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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RUSSELL WAYNE HAVNER,<br><br>Defendant and Appellant. | F062308<br><br>(Tulare Sup. Ct. No. VCF233945)<br><br>**OPINION** |

APPEAL from a judgment of the Superior Court of Tulare County. Gerald F. Sevier, Judge.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Barton Bowers, Deputy Attorneys General, for Plaintiff and Respondent.

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## STATEMENT OF THE CASE

On March 2, 2011, a jury returned verdicts finding appellant Russell Wayne Havner guilty of the following substantive offenses: counts 1 and 2 – first degree residential robbery (Pen. Code,[1] § 211); count 3 – first degree residential burglary (§ 459); counts 4 and 5 – dissuading a witness (§ 136.1, subd. (c)(1)); and counts 6 and 7 – possession of a firearm by a felon (§ 12021, subd. (a)(1)). On March 4, 2011, the court found that appellant had sustained two prior strike convictions (§§ 667, subds. (a)-(i), 1170.12, subd. (a)), one prior serious felony conviction (§ 667, subd. (a)), and three prior prison terms (§ 667.5, subd. (b)).

On March 30, 2011, the court denied appellant probation and sentenced him to a total term of 20 years plus 150 years to life in state prison.[2]

On March 30, 2011, appellant filed a timely notice of appeal.

## STATEMENT OF FACTS

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

[2] The court imposed the term of 25 years to life on count 1 plus five years for the prior strike. The court imposed the term of 25 years to life on counts 2, 4 and 5 plus five years for the prior strike on counts 2, 4 and 5 and directed those terms to run consecutive to the term imposed on count 1. On counts 6 and 7, the court imposed terms of 25 years to life. On count 3, the court imposed a concurrent term of 25 years to life plus five years for the prior serious felony conviction but stayed sentence (§ 654). The court also stayed sentence on appellant's prior prison term enhancements (§ 654). The court imposed a $10,000 restitution fine (§ 1202.4, subd. (b)), imposed and suspended a second such fine pending successful completion of parole (§ 1202.45), and awarded no days of custody credits.

In early 2010, appellant lived with his parents, Clifford and Shirley Havner, and their two teenage grandchildren in a home on the outskirts of Exeter. Clifford was a general contractor who had been involved in the cultivation of medical marijuana in the recent past. Clifford and appellant had medical cards that allowed them to use marijuana for medicinal purposes, and Clifford had helped appellant enter the "business" of cultivating medical marijuana. Clifford arranged for appellant to tend plants at several locations in Exeter. Appellant did not receive regular wages for his work, but Clifford gave him cash and necessaries. At some point in time, Clifford purchased a Lincoln LS automobile for appellant to use as transportation.

On March 1, 2010, Clifford asked appellant to leave the family home and appellant complied. On March 4, 2010, Shirley was in bed in the master bedroom and Clifford was in the shower. At 6:00 a.m., appellant knocked on the exterior of the doors that led from the patio of the home to the master bedroom. When appellant identified himself, Shirley unlocked the door and went back to bed as appellant came inside.

Appellant appeared agitated to Shirley and said he wanted to talk to Clifford to get things aired out and cleared up. After Clifford got out of the shower and put on some clothes, appellant demanded money and property from him. Shirley noticed that appellant was holding a pistol at his side, and she told Clifford that appellant had a gun. Clifford asked appellant what he wanted, and appellant said he wanted what was owed to him.

Appellant took several rifles from a closet, and then told Clifford to open a safe located in the closet. Clifford opened the safe and appellant removed about $1,000 in cash. Appellant, Clifford, and Shirley then went into the kitchen. Clifford and Shirley persuaded appellant to leave the house because they had to get the grandchildren ready for school. According to Clifford, appellant "told us that – that if we said anything, he would kill us. He'd come back and kill us and the family." Appellant drove away from

the house in his Lincoln. A short time later, Clifford went to the Woodlake home of his daughter, Lisa, and told her what had happened. Lisa contacted the police.

Later that morning, appellant went to the Woodlake home of his friend, Dennis Robertson. Appellant was agitated and wanted to change his clothes. Appellant showed Robertson a chrome or nickel plated pistol. Appellant told Robertson "he got what was owed to him from his father's …." Appellant showed Robertson some guns in his car trunk and asked if he could store them at Robertson's house. However, Robertson refused. Robertson called the police after appellant left.

