criminal street gang.

2. *The Plea Agreement*

On September 14, 2016, defendant completed an advisement of rights, waiver, and plea form. Defendant agreed to plead no contest to attempted murder (§§ 664, subd. (a), 187), shooting at an inhabited dwelling (§ 246), and assault with a firearm (§ 245, subd. (a)(2)). In connection with the count of attempted murder, defendant admitted a firearm enhancement (§ 12022.53, subd. (b)) and a gang enhancement (§ 186.22, subd. (b)(1)(C)). In connection with the counts of shooting into an inhabited dwelling and assault with a firearm, defendant admitted a firearm enhancement (§ 12022.5, subd. (a)) and a gang enhancement (§ 186.22, subd. (b)(1)(C)). Defendant also admitted he had a prior strike and a prior serious felony conviction. In exchange, defendant agreed

[2] Since defendant pleaded no contest, we derive our summary of the offense from the probation officer's report, which was based on a report prepared by the San Jose Police Department.

to a sentence of 34 years eight months if the trial court granted his *Romero*[3] motion, or 35 years if the trial court did not grant his *Romero* motion. Defendant entered his plea that same day.

3. *Sentencing*

On February 2, 2018, the trial court granted defendant's *Romero* motion. On March 23, 2018, the trial court sentenced defendant to an aggregate term of 34 years eight months in prison. The sentence was composed of: four years for assault with a firearm (§ 245, subd. (a)(2)), 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C)), and 10 years for the firearm enhancement (§ 12022.5, subd. (a)); two years four months for attempted murder (§§ 664, subd. (a), 187) and three years four months for the gang enhancement (§ 186.22, subd. (b)(1)(C)); seven years concurrent for shooting at an inhabited dwelling (§ 246) and five years concurrent for the gang enhancement (§ 186.22, subd. (b)(1)(B)). The trial court also imposed a five-year sentence for defendant's prior serious felony conviction (§ 667, subd. (a)).

On April 16, 2018, the trial court denied defendant's *Marsden*[4] motion and his motion to withdraw his plea.

On May 16, 2018, defendant filed a notice of appeal and request for a certificate of probable cause claiming that "his plea was not free and voluntary." The trial court denied defendant's request for a certificate of probable cause.

DISCUSSION

On appeal, defendant argues that this court should reverse the judgment and remand the matter back to the trial court so that it may exercise its discretion to dismiss his firearm or prior serious felony conviction enhancements in light of the Legislature's recent enactment of Senate Bill Nos. 620 and 1393.

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[3] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

[4] *People v. Marsden* (1970) 2 Cal.3d 118.

1. *Senate Bill Nos. 620 and 1393*

Senate Bill No. 620, effective January 1, 2018, permits a trial court to exercise its discretion and strike firearm enhancements imposed under sections 12022.5 and 12022.53. (§§ 12022.5, subd. (c), 12022.53, subd. (h); Stats. 2017, ch. 682, §§ 1, 2.) The statues provide that "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§§ 12022.5, subd. (c), 12022.53, subd. (h).) Appellate courts have construed Senate Bill No. 620 as retroactively applying to defendants whose sentences were not yet final when it came into effect. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1089-1091.) And, as explained in detail below, appellate courts have come to conflicting conclusions about whether Senate Bill No. 620 applies to defendants who were sentenced pursuant to negotiated plea bargains and whether a certificate of probable cause is required to raise the issue on appeal. (*People v. Hurlic* (2018) 25 Cal.App.5th 50 (*Hurlic*) [concluding that Senate Bill No. 620 applies to defendants who were sentenced pursuant to negotiated pleas and a certificate of probable cause is not required to raise issue on appeal]; but see *People v. Fox* (2019) 34 Cal.App.5th 1124, petn. for review pending, petn. filed June 12, 2019, (*Fox*) [coming to contrary conclusions].)

