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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LUIS ALFONSO MADRIGAL, Defendant and Appellant.	H044892 (Santa Clara County Super. Ct. No. C1226816)

Defendant Luis Alfonso Madrigal pleaded no contest and not guilty by reason of insanity to one count of a lewd act on a child under 14. He also pleaded no contest to one count of kidnapping. He admitted he had suffered a prior strike conviction and a prior serious felony conviction. As to the lewd act, the trial court found Madrigal was legally insane at the time and committed him to a state hospital. For kidnapping, the court imposed a total term of 21 years in state prison, including a mandatory five-year term for the prior serious felony conviction, to be served upon release from the hospital

After Madrigal was sentenced, the Legislature enacted Senate Bill No. 1393 (SB 1393), granting trial courts the discretion not to impose a five-year term for a prior serious felony conviction. Madrigal now contends we must remand for resentencing because this change in law applies retroactively to his case. The Attorney General contends the claim is barred by the failure to obtain a certificate of probable cause. As to the merits of the claim, the Attorney General contends we should not remand for

resentencing because the original sentence showed the trial court would have imposed the five-year term even if it had the discretion not to.

For the reasons below, we conclude Madrigal is entitled to retroactive application of SB 1393. We further conclude this claim is cognizable notwithstanding the absence of any certificate of probable cause for the reasons set forth in *People v. Hurlic* (2018) 25 Cal.App.5th 50 (*Hurlic*) and *People v. Baldivia* (2018) 28 Cal.App.5th 1071 (*Baldivia*). We will reverse the judgment and remand the matter for the trial court to consider whether to strike the prior serious felony enhancement.

I. BACKGROUND

The facts of the offenses are immaterial to this opinion. The prosecution charged Madrigal with two counts: Count 1—lewd or lascivious act on a child under 14 (Pen. Code, § 288, subd. (a))[1]; and count 2—kidnapping (§ 207, subd. (a)). The information further alleged Madrigal had suffered a prior strike conviction and a prior serious felony conviction (§ 667, subds. (a), (b)-(i)).

In June 2017, the parties reached a plea agreement. On count 1, Madrigal pleaded no contest and not guilty by reason of insanity. He pleaded no contest on count 2 and admitted the prior allegations. After a court trial on the insanity plea to count 1, the court found Madrigal was legally insane when he committed the offense. At sentencing for count 1, the court found Madrigal had not been restored to sanity. In accord with the plea agreement, the court committed him to the Department of State Hospitals for a maximum term of 16 years. On count 2, the court imposed a term of 16 years, equal to twice the aggravated term of eight years based on the prior strike conviction. The court imposed an additional five-year term for the prior felony conviction, resulting in a total term of 21 years. However, the court stayed the 21-year term pending a finding that Madrigal's sanity is restored and his commitment to the mental hospital is not extended.

[1] Subsequent undesignated statutory references are to the Penal Code.

Madrigal filed a notice of appeal in July 2017. He did not obtain a certificate of probable cause.

II. DISCUSSION

In 2017, the trial court imposed a mandatory five-year term based on Madrigal's admission of a prior serious felony conviction. Effective January 1, 2019, SB 1393 amended section 667, subdivision (a) and section 1385, subdivision (b) to give trial courts the discretion to strike or dismiss a prior serious felony conviction at sentencing. (Stats. 2018, ch. 1013, §§ 1-2.) Madrigal now contends we must remand for resentencing based on this change in law. Although SB 1393 took effect after Madrigal was sentenced, he contends it applies to his case under the retroactivity doctrine of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) and its progeny.

On the merits of this claim, the Attorney General concedes that the change in law would apply retroactively to Madrigal's case. The concession is well-taken. "[U]nder the *Estrada* rule, . . ., it is appropriate to infer, as a matter of statutory construction, that the Legislature intended [SB] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when [SB] 1393 becomes effective on January 1, 2019." (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) Madrigal's case is not final because the time for petitioning for a writ of certiorari in the United States Supreme Court has not yet passed. (*People v. Vieira* (2005) 35 Cal.4th 264, 306.)

