Filed 7/14/22 P. v. McDavid CA4/1
Opinion following rehearing

OPINION ON REHEARING

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. WELDON K. McDAVID, JR., Defendant and Appellant.	D078919 (Super. Ct. No. SCN363925)

APPEAL from a judgment of the Superior Court of San Diego County, Sim von Kalinowski, Judge. Affirmed in part, reversed in part, and remanded with directions.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Charles C. Ragland, Assistant Attorney General, A.

Natasha Cortina and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Weldon K. McDavid, Jr. appeals a judgment from his resentencing hearing after we remanded this matter following his original appeal in *People v. Lovejoy et al.* (July 28, 2020, D073477), a nonpublished opinion (*Lovejoy*).[1] In *Lovejoy*, we affirmed McDavid's criminal convictions, but vacated his sentence and remanded the matter to allow the trial court to exercise its discretion under recently amended Penal Code section 12022.53[2] to either impose or strike the section 12022.53, subdivision (d) enhancements that the court had originally imposed under the former version of the statute.

On remand, the trial court declined to strike the section 12022.53 enhancements and reimposed its original sentence, except for a reduction of the restitution fines from $10,000 to $1,800. On appeal from his resentencing judgment, McDavid contends: (1) the court was unaware of, and therefore abused, its discretion to impose lesser, uncharged section 12022.53 enhancements in lieu of imposing the greater, charged section 12022.53, subdivision (d) enhancements found true by the jury; (2) his $154 criminal justice administration fee imposed under former Government Code section 29550.1 must be vacated to the extent that any amount remained unpaid as of July 1, 2021; and (3) the court erred by not crediting him with all actual custody time that he had served through the time of his resentencing. We vacate McDavid's sentence and any balance of the criminal justice administration fee imposed under former Government Code section 29550.1

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1 McDavid was tried jointly with his codefendant, Diana Lovejoy.

2 All statutory references are to the Penal Code unless otherwise specified.

that remained unpaid as of July 1, 2021, and we remand the matter for resentencing to: (1) allow the trial court to exercise its discretion as to whether to impose lesser, uncharged section 12022.53 enhancements in lieu of imposing section 12022.53, subdivision (d) enhancements; (2) amend its abstract of judgment to reflect our vacatur of any balance of the criminal justice administration fee imposed under former Government Code section 29550.1 that remained unpaid as of July 1, 2021; and (3) correct its April 30, 2021 minute order and amend its abstract of judgment to reflect an award to McDavid of presentence credit for all custody time served through the time of his April 30, 2021 resentencing.[3] In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Trial. As discussed in *Lovejoy*, *supra*, D073477, in 2017, a jury found McDavid guilty of the offenses of conspiracy to commit murder (§§ 182, subd. (a)(1), 187, subd. (a)) (count 1) and premeditated attempted murder (§§ 664, 187, subd. (a), 189) (count 2).[4] The jury also found true allegations that in committing each of those offenses, McDavid intentionally and personally discharged a firearm, causing great bodily injury (§ 12022.53, subd. (d)) and personally inflicted great bodily injury on the victim (§ 12022.7, subd. (a)).

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[3] In the event that the trial court on remand exercises its discretion to strike either or both of the section 12022.53, subdivision (d) enhancements and impose lesser section 12022.53 enhancements, the court is directed to award McDavid presentence credits for all of the time that he has served in custody through the date of the resentencing.

[4] For purposes of our disposition of McDavid's contentions on appeal, we need not repeat the underlying facts in this case. For a detailed factual and procedural background, see *Lovejoy*, *supra*, D073477.

Original sentencing. On January 31, 2018, the trial court sentenced McDavid to an indeterminate term of 25 years to life on count 1 and a consecutive indeterminate term of 25 years to life for the related section 12022.53, subdivision (d) enhancement, for a total term of 50 years to life in prison. The court also imposed, but pursuant to section 654 stayed execution of, an indeterminate term of 25 years to life on count 2, a consecutive indeterminate term of 25 years to life for the related section 12022.53, subdivision (d) enhancement, and a three-year term for the related section 12022.7, subdivision (a) enhancement.

First appeal. In his first appeal, McDavid contended, among other things, that the trial court abused its discretion by failing to exercise its discretion under recently amended section 12022.53, subdivision (h), to strike the section 12022.53, subdivision (d) enhancements for personally using a firearm and causing great bodily injury in committing his two offenses or, in the alternative, that his counsel rendered ineffective assistance by failing to request that the court strike the section 12022.53, subdivision (d) enhancements. In particular, McDavid argued that because the record affirmatively showed that the court was unaware of its discretion to strike those enhancements, the matter must be remanded to allow the court to decide whether to exercise that discretion.

In *Lovejoy*, we noted that effective January 1, 2018, Senate Bill No. 620 (Stats. 2018, ch. 682, § 1), amended section 12022.53, subdivision (h) to permit the striking of a firearm enhancement under section 12022.53, whereas under the former version, imposition of a section 12022.53 enhancement was mandatory. (*Lovejoy*, *supra*, D073477.) We concluded that at time of McDavid's original sentencing (i.e., January 31, 2018), the trial court was unaware of its discretion under recently amended section 12022.53,

subdivision (h) to strike the section 12022.53, subdivision (d) enhancements and we therefore remanded the matter for the court to conduct a new sentencing hearing to allow it to exercise that discretion. (*Lovejoy*, *supra*, D073477.) In our disposition, we stated in part: "McDavid's sentence is vacated and the matter is remanded for resentencing for the limited purpose of allowing the trial court *to exercise its discretion as to whether to strike the section 12022.53, subdivision (d) enhancements*." (*Lovejoy*, D073477, italics added.)

