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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CESAR VELAZQUEZ RODRIGUEZ,

Defendant and Appellant.

G047212

(Super. Ct. No. 07CF1045)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Susan S. Bauguess, 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, William M. Wood and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Cesar Velazquez Rodriguez of possessing for sale methamphetamine (Health & Saf. Code, § 11378) and cocaine (Health & Saf. Code, § 11351), possessing a firearm and ammunition as a felon (Pen. Code, §§ 12021, subd. (a)(1), 12316, subd. (b)(1)), and cultivating marijuana (Health & Saf. Code, § 11358). After Rodriguez admitted he suffered a prior strike conviction, the trial court imposed an 11 year and 8 month prison sentence. We affirmed the convictions but remanded the matter for resentencing to allow the trial court to determine whether to impose consecutive or concurrent sentences on the convictions for possession of methamphetamine for sale (count 1) and felon in possession of a firearm (count 5), and to state its reasons if it decided to impose a consecutive term. The trial court on remand imposed consecutive terms on these counts. Rodriguez contends the court abused its discretion in reaching its decision, but for the reasons expressed below, we discern no basis to overturn the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

To understand the factual basis for this appeal, we incorporate the factual summary from our earlier opinion in *People v. Rodriguez* (July 29 2009, G039986 [nonpub. opn.]). “On March 21, 2007, Santa Ana Police Officer Manuel Moreno conducted surveillance of defendant’s residence. Defendant moved frequently in and out of the garage, and between one vehicle and another in his driveway. Around 4:00 p.m., Ezekiel Garcia arrived and entered the garage with defendant. Moments later Garcia came out from the garage, grabbed a yellow plastic bag hanging on a nearby post, and returned to the garage. Garcia soon reappeared empty-handed, walked to his truck, and drove away. Shortly after, defendant also departed.

“Based on information received from a confidential informant who purchased drugs from defendant, Moreno obtained a search warrant for defendant’s home, and resumed his surveillance the next day. Again, defendant moved between the two cars and the garage frequently, and Garcia returned around 4:00 p.m. Garcia entered the garage while defendant obtained something from one of the cars in the driveway and concealed it under his arm before joining Garcia. A few minutes later, Garcia left. Moreno followed him, stopped him for a traffic violation, and arrested him as he attempted to conceal nearly 15 grams of cocaine in his truck’s center console.

“Moreno and several other officers then proceeded to defendant’s home to execute the search warrant. They found defendant leaning into the passenger side of a vehicle and ordered him to put his hands up. Defendant complied, dropping a can of WD-40 lubricant. A false bottom in the can hid baggies containing 29 grams of cocaine and 29.2 grams of methamphetamine. The officers also found \$479 and three active cell phones on defendant, one of which received 15 calls over the next hour.

“Searching defendant’s residence, the officers discovered a bag containing one and one-half pounds of marijuana in the water heater closet. They also noticed live marijuana plants cultivated outside the home. Inside the garage, officers found a rifle on [a] high shelf under some clothing; the rifle was loaded with one round in the firing chamber, and an empty ammunition magazine sat next to the weapon. Detective Steven Lodge testified defendant stated, on seeing an officer remove the rifle from the garage, “[I]t is nothing, it has been there for a long time.” Officers also found 2.3 grams of methamphetamine and 1.7 grams of cocaine in two men’s shirts hanging under the shelf on which the rifle was discovered. Other items located in the garage included loose

12 gauge shotgun shells, numerous empty plastic baggies, and boxes of nine-millimeter and .22-, .40-, and .45-caliber ammunition.

“At trial Moreno testified, based on his training and experience, that the substantial drug quantities found in the WD-40 can as well as in the water-heater closet were possessed for sale, while the drugs found in the men’s shirts were most likely possessed for personal use.”

A jury convicted Rodriguez of the crimes listed above. As part of an 11 year and 8 month prison sentence, the court imposed consecutive 16-month terms for possessing methamphetamine for sale (count 1) and being a felon in possession of a firearm (count 5).

