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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. SAUL GARCIA CUEVAS, Defendant and Appellant.	2d Crim. No. B168269 (Super. Ct. No. LA040073) (Los Angeles County)

Saul Garcia Cuevas appeals from the judgment entered following his plea of no contest to 27 counts of robbery, one count of attempted robbery, one count of grand theft, and two counts of simple kidnapping. (Pen. Code, §§ 211, 664, 487, subd. (c), 207.)[1] He was sentenced to state prison for an aggregate term of 35 years eight months.

We appointed counsel to represent appellant in this appeal. After examination of the record, counsel initially filed an opening brief raising no issues and requesting that we independently examine the entire record pursuant to *People v. Wende* (1979) 25 Cal.3d 436. We allowed appellant to file a supplemental brief raising any issues he wished us to consider.

During the pendency of this appeal, the United States Supreme Court issued its decision in *Blakely v. Washington* (2004) __U.S. __ [124 S.Ct. 2531] (*Blakely*). We

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

asked counsel to file supplemental briefs addressing the question whether appellant was denied his rights under the federal Constitution when the trial court imposed the upper term on the two kidnapping counts and consecutive sentences on each of the 27 robbery counts. We also asked counsel to address the question whether appellant's sentence on eight of the robbery counts violated section 654.

We affirm the conviction but remand to correct sentencing error.

Factual and Procedural Background

Appellant was originally charged with 27 counts of robbery, one count of grand theft, one count of attempted robbery, and two counts of kidnapping for robbery. (§§ 211, 487, subd. (c), 664, 209, subd. (b)(1).) The People also alleged that he used a firearm in the commission of all of these offenses. (§ 12022.53, subd. (b).)

At the preliminary hearing, the evidence showed that between December 13, 2001, and March 3, 2002, appellant entered 17 businesses and, using a gun, demanded money and/or personal property from the employees. On seven occasions where appellant took both personal property from a store clerk and money from a store safe or register, he was charged with two robberies from the same victim, one for taking money from the clerk out of the cash register and one for taking personal property from the same store clerk (i.e., a cell phone, a driver's license, or money from the clerk's purse). This occurred in counts 1 and 2, 4 and 5, 9 and 10, 13 and 14, 15 and 16, 20 and 21, and 23 and 24.[2] Likewise, in count 11, appellant was charged with second degree

[2] For example, the preliminary hearing testimony showed that appellant demanded money from Vanessa Martinez, a clerk at Payless Shoe Store, out of the cash register. Appellant also demanded Martinez's personal identification. In count 1, he was charged with second degree robbery of Payless Shoe Store and Vanessa Martinez, for taking cash register money from Martinez. In count 2, he was charged with second degree robbery of Martinez for taking her personal identification at the same time. (See also counts 4 [robbery of Clothestime and Linda Luna] and 5 [robbery for taking Linda Luna's cell phone]; 9 [robbery of Pam's Hallmark and Pamela Escobar] and 10 [robbery for taking Pamela Escobar's driver's license]; counts 13 [robbery of Erandi Hurtado and Vin Baker Store] and 14 [robbery of Erandi Hurtado]; counts 15 [robbery of Laura Melvoin and Paper House Store] and 16 [robbery of Laura Melvoin]; counts 20 [robbery of Nicole Cirami and Dungarees Store] and 21 [robbery of Nicole Cirami]; and counts 23 [robbery of Laurie Schureman and Blonde store] and 24 [robbery of Laurie Schureman].

robbery of Baskin Robbins and its employee, Wendy Menendez, for taking the cash register money from Menendez. In count 12, he was charged with attempted second degree robbery of Menendez after he demanded her identification but she refused to give it to him.

The grand theft charge arose after appellant took personal property from one of two employees at Payless Shoe Store. He was charged with robbery of the store through its clerk (Mildred Anguiano) (count 7) and with grand theft of Erika Gutierrez (the employee who gave him personal property) (count 8).

The kidnapping charges (counts 32 and 33) arose after appellant robbed a beauty shop. After obtaining money from the shop's safe, appellant demanded that the two clerks leave with him in their car. The clerks drove appellant several blocks away. At some point, he directed the clerks to stop. He got out of their car and drove away in a parked car by himself. For this incident, he was charged with one count of robbery (count 17) and two counts of kidnapping for robbery (counts 32 and 33).

