Filed 4/28/06

CERTIFIED FOR PARTIAL PUBLICATION[*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SITHIXAY MANILA, Defendant and Appellant.	F046611 (Super. Ct. No. 122031) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Valeriano Saucedo, Judge.

Susan Burke, 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, Wanda Hill Rouzan, Deputy Attorney General, for Plaintiff and Respondent.

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This case again raises the unsettled question of whether Penal Code section 654 requires the trial court to stay one of two sentences imposed for the same act where one

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[*]Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part IV.

of the sentences was for an enhancement, not a punishment for a freestanding offense. In the published portion of this opinion, we hold that section 654 was applicable because the enhancement was based on defendant's conduct in committing the crime—not a status such as having a record of prior convictions. We also reject the People's argument that the two sentences were not based on a single indivisible course of conduct with a single objective and accept defendant's contention regarding which of the sentences must be stayed.

In the unpublished portion of the opinion, we explain that we will remand to permit the trial court to determine, in light of our decision, whether one of the other sentences it imposed should run consecutively, subject to the limitation that the aggregate sentence on remand not exceed the original sentence.

FACTUAL AND PROCEDURAL HISTORIES

Police entered the home of defendant Sithixay Manila's parents to search for narcotics pursuant to a search warrant. Defendant fled through the back door and was apprehended outside.

In a bedroom, officers found a loaded handgun under a mattress, $1,500 in $100 bills in a shirt in the closet, two cell phones, two digital scales, and a bag containing five bindles of an off-white substance. Mail addressed to defendant and a wallet containing defendant's California identification card were also in the room. More bindles of an off-white substance were found elsewhere in the house. The contents of the bindles were later tested and found to be cocaine base and methamphetamine. Defendant's mother told officers the bedroom was defendant's, though she later said other people also used it.

The District Attorney filed an information charging four counts: (1) possession of cocaine base for sale (Health & Saf. Code, § 11351.5); (2) possession of methamphetamine for sale (Health & Saf. Code, § 11378); (3) possession of a firearm by a convicted felon (Pen. Code, § 12021, subd. (a)(1)); and (4) resisting arrest (Pen. Code, § 148, subd. (a)(1)). The information further alleged that defendant was personally

armed with a firearm in the commission of the crimes charged in counts 1 and 2 (Pen. Code, § 12022, subd. (c)), and that defendant had a prior strike (a voluntary manslaughter conviction) within the meaning of the three strikes law (Pen. Code, § 1170.12, subd. (c)(1)).

A jury found defendant guilty of counts 1, 2, and 4 and found true the allegation of being armed in the commission of the drug offenses. In a separate proceeding, the court found defendant guilty of count 3 and found the prior-strike allegation true. It sentenced defendant to a term of 12 years on count 1, consisting of the middle term of four years, doubled for the prior strike, and four years for the enhancement of being armed. The court imposed concurrent sentences for the remaining charges, including a four-year concurrent sentence for being a felon in possession of a firearm, consisting of the middle term of two years, doubled for the prior strike.

DISCUSSION

Defendant's appeal is addressed only to his sentence. He contends that the concurrent sentence for being a felon in possession of a firearm and the consecutive sentence for the enhancement for being armed in the commission of the cocaine possession offense were for the same criminal act. Consequently, he alleges one of them (specifically, the consecutive one for the enhancement) should have been stayed pursuant to section 654.

Section 654 provides:

> "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.…"

This statute bars double punishment not only for a single criminal act but for a single indivisible course of conduct in which the defendant had only one criminal intent or objective. (*People v. Bauer* (1969) 1 Cal.3d 368, 376; *In re Ward* (1966) 64 Cal.2d 672, 675-676; *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) We review under the

substantial-evidence standard the court's factual finding, implicit or explicit, of whether or not there was a single criminal act or a course of conduct with a single criminal objective. (*People v. Coleman* (1989) 48 Cal.3d 112, 162; *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1408.) As always, we review the trial court's conclusions of law de novo. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1687.)

