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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE GUERRERO MAYORQUIN,

Defendant and Appellant.

D061874

(Super. Ct. No. SCD238102)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed as modified

I.

INTRODUCTION

Defendant Jose Guerrero Mayorquin appeals from his sentence, imposed after a jury convicted him of multiple drug offenses, including possession for sale and transportation of drugs. On appeal, Mayorquin originally contended (1) that the trial court should have stayed execution of his sentences for possessing drugs and using a false

compartment, pursuant to Penal Code<sup>1</sup> section 654, because the court imposed sentence for transportation of the same drugs, and (2) that the abstract of judgment does not accurately reflect the credits that the court orally pronounced at sentencing. The People concede that Mayorquin is partially correct as to his contention that some portions of his sentence should be stayed pursuant to section 654, but contend that the abstract of judgment accurately reflects the credits to which Mayorquin is entitled. In response, Mayorquin concedes that the People are correct with respect to the issue of the credits, and he also appears to accept as correct the People's partial concession with respect to section 654.

We agree with the People that the trial court should have stayed Mayorquin's sentences on some of the counts for which he was convicted. We therefore modify the judgment to conform to this conclusion. We otherwise affirm the judgment as modified.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. *Factual background*

On December 14, 2011, Orange County Sheriff reserve officer Scott Klappenback observed a Ford Explorer speeding in the number two lane, traveling north on Interstate 5 (I-5). Klappenback paced the car as going between 70 and 80 miles per hour. The car slowed down, and Klappenback fell back. When the Ford Explorer sped up again and

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise indicated.

Klappenback paced the car as going 80 miles per hour, Klappenback conducted a traffic stop.

The driver of the Ford Explorer, Mayorquin, spoke only Spanish. Deputy Sheriff Gino Rodriguez arrived shortly after the traffic stop to interpret for Mayorquin. In Klappenback's opinion, there were some unusual things about Mayorquin's appearance and demeanor, as well as his car, that gave Klappenback pause. Mayorquin appeared nervous; he had only a single key in the ignition of his car; there was an open energy drink in sight; and Mayorquin possessed a single-day insurance card. Klappenback asked for consent to search the vehicle and Mayorquin consented.

Klappenback had Mayorquin drive to a border checkpoint area so that Klappenback could conduct the search more safely. Klappenback then had his police dog approach the vehicle. The dog signaled at the right front door area. Klappenback examined the dashboard and noticed irregularities. In addition, an examination of the firewall in the engine compartment showed some nonconforming welds. Klappenback decided to drill through the firewall. When Klappenback withdrew his drill bit, it was covered in white powder. A presumptive test of the white powder was positive for cocaine. Klappenback arrested Mayorquin.

The vehicle was moved to a garage where the firewall was removed. Nine bundles were found behind the firewall. Eight of the packages were wrapped in a similar manner, while the ninth looked different. The combined weight of the bundles led Klappenback to believe that they were possessed for purposes of selling them.

Orange County Sheriff narcotics investigator Jeffrey Hampton interviewed Mayorquin through an interpreter. Mayorquin described having driven up from Rosarito, Mexico in his own Ford Explorer. He crossed the border at San Ysidro at 11:00 a.m. that morning. Mayorquin explained that he was out of work in Mexico and had no money. Mayorquin knew that the car had drugs in it, because he had made a deal with a man he knew as Manuel. Mayorquin had turned over his car to Manuel, and when it was returned to him, he was told that there were 10 kilograms of cocaine hidden in the car. Manuel instructed Mayorquin to drive to the intersection of Highway 73 and I-5, where someone would meet him. Mayorquin had been told that he would be paid a total of \$5,500.

At trial, the parties stipulated that the contraband found in Mayorquin's car had been weighed and tested by a forensic scientist for the Orange County Sheriff. Bundles one through five were tested. Each bundle contained, on average, close to 1,000 grams of cocaine. Bundles six through eight were not weighed or tested. The ninth bundle, which had a different appearance from the others, contained 235 grams of methamphetamine.

B. *Procedural background*

A jury found Mayorquin guilty of possession of a controlled substance (cocaine) for sale (Health & Saf. Code, § 11351; count 1); transporting a controlled substance (cocaine) with a quantity enhancement (Health & Saf. Code, §§ 11352, subd. (a) & 11370.4, subd. (a)(2); count 2); possession of a controlled substance (methamphetamine) for sale (Health & Saf. Code, § 11378; count 3); transporting a controlled substance (methamphetamine), with a quantity enhancement (Health & Saf. Code, § 11379, subd.

