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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JARVONNE FEREDELL JONES, Defendant and Appellant.	C060376 (Super. Ct. No. 08F04254)

A jury convicted defendant Jarvonne Feredell Jones of three firearms offenses and the trial court found he had served a prison term. (Pen. Code, §§ 12021, subd. (a)(1), 12025, subd. (b)(6), 12031, subd. (a)(2)(F), 667.5, subd. (b).)[1] Defendant was sentenced to prison for four years, and he timely appealed.

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[1] Hereafter, undesignated statutory references are to the Penal Code.

Defendant contends the trial court should have stayed the sentences for two counts and that the abstract reflects jail fees that were not orally pronounced at sentencing. The Attorney General partly concedes the former claim. We shall modify the sentence and otherwise affirm.

FACTS

In May 2008, the car defendant was driving was searched. A loaded revolver, not registered to defendant, was found in a door panel, and defendant, a convicted felon, said he bought the gun three days earlier.

DISCUSSION

I.

Count Three Must be Stayed

Defendant was convicted of possession of a firearm by a felon (count one, § 12021, subd. (a)(1)), carrying a readily accessible concealed and unregistered firearm (count two, § 12025, subd. (b)(6)), and carrying an unregistered loaded firearm in public (count three, § 12031, subd. (a)(2)(F)).

Defendant contends he committed one possessory act and therefore multiple punishment is improper and the sentences for counts two and three must be stayed. We agree in part.

"Section 654, subdivision (a), provides in pertinent part, '[a]n 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.' Section 654 therefore '"precludes multiple punishment for a single act or for a course of conduct comprising indivisible acts. 'Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor.' [Citations.] . . .

"Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1142-1143 (*Jones*).)

The probation report recommended the upper term of three years for count one. It recommended one-third the midterm on counts two and three, "stayed, pursuant to Penal Code Section 654." But a one-third midterm sentence is what is generally imposed for consecutive determinate counts. (See § 1170.1, subd. (a).) This page of the probation report contains handwritten notes, presumably made by the trial court, bracketing the paragraphs discussing counts two and three with the notation "654" and indicating "3 yrs."

At sentencing, the parties expressed no disagreement with the recommendation that counts two and three should be stayed pursuant to section 654, but contested whether defendant should receive the upper or middle term. The trial court imposed the

upper term of three years on each count, but ordered counts two and three to be served concurrently. It did not mention section 654.

It may be that the trial court agreed with the probation officer's recommendation regarding the applicability of section 654, but misapplied that statute. The correct way to implement it is for the trial court to impose sentence on all counts of which the defendant stands convicted, but then stay execution of sentence as necessary to prevent improper multiple punishment. (See *People v. Deloza* (1998) 18 Cal.4th 585, 591-592; *People v. Pearson* (1986) 42 Cal.3d 351, 359-360.) Imposing concurrent terms is not the correct method of implementing section 654. A concurrent term is not a stayed term. In fact, imposing concurrent terms is generally seen as an implied finding that the defendant bore multiple intents or objectives, that is, a rejection of the applicability of section 654. (See, e.g., *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1564-1565 (*Garcia*) ["implicit in the trial court's concurrent sentencing order is that defendant entertained separate intentions"]; see *Jones, supra*, 103 Cal.App.4th at p. 1147 [same].)

The Attorney General agrees that count three should be stayed as between it and count two, because defendant committed a single act when he possessed a loaded firearm in public and possessed a concealable weapon. But the Attorney General argues that as between counts one and two, no stay is required because

those crimes were committed at different times or with different intents or both. He relies on evidence that defendant, a convicted felon, possessed a firearm for three days before his arrest. We are not entirely persuaded by the Attorney General's reasoning, but we agree with his contention that defendant may be separately punished for possession by a felon of a firearm and another offense.