I. Application of section 654 to a conduct enhancement

Before turning to the question of whether defendant was subjected to double punishment impermissible under section 654, we must first decide whether section 654 is applicable in the first place. The People argue that it is not because section 654 does not apply to sentences imposed under enhancement statutes, or at least not to those imposed under the particular statute creating the enhancement for being armed in the commission of a crime.

We conclude that section 654 applies. As we will explain, section 654 applies to enhancements based on conduct in which the defendant engaged in committing the crime, but not those based on defendant's status, such as the status of having a record of prior convictions. Contrary to the People's argument, being armed with a firearm in the commission of a crime is conduct; it is not a status.

The issue of the applicability of section 654 to enhancements is unsettled. We once stated that "section 654 generally does not apply to enhancements because they do not define a crime or offense but relate only to the penalty imposed under certain circumstances." (*People v. Parrish* (1985) 170 Cal.App.3d 336, 344.) Later, in an opinion subsequently ordered depublished by the Supreme Court, we stated that our previous statement was dictum and declined to follow it. (*People v. Lozano* (Jan. 24, 2001, F032226) review den. and opn. ordered nonpub. Apr. 18, 2001, S095776.) Other Courts of Appeal have also reached divergent conclusions. (See, e.g., *People v. Price* (1992) 4 Cal.App.4th 1272, 1277 ["'[I]t is now well-accepted that section 654 applies to enhancements'"]; *People v. Warinner* (1988) 200 Cal.App.3d 1352, 1355 ["Section 654

has long been construed as inapplicable to enhancements because enhancements do not define an offense"].)

The Supreme Court's opinion in *People v. Coronado* (1995) 12 Cal.4th 145 points toward a solution. In that case, the defendant was convicted of driving under the influence. He admitted he had three prior convictions for driving under the influence and served three prior prison terms for felony convictions. One of the prior prison terms arose from the third driving-under-the-influence conviction. The trial court used that prior conviction to elevate the current offense to a felony and also used the associated prison term to impose one of three one-year enhancements under Penal Code section 667.5, subdivision (b). This court and the Supreme Court both affirmed the sentence, rejecting the defendant's argument that section 654 forbade the court to use the prior offense and associated prison term to increase his sentence twice—first by elevating the current offense to a felony and then by imposing the additional year. (*People v. Coronado, supra,* at pp. 149, 159.)

In reaching this conclusion, the Supreme Court divided sentence enhancements into two categories:

> "[W]e observe there are at least two types of sentence enhancements: (1) those which go to the nature of the offender; and (2) those which go to the nature of the offense. [Citations.] Prior prison term enhancements … fall into the first category and are attributable to the *defendant's status* as a repeat offender. [Citations.] The second category of enhancements … arise from the *circumstances of the crime* and typically focus on what the defendant did when the current offense was committed." (*People v. Coronado, supra,* 12 Cal.4th at pp. 156-157.)

The enhancements at issue in the case were based on prior offenses and were status enhancements to which section 654 did not apply. The court explained that status enhancements like these "are not imposed for 'acts or omissions' within the meaning of the statute .…" (*People v. Coronado, supra,* 12 Cal.4th at p. 157.) These enhancements "are attributable to the defendant's status as a repeat offender [citations]; they are not attributable to the underlying criminal conduct which gave rise to the defendant's prior

and current convictions." Therefore, "[b]ecause the repeat offender (recidivist) enhancement imposed here does not implicate multiple punishment of an act or omission, section 654 is inapplicable." (*Id.* at p. 158.)