Senate Bill No. 1393, effective January 1, 2019, amended section 1385 to give trial courts the discretion to dismiss prior serious felony conviction enhancements imposed under section 667, subdivision (a). (Stats. 2018, ch. 1013, §§ 1, 2.) Appellate courts have construed Senate Bill No. 1393 as retroactively applying to defendants whose sentences were not yet final when it came into effect. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) Like the conflicting appellate court decisions on Senate Bill No. 620, appellate courts have also reached conflicting conclusions about whether Senate

Bill No. 1393 applies to defendants who were sentenced pursuant to negotiated plea bargains and whether a certificate of probable cause is required to raise the issue on appeal. (*People v. Stamps* (2019) 34 Cal.App.5th 117, review granted Jun. 12, 2019, S255843 (*Stamps*) [concluding that Senate Bill No. 1393 applies to defendants who were sentenced pursuant to negotiated pleas and a certificate of probable cause is not required to raise issue on appeal]; but see *People v. Galindo* (2019) 35 Cal.App.5th 658, petn. for review pending, petn. filed Jun. 26, 2019 (*Galindo*) [coming to contrary conclusion].)

2. *Necessity of a Certificate of Probable Cause*

We first address the threshold issue of whether defendant needs a certificate of probable cause to maintain his appeal.

Section 1237.5 broadly states that "[n]o appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere . . . except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court." " 'Section 1237.5 was intended to remedy the unnecessary expenditure of judicial resources by preventing the prosecution of frivolous appeals challenging convictions on a plea of guilty.' " (*People v. Johnson* (2009) 47 Cal.4th 668, 676.)

" 'In determining whether section 1237.5 applies to a challenge of a sentence imposed after a plea of . . . no contest, courts must look to the substance of the appeal: "the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made." [Citation.] Hence, the critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5.' " (*People v. Buttram* (2003) 30 Cal.4th 773, 781-782.)

In *Hurlic*, *supra*, 25 Cal.App.5th 50, a case from the Second Appellate District, the defendant entered his plea and was sentenced before Senate Bill No. 620 came into effect. (*Hurlic*, *supra*, at p. 54.) The defendant, however, filed a timely notice of appeal and requested a certificate of probable cause on the ground that he sought to avail himself of " 'the new Senate Bill 620.' " (*Ibid*.) The trial court denied his request for a certificate of probable cause. *Hurlic*, however, determined that a certificate of probable cause was not required for the defendant to argue on appeal that Senate Bill No. 620 applied to his case. (*Id*. at pp. 56-57.)

Hurlic cited three reasons for its conclusion. First, "[u]nless a plea agreement contains a term requiring the parties to apply only the law in existence at the time the agreement is made" (*Hurlic*, *supra*, 25 Cal.App.5th at p. 57), " 'the general rule in California is that the plea agreement will be " 'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy' " ' " (*ibid*.). In *Hurlic*, the defendant's plea agreement did not contain a term applying only the law in effect at the time his plea was executed, so the plea agreement was deemed to incorporate the changes enacted by Senate Bill No. 620, including the trial court's newfound discretion to strike firearm enhancements. (*Ibid*.)

Second, *Hurlic* determined that "dispensing with the certificate of probable cause requirement in the circumstances present here better implements the intent behind that requirement." (*Hurlic*, *supra*, 25 Cal.App.5th at p. 57.) The defendant's entitlement to retroactive application of the law was undisputed, thus an appeal requesting an application of the new law to his case was "neither 'frivolous' nor 'vexatious,' thereby obviating any need for section 1237.5's screening mechanism." (*Id*. at p. 58.)

Lastly, *Hurlic* held that the rules of statutory construction favored applying Senate Bill No. 620 over section 1237.5. (*Hurlic*, *supra*, 25 Cal.App.5th at p. 58.)

Hurlic applied the general principle that when two statutes conflict, the more specific statute controls. (*Ibid*.) *Hurlic* determined that Senate Bill No. 620 was a more specific statute than section 1237.5; thus, Senate Bill No. 620 controlled. (*Hurlic*, *supra*, at p. 58.)

A different panel of this court followed the reasoning set forth in *Hurlic* in *People v. Baldivia* (2018) 28 Cal.App.5th 1071 (*Baldivia*). In *Baldivia*, the defendant committed criminal offenses when he was 17 years old and entered into a plea agreement before Proposition 57[5] and Senate Bill No. 620 went into effect. (*Baldivia*, *supra*, at p. 1073.) In accordance with his plea agreement, the defendant was sentenced to a term in prison that included a sentence attached to his firearm enhancements. (*Ibid*.) The defendant did not obtain a certificate of probable cause. (*Ibid*.)