Resentencing on remand. On April 30, 2021, the trial court conducted a resentencing hearing on remand. The court declined to strike the section 12022.53, subdivision (d) enhancements and reimposed its original sentence, except for a reduction in the restitution fines from $10,000 to $1,800. McDavid timely filed a notice of appeal, challenging his resentencing judgment. On January 31, 2022, we sent a letter to the parties requesting that they submit supplemental briefs addressing the effect on this appeal of the opinion recently issued by the California Supreme Court in *People v. Tirado* (2022) 12 Cal.5th 688 (*Tirado*). The parties submitted, and we have considered, their supplemental briefs.

On April 21, 2022, we issued our original opinion in this case, interpreting *Tirado* as authorizing trial courts to impose lesser enhancements under section 12022.53 or other statutes. On May 6, the People filed a petition for rehearing, arguing that under the express language of section 12022.53, subdivision (j) and *Tirado*, trial courts, after striking a greater, charged section 12022.53 enhancement, have authority to impose only a lesser, uncharged enhancement under section 12022.53 and not under any other statute. On May 12, McDavid filed an answer to the petition, arguing that our original opinion was correct. On May 13, we issued an order

granting the petition for rehearing. We now issue this instant opinion adopting the People's position as set forth in its petition for rehearing.

DISCUSSION

I

Remand for Resentencing Is Required in Light of Tirado's Holding that Trial Courts Have Discretion to Impose Lesser, Uncharged Section 12022.53 Enhancements

McDavid contends that the trial court abused its discretion in reimposing the section 12022.53, subdivision (d) enhancements because the court was unaware of its discretion to impose lesser, uncharged section 12022.53 enhancements or other lesser included enhancements in lieu of the greater, charged section 12022.53, subdivision (d) enhancements. He also contends that if his counsel forfeited this issue by not requesting that the court impose lesser section 12022.53 or other enhancements, he was denied effective assistance of counsel.

We agree with McDavid that remand for resentencing is required, but not because the trial court was unaware of its discretion. Rather, we conclude that remand is required because, while McDavid's appeal was pending in this court, the California Supreme Court issued its opinion in *Tirado*, *supra*, 12 Cal.5th 688, resolving a split of authority among the Courts of Appeal on the question of whether a trial court may strike a section 12022.53, subdivision (d) enhancement and impose a lesser, uncharged section 12022.53 enhancement; *Tirado* applies to all nonfinal judgments.

A

Resentencing. As noted, in *Lovejoy*, we vacated McDavid's original sentence and remanded the matter for resentencing to allow the trial court to exercise its discretion as to whether to strike the section 12022.53, subdivision (d) enhancements. (*Lovejoy*, *supra*, D073477.) On remand,

McDavid filed a motion to strike his section 12022.53, subdivision (d) enhancements in the furtherance of justice, citing his personal circumstances and history and the underlying facts of the case. At the resentencing hearing, his counsel requested that the court exercise its discretion to strike the section 12022.53, subdivision (d) enhancements. The prosecutor opposed McDavid's request, arguing that the interests of justice and the facts of the case supported reimposition of the section 12022.53, subdivision (d) enhancements. Neither McDavid's counsel nor the prosecutor argued that the court had discretion to impose lesser, uncharged section 12022.53 enhancements in lieu of imposing the greater, charged section 12022.53, subdivision (d) enhancements. The court declined to exercise its discretion to strike the section 12022.53, subdivision (d) enhancements, finding that doing so would not be in the interests of justice. The court reimposed the original sentence, including the section 12022.53, subdivision (d) enhancements, noting that McDavid was more culpable than his codefendant, Diana Lovejoy, and that his offenses were extremely serious.

B

Relevant law. "Section 12022.53 sets forth the following escalating additional and consecutive penalties, beyond that imposed for the substantive crime, for use of a firearm in the commission of specified felonies . . . : a 10-year prison term for personal use of a firearm, even if the weapon is not operable or loaded [section 12022.53, subdivision (b)]; a 20-year term if the defendant 'personally and intentionally discharges a firearm' [section 12022.53, subdivision (c)]; and a 25-year-to-life term if the intentional discharge of the firearm causes 'great bodily injury' or 'death, to any person other than an accomplice' [section 12022.53, subdivision (d)]." (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1124.) "For these enhancements to apply,

the requisite facts must be alleged in the information or indictment, and [the] defendant must admit those facts or the trier of fact must find them to be true." (*Id*. at pp. 1124-1125.)

Section 12022.53, subdivision (h), as amended effective January 1, 2018, provides: "The 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." (Stats. 2017, ch. 682, § 2.) Section 1385 provides: "[A] judge or magistrate may, either on motion of the court or upon the application of the prosecuting attorney, and in furtherance of justice, order an action be dismissed." (§ 1385, subd. (a).) Section 1385 further provides that where "the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice." (§ 1385, subd. (b)(1).)