The court expressed no opinion about whether section 654 applies to the second category, enhancements based on conduct rather than status. (*People v. Coronado, supra,* 12 Cal.4th at p. 157.) The court's reasoning, however, strongly implies that section 654 does apply to those enhancements. In the court's view, section 654 does not apply to status enhancements because, by its terms, section 654 only prohibits double punishment for a single criminal "act or omission." (Pen. Code, § 654.) A prior conviction enhancement, for instance, imposes punishment for the status of having priors or being a recidivist, not for an act or omission. A conduct or nature-of-the-offense enhancement, by contrast, does impose punishment for an act or omission, "typically … what the defendant did when the current offense was committed." (*People v. Coronado, supra,* 12 Cal.4th at p. 157.) It is only a short logical step to the conclusion that section 654 applies to conduct enhancements.

The Fourth District Court of Appeal took that step in *People v. Arndt* (1999) 76 Cal.App.4th 387. There, the defendant was convicted of driving under the influence. Three victims were injured in the accident the defendant caused. The defendant received a total of five sentence enhancements (three under Pen. Code, § 12022.7 and two under Veh. Code, § 23182) for causing bodily injury to the three victims. (*People v. Arndt, supra,* at pp. 391-392.) Holding that the bodily injury enhancements "'focus[ed] on what the defendant did when the current offense was committed'" within the meaning of the Supreme Court's opinion in *Coronado*, the court held that section 654 applied and ordered two of the enhancements stayed. (*People v. Arndt, supra,* at pp. 395, 397, 399.)

We see no reason not to take the same approach in this case. The enhancement for being armed in the commission of the underlying drug offense is within the second category of enhancements the Supreme Court defined in *Coronado*, those that pertain to

what defendant did when the current offense was committed. The enhancement at issue here is set forth in Penal Code section 12022, subdivision (c):

> "[A]ny person who is personally armed with a firearm in the commission of a violation or attempted violation of [any of several specific sections of the Health and Safety Code], shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years."

In *Coronado*, the court identified Penal Code section 12022.5 as an example of an enhancement in the second category. (*People v. Coronado, supra,* 12 Cal.4th at p. 157.) Penal Code section 12022.5, subdivision (a), provides:

> "[A]ny person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense."

Penal Code sections 12022, subdivision (c), and 12022.5, subdivision (a), do not differ in any way relevant to the question before us. Both impose enhanced punishment for defendant's conduct in the commission of the underlying crime.

There is no merit to the People's contention that in this case the enhancement under section 12022, subdivision (c), was not a conduct enhancement under *Coronado* because it pertained to defendant's "possessory status." The fact that the gun was under the mattress, not in defendant's hand, is irrelevant. Being armed with a firearm in the commission of the crime was one of the "circumstances of the crime" and something defendant "did when the current offense was committed"; it was not a part of the "nature of the offender." (*People v. Coronado, supra*, 12 Cal.4th at pp. 156-157, italics omitted.) To describe being armed with a firearm as a status is merely manipulating words. One could as easily, and as implausibly, call "being a cause of great bodily injury" a status when there is no question that it is conduct.

For these reasons, we conclude that section 654 applies to the question of whether the enhancement for being armed and the sentence for being a felon in possession of a firearm could both properly be imposed. We proceed to the section 654 analysis.

II. Same act or course of conduct

The first question to be answered in applying section 654 is whether the court imposed two punishments for one criminal act or an indivisible course of conduct with one criminal objective. On the basis of the gun found under the mattress, defendant was punished for possessing a gun while a convicted felon and for being armed with the gun in the commission of the cocaine offense. Defendant contends that the record contains no evidence that he possessed the gun at any time other than when he was possessing drugs for the purpose of sale, or that he possessed the gun pursuant to any other objective than the objective of possessing drugs for the purpose of sale. The People argue that because defendant *could* have possessed the gun before the drug possession offense began and *could* have had it for other purposes, "it is reasonable to infer" that he did, and that we should draw that inference to prevent him from receiving "a sentencing windfall." We hold that the record contains insufficient evidence to support the trial court's implicit finding of more than one criminal act or objective.

