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CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. LARRY JEMEL NELMS, Defendant and Appellant.	C055100 (Super. Ct. No. 06F00631)

APPEAL from a judgment of the Superior Court of Sacramento County, James M. Mize, Judge. Post-conviction order dismissing count vacated; reversed in part and affirmed in part with directions.

Thomas Owen, 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, Senior Assistant Attorney General, Carlos A. Martinez, Supervising Deputy Attorney General, and Jamie A. Scheidegger, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of Parts II through VI of the Discussion.

Defendant was convicted by a jury of possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) and smuggling a controlled substance into a prison or jail (Pen. Code, § 4573; further undesignated section references are to the Penal Code). Following discharge of the jury, defendant admitted three prior prison terms for felony convictions (§ 667.5, subd. (b)) and was sentenced to an aggregate term in state prison of five years.

Defendant appeals, contending (1) his conviction for smuggling a controlled substance into a prison or jail is not supported by substantial evidence and violates his Fifth Amendment rights; (2) the jury was erroneously instructed on the offense of possessing a controlled substance in a prison or jail rather than smuggling a controlled substance into a prison or jail; (3) the trial court was required to stay the sentence on the simple possession charge; and (4) the abstract of judgment must be amended to reflect the correct award of presentence credits. The People concede the jury was not properly instructed on the smuggling charge but request that we reduce the conviction to the offense on which the jury was instructed.

While this matter was pending on appeal, the trial court granted defendant's motion to recall the sentence pursuant to section 1170, subdivision (d). Thereafter, defendant moved to dismiss his smuggling conviction altogether. The People did not oppose the motion, and it was granted by the trial court. The court then resentenced defendant on the remaining count and enhancements to four years four months in state prison.

This court received no notice of the foregoing. On December 11, 2007, we issued an opinion on defendant's appeal in which we reversed defendant's conviction on the smuggling charge because of instructional error. However, we further concluded the offense of possession of a controlled substance in a prison or jail (§ 4573.6) is a lesser included offense of smuggling a controlled substance into a prison or jail under the circumstances of this case. Therefore, we remanded to give the trial court an opportunity to exercise its discretion to amend the information to conform to proof and to enter a new conviction on the lesser offense. We also concluded defendant's other contentions on appeal either need not be resolved or are moot. We issued our remittitur on February 13, 2008.

On March 7, 2008, the trial court issued a minute order acknowledging the remittitur but stating, in light of its earlier dismissal of the smuggling count: "[I]t does not appear that any further resentencing action need be taken at this time. Indeed, it may be that the Third District Court of Appeal will wish to recall its remittitur on its own motion or the parties might wish to seek a recall of the remittitur, in light of the dismissal of Count 2 and the resentencing that took place while the appeal was pending."

As suggested by the trial court, we recalled our remittitur and vacated our prior opinion. However, we requested supplemental briefing on the issue of whether the trial court exceeded its jurisdiction in dismissing the smuggling conviction while the case was pending on appeal. Defendant submitted a

supplemental brief arguing the court did not exceed its jurisdiction. In addition, defendant filed a notice of abandonment of his appeal. The People submitted a responsive brief agreeing with defendant that the trial court did not exceed its jurisdiction. The People did not respond to defendant's notice of abandonment.

We conclude that, once the record has been filed in this court, an appellant may abandon the appeal, but it is for us to decide if the appeal shall be dismissed. Under the circumstances presented here, we decline to dismiss the appeal. As we shall explain, the trial court exceeded its jurisdiction in dismissing the smuggling count. Therefore, such dismissal is of no force or effect. We shall reissue our opinion in order to allow the trial court an opportunity to resolve defendant's smuggling conviction.

FACTS AND PROCEEDINGS

In light of the issues raised on appeal, the facts may be briefly stated. At approximately 1:53 a.m. on January 20, 2006, defendant was stopped by police while driving along Highway 99 in Sacramento. He was thereafter lawfully arrested and transported to the Sacramento County Jail. During processing at the jail, defendant took off his shoes and socks as part of a search by jail personnel. When defendant took off one of his socks, officers observed two small off-white rocks fall to the floor. The rocks weighed .44 grams and tested positive for cocaine.

DISCUSSION

I

Dismissal of the Appeal

In light of the trial court's dismissal of the smuggling charge, defendant has filed a notice of abandonment of his appeal. The People have filed no opposition.

California Rules of Court, rule 8.316, permits abandonment of an appeal. It reads in relevant part:

"(a) How to abandon

"An appellant may abandon the appeal at any time by filing an abandonment of the appeal signed by the appellant or the appellant's attorney of record.

"(b) Where to file; effect of filing

"(1) If the record has not been filed in the reviewing court, the appellant must file the abandonment in the superior court. The filing effects a dismissal of the appeal and restores the superior court's jurisdiction.