In *People v. Morrison* (2019) 34 Cal.App.5th 217 (*Morrison*), the court concluded that under then newly amended section 12022.53, subdivision (h), trial courts had the discretion to strike a section 12022.53 enhancement and impose a lesser included, *uncharged* section 12022.53 enhancement. (*Morrison*, at pp. 222-223.) *Morrison* explained that case law generally supports the imposition by a trial court of a lesser enhancement that was not charged in the information when the greater, charged enhancement was found true by the trier of fact, but the trial court thereafter found that greater enhancement to be either legally inapplicable or unsupported by sufficient evidence. (*Id*. at p. 222.) Based on that general discretion, *Morrison* extended the scope of a trial court's discretion by concluding that a trial court could also impose a lesser section 12022.53 enhancement after

striking a section 12022.53, subdivision (d) enhancement under section 1385, *even if* that lesser enhancement had not been charged in the information and not been found true by a trier of fact. (*Morrison*, at pp. 222-223.)

In *People v. Tirado* (2019) 38 Cal.App.5th 637 (review granted Nov. 13, 2019, S257658 and reversed and remanded by *Tirado*, *supra*, 12 Cal.5th 688), the Court of Appeal concluded that the plain language of sections 1385 and 12022.53, subdivision (h) did not authorize a trial court to substitute one enhancement for another. (*People v. Tirado*, at p. 643.) Accordingly, the court concluded that trial courts do not have the authority to impose lesser, uncharged section 12022.53 enhancements, but rather, have only the binary choice of imposing a section 12022.53, subdivision (d) enhancement or striking or dismissing it. (*People v. Tirado*, at pp. 640, 643-644.) In so holding, the court expressed its disagreement with the reasoning and holding in *Morrison*, *supra*, 34 Cal.App.5th 217. (*People v. Tirado*, at p. 644.)

In *Tirado*, *supra*, 12 Cal.5th 688, the California Supreme Court noted that the Courts of Appeal had split on the question of whether a trial court has the authority to strike a greater section 12022.53, subdivision (d) enhancement and impose a lesser, uncharged section 12022.53 enhancement instead, and agreed with *Morrison*'s holding that trial courts do have such discretion. (*Tirado*, at pp. 696, 701.) In explaining its holding, *Tirado* applied reasoning somewhat different from that applied in *Morrison*, concluding: "When an accusatory pleading alleges and the jury finds true the facts supporting a section 12022.53[, subdivision] (d) enhancement, and the court determines that the section 12022.53[, subdivision] (d) enhancement should be struck or dismissed under section 12022.53[, subdivision] (h), the court may, under section 12022.53[, subdivision] (j), impose an enhancement under section 12022.53[, subdivision] (b) or (c)." (*Tirado*, at p. 700.) The

court reasoned that section 12022.53, subdivision (h) gives trial courts the discretion to strike or dismiss a greater, charged section 12022.53 enhancement and that section 12022.53, subdivision (j) gives them the discretion to impose a lesser, uncharged section 12022.53 enhancement where the accusatory pleading alleged, and the jury found true, the facts supporting such a lesser, uncharged section 12022.53 enhancement. (*Tirado*, at pp. 694, 697.) In particular, the court stated: "Section 12022.53[, subdivision] (j) is the subdivision that authorizes the imposition of enhancements under section 12022.53. It provides that for the penalties in section 12022.53 to apply, the existence of any fact required by section 12022.53[, subdivision] (b), (c), or (d) must be alleged in the accusatory pleading and admitted or found true."[5] (*Tirado*, at p. 700.) Accordingly, *Tirado* held that a trial court has the discretion to strike a greater, charged section 12022.53 enhancement and impose a lesser, uncharged section 12022.53 enhancement where the facts supporting that lesser enhancement were alleged in the information and found true by the jury.

C

Analysis. McDavid asserts that because the record shows that the trial court was unaware of its discretion to strike the section 12022.53, subdivision (d) enhancements and instead impose lesser, uncharged section 12022.53

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5 Section 12022.53, subdivision (j) provides: "For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact. When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment for that enhancement pursuant to this section rather than imposing punishment authorized under any other law, unless another enhancement provides for a greater penalty or a longer term of imprisonment."

enhancements or other lesser included enhancements, we must remand the matter to permit the court to decide whether to exercise that discretion. The People argue that McDavid may not raise this issue on appeal because he forfeited it by not raising it in the trial court prior to or during his resentencing hearing. However, as discussed *post*, because *Tirado* resolved a split of authority among the Courts of Appeal on the instant question, *Tirado* applies retrospectively to McDavid's nonfinal judgment and therefore, remand for resentencing is required regardless of any forfeiture.

At the time of McDavid's April 30, 2021 resentencing, the California Supreme Court had not yet issued its decision in *Tirado*, *supra*, 12 Cal.5th 688, and there is nothing in the record indicating that the trial court anticipated the Supreme Court's holding, or otherwise understood that it had discretion to strike the section 12022.53, subdivision (d) enhancements and instead impose lesser, uncharged section 12022.53 enhancements. Neither McDavid's counsel nor the prosecutor raised the issue of the trial court's discretion to strike the section 12022.53, subdivision (d) enhancements and instead impose lesser, uncharged section 12022.53 enhancements. Further, there is nothing in our opinion in *Lovejoy* that would have made the trial court aware of that discretion. On the contrary, the trial court, as well as the parties, could have reasonably interpreted the language of our disposition in *Lovejoy* as giving the court only a binary choice on remand to either impose *or* strike the section 12022.53, subdivision (d) enhancements. (*Lovejoy*, *supra*, D073477.) In reimposing the section 12022.53, subdivision (d) enhancements, the trial court reasoned that it would not be in the interests of justice to strike those enhancements. Because the court's reasoning reflects an apparent belief that it had only a binary choice (i.e., to either impose *or* strike the section 12022.53, subdivision (d) enhancements) in exercising its

sentencing discretion on remand, the record does not demonstrate that the trial court understood, and exercised, its discretion to strike the section 12022.53, subdivision (d) enhancements and instead impose lesser, uncharged section 12022.53 enhancements.

