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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JASON NICHOLAS ARNOLD, Defendant and Appellant.	B305073 (Los Angeles County Super. Ct. No. GA077104)

APPEAL from an order of the Superior Court of Los Angeles County, Suzette Clover, Judge. Affirmed.

Jennifer Hansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Matthew Rodriguez, Acting Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Michael R. Johnsen, Noah P. Hill, and Stephanie C. Santoro, Deputy Attorneys General, for Plaintiff and Respondent.

Jason Nicholas Arnold challenges the trial court's denial of a recommendation by the California Department of Corrections and Rehabilitation (CDCR) that the court recall his sentence in light of Senate Bill No. 1393. The trial court declined to recall the sentence, holding that Senate Bill No. 1393 does not apply to final judgments.

We affirm the trial court's order. Arnold's judgment became final in 2012, and Senate Bill No. 1393 only applies to nonfinal judgments. The trial court therefore properly denied CDCR's request to recall Arnold's sentence based upon Senate Bill No. 1393.

FACTUAL AND PROCEDURAL SUMMARY

In an information filed on August 2, 2012, the People charged Arnold with second degree robbery (Pen. Code, § 211)[1] and attempted carjacking (§§ 215, subd. (a), 664). The information also alleged Arnold suffered two prior serious felony convictions. (§ 667, subd. (a)(1).)

Arnold entered a plea of no contest to the charges and admitted the two prior serious felony convictions. On October 25, 2012, the trial court sentenced him to a total term of 22 years, eight months in state prison. The term included two five-year prior conviction enhancements under section 667, subdivision (a)(1). Arnold did not appeal.

On July 2, 2019, CDCR recommended that the trial court recall Arnold's sentence pursuant to section 1170, subdivision (d), and resentence Arnold in light of Senate Bill No. 1393, which grants trial courts the discretion to strike prior serious felony

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

conviction enhancements. On July 29, 2019, the trial court denied the request, making the following findings in the accompanying minute order: "The court takes no action on the request of the Department of Corrections dated July 2, 2019, for the court to exercise its discretion as to the 5-year state prison enhancement. [Arnold's] case was final when the new law went into effect. The new law does not apply to cases that are final."

Arnold timely appealed.

DISCUSSION

Arnold argues the trial court mistakenly concluded the finality of his judgment was a bar to providing the requested relief. We disagree. Given that we conclude Senate Bill No. 1393 does not apply to final judgments, the trial court properly declined CDCR's recommendation to recall Arnold's sentence.

A. Senate Bill No. 1393

Prior to enactment of Senate Bill No. 1393, trial courts had no authority to strike enhancements under section 667, subdivision (a)(1). (*People v. Alexander* (2020) 45 Cal.App.5th 341, 344 (*Alexander*).) Senate Bill No. 1393, which became effective January 1, 2019, removed the prohibition on striking such enhancements by deleting the following provision of former section 1385, subdivision (b), which stated: "This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) ch. 1013, § 2.) Section 1385, subdivision (b)(1), now provides that "[i]f the court has the authority . . . to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice . . . ."

Whether Senate Bill No. 1393's amendment of section 1385 is to be applied retroactively to cases that are final is a question of law that we review de novo. (*People v. Failla* (2006) 140 Cal.App.4th 1514, 1520.)

B. CDCR's Recommendation to Recall Arnold's Sentence

Section 1170, subdivision (d)(1), authorizes a court to "recall the sentence and commitment previously ordered," and resentence a defendant "at any time upon the recommendation of" the Secretary of CDCR. Of relevance here, the secretary may recommend that a sentence be recalled when there is a change in sentencing law "due to new statutory or case law authority with statewide application." (Cal. Code Regs., tit. 15, § 3076.1, subds. (a)(3) & (d)(1).)

On July 2, 2019, CDCR wrote to the trial court "to provide the court with authority to resentence [Arnold] pursuant to . . . section 1170, subdivision (d)." The basis for CDCR's recommendation was as follows: "Courts were previously barred from striking prior serious felony convictions for purposes of enhancement under this section. However, . . . courts are now authorized to exercise their discretion to strike prior serious felony convictions for purposes of enhancement under this section, or to strike the punishment for the enhancement under this section, pursuant to section 1385. [¶] In light of the court's newfound authority to not impose a consecutive enhancement pursuant to section 667, subdivision (a)(l) (authority which did not exist at the time of Arnold's sentencing) [CDCR] recommend[s] that inmate Arnold's sentence be recalled and that he be resentenced in accordance with section 1170, subdivision (d)."

