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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BARRY SCOTT TOLBERT,

Defendant and Appellant.

D060357

(Super. Ct. No. RIF143634)

APPEAL from a judgment of the Superior Court of Riverside County, Jean P. Leonard, Judge. Affirmed in part, reversed in part and remanded with directions.

On appeal after resentencing, Barry Scott Tolbert contends the trial court acted in excess of the limited jurisdiction established by this court's prior directions on appeal in our nonpublished opinion in *People v. Markson* (Dec. 8, 2010, D056075). He argues that because the trial court did not merely amend the abstract of judgment as instructed, but instead conducted a new sentencing hearing, its action is void and the judgment must be reversed. We reverse as to counts 7 and 8 and direct the trial court to prepare a new

abstract of judgment conforming to our prior directions and with specified corrections set forth below.

## FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

A jury convicted Tolbert of three counts of attempted murder (Pen. Code, <sup>2</sup> §§ 664, 187; counts 1, 2 and 3), three counts of assault with a firearm (§ 245, subd. (a)(2); counts 4, 5 and 6), three counts of assault with force likely to cause great bodily injury (§ 245, subd. (a)(1); counts 7, 8 and 9) and one count of active participation in a criminal street gang (§ 186.22, subd. (a); count 10). It found true that the attempted murders were willful, deliberate and premeditated; that counts 1 through 9 were committed for the benefit of a criminal street gang, and that Tolbert caused great bodily injury with respect to counts 1 through 3 (§§ 12022.53, subd. (d); 1192.7, subd. (c)(8)) and counts 4 through 6 (§§ 12022.7, subd. (a); 1192.7, subd. (c)(8)). The jury found "not true" allegations that Tolbert personally used a firearm in counts 4 through 6. (*People v. Markson, supra*, D056075.)

The trial court sentenced Tolbert to a total prison term of 15 years to life plus 20 years, consisting of 15 years to life on count 1; two concurrent terms of 15 years to life on counts 2 and 3; the midterm of three years, plus an additional three years for the great

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<sup>1</sup> The background facts of the crimes and Tolbert's trial are set forth in our prior nonpublished appellate opinion, *People v. Markson, supra*, D056075. We take judicial notice of our prior opinion and the appellate record in the matter. (Evid. Code, §§ 452, subd. (d) [judicial notice may be taken of court records], 459; Cal. Rules of Court, rule 8.1115(b)(1); *Fink v. Shemtov* (2010) 180 Cal.App.4th 1160, 1171-1173 [court may take judicial notice of prior nonpublished opinions in related appeals on its own motion].)

<sup>2</sup> Further statutory references are to the Penal Code unless otherwise indicated.

bodily injury enhancement, four years for the firearm enhancement, and 10 years for the gang enhancement on count 4; and concurrent terms of 16 years on count 5, eight years on count 6, six years each on counts 7, 8 and 9, and two years on count 10. (*People v. Markson, supra*, D056075.)<sup>3</sup>

Tolbert appealed, in part contending the court should have stayed execution of his sentences for counts 4 through 9 under section 654. (*People v. Markson, supra*, D056075.) This court reversed the true findings on the enhancements for personal infliction of great bodily injury on counts 5 and 6, holding there was no evidence the victims pertaining to those counts suffered any injury related to the assault with a firearm. (*People v. Markson, supra*, D056075.) We also concluded the trial court had erred in Tolbert's sentencing by failing to stay execution of sentence on the counts 4, 5 and 6 assaults with a firearm under section 654, because the conduct was the same as that underlying the attempted murder convictions. We rejected Tolbert's contention as to the other counts, holding the court "did not err in imposing, and not staying, sentences for the offenses charged in counts 7, 8 and 9." (*People v. Markson, supra*, D056075.)

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<sup>3</sup> Though our prior opinion indicates a 20-year sentence on count 5, the trial court in fact sentenced Tolbert to a 16-year term. Also, in orally pronouncing judgment, the court stated it would impose an eight-year term on count 6. The original August 19, 2009 abstract of judgment, however, shows a 13-year term. The trial court's oral judgment controls. (*People v. Mitchell* (2011) 26 Cal.4th 181, 185.) The new abstract of judgment should reflect an imposed but stayed eight-year sentence on Tolbert's count 6 conviction.

