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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,
Plaintiff and Respondent,
v.
WENDELL COLEMAN,
Defendant and Appellant.

A130687
(Alameda County
Super. Ct. No. C160288B)

A jury convicted appellant Wendell Coleman of murder, attempted murder, being a convicted felon in possession of a firearm and discharging a firearm from a motor vehicle, plus enhancements. He was sentenced to serve 36 years four months to life in state prison. (Pen. Code,¹ § 187; former §§ 12021, subd. (a)(1) [Stats. 2006, ch. 538, § 526, pp. 4395-4400; now § 29800, subd. (a)(1)], 12022, subd. (a)(1) [Stats. 2004, ch. 494, § 3, pp. 4042-4043], 12022.5, subd. (a) [Stats. 2004, ch. 494, § 4, pp. 4043-4044], 12022.53, subds. (b)-(c) [Stats. 2006, ch. 901, § 11.1, pp. 7075-7077], 12034, subd. (d) [Stats. 1987, ch. 1147, § 3, p. 4059; now § 26100, subd. (d)].) On appeal, Coleman contends that the trial court erred at sentencing by (1) imposing separate terms for illegal firearm possession and shooting at a motor vehicle, such that he suffered multiple punishment; and (2) requiring him to pay a \$250 presentence investigation fee without first determining whether he had the ability to pay this fee. (§ 654; former § 1203.1b [Stats. 2002, ch. 784, § 546, pp. 4910-4912].) We reverse the sentence for shooting a

¹ All statutory references are to the Penal Code unless otherwise indicated.

firearm from a motor vehicle on multiple punishment grounds, but otherwise affirm the judgment.

I. FACTS

On June 30, 2007, appellant Wendell Coleman was a passenger in a vehicle involved in an Oakland drive-by shooting in retaliation for the death of a friend. He later told Oakland police that a weapon was given to him before he rode to the site of memorial vigil where he fired near a crowd that had gathered there. The weapon jammed after firing a single shot. Although his shot did not hit anyone, other shots were fired, causing the death of Melvin Hughes, the driver of the vehicle Coleman sat in. Coleman fled the vehicle after Hughes was shot, abandoning the jammed weapon.

Coleman was tried for the first degree murder of Hughes, on a provocative act theory. He was acquitted of first degree murder, but convicted of second degree murder. Coleman was found to have been armed with a firearm, to have personally used a firearm, and to have intentionally discharged a firearm during the commission of Hughes's murder. The jury also found that he committed the attempted murder of John Doe and that related firearm enhancement allegations were true. He was also convicted of two other offenses—possession of a firearm by a convicted felon² and discharging a firearm from a motor vehicle, the latter being a lesser included offense of the charged offense of discharging a firearm from a motor vehicle at a person. (§ 187; former §§ 12021, subd. (a)(1), 12022, subd. (a)(1), 12022.5, subd. (a), 12022.53, subds. (b)-(c), 12034, subds. (c)-(d).)

The prosecution sought a sentence of 45 years four months to life in prison, with all terms to be imposed as consecutive sentences. At sentencing, Coleman argued that the attempted murder, possession and discharge offenses were part of the same course of conduct as the murder. Citing the section 654 ban on multiple punishment, he asked that the sentences for these lesser offenses be made to run concurrent to the term to be imposed for the murder. The prosecution argued that section 654 did not bar the trial

² Coleman was convicted of possession of marijuana for sale earlier in 2007. (Former Health & Saf. Code, § 11359 [Stats. 1976, ch. 1139, § 73, p. 5082.]

court from imposing consecutive terms. It reasoned that Coleman’s conviction of shooting from a motor vehicle could be found to constitute the provocative act for murder. It also noted that the murder and attempted murder were committed against separate victims.

The trial court sentenced Coleman to an indeterminate term of 35 years to life for second degree murder—15 years to life for the offense enhanced by an additional 20-year term for discharging a firearm during its commission. (§ 187; former § 12022.53, subd. (c).) Enhancement terms for being armed with and personally using a firearm were stayed. (Former §§ 12022, subd. (a)(1), 12022.53, subd. (b).) Sentence for the attempted murder of John Doe and its related enhancements was stayed on multiple punishment grounds. (§ 654; former §§ 12022, subd. (a)(1), 12022.53, subds. (b)-(c).) The trial court rejected the section 654 argument on the two lesser offenses, sentencing Coleman to a determinate term of 16 months—one-third consecutive midterms of eight months each—for being a convicted felon in possession of a firearm and for discharging a firearm from a motor vehicle. (Former §§ 12021, subd. (a)(1), 12034, subd. (d).) The total term imposed was 36 years four months to life. Coleman was also ordered to pay a \$250 probation investigation fee as well as other fines. (Former § 1203.1b.)