People v. Venegas (1970) 10 Cal.App.3d 814 strongly supports our conclusion. There, the defendant was convicted of assault with a deadly weapon with intent to commit murder and possession of a firearm by a convicted felon. He received a prison sentence for each count. (*Id.* at p. 817.) The Court of Appeal held that there was only one act of possessing the weapon, so the felon-in-possession offense did not constitute a "divisible transaction" from the assault. "[W]here the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved," the court stated. But "[h]ere the evidence shows a possession only at the time defendant shot" the victim. Accordingly, imposition of sentence on both counts "constituted multiple punishment proscribed by section 654." (*Id.* at p. 821.)

Here, there was no evidence of any possession of the gun "distinctly antecedent and separate" from the possession in the commission of the drug offense. Consequently, there was no evidentiary support for an inference that separate acts of possessing the gun, or possession of the gun pursuant to separate criminal objectives, existed to support distinct punishments for the felon-in-possession offense and the enhancement for being armed in the commission of the drug offense.

The People claim that separate objectives were shown by a police officer's opinion testimony at trial that narcotics dealers use guns to protect themselves as well as the drugs. The testimony was as follows:

> "Q. You also found a loaded gun. Does a gun have any relationship to narcotic sales?
>
> "A. Sure.
>
> "Q. What's the relationship?
>
> "A. Well, a lot of crimes go unreported when drug dealers are basically ripped off. That happens quite a lot. So narcotics dealers have guns for protection.
>
> "Q. Protection of what?
>
> "A. Other individuals, both buyers and other drug dealers.
>
> "Q. Do they use it to protect the narcotics themselves?
>
> "A. Themselves and the narcotics.
>
> "Q. And what about money, does it protect a narcotics dealer with money?
>
> "A. Sure."

We do not think this testimony constitutes sufficient evidence to show two objectives, one of protecting the drugs and another of protecting the drug dealer. It could as easily be argued that the testimony established five objectives: protecting the drugs, protecting the dealer, protecting the dealer's money, protecting the buyer, and protecting

other dealers. The Supreme Court has warned against "pars[ing] the objectives too finely" in analyzing potentially impermissible multiple punishments under section 654. (*People v. Britt* (2004) 32 Cal.4th 944, 953 [only one objective in sex offender's failure to notify authorities when he moved, so only one punishment permissible for two offenses of leaving old location and arriving in new without notification, despite argument that defendant intended to deceive authorities in both the old and new locations].) The People here parse objectives too finely.

The cases on which the People rely, *People v. Ratcliff, supra,* 223 Cal.App.3d 1401 and *People v. Harrison* (1969) 1 Cal.App.3d 115, are distinguishable. In *Ratcliff*, the defendant committed two robberies about an hour and a half apart and was arrested half an hour after the second robbery. He received sentence enhancements for being armed with a firearm in the commission of each robbery. He was also convicted of and received an additional sentence for being a felon in possession of a firearm. (*People v. Ratcliff, supra,* 223 Cal.App.3d at pp. 1404-1405, 1407-1408.) The Court of Appeal rejected his argument that imposing sentences for both being armed during the offenses and being a felon in possession of a firearm violated section 654. Noting that the crime of being a felon in possession of a firearm "is committed the instant the felon in any way has a firearm within his control" (*People v. Ratcliff, supra,* at p. 1410, italics omitted), the court relied on the fact that the defendant possessed the gun during the hour and a half after the first robbery ended and before the second began, as well as during the half hour after the second robbery ended and before he was arrested. Consequently, "defendant's possession of the weapon was not merely simultaneous with the robberies, but continued before, during and after those crimes. Section 654 therefore does not prohibit separate punishments." (*Id.* at p. 1413.) In the present case, by contrast, there was no evidence at all that defendant possessed the gun before the drug possession began or after it was completed.