In addition, because, as noted *ante*, prior to the Supreme Court's decision in *Tirado* there was a split among the Courts of Appeal on the question of a trial court's authority to strike a greater section 12022.53 enhancement and instead impose a lesser, uncharged section 120220.53 enhancement, we cannot presume that, at the time of McDavid's resentencing on April 30, 2021, the trial court was aware of its discretion in this regard. (See, e.g., *People v. Jeffers* (1987) 43 Cal.3d 984, 1000 (*Jeffers*); *People v. Chambers* (1982) 136 Cal.App.3d 444, 457 (*Chambers*).) On the contrary, we cannot fault the trial court for failing to anticipate that the California Supreme Court would subsequently issue its opinion in *Tirado* holding that trial courts have such discretion.

We agree with McDavid that his case must be remanded for resentencing, but not, as he argues, because the trial court was unaware of its discretion under *Morrison*. Rather, his case must be remanded because he is entitled to the retrospective application of the holding in *Tirado*. The general rule is that judicial decisions are given retrospective effect. *People v. Guerra* (1984) 37 Cal.3d 385 noted that the principle of retrospective application to all nonfinal judgments "is well settled. 'As a matter of normal judicial operation, even a non-retroactive decision [i.e., one that cannot serve as a basis for collateral attack on a final judgment] ordinarily governs all cases still pending on direct review when the decision is rendered.' [Citation.]" (*Id*. at p. 400, quoting *People v. Rollins* (1967) 65 Cal.2d 681, 685, fn. 3.) That rule applies to decisions of the California Supreme Court, like

Tirado, that resolve conflicts between the Courts of Appeal or establish the meaning of a statutory enactment. (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1023; *In re Borlik* (2011) 194 Cal.App.4th 30, 40; *People v. Walsh* (1996) 49 Cal.App.4th 1096, 1104 [holding that because California Supreme Court opinion "resolved a conflict between lower court decisions, the ordinary presumption of retroactive operation applies"]; *Sargon Enterprises, Inc. v. University of Southern California* (2013) 215 Cal.App.4th 1495, 1503.) Accordingly, although *Tirado* had not been decided at the time of McDavid's resentencing on April 30, 2021, he is entitled to its retrospective application to his case because the judgment in his case is not final.

Because the record does not show that the trial court was aware that it had discretion to strike the section 12022.53, subdivision (d) enhancements and instead impose lesser, uncharged section 12022.53 enhancements, we conclude that the appropriate remedy is to remand the matter to the trial court for the court to conduct another resentencing hearing at which it shall exercise its discretion as to whether to strike the section 12022.53, subdivision (d) enhancements and instead impose lesser, uncharged section 12022.53 enhancements, as authorized by *Tirado*.[6] (Cf. *People v. Lua* (2017)

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6 Although at the April 30, 2021 resentencing hearing the trial court elected not to strike the section 12022.53, subdivision (d) enhancements, noting McDavid's greater culpability than Lovejoy's and the seriousness of his offenses, the record supports an inference that the court may not necessarily have declined to exercise its discretion under *Tirado* if it had been aware of it. For example, given Lovejoy's recruitment and manipulation of McDavid to kill her estranged husband, as well as other circumstances (e.g., McDavid's lack of serious criminal history, his military history, etc.), the court might have concluded that the imposition of a total prison term for McDavid (i.e., 50 years to life) that was nearly twice the total prison term imposed on Lovejoy (i.e., 26 years to life) was not appropriate under the circumstances and exercised its discretion to strike the section 12022.53,

10 Cal.App.5th 1004, 1007 [remand appropriate for court to consider striking some or all enhancements]; cf. *Jeffers*, *supra*, 43 Cal.3d at p. 1000 [remanded for resentencing where lack of authoritative statutory construction rebutted presumption that trial court followed established law]; *Chambers*, *supra*, 136 Cal.App.3d at p. 457 [remand for resentencing was appropriate because trial court's sentencing discretion had not been established at the time of appellant's sentencing].) We express no opinion regarding how the trial court should exercise that discretion on remand.

D

McDavid's suggested section 12022.5, subdivision (a) lesser enhancement option. McDavid also argues that the trial court has discretion to strike the section 12022.53, subdivision (d) enhancements and instead impose *any* lesser included enhancements if the elements of those enhancements have been found true by the trier of fact (e.g., § 12022.5, subd. (a) enhancement or § 12022.53, subd. (b) or (c) enhancement). However, we agree with the People's argument that the plain language of section 12022.53, subdivision (j) provides that if the elements of a section 12022.53 enhancement have been alleged in the accusatory pleading and found true by the trier of fact, a trial court may impose an enhancement only under section 12022.53 and not under any other statute, unless the other statute provides for a greater penalty or longer term of imprisonment. We further agree with the People that *Tirado*'s reasoning and holding support this interpretation of section 12022.53, subdivision (j).

As discussed *ante*, *Tirado* stated: "Section 12022.53[, subdivision] (j) is the subdivision that authorizes the imposition of enhancements under section

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subdivision (d) enhancements and instead impose lesser, uncharged section 12022.53 enhancements.

