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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. STEPHEN MYO MYINT, Defendant and Appellant.	H023781 (Santa Clara County Super.Ct.No. 210651)

Defendant Stephen Myo Myint appeals from a judgment after a plea of no contest to assault with a stun gun (Pen. Code, § 244.5, subd. (b)),[1] and attempted kidnapping (§§ 664, 207, subd. (a)). He asserts the trial court violated his due process rights by ordering restitution to the victim without notice, and violated section 654 by imposing concurrent terms of imprisonment for counts 2 and 3. We agree with regard to the 654 issue, and modify the judgment.

[1] Further statutory references are to the Penal Code unless otherwise specified.

STATEMENT OF PROCEDURE

On June 20, 2001, the Grand Jury of the County of Santa Clara filed an indictment against defendant and his wife, Muriel Myint, charging them with assault with a deadly weapon (§ 245, subd. (a)(1) - count 1); assault with a stun gun (§ 244.5, subd. (b) - count 2); and attempted kidnapping (§§ 664 and 207, subd. (a) - count 3). The Grand Jury charged defendant with personally inflicting great bodily injury within the meaning of sections 12022.7, subdivision (a) and 1203, subdivision (e)(3) as to all counts and with personally inflicting great bodily injury within the meaning of sections 667 and 1192.7 as to all counts. Muriel Myint was charged alone with being an accessory.

Defendant entered a plea of no contest to counts 2 and 3,[2] with the understanding that count 1, and the allegations of personally inflicting great bodily injury on counts 2 and 3 would be dismissed at the time of sentencing. As part of his plea bargain, defendant would be sentenced to 18, 30 or 48 months in state prison. Defendant was admonished before his plea that victim restitution would be ordered if sought.

On November 19, 2001, the court sentenced defendant to serve 18 months in state prison on the attempted kidnapping charge (count 3), and 16 months in state prison on the stun gun assault charge (count 2), to be served concurrently. Defendant was also ordered to pay restitution to the victim in the amount of $3,543.45.

Defendant filed a notice of appeal to this court on November 15, 2001.

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[2] This appeal is based on grounds occurring after the entry of plea, and does not challenge the plea's validity. Therefore, there is no requirement that defendant obtain a certificate of probable cause. (Cal. Rules of Court, rule 31(d); *People v. Ward* (1967) 66 Cal.2d 571.)

All further rule references are to the California Rules of Court.

STATEMENT OF FACTS

Defendant's wife was having problems with a coworker (hereinafter victim) and her supervisor at work. On December 6, 2000, defendant went to his wife's place of business and waited in the parking lot for the arrival of the victim and supervisor. When the victim arrived, defendant used a taser gun to stun the victim in the stomach. The victim fell to ground at which point defendant stunned him a second time in the stomach. The victim pushed defendant away and ran approximately 30 feet when defendant attempted to stun him a third time in the neck. At this point, the victim wrestled the defendant to the ground and took away the taser gun. Defendant fled, leaving his van and glasses in the parking lot. Defendant was taken into custody shortly thereafter.

At the time he was arrested, defendant had in his possession latex gloves, a nylon cord, and a business card that contained the descriptions and license plate numbers of the vehicles of the victim and supervisor. Defendant's van contained another pair of latex gloves and the plastic packaging for the stun gun.

DISCUSSION

I. Victim Restitution[3]

Defendant contends that his due process rights were violated when the court ordered restitution to the victim without providing him prior notice of the amount requested. In light of the California Supreme Court decision in *People v. Gonzalez*, *supra*, 31 Cal.4th 745, we disagree.

Due process requires the defendant to have notice of the amount of restitution claimed and an opportunity to be heard. (*People v. Blankenship* (1989) 213 Cal.App.3d

[3] In light of the California Supreme Court case of *People v. Gonzalez* (2003) 31 Cal.4th 745, we granted respondent's petition for rehearing, filed August 29, 2003.

992, 996-997.) A recommendation in the probation report of the amount of restitution to be awarded to the victim provides the required notice to the defendant. (*Ibid*.)

When notice of the amount of restitution is not given, "a criminal defendant's silence at the time a direct victim restitution order is made will not act as a waiver of the defendant's right to challenge the validity of that restitution order for the first time on appeal if the sentencing court rejects the recommendations in the probation report regarding a restitution fine (payable pursuant to Gov. Code, § 13967, subd. (a) [now § 1202.4, subd. (a)(3)(A)]) and summarily orders direct payment of restitution to the victim(s) in a certain amount (payable pursuant to Gov. Code, § 13967, subd. (c) [now § 1202.4, subds. (f) - (j)]), all without setting a hearing thereon or, at the least, obtaining an express waiver of such a hearing from the defendant—precisely because such conduct by the sentencing court would violate a defendant's fundamental right to the due process of law (most particularly, to the 'fair notice' aspect of due process). This is consistent with the general principle of constitutional law that violations of fundamental constitutional rights will not be deemed waived by virtue of mere silence. ('Of course, there can be no waiver of a constitutional right absent "an intentional relinquishment or abandonment of a known right or privilege.") [Citation.]' [Citation.]" (*People v. Resendez* (1993) 12 Cal.App.4th 98, 113-114.)