Appellant subsequently reached a plea agreement with the prosecution. The People agreed to reduce the kidnapping counts to simple kidnapping (§ 207) and drop the special allegations that he used a firearm in the commission of all offenses (§ 12022.53). The record reveals that appellant used a BB gun in the commission of the offenses which would not, in any event, qualify for an enhancement under section 12022.53. (See § 12001, subd. (b).) Appellant pleaded no contest to 27 counts of second degree robbery, two counts of simple kidnapping, one count of attempted robbery, and one count of grand theft. He admitted one allegation that he was armed with a firearm during the commission of the offenses within the meaning of section 12022, subdivision (b)(1). The plea agreement specified that he could be sentenced up to a maximum of 37 years eight months, and that the defense could present factors in mitigation at sentencing after which the court would decide the appropriate sentence.

At sentencing, the trial court stated it had reviewed the probation report which recommended an upper term sentence. The report noted that appellant had

suffered one prior theft-related conviction in federal court for which he was sentenced to prison and paroled in 1999.[3] The court heard statements from victims, witnesses for the defense, and appellant. The court noted the presence of the following factors in aggravation: the nature of the crimes was above and beyond the normal robbery, a weapon was used, the victims were all vulnerable females, the circumstances were indicative of planning and sophistication, and appellant had suffered a recent, significant prior conviction. The court concluded that these factors qualified him for a high-term consecutive sentence.

The court sentenced appellant to 35 years eight months, calculated as follows: the upper term of eight years for simple kidnapping (count 32); plus 27 consecutive one-year terms for each of the robbery counts (counts 1-7, 9-11, 13-17, 20-31); plus a consecutive term of eight months for grand theft (count 8); plus a concurrent term of one year four months for attempted robbery (count 12); and a concurrent upper term of eight years for the remaining simple kidnapping charge (count 33).[4] The court dismissed the remaining charges pursuant to section 1385, ordered appellant to pay restitution to various victims, and allowed custody credits. The court denied appellant's request for a certificate of probable cause.

Discussion

1. Duplicative Robbery Counts

In response to this court's request for supplemental briefing, appellant contends that his pleas to several of the second degree robbery counts and the attempted robbery count are duplicative and cannot be sustained. He seeks to set aside his pleas to the duplicative counts. Alternatively, in the event we conclude he has waived his right to

[3] Other than this general statement, there is no information in the record on appeal or the probation report about the federal conviction.

[4] We take judicial notice of the superior court file. On September 11, 2003, the trial court amended the abstract of judgment to reflect that appellant was sentenced to an aggregate term of 35 years eight months, rather than 36 years two months. The briefs filed by the parties incorrectly state the length of the sentence imposed by the trial court.

challenge the validity of his pleas to these counts, he contends that he can nevertheless challenge the sentences on these counts under section 654.

Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) """Robbery is an offense against the person; thus a store employee may be the victim of a robbery even though he is not its owner and not at the moment in immediate control of the stolen property."""" (*People v. Nguyen* (2000) 24 Cal.4th 756, 761; see also *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 520-521.) "'When a defendant steals multiple items during the course of an indivisible transaction involving a single victim, he commits only one robbery or theft notwithstanding the number of items he steals.'" (*People v. Ortega* (1998) 19 Cal.4th 686, 699, quoting *People v. Brito* (1991) 232 Cal.App.3d 316, 326, fn. 8.)

In counts 1 and 2, 4 and 5, 9 and 10, 13 through 16, 20 and 21, 23 and 24, appellant was improperly charged and convicted of 14 counts of second degree robbery. During the incidents that gave rise to these counts, he robbed seven victims at seven different stores, and each of the seven robberies involved a single course of conduct with a single victim. The items taken were removed from the possession of a single clerk at each store. Although he took property belonging to the store and personal property belonging to the clerk during each of the seven robberies, the distinction between store property and personal property is irrelevant. (*People v. Ortega*, *supra*, 19 Cal.4th at p. 699.) Thus, rather than being charged and convicted of 14 robberies for his actions during these incidents, he should have only been charged and convicted of seven counts of second degree robbery.

Likewise, in counts 11 and 12, he was convicted of second degree robbery and attempted second degree robbery after he took store property from one store clerk and did not succeed in taking the same clerk's personal property. He should have only been charged with one count of second degree robbery for this incident. He should not have been charged and convicted of attempted second degree robbery.

The Attorney General concedes that appellant's convictions on the duplicative counts 2, 5, 10, 12, 14, 16, 21, and 24 are invalid. The Attorney General argues, however, that appellant's failure to obtain a certificate of probable cause precludes this court from addressing the *validity* of his plea to these counts. We agree. (See *People v. Panizzon* (1996) 13 Cal.4th 68, 76 [issues going to the validity of a plea require compliance with section 1237.5].)

