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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL G. HERNANDEZ et al.,

Defendants and Appellants.

B229184

(Los Angeles County
Super. Ct. No. KA090252)

APPEALS from judgments of the Superior Court of Los Angeles County. George Genesta, Judge. Affirmed as modified.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant Omar A. Guevara-Gomez.

Gerald Peters, under appointment by the Court of Appeal, for Defendant and Appellant Miguel G. Hernandez.

Janice Wellborn, under appointment by the Court of Appeal, for Defendant and Appellant Abel Hernandez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Baine P. Kerr, Deputy Attorneys General for Plaintiff and Respondent.

Appellants and defendants, Abel Hernandez (Abel), Miguel G. Hernandez (Miguel), and Omar A. Guevara-Gomez (Guevara-Gomez) appeal from their felony convictions.¹ Raising only sentencing issues, Abel and Miguel contend that the trial court should have stayed fines and penalties imposed on counts which were stayed pursuant to Penal Code section 654.² We agree and modify the judgment accordingly and otherwise affirm the judgments.

Guevara-Gomez's appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), raising no issues. On December 16, 2011, we notified Guevara-Gomez of his counsel's brief and gave him leave to file, within 30 days, his own brief or letter stating any grounds or argument he might wish to have considered. That time has elapsed, and defendant has submitted no brief or letter. We have reviewed the entire record, and finding no arguable issues as to Guevara-Gomez, we affirm the judgment.

BACKGROUND

1. Procedural Background

Defendants were each charged with two counts of second degree robbery in violation of section 211 (counts 1 and 2); one count of possession for sale of cocaine in violation of Health and Safety Code section 11351 (count 3); and one count of transportation of cocaine, in violation of Health and Safety Code section 11352 (count 5). The information alleged that the quantity of cocaine exceeded 20 kilograms by weight. Count 4 charged Abel with the crime of felon in possession of a firearm, in violation of section 12021, subdivision (a)(1). As to counts 1 and 2, it was alleged that Abel

¹ To avoid confusion, we refer to defendants and witnesses who share a last name by their first names. We refer to the three defendants collectively as defendants.

² All further statutory references are to the Penal Code unless otherwise indicated. Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

personally used a firearm within the meaning of section 12022.53, subdivision (b), and as to counts 3 and 5, that Abel was personally armed with a firearm within the meaning of section 12022, subdivision (c). As to counts 1, 2, 3, and 5, it was alleged that a principal was armed with a semiautomatic weapon within the meaning of section 12022, subdivision (a)(1).

Defendants were jointly tried. A jury returned guilty verdicts on counts 1, 2, 3, and 5 against all defendants with a true finding as to the firearm allegations, and a guilty verdict on count 4 against Abel. The jury was unable to reach a verdict as to the quantity of cocaine, and the trial court dismissed that allegation. Each defendant filed a timely notice of appeal.

The trial court sentenced Guevara-Gomez to a total of seven years four months in prison. The court imposed the high term of five years as to count 1, plus a consecutive term of one year due to the firearm enhancement; one-third the middle term, one year, as to count 2, with four months for the gun enhancement; and the middle term of three years and four years respectively as to counts 3 and 5, with a one-year firearm enhancement as to each. The terms as to counts 3 and 5 were then stayed under section 654. The trial court awarded 259 total custody credits which included 226 actual days served, and imposed statutory fines and fees which were later modified. The trial court recalculated the fines and fees and stayed those imposed as to counts 3 and 5 pursuant to section 654.

Miguel was sentenced to a total of 10 years, with count 5 designated as the principal term. The trial court imposed and stayed sentences as to counts 1, 2, and 3, pursuant to section 654. The court awarded Miguel 259 days of custody credit, which included 226 actual days in custody, and imposed statutory fines and fees which were recalculated on Miguel's motion. The court did not stay the crime prevention fee imposed in count 1.

Abel was sentenced to a total of 20 years in prison as to counts 1, 2, and 4. The court imposed and stayed sentences as to counts 3 and 5 pursuant to section 654, and awarded 259 days of custody credit, which included 226 actual days in custody. The

statutory fines and fees were also recalculated on motion, but the court did not stay the drug related fines and fees imposed as to counts 3 and 5.

2. Prosecution Evidence

Detective Sergeant Thomas Frayeh and Detective Shannon Sullivan of the La Verne Police Department planned a surveillance operation using paid informants Eduardo Perez (Eduardo) and Jose Perez (Jose). On April 8, 2010, Eduardo arranged a drug sale using 26 kilograms of cocaine supplied by the police. After several telephone conversations and an initial meeting with Guevara-Gomez, Eduardo and his brother met Guevara-Gomez and Abel in a laundromat parking lot, observed by Detectives Frayeh and Sullivan and other officers. Eduardo agreed to sell 26 kilograms of cocaine for \$20,000 per kilogram.

