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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. RICARDO ALEXANDER PLEITEZ, Defendant and Appellant.	B168671 (Los Angeles County Super. Ct. No. KA060079)

APPEAL from a judgment of the Los Angeles County Superior Court. Robert M. Martinez, Judge. Affirmed as modified.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Michael R. Johnsen, Deputy Attorneys General, for Plaintiff and Respondent.

Ricardo Alexander Pleitez appeals from the judgment entered following his conviction of residential burglary and related offenses. He contends, and the People concede, that the trial court erred by failing to strike his conviction of petty theft with a prior theft-related conviction, and by imposing concurrent terms in violation of Penal Code section 654. We agree and modify the judgment accordingly.

FACTUAL AND PROCEDURAL BACKGROUND

Following a brief chase and a collision, an off-duty police officer arrested Pleitez, who was driving a stolen car after stealing property from the owner's residence. As a result, a jury found him guilty of residential burglary, vehicle theft, grand theft, and petty theft with a prior theft-related conviction. (Pen. Code, §§ 459; 10851, subd. (a); 487; 484, subd. (a), 666.) In a bifurcated proceeding, the trial court found that Pleitez had suffered two prior serious felony convictions, which also made him eligible for sentencing under the "Three Strikes" law, and that he had served a separate prison term. (Pen. Code, §§ 667, subd. (a)(1); 667, subds. (b)-(i); 1170.12, subds. (a)-(d); 667.5, subd. (b).)

At sentencing the trial court granted the People's motion to dismiss one of the five-year serious felony enhancements. The court decided to strike the one-year prior prison term enhancement in furtherance of justice. Pleitez was sentenced as a third strike offender to an indeterminate term of 25 years to life for residential burglary plus a five-year serious felony enhancement for an aggregate sentence of 30 years to life. The court imposed concurrent terms of 25 years to life each on the remaining counts of vehicle theft, grand theft, and petty theft with a prior theft-related conviction.

1. *Petty Theft Is a Lesser Included Offense of Grand Theft*

Generally, a defendant may be convicted "of any number of the offenses charged." (Pen. Code, § 954.) However, a defendant cannot be convicted of an offense and a lesser included offense. (*People v. Ortega* (1998) 19 Cal.4th 686, 692.) "'The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included

offense.' [Citation.]" (*People v. Ortega, supra*, 19 Cal.4th at p. 692 quoting *People v. Pearson* (1986) 42 Cal.3d 351, 355.)

Here appellant was convicted of grand theft and petty theft with a prior theft-related conviction. (Pen. Code, §§ 484-487, 666.) Petty theft is a lesser and necessarily included offense of grand theft. (*People v. Shoaff* (1993) 16 Cal.App.4th 1112, 1116.) "The prior conviction and incarceration requirement of [Penal Code] section 666 is a sentencing factor and not an element of an offense." (*Ibid*.) Upon appellant's conviction of both offenses, the proper procedure was for the court to strike the conviction in count 4 and sentence appellant only as to grand theft. (*People v. Ortega, supra,* 19 Cal.4th 686, 697, 699.) We therefore reverse the conviction of petty theft with a prior theft-related conviction in count 4.

2. *The Concurrent Terms Imposed By the Court Should Be Stayed*

When, as in this case, the jury convicts a defendant of two or more offenses occurring during an indivisible course of conduct with a single intent and objective, Penal Code section 654 prohibits courts from imposing multiple punishment and requires them to stay additional prison terms. (Pen. Code, § 654; *People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1209.) After correctly acknowledging that Penal Code section 654 applied in the case, the trial court should have stayed sentencing on the remaining counts rather than impose concurrent terms.

DISPOSITION

The judgment is modified as follows: (1) The conviction in count 4 of petty theft with a prior theft-related conviction is reversed; (2) The sentences for the remaining counts of vehicle theft and grand theft are stayed. As modified, the judgment is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J. JOHNSON, J.