On the morning of March 4, 2010, Tulare County Sheriff's Sergeant Mark Wallace was dispatched to Clifford and Shirley's home to investigate a possible armed robbery. Sergeant Wallace interviewed both Clifford and Shirley and broadcast a report about the suspect and the Lincoln he was driving. That afternoon, Wallace saw appellant's Lincoln on Avenue 295 south of Highway 198. However, there was no one inside the vehicle. Sergeant Wallace parked his car around the corner and lost sight of the Lincoln. That same afternoon, Tulare County Sheriff's Detective Chad Bruce heard a broadcast about a subject armed with firearms. Detective Bruce later pursued the Lincoln at speeds in excess of 100 miles an hour but lost the vehicle during the chase.

**Defense Evidence**

Appellant testified on his own behalf and admitted sustaining separate felony convictions in 2002 and 2009. Appellant also acknowledged he had a recommendation to use marijuana for medical purposes. In 2008, appellant was involved with growing marijuana. He said he would donate to dispensaries and they would "donate back" to him in compensation for his time. Appellant said he had an agreement with Clifford for the latter to pay him $56,000. Appellant said he received less than $27,000 of the agreed amount. In the summer of 2009, he got out of prison and tried to talk to Clifford about

"settling the account." However, as late as March 2010, appellant was unsuccessful in this effort.

On March 4, 2010, appellant planned to go to Southern California to deliver five pounds of marijuana to a dispensary. He decided to talk to his father before leaving on the trip. Appellant said he was not under the influence when he went to his parents' home. Appellant asked his father if they could talk, but Clifford said he did not have the time. Appellant said his father approached him in an aggressive manner, and appellant used his hands to stop him. Clifford refused to talk with appellant in front of Shirley but eventually handed appellant $1,000.

Appellant said he made no threats and that he, Clifford, and Shirley went into the living room after Clifford gave him the $1,000. Appellant told his mother that Clifford still owed him $25,000 out of an agreed $56,000. When Shirley said the grandsons needed to get going, appellant agreed to leave the family home. Appellant said he had no guns with him and took no guns from the house. Appellant also said he owns no guns and cannot possess them because he is an ex-felon.

Appellant said he went to Dennis Robertson's house later that morning for "prayer" and to change his clothes. However, he did not take any guns with him. Appellant said he and Dennis prayed together before he left Dennis's home. Appellant said he went to a gas station and then to the home of another friend. Appellant said he received telephone calls that he was wanted by the Tulare County Sheriff's Department. Appellant said he changed plans and went to the home of his friend, "Little James," near Lindsay. Appellant lent his Lincoln to Little James and "hung out" with him. Appellant called his father to apologize for his part in the argument but did not call police.

That evening, appellant smoked some marijuana and decided to drive his Lincoln to New Mexico. The following day, law enforcement officers apprehended appellant after pursuing him at high speeds in excess of 130 miles per hour near Flagstaff, Arizona.

## DISCUSSION

### I. APPELLANT DID NOT PURSUE HIS REQUEST FOR A RULING UNDER *PEOPLE V. SUPERIOR COURT (ROMERO).*

Appellant contends his case should be remanded to the trial court for a hearing under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, because the trial court abused its discretion by failing to rule on his request to dismiss one of his prior strike convictions.

#### A. Procedural History

Prior to his sentencing hearing, appellant submitted a letter to the trial court about his background. The letter indicated that appellant had not hurt anyone during the commission of his present or prior offenses and expressed the view that he should not be sentenced to a life term. On March 30, 2010, the probation officer filed a report setting forth appellant's criminal history, including 14 prior misdemeanor convictions, 4 prior felony convictions, and 2 felony convictions that occurred after the date of the offenses charged in the instant information. The probation officer identified multiple factors in aggravation and no factors in mitigation. The probation officer recommended a prison sentence in appellant's companion case, No. VCF214336, and a three strikes sentence in the instant case.

At the beginning of the sentencing hearing, appellant's trial counsel cited the letter and asked the court to exercise its discretion and dismiss one of appellant's two prior strike convictions so that appellant could receive a determinate term of imprisonment. Counsel said: "I'd ask the court just based on Mr. Havner's letter, his description of his life story, the court consider striking one of the strikes so that he would not be looking at an indeterminate term." Appellant's trial counsel went on to make other arguments regarding sentencing. At the conclusion of those remarks, the court asked whether defense counsel had any other comments "[b]eside[s] your motion to strike one of the

strikes." Defense counsel conferred with appellant off the record and then appellant made a personal statement to the court. After that statement, the parties discussed whether the court could impose multiple enhancements under section 667, subdivision (a)(1).