Sentencing issues may be appealed, however, pursuant to California Rules of Court, rule 30(b), without obtaining a certificate of probable cause, unless the challenge is actually to the plea bargain itself. The Attorney General concedes, and we agree, that appellant's sentences on counts 2, 5, 10, 12, 14, 16, 21, and 24 violate section 654 because he was sentenced twice for robbing a single victim (store employee) of personal property and the store's money during the course of a single robbery. Section 654 precludes multiple punishment for a single act or indivisible course of conduct. (*People v. Deloza* (1998) 18 Cal.4th 585, 591-592.) If a course of conduct has only one objective, then it is indivisible and punishable only once. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) If "a defendant suffers two convictions, punishment for one of which is precluded by section 654, that section requires the sentence for one conviction to be imposed, and the other imposed and then stayed." (*Deloza*, at pp. 591-592.)

Although the Attorney General concedes that the consecutive sentences imposed on the duplicative robbery counts are invalid, the Attorney General contends that appellant is procedurally barred from challenging his sentence. We disagree and conclude appellant has not waived his right to challenge his sentence on these counts. California Rules of Court, rule 4.412(b), cited by the Attorney General, is inapplicable. This rule provides: "By agreeing to a *specified* prison term personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654's prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record."

(Emphasis added.) Appellant did not agree to a *specified* prison term in exchange for entry of his plea.

For example, in *People v. Buttram* (2003) 30 Cal.4th 773, the defendant pled guilty to felony charges in exchange for assurances that he would be sentenced to no more than an agreed maximum sentence of six years, or "lid." (*Id.* at p. 776.) The agreement included no waiver of his right to appeal sentencing issues. At sentencing, the trial court denied defendant's request for diversion to a drug treatment program and imposed the negotiated maximum sentence. The Supreme Court held that a probable cause certificate was not required for the defendant to argue on appeal that the trial court abused its discretion by imposing a sentence within the negotiated maximum. (*Id*. at p. 777.) The court reasoned that a plea agreement providing for a maximum sentence inherently reserves the parties' right to a sentencing proceeding in which they may litigate the appropriate individualized sentencing choice within the constraints of the bargain and the trial court's lawful discretion. (*Ibid*.) The court went on to note that "where the terms of the plea agreement leave issues open for resolution by litigation, appellate claims arising within the scope of that litigation do not attack the validity of the plea, and thus do not require a certificate of probable cause." (*Id.* at p. 783.)

In contrast, in *People v. Hester* (2000) 22 Cal.4th 290, the defendant entered into a plea bargain in which he agreed to plead to various felony and misdemeanor charges in exchange for a four-year prison term. In accordance with the plea agreement, the trial court imposed a four-year prison sentence and imposed a concurrent prison term for an assault count. The defendant appealed, arguing that the trial court erred in not staying the sentence on the assault count under section 654. The Supreme Court held, pursuant to California Rules of Court, rule 4.412(b), that appellant had waived his contention by pleading guilty in exchange for a specified prison term. The Supreme Court explained the interplay between section 654 and rule 4.412(b): "Ordinarily, a section 654 claim is not waived by failing to object below. '[T]he waiver doctrine does not apply to questions involving the applicability of section 654. Errors in

the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal.'. . . This exception is not required by the language of section 654, but rather by case law holding that a court acts in excess of its jurisdiction and imposes an unauthorized sentence when it fails to stay execution of a sentence under section 654. . . . [¶] The rule that defendants may challenge an unauthorized sentence on appeal even if they failed to object below is itself subject to an exception [under rule 412(b)]: Where the defendants have pleaded guilty in return for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction. The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process." (*Hester*, at p. 295, citations omitted.)

Here, the People could have negotiated a specified sentence, but they did not do so. Instead, their bargain provided that appellant would not be vulnerable to a sentence above the agreed limit of 37 years. The plea bargain left open a variety of sentencing choices within that limit. Appellant is, therefore, not precluded from asserting that the consecutive sentences on the duplicative counts violate section 654. This is a postplea issue that does not affect the validity of his plea. Consequently, the consecutive sentences imposed on the duplicative robbery counts violate section 654 and must be stayed.[5]

We reject the Attorney General's contention that appellant should be estopped from challenging his sentence on the duplicative counts because he received a substantial benefit in the plea bargain when the People reduced the original kidnapping charges to simple kidnapping and agreed not to pursue the personal firearm use allegation