Accordingly, our disposition reads:

"The jury's true findings with respect to the enhancements for personal infliction of great bodily injury on counts 5 and 6 as to Tolbert are reversed. The trial court is directed to prepare a new abstract of judgment for Tolbert in which the court shall:

"(1) vacate the four-year term for the personal use of a firearm enhancement related to count 4;

"(2) strike the section 12022.7, subdivision (a) enhancements on counts 5 and 6; and

"(3) stay execution of sentence on counts 4, 5, and 6, pursuant to section 654.

"The trial court is directed to forward a copy of Tolbert's amended abstract of judgment to the Department of Corrections and Rehabilitation. Tolbert's judgment is otherwise affirmed." (*People v. Markson, supra*, D056075.)

This court's remittitur issued on March 21, 2011. On July 1, 2011, the trial court held proceedings following the remittitur. It acknowledged our holding and correctly restated our disposition.<sup>4</sup> It then said, "Because this direction does change the actual

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<sup>4</sup> The court said: "[T]he appellate court in this matter has, in fact, indicated that the appeal from a judgment of the Superior Court is in fact affirmed in part, reversed in part, and remanded for modification of judgment. [¶] In reviewing the Court of Appeal[']s decision, it appears to me that although the decision of the jury was actually affirmed and there were no problems with the trial itself, there were certain points in the sentencing that the Court of Appeal decided should be stricken or reversed. The Court of Appeal actually in [remittitur] indicated that the jury's true findings with respect to the enhancements for personal infliction of great bodily injury on Counts 5 and 6 as to Tolbert are reversed, and the trial court is directed to prepare a new Abstract of Judgment for Mr. Tolbert in which the Court shall: [¶] 1. Vacate the four-year term for the personal use of a firearm enhancement related to Count 4. [¶] 2. Strike the [s]ection

sentence in this matter, the Court ordered that Mr. Tolbert be transported to Riverside County so that we could go ahead and take care of the sentencing today. [¶] We were here a couple of weeks ago, and I spoke with [the prosecutor and defense counsel] about my plan on how to go forward on this today. And so I'm ready to proceed."

The court found Tolbert ineligible for probation. It first sentenced him to concurrent 15-year-to-life terms on counts 1, 2 and 3, and found the section 186.22, subdivision (b) enhancement replaced the original sentence with the 15-year-to-life term. As to count 4, it sentenced Tolbert to the midterm of three years, added a consecutive three-year enhancement under section 12022.7, subdivision (a), vacated the section 12022.5, subdivision (a) enhancement, and added a consecutive ten-year gang enhancement (§ 186.22, subdivision (b)(1)(C)). On count 5, the court sentenced Tolbert to 13 years: the midterm of three years plus a consecutive ten-year gang enhancement. It struck the section 12022.7, subdivision (a) enhancement on count 5. It sentenced Tolbert to eight years on count 6, consisting of the midterm of three years and a five-year enhancement under section 186.22, subdivision (b)(1)(B), and struck the section 12022.7, subdivision (a) enhancement. It stayed the sentences and enhancements on counts 4, 5 and 6 under section 654. Declaring count 8 the principal count, the court gave Tolbert six-year sentences on each of counts 7, 8 and 9: three-year midterms plus three-year enhancements under section 186.22, subdivision (b)(1)(a), and, noting it was not directed to do so, stayed the sentence on count 7 under section 654. It sentenced Tolbert to a two-

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12022.7, [s]ubdivision (a) enhancements on Counts 5 and 6, and [¶] 3. Stay the execution of sentence on Count[s] 4, 5 and 6, pursuant to [section] 654 of the Penal Code."

year midterm on count 10. Accordingly, Tolbert's aggregate determinate term was six years, which the court ordered be run consecutively to the indeterminate term of 15 years to life. The court described the total term as "life with a minimum of 21 years."

The court invited questions from counsel and the clerk, who had none. It concluded by stating that "[a]ny and all orders made regarding probation terms and conditions, monetary funding will remain in full force and effect. The Court is not going to resentence on that. . . . [¶] As to credit for time served, . . . I don't believe that changes at all."

## DISCUSSION

Tolbert's sole argument on appeal is that his sentence is void because the trial court did not conform its actions on remittitur "to the letter" of this court's directions in the disposition of case No. D056075 by issuing a new abstract of judgment, but instead conducted a new sentencing hearing. Tolbert argues the issue is governed by *People v. Dutra* (2006) 145 Cal.App.4th 1359 (*Dutra*), in which a majority panel of the appellate court vacated a sentence imposed by the trial court after it had been directed on remittitur from a prior appeal to conduct a new sentencing trial, but did not do so due to an intervening decision from the California Supreme Court. The majority held the trial court's obligation to follow the terms of a remittitur was jurisdictional and defined by the terms of the remittitur. (*Dutra*, 145 Cal.App.4th at pp. 1367-1369.) The dissenting justice's view was that no miscarriage of justice had taken place, but the majority disagreed, reasoning "once the remittitur issued [the defendant] had a legal right to a sentencing hearing. The trial court deprived her of that right in an act made wholly

outside the trial court's jurisdiction." (*Id.* at p. 1369.)

