Filed 10/9/08

**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RAYMOND P. BRIONES,<br><br>Defendant and Appellant. | 2d Crim. No. B195452<br>(Super. Ct. No. 1182940)<br>(Santa Barbara County) |

Defendant is convicted of two counts of possession of drugs for sale, each count for a different drug. He is also convicted of two additional counts of conspiracy to possess those drugs for sale.

Here we conclude defendant may be convicted for only one act of conspiracy to possess drugs for sale. And because the conspiracy and drug convictions are based on the same set of operative facts, defendant may not be punished for both the substantive offenses and the conspiracy.

Raymond P. Briones was convicted of possessing heroin for sale (Health & Saf. Code, § 11351), conspiracy to possess heroin for sale (Pen. Code, § 182),**1**

---

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for partial publication. The portions of this opinion to be deleted from publication are identified as those portions between double brackets, e.g., [[/]].

**1**All statutory references are to the Penal Code unless stated otherwise.

possessing methamphetamine for sale (Health & Saf. Code, § 11378), and conspiracy to possess methamphetamine for sale (§ 182).

The trial court sentenced him to 50 years to life in prison under the Three Strikes Law. (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(e).) The sentence consists of 25 years to life for the heroin possession count, a concurrent 25 years to life for the methamphetamine possession count, a consecutive 25 years to life for conspiracy to possess methamphetamine, and a concurrent 25 years to life for conspiracy to possess heroin.

We conclude the trial court erred in sentencing Briones on two conspiracy counts instead of one. We also conclude the trial court erred in its belief that section 667, subdivision (c)(6), mandates consecutive sentences for the conspiracy and drug possession for sale that is the object of the conspiracy. Because section 667, subdivision (c)(6), does not apply, section 654 applies to the conspiracy and the object of the conspiracy. Thus the sentence for conspiracy is stayed, leaving concurrent 25-years-to-life sentences for the 2 drug possession counts. In all other respects we affirm.

## FACTS

In early March 2006, Briones was unemployed and staying in a room of the Broadway Motel in Santa Maria. The room was registered to his friend, Tanya Alvarez.

Briones told another friend, Donald Gothard, that he wanted to borrow $6,000 to buy drugs. Gothard agreed to loan him the money. Briones purchased the drugs and invited Gothard into his room to see them. Alvarez was also in the room. Gothard noticed some heroin and methamphetamine on a table.

A Santa Maria police officer knocked on the door and identified himself. He heard a commotion inside and kicked down the door. Briones ran into the bathroom and tried to leave through the window. During a search, police officers found approximately 100 grams of methamphetamine and 260 grams of heroin in the

room, including 1 bindle of methamphetamine and 5 bindles of heroin in Alvarez's clothing. Gothard later accepted a plea agreement that required him to testify truthfully at Briones's trial.

[[DISCUSSION

I

Briones contends the prosecutor committed misconduct by improperly vouching for Gothard's veracity.

This colloquy took place, without objection, on the prosecutor's direct examination of Gothard:

"Q. Did you make a deal with the prosecution?

"A. A deal with a prosecution? If you want to call it that.

"Q. What would you call it?

"A. An agreement to not have to do as much time as if I wasn't here right now, if that makes any sense.

"Q. So leniency in sentencing, does that sound right?

"A. Yes.

"Q. And what were you promised?

"A. If I were to tell the truth, tell what I - - promised that I would have a suspended sentence instead of prison. [¶] . . . [¶]

"Q. And you have to testify truthfully, though; is that correct?

"A. Correct.

"Q. If the judge finds that you are not truthful today, can he still send you to prison as part of the agreement?

"A. Yes, most certainly."

Alvarez's defense was consistent with Gothard's testimony. The following colloquy took place, without objection, on Alvarez's counsel's examination of Gothard:

"Q. You entered into an agreement with the district attorney's office to come here today and testify; correct?

"A. Correct.

"Q. Part of that understanding was that you were to tell the complete truth of what transpired, and that's everything?

"A. Yes, sir.

"Q. You weren't to conceal any of the information?

"A. correct.

"Q. And Judge Rigali, sitting there at the bench, was to weigh your credibility; correct?

"A. Correct.

"Q. So make sure that you were indeed following the requisite of telling the truth?

"A. Correct.