After examining the decision in *Hurlic*, this court determined that the first reason discussed in *Hurlic*—that plea agreements are deemed to incorporate changes in the law—was dispositive. (*Baldivia*, *supra*, 28 Cal.App.5th at p. 1077.) We concluded that "[i]f the electorate or the Legislature expressly or implicitly contemplated that a change in the law related to the consequences of criminal offenses would apply retroactively to all nonfinal cases, those changes logically must apply to preexisting plea agreements, since most criminal cases are resolved by plea agreements." (*Id*. at p. 1079.) Thus, the defendant's arguments pertaining to the applicability of Proposition 57 and Senate Bill No. 620 were not an attack on the validity of the defendant's plea and the defendant did not need a certificate of probable cause to maintain his appeal. (*Baldivia*, *supra*, at p. 1079.)

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[5] Proposition 57 bars direct-filed adult criminal proceedings for juveniles and requires a juvenile fitness hearing before a juvenile case can be transferred to adult criminal court. (*Baldivia*, *supra*, 28 Cal.App.5th at p. 1074.)

After *Baldivia* was decided, the First Appellate District followed *Hurlic* in *Stamps*, *supra*, 34 Cal.App.5th 117, review granted, and applied *Hurlic*'s analysis to Senate Bill No. 1393. In *Stamps*, the defendant pleaded no contest and admitted a prior serious felony conviction. (*Stamps*, *supra*, at p. 119.) At the time the defendant was sentenced in January 2018, the trial court did not have the discretion to strike an enhancement for a prior serious felony conviction. (*Id*. at p. 120.) Subsequently, the Governor signed Senate Bill No. 1393, effective January 1, 2019, which amended section 1385 to give trial courts the discretion to strike prior serious felony convictions. (*Stamps*, *supra*, at p. 120.) On appeal, the defendant argued that the amendment to section 1385 applied retroactively to his case. (*Stamps*, *supra*, at p. 120.) The Attorney General disagreed, arguing that the defendant was not entitled to relief because he pleaded no contest in exchange for a stipulated sentence and he failed to obtain a certificate of probable cause. (*Id*. at p. 121.)

Citing *Hurlic* and *Baldivia*, *Stamps* concluded a certificate of probable cause was not required to raise the issue on appeal. (*Stamps*, *supra*, 34 Cal.App.5th at p. 121, rev. granted.) *Stamps* observed that the amendment to section 1385 enacted by Senate Bill No. 1393 was not "on the books or anticipated when defendant entered his plea agreement, so [the defendant's] present appeal [was] not a challenge to the validity of the plea itself." (*Stamps*, *supra*, at p. 122.) *Stamps* rejected the Attorney General's claim that applying Senate Bill No. 1393 retroactively to the defendant's case would deprive the prosecution of the benefits of the plea bargain, applying the general rule that a plea agreement is deemed to incorporate existing law *and* reserve the power of the state to amend the law or enact additional laws. (*Stamps*, *supra*, at pp. 122-123.)

Not all appellate courts have reached the same conclusion reached by *Hurlic*, *Baldivia*, and *Stamps*. In *People v. Kelly* (2019) 32 Cal.App.5th 1013, review granted June 12, 2019, S255145 (*Kelly*), the Second Appellate District dismissed a defendant's appeal seeking retroactive application of Senate Bill No. 1393 because she failed to

obtain a certificate of probable cause. (*Kelly*, *supra*, at p. 1015.) The defendant in *Kelly* agreed to a negotiated disposition of 18 years, which included five-year enhancements for her prior serious felony convictions. (*Ibid*.)

Kelly distinguished *Hurlic*, noting that *Hurlic* "dispensed with the certificate of probable cause requirement based on very 'narrow circumstances.' " (*Kelly*, *supra*, 32 Cal.App.5th at p. 1016, rev. granted.) *Kelly* observed that the defendant in *Hurlic* " 'did not check the box on the first page indicating that his appeal "challenge[d] the validity of the plea or admission," but, in the blank space where defendants are to spell out why they are requesting a certificate of probable cause, defendant wrote that he sought to avail himself of "the new Senate bill 620." ' " (*Ibid*.) *Kelly* determined that the defendant's notice of appeal did not state that she intended to avail herself of the new law and concluded that the five-year enhancements were "a bargained-for component of the sentence." (*Id*. at p. 1017.) *Kelly* did not otherwise analyze or attempt to distinguish *Hurlic*'s analysis.

