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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

RAY FORD,

Defendant and Appellant.

E052898

(Super.Ct.Nos. RIF143312 &  
RIF145402)

OPINION

APPEAL from the Superior Court of Riverside County. Roger A. Luebs, Judge.

Affirmed.

Gregory Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Kevin Vienna, Deputy Attorney General, for Plaintiff and Respondent.

Pursuant to a plea to the court in two consolidated cases, defendant and appellant Ray Ford pled guilty to one count of robbery (Pen. Code, § 211, count 1);<sup>1</sup> one count of first degree burglary (§ 459, count 2); one count of grand theft of a firearm (§ 487, subd. (d)(2), count 3); and two counts of second degree burglary (§ 459, counts 4 & 5). Defendant also admitted that he had personally used a firearm in the commission of the robbery. (§ 12022.53, subd. (b).) In return, defendant was sentenced to the agreed upon indicated sentence of 14 years four months in state prison with credit for time served. Defendant's sole contention on appeal is that the trial court violated section 654 by imposing a concurrent term for the grand theft of a firearm charge in count 3. We reject this contention and affirm the judgment.

#### FACTUAL BACKGROUND<sup>2</sup>

On May 7, 2008, the victim's home was burglarized. Numerous items were missing, including a "Bersa 380 handgun." A neighbor saw the perpetrators leaving in a vehicle and wrote down the vehicle's license plate number.

Later that same day, two men committed an armed robbery at a restaurant located on Arlington Avenue. One of the suspects pointed a handgun at a clerk and demanded that she give him money. Because she was afraid, the clerk complied and began placing money on the counter. The man with the handgun grabbed the money, and the two men fled.

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

<sup>2</sup> The factual background is taken from testimony at the preliminary hearing and will be limited to counts 1, 2, and 3.

The clerk recognized the two men from a previous incident that had occurred about a week earlier. In that prior incident, the two suspects tried to pay with a “fake \$50 bill,” and the clerk wrote down the vehicle’s license plate number as they drove away. During the robbery investigation, the clerk gave the investigating police officer the vehicle’s license plate number.

The vehicle’s license plate number led police to codefendant Morion Thomas.<sup>3</sup> During a consent search of Thomas’s bedroom, police found items stolen from the residential burglary victim. Thomas implicated defendant as the coperpetrator and gunman.

The restaurant robbery was captured on a surveillance video camera, and the clerk was able to identify codefendant Thomas.

Police later conducted a consent search of the residence where defendant’s girlfriend lived. During the search, the police found clothing worn by the gunman during the robbery, as well as the “Bersa 380 semiautomatic handgun.”

## DISCUSSION

Defendant’s sole argument on appeal is that the trial court erred by imposing, rather than staying, a concurrent two-year term on the grand theft of a firearm offense (count 3). Defendant contends that both the grand theft and burglary (count 2) were part of an indivisible course of conduct in which he entertained a single objective—to steal—and, therefore, were subject to section 654.

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<sup>3</sup> Codefendant Thomas is not a party to this appeal.

The People essentially concede that defendant could not normally be sentenced for both of these offenses; however, they argue that by agreeing to a specified sentence, defendant is barred from raising this issue on appeal and, therefore, his appeal should be dismissed. They point out that, under rule 4.412 of the California Rules of Court<sup>4</sup> and the California Supreme Court holding in *People v. Hester* (2000) 22 Cal.4th 290 (*Hester*), defendant's guilty plea in exchange for a specified sentence barred any claim that his sentence violates section 654.

In *Hester*, the defendant pleaded no contest to five substantive counts and a personal use allegation in return for an agreed four-year sentence. (*Hester, supra*, 22 Cal.4th at p. 293.) The trial court sentenced him to a stipulated four-year prison term with concurrent three-year terms for two other felonies and concurrent jail terms for misdemeanor counts. (*Ibid.*) On appeal, the defendant argued the sentence was unauthorized. He claimed that the sentencing court should have stayed a concurrent three-year term on the assault charge pursuant to section 654, which "precludes multiple punishments for a single act or indivisible course of conduct" because the burglary and the assault were committed pursuant to a single intent and objective. (*Hester*, at p. 294.)