12022.53." (*Tirado*, *supra*, 12 Cal.5th at p. 700.) Accordingly, we look to section 12022.53, subdivision (j) to determine a trial court's authority to impose enhancements that are alleged and found true under section 12022.53. Section 12022.53, subdivision (j) provides in pertinent part: "When an enhancement specified in this section has been admitted or found to be true, *the court shall impose punishment for that enhancement pursuant to this section rather than imposing punishment authorized under any other law*, unless another enhancement provides for a greater penalty or a longer term of imprisonment." (Italics added.)

In construing section 12022.53, subdivision (j) and determining its legislative purpose, we first examine the statute's words themselves, giving them their usual and ordinary meaning and construing them in context, because a statute's plain and common sense meaning is generally the most reliable indicator of its legislative intent and purpose. (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663; *People v. Cochran* (2002) 28 Cal.4th 396, 400 (*Cochran*).) If there is no ambiguity or uncertainty in a statute's language, we presume the Legislature meant what it said; therefore, its plain meaning governs and we need not resort to its legislative history or other extrinsic sources to ascertain its legislative intent. (*Cochran*, at pp. 400-401; *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919.) Here, as the People argue, the usual and ordinary meaning of the language of section 12022.53, subdivision (j) is clear and unambiguous with respect to a trial court's authority to impose enhancements when a section 12022.53 enhancement has been alleged and admitted or found true by the trier of fact. In that circumstance, section 12022.53, subdivision (j) expressly provides that a trial court "*shall impose punishment for that enhancement pursuant to this section rather than imposing punishment authorized under any other*

law, ..." (Italics added.) By its express provisions, section 12022.53, subdivision (j) provides that if a section 12022.53 enhancement has been alleged and found true by a trier of fact, a trial court may impose *only* an enhancement under section 12022.53 (i.e., § 12022.53, subd. (b), (c), or (d)) and *not* an enhancement under any other statute (e.g., § 12022.5, subd. (a)).[7] Accordingly, as the People argue, on remand the trial court in this case has discretion under section 12022.53, subdivision (h) to strike one or both of the section 12022.53, subdivision (d) enhancements alleged against McDavid and found true by the jury and then either: (1) not impose any section 12022.53 enhancement; or (2) impose one, or two, lesser, uncharged section 12022.53 enhancements (i.e., § 12022.53, subd. (b) or (c)) pursuant to section 12022.53, subdivision (j).

Contrary to McDavid's assertion, this interpretation of section 12022.53, subdivision (j) is consistent with *Tirado*'s holding. As discussed *ante*, *Tirado* relied on section 12022.53, subdivision (j) as support for its conclusion that after a trial court exercises its discretion under section 12022.53, subdivision (h) to strike a section 12022.53 enhancement, it then has discretion to impose *a lesser section 12022.53 enhancement*. (*Tirado*, *supra*, 12 Cal.5th at pp. 694, 697, 700.) In particular, as quoted *ante*, *Tirado* stated: "When an accusatory pleading alleges and the jury finds true the facts supporting a section 12022.53[, subdivision] (d) enhancement, and the court determines that the section 12022.53[, subdivision] (d) enhancement

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7 There is an exception to this general rule authorizing a trial court to impose an enhancement under another statute when that other statutory enhancement "provides for a greater penalty or longer term of imprisonment." (§ 12022.53, subd. (j).) In the circumstances of this case, that exception does not appear to be an option for the trial court in resentencing McDavid on remand.

should be struck or dismissed under section 12022.53[, subdivision] (h), *the court may, under section 12022.53*[, subdivision] *(j), impose an enhancement under section 12022.53*[, subdivision] *(b) or (c)*." (*Tirado*, at p. 700, italics added.) The court explained: "Section 12022.53[, subdivision] (j) is the subdivision that authorizes the imposition of enhancements under section 12022.53. It provides that for the penalties in section 12022.53 to apply, the existence of any fact required by section 12022.53[, subdivision] (b), (c), or (d) must be alleged in the accusatory pleading and admitted or found true." (*Tirado*, at p. 700.) *Tirado* held that a trial court has the discretion to strike a greater, charged section 12022.53 enhancement and impose a lesser, uncharged section 12022.53 enhancement where the facts supporting that lesser enhancement were alleged in the information and found true by the jury. (*Tirado*, at p. 700.) Accordingly, *Tirado*'s reasoning and holding support our interpretation above of section 12022.53, subdivision (j).

Contrary to McDavid's assertion, neither *Tirado*'s introductory language nor its discussion of other cases in interpreting section 12022.53 requires a different conclusion regarding the proper interpretation of section 12022.53, subdivision (j). In its introductory paragraph, *Tirado* states: "The question [in this case] is what the court may do if it decides to strike [a section 12022.53, subdivision (d)] enhancement. May the court impose a lesser uncharged enhancement under either section 12022.53, subdivision (b) . . . or section 12022.53, subdivision (c) . . . ? Or is the court limited to imposing the section 12022.53[, subdivision] (d) enhancement or striking it? We conclude the statutory framework permits a court to strike the section 12022.53, [subdivision] (d) enhancement found true by the jury and to *impose a lesser uncharged statutory enhancement instead*." (*Tirado*, *supra*, 12 Cal.5th at p. 692, italics added.) The italicized language must be construed

together with the language preceding it and, in particular, the question posed by the *Tirado* court, i.e., whether a trial court may "impose a lesser uncharged enhancement under either section 12022.53, subdivision (b) . . . or section 12022.53, subdivision (c)." (*Tirado*, at p. 692.) In limiting the options available to a trial court in this circumstance, *Tirado* makes it clear that a trial court has discretion to impose a lesser, uncharged enhancement only under section 12022.53, subdivision (b) or (c).