More recently, the First Appellate District decided *Fox*, *supra*, 34 Cal.App.5th 1124. The defendant in *Fox* entered his plea on September 19, 2017, the week after the Legislature passed Senate Bill No. 620 and the day after it was enrolled. (*Id*. at p. 1128.) He was sentenced on October 11, 2017, the same day the Governor signed the bill into law. (*Ibid*.) The defendant appealed, seeking a certificate of probable cause on the basis that his trial counsel coerced him into taking the plea offer. (*Ibid*.) The trial court denied the defendant's certificate of probable cause. (*Ibid*.)

Fox reviewed the decisions in *Hurlic*, *Baldivia*, and *Stamps* and concluded that these cases were not convincing. (*Fox*, *supra*, 34 Cal.App.5th at pp. 1130-1133.) *Fox* determined that the "general rule that plea agreements incorporate subsequent changes in the law" (*id*. at p. 1135) was not pertinent for two reasons: (1) Senate Bill No. 620 was a part of the legal landscape before the defendant entered his plea and his trial counsel's

comments at the sentencing hearing indicate that the parties understood that the defendant would not have the benefit of Senate Bill No. 620 when it came into effect (*Fox*, *supra*, at pp. 1134-1135), and (2) given that Senate Bill No. 620 applies only at the time of sentencing or any resentencing that may occur pursuant to any other law, there is no discernible legislative intent to "dispose of existing limits on a trial court's discretion when sentencing a defendant convicted by plea" (*Fox*, *supra*, at p. 1137). *Fox* concluded that the Legislature did not intend for the new law to enable "defendants who agreed to serve a specific term for a firearm enhancement to avoid that term yet retain the benefits of their plea agreements." (*Id*. at p. 1139.) *Fox* held that "the remedy for such defendants is to seek to withdraw their pleas, and they may therefore seek resentencing under Senate Bill No. 620 on direct appeal only if they first obtain a certificate of probable cause—hardly as onerous a requirement as *Hurlic* suggests—to enable them to challenge the validity of their pleas." (*Fox*, *supra*, at p. 1139.)

Following *Fox*, a different panel of the First Appellate District decided *Galindo*, *supra*, 35 Cal.App.5th 658. *Galindo* agreed with the reasoning set forth in *Fox* and concluded that a certificate of probable cause was required to request remand and resentencing under Senate Bill No. 1393 when a defendant has been convicted by negotiated plea and sentenced to an agreed-upon term in prison. (*Galindo*, *supra*, at pp. 669-670.)[6] *Galindo* held that when the parties agree to a specific sentence, a defendant seeking to reduce the agreed-upon sentence is "necessarily challenging the validity of the plea itself." (*Id*. at p. 670.) Relying on *Fox*, *Galindo* concluded that the principle that later laws are incorporated into plea bargains was inapplicable because the

[6] In the recently filed concurring and dissenting opinion from the First Appellate District, *People v. Alexander* (Jun. 25, 2019, A15809, A152247) __ Cal.App.5th __, __ [2019 Cal. App. LEXIS 580, *25], Justice Needham agreed with *Fox* and *Galindo* and concluded that a certificate of probable cause was necessary to request remand for resentencing under Senate Bill No. 1393.

principle is relevant only when changes are intended to apply to the defendant in question. (*Id*. at pp. 670-671.) *Galindo* concluded that "[t]here is nothing in the language or legislative history of Senate Bill [No.] 1393 that suggests the Legislature intended to grant trial courts discretion to reduce stipulated sentences to which the prosecution and defense have already agreed in exchange for other promises. Neither the words of the statute itself nor the legislative history reference plea bargaining, nor do they express an intent to overrule existing law that once the parties agree to a specific sentence, the trial court is without power to change it unilaterally." (*Id*. at p. 671.)

