Filed 2/1/11 P. v. Sanders CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent v. MAURICE D. SANDERS, Defendant and Appellant.	F059287 (Super. Ct. No. BF126309A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Michael E. Dellostritto, Judge.

Robert Navarro, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Two shotguns were found in the master bedroom closet of the apartment where appellant Maurice D. Sanders resided with his wife. Appellant was convicted after jury trial of two counts of unlawfully possessing a firearm (counts 1 & 3) and two counts of being a felon in possession of a firearm (counts 2 & 4). (Pen. Code, §§ 12021, subd. (a)(1), 12021.1, subd. (a).)[1] The court found four prior strike allegations and three prior prison term allegations to be true. (§§ 667, subds. (a)-(e), 1170.12, 667.5, subd. (d).) Appellant was sentenced on counts 1 and 3 to 25-years-to-life imprisonment; the term imposed on count 3 was ordered to run concurrently with the term imposed on count 1. The court struck all of the prior prison term enhancements. He was sentenced to terms of 25-years-to-life imprisonment on counts 2 and 4 but imposition of punishment was stayed pursuant to section 654.

Appellant argues the corpus deliciti of these crimes were not established. This contention is not persuasive. Appellant also argues the concurrent term imposed for count 3 must be stayed pursuant to section 654. Appellant is correct. Finally, appellant argues counts 2 and 4 must be reversed because, under the facts in this case, the violations of section 12021.1 are lesser included offenses of the violations of section 12021 (counts 1 and 3). Respondent concedes this last point and we accept the concession as properly made. The convictions on counts 2 and 4 will be reversed and the sentence modified.

FACTS

On January 14, 2009, Bakersfield Police Officers Paul Yoon and Stephen Kauffman contacted appellant. Appellant told them he lived with his wife somewhere in downtown Bakersfield but he did not know his address or phone number.

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[1] Unless otherwise specified all statutory references are to the Penal Code.

A parole search was conducted of appellant's person. He possessed a key ring containing, inter alia, a car key and a house key. The car key fit the ignition of a vehicle parked nearby. Inside the vehicle, officers found a bank statement addressed to Tamu Tenison at an apartment in Bakersfield (the Bakersfield apartment).

Officer Kauffman telephoned Tamu, who said she was married to appellant in December 2008.

Appellant telephoned Tamu. During their conversation, appellant said, "Baby, remember when I brought the thing into the house, you asked me about it? I told you not to worry about it. It was some guns."

Some Bakersfield police officers, including Officer Kauffman and Officer Joshua Finney, arrived to search the Bakersfield apartment. Kauffman opened the front door using one of the keys on appellant's key ring. During a protective sweep of the apartment, officers noted the door of the master bedroom closet was open. Two shotguns were found in the master bedroom closet, along with several 20-gauge and 12-gauge shotgun shells. The shotguns were in plain view. Although one of them was covered, it was still identifiable as a firearm. One of the shotguns was a 12-gauge pump-action type and the other was a 20-gauge bolt action type. Both shotguns were operable.

A duffel bag was found resting on the ground in the master bedroom. It contained men's clothing and a letter from the Department of Corrections and Rehabilitations addressed to appellant at an address in Palmdale. A photograph of appellant was found in the living room. A photograph of appellant and Tamu was found in the master bedroom.

The field arrest data sheet reflects that appellant gave the Bakersfield address as his residence. Appellant told Officer Finney he stays at the Bakersfield apartment with Tamu when he is in Bakersfield but he lives in Palmdale.

Appellant gave a statement to Officer Finney. In relevant part, appellant said he was married to Tamu but did not live with her. Appellant said he purchased the shotguns for Bakersfield Police Officer Mason Woessner. Appellant said that he had been stopped

by Woessner and had made a deal with him to find information for him in exchange for getting some unrelated charges dismissed. Appellant said he purchased the guns from a "crack head" on the day of his arrest.

Officer Woessner testified on December 30, 2008, he stopped a vehicle driven by Tamu in which appellant was a passenger. Appellant initially gave Woessner a false name. He told Woessner he wanted to "work off" the situation by becoming a confidential informant concerning drugs and firearm possession. Woessner did not ask appellant to purchase firearms for him and did not say anything that would have led appellant to believe that Woessner wanted him to do so. Appellant never indicated to Woessner that he was going to purchase some firearms. Appellant did not tell Woessner he had purchased the shotguns.

It was stipulated that appellant was convicted of a felony within the meaning of sections 12021 and 12021.1 prior to January 14, 2009.

Appellant's sister-in-law, Danyell Sanders, testified appellant lived in Palmdale with appellant's brother and her.

Appellant testified he lived in Palmdale at the time of his arrest. Appellant further testified Officer Woessner telephoned him several times. During one of their conversations, Woessner offered to pay appellant $75 to $100 for shotguns and $100 to $300 for fully automatic weapons. Tamu listened to this conversation. She bought the shotguns. She thought that if appellant gave Woessner what he wanted, he would stop telephoning appellant.