"Q. Up to this point, have you told the complete truth - - [?]

"A. Yes."

At a subsequent recess, the court expressed concern that the testimony about Gothard's plea agreement indicated to the jury that the court would be the finder of fact as to whether Gothard told the truth. When the trial resumed, the court admonished the jury as follows:

"The People are in the middle of the People's case in chief. We had testimony this morning from witness Don Gothard. I want to explain something to the jurors. Mr. Gothard, as part of his plea agreement, has negotiated certain things and one of those is that if, after these proceedings are over, as far as he's concerned, that the court can consider his testimony and decide whether or not he's entitled to the rest of the terms and conditions of his plea agreement. I think the lawyers asked questions in front of you indicating that the judge would decide whether he was telling the truth.

"Well, all of that is not going to be done in front of you; it's not to substitute for your deciding whether Mr. Gothard was telling the truth. So we're all familiar with how things can be unrelated and these are unrelated matters. You're not going to be told by me what I think of Mr. Gothard's testimony; that's for you to decide and you're not to speculate as to what conclusions, if any, I reached about his testimony. I do further admonish you to continue to keep an open mind until you hear all of the evidence from all of the witnesses, not only the prosecution's case in chief, but defense and rebuttal evidence; that's one of your jobs, is to keep an open mind. So don't be looking to me for anything other than the law and the other instructions I give you."

"It is improper for a prosecutor to offer assurances that a witness is credible or to suggest that evidence available to the government, but not before the jury, corroborates the testimony of a witness. [Citations.]" (*People v. Cook* (2006) 39 Cal.4th 566, 593.) Thus in *United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1146, the court held it was improper for the prosecutor to urge that the possibility of legal and professional repercussions ensure the credibility of a police officer's testimony. Similarly, here it was improper for the prosecutor to suggest that the trial court's determination of Gothard's credibility and the legal repercussions that may flow from the determination, ensure the truthfulness of Gothard's testimony.

Nevertheless, the misconduct is harmless by any standard of review. The trial court sua sponte instructed that the truth of Gothard's testimony is for the jury to decide and that it may not speculate on any conclusions the trial court might reach about Gothard's testimony. We presume the jury followed the trial court's instructions. (*People v. Bonin* (1988) 46 Cal.3d 659, 699, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Briones argues the trial court's admonition did not dispute the truth of the prosecution's improper suggestion. Instead, it implicitly acknowledged that the trial court would be deciding Gothard's credibility. Briones claims this case is like *People*

*v. Morse* (1964) 60 Cal.2d 631, where the court held it was error to instruct that a verdict of death would be reviewed by the trial court, which had the authority to reduce the sentence. The court held the instruction weakens the jury's own sense of responsibility. (*Id.* at p. 649.) But here the trial court did not instruct the jury that it would review the jury's determination of credibility and could overturn it. The prosecutor's questions revealed the court would determine Gothard's credibility for the purpose of deciding whether Gothard would go to prison. That is different from the jury's task: determining Gothard's credibility for the purpose of deciding Briones's guilt. The court admonished that the court's determination of credibility and the jury's determination of credibility are "unrelated matters," and that the jury may reach its own conclusion.

In any event, even assuming the trial court's admonition is insufficient, the misconduct is still harmless by any standard of review. Briones's codefendant elicited the same information on cross-examination of Gothard. Briones raises no issue on appeal as to the propriety of his codefendant's cross-examination.]]

II

Briones challenges his sentence.

First, he argues the trial court erred by sentencing him on two or more counts of conspiracy. The Attorney General concedes. Briones was found guilty of conspiracy to possess heroin for sale and conspiracy to possess methamphetamine for sale. But there was only a single conspiracy to possess both drugs. Therefore we strike one of the 25-years-to-life terms imposed for conspiracy. (See *People v. Liu* (1996) 46 Cal.App.4th 1119, 1133.)

Second, Briones argues that because the object of the conspiracy was to commit both of the charged drug offenses, it was error to sentence him on all counts. He claims he can be sentenced on either the conspiracy or one of the drug offenses, but not all three.

Briones claims the court mistakenly believed that section 667, subdivision (c)(6), requires a mandatory consecutive sentence because the conspiracy occurred on an earlier date than the substantive offense. Subdivision (c)(6) requires consecutive sentences for concurrent convictions for felonies "not committed on the same occasion, and not arising from the same set of operative facts . . . ."