We find *Hurlic*, *Baldivia*, and *Stamps* to be more persuasive than *Kelly*, *Fox*, and *Galindo*. We agree with *Hurlic*, *Baldivia*, and *Stamps* that since plea agreements generally incorporate the possibility that changes in the law will alter the consequences of pleas, defendant is not attacking the validity of his plea when he argues that Senate Bill Nos. 620 and 1393 apply to his case. (*Hurlic*, *supra*, 25 Cal.App.5th at p. 57; *Baldivia*, *supra*, 28 Cal.App.5th at pp. 1077-1078; *Stamps*, *supra*, 34 Cal.App.5th at pp. 121-122, rev. granted.) And since defendant's arguments about Senate Bill Nos. 620 and 1393 do not attack the validity of his plea, he does not need a certificate of probable cause to raise his arguments. (*Hurlic*, *supra*, at pp. 58-59; *Baldivia*, *supra*, at p. 1079; *Stamps*, *supra*, at p. 121.)

We adhere to *Hurlic*, *Baldivia*, and *Stamps* for several reasons. First, we do not find *Kelly* to be persuasive. *Kelly* dispensed with *Hurlic* by incorrectly concluding that *Hurlic* decided its case on narrow circumstances—that the *Hurlic* defendant wrote on his request for a certificate of probable cause that he sought to avail himself of the benefits of Senate Bill No. 620. (*Kelly*, *supra*, 32 Cal.App.5th 1013, rev. granted, at pp. 1016-1017.) *Kelly* did not otherwise discuss or analyze the reasoning behind the *Hurlic* court's decision.

We find *Fox* similarly unpersuasive. In part, *Fox* noted that the defendant in that case entered and executed his plea at a time when Senate Bill No. 620 was arguably " 'part of the legal landscape,' " so the general rule that plea agreements incorporate subsequent changes in the law was not applicable. (*Fox*, *supra*, 34 Cal.App.5th at p. 1135.) The defendant in *Fox* entered his plea the week after the Legislature passed Senate Bill No. 620 and was sentenced the same day the Governor signed the bill into law. (*Id*. at p. 1138.)

We are not convinced by *Fox*'s conclusion that Senate Bill No. 620 was part of the legal landscape when the defendant in that case entered his plea. The defendant in *Fox* negotiated his plea agreement *before* the bill was signed into law. (*Fox*, *supra*, 34 Cal.App.5th at p. 1128.) It is not plausible that a bill that was not yet signed into law—which would not have been effective for several months—could have factored into the defendant's plea negotiations.

Fox is also distinguishable. Even if we were to accept that Senate Bill No. 620 was part of the legal landscape when the *Fox* defendant entered his plea agreement, it is apparent that neither Senate Bill Nos. 620 nor 1393 were a part of the legal landscape when defendant entered his plea in this case. Defendant entered his plea in September 2016. Senate Bill No. 620 was passed by the Legislature and signed into law in 2017. (*Hurlic*, *supra*, 25 Cal.App.5th at p. 54.) Senate Bill No. 1393 was passed by the Legislature and signed into law in 2018. (*People v. Garcia*, *supra*, 28 Cal.App.5th at p. 971.) These bills were not in effect at the time defendant negotiated and entered his plea in 2016. They could not have been considered by the parties during plea negotiations. As a result, the principle that plea agreements incorporate subsequent changes in the law remains applicable in defendant's case.

We also respectfully disagree with *Fox* and *Galindo*'s conclusion that the Legislature did not intend for Senate Bill Nos. 620 and 1393 to apply to defendants who

were sentenced pursuant to a negotiated plea. *Fox* concluded that nothing in Senate Bill No. 620 suggested that it was intended to empower trial courts to disregard express terms of a negotiated plea agreement. (*Fox*, *supra*, 34 Cal.App.5th at p. 1138.) *Galindo* reached the same conclusion with respect to Senate Bill No. 1393. (*Galindo*, *supra*, 35 Cal.App.5th at pp. 670-671.) Yet Senate Bill No. 620 broadly applies at the time of sentencing or resentencing and does not draw a distinction between sentencing hearings for negotiated plea deals or for criminal trials. (§§ 12022.5, subd. (c), 12022.53, subd. (h).) And we must infer that both Senate Bill Nos. 620 and 1393 apply to *all* cases not yet final after the statutes became effective because the Legislature did not make any express declarations about their retroactivity. (*People v. Garcia*, *supra*, 28 Cal.App.5th at pp. 972-973; *In re Estrada* (1965) 63 Cal.2d 740, 744-745; *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 307-308 & fn. 5.)