Although *Tirado* discussed cases in which courts have approved the imposition of a lesser included enhancement other than one listed in the specific statute for the charged enhancement, none of those cases involved the instant circumstances in which a section 12022.53 enhancement was properly alleged and found true and then stricken or dismissed by the trial court. Thus, section 12022.53, subdivision (j) was not at issue. (*Tirado*, *supra*, 12 Cal.5th at pp. 697-699, citing *People v. Strickland* (1974) 11 Cal.3d 946, 961 [§ 12022 enhancement applied instead of charged § 12022.5 enhancement]; *People v. Fialho* (2014) 229 Cal.App.4th 1389, 1395, 1398 [§ 12022.5, subd. (a) enhancement applied instead of charged § 12022.53, subd. (d) enhancement which could not apply because defendant was convicted of voluntary manslaughter instead of murder].) Accordingly, we reject McDavid's argument that, under the reasoning of *Tirado*, the trial court has the discretion on remand to strike the section 12022.53, subdivision (d) enhancements and instead impose lesser included uncharged enhancements under statutes other than section 12022.53, if the factual elements for those lesser included enhancements were alleged in the information and found true by the jury (e.g., § 12022.5, subd. (a)).

II

Government Code Section 29550.1 Fee

In his opening brief, McDavid contended that the $154 criminal justice administration fee imposed under former Government Code section 29550.1 by the trial court at his April 30, 2021, resentencing hearing should be stricken in its entirety pursuant to Assembly Bill No. 1869, which became effective July 1, 2021. However, in his reply brief, he acknowledges our holding in *People v. Lopez-Vinck* (2021) 68 Cal.App.5th 945 (*Lopez-Vinck*), which was decided after he filed his opening brief, and now agrees with the People that only any remaining unpaid balance of that $154 fee as of July 1, 2021, must be vacated.

A

$154 fee imposed. At McDavid's original sentencing hearing on January 31, 2018, the trial court imposed a criminal justice administration fee of $154 pursuant to former Government Code section 29550.1.[8] At McDavid's resentencing hearing on April 30, 2021, the court reimposed the $154 criminal justice administration fee.

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8 Although the abstract of judgment states that the $154 criminal justice administration fee was being imposed pursuant to Government Code section 29550, we presume the court actually imposed that fee pursuant to former Government Code section 29550.1. (See, e.g., *Lopez-Vinck*, *supra*, 68 Cal.App.5th at p. 950 [$154 criminal justice administration fee imposed pursuant to former Gov. Code, § 29550.1]; *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1031 & fn. 10 [$154 criminal justice administration fee imposed pursuant to former Gov. Code, § 29550.1].) Accordingly, we shall hereafter refer to former Government Code section 29550.1 as the statutory authority for the court's imposition of the $154 criminal justice administration fee.

B

Relevant law. As we discussed in *Lopez-Vinck*, *supra*, 68 Cal.App.5th 945, the Legislature enacted new Government Code section 6111 (§ 6111) and repealed former Government Code section 29550.1, effective July 1, 2021. (*Lopez-Vinck*, at p. 950.) Section 6111 provides:

> "(a) On and after July 1, 2021, the unpaid balance of any court-imposed costs pursuant to Section 27712, subdivision (c) or (f) of Section 29550, and Sections 29550.1, 29550.2, and 29550.3, as those sections read on June 30, 2021, is unenforceable and uncollectible and any portion of a judgment imposing those costs shall be vacated.
>
> "(b) This section shall become operative on July 1, 2021."

(Stats. 2020, ch. 92; Assem. Bill No. 1869 (2019-2020 Reg. Sess.) § 2.) Construing that statutory language, we concluded: "By specifying the precise date on which the costs that have been imposed on defendants pursuant to [former Government Code section 29550.1] become unenforceable and uncollectible, the Legislature made clear that any amounts paid prior to [July 1, 2021] need not be vacated, regardless of whether the sentence of the person on whom the costs were imposed is final." (*Lopez-Vinck*, *supra*, 68 Cal.App.5th at p. 953.) We further concluded that because the Legislature expressed its intent to extend the ameliorative changes regarding the imposition of administrative fees to individuals serving both final and nonfinal sentences, "but only to the extent of relieving those individuals of the burden of any debt that remains unpaid on and after July 1, 2021, the [*In re Estrada* (1965) 63 Cal.2d 740] rule does not apply, and [the appellant] is not entitled to have the fee imposed pursuant to [former] Government Code section 29550.1 vacated in its entirety as a result of the repeal of [former Government Code] section 29550.1." (*Ibid.*) Accordingly, we held that the appellant was "entitled to the vacatur of that portion of the criminal justice

administration fee imposed pursuant to [former] Government Code section 29550.1 that remains unpaid as of July 1, 2021, and to the modification of his judgment consistent with such vacatur." (*Ibid.*)

C

Analysis. As the People argue in their respondent's brief and as McDavid concedes in his reply brief, our opinion in *Lopez-Vinck*, *supra*, 68 Cal.App.5th 945 is the controlling authority on McDavid's initial contention that the $154 criminal justice administration fee imposed by the trial court under former Government Code section 29550.1 should be stricken in its entirety. As we explained in *Lopez-Vinck*, under section 6111, subdivision (a), an appellant like McDavid is not entitled to have the entire $154 fee stricken from his judgment, but rather is entitled to have vacated only any remaining balance of that fee that was unpaid as of July 1, 2021. (*Lopez-Vinck*, at p. 953.) Accordingly, we vacate any balance of the costs imposed by the trial court pursuant to former Government Code section 29550.1 that remained unpaid as of July 1, 2021. (*Lopez-Vinck,* at p. 954.)