After appellant discussed the issue of multiple enhancements with his counsel, appellant told the court: "Judge, life is life, you guys gonna give me anyway. I mean, whether it's one to life, a thousand to life, what does it matter, life is life. You guys are gonna give me that now anyway. [¶] I don't want to have to come back here. I want to get this over with, let me get outta here. Let me get out of Tulare County, period. That's what I've been wanting the whole time." Appellant next waived his objection to the imposition of multiple enhancements under section, subdivision (a)(1). The court then asked, "All right then, is there anything else?" Appellant's counsel responded, "No." The prosecutor made one more comment and the court imposed sentence without expressly ruling on appellant's *Romero* request.

**B. <u>Law of *Romero*</u>**

Penal Code section 1385, subdivision (a) provides in relevant part: "The judge or magistrate may … in furtherance of justice, order an action to be dismissed." In *Romero*, the California Supreme Court concluded that "section 1385[,] [subdivision] (a) … permit[s] a court acting on its own motion to strike prior felony conviction allegations in cases brought under the Three Strikes law." (*People v. Superior Court (Romero), supra*, 13 Cal.4th at pp. 529-530.)

In determining whether to strike a prior conviction " ' " 'in furtherance of justice,' " ' " a court must consider " ' "both … the constitutional rights of the defendant, and *the interests of society represented by the People …*" ' " (*People v. Superior Court (Romero), supra*, 13 Cal.4th at p. 530, original italics.) The trial court must consider the defendant's background, the nature of the current offense and other individualized

considerations (*id*. at p. 531), including all of the relevant factors, both aggravating and mitigating (*People v. Tatlis* (1991) 230 Cal.App.3d 1266, 1274). As further clarified in *People v. Williams* (1998) 17 Cal.4th 148, the California Supreme Court held: "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams*, *supra*, 17 Cal.4th at p. 161.)

**C. <u>Analysis</u>**

At the beginning of the March 30, 2011, sentencing hearing, defense counsel advised the court: "I'd ask the court just based on Mr. Havner's letter, his description of his life story, the court consider striking one of the strikes so that he would not be looking at an indeterminate term." Counsel went on to review the determinate terms recommended by the probation officer and to offer his views. At the conclusion of counsel's review, the court asked, "All right, then, any other comments, Mr. Schulte [defense counsel]?" Counsel responded, "One second." The court replied, "Beside your motion to strike one of the strikes?" At that point appellant and his counsel conferred off the record and counsel asked the court for his client to have the opportunity to make a statement. The court indicated, "I'll certainly listen to what Mr. Havner has to say." After appellant made his statement, defense counsel expressed his views regarding the imposition of prior prison term enhancements (§ 667.5, subd. (b)). After defense counsel

expressed his views, the prosecutor suggested that section 667, subdivision (a) mandated the imposition of an additional five-year term on counts, 2, 3, and 4.

After the court and counsel shared their respective views, appellant conferred with his counsel off the record. Defense counsel then advised the court that appellant wished to waive the issue. The court pointed out to appellant, "If the District Attorney is wrong, then that's a difference to you of 15 years. If you waive it, then you're going to get an extra 15 years." Appellant replied, "I don't care. I want outta here." The court inquired further and noted that appellant was acting against his counsel's advice. Appellant acknowledged that he was rejecting his attorney's advice and said, "I want outta here. I want to be done with this." After the court verified that appellant was waiving the issue against the advice of his counsel, the court asked counsel, "All right, then, is there anything else?" Counsel responded, "No." The court heard one more comment from the prosecutor and then proceeded to sentence appellant without expressly addressing appellant's request to strike prior strike convictions.

Where the court, through inadvertence or neglect does not rule or reserve its ruling, the party who objected must make some effort to have the court actually rule. If the point is not pressed, the party may be deemed to have waived or abandoned it, just as if he or she had failed to make the objection in the first place. "This is an application of the broader rule that a party may not challenge on appeal a procedural error or omission if the party acquiesced by failing to object or protest under circumstances indicting that the error or omission probably was inadvertent. [Citations.]" (*People v. Braxton* (2004) 34 Cal.4th 798, 813-814.)

In this case, appellant's trial counsel made a *Romero* request at the inception of the sentencing hearing. However, he failed to press the trial court for an express ruling prior to the imposition of sentence. Moreover, immediately prior to the imposition of sentence, appellant advised the court, "I don't want to object – I want outta here. … I don't want to

have to come back." He also told the court, "Yes, I want outta here. I want to be done with this." Appellant did not make a reasonable effort to obtain a hearing or ruling under *Romero* and the point may be deemed waived or abandoned.