The Attorney General's legal theory is that defendant admitted possessing the gun three days before his arrest, a felon commits a crime the moment she or he possesses a gun, and therefore defendant's antecedent possession of the gun is separately punishable. He relies on cases where a felon uses a gun to commit some crime with the gun, such as assault or robbery. In those cases, the rule is that where a felon acquires the gun at the scene of the crime, such as in a struggle, she or he may not be separately punished, but if the felon arrives at the scene armed, separate punishment is permitted. (See *People v. Bradford* (1976) 17 Cal.3d 8, 22-23 [felon took officer's gun during struggle, multiple punishment barred]; *People v. Venegas* (1970) 10 Cal.App.3d 814, 821 [similar holding]; cf. *Garcia, supra*, 167 Cal.App.4th at pp. 1564-1566 [felon kept gun after robberies and planned to use it to avoid arrest, multiple punishment allowed]; *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1407-1410 [similar

holding]; see generally *Jones, supra*, 103 Cal.App.4th at pp. 1144-1146 [collecting and discussing cases].)

Defendant did not use his gun to commit a nonpossessory crime. And the People did not argue defendant was guilty of possession three days before his arrest: The prosecutor mentioned defendant's admission that he bought the gun three days before to bolster the theory that defendant knowingly possessed the gun, not to base liability on possession before the date of arrest. Accordingly, we question the theory of antecedent possession in this case.

However, because of the purpose of the ban on felons possessing firearms, we agree that multiple punishment is appropriate as between count one (possession by a felon of a firearm) and either counts two or three.

The purpose of section 12021 is to protect public welfare by precluding the possession of guns by those who are more likely to use them for improper purposes--felons (*People v. Pepper* (1996) 41 Cal.App.4th 1029, 1037, citing *People v. Bell* (1989) 49 Cal.3d 502, 544), and to provide a greater punishment to an armed felon than to an unarmed felon (*People v. Winchell* (1967) 248 Cal.App.2d 580, 597). "Section 654's purpose is to ensure that punishment is commensurate with a defendant's culpability. [Citations.] This concept 'works both ways. It is just as undesirable to apply the statute to lighten a just punishment as it is to ignore the statute and impose an

oppressive sentence.' [Citation.] Section 12021 uniquely targets the threat posed by felons who possess firearms." (*Jones, supra*, 103 Cal.App.4th at p. 1148.)

In cases where a felon possessed a separately proscribed firearm, that is, an inherently unlawful weapon, multiple punishment has been barred. (*People v. Perry* (1974) 42 Cal.App.3d 451, 456 ["The possessor here happened to be one previously convicted of a felony, whose possession of a concealable firearm was punishable regardless of its being a sawed-off rifle"]; see *People v. Scheidt* (1991) 231 Cal.App.3d 162, 170 [similar facts, following *Perry*].)

But here, defendant did not possess an inherently unlawful firearm; he possessed his firearm in an unlawful way, that is, beyond the unlawfulness inherent in a felon's possession of a firearm. In this case defendant concealed the loaded firearm in a vehicle that then he drove on a public street.

In *People v. Harrison* (1969) 1 Cal.App.3d 115, Harrison was convicted of possession by a felon of a firearm and possession of a loaded firearm on a public street. Multiple punishment was upheld based on the following reasoning:

"In our case, appellant argues he possessed or controlled but one object, the revolver, and yet was punished for two crimes only because he was an ex-convict driving a car. We note these distinctions: Penal Code section 12021 applies only to a person previously convicted of a felony and who owns or has

custody, control or possession of a concealable firearm, loaded or unloaded and whether in a vehicle or not; so long as he owns or has custody, control, or possession of it, such a weapon need not be on his person or in his vehicle. The [misdemeanor] offense proscribed by Penal Code section 12031, however, applies to any person and to any firearm, concealable or not, but only if it is loaded and he carries it either on his person or in a vehicle. . . .

"The two statutes strike at different things. One is the hazard of permitting ex-felons to have concealable firearms, loaded or unloaded; the risk to public safety derives from the type of person involved. The other strikes at the hazard arising when any person carries a loaded firearm in public. Here, the mere fact the weapon is loaded is hazardous, irrespective of the person (except those persons specifically exempted) carrying it.

"The 'intent or objective' underlying the criminal conduct is not single, but several, and thus does not meet another of the tests employed to determine if Penal Code section 654 is violated. [Citation.] For an ex-convict to carry a concealable firearm is one act. But loading involves separate activity, and while no evidence shows that appellant personally loaded the pistol, there seem little distinction between loading and permitting another to do so. Thus, two acts, not a single one, are necessarily involved and bring our case outside the

prohibition against double punishment for a single act or omission. We therefore hold contrary to appellant's contentions on this point." (*People v. Harrison, supra,* 1 Cal.App.3d at p. 122.)