The *Ratcliff* court distinguished some other cases which it described as barring multiple punishments because "fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense …." (*People v. Ratcliff, supra,* 223 Cal.App.3d at p. 1412.) The People in this case attempt to employ this language as a general standard for the application of section 654 in felon-in-possession cases, saying "the evidence … must show possession occurring only at the moment the offense has occurred" if multiple punishments are to be prohibited. If this were correct, it would mean double punishment is allowed unless there is substantial evidence to show the defendant had only one objective or committed only one act. As the *Ratcliff* court acknowledged, that is the opposite of the actual rule: Double punishment is *prohibited* unless there is substantial evidence to show *multiple* criminal objectives. (*People v. Ratcliff, supra,* at p. 1408.) There was no evidence like this here.

In *Harrison*, the defendant was convicted of one count of being a felon in possession of a firearm and one count of carrying a loaded firearm in a vehicle on a public street, based on a single traffic stop in which a loaded gun was found in his car. (*People v. Harrison, supra,* 1 Cal.App.3d at p. 118.) The court rejected the defendant's argument that the imposition of sentences for both offenses violated section 654. The court opined that the two statutes addressed two different concerns: that of felons possessing guns, loaded or not, and that of anyone carrying a loaded gun in a public place. Then it stated that, to violate the second statute, defendant had either to load the gun himself or let someone else load it. This, the court concluded, meant that defendant committed two acts, loading the gun and carrying it, thus "bring[ing] our case outside the prohibition against double punishment for a single act or omission." (*People v. Harrison, supra,* at p. 122.) We need not comment on the persuasiveness of this reasoning[1] in

[1]Cf. *People v. Lopez* (2004) 119 Cal.App.4th 132, 134, 137-138 [section 654 violated by punishment for both unlawful possession of a gun and unlawful possession of

observing that no comparable facts are present in this case. The enhancement here did not require the gun to be loaded. It only required that defendant be armed with the gun in the commission of the underlying drug offense. There was no reason why his being a felon in possession of a firearm had to involve any act or objective other than those included in being armed in the commission of the drug offense.

We hold that the evidence was insufficient to show more than one "act" within the meaning of section 654. One of the punishments must be stayed.

III. Which sentence should be stayed?

Penal Code section 654 requires that a single act punishable under more than one provision "shall be punished under the provision that provides for the longest potential term of imprisonment .…" The parties disagree about which provision that is in this case. This is important as a practical matter because, although the court imposed sentences of four years under each provision, the enhancement for being armed was consecutive while the felon-in-possession sentence was concurrent. We agree with defendant's argument that the felon-in-possession statute provided a longer potential term of imprisonment in this case, so the enhancement must be stayed.

The felon-in-possession statute provides that the offense is a felony. (Pen. Code, § 12021, subd. (a).) The sentence for a felony, if not otherwise specified, is 16 months, two years, or three years. (Pen. Code, § 18.) In this case, the sentence was subject to doubling under the three strikes law (Pen. Code, § 1170.12, subd. (c)(1)), so the maximum sentence for the felon-in-possession conviction was six years. The enhancement for being armed with a firearm in the commission of the cocaine offense had a maximum term of five years. (Pen. Code, § 12022, subd. (c).) The three strikes law does not provide for the doubling of enhancements. (*People v. Hardy* (1999) 73 Cal.App.4th 1429, 1433.)

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the ammunition inside the gun; multiple punishment would "parse the objectives too finely"].

On its face, therefore, the matter appears straightforward: The maximum under the felon-in-possession statute, applied in conjunction with the three strikes law, is one year longer than the maximum for the enhancement for being armed, so the latter should be stayed and the former should remain.

The People argue the contrary on the basis of *People v. Kramer* (2002) 29 Cal.4th 720. In that case, the defendant was convicted of assault with a firearm and discharging a firearm at an occupied vehicle. He received a sentence of five years for the firing-at-a vehicle charge. The trial court also imposed a four-year enhancement for personal use of a firearm in the assault, but stayed the sentence for the underlying offense. The Court of Appeal reversed, holding that the trial court was required to impose sentence for the firing-at-a-vehicle charge because it provided the longer maximum term, but could not impose the enhancement for the assault because it had stayed the sentence for the underlying offense. (*Id.* at p. 722.)

The Supreme Court reversed. It explained that, although the crime of firing at a vehicle standing alone had a longer maximum term (seven years) than the crime of assault with a firearm (four years), the crime of assault with a firearm combined with the enhancement had a maximum that was longer still (14 years, consisting of 4 years for the underlying crime plus 10 years for the enhancement). (*People v. Kramer, supra,* 29 Cal.4th at pp. 722-723.) The assault plus enhancement provided "the longest potential term of imprisonment" (Pen. Code, § 654), so it was the firing-at-a-vehicle sentence that should have been stayed. (*People v. Kramer, supra,* at p. 723.) The court relied on the plain language of section 654, as well as on legislative history of the "longest potential term" clause that revealed a legislative intent to prohibit courts from using section 654 to sentence defendants under statutes providing shorter maximums than would be available absent the application of section 654. (*People v. Kramer, supra,* at pp. 723-724.)

The People argue that *Kramer* means the relevant comparison in this case is between drug crime plus enhancement on the one hand (15-year maximum, consisting of

the doubled five-year upper term plus the five-year maximum enhancement), and the felon-in-possession crime on the other (six-year maximum, consisting of the doubled three-year upper term). They contend it is the felon-in-possession sentence that must be stayed.

The defect in the People's argument is that, unlike in *Kramer*, there is no question in this case of staying the underlying offense to which the enhancement is attached. The cocaine-possession offense does not include gun possession, the criminal act by which section 654 was triggered in the first place. The only question is which of the two sentences based on gun possession—the arming enhancement or the felon-in-possession sentence—should be stayed. Section 654 directs that the sentence based on the provision with the shorter maximum be stayed. That provision is the enhancement (Pen. Code, § 12022, subd. (c)), providing a maximum term of five years, not the felon-in-possession provision (Pen. Code, § 12021) as applied under the three strikes law, providing a maximum term of six years.

Further, the People's position is contrary to the legislative intent found by the Supreme Court in *Kramer* because it would require sentencing under provisions providing for a shorter combined maximum. If the People's position prevailed, the trial court would be required to sentence defendant under the provisions defining the drug offense (10-year maximum under three strikes) plus the enhancement (five-year maximum), for a combined maximum of 15 years. Under the position we adopt, the trial court must sentence defendant under the provisions defining the drug offense (10-year maximum) plus the felon-in-possession offense (six-year maximum under three strikes), for a combined maximum of 16 years.

In sum, the People's position, if adopted, would contravene both the letter of section 654 and the legislative intent behind it. It would also create the anomaly—surely contrary to the People's long-term interest even if it would cause the consecutive

sentence to be retained in this case—of sometimes requiring trial courts applying section 654 to sentence under the lesser of two possible combined maximum terms.

Consequently, we hold that the enhancement under Penal Code section 12022, subdivision (c), is the sentence that must be stayed.

IV. Remand

The People ask us to remand the case to the trial court for resentencing if we accept defendant's arguments. With the enhancement for being armed stayed, the remaining sentences are eight years for the cocaine-possession offense, four concurrent years for being a felon in possession of a firearm, four more concurrent years for the methamphetamine possession offense, and 365 concurrent days for resisting arrest. The People contend that because the trial court believed the consecutive enhancement would be effective when it decided to make the other sentences concurrent, it should now have the opportunity to consider whether to make any of them consecutive, especially the felon-in-possession sentence. When the trial court decided to impose a concurrent sentence for that conviction, it believed it had already imposed an effective consecutive sentence for the firearm-related conduct. We agree with the People.

Defendant contends that we should simply stay the enhancement. He asserts that a remand to permit the court to make another sentence consecutive would be improper under double jeopardy principles, as any alteration in the other sentences would "lend an appearance of vindictiveness for appellant's success on appeal."