DISCUSSION

I. The Corpus Delicti of the Offenses was Adequately Proven.

A. The corpus delicti rule.

> "In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself—i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by

> relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant. [Citations.] Though mandated by no statute, and never deemed a constitutional guaranty, the rule requiring some independent proof of the corpus delicti has roots in the common law. [Citation.]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169 (*Alvarez*).)

The corpus delicti "rule is intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened. [Citations.]" (*Alvarez, supra*, 27 Cal.4th at p. 1169.) "[T]he rule in California has been that one cannot be convicted when there is no proof a crime occurred other than his or her own earlier utterances indicating a predisposition or purpose to commit it." (*Id*. at p. 1171.)

The corpus delicti rule is not onerous. In California, it only "require[s] some independent proof of the corpus delicti itself, i.e., injury, damage, or loss by a criminal agency. [Citation.]" (*Alvarez, supra,* 27 Cal. 4th at p. 1169, fn. 3.) "A slight or prima facie showing, permitting the reasonable inference that a crime was committed, is sufficient. [Citations.]" (*People v. Alcala* (1984) 36 Cal.3d 604, 624-625.)

> "The independent proof may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. [Citations.] There is no requirement of independent evidence 'of every physical act constituting an element of an offense,' so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency. [Citation.] In every case, once the necessary quantum of independent evidence is present, the defendant's extrajudicial statements may then be considered for their full value to strengthen the case on all issues. [Citations.]" (*Alvarez, supra*, 27 Cal.4th at p. 1171.)

The corpus delicti rule applies in various contexts. "[A]ppellate courts have entertained direct claims that a conviction cannot stand because the trial record lacks independent evidence of the corpus delicti. [Citations.]" (*Alvarez, supra,* 27 Cal.4th at p. 1170.) When such a claim is raised, the entire record is reviewed to determine if it contains some evidence, independent of the defendant's extrajudicial statements, from

which one could reasonably infer that a crime was committed. (See, e.g., *People v. Morales* (1989) 48 Cal.3d 527, 553; *People v. Wright* (1990) 52 Cal.3d 367, 403-405.)

B. The evidence adequately establishes the corpus delicti of the charged crimes.

Appellant contends all four convictions must be reversed because "no sufficient prima facie showing was made regarding the elements of possession (custody or control) and knowledge." We are not convinced.

When a defendant is charged with violating section 12021, the corpus delicti rule requires slight proof of "(1) conviction of a felony and (2) ownership or possession of a firearm. [Citation.]" (*People v. Hilliard* (1963) 221 Cal.App.2d 719, 724; § 12021, subd. (a)(1).) Section 12021.1 adds the requirement that the defendant has been previously convicted of a specified violent felony. (§ 12021.1, subd. (b).)

Appellant acknowledges that he stipulated to having suffered three prior felony convictions of moral turpitude. Therefore, we must determine only whether there is slight or minimal evidence supporting a reasonable inference that appellant knowingly possessed the shotguns. The record contains such evidence.

> "Possession may be actual or constructive. Actual possession means the object is in the defendant's immediate possession or control. A defendant has actual possession when he himself has the weapon. Constructive possession means the object is not in the defendant's physical possession, but the defendant knowingly exercises control or the right to control the object. [Citation.] Possession of a weapon may be proven circumstantially, and possession for even a limited time and purpose may be sufficient. [Citation.]" (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 831.)

Constructive "'possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another.' [Citation.]" (*People v. Johnson* (1984) 158 Cal.App.3d 850, 854.)

It is undisputed that Tamu lived at the Bakersfield apartment. She told officers she married appellant in December 2008. Appellant possessed a key to the front door of

the Bakersfield apartment. There were two photographs of appellant in the Bakersfield apartment, one was in the living room and the other was in the master bedroom. A duffle bag containing men's clothing and paperwork addressed to appellant was found in the apartment. This evidence is sufficient to permit a reasonable inference that appellant resided at the Bakersfield apartment with his wife.

Two shotguns were found inside the master bedroom closet of the Bakersfield apartment. The closet's door was open and shotguns were in plain view. Although one was covered, it was still recognizable to officers as a firearm. Officer Yoon testified, "They were partially wrapped up in a blanket leaned up against the closet. I could see the tubes of the shotguns and a butt stalk of one of the shotguns." The duffle bag, which contained paperwork addressed to appellant, was found resting on the floor of the master bedroom. A photograph of appellant and Tamu was found in the master bedroom. This evidence is sufficient to support a prima facie inference that appellant used the master bedroom, including the master bedroom closet, and he possessed and had knowledge of the shotguns.