Although CDCR's recommendation does not explicitly mention Senate Bill No. 1393, the change to section 1385 that is referenced in its request was made by Senate Bill No. 1393. (See *People v. Stamps* (2020) 9 Cal.5th 685, 693, fn. omitted ["On September 30, 2018, the governor approved Senate Bill No. 1393 . . . allowing a trial court to dismiss a serious felony enhancement in furtherance of justice"].) CDCR's request is therefore premised upon Senate Bill No. 1393, squarely raising the question whether its amendment of section 1385 should be applied to Arnold's sentence.

Respondent contends the trial court is not obliged to accept CDCR's recommendation. Rather, the court first should consider whether there is a legal basis to recall the sentence. We agree. By virtue of its permissive language, authorizing CDCR to make a "recommendation," and specifying the court "may" recall the sentence, section 1170, subdivision (d)(1), affords the trial court the opportunity first to determine whether to recall the sentence, and then to conduct a resentencing hearing in the event it does recall the sentence. (See *Dix v. Superior Court* (1991) 53 Cal.3d 442, 459 & fn. 13 [the trial court is not required to accept CDCR's recommendation to recall a sentence]; *People v. Frazier* (2020) 55 Cal.App.5th 858, 866 [a recommendation by CDCR does not trigger "any right to the recommended relief"]; see also *People v. McCallum* (2020) 55 Cal.App.5th 202, 214 [concluding that upon receiving a recommendation from CDCR under § 1170, subd. (d)(1), the trial court should have considered the briefing submitted by the parties before deciding whether to recall the sentence].)

Therefore, we first examine the basis for CDCR's recommendation to determine whether the trial court erred in declining to recall Arnold's sentence.

C. The Trial Court Properly Declined CDCR's Recommendation to Recall Arnold's Sentence Because Senate Bill No. 1393 Does Not Apply Retroactively to Final Judgments

Arnold entered his plea, and was convicted and sentenced in October 2012. Because he did not appeal from the judgment, Arnold's conviction became final in December 2012. (*Alexander*, *supra*, 45 Cal.App.5th at pp. 344-345, citing *In re Spencer* (1965) 63 Cal.2d 400, 405 [a conviction becomes final when "courts can no longer provide a remedy to a defendant on direct review"] and Cal. Rules of Court, rule 8.308(a) [a defendant has 60 days to appeal].)

The California Supreme Court has concluded that Senate Bill No. 1393 is an ameliorative change in sentencing law that applies retroactively to defendants whose judgments were not final as of January 1, 2019. (*People v. Stamps*, *supra*, 9 Cal.5th at p. 699; *People v. Bell* (2020) 47 Cal.App.5th 153, 198; *Alexander*, *supra*, 45 Cal.App.5th at pp. 345-346.) In *Alexander*, our colleagues in Division Six determined that Senate Bill No. 1393 does not apply to final judgments. (*Alexander*, *supra*, at p. 344.) Its decision is based upon the settled rule that " ' "in the absence of an express retroactivity provision[,] . . . [or] unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application," ameliorative legislation does not affect convictions that have become final. [Citation.]' " (*Id.* at p. 345, quoting *People v. Martinez* (2018) 4 Cal.5th 647, 655; see also *People v. McKenzie* (2020) 9 Cal.5th 40, 46 ["the

cutoff point for application of ameliorative amendments [is] the date when the 'case[ ]' [citation] or 'prosecution[ ]' is 'reduced to final judgment' "], quoting *In re Estrada* (1965) 63 Cal.2d 740, 746, 747 (*Estrada*).)

We agree with *Alexander* that there is "nothing in Senate Bill [No.] 1393's legislative history indicating that the law applies to final convictions." (*Alexander*, *supra*, 45 Cal.App.5th at p. 345.)

To the contrary, a comparison of Senate Bill No. 1393's amendment of section 1385 with other statutes or voter initiatives in which courts have applied an ameliorative reform retroactively to final judgments reveals why we must apply the presumption that "ameliorative legislation does not affect convictions that have become final." (*People v. Martinez*, *supra*, 4 Cal.5th at p. 655.)

For instance, our Supreme Court held that the Three Strikes Reform Act, passed by the voters in Proposition 36 in 2012 to reduce the punishment prescribed for certain third strike defendants, retroactively applied to final judgments because the sentence recall provision, found at section 1170.126 "creates a special mechanism that entitles all persons 'presently serving' indeterminate life terms imposed under the prior law to seek resentencing under the new law." (*People v. Conley* (2016) 63 Cal.4th 646, 657 (*Conley*).) The court concluded Proposition 36 applied to final judgments because: "In enacting the recall provision, the voters . . . took the extraordinary step of extending the retroactive benefits of the [Three Strikes Reform] Act beyond the bounds contemplated by *Estrada*—including even prisoners serving *final* sentences within the [Three Strikes Reform] Act's ameliorative reach—but subject to a special procedural

mechanism for the recall of sentences already imposed. In prescribing the scope and manner of the [Three Strikes Reform] Act's retroactive application, the voters did not distinguish between final and nonfinal sentences, as *Estrada* would presume, but instead drew the relevant line between prisoners 'presently serving' indeterminate life terms—whether final or not—and defendants yet to be sentenced." (*Conley*, *supra*, at pp. 657-658.)