In this case, the People argue the trial court imposed a proper sentence on remand; that, unlike *Dutra*, it did not retry the case or make other findings contrary to this court's disposition order. According to the People, the trial court followed this court's directions and merely deemed count 8 to be the principal count, replacing the count 4 sentence that was ordered stayed under section 654 for the purpose of adding an otherwise valid consecutive determinate term to the overall sentence. This, they assert, was within the trial court's jurisdiction under section 1265, subdivision (a) to issue "all orders necessary to carry the judgment into effect" following the remittitur. The People acknowledge in a footnote that the trial court additionally stayed execution of the count 7 sentence, and that "technically" that sentence should have been imposed. The People go on to say, however, that imposition of a concurrent six year term on count 7 "presumably would have resulted appellant [*sic*] challenging *that* sentence based on a [section] 654 problem related to the sentence now imposed in count 8."

The law governing this issue is settled. For its holding, *Dutra* relied in part on *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754 and *Griest v. Fair Political Practices Com'n* (2001) 25 Cal.4th 688. In *Griest*, the California Supreme Court held an appellate court's remittitur "defines the scope of the jurisdiction of the court to which the matter is returned. "The order of the appellate court as stated in the remittitur, "is decisive of the character of the judgment to which the appellant is entitled. The lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the case, and if it should do so, the judgment rendered

thereon would be void." ' ' (Griset, at p. 701; see also *Snukal v. Flightways Manufacturing, Inc.*, at p. 774, fn. 5.)

Additionally, as Tolbert points out, the California Supreme Court more recently cited *Dutra* in *People v. Picklesimer* (2010) 48 Cal.4th 330, in which the court addressed the scope of a trial court's postjudgment jurisdiction following appellate affirmance and issuance of a remittitur. The California Supreme Court confirmed that in that instance, " 'the trial court is revested with jurisdiction of the case, *but only to carry out the judgment as ordered by the appellate court.*' " (*Id.* at p. 337, quoting *Dutra, supra*, 145 Cal.App.4th 1359 & § 1265, subd. (a).)

Thus, where, as here, the decision on appeal reverses with directions, the trial court is reinvested with only such jurisdiction as is defined by the remittitur's terms. The court is empowered to act only in accordance with the direction of the reviewing court; action that materially varies from those directions is unauthorized and void. (*People v. Picklesimer, supra*, 48 Cal.4th at p. 337; *Griset, supra*, 25 Cal.4th at p. 701; *Hampton v. Superior Court* (1952) 38 Cal.2d 652, 655; see also *Rice v. Schmid* (1944) 25 Cal.2d 259, 263; *Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982.) This "strict rule applies [even if] the directions of the reviewing court are based upon an erroneous concept. The remedy of the party aggrieved by the error lies only in a petition [for rehearing] to a reviewing court." (*Puritan Leasing Co. v. Superior Court* (1977) 76 Cal.App.3d 140, 147, cited with approval in *Griset*, at p. 701; see also *Skaggs v. City of Los Angeles* (1956) 138 Cal.App.2d 269, 272-273.)

Applying the principles expressed above, we conclude the trial court exceeded its limited jurisdiction on remand by staying the count 7 sentence under section 654 without directions from this court to do so. It is of no moment that the parties apparently agreed to the court's action, because the rule requiring a trial court to conform to the remittitur's terms is jurisdictional (*Dutra, supra*, 145 Cal.App.4th at p. 1367), and the parties may not confer jurisdiction by consent or stipulation. (*In re Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1216.)