The Attorney General nonetheless contends we must dismiss this appeal based on Madrigal's failure to obtain a certificate of probable cause.[2] Assuming the claim is not barred, the Attorney General argues we should not remand for resentencing because the 21-year term imposed by the trial court shows it would not have stricken the five-year enhancement even if it had the discretion to do so.

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[2] Contrary to the arguments set forth in the body of the respondent's brief, the brief's main argument heading states Madrigal is entitled to remand for resentencing. We will assume this heading is the result of a typographical error.

A. No Certificate of Probable Cause Was Required

The Attorney General contends Madrigal's claim is not cognizable without a certificate of probable cause under section 1237.5 (precluding certain claims on appeal after a plea of no contest or guilty unless the trial court has granted a certificate of probable cause). Madrigal claims no certificate is required for the reasons set forth in *Hurlic*, *supra*, 25 Cal.App.5th 50.

In *Hurlic*, the court of appeal considered a claim similar to that raised by Madrigal here. Hurlic had entered a plea agreement including a term for an admitted firearm enhancement, but on appeal he sought remand for resentencing under a legislative amendment to section 12022.53 granting trial courts the discretion not to impose the enhancement. The trial court had not issued a certificate of probable cause. The court of appeal held that no certificate of probable cause is required when a defendant challenges an agreed-upon sentence based on a legislative amendment that retroactively grants a trial court the discretion to waive a sentencing enhancement. (*Hurlic*, *supra*, 25 Cal.App.5th at p. 53.) Under the logic of *Hurlic*, Madrigal is also entitled to retroactive application of SB 1393.

The Attorney General contends that Madrigal's entry into a negotiated plea agreement required him to seek a certificate of probable cause because without a certificate his appeal is limited to "postplea claims, including sentencing issues, that do not challenge the validity of the plea." (*People v. Cuevas* (2008) 44 Cal.4th 374, 379.) The Attorney General argues that any change to the terms of the negotiated sentence would affect the substance of the plea agreement. He argues *Hurlic* was incorrectly decided, and he urges us to follow *People v. Enlow* (1998) 64 Cal.App.4th 850 (*Enlow*) (defendant required to obtain certificate of probable cause to appeal from stipulated sentence).

This court, however, recently rejected the logic of *Enlow* and agreed with *Hurlic* in *Baldivia*, *supra*, 28 Cal.App.5th 1071: "Hurlic's appeal was indisputably meritorious,

and no defendant could possibly obtain a certificate to make a challenge based on a law that did not exist at the time of sentencing." (*Baldivia*, *supra*, 28 Cal.App.5th at p. 1077.) "If 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. It follows that defendant's appellate contentions were not an attack on the validity of his plea and did not require a certificate of probable cause." (*Id.* at p. 1079.) The same reasoning applies here. The Attorney General urges us to reconsider *Baldivia*, but we decline to do so.

For the reasons above, we conclude Madrigal's claim is cognizable on appeal, and he is entitled to retroactive application of SB 1393.

B. Retroactive Application of SB 1393 Requires Remand for Resentencing

The Attorney General argues that even if Madrigal is entitled to retroactive application of SB 1393, no remand is necessary because the trial court's imposition of a 21-year term as part of a negotiated disposition shows it would not strike the enhancement even if it had the discretion to do so. "We are not required to remand to allow the court to exercise its discretion if 'the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the] . . . enhancement' even if it had the discretion. [Citation.]" (*People v. Jones* (2019) 32 Cal.App.5th 267, 272-273.) Apart from the fact that the sentence was negotiated, however, the Attorney General points to nothing in the record to support this assertion. As Madrigal points out, the trial court made clear it was imposing the enhancement because the enhancement was mandatory. At sentencing, the court stated, "The 16-year term is two times the aggravated term of 8 years, exacerbated by the strike prior conviction that was admitted. [¶] In addition, the Court *must impose the mandatory five-year serious felony prior*, for a total of 21 years." (Italics added.)

This record does not clearly indicate the trial court would decline to strike the enhancement on resentencing. Accordingly, we must remand for resentencing. We will reverse the judgment and remand solely to allow the court to decide whether to strike the enhancement.

III. DISPOSITION

The judgment is reversed and the matter is remanded for the sole purpose of resentencing.

Greenwood, P.J.

WE CONCUR:

Premo, J.

Elia, J.

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No. H044892