Similarly, our Supreme Court held Proposition 47, passed by the voters in 2014 to reduce common theft- and drug-related felonies to misdemeanors, applied to final judgments because, "[l]ike the [Three Strikes] Reform Act, Proposition 47 is an ameliorative criminal law measure that is 'not silent on the question of retroactivity,' but instead contains a detailed set of provisions designed to extend the statute's benefits retroactively." (*People v. DeHoyos* (2018) 4 Cal.5th 594, 603, quoting *Conley*, *supra*, 63 Cal.4th at p. 657.) Proposition 47's recall provisions "include . . . a recall and resentencing mechanism for individuals who were 'serving a sentence' for a covered offense as of Proposition 47's effective date. (§ 1170.18, subd. (a)." (*DeHoyos*, *supra*, at p. 603.) Finally, the court observed that like the Three Strikes Reform Act, Proposition 47's recall provision "expressly makes resentencing dependent on a court's assessment of the likelihood that a defendant's early release will pose a risk to public safety, undermining the idea that voters 'categorically determined that "imposition of a lesser punishment" [§ 1170.18] will in all cases "sufficiently serve the public interest." ' " (*DeHoyos*, *supra*, at p. 603, quoting *Conley*, *supra*, at p. 658.)

Finally, we held Proposition 64, passed by the voters in 2016 to reduce several felony cannabis offenses to misdemeanors, applied to final judgments because "Proposition 64, like

Proposition 36, 'is not silent on the question of retroactivity[,]' . . . [because i]t provides for a procedure analogous to Proposition 36's procedure 'for application of the new lesser punishment to persons who have previously been sentenced.' " (*People v. Rascon* (2017) 10 Cal.App.5th 388, 394, citation omitted, quoting *Conley*, *supra*, 63 Cal.4th at pp. 657 & 658.) "Proposition 64, like Proposition 36, expressly restricts the availability of the reduced criminal penalties to those inmates who do not pose an unreasonable risk of danger to public safety (Health & Saf. Code, § 11361.8, subd. (b)), thereby making 'retroactive application of the lesser punishment contingent on a court's evaluation of the defendant's dangerousness.' " (*Rascon*, *supra*, at p. 394, quoting *Conley*, *supra*, at p. 658.) We therefore concluded: "In light of the similarities between the two propositions as to resentencing, we infer a similar intent on the part of the electorate—to create access to resentencing for prisoners previously sentenced for specified marijuana-related crimes . . . ." (*Rascon*, *supra*, at p. 394.)

Unlike the amendments to the Penal Code made by Propositions 36, 47, and 64, the amendment made by Senate Bill No. 1393 was to remove a prohibition on a trial court's sentencing authority by authorizing it to strike additional punishment for prior serious felony convictions. Unlike those Propositions, Senate Bill No. 1393 created no recall mechanism applicable to persons currently serving sentences. And, unlike those Propositions, Arnold has not identified any legislative history suggesting the Legislature intended to take "the extraordinary step of extending the retroactive benefits of [Senate Bill No. 1393] beyond the bounds contemplated by *Estrada*—[to include] even prisoners serving *final* sentences within [Senate

Bill No. 1393]'s ameliorative reach . . . ." (*Conley*, *supra*, 63 Cal.4th at pp. 657-658.)

Arnold acknowledges his conviction became final in 2012, but contends that "[i]n accordance with . . . section 1170, subdivision (d) as updated in 2018, CDCR's recommendation letter on behalf of [Arnold] provided the trial court with authority to resentence him." The reason Arnold offers is that "[u]nder the new version of section 1170[, subdivision] (d), the resentencing court is expressly given authority to 'reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice.['] (. . . § 1170, subd. (d)(1).)"

This argument misses the mark. It is true that the recommendation by CDCR vests the trial court with jurisdiction to consider recalling a sentence. (*People v. McCallum*, *supra*, 55 Cal.App.5th at pp. 210, 217.) It is also true that section 1170, subdivision (d)(1), was amended in 2018 to authorize the court "resentencing under this paragraph" to modify the judgment "in the interest of justice" on consideration of certain "postconviction factors."[2] Nonetheless, "the inclusion of postconviction factors in

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[2] The 2018 amendment added the following language to section 1170, subdivision (d)(1): "The court resentencing under this paragraph may reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice. The court may consider postconviction factors, including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed since the inmate's original

section 1170, subdivision (d)(1), [provides] guidance for the trial court's resentencing decision, not its initial decision whether to recall the sentence." (*Ibid.*)

Arnold does not cite any legal authority that requires a trial court to recall a lawfully imposed sentence based on CDCR's recommendation for the purpose of applying a change in sentencing law enacted after the judgment of conviction is final, absent any indication that the Legislature intended the amended law to apply retroactively to final judgments. We have not located any authority to support this proposition. Because there is no basis for the trial court to retroactively apply Senate Bill No. 1393's amendment of section 1385 to Arnold's sentence, the trial court did not err in failing to recall his sentence.