Although the record of the trial court contains different representations regarding whether or not the victim was seeking restitution, adequate notice of the restitution amount sought by the victim was provided to defendant during the sentencing hearing. The probation report filed with the court on November 9, 2001, states that the victim "was seeking restitution." However, the supplemental probation report filed the same day states that the victim "is not asking for restitution at this time." A letter from the victim, which is attached to the supplemental probation report states, "Do not ask me what I want to do with [defendant] and his family. I trust in the United States justice system to take care of that. [¶] All I want—all I ever wanted—is to bring back a future

for my family. Please do what you can to make it like it was before." There is no specific reference in the letter that the victim is seeking restitution, or any amount of restitution. At the sentencing hearing, the court ordered a letter from the victim received into evidence and made part of the record.[4] The probation officer stated on the record at the outset of the sentencing hearing that the victim was requesting $3,543 in restitution. Finally, the original typewritten probation report contains a handwritten notation that reads, "[$3,543.45]-[victim]" next to the phrase "Restitution as determined by the Court."

The Attorney General contends the notice of the amount of restitution was sufficient in this case. Specifically, the reference in the original probation report that the victim "was seeking restitution," and the oral representations of the prosecutor and probation officer at the sentencing hearing as to the amount of restitution were sufficient notice to satisfy defendant's due process rights. In *In re S.S.* (1995) 37 Cal.App.4th 543, 547, the court stated, " ' "A defendant's due process rights are protected if he is given notice of the amount of restitution sought and an opportunity to contest the amount." ' "

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[4] At the sentencing hearing, the court made reference to a letter from the victim that requested a specific restitution amount of $3,543.00. The statements in the reporter's transcript for the sentencing hearing are as follows:

"THE COURT: For the record the court has from the victim a letter that the court's read and considered and it's received into evidence."

"[PROBATION OFFICER:] Judge, I do have a victim response letter to the probation department.

"THE COURT: I have it also right here. [¶] You have that one, another letter. Thank you. We'll make that part of the record and received.

"[PROBATION OFFICER:] With the amount of three thousand five hundred and forty-three dollars."

We requested further briefing from the parties on the issue of the victim's letter. There is no letter from the victim requesting restitution in the record on appeal. In addition, there is no entry in the clerk's minutes that any letter was received into evidence at the sentencing hearing.

The Attorney General asserts, as "long as [defendant] was given notice of the amount of restitution . . . his due process rights were satisfied." We agree.

In *People v. Gonzalez, supra*, our Supreme Court considered whether the trial court must provide a tentative ruling on its discretionary sentencing choices before the sentencing hearing in order to provide the parties with a "meaningful opportunity to object." (*People v. Gonzalez, supra,* 31 Cal.4th at p. 748.) Although the issue in *Gonzalez* is somewhat different than in the instant case, the court's ruling is instructive. Specifically, the *Gonzalez* court clarified the phrase "meaningful opportunity to object," as being notification *at any time* during the sentencing hearing of the court's intended sentence. (*Id.* at p. 752.) Such notice provides the parties a sufficient opportunity object to the sentence.

In the instant case, while there was contradictory information provided to appellant regarding whether or not the victim was seeking restitution, the court, the district attorney and the probation officer all made oral representations during the sentencing hearing that the victim was seeking restitution in a specific amount. Under *Gonzalez*, these representations gave appellant a "meaningful opportunity to object" to the amount of restitution. Therefore, appellant's due process rights were not violated by the ordering of restitution in this case.

II. Section 654

Defendant was sentenced to 18 months in state prison on count 2, and 16 months in state prison on count 3 to be served concurrently.[5] On appeal, defendant asserts that this is an unauthorized sentence, because it violates the prohibition against double punishment in section 654, which provides: "An act or omission that is punishable in

different ways by different provisions of law shall be punishable 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." (§ 654, subd. (a).)

Effect of the plea bargain

The Attorney General asserts that defendant is precluded by his plea bargain from challenging his sentence under section 654, because he agreed to a specified prison term and he did not raise the issue of double punishment at the time the plea was entered. Rule 4.412 (derived from former rule 412, which derived from former rule 440) provides: "(b) By agreeing to a specified prison term personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654's prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record." The waiver rule in 4.412 has been applied to preclude the challenge of the imposition of a concurrent term when the defendant agrees to a specified term of sentencing as part of the plea bargain. In *People v. Hester* (2000) 22 Cal.4th 290 (*Hester*), our Supreme Court applied this rule where a defendant agreed to a four-year sentence, and then, on appeal, sought to challenge imposition of additional terms concurrent to his four-year sentence. (*Id*. at pp. 294-295.) The Supreme Court deemed the defendant's objection to concurrent terms waived under rule 4.412 as a result of the plea agreement. "The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process." (*Id*. at p. 295.)

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[5] The probation report recommended that defendant be sentenced to 30 months for attempted kidnapping (count 3), and two years for assault with a stun gun (count 2), stayed pursuant to section 654, subdivision (a).