In Rodriguez’s 2009 appeal, we remanded for a limited resentencing, explaining: “[R]emand is required for the trial court to consider whether to impose consecutive or concurrent sentences on count one for defendant’s methamphetamine possession and on count five for his possession of a firearm, and to state its reasons if it imposes consecutive sentences. The evidence is consistent with these offenses occurring in the close temporal and spatial proximity that permits concurrent sentencing [under the Three Strikes law]” The disposition portion of our opinion read: “The judgment is affirmed with directions for a limited remand for the trial court to consider whether to impose consecutive or concurrent sentences on counts one and five and, if it imposes consecutive sentences, to state its reasons for doing so.”

In *People v. Rodriguez* (June 13, 2012, G045911 [nonpub. opn.]), we agreed with Rodriguez and the Attorney General that the trial court committed reversible error on remand by resentencing Rodriguez in his absence. We again remanded for resentencing.

The court conducted the resentencing hearing on July 13, 2012, in the presence of Rodriguez and his lawyer. The court again imposed consecutive terms on the two counts stating “the crimes were predominantly independent of each other”

II

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Imposing a Consecutive Sentence for Possession of Methamphetamine*

California Rules of Court, rule 4.425, lists criteria affecting the decision to impose consecutive rather than concurrent sentences, including “[f]acts relating to the crimes, including whether or not: [¶] (1) The crimes and their objectives were predominantly independent of each other; [¶] (2) The crimes involved separate acts of violence or threats of violence; or [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.” The sentencing court may consider “[a]ny circumstances in aggravation or mitigation . . . in deciding whether to impose consecutive rather than concurrent sentences, except: [¶] (1) A fact used to impose the upper term; [¶] (2) A fact used to otherwise enhance the defendant’s prison sentence; and [¶] (3) A fact that is an element of the crime may not be used to impose consecutive sentences.” (Cal. Rules of Court, rule 4.425(b); see also Cal. Rules of Court, rule 4.406 [sentencing judge is required to state reasons for imposing consecutive sentences].)

The trial court has broad discretion to tailor the sentence to a particular case by imposing consecutive rather than concurrent sentences. (*People v. Scott* (1994) 9 Cal.4th 331, 349.) Judicial discretion “‘implies absence of arbitrary determination,

capricious disposition or whimsical thinking.’ [Citation.] [D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]” (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) The burden is on the party attacking the sentence to clearly show the sentencing decision was irrational or arbitrary. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.) In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and therefore we will not set aside its discretionary determination to impose a particular sentence. (*Ibid.*)

Here, the trial court gave the following explanation for imposition of consecutive sentences: “[Y]ou have an ex-con here who is convicted by a jury for possessing narcotics for sale and dangerous drugs for sale, and they found ammunition and a gun in the house [¶] It may be one transaction because it was pursuant to one search of a house by the police . . . but there are separate crimes. Cocaine, methamphetamine, ammunition, and guns. I don’t see any of this as being [subject to Penal Code section] 654 or warranting a concurrent sentence. . . . [¶] . . . [¶] So he is a drug dealer with methamphetamine. That is one crime. He is a drug dealer with cocaine. That is a second crime. He is a drug dealer with a firearm. That is a third one. He is a drug dealer with ammunition. Although the court ran that count concurrent, the court has no intention of running count 5 the 12021(a)(1) concurrent because it’s a separate crime. [¶] For those reasons the court finds as it did on February 1, 2008 when it entered the nunc pro tunc order that the crimes were predominantly independent of each other because I don’t think it’s disingenuous to say some drug dealers use and keep weapons and some don’t. So for that reason the court finds they are independent.”~(rt5)~
Defense counsel argued the drugs were “in the same container. Some drug dealers will

deal in one and some drug dealers will deal in both. I still think that it's under the same situation, same facts. I don't see how you can separate those two." The court responded "I don't see how you can put them together. I mean, he has customers that will take one or the other or both."