II. MULTIPLE PUNISHMENT

A. General Principles

First, Coleman contends that the trial court violated the ban on multiple punishment and his due process rights by imposing separate terms for shooting from a motor vehicle and possession of a firearm by a convicted felon, in addition to the sentence he received for murder. He reasons that the lesser offenses are part of the course and conduct of the murder, noting that he came into possession of the firearm on the way to the shooting and that he left the firearm in the vehicle soon after discharging it. He asks that the lesser sentences be stayed. (§ 654.)

An act made punishable in different ways by different statutes must be punished only under the statute that provides the longest potential prison term, but may not be punished under more than one statute. (§ 654, subd. (a).) The ban on multiple

punishment applies when there is one act in the ordinary sense, but also when the crimes arise as the result of an indivisible course of conduct. Whether a course of conduct is divisible and thus gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any of these offense, but not for more than one of them. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208; *People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) Similar but consecutive objectives permit multiple punishment, as do separate but simultaneous objectives. (*People v. Latimer, supra*, 5 Cal.4th at pp. 1211-1212.) Whether section 654 applies is a factual issue for the trial court, which has considerable discretion in this matter. Its factual findings will not be overturned on appeal if substantial evidence supports them. When reviewing this factual determination, we consider the record in the light most favorable to the judgment and make every reasonable inference that could be drawn from that evidence. (*People v. Jones, supra*, 103 Cal.App.4th at p. 1143.) If multiple punishment would result, the trial court must stay execution of sentence for the lesser offenses. (*People v. Jones* (2012) 54 Cal.4th 350, 353.)

B. *Possession of Firearm by Convicted Felon*

Coleman argues that the trial court violated the ban on multiple punishment when it imposed a term for his possession of a firearm as a convicted felon, consecutive to the term for murder. (Former § 12021, subd. (a)(1).) Whether a firearms possession offense constitutes a divisible transaction from an offense in which the weapon was used turns on the facts of each case. When the evidence shows possession “distinctly antecedent and separate from the primary offense,” both offenses may be punished. When the evidence shows only possession in conjunction with the primary offense, only the primary offense is punishable. (*People v. Bradford* (1976) 17 Cal.3d 8, 22; *People v. Jones, supra*, 103 Cal.App.4th at p. 1143; *People v. Venegas* (1970) 10 Cal.App.3d 814, 821.) Multiple punishment is improper when fortuitous circumstances put the firearm in the defendant’s hand “at the instant of committing another offense” (*People v. Ratcliff* (1990) 223

Cal.App.3d 1401, 1412 (*Ratcliff*); *People v. Jones, supra*, 103 Cal.App.4th at pp. 1144-1145.)

For example, if a defendant barred from possessing a weapon obtains one during a struggle and then commits a primary offense with that weapon, section 654 bars punishment for more than the primary offense. The possession of the firearm was not distinctly antecedent and separate from its use to commit the primary offense. (*People v. Bradford, supra*, 17 Cal.3d at pp. 22-23; *People v. Jones, supra*, 103 Cal.App.4th at p. 1144.) Instead, the possession was physically simultaneous with the commission of the primary offense and was incidental to the single objective of using the weapon to commit the primary offense. (*People v. Jones, supra*, at p. 1144; *People v. Venegas, supra*, 10 Cal.App.3d at p. 821.)

Coleman criticizes *Ratcliff*, arguing that the California Supreme Court has not approved it and urging us not to apply it. However, in June 2012, since the time that he filed his brief, the California Supreme Court has endorsed the approach adopted by the Courts of Appeal in *Jones* and the cases it discusses—including *Ratcliff*. These appellate cases apply section 654 when the defendant is convicted of both a firearm possession offense and the commission of a separate non-possession crime with that firearm. The California Supreme Court noted that its decision on section 654 in the context of multiple possession offenses was not intended to cast doubt on the wisdom of these appellate decisions. (*People v. Jones, supra*, 54 Cal.4th at p. 358, fn. 3.)

