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

THE PEOPLE,

Plaintiff and Respondent,

v.

ELADIO LARRY PALOMINO,

Defendant and Appellant.

F039025

(Super. Ct. No. 00-63590)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Tulare County. Ronn M. Couillard, Judge.

Deborah Prucha, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Stephen G. Herndon and Rachelle A. Newcomb, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Dibiaso, Acting P.J.; Levy, J.; and Cornell, J.

## **STATEMENT OF THE CASE**

Appellant, Eladio Larry Palomino, was charged with brandishing a firearm (Pen. Code,<sup>1</sup> § 417, subd. (a)) and possession for sale of a controlled substance (Health & Saf. Code, § 11378). It was alleged with respect to the brandishing charge that the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (d)). It was further alleged with respect to the possession charge that appellant was ineligible for probation (§ 1203.073, subd. (b)(2)) and was personally armed with a firearm (§ 12022, subd. (c)).

Appellant filed a demurrer claiming that the section 186.22, subdivision (d), enhancement could not apply to the brandishing charge because the base offense was a misdemeanor rather than a “wobbler.” Upon the denial of this motion, appellant pleaded not guilty to the charges and denied the allegations.

Appellant thereafter pleaded nolo contendere to felony brandishing a weapon, and an amended charge of possession of methamphetamine while armed with a firearm (Health & Saf. Code, § 11370.1). These pleas were entered with the understanding that appellant would be sentenced to probation from the outset and would maintain his right to appeal the applicability of section 186.22, subdivision (d), to misdemeanor charges. Appellant was sentenced to three years’ probation. The court also ordered appellant to pay a restitution fee and fine, register pursuant to section 186.30 and Health and Safety Code section 11590, participate in a substance abuse counseling program, and not to associate with known gang members or wear gang indicia.

## **STATEMENT OF FACTS**

Because appellant pleaded nolo contendere to the charges against him and raises a purely legal issue, we need not dwell long on the underlying facts of his case. In brief,

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<sup>1</sup> All further statutory references shall be to the Penal Code unless specified otherwise.

appellant and two other members of a gang affiliated with the Northern California sect of gangs challenged two juveniles to fight, shouting Northern California gang slogans and derogatory remarks about Southern California gangs. Appellant brandished a firearm during this confrontation. Investigating officers established appellant's identity as one of the assailants and discovered he was on probation. A subsequent search of appellant's bedroom produced a handgun, gang paraphernalia, and a bag containing 78.49 grams of methamphetamine.

### **DISCUSSION**

Appellant contends sentencing pursuant to section 186.22, subdivision (d), must be reversed as a matter of law. He argues this provision applies only where the underlying offense is a "wobbler," i.e., a crime that can be punished either as a felony or as a misdemeanor. Appellant claims his conviction for brandishing a firearm is only a misdemeanor and, therefore, the gang enhancement of section 186.22, subdivision (d), cannot apply to his conviction. Respondent argues the language used in section 186.22, subdivision (d), indicates its provisions are not limited to wobblers and thus may properly be applied to ordinary misdemeanors. We find merit to appellant's contention and will reverse the finding on the gang enhancement.

Section 186.22, subdivision (d), dictates that anyone convicted of "a public offense punishable as a felony or a misdemeanor" for the benefit of a criminal street gang is subject to certain sentencing minimums. This dispute therefore centers on the meaning to be attributed to the words "public offense punishable as a felony or a misdemeanor," as used in subdivision (d), to which this subdivision declares itself to be applicable.

A wobbler is a special class of crime that can be classified and punished as a felony or misdemeanor depending upon the severity of the facts surrounding its commission. (*People v. Williams* (1996) 49 Cal.App.4th 1632, 1639.) Wobbler offenses are punishable by imprisonment either in the county jail or in the state prison. The

characterization of the crime is dependent upon the actual punishment that is imposed. When a defendant is sentenced to state prison, the offense is a felony; when the defendant is sentenced to county jail, the offense is a misdemeanor. (*People v. Terry* (1996) 47 Cal.App.4th 329, 331-332.)

The structure of section 186.22 indicates subdivision (d) was intended to apply only to wobbler offenses and not to ordinary misdemeanors. Subdivision (b)(1) of section 186.22 applies to felonies. If the intent of the drafters of subdivision (d) was to have it apply to misdemeanors, they could have described a qualifying subdivision (d) offense as a misdemeanor. They did not do so. Instead, the drafters employed language typically used in wobbler statutes. The only rational distinguishing feature between subdivision (b)(1) felonies and subdivision (d) felonies is that subdivision (d) felonies are subject to lesser punishment by virtue of their wobbler status. Reading the statute in this manner gives meaning to both subdivisions of the statute. Respondent's proposed interpretation would render superfluous or inoperative the reference to felonies either in subdivision (d) or the entirety of subdivision (b)(1), in violation of a basic rule of statutory construction. (See *Rodriguez v. Superior Court* (1993) 14 Cal.App.4th 1260, 1269.)<sup>2</sup>

Thus, it appears the intent of the statutory drafters was for subdivision (d) of section 186.22 to apply only to wobbler offenses and not to ordinary misdemeanors. We therefore find as a matter of law that the violation of section 417 does not qualify appellant for an enhancement pursuant to subdivision (d) of section 186.22.

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<sup>2</sup> We recognize that the California Supreme Court is currently considering the applicability of section 186.22, subdivision (d) to ordinary misdemeanors. (*Robert L. v. Superior Court* (2001) 90 Cal.App.4th 1414, review granted Oct. 24, 2001, S100359.)

## **DISPOSITION**

The section 186.22, subdivision (d), enhancement is stricken. The matter is remanded to the trial court for resentencing. In all other respects, the judgment is affirmed.