

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Appellant,

v.

ANTHONY GUARINO, JR. ,

Defendant and Respondent.

D059698

(Super. Ct. No. SCD229280)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Einhorn, Judge. Affirmed and remanded with directions.

A jury convicted Anthony Guarino, Jr. of gross vehicular manslaughter while intoxicated, for Marc Durham's death (Pen. Code,¹ § 191.5, subd. (a); count one); driving under the influence of alcohol and causing injury to Clemente Rieta (Veh. Code, § 23153, subd. (a); count two); and driving with a measurable blood alcohol level and causing injury to Rieta (Veh. Code, § 23153, subd. (b); count three.) As to counts one and two,

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

the jury found true allegations that Guarino personally inflicted great bodily injury on Durham, who was not an accomplice (§§ 1192.7, subd. (c)(8), 12022.7, subd. (a)), and proximately caused bodily injury to Rieta, Moses Small, Elizabeth Reyes, Adolfo Reyes, Esain M. and Maria Jocson (Veh. Code, § 23558). As to counts two and three, the jury found true the same enhancement allegations against all of the same victims except Rieta.

Guarino unsuccessfully moved for a new trial, but successfully moved to dismiss counts two and three on the ground those counts were necessarily included offenses of count one. In the interest of justice, the court also struck the true Vehicle Code section 23558 findings attached to count one, and sentenced Guarino to the middle term of six years on that count.

The People appeal under section 1238, contending the court erroneously dismissed counts two and three. We agree. The judgment of conviction is affirmed. The sentence is vacated and the matter is remanded to the trial court for resentencing.

BACKGROUND

The facts are not in dispute. The trial court, in the context of a motion for a new trial, summarized: "The evidence was clear that Mr. Guarino drove to a bar in National City. There he consumed alcohol. He consumed enough alcohol to register a .15 [blood alcohol level] two hours after the collision. . . . ¶] Thereafter, he . . . drove from National City, almost 30 miles, and at a speed of [approximately] 55 [miles per hour] he collided with the rear of Mr. Durham's vehicle[,] ultimately causing Mr. Durham's death and caused a chain reaction of collisions that resulted in an additional six persons[,] including a little kid[,] being injured."

The trial court, in dismissing counts two and three, reasoned: "[T]he pleading was such that the—the decedent was listed in all three counts [and] the multiple victims were listed similarly in all of the counts, albeit I think there were five [victims] in Count 2 and six in Count 1. [¶] And the rationale of it being necessarily included seems to fit our case under the way it was pled and under the way that the jury concluded their verdicts. And isn't it whether they're imposed and stayed or imposed—doesn't that constitute multiple punishment for the same conduct? I think it does. [¶] So accordingly, I modify the ruling on the motion to dismiss and dismiss pursuant to the defense request Counts 2 and 3 on the basis that they're necessarily includable offenses to Count 1, which subsumes all of the allegations . . . set forth in Counts 2 and 3."

DISCUSSION

Relying on California Supreme Court authority, *People v. Reed* (2006) 38 Cal.4th 1224, 1231 and *People v. Izaguirre* (2007) 42 Cal.4th 126, 128, the People contend the trial court impermissibly took into account the enhancement allegations when dismissing counts two and three.

Section 954 provides: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense

of which the defendant is convicted must be stated in the verdict or the finding of the court." The California Supreme Court relied on that statute in *People v. Sloan* (2007) 42 Cal.4th 110, 122, and noted, "multiple convictions permitted under section 954 serve an important and legitimate function in criminal sentencing. Where one of two multiple convictions valid under section 954 is overturned on appeal or habeas corpus, the remaining and intact conviction, even though it arose from the same facts or indivisible course of conduct as the conviction that is being reversed, may be substituted in its stead, with the stay of execution of sentence lifted at resentencing, so that punishment on the valid conviction can be imposed in the interests of justice."

The People also point out that the trial court was not barred from imposing multiple punishment on Guarino under section 654 because *People v. McFarland* (1989) 47 Cal.3d 798 held, "[W]here, as here, a defendant commits vehicular manslaughter with gross negligence—an act of violence against the person—he may properly be punished for injury to a separate individual that results from the same incident." (*Id.* at pp. 803-804.) Moreover, we have ruled that "it is generally appropriate that a defendant be subject to greater punishment for committing an offense if his or her commission of that offense causes injuries to multiple persons." (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1331.)

Guarino concedes that the People's arguments are supported by *People v. McFarland, supra*, and *People v. Izaguirre, supra*, but he insists that under section 654 the trial court was barred from imposing separate punishment for counts two and three. The *Izaguirre* court stated, "To the extent defendant claims enhancements should be

considered when applying the multiple conviction rule to charged offenses, . . . [t]hey may not." (*People v. Izaguirre, supra*, 42 Cal.4th at p. 134.) We do not address the section 654 issue because it is premature at this point, and we will not preempt the trial court's sentencing discretion.

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated and the matter is remanded to the trial court for resentencing.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.