There is nothing to suggest that plea agreements should be specifically exempted from the ameliorative effects of Senate Bill Nos. 620 and 1393. In fact, it is established precedent that "requiring the parties' compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement, nor does the failure of a plea agreement to reference the possibility the law might change translate into an implied promise the defendant will be unaffected by a change in the statutory consequences attending his or her conviction." (*Doe v. Harris* (2013) 57 Cal.4th 64, 73-74; see *Harris v. Superior Court* (2016) 1 Cal.5th 984, 989-993 [Proposition 47 applies retroactively to all qualifying convictions, whether conviction was for trial or plea].)

For these reasons, we conclude that defendant's arguments pertaining to Senate Bill Nos. 620 and 1393 are reserved by the plea agreement, do not challenge the validity

of the plea, and, as a result, a certificate of probable cause is not required to maintain defendant's appeal.[7]

3. *Necessity of Remand*

Having determined that both Senate Bill Nos. 620 and 1393 retroactively apply to defendant and having concluded that he does not need a certificate of probable cause to maintain his appeal, we must now determine whether a remand is necessary or if it would be an " 'idle act.' " (*People v. Gamble* (2008) 164 Cal.App.4th 891, 901 (*Gamble*).)

Generally, "when the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) The rationale for this general rule is that "[d]efendants are entitled to 'sentencing decisions made in the exercise of the "informed discretion" of the sentencing court,' and a court that is unaware of its discretionary authority cannot exercise its informed discretion." (*Ibid.*) There is an exception to this rule, however, where " 'the record shows that the trial court would not have exercised its discretion even if it believed it could do so,' " in which case, " 'remand would be an idle act and is not required.' " (*Gamble, supra,* 164 Cal.App.4th at p. 901.)

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[7] On May 4, 2019, defendant filed an application for relief from default and for leave to file an amended notice of appeal that includes a statement and request for a certificate of probable cause. Defendant sought leave with this court to seek a late certificate of probable cause with the trial court, citing his arguments pertaining to Senate Bill Nos. 620 and 1393. The ruling on defendant's application was deferred for consideration with the merits of his appeal. We deny defendant's application.

Nonetheless, our decision on defendant's application does not affect his appeal. A certificate of probable cause is not necessary if a defendant's appeal is based on grounds that arose after entry of the plea that do not affect the plea's validity. (Cal. Rules of Court, rule 8.304(b)(4).) We have determined that a certificate of probable cause is not necessary to maintain defendant's appeal and have reached his arguments pertaining to Senate Bill Nos. 620 and 1393.

In *People v. McDaniels* (2018) 22 Cal.App.5th 420, the appellate court addressed the appropriate standard to "apply in assessing whether to remand a case for resentencing in light of Senate Bill [No.] 620."[8] (*Id*. at p. 425.) Relying on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, which dealt with reconsidering Three Strikes sentencing in light of *Romero*, *McDaniels* determined that a "remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*McDaniels*, *supra*, at p. 425.) *McDaniels* concluded that the salient question is whether the trial court "express[ed] its intent to impose the maximum sentence permitted." (*Id*. at p. 427.) "When such an expression is reflected in the appellate record, a remand would be an idle act because the record contains a clear indication that the court will not exercise its discretion in the defendant's favor." (*Ibid*.) Likewise, in *People v. Almanza* (2018) 24 Cal.App.5th 1104, the appellate court remanded the matter for resentencing because the court's imposition of consecutive sentences was not a clear indication of how the trial court would ultimately rule on remand. (*Id*. at pp. 1110-1111.)

Based on the record before us, we determine that remand is necessary so that the trial court may exercise its discretion to dismiss the enhancement imposed for defendant's prior serious felony conviction imposed under section 667, subdivision (a). Senate Bill No. 1393 was not in effect at the time of the sentencing hearing and the record is silent as to whether the court would have struck the enhancement had it been given the discretion to do so.

Whether remand is necessary with respect to defendant's firearm enhancements is a more complicated issue. Both parties acknowledge that Senate Bill No. 620 was effective January 1, 2018, and defendant was sentenced in March 2018. Thus, at the time

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[8] We find that the same standard applies in cases involving Senate Bill No. 1393.

of the sentencing hearing, the trial court had the discretion to strike defendant's firearm enhancements.

As the reviewing court, we must presume that the trial court knew and applied the correct statutory and case law at the time of sentencing absent affirmative evidence to the contrary. (*People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on a different ground as stated in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Woods* (1993) 12 Cal.App.4th 1139, 1152 [reviewing court presumes trial court knew and properly applied law].) This presumption, however, does not apply if "the law in question was unclear or uncertain when the lower court acted." (*People v. Jeffers* (1987) 43 Cal.3d 984, 1000; *People v. Diaz* (1992) 3 Cal.4th 495, 567.)

Hurlic, *supra*, 25 Cal.App.5th 50, was not yet decided at the time of defendant's sentencing hearing. And, given that there is conflicting case law on the applicability of Senate Bill No. 620 to convictions obtained by plea (see *Fox*, *supra*, 34 Cal.App.5th 1124; *Kelly*, *supra*, 32 Cal.App.5th 1013, rev. granted), the presumption that the trial court understood and applied the correct statutory law does not apply.

For these same reasons, we conclude that defendant's failure to invite the trial court to exercise its discretion to strike his firearm enhancements does not forfeit his argument on appeal. (See *People v. Carmony* (2004) 33 Cal.4th 367, 375-376 [failure on part of defendant to invite trial court to dismiss prior strike forfeits right to raise issue on appeal].) The law was new and unsettled at the time of defendant's sentencing, which excuses his counsel's failure to object. (See *People v. Turner* (1990) 50 Cal.3d 668, 703 [unforeseeable change in law rendered it unreasonable to expect trial counsel to object and anticipate the change]; *People v. Rangel* (2016) 62 Cal.4th 1192, 1215-1216 [failure to object is excused if there is an unforeseen change in the law]; *In re Sean W.* (2005) 127 Cal.App.4th 1177 [since trial court was unaware it had discretion with respect to sentencing issue, juvenile's failure to raise issue below did not constitute waiver].)

As a result, we must remand the matter back to the trial court so that it can exercise its discretion to decide whether to strike defendant's firearm enhancements. Like the prior serious felony conviction enhancement, the record is silent as to whether the trial court would have struck the firearm enhancements had it been aware of its newfound discretion at the sentencing hearing, and the trial court did not express an intent to impose the maximum sentence permitted by law.

Lastly, we reject the People's argument that the trial court's decision to impose the agreed-upon sentence of 34 years eight months clearly indicates that it would impose the same sentence on remand. The People contend that under *People v. Segura* (2008) 44 Cal.4th 921, the trial court could not unilaterally alter the terms of the plea agreement; it could only approve or disapprove of the plea agreement. (*Id*. at pp. 931-932.) However, as we previously discussed, a plea agreement is deemed to incorporate changes in the law unless the agreement contains a term requiring the parties to apply only the law in effect at the time the agreement was made. (*Hurlic*, *supra*, 25 Cal.App.5th at p. 57; *Doe v. Harris*, *supra*, 57 Cal.4th at p. 66.) Defendant's plea agreement does not contain this kind of term. Moreover, given that the law in this area remains unclear, the trial court's decision to impose the agreed-upon term does not definitively demonstrate that it would impose the same sentence on remand.

DISPOSITION

The judgment is reversed and the matter is remanded for the purpose of allowing the trial court to consider whether to strike the Penal Code section 12022.53 enhancement and the Penal Code section 667, subdivision (a) enhancement under Penal Code section 1385. If the trial court strikes any of the enhancements, it shall resentence defendant. If the trial court does not strike any of the enhancements, it shall reinstate the sentence.

Premo, J.

WE CONCUR:

Greenwood, P.J.

Elia, J.