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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DINH,

Defendant and Appellant.

H037292

(Santa Clara County

Super. Ct. No. CC959497)

1. INTRODUCTION

The sole contention on appeal by defendant Michael Dinh is that his trial counsel should have objected to the reasons given by the trial court for imposing a consecutive eight month prison term.¹ Following defendant's no contest pleas and admissions, the trial court sentenced defendant to nine years eight months in prison, consisting of the upper term of three years for possessing methamphetamine for sale (count 1; Health & Saf. Code, § 11378),² enhanced by two fully consecutive three-year terms for prior drug

¹ At the outset we note that we have elected to disregard the tables of contents and authorities in defendant's reply brief, which obviously come from a different case, rather than ordering the reply brief stricken and returned for corrections. (Cal. Rules of Court, rule 8.204(e)(2).)

² Unspecified section references are to the Health and Safety Code. Unspecified rule references are to the California Rules of Court.

convictions (§ 11370.2, subd. (c)), and eight months consecutive for the separate offense of possessing ammunition. (Count 2; Pen. Code, § 12316, subd. (b)(1).) For the reasons stated below, we will affirm the judgment after concluding that an objection was not constitutionally required and that defendant was not prejudiced by its absence.

1. THE CHARGES AND PLEA

On or about October 28, 2009, defendant Michael Dinh was arrested at the residence of an acquaintance for absconding from parole. Defendant was under the influence of methamphetamine at the time (count 3; § 11550) and in possession of 15.35 grams of methamphetamine, hypodermic needles (count 4; Bus. & Prof. Code, § 4140), and 28 shotgun shells (count 2; Pen. Code, § 12316, subd. (b)(1)), as well as \$1,100 cash and drug paraphernalia. He admitted the items were his and that he was selling methamphetamine (count 1; § 11378) to support his own drug habit. He entered no contest pleas to the four above counts, and admitted two prior prison terms (Pen. Code, § 667.5, subd. (b)) and two prior drug convictions.³ (§ 11370.2, subd. (c).)

3. SENTENCING

The probation department's presentence report recommended an eight-year prison sentence, based on the upper term of three years for possessing methamphetamine for sale (count 1), plus one fully consecutive term of three years for a prior drug conviction (§ 11370.2, subd. (c)) and one fully consecutive year for each of the two prison priors. (Pen. Code, § 667.5, subd. (b).)

³ On July 2, 2004, defendant was sentenced to three years in prison in Santa Clara County Superior Court Case No. CC451556 for possessing cocaine base for sale (§ 11351.5), felony assault with force likely to inflict great bodily injury (Pen. Code, § 245, subd. (a)(1)), felony false imprisonment (Pen. Code, §§ 236-237), and dissuading a witness (Pen. Code, § 422). On December 7, 2006, defendant was sentenced to four years in prison in Santa Clara County Superior Court Case No. CC643894 for possessing methamphetamine for sale (§ 11378). The drug possession convictions in defendant's previous cases rendered him ineligible for probation in the instant case. (Pen. Code, § 1203.07, subd. (a)(11).)

The probation report also included a check list of possible circumstances in aggravation under Rule 4.421 with the following boxes checked: imposition of concurrent sentences on other convictions (*id.*, subd. (a)(7)), the crime involved a large quantity of contraband (*id.*, subd. (a)(10)), defendant had engaged in violent conduct (*id.*, subd. (b)(1)), his prior convictions are numerous or of increasing seriousness (*id.*, subd. (b)(2)), he had served a prior prison term (*id.*, subd. (b)(3)), he was on parole when the crime was committed (*id.*, subd. (b)(4)), and his performance on parole was unsatisfactory (*id.*, subd. (b)(5)). No boxes were checked in a list of possible circumstances in mitigation from Rule 4.423. The report contained no list of the criteria for selecting concurrent or consecutive sentences under Rule 4.425 (quoted in pt. 4, *post*).

At the sentencing hearing, the prosecutor concurred with the sentence recommended in the probation report.

Defense counsel argued that 15.35 grams was not a large quantity of contraband in a sales case; the case did not involve violence; the court could not rely on the same prison priors to impose the upper term and the enhancements for those prison priors; and early resolution of the case was a mitigating factor. Defense counsel urged that the middle term of two years be imposed on the drug possession count; the three-year enhancement under section 11370.2, subdivision (c) be stayed because the case did not involve large quantities and defendant was selling to support his own habit and not for profit; and, at most, only one of the Penal Code section 667.5, subdivision (b) enhancements be imposed, resulting in a sentence of four or five years.

The prosecutor responded that defendant had been previously convicted of both a violent assault and methamphetamine sales, and that he was on parole for the latter at the time of the current offenses. Further, defendant had absconded from parole and he acknowledged guilt only on the verge of a jury trial.

The probation officer at the hearing recommended a five year sentence.