[5] The issue of whether a defendant has waived a claim that his sentence violates section 654 where he does not agree to a specified term but reserves the right to argue for a term less than the "lid" or maximum, is currently pending before the California Supreme Court in *People v. Shelton*, review granted June 16, 2004 (S124503).

on all counts. (§ 12022.53.) The record reveals that just before appellant entered his pleas to the various charges, the prosecutor advised him that the original charges exposed him to a life sentence with the possibility of parole plus 37 years. There was no discussion, however, about any of the robbery counts. There was no acknowledgement that some of the robbery counts were duplicative and improperly charged. In fact, the deputy district attorney suggested at sentencing that the trial court had very little discretion to go below the negotiated lid, other than imposing concurrent sentences on the kidnapping offenses, stating erroneously that section 654 did not apply, and that these were "individual as well as business robberies."

Here, the People bargained for a lawful sentence of up to 37 years in exchange for appellant's plea to the various counts. The People agreed that he could press for a lesser sentence at the sentencing hearing. The ultimate sentence imposed by the trial court included eight consecutive one-year terms that are unauthorized under California law. Our conclusion that sentencing on those eight counts violates section 654 does not infringe upon the plea agreement as bargained for by the People.

The question remaining is whether this court should remand this case for resentencing or simply modify the judgment to stay the consecutive one-year sentences imposed on the eight duplicative counts. Appellant contends the appropriate remedy for correcting the trial court's sentencing error is to remand for resentencing. (See *People v. Hill* (1986) 185 Cal.App.3d 831, 834 [felony sentence on multiple count conviction is an integrated whole]; *People v. Castaneda* (1999) 75 Cal.App.4th 611, 614 [resentencing proper as long as the new aggregate term does not exceed the original aggregate term].) Significantly, appellant raises other sentencing issues that the trial court has not had an opportunity to consider, i.e., the *Blakely* errors mentioned below. We agree that a remand for resentencing is appropriate. We will vacate appellant's sentence and remand this case to the trial court with instructions to conduct a new sentencing hearing consistent with this opinion. On remand, the trial court must stay imposition of sentence on the duplicative robbery counts 2, 5, 10, 12, 14, 16, 21, and 24 pursuant to section 654.

2. Imposition of the Upper Term for Kidnapping and Consecutive Sentencing

Appellant also contends the trial court deprived him of his constitutional rights to have all facts legally essential to his sentence be determined by a jury and beyond a reasonable doubt when it sentenced him to the upper term on the kidnapping counts and imposed consecutive sentences on each of the 27 robbery counts. Relying upon *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Blakely, supra,* __ U.S. __ [124 S.Ct. 2531], he contends that no more than the presumptive middle term should have been imposed on each of the kidnapping counts and his sentence should not have been further aggravated by the imposition of consecutive terms.

Because we are remanding this case for resentencing, we need not reach these contentions. We observe that these issues are currently pending before the California Supreme Court in *People v. Towne*, review granted July 14, 2004 (S125677), and *People v. Black*, review granted July 28, 2004 (S126182), and may be resolved by the time resentencing is conducted in this case.

3. Appellant's Supplemental Briefs

On May 10, 2004, and on June 3, 2004, appellant filed supplemental briefs in proper person raising numerous issues he wished us to consider. He challenges the validity of his nolo contendere pleas to all 31 charges, the sufficiency of the evidence to support his conviction on the various counts, and argues he was prejudiced by prosecutorial misconduct. He also argues that he received ineffective assistance of counsel and the court imposed duplicative sentencing for greater and lesser offenses.

Having examined the entire record and appellant's supplemental briefs, we are satisfied that appellant's attorney has fully complied with her responsibilities and that, other than the issues discussed above, no arguable issues exist. (*People v. Wende*, *supra*, 25 Cal.3d at p. 441.)

Disposition

The judgment of conviction is affirmed. We vacate appellant's sentence and remand this case to the trial court with instructions to conduct a new sentencing

hearing consistent with this opinion. In particular, the trial court must stay sentencing on the duplicative counts 2, 5, 10, 12, 14, 16, 21, and 24, and ensure that his aggregate sentence on remand does not exceed the aggregate sentence previously imposed.

After resentencing, the trial court is directed to prepare a corrected abstract of judgment and forward it to the Department of Corrections.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

John Fisher, Judge

Superior Court County of Los Angeles

Roberta Simon, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Lawrence M. Daniels, Susan S. Kim, Deputy Attorneys General, for Plaintiff and Respondent.