III

Presentence Custody Credits

McDavid contends that the trial court erred by not crediting him with all actual custody time that he had served before his resentencing on April 30, 2021. The People concede that the trial court should have awarded McDavid credit for all presentence custody that he served prior to his resentencing on April 30, 2021.

A

Awards of presentence custody credits. At McDavid's original sentencing hearing on January 31, 2018, the trial court awarded him 511 days of presentence credits for actual days served in custody and 76 days of

presentence credits for local conduct, for a total of 587 days of presentence credits. At his resentencing hearing on April 30, 2021, the court reduced the amount of his restitution fines from $10,000 to $1,800 and then awarded him a total of 587 days of presentence credits, which is the same number of presentence credits that it awarded him at his original sentencing.

B

Relevant law. "When . . . an appellate remand results in a modification of a felony sentence during the term of imprisonment, the trial court must calculate *actual time* the defendant has already served and credit that time against the 'subsequent sentence.' " (*People v. Buckhalter* (2001) 26 Cal.4th 20, 23 (*Buckhalter*); see also § 2900.1 [when a sentence is modified while being served, the time already served "shall be credited upon any subsequent sentence [the defendant] may receive upon a new commitment for the same criminal act or acts"].) Accordingly, when a trial court modifies a defendant's sentence on remand after an appeal, it must credit the defendant "with all *actual* days he had spent in custody, whether in jail or prison, up to that time." (*Buckhalter*, at p. 37.)

C

At McDavid's resentencing on remand after *Lovejoy*, the trial court modified its original sentence by reducing the amount of his restitution fines from $10,000 to $1,800. We conclude, and the parties agree, that because the trial court modified McDavid's sentence on remand, the court was required to recalculate the number of presentence credits to which he was entitled through the date of his resentencing (i.e., 1,772 days of presentence custody credits), award him those presentence credits in resentencing him, and then reflect that updated award in its amended abstract of judgment. (*Buckhalter*, *supra*, 26 Cal.4th at pp. 23, 37; § 2900.1.) By awarding McDavid only 511

days of presentence custody credits served through the date of his original sentencing and omitting an award for the 1,185 days of custody that he served in prison between the time of his original sentencing on January 31, 2018, and his resentencing on April 30, 2021, the court erred. On remand of this matter, the trial court is directed to amend its abstract of judgment for its April 30, 2021 resentencing to reflect a total award of 1,772 days of presentence credits (i.e., 1,696 days of presentence custody credits and 76 days of local conduct credits). In addition, in the event that the court on remand exercises its discretion to strike either or both of the section 12022.53, subdivision (d) enhancements entirely or impose lesser section 12022.53 or other lesser enhancements, the court is directed to award McDavid presentence credits for all time he will have served in custody through the date of that resentencing.[9]

DISPOSITION

The judgment is modified to vacate any portion of the criminal justice administration fee imposed by the trial court pursuant to former Government Code section 29550.1 that remained unpaid as of July 1, 2021. McDavid's sentence that was imposed on April 30, 2021, is vacated and the matter is remanded for resentencing: (1) for the limited purpose of allowing the trial

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9 Because our vacating any remaining balance of the criminal justice administration *fee* imposed pursuant to Government Code section 29550.1 does not have the effect of reducing McDavid's criminal punishment (*People v. Alford* (2007) 42 Cal.4th 749, 756-759 [court security *fee* is *not* criminal punishment]; cf. *People v. Hanson* (2000) 23 Cal.4th 355, 362 [restitution *fines* are a form of criminal punishment]), any reimposition of the section 12022.53, subdivision (d) enhancements without other modification of McDavid's sentence will not require a recalculation of his presentence credits through the date of the resentencing on remand from this appeal. (*Buckhalter*, *supra*, 26 Cal.4th at pp. 23, 37; § 2900.1.)

court to exercise its discretion as to whether to strike the section 12022.53, subdivision (d) enhancements and instead impose lesser section 12022.53, subdivision (b) or subdivision (c) enhancements; and (2) with directions that the trial court amend its abstract of judgment to reflect our vacatur of any balance of the criminal justice administration fee imposed pursuant to former Government Code section 29550.1 that remained unpaid as of July 1, 2021, and to reflect an award of the correct number of presentence credits as of April 30, 2021. In all other respects, the judgment is affirmed as so modified. The court shall forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

AARON, J.

I CONCUR:

McCONNELL, P. J.

Dato, J., Concurring and Dissenting.

I concur in the majority opinion except for part I.D of the discussion.

In our original opinion filed in April before the grant of rehearing, we concluded that although the Supreme Court's recent decision in *People v. Tirado* (2022) 12 Cal.5th 688 (*Tirado*) did not directly address the question, its language and reasoning supported the notion that a trial court has the discretion to strike a Penal Code[1] section 12022.53, subdivision (d) enhancement and instead impose a lesser included enhancement *other than* a section 12022.53, subdivision (b) or (c) enhancement (e.g., § 12022.5, subd. (a) enhancement). Nothing has changed in the intervening three months that casts doubt on our original conclusion. Because I continue to believe that the principles set forth in *Tirado* permit the sentencing court to consider imposition of a lesser included enhancement other than one specified in section 12022.53, I respectfully dissent.