"(2) If the record has been filed in the reviewing court, the appellant must file the abandonment in that court. The reviewing court *may* dismiss the appeal and direct immediate issuance of the remittitur." (Italics added.)

Under the express language of this provision, where an appeal is abandoned before the record is filed in the reviewing court, a notice of abandonment effects a dismissal of the appeal without any trial court action. However, once the record has been filed in the reviewing court, dismissal of the appeal is

within the reviewing court's discretion. (See *People v. Wright* (1969) 275 Cal.App.2d 738, 739, fn. 1.)

Here, as we shall explain, the trial court exceeded its jurisdiction in dismissing the smuggling charge while the case was pending on appeal. Therefore, the dismissal was of no force and effect. Although defendant's abandonment of his appeal is an attempt to preserve the trial court's dismissal of the smuggling charge, the effect of dismissing the appeal would instead be to preserve the conviction. Furthermore, in order to alert the trial courts to the limits of their jurisdiction under section 1170, subdivision (d), we decline to dismiss this appeal.

II

Dismissal of the Smuggling Count

We next address the impact of the trial court's actions after defendant filed his notice of appeal.

As a general matter, "[t]he filing of a valid notice of appeal vests jurisdiction of the cause in the appellate court until determination of the appeal and issuance of the remittitur." (*People v. Perez* (1979) 23 Cal.3d 545, 554.) By the same token, the notice of appeal divests the trial court of subject matter jurisdiction. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1044; *People v. Murphy* (1969) 70 Cal.2d 109, 116.) "Because an appeal divests the trial court of subject matter jurisdiction, the court lacks jurisdiction to vacate the judgment or make any order affecting it. [Citations.] Thus,

action by the trial court while an appeal is pending is null and void. [Citations.] Indeed, '[s]o complete is this loss of jurisdiction effected by the appeal that even the consent of the parties has been held ineffective to reinvest the trial court with jurisdiction over the subject matter of the appeal and that an order based upon such consent would be a nullity.' [Citation.]" (*People v. Alanis* (2008) 158 Cal.App.4th 1467, 1472-1473.)

"The purpose of the rule depriving the trial court of jurisdiction pending appeal '"is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The rule prevents the trial court from rendering an appeal futile by altering the appealed judgment . . . by conducting other proceedings that may affect it." [Citation.]'" (*People v. Alanis, supra,* 158 Cal.App.4th at p. 1472.)

There are, however, exceptions to the general rule. The trial court retains jurisdiction to vacate a void, but not a voidable, judgment. (*People v. Malveaux* (1996) 50 Cal.App.4th 1425, 1434.) "A judgment is void rather than voidable only if the trial court lacked subject matter jurisdiction." (*Ibid.*) The trial court also retains jurisdiction to correct clerical errors in the judgment (*People v. Alanis*, *supra*, 158 Cal.App.4th at p. 1473) or to correct an unauthorized sentence (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1424). Finally, under section 1170, subdivision (d), the trial court retains jurisdiction to recall a sentence in a criminal matter and to

resentence the defendant notwithstanding the pendency of an appeal. (*Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1836.)

In the present matter, the trial court recalled the sentence under section 1170, subdivision (d). Both defendant and the People contend this recall afforded the trial court the authority to dismiss the smuggling count. However, as we shall explain, that recall was limited to *resentencing* and did not give the court authority to modify the judgment of conviction.

Section 1170, subdivision (d), reads: "When a defendant subject to this section . . . has been sentenced to be imprisoned in the state prison and has been committed to the custody of the secretary, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary of the Board of Parole Hearings, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced . . . ." By its express terms, section 1170, subdivision (d), is limited to *sentencing* and says nothing about modifying the judgment.

In the present matter, the trial court recalled defendant's sentence under section 1170, subdivision (d). However, rather than merely resentencing him, the court first dismissed one of the counts on which he was convicted, thereby altering the judgment itself. Then, based on this modified judgment, the court imposed a new sentence.

In *Dix v. Superior Court* (1991) 53 Cal.3d 442 (*Dix*), the California Supreme Court concluded section 1170, subdivision (d), "permits recall and resentencing for any otherwise lawful reason, not simply to correct a 'disparate' sentence." (*Id.* at p. 460.) Read broadly, this language would suggest a trial court retains jurisdiction to recall a sentence not only to change the sentence but "for any otherwise lawful reason." (*Ibid.*) However, a closer look at *Dix* reveals the Supreme Court intended something much more limited.