In sentencing defendant, the court stated that it had reviewed not only the file in this case, but also defendant's 2006 case. In respectfully disagreeing with both counsel and with the probation officer, the court recited defendant's prior history of felony

convictions in 2004 and 2006 and noted that he resumed criminal activity soon after being put on parole twice, including the current charges. In describing defendant's poor performance on parole, the court stated that immediately after his release from prison, he committed the instant offense which involved, among other things, "a great concern to this Court, shotgun shells, although on two occasions the defendant had been formally notified that he was, under no conditions for the rest of his life, to own, possess or control any form of firearm or firearm ammunition." The court also noted that defendant had not taken advantage of prior opportunities to deal with his drug use.⁴

On count 1, the court imposed the upper term of three years based on defendant's two prison priors for which additional time was not imposed, and his being on parole. As to count 2, the court stated, "I do not believe that it is appropriate to order that term served concurrent. This represents a distinct course of conduct and blatant violation of the prohibition against firearms and ammunition for someone who has previously been convicted of a dangerous violent offense." The court imposed a consecutive term of eight months, or one-third the middle term.

The court imposed both consecutive three-year enhancements for defendant's two prior drug convictions under section 11370.2, subdivision (c), stating that defendant had previously received the benefit of having one stricken and had not learned to change his conduct "in spite of being given every opportunity and every benefit that the sentencing laws allow." The court struck the punishment for the two prison priors. The court also imposed a one-year concurrent jail term on the two misdemeanor counts, as well as nine separate fines, fees, and assessments. There was no objection as the court announced the components of the sentence.

⁴ The court initially also stated that defendant entered his change of plea on the second day of jury selection, which was not an early acknowledgement of guilt. After imposing sentence, the court recalled defendant to court to correct the record to reflect that he had entered his plea before the jury panel was called.

4. CRITERIA FOR CONSECUTIVE SENTENCES

Defendant's underlying premise on appeal is that neither reason given for imposing a consecutive term on count 2 survives scrutiny. To reiterate, the trial court stated: "This represents a distinct course of conduct and blatant violation of the prohibition against firearms and ammunition for someone who has previously been convicted of a dangerous violent offense."

A sentencing court "shall state the reasons for its sentence choice on the record at the time of sentencing." (Pen. Code, § 1170, subd. (c).) "[T]he judge must state in simple language the primary factor or factors that support the exercise of discretion The statement need not be in the language of these rules." (Rule 4.406(a).) "Imposing consecutive sentences" is a sentence choice that generally requires a stated reason. (*Id.* subd. (b)(5); *People v. McLeod* (1989) 210 Cal.App.3d 585, 590; *People v. Powell* (2011) 194 Cal.App.4th 1268, 1297.)

Rule 4.425 states: "Criteria affecting the decision to impose consecutive rather than concurrent sentences include:

"(a) Criteria relating to crimes [¶] Facts 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.

"(b) Other criteria and limitations [¶] Any circumstances in aggravation or mitigation may be considered 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."

Under Rule 4.425(a), the trial court's reference to "a distinct course of conduct" could mean either that "[t]he crimes and their objectives were predominantly independent

of each other” (Rule 4.425(a)(1)) or that “[t]he crimes were committed at different times or separate places” (Rule 4.425(a)(3)). In the circumstances of this case, we agree with defendant that the trial court more likely had the first alternative in mind, as defendant was found in possession of the methamphetamine and shotgun shells at the same time and in the same location. (*People v. Monarrez* (1998) 66 Cal.App.4th 710, 715 (*Monarrez*) [possession of both heroin and cocaine].) While the Attorney General argues that Rule 4.425(a)(3) could also apply under the theory that “although found together, the items were not acquired together,” nothing in the record indicates that the trial court made that speculative inference.

As the phrase “course of conduct” is a familiar concept in multiple punishment cases applying Penal Code section 654, we look to those cases for guidance in analyzing the trial court’s reasoning here.⁵

“[I]f the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct.” (*People v. Perez* (1979) 23 Cal.3d 545, 551, fn. omitted.) Thus, a “course of conduct” is distinct for purposes of Penal Code section 654 when the defendant had multiple criminal objectives. “[P]redominantly independent” objectives will also justify imposition of a consecutive sentence under Rule 4.425(a)(1).

It is generally a factual question for the sentencing court whether a defendant’s multiple crimes involved multiple objectives. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) On appeal we defer to express or implied determinations that are supported by substantial evidence. (Cf. *People v. Osband* (1996) 13 Cal.4th 622, 730-731 (*Osband*);

⁵ Penal Code section 654, subdivision (a), states in 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.”

People v. McCoy (1992) 9 Cal.App.4th 1578, 1585; *In re Jose P.* (2003) 106 Cal.App.4th 458, 469.)

It is well established that Penal Code section 654 does not preclude separate punishments for simultaneous possession of multiple narcotics. (*People v. Barger* (1974) 40 Cal.App.3d 662, 672, and cases there cited; *Monarrez, supra*, 66 Cal.App.4th 710, 715.) The rationale is that “[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.] As we also noted, different drugs have different effects and pose different dangers to society. Although the overall intent is always to make money, the objectives of selling cocaine and heroin are separate.” (*Monarrez, supra*, 66 Cal.App.4th at pp. 714-715.)