Rodriguez contends the trial court abused its discretion because the crimes of possession of methamphetamine for sale and possession of a firearm were committed on the same occasion and arose from the same set of operative facts as the crime of possession of cocaine. These are relevant factors, but the key issue is whether the court abused its discretion in determining the "crimes and their objectives were predominantly independent of each other." (Cal. Rules of Court, rule 4.425(a).)

Analysis in our prior opinion addressing Rodriguez's argument concerning Penal Code section 654 informs the issue here: "Defendant asserts his 'crimes and their objectives were not independent of each other,' but rather 'were committed at the same time and place . . . motivated by a single objective.' The trial court, however, could reasonably conclude otherwise. Defendant's reliance on *In re Adams* (1975) 14 Cal.3d 629 (*Adams*) is misplaced. The Supreme Court held the defendant there could be punished only once for *transporting* five different controlled substances because he transported the substances on a single occasion pursuant to a lone objective of making delivery to one individual in a single transaction. (*Id.* at p. 635; see *People v. Monarrez* (1998) 66 Cal.App.4th 710, 714 (*Monarrez*) ['It was reasonable for the court in *Adams* to find a single illegal intent where the defendant's sole act was to move a large quantity of drugs from one place to another'.])

"*Adams* furnishes no support to defendant because *Adams* declined to overrule cases holding multiple punishments may be imposed for *possession* of multiple

substances. (*Adams, supra*, 14 Cal.3d at p. 635; see, e.g., *People v. Barger* (1974) 40 Cal.App.3d 662, 672.) Possession is distinct from transportation because while one may transport multiple substances in a single act, the intent to possess one substance is distinct from the intent to possess another, since the substances themselves are distinct. As the *Monarrez* court explained, ‘[N]arcotics are separately classified and regulated by the Legislature; they have different effects and pose different hazards to society.’ (*Monarrez, supra*, 66 Cal.App.4th at p. 715.) It follows that defendant’s choice to obtain and possess not just cocaine, but also an additional and distinct controlled substance – methamphetamine – means his possession of each substance is properly subject to separate punishment. (*Ibid.*) This is especially true where the defendant possesses, as here, each of the drugs in a saleable quantity, which supports the inference of an ‘intent to sell to a presumptively large number of buyers.’ (*Id.* at p. 714.) Contemplation of multiple transactions thus further distinguishes *Adams*.” (*People v. Rodriguez* (July 29, 2009, G039986 [nonpub. opn. at pp. 16-17.])

Rodriguez argues the possession of both drugs in three baggies in the same “can [give] rise to an inference the drugs were possessed for sale to one individual because of the manner of packaging and storage.” Perhaps, but the trial court was not required to adopt this view, and even if it had, the court could still impose consecutive sentences. As noted, the trial court may separately and consecutively punish *possession of different drugs* possessed at the same time and place without running afoul of *Adams*. For example, in *People v. Barger, supra*, 40 Cal.App.3d at p. 672, the appellate court noted California courts have uniformly upheld multiple punishment for simultaneous possession of various narcotic drugs, including the sale and possession of the same drug if the sale consumes only part of a defendant’s entire inventory of drugs. The appellate

court noted, “*Since the offenses with which appellant was charged were separately punishable, the trial court had discretion to determine that sentences were to run consecutively.* (Pen. Code, § 669)” (italics added.)