In *Dix*, the defendant, Bradley, was convicted on a charge of assault with a firearm and sentenced to seven years in state prison. Thereafter, Bradley agreed to testify in another matter in exchange for a modification of his sentence. At the prosecutor's request, the trial court recalled Bradley's sentence under section 1170, subdivision (d), and delayed resentencing pending the completion of Bradley's testimony in the other matter. However, in the meantime, the victim of Bradley's assault filed a petition for writ of prohibition and/or mandamus in the Court of Appeal seeking to prevent the court from resentencing Bradley. The appellate court issued a peremptory writ directing the trial court to vacate its recall of the sentence, concluding section 1170, subdivision (d), permits recall only to correct a sentencing disparity and not based on events occurring after sentencing. (*Dix*, *supra*, 53 Cal.3d at pp. 448-450.)

In *Dix*, the issue presented was whether section 1170, subdivision (d), permits recall and resentencing *only* for the

purpose of eliminating disparity and promoting uniformity in sentencing. (*Dix*, *supra*, 53 Cal.3d at p. 455.) It was in answer to this question that the high court reached the conclusion, quoted above, that a trial court may recall and resentence for *any* lawful reason, not simply to correct a disparate sentence. (*Id.* at p. 460.) In other words, the motivation for the court's recall of the sentence is not limited to correcting a disparate sentence but may include other lawful reasons, such as providing the defendant an incentive for testifying for the prosecution in another matter. However, once the sentence is recalled, for whatever lawful reason, the court's authority remains limited to "resentenc[ing] the defendant in the same manner as if he or she had not previously been sentenced." (§ 1170, subd. (d).) As the high court summarized: "[W]e see no reason to conclude that section 1170[, subdivision] (d), contrary to its terms, limits the reasons why a trial court may exercise its statutory authority to recall and resentence. We hold that section 1170[, subdivision] (d) permits the sentencing court to recall a sentence for any reason which could influence sentencing generally, even if the reason arose after the original commitment. The court may thereafter consider any such reason in deciding upon a new sentence. After affording the victim the right to attend sentencing proceedings and express his or her views (§ 1191.1), the court may then impose any new sentence that would be permissible under the Determinate Sentencing Act if the resentence were the original sentence." (*Dix*, at p. 463.)

In the present matter, the trial court had no jurisdiction to dismiss the smuggling count once defendant filed his notice of appeal, even if the parties agreed to such action. And because the resentencing was premised on dismissal of the smuggling count, it too is of no force and effect. Thus, the matter before us remains as it was when defendant filed his notice of appeal.

There is one final point we must address. In the following section, we conclude the smuggling count must be reversed because of instructional error. However, we remand to afford the trial court an opportunity to decide whether to amend the information to reduce the smuggling count to a lesser offense.

By agreeing to dismiss the smuggling count, the Sacramento County District Attorney has indicated her desire that this count be pursued no further. Therefore, it does not appear that either the district attorney or the trial court would have any interest in pursuing a lesser included offense.

However, once defendant filed his notice of appeal, representation of the People transferred from the district attorney to the Attorney General. The Attorney General has filed a brief in which he requests that we reduce the smuggling conviction to the lesser offense of possession of a controlled substance in a prison or jail. We have heard nothing further from the Attorney General in this regard. We therefore assume it is still the wish of the People that they be given an opportunity to seek conviction on the lesser offense.

III

Sufficiency of the Evidence

Defendant contends there is insufficient evidence to support his conviction for smuggling a controlled substance into a jail, inasmuch as he did not voluntarily enter the jail but was brought there against his will pursuant to an arrest. Defendant cites as support *People v. Gastello* (2007) 149 Cal.App.4th 943 (*Gastello*).

In *Gastello*, the Court of Appeal concluded a defendant who is in possession of a controlled substance and is arrested and taken to jail is not guilty of smuggling a controlled substance into a jail. The court indicated the offense requires an affirmative act by the defendant, and there was no such affirmative act under those circumstances. However, as the People point out, the Supreme Court granted review in *Gastello* on June 13, 2007, S153170, and it may no longer be cited as authority.

The People contend there is sufficient evidence to support the conviction. They point out that section 4573 prohibits "knowingly" bringing a controlled substance into a jail. According to the People, a reasonable jury could conclude defendant knew he was in possession of cocaine, was warned before arriving at the jail that it was an offense to bring weapons or drugs into the jail, yet chose not to divest himself of the cocaine. The People argue that when defendant entered the jail, he "chose to do so with cocaine on his person."

According to the People, "[defendant]'s actions of hiding the cocaine in his sock and not informing the officer that he had cocaine on him when specifically asked satisfied the actus reus for bringing cocaine into the jail."

The People further argue the statute requires that defendant "knowingly" bring drugs into the jail, and knowledge requires only that the defendant is aware of the facts that bring his conduct within the terms of the statute.