The question remains whether, after receipt of the remittitur, the trial court had jurisdiction to redesignate the principal count and impose it consecutively with Tolbert's indeterminate terms as an "order[] necessary to carry the judgment into effect" under section 1265. We conclude it did not have such jurisdiction because, as we explain, redesignation of a principal term was not necessary for Tolbert to have a proper determinate sentence or to give effect to the judgment.<sup>5</sup>

Generally, section 1170.1 establishes the "sentencing protocol" for offenses with determinate terms (*People v. Neely* (2009) 176 Cal.App.4th 787, 797), unless the offenses fall under a special sentencing scheme. (See *People v. Pelayo* (1999) 69 Cal.App.4th 115, 123.) Sentencing under section 1170.1 proceeds in the following manner: "First, the trial court is required to select a base term—either the statutory low, middle or upper term—for each of the crimes. [Citations.] Second, if the court determines that a

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<sup>5</sup> We do not intend to suggest that a trial court has jurisdiction to deviate from appellate directions on remittitur in order to achieve an authorized sentence. The only question is whether, following a remittitur, additional sentencing proceedings are necessary to carry the judgment into effect.

consecutive sentence is merited, it must designate the crime with the 'greatest' selected base term as the principal term and the other crimes as subordinate terms. [Citation.] Third, the court sentences the defendant to the full base term it selected for the principal term crime and one-third of the middle term for any crimes for which the sentence is ordered to run consecutively. [Citations.] A subordinate term is one-third of the middle term even if the trial court had initially selected the lower or upper term as the base term." (*People v. Neely*, at p. 798, italics omitted.) The trial court has discretion to sentence a determinate term consecutively to an indeterminate term, but if it elects to do so, it must state its reasons. (§ 669; *People v. Galvez* (2011) 195 Cal.App.4th 1253, 1264; *In re Maes* (2010) 185 Cal.App.4th 1094, 1099; *People v. Dixon* (1993) 20 Cal.App.4th 1029, 1037; see *People v. Felix* (2000) 22 Cal.4th 651, 655; Cal. Rules of Court, rules 4.425, 4.451.) "Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently." (§ 669.)

Once the trial court stayed execution of the sentence on count 4 under section 654 as directed, that sentence was no longer part of the calculation of Tolbert's determinate sentence, including whether it was to be served consecutively or concurrently. (See, e.g., *People v. Deloza* (1998) 18 Cal.4th 585, 594 ["section 654 is irrelevant to the question of whether multiple current convictions are sentenced concurrently or consecutively"].) But the trial court was not required to redesignate one of Tolbert's determinate sentences as a

principal term.<sup>6</sup> (See § 1170.1; *People v. Neely, supra*, 176 Cal.App.4th at pp. 797-798.)

The authorities cited above do not prevent or preclude all of the determinate terms on separate counts from being served concurrently to the indeterminate terms; in that event, the court was not required to designate a principal term among the determinate terms.

Accordingly, our directions in *Markson* to prepare an amended abstract of judgment resulted in a proper sentence in which Tolbert's determinate terms on counts 7, 8, 9 and 10 were all to run concurrent to the indeterminate terms.

Finally, we observe that the July 27, 2011 abstract of judgment purports to stay the section 12022.7, subdivision (a) enhancements on counts 5 and 6, which the trial court properly ordered stricken (see *People v. Campbell* (1999) 76 Cal.App.4th 305, 311) and also incorrectly reflects and purports to stay section 12022.5, subdivision (a) enhancements on counts 4, 5 and 6, which the jury found not true. The abstract of judgment incorrectly includes section 12022.7 and 12022.5 enhancements on count 7 with which Tolbert was not charged. The abstract of judgment does not reflect the duration of the stayed terms on counts 4, 5 and 6. The new abstract of judgment should correct these errors and omissions.

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<sup>6</sup> The record from our prior appeal shows the trial court originally intended count 4 to run consecutively, and Tolbert's August 19, 2009 abstract of judgment ordered the 20-year determinate term on count 4 to run consecutive to the indeterminate term. If our directions on remittitur did not conform to the trial court's intention or were otherwise somehow erroneous, it was for the party aggrieved to petition for rehearing. (*Puritan Leasing Co. v. Superior Court, supra*, 76 Cal.App.3d at p. 147.)

## DISPOSITION

Tolbert's sentence as to counts 7 and 8 is reversed. We remand and direct the trial court to prepare a new abstract of judgment conforming to our prior directions (*People v. Markson* (Dec. 8, 2010, D056075) [nonpub. opn.]) including to impose an unstayed six-year sentence on count 7 (a three-year midterm plus a three-year enhancement under section 186.22, subdivision (b)(1)(a)), reflect that count 7 and count 8 are to run concurrent to the indeterminate term, and reflect the duration of the stayed terms on counts 4, 5 and 6. The abstract of judgment shall omit the stricken section 12022.7, subdivision (a) enhancements on counts 5 and 6, and omit the section 12022.5, subdivision (a) enhancements on counts 4, 5 and 6. The court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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O'ROURKE, J.

WE CONCUR:

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BENKE, Acting P. J.

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McDONALD, J.

