

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE,

Plaintiff and Respondent,

v.

DANNY LEE DOWNING, SR.,

Defendant and Appellant.

C068547

(Super. Ct. No.
CRF10429)

A jury convicted defendant Danny Lee Downing, Sr., of unlawfully possessing a firearm, unlawfully possessing ammunition, and unlawfully carrying a concealed weapon in his vehicle.

On appeal, defendant contends his convictions for unlawfully possessing a firearm and unlawfully carrying a concealed weapon in his vehicle arose from a single possessory act and the trial court should have stayed his sentence for

carrying a concealed weapon pursuant to Penal Code section 654. The People agree, and so do we.

We will modify the judgment to stay the sentence on count 3 and affirm the judgment as modified.

BACKGROUND

When officers conducted a traffic stop to execute a search warrant on defendant's truck, they found a sock with several .22 caliber bullets on the front passenger floorboard and a pistol and holster under the driver's seat. Defendant told officers he worked as a night watchman and kept the gun for protection, although he knew (having previously been convicted of a felony) he should not possess a gun.

The jury found defendant guilty of unlawful possession by a felon of a firearm (former Pen. Code, § 12021, subd. (a)(1)¹ [now § 29800]² -- count 1), unlawful possession by a felon of ammunition (former § 12316, subd. (b)(1) [now § 30305] -- count 2), and carrying a concealed weapon in his vehicle (former § 12025, subd. (a)(1) [now § 25400] -- count 3). The trial court sentenced defendant to six years in prison on count 1

¹ Undesignated statutory references are to the Penal Code.

² The weapons statutes relevant to defendant's convictions were reorganized by the Legislature in 2010, operative January 1, 2012. (Stats. 2010, ch. 711 (Sen. Bill No. 1080).) The reorganization was expressly intended not to entail substantive change. (See Cal. Law Revision Com. com., 51D pt. 1 West's Ann. Pen. Code (2012 supp.) foll. §§ 12010 to 12021.3, p. 37 and foll. §§ 12023 to 12031.1, p. 85.) We will refer to the statutes in effect at the time of defendant's prosecution and trial.

(three years, doubled for defendant's prior strike conviction), a concurrent sentence of one year four months on count 2, and a concurrent sentence of six years on count 3. The trial court declined to apply section 654 to stay the sentence in count 2.

DISCUSSION

Defendant contends the trial court should have stayed his concurrent sentence on count 3 pursuant to section 654. The People agree and so do we.

Section 654 prohibits punishment for multiple offenses that arise from the same act or from a series of acts that constitute an indivisible course of conduct. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) It does not allow any multiple punishment, including either concurrent or consecutive sentences. (*People v. Deloza* (1998) 18 Cal.4th 585, 591-592.) The purpose of section 654 "is . . . to ensure that punishment is commensurate with a defendant's criminal culpability. [Citations.]" (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 196.)

Whether section 654 applies depends on the intent and objective of the actor (*Neal v. State of California* (1960) 55 Cal.2d 11, 19), and is a question of fact for the trier of fact. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) The trial court's ruling on that issue, express or implied, will be affirmed on appeal if it is supported by substantial evidence. (*People v. Nelson* (1989) 211 Cal.App.3d 634, 638.) "'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.'" [Citation.]"

(*People v. Hester* (2000) 22 Cal.4th 290, 295; see also *People v. Lopez* (2004) 119 Cal.App.4th 132, 138.)

A person could be convicted for unlawful possession by a felon of a firearm (former Pen. Code, § 12021, subd. (a)(1) -- count 1) if the person had a prior felony conviction and knowingly possessed a firearm. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922; *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1414.) In addition, a person could be convicted for unlawfully carrying a concealed weapon in a vehicle (former § 12025, subd. (a)(1) -- count 3) if the person carried concealed within a vehicle under his control a firearm capable of being concealed upon the person. (Former § 12025, subd. (a)(1).)

Although the probation report advised against staying the sentence imposed on count 3, it recommended a concurrent rather than consecutive sentence by stating: "The probation officer sees no separate objective distinguishing Count I from Count III. Nor in the criminal complaint charged in the present matter did [defendant] possess the gun at a separate place or time. Count I involves [defendant's] status as a convicted felon, a fact that will remain in effect for the entirety of his life. [Defendant] obtained the firearm for his employment as a night watchman. In Count III, he possessed this same firearm concealed under the driver's seat of his vehicle. The probation officer considered the circumstances of Count III and the fact that [defendant] was homeless and living in his vehicle at the time of the offense. The probation officer believes the Court

should consider that [defendant] was in effect storing the weapon, for all practical purposes, within his residence rather than walking the streets with the gun concealed in his waistband."

While it is true that defendant committed separate and distinct offenses in possessing a firearm as a felon and in concealing the weapon in his truck, there is no evidence to support a finding that defendant had a different intent and objective in violating counts 1 and 3, and the trial court made no such finding. Defendant did not use his gun to commit a nonpossessory crime. Both offenses were predicated on the possession of the same firearm at the same time and place. Speculation regarding the existence of multiple intents and objectives with no evidentiary support "parses the objectives too finely." (*People v. Britt* (2004) 32 Cal.4th 944, 953.)

Accordingly, although the trial court did not err in imposing sentences on both counts 1 and 3, the sentence on count 3 should have been stayed. (*People v. Scheidt* (1991) 231 Cal.App.3d 162, 170 [§ 654 precludes separate punishment for single act of possessing a concealable firearm and possessing a sawed-off rifle]; see *People v. Lopez, supra*, 119 Cal.App.4th at p. 138 [§ 654 precludes imposition of separate sentences for unlawful possession of ammunition and unlawful possession of a firearm when both violations were part of an "indivisible course of conduct"]; see generally *People v. Miller* (1977) 18 Cal.3d 873, 887 [where applicable, § 654 precludes imposition of concurrent sentence].)

The parties reference *People v. Harrison* (1969) 1 Cal.App.3d 115 (*Harrison*), but they agree it is not controlling here. In that case the defendant was doubly punished for violating former iterations of section 12021 (felon in possession of firearm) and section 12031 (carrying a loaded firearm in a vehicle on any public street). *Harrison's* reasoning focused on the "loaded firearm" provision of a former version of the statute that is not applicable here (*id.* at p. 122) and as the Attorney General notes, *Harrison's* reasoning has not been universally followed. (See *People v. Lopez, supra*, 119 Cal.App.4th at pp. 137-138; *People v. Perry* (1974) 42 Cal.App.3d 451, 456-457 [§ 654 bars multiple punishment for simultaneous offenses of possession of a sawed-off shotgun and felon in possession of a firearm].) In any event, *Harrison* does not hold as a matter of law that multiple punishment is required under the circumstances of this case. A search for substantial evidence of defendant's intent or objective must be undertaken, because whether multiple convictions are part of an indivisible transaction is primarily a question of fact. (*People v. Hutchins, supra*, 90 Cal.App.4th at p. 1312.)

DISPOSITION

The judgment is modified to stay the sentence on count 3 pursuant to section 654, the stay to become permanent upon completion of the sentence on the remaining counts. The judgment is affirmed as modified. The trial court shall prepare an amended abstract of judgment reflecting the stay of sentence on count 3 and shall forward a certified copy of the amended

abstract of judgment to the California Department of Corrections
and Rehabilitation.

_____ MAURO _____, J.

We concur:

_____ HULL _____, Acting P. J.

_____ BUTZ _____, J.