

IN THE
Court of Appeal of the State of California

IN AND FOR THE
Fifth Appellate District

THE PEOPLE,

Plaintiff and Respondent,

v.

SITHIXAY MANILA,

Defendant and Appellant.

F046611

(Super. Ct. No. 122031)

**ORDER MODIFYING OPINION
AND DENYING REHEARING**

THE COURT

IT IS ORDERED that the partially published opinion filed herein on April 28, 2006, be modified in the following particulars:

1. At the top of page 1, replace the notation CERTIFIED FOR PARTIAL PUBLICATION with CERTIFIED FOR PUBLICATION and delete the footnote.
2. Delete the first paragraph of the opinion, beginning on page 1 and continuing on page 2, and insert in its place the following paragraph:

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 of the sentences was for an enhancement, not a punishment for a freestanding offense. 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, but accept the People's contention regarding which of the sentences must be stayed. We will order stayed the sentence for being a felon in possession of a firearm, which the court ordered to be served concurrently, and otherwise affirm the judgment.

3. Delete the first full paragraph on page 2.

4. In the first sentence of the first full paragraph on page 4, delete the first instance of the word “first,” so that “we must first decide” becomes “we must decide.”

5. On page 12, delete the last sentence (beginning “We agree with defendant’s ...”) of the first paragraph of section III. Insert in the following sentence in its place:

We agree with the People’s argument that the enhancement provision provided a longer potential term of imprisonment in this case, so the felon-in-possession sentence must be stayed.

6. Delete the first two full paragraphs on page 13. Insert in their place the following two paragraphs:

If these were the only pertinent provisions, the matter would be 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. It is also necessary, however, to take account of Penal Code section 1170.1. Section 1170.1 provides that when a defendant is convicted of two felonies and consecutive sentences are imposed, one sentence is deemed the principal term and one the subordinate term. The principal term is the “the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements.” The subordinate term “shall consist of one-third of the middle term of imprisonment prescribed” for the consecutive offense, plus one-third of applicable specific enhancements. (§ 1170.1, subd. (a).) Because the felon-in-possession sentence would have been a subordinate term had it been imposed consecutively, we must count only one-third of the maximum when determining which is the longest potential sentence for section 654 purposes. As noted, the maximum was the upper term of three years, doubled for the prior strike, or six years. One third of that is two years. Two years is less than five, so the felon-in-possession sentence is the one that should be stayed.

The reason we base the calculation on the assumption that the sentence is consecutive (even though it was, in reality, imposed concurrently) is that, according to *People v. Kramer* (2002) 29 Cal.4th 720, section 654 must never be applied in a way that forces the sentencing court to choose the lesser aggregate total. 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. (*People v. Kramer, supra*, at p. 722.)

7. Delete the three full paragraphs on page 14, the paragraph beginning at the bottom of page 14 and continuing to page 15, and the first full paragraph on page 15. In their place, insert the following paragraph:

In the present case, section 1170.1 affected the maximum total sentence the court could have imposed for the two counts while staying either the arming enhancement or the felon-in-possession sentence. With the arming enhancement stayed, the maximum total the court could have imposed for the two counts was 12 years: the doubled five-year upper term for the drug count plus one-third of the doubled three-year upper term for felon-in-possession. With the felon-in-possession sentence stayed, by contrast, the maximum available would have been 15 years: the doubled five-year upper term for the drug count plus five years for the arming enhancement. Therefore, to avoid forcing the court to sentence under a shorter maximum than would be available absent section 654, it is necessary to impose the stay on the felon-in-possession sentence instead of the arming enhancement.

8. Delete section IV of the opinion entitled “Remand,” found on pages 15, 16, and 17.

9. On pages 17 and 18, delete the text of the Disposition and replace it with the following:

The judgment is modified to stay the sentence on count 3, possession of a firearm by a convicted felon (Pen. Code, § 12021, subd. (a)(1)). The trial court is directed to prepare an amended abstract of judgment and forward it to the Department of Corrections. The judgment is affirmed in all other respects.

The petitions for rehearing are denied. Except for the modifications set forth, the opinion previously filed remains unchanged. These modifications include a change in the judgment as reflected in the modified Disposition.

Wiseman, J.

WE CONCUR:

Vartabedian, Acting P.J.

Levy, J.