We therefore conclude the corpus delicti rule was satisfied; this challenge to the sufficiency of the evidence fails.[2]

II. Section 654 Applies to Count 3.

The probation report recommended a term of 25-years-to-life be imposed for count 3 (possession of the 12-gauge shotgun). It also recommended this term run

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[2] Respondent contends this issue was forfeited by the absence of an objection on this ground below. Our Supreme Court has not "suggested that an evidentiary objection at trial is a prerequisite to raising *instructional* and *sufficiency* claims on appeal." (*Alvarez, supra*, 27 Cal.4th at p. 1172, fn. 8.) However, a split has developed in the appellate courts on the question whether "the defendant must either give the prosecution trial notice of his insistence on independent proof or forfeit the benefit of the independent-proof rule entirely. [Citations.]" (*Ibid*.) Since we have determined the corpus delicti rule was satisfied, it is unnecessary to address the question of forfeiture. The point is moot.

concurrently with the term imposed for count 1 (possession of the 20-gauge shotgun). The court sentenced appellant in accordance with both of these recommendations. It did not proffer any reason for the decision to run count 3 concurrently with count 1.

Appellant argues the concurrent term imposed for count 3 must be stayed pursuant to section 654. We agree.

> "Section 654 precludes multiple punishment for a single act or indivisible course of conduct punishable under more than one criminal statute. Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the 'intent and objective' of the actor. [Citation.] If all of the offenses are incident to one objective, the court may punish the defendant for any one of the offenses, but not more than one. [Citation.] If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]" (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268.)

Whether the defendant possessed multiple objectives and intents within the meaning of section 654 is a factual question. We will uphold a trial court's explicit or implicit finding if it is supported by substantial evidence. The trial court's determination is viewed in the light most favorable to the respondent and we presume the existence of every fact that could reasonably be deduced from the evidence. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) The absence of a timely objection during sentencing does not result in forfeiture of a section 654 claim. (*People v. Le* (2006) 136 Cal.App.4th 925, 931.)

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 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, "nonwithstanding 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."

The question whether a felon may be separately punished for possession of multiple firearms is currently pending in our 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*, review granted Mar. 24, 2010, S179552; see also *People v. Correa*, review granted Jul. 9, 2008, S163273, formerly published at 161 Cal.App.4th 980, submission vacated June 11, 2010, so the matter may be considered in conjunction with *People v. Jones*, S179552 [review was granted in *People v. Correa* to consider if defendant was properly sentenced on multiple counts of being a felon in possession of a firearm where he was discovered in a closet with a cache of weapons].)

Thus, 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*, *supra*, 87 Cal.App.4th at pp. 267-268.) Here, the record lacks such evidence. The two shotguns were found next to each other in the master bedroom closet. The record does not contain any proof that appellant intended to use these weapons in different crimes or to sell them to different people. There is also no proof that appellant obtained the shotguns in separate transactions. There is no evidence the two weapons were previously used in different crimes.

In sum, the record lacks evidence from which the court could have inferred that appellant had a different criminal objective or intent for each shotgun. Therefore, we

conclude section 654 precludes imposition of separate punishment for count 3 and the concurrent term imposed for this count must be stayed.

III. Counts 2 and 4 are Necessarily Included Offenses of Counts 1 and 3.

Finally, appellant contends counts 2 and 4 must be reversed because the violations of section 12021.1, subdivision (a), are lesser included offenses of the violations of section 12021, subdivision (a). Respondent concedes this point and we accept the concession as properly made.

A defendant cannot be convicted of both a greater offense and a necessarily included lesser offense. (*People v. Ortega* (1998) 19 Cal.4th 686, 692.)

> "We employ two alternative tests to determine whether a lesser offense is necessarily included in a greater offense. Under the elements test, we look to see if all the legal elements of the lesser crime are included in the definition of the greater crime, such that the greater cannot be committed without committing the lesser. Under the accusatory pleading test, by contrast, we look not to official definitions, but to whether the accusatory pleading describes the greater offense in language such that the offender, if guilty, must necessarily have also committed the lesser crime. [Citation.]" (*People v. Moon* (2005) 37 Cal.4th 1, 25-26.)

We agree with respondent that because section 12021, subdivision (a), prohibits a person convicted of a felony from possessing a firearm, and section 12021.1, subdivision (a), prohibits a person convicted of a violent felony from possessing a firearm, section 12021.1 is a lesser included offense of section 12021 under certain circumstances. Since some or all of appellant's prior convictions are for violent felonies listed in section 12021.1, under the facts of the case when appellant possessed the shotguns he necessarily violated both section 12021 and section 12021.1. Therefore, the convictions on counts 2 and 4 are lesser included offenses of counts 1 and 3, and they must be reversed for this reason.

DISPOSITION

The convictions on counts 2 and 4 are reversed and the sentences imposed and stayed for these counts are vacated. The sentence imposed for count 3 is ordered to be stayed pursuant to Penal Code section 654. In all other respects, the judgment is affirmed. The superior court is ordered to prepare an amended abstract of judgment and to transmit a copy of it to the appropriate authorities.

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LEVY, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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CORNELL, J.