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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

VINCENT VELEZ,

Defendant and Appellant.

F042668

(Super. Ct. No. 658120-1)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Gary Austin, Judge.

Cara DeVito, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Matthew L. Cate and Angelo S. Edralin, Deputy Attorneys General, for Plaintiff and Respondent.

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A Fresno County jury convicted appellant Vincent Velez of first-degree murder (Pen. Code,¹ § 187(a)) with the personal use of a firearm (§ 12022.53, subds. (b)) for the

* Before Harris, Acting P.J., Buckley, J., and Levy, J.

benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The trial court sentenced Velez to 25-years-to-life for the murder plus two consecutive 10-year terms for the street gang and firearm enhancements.² Velez believes the increased 10-year term for the street gang enhancement was unauthorized by law. We agree and modify the judgment accordingly.

DISCUSSION³

Enacted as part of Proposition 21’s Gang Violence and Juvenile Crime Prevention Act, section 186.22 provides in pertinent part:

“(b)(1) *Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows:*

[¶] ... [¶]

“(C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5 [including murder], the person shall be punished by an additional term of 10 years.

[¶] ... [¶]

“(5) Except as provided in paragraph (4) [addressing inapplicable felony offenses], any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for

¹ Further statutory references are to the Penal Code.

² The trial court also struck a second firearm enhancement under section 12022, subdivision (a)(1).

³ Velez does not dispute the jury’s findings or the substantiality of the evidence; a recitation of the underlying facts is therefore unnecessary to address his legal question regarding the application of the section 186.22 street gang enhancement. Velez has not waived his right to appellate review by failing to raise the issue before the trial court because he contends his sentence was unauthorized by law and could not have been imposed under any circumstances. (*People v. Smith* (2001) 24 Cal.4th 849, 852; *People v. Scott* (1994) 9 Cal.4th 331, 354.)

life, shall not be paroled until a minimum of 15 calendar years have been served.” (Emphasis added.)

Velez contends that in lieu of the 10-year consecutive sentence imposed for the gang enhancement under section 186.22, subdivision (b)(1)(C), the trial court should have sentenced him under the enhancement provision’s subdivision (b)(5), which provides for a 15 year minimum period of incarceration before parole.

The application of the gang enhancement under section 186.22 has been subject to debate and is currently pending before the Supreme Court. (*People v. Lopez*, review granted Nov. 12, 2003, S119294; see also *People v. Lopez*, review granted June 9, 2004, S123684; *People v. Vo*, review granted Nov. 25, 2003, S119234.⁴) The majority of published appellate decisions have found the determinate term sentence enhancement under subdivision (b)(1) applicable only where the defendant did not commit a felony punishable by imprisonment for life under subdivision (b)(5).⁵ (*People v. Harper* (2003) 109 Cal.App.4th 520 [Fourth App. Dist., Div. One]; *People v. Johnson* (2003) 109 Cal.App.4th 1230 [Second App. Dist., Div. Six]; *People v. Ortiz* (1997) 57 Cal.App.4th 480 [Fourth App. Dist., Div. Three].) Under these cases, the courts of appeal found the defendants’ minimum parole terms extended under subdivision (b)(5). “Put another way,

⁴ The Supreme Court granted review in *People v. Lopez* (S119234) and *People v. Vo* (S119294), deferring briefing pending its decision in *People v. Lopez* (S119294) to examine the following issue: “Is a defendant who is convicted of first degree murder with a finding that the crime was committed for the benefit of a criminal gang within the meaning of Penal Code section 186.22, subject to an enhancement of 10 years under section 186.22, subdivision (b)(1)(c) or a minimum parole eligibility term of 15 years section 186.22, subdivision (b)(5), which applies where the defendant is convicted of ‘a felon punishable by imprisonment in the state prison for life?’ ” (Supreme Ct. Minutes, June 9, 2004, S123684 [*Lopez*]; Supreme Ct. Minutes, Nov. 25, 2003, S119234 [*Vo*]; Supreme Ct. Minutes, Nov. 12, 2003, S119294 [*Lopez*].)

⁵ Section 186.22, subdivision (b)(5) was formerly numbered (b)(4) before the voters approved Proposition 21 at the March 7, 2000, Primary Election, effective March 8, 2000. Further reference to subdivision (b)(5) includes former subdivision (b)(4).

the Penal Code section 186.22 enhancement is not an additional term, but an extended parole eligibility date.” (*Ortiz, supra*, at p. 486.)

The Attorney General urges this court to apply the reasoning of the majority in *People v. Herrera* (2001) 88 Cal.App.4th 1353 [Second App. Dist., Div. Five]. Over a strongly worded dissent, the *Herrera* court construed the “[e]xcept as provided by paragraph (4)” language in section 186.22, subdivision (b)(1) to mean that if subdivision (b)(5) does not apply for any reason, then the determinate sentencing enhancement under subdivision (b)(1) must be adopted. (*Herrera, supra*, at p. 1364.) The Attorney General contends that as in *Herrera*, the 15-year minimum parole term under subdivision (b)(5) is inapplicable to Velez because he was already subject to a minimum parole term under his 25-years-to-life sentence for first-degree murder. According the Attorney General, the 10-year determinate sentence enhancement must therefore be applied under section 186.22, subdivision (b)(1)(C).

Given the weight of contrary appellate authority and lack of directly relevant Supreme Court direction,⁶ we decline to adopt the Attorney General’s position. Moreover, “any statutory ambiguities in a penal law ordinarily should be construed in the defendant’s favor.” (*People v. Franklin* (1999) 20 Cal.4th 249, 255.) “When language which is susceptible of two constructions is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance

⁶ In *People v. Montes* (2003) 31 Cal.4th 350, the Supreme Court examined whether the 10-year determinate term under section 186.22, subdivision (b)(1)(C) applied to a seven-year base term for attempted murder (§§ 187, 664) where the defendant was also sentenced to 25-year-to-life firearm enhancement (§ 12022.53, subd. (d)). *Montes* concluded that “section 186.22(b)(5) applies only where the felony by its own terms provides for a life sentence.” (*Montes, supra*, 31 Cal.4th at p. 352.) However, the Supreme Court deliberately cautioned that the proper application of section 186.22(b)(5) when the underlying felony itself provides for an indeterminate life sentence was not before it and declined to express an opinion on the matter. (*Montes, supra*, at p. 361, fn. 14.)

of its application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute.” (*People v. Overstreet* (1986) 42 Cal.3d 891, 896.) So construing section 186.22, the determinate street gang enhancement applies only when a determinate sentence is imposed for the underlying offense. (§ 186.22, subd. (b)(1).) When a defendant is sentenced to a life term, the 15-year parole minimum must be imposed. (§ 186.22, subd. (b)(5).)

We therefore modify Velez’s sentence by vacating the 10-year gang-related enhancement under section 186.22, subdivision (b)(1)(C) and imposing in its place the requirement that he “shall not be paroled until a minimum of 15 calendar years have been served” under section 186.22, subdivision (b)(5). As a result, Velez’s sentence is now 25 years to life for murder plus a consecutive 10 years for the firearm enhancement, with a “no parole” condition until he has served at least 15 years.

DISPOSITION

The judgment is modified by vacating the 10-year enhancement imposed under subdivision (b)(1)(C) of section 186.22 and imposing in its place the enhancement required by subdivision (b)(5) of section 186.22 mandating Velez not be paroled until he serves a minimum of 15 calendar years. As modified, the judgment is affirmed and the case is remanded to the trial court with directions to issue a corrected abstract of judgment and forward it to the Department of Corrections.