The *Hester* court rejected the claim, concluding that although a defendant may challenge an unauthorized sentence on appeal even if he failed to object below, that principle is inapplicable where the defendant pleaded guilty in return for a specified sentence. (*Hester, supra*, 22 Cal.4th at p. 295.) The court explained that "appellate

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<sup>4</sup> All further references to rules are to the California Rules of Court.

courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction.” (*Ibid.*) It reasoned “that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process. [Citations.] While failure to object is not an implicit waiver of section 654 rights, acceptance of the plea bargain here was. ‘When a defendant maintains that the trial court’s sentence violates rules which would have required the imposition of a more lenient sentence, yet the defendant avoided a potentially harsher sentence by entering into the plea bargain, it may be implied that the defendant waived any rights under such rules by choosing to accept the plea bargain.’ [Citation.]” (*Ibid.*)

The basic rule, derived from case law, is that “defendants are estopped from complaining of sentences to which they agreed.” (*Hester, supra*, 22 Cal.4th at p. 295.) One application of that rule that has been codified by the Judicial Council appears in rule 4.412(b), which provides: “By agreeing to a specified prison term personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654’s prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record.” The *Hester* court noted that under former rule 412(b) (now rule 4.412(b)), when the defendant failed to raise a section 654 objection to any possible concurrent term at the time he entered his negotiated pleas of no contest, “he abandoned ‘any claim that a component of the sentence violate[d] section 654’s prohibition of double punishment.’” (*Hester*, at p. 296.)

In the instant case, defendant pled guilty to one count of robbery (§ 211) with the personal use of a firearm (§ 12022.53, subd. (b)), one count of first degree burglary (§ 459), two counts of second degree burglary (§ 459), and one count of grand theft of a firearm (§ 487, subd. (d)(2)). He received an indicated sentence of “14 years, four months in prison.” In fact, the trial court informed defendant that when he returned for sentencing, it intended “to sentence [defendant] to the midterm of three years on Count 1 [robbery offense] and consecutive thereto ten years for [defendant’s] personal use of a firearm for 13 years on Count 1. That would be the principal term. ¶ Then as to Count 2, [the court] would sentence [defendant] to one-third the midterm. The midterm is four years. One-third of that is one year, four months. [Defendant] would do a consecutive subordinate term of one year, four months on Count 2. ¶ The rest of the counts [the court] would give [defendant] concurrent sentencing on, probably the midterm on each of them sentenced concurrently. So [defendant’s] aggregate state prison commitment will be as [the court] promised: 14 years and four months.” Defendant was subsequently sentenced to the agreed upon indicated sentence and did not object to the court sentencing him to a concurrent term of two years on the grand theft of a firearm offense (count 3).

Under the circumstances of this case, defendant is estopped from challenging his sentence because he admitted to the crimes and enhancement, in exchange for an agreed upon sentence of 14 years four months, as opposed to a possible sentence of 17 years eight months. Defendant received the benefit of his bargain, and cannot now challenge the sentence given to him pursuant to the terms of the agreement. (*Hester, supra*, 22 Cal.4th at p. 295; *People v. Couch* (1996) 48 Cal.App.4th 1053, 1057 [“When a

defendant maintains that the trial court's sentence violates rules which would have required the imposition of a more lenient sentence, yet the defendant avoided a potentially harsher sentence by entering into the plea bargain, it may be implied that the defendant waived any rights under such rules by choosing to accept the plea bargain"].)

DISPOSITION

The judgment is affirmed.

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RAMIREZ  
P. J.

We concur:

RICHLI  
J.

CODRINGTON  
J.