In any event, "[a] court's failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*).) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citations.] Second, a ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id*. at pp. 376-377.)

Moreover, appellant had sustained two prior strike offenses that were seven years apart. One of the prior convictions was for a serious offense of first degree burglary. (*People v. Estrada* (1997) 57 Cal.App.4th 1270, 1282.) !(CT 162-163)! When appellant committed the current offenses, he was on felony probation for a prior strike offense. His criminal history included multiple violations of probation and parole. The Three Strikes laws were enacted to promote a compelling interest in the protection of public safety and in punishing recidivism. (*People v. Castello* (1998) 65 Cal.App.4th 1242, 1251.) A court must consider " ' "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's

spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." ' " (*People v. Scott* (2009) 179 Cal.App.4th 920, 926, quoting *People v. Carmony*, *supra*, 33 Cal.4th 367) Appellant was well within the spirit of the Three Strikes law. (*People v. Gaston* (1999) 74 Cal.App.4th 310, 320.)

Appellant has failed to show the sentencing decision of the trial court was irrational or arbitrary in this case and his contention must be rejected.

## II. THE TRIAL COURT SHOULD HAVE STAYED EITHER COUNT 4 OR COUNT 5 PURSUANT TO SECTION 654.

Appellant contends, and respondent concedes, that the trial court erroneously imposed two consecutive terms on the attempting to dissuade a witness offenses charged in counts 4 and 5.

Respondent explains: "Here, the evidence showed that appellant committed the acts in counts 4 and 5 when he threatened to kill his parents and the family if they 'said anything.' He made this threat to both his parents at the same time, before leaving their home.… Thus, although appellant committed separate offenses against his parents, those crimes were incident to a single objective. [See *Neal v. State of California* (1960) 55 Cal.2d 11, 19.)] It follows that appellant may only be punished [for] one of those offenses…. Because this Court may correct the error, remand is unnecessary. (See *In re Ricky H.* (1981) 30 Cal.3d 176, 191 [appellate court may correct unauthorized sentence when it appears].) Thus, this Court should order sentence stayed on count 4 or 5."

Since the trial court must correct other errors, as discussed in issues IV and V below, we will direct that court to stay the term imposed on either count 4 or 5.

## III. THE TRIAL COURT WAS NOT REQUIRED TO STAY EITHER COUNT 6 OR COUNT 7 PURSUANT TO SECTION 654.

Appellant contends the trial court erroneously imposed consecutive terms on counts 6 and 7 because he possessed the pistol and the rifle with the same intent and

objective. He maintains "more than one sentence on these convictions was prohibited by the provisions of section 654."[3]

Appellant was charged in counts 6 and 7 with possession of a firearm by a felon in violation of section 12021, subdivision (a)(1). The latter section states: "Any person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state, government, or country or of an offense enumerated in subdivision (a), (b), or (d) of Section 12001.6, or who is addicted to the use of any narcotic drug, who owns, purchases, receives, or has in his or her possession or under his or her custody or control any firearm is guilty of a felony."

In *People v. Kirk* (1989) 211 Cal.App.3d 58 (*Kirk*), the appellate court held that the defendant could not be convicted of multiple counts of unlawfully possessing a sawed-off shotgun under former section 12020 for his contemporaneous possession of two shotguns, which were found at the same time and place. (*Kirk, supra*, at p. 65.) In light of this holding, it did not consider the defendant's contention that section 654 barred punishment for more than one violation of section 12020. (*Kirk, supra*, at p. 65.)

The Legislature subsequently added subdivision (k) to section 12001, which provides that for the purposes of, inter alia, sections 12021 and 12021.1, "notwithstanding the fact that the term 'any firearm' may be used in those sections, each firearm or the frame or receiver of the same shall constitute a distinct and separate offense under those sections."

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[3] Appellant and respondent correctly note that the question whether a felon may be separately punished for possession of multiple firearms is currently pending in the California Supreme Court in the context of whether the trial court properly imposed concurrent sentences for being an ex-felon in possession of a firearm and carrying a loaded, concealed weapon. (*People v. Jones* (Dec. 9, 2009, C060376) [nonpub. opn.], review granted on specified issue Mar. 24, 2010, S179552; see also *People v. Correa* (Dec. 4, 2006, C054365) [nonpub. opn.], review granted on specified issue Jul. 9, 2008, S163273.)