At the laundromat, Eduardo and Jose left their car and stood by the trunk as Guevara-Gomez and Abel approached. When Eduardo opened the trunk and unzipped the duffel bag holding the cocaine, Abel placed a gun against his ribs. Meanwhile Miguel approached Jose and told him to move away. Eduardo saw three other men standing near their car a short distance away. One of them had a gun. Abel ordered Eduardo to place the duffel bag into Abel's white SUV. Eduardo initially refused and then carried the bag to the SUV, but refused Abel's order for him to get into the SUV. Abel took Eduardo's keys, and all three defendants left in the SUV.

Police officers pursued defendants as the white SUV took evasive action through heavy traffic, at one time crossing lanes into oncoming traffic. Finally, surrounded by police vehicles, the white SUV came to a near stop. Officers approached the SUV on foot with guns drawn, removed defendants from the SUV, and arrested them. Cocaine, a loaded handgun and loaded magazine, as well as \$21,000 in cash (packaged to make it appear to be a larger amount) were recovered.

DISCUSSION

I. Fines and fees subject to section 654

A. *Abel Hernandez*

Abel contends that the drug related fines and fees imposed as to counts 3 and 4 must be stayed along with the stayed prison terms. Specifically, a \$50 laboratory analysis fee pursuant to Health and Safety Code section 11372.5, with a penalty assessment and surcharge pursuant to Penal Code section 1465.7, subdivision (a); a \$130 drug program fee pursuant to Health and Safety Code section 11327.7, plus a penalty assessment and a surcharge pursuant to Penal Code section 1465.7, subdivision (a). Respondent concedes the point and we agree.

The laboratory analysis fee and the drug program fee were mandatory due to Abel's conviction of violating Health and Safety Code sections 11351 (count 3) and 11352 (count 5). (See Health & Saf. Code, §§ 11372.5, 11372.7.) Although denominated a "fee" the laboratory analysis fee is additional punishment; thus, section 654 requires that it also be stayed. (*People v. Sharret* (2011) 191 Cal.App.4th 859, 865, 870 (*Sharret*); Health & Saf. Code, § 11372.5.) The drug program fee is also punishment. (*People v. Sierra* (1995) 37 Cal.App.4th 1690, 1696.) It follows that the drug program fee must also be stayed. (See *Sharret, supra*, at p. 865.)

B. *Miguel Hernandez*

Miguel contends that the trial court should have stayed the crime prevention fine imposed pursuant to section 1202.5 as to count 1, because the court stayed execution of sentence under section 654. Again, respondent concedes the point and we agree. Section 1202.5, subdivision (a) provides for an "additional fine" for each robbery conviction, "in addition to any other penalty or fine imposed." "Fines arising from [criminal] convictions are generally considered punishment." (*People v. Alford* (2007) 42 Cal.4th 749, 757; *Sharret, supra*, 191 Cal.App.4th at p. 870.) By labeling an amount due upon conviction "fine" rather than "fee," the Legislature ordinarily intends the amount to have a punitive purpose. In section 1202.5, the Legislature went further and indirectly referred to the fine as a penalty. We conclude that section 1202.5 provides for additional

punishment, and because the prison term for count 1 was stayed pursuant to section 654, the additional punishment must be stayed as well.

II. Guevara-Gomez: *Wende* Review

We have reviewed the entire record and conclude that Guevara-Gomez has, by virtue of counsel’s compliance with the *Wende* procedure and our review, received adequate and effective appellate review of the judgment entered against him in this case. (*Smith v. Robbins* (2000) 528 U.S. 259, 278; *People v. Kelly* (2006) 40 Cal.4th 106, 112-113.) Finding no other arguable issues, we affirm the judgment.

DISPOSITION

The judgment of Abel is modified as follows: the laboratory analysis fee imposed pursuant to Health and Safety Code section 11372.5 and the penalty assessment and surcharge imposed pursuant to Penal Code section 1465.7, subdivision (a) are stayed; the drug program fee imposed pursuant to Health and Safety Code section 11327.7, and the penalty assessment and a surcharge imposed pursuant to Penal Code section 1465.7, subdivision (a) are stayed.

The judgment of Miguel is modified as follows: the crime prevention fine imposed pursuant to section 1202.5 as to count 1 is stayed.

The trial court is directed to prepare new abstracts of judgment reflecting the modified judgments and to forward a copy of each to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD