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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL ROBERT MERCADO,

Defendant and Appellant.

F068369

(Super. Ct. Nos. SC083293A &
SC083426A)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Kern County. Colette M. Humphrey, Judge.

Jeffrey S. Kross, 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, Louis M. Vasquez and Charity S. Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Poochigian, J., and Smith, J.

FACTS AND PROCEEDINGS

Appellant, Daniel Robert Mercado, was arrested in August 2001 for his alleged involvement in a drive-by shooting on Tucker Street in the City of Arvin (hereafter the Tucker Street shooting) that occurred in July 2001.¹ On February 21, 2002, appellant was convicted in case No. SC83426 of assault with a firearm (Pen. Code, § 245, subd. (a)(2)) (unless otherwise designated, all statutory references are to the Penal Code), discharging a firearm at an inhabited dwelling (§ 246), and discharging a firearm in a grossly negligent manner (§ 246.3). An enhancement was alleged for the assault with a firearm offense (§ 12022.5, subd. (a)). At the conclusion of a jury trial, appellant was convicted of all three counts and the jury found the enhancement to be true.

While appellant was in local custody awaiting trial, an information was filed on November 26, 2001, in case No. SC83293 (the jail offense) alleging that appellant possessed a sharp instrument while incarcerated in a penal institution on October 21, 2001 (§ 4502, subd. (a)). On January 17, 2002, appellant waived his constitutional rights and pled no contest to this allegation. On February 19, 2002, the trial court sentenced appellant to the midterm of three years.

On May 7, 2002, the trial court sentenced appellant in the Tucker Street shooting to a term of four years on assault with a firearm plus a consecutive term of ten years for the enhancement for use of a firearm. The two remaining counts were stayed. The trial court did not refer to appellant's sentence in the jail offense.

¹ On May 15, 2014, we granted the People's request to take judicial notice of the probation report prepared for appellant in 2002; the reporter's transcript of the sentencing hearing on May 7, 2002; the minute order of the sentencing hearing; the abstract of judgment; and our opinion in appellant's original appeal in *People v. Daniel Mercado* (April 16, 2003, F040641 [nonpub. opn.]).

On August 12, 2013, a Correctional Case Records Manager for the California Department of Corrections and Rehabilitation (CDCR) sent a letter to Kern County Superior Court Judge Arthur Wallace to notify him that appellant's sentence for the jail offense had to be consecutive to the sentence he was serving for the Tucker Street shooting.

On August 21, 2013, the Public Defender's Office of Kern County sent a letter in response to the correspondence from CDCR stating its objection on behalf of appellant to the imposition of a consecutive sentence for the jail offense. The Public Defender argued that general sentencing provisions of section 1170.1, subdivision (a) were applicable rather than sentencing provisions for the commission of crimes in a penal institution set forth in section 1170.1, subdivision (c).² This was so, according to appellant, because the jail offense was adjudicated prior to the Tucker Street shooting case, appellant was not serving a prison sentence when he committed the jail offense, there was no pending conviction from which to imposed a consecutive sentence for the jail offense, and therefore the trial court could not sentence appellant consecutively for the jail offense and the Tucker Street shooting case.

Appellant also argued that under section 1170.1, subdivision (c), he had to be sentenced to a term consecutive to the term he was already serving in prison. Because he

² In 2001, section 1170.1, subdivision (c) provided:

“In the case of any person convicted of one or more felonies committed while the person is confined in a state prison or is subject to reimprisonment for escape from custody and the law either requires the terms to be served consecutively or the court imposes consecutive terms, the term of imprisonment for all the convictions that the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison. If the new offenses are consecutive with each other, the principal and subordinate terms shall be calculated as provided in subdivision (a). This subdivision shall be applicable in cases of convictions of more than one offense in different proceedings, and convictions of more than one offense in the same or different proceedings.”

had no predicate felony conviction for which he was serving a prison term, appellant argued that he did not have to serve a consecutive term pursuant to section 1170.1, subdivision (c). Appellant alternatively argued that even if he were subject to a consecutive sentence for both cases, his sentence for the jail case would be the subordinate sentence and he would be subject to a term of one-third the midterm of three years, or one consecutive year in prison.

On October 9, 2013, Judge Colette M. Humphrey conducted a hearing to determine whether the trial court's failure to sentence appellant consecutively was an unauthorized sentence. Appellant argued that his sentence for the jail case could be run concurrently to his sentence for the Tucker Street shooting.

The court believed that under equitable principles, the sentence for the jail case should be run concurrently to the other case, but found that it was legally mandated to impose consecutive sentences. The court imposed a consecutive sentence on the jail case of one-third the midterm of three years, or one year.

CONSECUTIVE SENTENCING PURSUANT TO SECTION 4502

Appellant contends that because he was convicted of and sentenced first for his violation of section 4502, it was legally possible for the trial court to impose a concurrent sentence for that offense. Appellant argues that a conviction for an antecedent felony, here the Tucker Street shooting, was necessary for the trial court to impose a consecutive prison term for the jail case. Appellant argues that because he was in county jail, rather than state prison, he could have been sentenced to a concurrent sentence pursuant to section 1170.1, subdivision (a), rather than to a mandated consecutive term pursuant to subdivision (c) of the statute, and the trial court could sentence him to a concurrent or a consecutive sentence pursuant to section 669. We disagree with appellant's contentions and affirm the trial court's judgment.

A claim that a sentence is unauthorized may be raised for the first time on appeal. Furthermore, it may be raised whenever the error comes to the attention of the reviewing court. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1048, fn. 7; *People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.) We initially observe that although section 1170.1, subdivision (a) may be applicable to those who commit new offenses in jail rather than state prison, section 4502, subdivision (a) mandates a consecutive prison term for an offense committed in a penal institution, which included offenses committed in a county jail.³

Even assuming *arguendo* that appellant can be sentenced under section 1170.1, subdivision (a), this statute is inapplicable in appellant's case because the more specific statute defining the offense he committed in jail mandates a consecutive prison term. It is a well-settled rule that a general statutory provision is controlled by a special, more specific statutory provision even though the more general statute standing alone is broad enough to include the subject of the special statute. (*People v. Superior Court (Jimenez)* (2002) 28 Cal.4th 798, 808; *People v. Chaffer* (2003) 111 Cal.App.4th 1037, 1045.)

Like section 1170.1, subdivision (a), section 669 is a more general statute than section 4502, subdivision (a) and is not controlling over the more specific statute. Pursuant to sections 4502, subdivision (a) and 1170.1, subdivision (c), the trial court was mandated to impose a consecutive prison term for appellant's jail offense and the trial court's failure to do so in 2002 was an unauthorized sentence.

³ In 2001, section 4502, subdivision (a) provided in relevant part:

“Every person who, while at or confined in any penal institution, ... possesses or carries upon his or her person or has under his or her custody or control any instrument or weapon of the kind commonly known as ... any dirk or dagger or sharp instrument, ... shall be punished by imprisonment in the state prison for two, three, or four years, to be served consecutively.”

Section 4502, subdivision (c) included within its definition of a penal institution, “a county jail.”

Appellant argues that because there was no antecedent conviction to his jail offense, his jail offense did not have to be sentenced consecutively. Appellant finds support for his position in *People v. Jackson* (1979) 91 Cal.App.3d 767, 770 (*Jackson*). *Jackson* noted that it was possible for a defendant to be found guilty of only escape and in “such a case, imposition of a consecutive term would not be possible.” The *Jackson* court further noted, however, that violation of section 4532 does not require as an element the antecedent conviction of another felony and a defendant never convicted of an antecedent felony could still be guilty of escape. (*Jackson*, at p. 770.) We agree with the People that *Jackson* stands for the proposition that an antecedent conviction is not necessary to impose a consecutive sentence for escape, or in this case, possession of a sharp instrument in a penal institution.

In *People v. Scott* (1993) 17 Cal.App.4th 1383 (*Scott*), the defendant also escaped from a penal institution in violation of section 4532 prior to being convicted of a felony. (*Scott*, at pp. 1384-1385.) As did the court in *Jackson*, *Scott* noted that it is conceivable an escape conviction could also be the sole prison term if a pretrial felony detainee escapes and is ultimately acquitted of other felony charges.⁴ (*Scott, supra*, 17 Cal.App.4th at p. 1387, fn. 5.) Like section 4532, section 4502 is not reliant on conviction for an underlying felony and a conviction for an antecedent felony is not an element of the offense and appellant did not have to have a conviction for an antecedent

⁴ *Scott* disagreed with the sentencing procedure followed in *Jackson* which involved using the escape conviction as the principal term rather than the other felony. *Scott* noted that after amendments to section 1170.1, the proper sentencing procedure is to first sentence a defendant for the original felony conviction(s) and then to impose a consecutive sentence pursuant to section 4532. (*Scott, supra*, 17 Cal.App.4th at pp. 1386-1387.)

felony to be sentenced consecutively for his violation of section 4502. We reject appellant's arguments to the contrary.⁵

DISPOSITION

The order of the trial court modifying appellant's sentence to impose a term of one year to be served consecutively to his sentence for the Tucker Street shooting is affirmed.

⁵ Appellant argued to the trial court that under section 1170.1, subdivision (c), he must have served a term for an antecedent felony conviction prior to serving a sentence for section 4502, subdivision (a). Appellant points out section 1170.1, subdivision (c) states that, "the term of imprisonment for all the convictions that the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison." Appellant interprets this language to mean that he had to be serving the antecedent term in state prison for the section 4502, subdivision (a) offense to be imposed consecutively.

We reject this statutory construction because section 1170.1, subdivision (c) more completely provides that: "*the law either requires the terms to be served consecutively or the court imposes consecutive terms*, the term of imprisonment for all the convictions that the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison." (Italics added.) We do not find that section 1170.1, subdivision (c) is limited only to offenses that occur in state prisons, but can be applied to offenses such as this that occur in other penal institutions. As we explain above, an antecedent felony conviction is not necessary for a defendant to be sentenced consecutively for a conviction of section 4502, subdivision (a) that occurs prior to a conviction for another felony. In any event, the more specific provisions of section 4502, subdivision (a) control over the more general provisions of section 1170.1, subdivision (c) to the extent, if any, that there is a conflict between them.