The California Constitution's prohibition on double jeopardy generally prevents imposition of a greater sentence on remand following an appeal. The purpose of the rule is to avoid penalizing defendants for exercising their right to appeal. (Cal. Const., art. I, § 15; *People v. Hanson* (2000) 23 Cal.4th 355, 358, 365; *People v. Collins* (1978) 21 Cal.3d 208, 216.) (The rule under the federal Constitution provides less protection for defendants than the California rule. See *Alabama v. Smith* (1989) 490 U.S. 794, 798-799, 801-803.)

An exception to the California rule permits imposition of a greater sentence on remand if the original sentence was unauthorized because it was illegally low, i.e., failed to include mandatory time. (*People v. Serrato* (1973) 9 Cal.3d 753, 764-765, overruled on other grounds by *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.) The exception does not, however, permit increases in those portions of a sentence that were unaffected by the illegality, i.e., did not lack any mandatory time. (*People v. Price* (1986) 184 Cal.App.3d 1405, 1413.) Defendant is correct in arguing that this case does not fall within the exception for illegally low sentences. The trial court did not fail to impose any mandatory time and no part of the sentence that remains is required to be higher by any provision of law.

That the case does not fall within the exception is irrelevant, however, because we believe the case does not fall within the guarantee against double jeopardy in the first place. Although our Supreme Court has not spoken to the issue, we are persuaded by the view, set forth in *People v. Savala* (1983) 147 Cal.App.3d 63, 69 (disapproved on other grounds by *People v. Foley* (1985) 170 Cal.App.3d 1039, 1044), that double jeopardy is not implicated by a remand for resentencing if the trial court made an error potentially affecting its calculation of the entire aggregate sentence and if the sentence imposed on remand is no greater than the original sentence.

In *Savala*, the defendant received a sentence of 12 years and four months for four counts of robbery with firearm-use enhancements, one count of assault on a police officer, and one count of being a felon in possession of a firearm. The Court of Appeal held that the firearm enhancements were unauthorized under the circumstances and remanded. The trial court again imposed an aggregate sentence of 12 years and four months. It set aside the enhancements, but compensated by increasing the principal term for robbery from the middle to the upper term. (*People v. Savala, supra,* 147 Cal.App.3d at p. 65.) When the defendant appealed again, the Court of Appeal found no double-jeopardy violation. It stated that the aggregate sentence "cannot be viewed as a series of

separate independent terms, but rather must be viewed as one prison term made up of interdependent components. The invalidity of some of those components necessarily infects the entire sentence." (*Id.* at pp. 68-69.) For that reason, the court concluded:

> "In sentencing defendant in the first instance the trial court made an error which affected the entire sentencing scheme devised. When we ordered the court to set aside the first judgment and to resentence defendant the court was entitled to reconsider all of its sentencing choices, subject only to the limitation that defendant not be sentenced to a greater aggregate term than the first sentence." (*People v. Savala, supra,* 147 Cal.App.3d at p. 69.)

A similar approach was taken more recently in *People v. Craig* (1998) 66 Cal.App.4th 1444, 1450-1452.

The same reasoning applies in this case. The trial court decided to make the four-year felon-in-possession sentence concurrent in the belief that the four-year consecutive arming enhancement was properly imposed without a stay. On remand, it will be entitled to reconsider that decision in light of the fact that no other punishment for the firearm conduct will be in effect, subject to the condition that the aggregate sentence imposed on remand may not exceed the original sentence. We express no opinion regarding how the trial court should exercise its discretion in resentencing defendant.

DISPOSITION

The sentence is vacated and the case remanded for resentencing consistent with this opinion. Specifically, the sentence for the arming enhancement imposed under Penal Code section 12022, subdivision (c), must be stayed pursuant to Penal Code section 654, and the aggregate sentence imposed on remand may not exceed the aggregate sentence originally imposed. The judgment is affirmed in all other respects.

Wiseman, J.

WE CONCUR:

Vartabedian, Acting P.J.

Levy, J.