In their rehearing petition the People do not contend that we overlooked any language in *Tirado*. Rather, they point to something that has been there all along but was never raised—subdivision (j) of section 12022.53. The Attorney General argues that if a sentencing court elects to exercise its express statutory discretion under subdivision (h) to strike a section 12022.53 enhancement, subdivision (j) nonetheless intercedes to prohibit imposing any lesser included enhancement other than those in section 12022.53 itself.

"Our primary task in interpreting a statute is to determine the Legislature's intent, giving effect to the law's purpose." (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037.) In construing a statute, "both the policy expressed in its terms and object

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1 Further undesignated statutory references are to the Penal Code.

implicit in its history and background should be recognized." (*People v. Navarro* (1972) 7 Cal.3d 248, 273.) To understand why the People's argument misreads the Legislature's evolving intent, some historical perspective is helpful.

The language of subdivision (j) dates from the original enactment of section 12022.53 in 1997. (Stats. 1997, ch. 503 (Assem. Bill No. 4) § 3.) The second sentence, at issue here, provides in relevant part: "When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment for that enhancement pursuant to this section rather than imposing punishment authorized under any other law . . . ." It is critical to recognize that when section 12022.53 was enacted, subdivision (h) *prohibited* a court from striking an enhancement that was alleged and found true. Under these circumstances and until subdivision (h) was amended in 2017, the meaning of subdivision (j) was clear. If a defendant was charged with both a section 12022.53 enhancement *and* a different enhancement (e.g., § 12022.5) based on the same firearm use and the jury found both to be true, subdivision (j) told the court it had to impose the 12022.53 enhancement because it provided a longer prison sentence.

By 2017, however, the Legislature had come to recognize that " '[l]onger sentences do not deter crime or protect public safety . . . . [¶] [ ]Instead, research has found that these enhancements cause problems. They disproportionately increase racial disparities in prison populations and they greatly increase the population of incarcerated persons.' " (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 620 (2017-2018 Reg. Sess.) p. 3, as amended June 13, 2017.) As a result, the Legislature amended subdivision (h), flipping it 180 degrees. (Stats. 2017, ch. 682 (Sen. Bill No.

620).) Now the statute expressly gives the sentencing court discretion to strike a section 12022.53 enhancement.

Needless to say, the question of *which* "lesser included" enhancement a court can impose after it decides to strike the greater enhancement that was alleged and adjudicated did not even arise until after subdivision (h) was amended in 2017. Two years later, in *People v. Morrison* (2019) 34 Cal.App.5th 217, the Court of Appeal held for the first time that a lesser included enhancement could be imposed after a greater enhancement was stricken. And earlier this year, the Supreme Court's *Tirado* decision approved the *Morrison* court's reasoning in holding that a sentencing court has the option to impose an intermediate lesser included enhancement as long as (1) the Legislature did not forbid use of the enhancement in this manner, and (2) all the elements of the lesser enhancement were alleged and either found true by the jury or admitted by the defendant. (*Tirado*, *supra*, 12 Cal.5th at pp. 697, 700.)

So what role does the second sentence of subdivision (j)—a provision enacted when sentencing courts had *no* discretion to strike an enhancement—play after a court exercises its new power to strike an enhancement? The simple answer is that it plays no role at all. Suppose, for example, that the trial court decides to strike a section 12022.53 enhancement and impose no other. Subdivision (j) commands that the court "shall" impose punishment "[w]hen an enhancement specified in this section has been admitted or found to be true." In the hypothetical posed, although the enhancement was found to be true, no one could seriously contend that this portion of subdivision (j) would apply in those circumstances. It is inconceivable that the Legislature intended to grant judicial discretion in subdivision (h), only to have it taken away by subdivision (j).

The analysis is no different where, in addition to striking the 12022.53 enhancement, the trial court elects to impose a lesser included enhancement under some other statute. As noted, when subdivision (j) was enacted in 1997, it instructed the sentencing court that if a greater firearm use enhancement under section 12022.53 was alleged and found to be true, it could not choose to impose a lesser enhancement in the interests of justice. But the amendment of subdivision (h) in 2017 expressly permits such leniency where it was previously prohibited. In my view, the only reasonable way to harmonize subdivision (h) and (j) is that where a trial court strikes an enhancement under subdivision (h), the part of subdivision (j) that states "the court shall impose punishment for that enhancement pursuant to this section" cannot apply. Properly interpreted to effectuate the Legislature's present intent as expressed in subdivision (h), subdivision (j) now tells the sentencing court that *unless the greater enhancement* alleged and found true under section 12022.53 *is stricken*, it cannot impose a lesser enhancement. But once a court strikes an enhancement, "[i]t is tantamount to a dismissal." (*People v. Santana* (1986) 182 Cal.App.3d 185, 190.) The allegation no longer has any effect, and subdivision (j)—which the People argue compels the court to "impose punishment for [the stricken enhancement] pursuant to this section"—cannot possibly apply.[2] (§ 12022.53, subd. (j), italics added.)

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[2] The People would interpret subdivision (j) as though it read: "When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment for that enhancement pursuant to this section*, or some other lesser enhancement provided by this section,* rather than imposing punishment authorized under any other law . . . ." But this would violate "the cardinal rule of statutory construction that courts must not add provisions to statutes." (*Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 998.)

For these reasons, I would hold that on remand, if the court exercises its discretion to strike the enhancement charged and found true under section 12022.53, subdivision (d), it also retains the discretion to impose a lesser included enhancement under section 12022.5.

DATO, J.