Coleman also attempts to distinguish the facts of his case from those in these cases. We are not persuaded. Multiple punishment is proper when the defendant possessed the firearm *before* the primary offense with an independent intent. When the defendant arrives at the scene of the primary crime already in possession of the firearm, section 654 does not bar punishment for both the firearm possession and the primary offense committed with the firearm. (*People v. Jones, supra*, 103 Cal.App.4th at pp. 1144-1145; *People v. Ratcliff, supra*, 223 Cal.App.3d at p. 1413.) In these circumstances, the crime is committed the instant that the defendant takes possession of the firearm. (*People v. Jones, supra*, 103 Cal.App.4th at pp. 1145-1146; *People v.*

Ratcliff, supra, 223 Cal.App.3d at p. 1410.) By his own admission, Coleman obtained possession of the weapon, then rode to the location where the drive-by shooting occurred, estimated to be two to three miles away. The trial court found that the firearm possession offense was completed before Coleman drove to the vigil site. Sufficient evidence supports this factual finding. As such, Coleman’s punishment for both second degree murder and being a convicted felon in possession of a firearm did not constitute multiple punishment.³

C. *Shooting from a Motor Vehicle*

Coleman also contends that the trial court erred by imposing a consecutive term for his conviction of shooting a firearm from a motor vehicle in addition to sentencing him to a prison term for second degree murder. He reasons that the shooting from a motor vehicle was the provocative act that resulted in his second degree murder conviction, making the two offenses a single act for section 654 purposes. Viewed separately, Coleman urges us to conclude that the shooting offense was a victimless crime because the jury acquitted him of shooting at anyone. (Former § 12034, subd. (d).)

We agree that Coleman may not be lawfully sentenced for this offense. The shot he fired from Hughes’s motor vehicle was the provocative act that led to Coleman’s second degree murder conviction. Although section 654 does not preclude separate punishment for violent crimes committed against separate victims, there must be a victim of the shooting from a motor vehicle other than Hughes to allow a separate punishment for that offense. (See *People v. Cruz* (1995) 38 Cal.App.4th 427, 434.) The jury’s acquittal of the charged offense of shooting from a motor vehicle at a person precludes any factual finding that Coleman shot a victim in the crowd near where the shot was discharged. Thus, the sentence for shooting from a motor vehicle must be reversed.⁴

³ As we reject his contention that the multiple offenses were the result of a single criminal act, we necessarily reject Coleman’s due process challenge to the imposition of the terms for the possession and shooting offenses.

⁴ Our consideration of this issue brought a different error to our attention. The abstract of judgment and the court minutes state that Coleman was convicted of a violation of former section 12034, subdivision (c)—shooting *at a person* from a motor

III. RESTITUTION

Coleman also contends that the trial court erred by requiring him to pay a \$250 presentence investigation fee without first determining whether he had the ability to pay this fee. Statutory law authorizes a court to impose a fee to recoup the cost of preparing a presentence report. (Former § 1203.1b, subd. (a); *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1070.) The purpose of this provision is to shift costs stemming from criminal acts back to the convicted defendant, thus conserving public funds for other uses. (*People v. Valtakis, supra*, at p. 1073.)

Before his December 2010 sentencing, Coleman was advised that the probation department would recommend that the court assess a \$250 fee for this purpose. He was also notified of his right to have a hearing with counsel on his ability to pay. (Former § 1203.1b, subd. (a).) At sentencing, the trial court imposed this fee. It also ordered him to pay other fines and restitution after rejecting Coleman's objection that another \$5,000 fine posed a financial hardship on his family. (Former § 1202.4, subd. (b)(1) [Stats. 2010, ch. 351, § 9, eff. Sept. 27, 2010].) He did not object to the lesser probation investigation fee, nor did he seek a hearing before the probation officer as allowed by statute. (See § 1203.1b, subd. (a).) As such, he has waived his right to challenge on appeal the imposition of the fee. (*People v. Valtakis, supra*, 105 Cal.App.4th at pp. 1071-1076.)

vehicle. In fact, this was the charged offense of which Coleman was *acquitted*. He was convicted of the lesser included offense of shooting from a motor vehicle—a violation of former section 12034, subdivision (d). The sentence imposed—a term of eight months as one-third of the two-year midterm for this violent felony—is consistent with the jury's verdict rather than the statutory citation in the minutes and the abstract of judgment. It appears that the citation of former section 12034, subdivision (c) in the minutes and the abstract of judgment was a clerical error. On remand, the trial court is ordered to correct this error.

The sentence is reversed for the conviction of shooting a firearm from a motor vehicle on multiple punishment grounds. The trial court is also ordered to correct the statutory citation of this offense when it issues a revised abstract of judgment. As modified, the judgment is affirmed.

Reardon, Acting P.J.

We concur:

Rivera, J.

Sepulveda, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.