The Attorney General argues the conspiracy did not arise on the same occasion and from the same set of operative facts as the drug offenses. The Attorney General relies on *People v. Durant* (1999) 68 Cal.App.4th 1393, 1405-1406. There, the court stated: "[W]here the elements of the original crime have been satisfied, any crime subsequently committed will not arise from the same set of operative facts underlying the completed crime; rather such crime is necessarily committed at a different time." (*Id.* at p. 1406.) The Attorney General points out that the crime of conspiracy requires only an agreement to commit a crime and an overt act in furtherance of the agreement. (§§ 182, subd. (a)(1), 184; *People v. Swain* (1996) 12 Cal.4th 593, 600.) Here the minimum facts necessary to prove the conspiracy to possess the drugs occurred when Gothard gave Briones the money to make the purchase. That was prior to the time Briones committed the drug possession offenses. Thus the Attorney General believes section 667, subdivision (c)(6), mandates consecutive sentences.

But in *People v. Lawrence* (2000) 24 Cal.4th 219, our Supreme Court cautioned that factors in addition to the minimum facts necessary to prove the charged offenses, may be relevant. There, the defendant stole a bottle of brandy from a store. During his flight through a neighborhood, a resident tried to stop him. He hit the resident with the brandy bottle. The trial court imposed consecutive sentences under section 667, subdivision (c)(6), for felony petty theft with a prior and felony assault.

Our Supreme Court held that the two felonies were sufficiently separated in time and space that they did not occur on the same occasion. (*People v. Lawrence*, *supra*, 24 Cal.4th at p. 229.) The court then considered the question whether the

felonies arose from the "same set of operative facts." The court defined "'operative'" as "'producing an appropriate or desired effect; exerting force or influence.' [Citation.]" (*Id.* at p. 231.) The court interpreted "not arising from the same set of operative facts" to mean "not sharing common acts or criminal conduct that serves to establish the elements of the current felony offenses . . . ." (*Id.* at p. 233.) The court cautioned that in making such determination, the sentencing court must consider "the extent to which common acts and elements of such offenses unfold together or overlap, and the extent to which the elements of one offense have been satisfied, rendering that offense completed in the eyes of the law before the commission of further criminal acts constituting additional and separately chargeable crimes . . . ." (*Ibid.*) The court concluded the theft and assault did not arise from the same set of operative facts.

Here the possession for sale of the drugs was an object of the conspiracy. Neither *Durant* nor *Lawrence* considered the meaning of "not arising from the same set of operative facts" within the context of a conspiracy and its objective.

Although the crime of conspiracy requires only an agreement and overt act, the conspiracy does not necessarily end on the commission of the first overt act. Instead, conspiracy is a continuing offense while the agreement continues. (See 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 226, pp. 593-594.) The crime that forms the objective of the conspiracy is the conspiracy's "desired effect," and the conspiracy and its objective share "common . . . criminal conduct." (See *People v. Lawrence, supra,* 24 Cal.4th at pp. 231, 233.) Thus here the conspiracy and possession of the drugs for sale arise from the same set of operative facts. Section 667, subdivision (c), does not require consecutive sentences.

Because section 667, subdivision (c)(6), does not require consecutive sentences, section 654 applies. (3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 323, p. 474.) Section 654 prohibits multiple punishment for both the conspiracy and the substantive offenses that were its object. (*People v. Ramirez*

(1987) 189 Cal.App.3d 603, 615.) Thus punishment on the conspiracy count must be stayed.

Finally, the trial court did not err in refusing to stay one of the drug counts pursuant to section 654. There were two types of drugs in large amounts. This supports the inference Briones intended multiple sales to different customers. Under the circumstances, section 654 does not prohibit punishment for each drug offense. (*People v. Blake* (1998) 68 Cal.App.4th 509.)

One of the 25-years-to-life terms for conspiracy is stricken. The other 25-years-to-life term for conspiracy is stayed. In all other respects, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

James F. Rigali, Judge

Superior Court County of Santa Barbara

---

Richard E. Holly, under appointment by the Court of Appeal, Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Ryan B. McCarroll, Deputy Attorney General, for Plaintiff and Respondent.