Here, as stated, after defendant purchased the gun, he concealed it in the car, or had someone conceal it for him. Under the reasoning of Harrison just quoted, that act merits separate punishment from mere possession. Accordingly, a section 654 stay is not required as between counts one and two.

Defendant relies in part on *In re Joseph G.* (1995) 32 Cal.App.4th 1735. There, a minor carried a loaded, concealed, gun to school, and the juvenile court sustained delinquency allegations that he violated three separate statutes proscribing, respectively, carrying a loaded firearm at school, carrying a loaded firearm in public and carrying a concealed weapon, and multiple punishment was precluded, although it was an academic victory, since no sentence had been imposed, the minor not having been removed from the home. (*Id.* at pp. 1743-1744; see *People v. Hurtado* (1996) 47 Cal.App.4th 805, 807-808, 816 [defendant convicted of carrying a loaded weapon in a car and carrying a concealed weapon in a car; court accepted People's concession of applicability of section 654, citing *Joseph G.*].) We agree *Joseph G.* supports application of section 654 as between counts two and three in defendant's case, but it does not address the issue of defendant's status as a convicted

felon. For the reasons stated above, that status merits additional punishment in this case.

In conclusion, the concurrent sentence on count two is proper, but the sentence on count three must be stayed.

II.

The Jail Fees were Properly Imposed

When a defendant is convicted, the county may recoup the "actual administrative costs . . . incurred in booking or otherwise processing arrested persons." (Gov. Code, § 29550.2, subd. (a); see *People v. Rivera* (1998) 65 Cal.App.4th 705.)

The probation report made six recommendations, including a prison sentence, an $800 restitution fine and an equivalent, stayed, parole revocation fine, and recommended the trial court order defendant to "pay a court security surcharge fee" of $60, "pay a $242.29 main jail booking fee" and "pay a $27.22 main jail classification fee", and both of the latter were "pursuant to Section 29550.2 of the Government Code[.]"

After imposing concurrent upper-term prison sentences, the trial court made the following orders: "Impose the restitution fine of $200, a . . . parole revocation fine of $200 to be stayed upon successful completion of parole; order that you pay the court security surcharge, main jail booking fee and main jail classification fees."

The abstract and court minutes reflect the three fees in the amounts recommended by the probation officer, a $60 court

security fee, a $242.29 booking fee and a $27.22 jail classification fee.

Defendant contends that because the trial court did not recite the amount of the booking and jail classification fees, they were not properly imposed. He does not raise a similar challenge as to the $60 court security fee.

Defendant relies on the rule that "Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) The abstract of judgment and court minutes must accurately reflect what the trial court ordered, and the clerk, in preparing those documents, lacks the power to add fines or fees not imposed by the court. (*Id.* at pp. 386-390.)

But in this case, there is no discrepancy between the abstract, the minutes and the trial court's order. Although the trial court did not recite the amounts of the jail booking and classification fees, the trial court ordered that they be paid. The trial court was following the recommendations of the probation officer in the order presented in the report, although it disagreed with the sentence and the amount of the restitution fines. The parties had the probation report and could follow the trial court's orders. Defendant did not object to the amount of the fees or to the failure to recite that amount. No doubt this is because the amount—actual administrative costs was

routinely calculated. For lack of objection, we presume the amounts in the probation report reflect the correct administrative costs incurred for booking and classifying defendant into jail. (See *People v. Bartell* (2009) 170 Cal.App.4th 1258, 1262; *People v. Evans* (1983) 141 Cal.App.3d 1019, 1021.)

This is not like cases where a clerk adds some fee or fine that was not actually imposed. The clerk accurately captured in the minutes and the abstract the trial court's imposed judgment. Although the trial court should have recited the amounts, we see no basis for striking those two orders in this case.

DISPOSITION

The judgment is modified by staying execution of the sentence on count three pursuant to section 654, and as so modified is affirmed. The trial court is directed to forward a new abstract of judgment to the Department of Corrections and Rehabilitation

CANTIL-SAKAUYE, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.