(a); Pen. Code, § 1203.073, subd. (b)(2); count 4); and using a false compartment to smuggle controlled substances (Health & Saf. Code, § 11366.8, subd. (a); count 5).

The trial court sentenced Mayorquin to the lower term of three years on count 2, plus an additional five years for the quantity enhancement on that count. The court also sentenced Mayorquin to the midterms of three years on count 1; two years on count 3; three years on count 4; and two years on count 5, all to run concurrently with the sentence imposed on count 2.

Mayorquin filed a timely notice of appeal.

### III.

#### DISCUSSION

A. *The trial court should have stayed imposition of the sentences on counts 1, 3, and 5 pursuant to section 654*

Mayorquin contends that the trial court should not have imposed concurrent sentences on counts 1, 3, 4 and 5, but instead, should have stayed the sentences on those counts pursuant to section 654. According to Mayorquin, there was a singular act or purpose underlying the offenses alleged in all of the counts. The People concede that Mayorquin is correct with respect to counts 1, 3 and 5, but assert that the trial court properly imposed a concurrent sentence on count 4. We agree with the People.<sup>2</sup>

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<sup>2</sup> It appears that Mayorquin agrees that the People's view on this matter is correct. After receiving the People's brief in response to his opening brief, Mayorquin filed a letter indicating that he would not be filing a reply brief given the fact that the People "agree[] that the sentence as to various counts should be ordered stayed pursuant to Penal Code section 654."

Section 654 provides in relevant part: "(a) 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. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." Section 654 prohibits multiple punishments where a single criminal act or omission violates more than one penal statute. This statutory prohibition has been extended to cases in which the defendant engages in an indivisible course of conduct with a single objective, but violates several different penal statutes in the process. (See *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) "If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once. [Citation.] If, however, a defendant had several independent criminal objectives, he may be punished for each crime committed in pursuit of each objective, even though the crimes shared common acts or were parts of an otherwise indivisible course of conduct. [Citation.]" (*People v. Perry* (2007) 154 Cal.App.4th 1521, 1525.)

A defendant may be punished for simultaneously possessing different drugs for sale. (See *People v. Monarrez* (1998) 66 Cal.App.4th 710, 714-715 [" [I]t would be absurd to hold that a criminal who deals in one contraband substance can expand the scope of his inventory without facing additional consequences' [citation]"].) This is because "[a]lthough the overall intent is always to make money, the objectives of selling cocaine and [another drug] are separate." (*Id.* at p. 715.) It is thus clear that the trial

court could find that Mayorquin harbored a different objective in transporting the cocaine, for which he received an eight-year sentence (count 2), than he did in transporting the methamphetamine, for which he received a concurrent three-year sentence (count 4).

However, it seems clear, and the People concede, that Mayorquin possessed the drugs and used a false compartment to contain the drugs with a single objective, which was to transport the drugs into the United States. As a result, the trial court should have stayed Mayorquin's sentences under section 654 for the two possession for sale offenses (counts 1 and 3), and the false compartment for smuggling offense (count 5). (See *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583 [staying imposition of sentences on transportation of methamphetamine and possession for sale of same drugs after trial court chose one count of possession for sale of methamphetamine as the primary term].) As a result, we modify the judgment to stay execution of Mayorquin's sentences on counts 1, 3, and 5.

B. *The abstract of judgment accurately reflects Mayorquin's credits*

Mayorquin asserted in his opening brief on appeal that the abstract of judgment does not conform to the trial court's original oral pronouncement of judgment because it reflects only 269 days of conduct credit, as opposed to 270 days. However, after receiving the People's briefing on appeal, Mayorquin conceded that the 269 days of conduct credit is, in fact, correct. He therefore abandons this aspect of his appeal. We agree with the People and Mayorquin that the abstract of judgment sets forth the correct

calculation of conduct credits, and no amendment of the abstract of judgment for this purpose is necessary.

IV.

DISPOSITION

The judgment is modified to stay execution of the sentences imposed on counts 1, 3 and 5, pursuant to section 654. The trial court is directed to prepare an amended abstract of judgment reflecting this change and to deliver the amended abstract of judgment to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

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AARON, J.

WE CONCUR:

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NARES, Acting P. J.

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O'ROURKE, J.