A similar decision was reached in *People v. Cole* (2001) 88 Cal.App.4th 850 (*Cole*), in which the court applied the 4.412 waiver rule to bar the defendant from challenging imposition of two concurrent terms of 25 years to life. (*Cole*, *supra*, 88 Cal.App.4th at p. 869.) The *Cole* court reasoned that because the defendant had agreed to a "specified prison term," namely "the maximum possible sentence of 25 years to life," as part of his plea bargain, he could not then challenge the imposition of concurrent terms on appeal. (*Id.* at p. 872.) The court's rationale behind this conclusion was that through the agreement to the plea bargain, the defendant avoided a possible sentence of 75 years to life. "He should not be heard to complain that concurrent sentences—a potential consequence which he understood and to which he did not object—were imposed." (*Id*. at p. 873.) *Hester* and *Cole* are clearly distinguishable from the present case, in that in the present case, defendant did not agree to a specified term. In neither *Hester* nor *Cole* did the plea bargain expressly contemplate a range of sentences as here, from a minimum of 18 months to a maximum of 48 months in prison. In *Hester*, the defendant agreed to a specified term of four years. Similarly, in *Cole*, the defendant agreed to a specified maximum sentence of 25 years to life with the possibility of a shorter sentence if the sentencing court decided to strike prior convictions. In both cases, the defendants agreed as part of their plea bargains to specific sentencing terms, rather than a sentencing range.

Moreover, in a recent case, our Supreme Court held that a plea agreement to a maximum term "contemplates that the court will choose from among a range of permissible sentences within the maximum, and that abuses of this discretionary sentencing authority will be reviewable on appeal." (*People v. Buttram* (2003) 30 Cal.4th 773, 790-791.) In its decision to allow the defendant to challenge the imposition of a particular sentence within the maximum agreed to after a no contest plea without a certificate of probable cause, the court in *Buttram* drew a clear distinction between a specified term and a sentencing range. (*Ibid.*)

Because defendant did not agree to a specified term as part of his plea bargain, his failure to raise the section 654 issue at the time he entered his plea or at his sentencing does not preclude his raising the issue on appeal under rule 4.412. We therefore reach the merits of the section 654 claim.

Double punishment for indivisible conduct

Defendant asserts that the trial court violated section 654 in imposing a concurrent sentence on count 2, because the acts committed in the stun gun assault (count 3) and the attempted kidnapping (count 2) are indivisible conduct, and may not be subject to double punishment. We agree.

Where an indivisible course of conduct involves multiple criminal violations, it is the criminal objective of each violation that determines whether section 654 applies to prevent the imposition of concurrent terms. (*People v. Beamon* (1973) 8 Cal.3d 625, 638.) If the criminal objective is the same throughout, only one violation may be punished. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19-20.) If all of the offenses were merely incidental to, or were means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. (*People v. Hicks* (1993) 6 Cal.4th 784, 788-789.)

Whether a defendant has acted pursuant to a single intent and objective is generally a factual question for the trial court. An appellate court will uphold a determination that is supported by substantial evidence. (*People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585; *People v. Saffle* (1992) 4 Cal.App.4th 434, 439-440.)

Because of the early plea in this case, the facts were not fully developed in the trial court. However, it appears from the totality of the record presented on appeal that the trial court did not have substantial evidence to support the imposition of a concurrent term. As an initial matter, the probation officer recommended in her report that the defendant be sentenced to two years on the stun gun assault, and that such sentence be stayed pursuant to section 654. At the sentencing hearing, the prosecutor indicated that

although he had a question about whether section 654 served to bar the imposition of a concurrent term, he agreed with the probation officer's report and recommendation. Moreover, defendant's act of committing the assault with the stun gun on the victim was a "means to achieve the objective" of the intended kidnapping. (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 191.) Indeed, the stun gun assault was not a "separate act of violence," from the kidnapping such that the imposition of multiple punishments was appropriate, because the assault was committed for the purpose of the successful commission of the kidnapping. (*Id*. at p. 193.)

Although there is case law suggesting that defendant's failure to reserve or attempt to reserve the question of whether the offenses constitute an indivisible transaction at the time he entered his plea is a *prima facie* admission that the crimes were separate and divisible for the purpose of section 654, such reasoning does not impact our conclusion in this case. (*People v. Ross* (1988) 201 Cal.App.3d 1232, 1237, fn. 2, citing *Seiterle v. Superior Court* (1962) 57 Cal.2d 397, 400-401.) Assuming defendant admitted, at least *prima facie* that the crimes to which he pleaded no contest were divisible for the purpose of section 654, a review of the trial court record refutes that admission. We conclude that the record does not contain substantial evidence supporting the conclusion that defendant's crimes were divisible. The trial court erred in imposing a concurrent term on count 2.

DISPOSITION

The judgment is modified to reflect that the sentence on count 2 is stayed pursuant to section 654. As so modified, the judgment is affirmed.

Wunderlich, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Mihara, J.