The trial court could have reasonably imposed consecutive punishment for possession of methamphetamine and cocaine *even if* Rodriguez intended to sell all the drugs in the WD-40 can to one purchaser. The trial court, however, could conclude it was more likely the can contained Rodriguez’s inventory, which allowed him to fulfill multiple orders depending on his purchaser’s needs. As the trial court noted, some users like cocaine, others methamphetamine. Moreover, Garcia, who appeared to be working with Rodriguez, transported 15 grams of cocaine, about half the amount of cocaine Rodriguez possessed in the can, which suggested the cocaine in the can was not intended for one purchaser. Rodriguez also concedes the police found Ziploc baggies on the shelf in the garage, which supports the trial court’s implicit conclusion that Rodriguez was packaging the drugs in smaller quantities for sale. This is true even if no scales or pay/owe sheets were discovered. In any event, the trial court need only find the crimes and their objectives are “predominantly independent,” not completely independent. The trial court did not abuse its discretion in imposing consecutive sentences for possessing for sale both cocaine and methamphetamine.

B. The Trial Court Did Not Abuse Its Discretion in Imposing a Consecutive Sentence for Possession of a Firearm

The parties disagree whether the trial court had *authority* to impose a *concurrent* term for possession of a firearm by a felon under the Three Strikes law. But assuming Rodriguez’s firearm possession conviction was committed on the same

occasion and arose from the same set of operative facts as the drug offenses (see *People v. Deloza* (1998) 18 Cal.4th 585, 595-596 [“same occasion” under Three Strikes law means the acts underlying the convictions occurred close in time and space to each other]; *People v. Hendrix* (1997) 16 Cal.4th 508), the trial court did not abuse its discretion in imposing a consecutive term.

As we noted in our prior opinion, “The trial court could also reasonably conclude defendant’s possession of a firearm and ammunition . . . betrayed [an objective] distinct from his possession of cocaine or methamphetamine or his other crimes. Specifically, the trial court could infer from defendant’s admission the loaded rifle had been in his garage ‘a long time’ that his possession of the weapon and its ammunition predated his acquisition of the controlled substances. This is particularly true since defendant possessed the drugs for sale, which reasonably implied a short shelf life and rapid turnover of the drugs prompted by the danger and liability in possessing them and by the anticipation of profits to be garnered from selling them. There was no evidence defendant intended to dispose of the weapon or ammunition immediately upon the sale of any drugs in his possession. To the contrary, that the weapon was so well-hidden suggested an intent to keep it. The trial court could thus reasonably infer defendant’s possession of the weapon and ammunition was not limited strictly to the period he possessed drugs, but predated it and was intended to postdate it, and was therefore a distinct and separately punishable crime from his drug offenses. (See *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1413-1414 (*Ratcliff*) [firearm possession that continues before or after other offenses warrants separate punishment].) [¶]

Additionally, because defendant’s prohibited-person firearm and ammunition offenses were complete the moment he possessed those items, even if he thereafter retained them

solely to safeguard drugs that came into his possession, ‘[w]hat the ex-felon does with the weapon later is another separate and distinct transaction undertaken with an additional intent which necessarily is something more than the mere intent to possess the proscribed weapon.’ (*Ratcliff, supra*, 223 Cal.App.3d at p. 1414.) The trial court therefore could reasonably conclude defendant warranted separate sentences because the evidence showed he intended to possess drugs, which was ‘more than the mere intent to possess the proscribed weapon.’ (*Ibid.*)” (*People v. Rodriguez, supra*, G039986. at pp. 17-18.)

The trial court concluded possession of cocaine for sale and possession of a firearm by a felon “were predominantly independent of each other because I don’t think it’s disingenuous to say some drug dealers use and keep weapons and some don’t” Rodriguez’s intent in possessing drugs was to make money. His intent or objective in possessing the gun could have been to facilitate his drug business, for general self-defense, or for recreational purposes. The court did not abuse its discretion in imposing a consecutive term for felon in possession of a firearm. (See also *People v. Vang* (2010) 184 Cal.App.4th 912 [probation search of the defendant felon’s residence uncovered methamphetamine in one closet, a loaded revolver in the defendant’s bed, and ammunition for the revolver in another closet; court held possession of both a firearm and methamphetamine could be separately punished; among other things, court reasonably could conclude the defendant possessed the firearm to both conduct his drug business and to protect his home in a high crime area].)

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.