D. Recent Cases Addressing the Scope of a Court's Resentencing Authority are Inapposite

Arnold argues that "[i]f [his] sentence from 2012 were to be recalled pursuant to [section]1170[, subdivision] (d)(1), there would no longer be a final judgment." He cites recent cases for the proposition that when a sentence is recalled, the original sentence is no longer operative, freeing the trial court to apply ameliorative laws because the judgment is no longer final. (See *People v. Hwang* (2021) 60 Cal.App.5th 358, review granted Apr. 14, 2021, S267274 (*Hwang*); *People v. Lopez* (2020) 56 Cal.App.5th 835, review granted Jan. 27, 2021, S265936 (*Lopez*); contra, *People v Federico* (2020) 50 Cal.App.5th 318, 321, review granted Aug. 26, 2020, S263082 (*Federico*).) This argument rests on a false premise. As we have explained, CDCR's

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sentencing so that the inmate's continued incarceration is no longer in the interest of justice." (Stats. 2018, ch. 36, § 17.)

recommendation did not operate to recall Arnold's sentence, and the trial court did not err in declining to recall the sentence. Unless and until the trial court determines the sentence should be recalled, Arnold's judgment is final and his sentence stands as originally imposed.

The cases Arnold relies upon involved resentencing hearings held to consider clarifications in sentencing laws as determined by subsequent court decisions, which called into question the legality of the sentence imposed. In *Hwang*, CDCR initiated proceedings under section 1170, subdivision (d)(1), by recommending the defendant's sentence be recalled because the sentence might have been unlawful under *People v. Rodriguez* (2009) 47 Cal.4th 501 (*Rodriguez*). (*Hwang*, *supra*, 60 Cal.App.5th at p. 362.) *Rodriguez* held the trial court erred in imposing punishment for both a firearm enhancement and a gang enhancement, which had potential application to the sentence imposed in *Hwang*. (*Rodriguez*, *supra*, at p. 504; *Hwang*, *supra*, at p. 362.) Thus, the referral by CDCR in *Hwang* rested on the possibility that the trial court had imposed an unlawful sentence. (*Hwang*, *supra*, at p. 362.)

Similarly, in *Lopez,* CDCR recommended recall of a sentence pursuant to *People v. Le* (2015) 61 Cal.4th 416, which applied *Rodriguez* to another pair of sentencing enhancements, and called into question the propriety of the sentence imposed on the defendant. (*Lopez*, *supra*, 56 Cal.App.5th at p. 839; see *Le*, *supra*, at p. 419.) The *Hwang* court agreed with *Lopez* that the recall of the sentence in turn "reopened the finality of [the] judgment," at the time of resentencing, which allowed the trial court to consider the application of ameliorative statutes enacted after the initial judgment had become final. (*Hwang*, *supra*, 60

Cal.App.5th at p. 366; *Lopez*, *supra*, at p. 845; contra, *Federico*, *supra*, 50 Cal.App.5th at pp. 324-326.)[3]

In Arnold's case, CDCR's referral for resentencing is not premised on the possibility that Arnold's sentence is unlawful. Because we conclude there is no basis for recall of Arnold's sentence, the cases concerning the breadth of the trial court's sentencing authority once a sentence is recalled are inapposite.

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[3] Two additional cases pending review in the Supreme Court also concern the scope of the trial court's resentencing authority when reconsidering potentially unlawful sentences. In *Federico*, CDCR recommended recall of a sentence pursuant to *People v. Gonzalez* (2009) 178 Cal.App.4th 1325, which barred imposition of both an enhancement for great bodily injury and a gang enhancement. (*Federico*, *supra*, 50 Cal.App.5th at p. 321.) *People v. Padilla* (2020) 50 Cal.App.5th 244, review granted August 26, 2020, S263375, involves a resentencing hearing following a successful challenge to a sentence in light of intervening decisions concerning the sentencing of juveniles to life without parole. (*Id.* at p. 247.)

DISPOSITION

The trial court's order is affirmed.
NOT TO BE PUBLISHED

FEDERMAN, J.*

We concur:

ROTHSCHILD, P. J.

BENDIX, J.

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* Judge of the San Luis Obispo County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.