The same reasoning applies when a defendant is sentenced for possessing different kinds of contraband. *People v. Vang* (2010) 184 Cal.App.4th 912, cited by the Attorney General, illustrates how possessing both a firearm and methamphetamine can be separately punished. A probation search of the defendant’s residence in that case uncovered methamphetamine in one closet, a loaded revolver in the defendant’s bed, and ammunition for the revolver in another closet. (*Id.* at p. 914.) The defendant was convicted, among other things, of possessing methamphetamine while armed with a loaded, operable firearm (§ 11370.1, subd. (a)) and being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)). (*People v. Vang, supra*, 184 Cal.App.4th at p. 914.)

Defendant Vang argued on appeal that Penal Code section 654 precluded imposing a sentence for the firearm possession consecutive to the sentence for armed possession of methamphetamine. The appellate court found substantial evidence supported the trial court’s finding that the crimes involved separate intents. (*People v. Vang, supra*, 184 Cal.App.4th 912, 916.) Noting the defendant’s concern about home security, the appellate court stated, “The court could reasonably conclude that [the] defendant possessed the firearm to both conduct his drug business and to protect his home in a high crime area.” (*Id.* at p. 917.) The court noted that only one of the crimes

required the gun to be loaded, which was a separate act, and the offenses addressed “distinct dangers.” (*Ibid.*)

In our case, nothing about defendant’s stated intent to possess methamphetamine for sale to support his own methamphetamine habit explained why he needed shotgun shells. Defendant argues that the crimes were predominantly connected as they occurred in the same time and place, but he offers no explanation for how possessing ammunition served his use or sale of methamphetamine. The ammunition suggests an entirely different intent and poses a distinct danger to the public. “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.)” (*People v. Barger, supra*, 40 Cal.App.3d 662, 672.) We conclude that the trial court’s reasoning on this point is supported by substantial evidence and adequately justified imposition of a consecutive sentence.

The trial court’s second stated reason for imposing a consecutive sentence was the “blatant violation of the prohibition against firearms and ammunition for someone who has previously been convicted of a dangerous violent offense.” The court had earlier explained that it was greatly concerned about defendant’s possession of shotgun shells, “although on two occasions the defendant had been formally notified that he was, under no conditions for the rest of his life, to own, possess or control any form of firearm or firearm ammunition.” Defendant contends that this reason violated Rule 4.425(b)(3) by relying on the elements of the crime defined in Penal Code section 12316.

In this case, we need not determine whether the trial court properly invoked this second reason, as we have found the first reason was sufficient by itself to justify imposition of a consecutive sentence. Even if defendant’s previous felonies or his violation of parole conditions arguably amounted to dual use of a fact either reflected in the elements or relied on to impose an upper term, we find no prejudice resulting from this overstatement of reasons. “Improper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if “[i]t is not reasonably probable that a more favorable sentence would have

been imposed in the absence of the error.”’” (*Osband, supra*, 13 Cal.4th 622, 728, quoting *People v. Coleman, supra*, 48 Cal.3d 112, 162.) Considering the tenor of the sentencing court’s remarks, the absence of any mitigating factors, and the presence of a valid aggravating factor, we conclude it is not reasonably probable that defendant would have received a more favorable sentence if defense counsel had objected to the second reason.

In *People v. Alvarado* (2001) 87 Cal.App.4th 178, this court rejected a claim of ineffectiveness based on failing to object when no reasons were given for a consecutive sentence, concluding that a rape and robbery involved separate acts of violence and predominantly independent objectives, though occurring within a single period of behavior. “Given the court’s express decision to impose consecutive sentences and factual bases for two supporting reasons, counsel could reasonably have considered it unnecessary to request an express statement of reasons from the court. This is especially so given the court’s decision to impose an aggravated sentence for the robbery. Clearly, the court was not impressed with any evidence of mitigation. [¶] Since the record is silent as to why counsel declined to object and since his failure to do so was not unreasonable as a matter of law, we reject [the] defendant’s claim of ineffective assistance.” (*Id.* at p. 194.) This court further concluded that the oversight was harmless. “Simply put, given the record, we do not consider it reasonably probable the court would have been unable to provide sufficient reasons for consecutive sentences or that it would have imposed concurrent sentences.” (*Id.* at pp. 194-195.)

Because we find that the trial court stated at least one permissible reason for imposing a consecutive term on count 2, we conclude that defendant cannot establish trial counsel’s ineffectiveness for not objecting to the court’s statement. Defense counsel was not constitutionally required to register a futile objection.

5. DISPOSITION

The judgment is affirmed.

GROVER, J.*

WE CONCUR:

RUSHING, P.J.

ELIA, J.

*Judge of the Monterey County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.