Appellant's unlawful possession of each shotgun constitutes "a distinct and separate offense." (§ 12001, subd. (k).) Yet, separate sentences must nonetheless be supported by substantial evidence of independent criminal objectives. (§ 654; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268.) Here, the information charged appellant with being a felon in possession of a "handgun" and the jury found appellant guilty of being a felon in possession of a "handgun (derringer)" in count 6. The information charged appellant with being a felon in possession of a "rifle" and the jury found appellant guilty of being a felon in possession of a "rifle (30-06)" in count 7. One weapon was a rifle and the other a handgun. Appellant arrived at his parents' home armed with the pistol; he left their home in possession of the pistol and at least one rifle. The rifle or rifles had been stored in the closet of his parents' master bedroom. Appellant used the pistol, but not the rifle or rifles, to intimidate his parents. Before departing his parents' home, he threatened to return and kill them and other family members if they "said anything." Appellant's friend, Dennis Robertson of Woodlake, said appellant showed him a pistol and said "he got what was owed to him from his father's …." Robertson also said appellant opened the trunk of his car and asked if Robertson could keep some guns at his home. Robertson explained, "There was one that I [had] seen that he pulled out, it was a rifle, and when he said those guns as in plural, I thought he meant the pistol and that rifle, and I told him hell, no."

The purpose of section 12021, charged in counts 6 and 7, is to protect the public welfare by precluding possession of guns by those who are more likely to use them for improper purposes and to provide a greater punishment to an armed ex-felon than another person in possession of a firearm. (*People v. Pepper* (1996) 41 Cal.App.4th 1029, 1037; *People v. Bell* (1989) 49 Cal.3d 502, 544; *People v. Winchell* (1967) 248 Cal.App.2d 580, 597.) Here, the record suggests separate intents and objectives for the various weapons. Appellant used the pistol to intimidate his parents and obtain possession of the rifle or

rifles from the closet in their master bedroom. Although appellant asked his friend, Dennis Robertson, if he could keep his rifles at Robertson's house, appellant did not make the same request of Robertson with respect to the pistol. Appellant testified he had five pounds of marijuana in the trunk of his Lincoln and planned to deliver it to a dispensary in Orange County. The superior court could have reasonably inferred that appellant intended to take his pistol to carry out the transportation and delivery of the marijuana and intended to possess the larger weapon or weapons for some other purpose.

In sum, the record contains evidence from which the court could have inferred that appellant had a different criminal objective or intent for each firearm. Therefore, we conclude section 654 did not preclude imposition of separate punishment for counts 6 and 7.

## IV. THE ABSTRACT OF JUDGMENT SHOULD BE CORRECTED.

Appellant contends, and respondent concedes, that the abstract of judgment sets forth incorrect information as to the terms imposed on counts 1, 2, 3, 4, and 5.

Respondent explains: "[T]he trial court imposed a term of imprisonment of 5 years plus 25 years to life on counts 1, 2, 3, 4, and 5. Consequently, the abstract of judgment, which recites terms of '**30** years to Life on counts **1, 2, 3, 4, 5**' … must be corrected."

## V. THE TRIAL COURT SHOULD STAY COUNT 3 PURSUANT TO SECTION 654.

Appellant contends, and respondent concedes, that the trial court erroneously imposed a concurrent term on the first degree burglary conviction in count 3.

Respondent explains: " '[R]ather than dismissing charges or imposing concurrent sentences, when a court determines that a conviction falls within the meaning of section 654, it is necessary to *impose* sentence but to stay the *execution* of the duplicative sentence …. [Citations.]' (*People v. Duff* (2010) 50 Cal.4th 787, 796, italics in original.) [¶] Here, the trial court imposed a term of 5 years plus 25 years to life in count 3 to run

concurrent to count 1. It did so 'based on Penal Code section 654.' [Citation.] But where 654 applies, as here, the court must impose sentence but stay its execution, rather than impose concurrent sentences. (*People v. Duff*, *supra*, 50 Cal.4th at p. 796.)"

**DISPOSITION**

The superior court is directed to (1) stay the term of imprisonment imposed on either count 4 or count 5; (2) correct the abstract of judgment to reflect terms of 25 years to life on counts 1, 2, 3, 4, and 5; (3) stay the term of imprisonment imposed on count 3; and (4) amend the abstract of judgment accordingly, and transmit certified copies of the amended abstract to all appropriate parties and entities. In all other respects, the judgment is affirmed.

_____
Poochigian, J.

WE CONCUR:

_____
Cornell, Acting P.J.

_____
Detjen, J.