Defendant counters that his knowledge of the presence of the drugs is irrelevant, because he committed no affirmative act in bringing the drugs into the jail. Rather, all he did was to submit to the lawful authority of the police. Defendant further argues his conviction violates the Fifth Amendment to the United States Constitution, because the only way he could have avoided bringing the drugs into the jail was to have confessed to the officers before arriving at the jail that he had the drugs in his possession, i.e., that he violated the crime of possession of a controlled substance.

We need not resolve this issue. As we shall explain in the next section, because the jury was not properly instructed on the crime of smuggling a controlled substance into a prison or jail, defendant's conviction on that offense cannot stand.

IV

Instructional Error

Defendant was charged with knowingly bringing a controlled substance into a penal institution, as defined in section 4573.

However, the jury was instructed on the crime of possessing a controlled substance in a penal institution, as defined in section 4573.6. In particular, the court instructed: "The Defendant is charged in Count 2 with possessing cocaine base, a controlled substance, in a penal institution. To prove the Defendant is guilty of this crime the People must prove that, one, the Defendant possessed a controlled substance in a penal institution or on the grounds of a penal institution; the Defendant knew of the substance's presence; the Defendant knew of the substance's nature or character as a controlled substance; the controlled substance that the Defendant possessed was cocaine base; and, five, the controlled substance was a usable amount."

To compound the confusion, after defense counsel argued there was no evidence defendant intentionally brought the controlled substance into the jail, the prosecutor informed the jury defendant "is not charged with bringing drugs into a jail" but with possessing drugs in a jail. The verdict form labeled the offense as section 4573 but identified it as "possession of a controlled substance in a penal institution."

Defendant contends the jury was not instructed on a key element of the charged offense, i.e., that he *brought* the controlled substance into a penal institution. The People concede error, but argue the appropriate remedy is to reduce the offense to that on which the jury was instructed--possession of a controlled substance in a penal institution.

A trial court has a sua sponte duty to instruct on the general principles of law relevant to a particular dispute. This duty includes instruction on the elements of any charged offense. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) Failure to instruct on an element of a charged offense is federal constitutional error subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705]. However, because the People do not claim harmless error under the circumstances of this case, we assume the error was not harmless. Therefore, the question before us is what remedy to apply to the error.

When a greater offense must be reversed, but a lesser included offense could be affirmed, we normally give the prosecutor the option of retrying the defendant on the greater offense or accepting a reduction of the conviction to the lesser offense. (*People v. Kelly* (1992) 1 Cal.4th 495, 528.) The People have already chosen to pursue reduction of the section 4573 conviction to one for a violation of section 4573.6. However, before we can grant this remedy, we must decide if the latter offense is a lesser included offense of the former.

"To determine whether a lesser offense is necessarily included in the charged offense, one of two tests (called the 'elements' test and the 'accusatory pleading' test) must be met. The elements test is satisfied when '"all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense." [Citation.]' [Citations.] Stated differently, if a crime cannot be committed

without also necessarily committing a lesser offense, the latter is a lesser included offense within the former. [Citations.] [¶] Under the accusatory pleading test, a lesser offense is included within the greater charged offense ‘“if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed.” [Citation.]’” (*People v. Lopez* (1998) 19 Cal.4th 282, 288-289.) Satisfaction of either test will suffice in deciding whether a defendant may be convicted of an uncharged lesser offense. (*People v. Reed* (2006) 38 Cal.4th 1224, 1231.)

Section 4573 reads in relevant part: “Except when otherwise authorized . . . , any person, who knowingly brings or sends into, or knowingly assists in bringing into, or sending into, any state prison, . . . or into any . . . jail . . . , any controlled substance . . . , any device, contrivance, instrument or paraphernalia intended to be used for unlawfully injecting or consuming a controlled substance, is guilty of a felony . . . .”

Section 4573.6 in turn reads in relevant part: “Any person who knowingly has in his or her possession in any state prison, . . . or in any . . . jail . . . , any controlled substances . . . , any device, contrivance, instrument, or paraphernalia intended to be used for unlawfully injecting or consuming controlled substances, without being authorized . . . is guilty of a felony . . . .”

The elements of the latter offense are (1) possession of a controlled substance, (2) in a prison or jail, (3) knowledge of

its presence, (4) knowledge of its nature as a controlled substance, and (5) an amount sufficient for use. (See *People v. George* (1994) 30 Cal.App.4th 262, 277.) Although lack of authorization is mentioned in the statute, this is not considered an element of the offense. Rather, authorization is an affirmative defense. (*Id.* at p. 275.)

Because of the similarity in language between the two provisions, many of the elements are the same. However, while it may reasonably be inferred that one who brings a controlled substance into a jail has possession of it at the moment he crosses the threshold into the jail, section 4573 may also be committed by *sending* a controlled substance into a jail or *assisting* another in bringing or sending the substance into a jail. A controlled substance sent into a jail need not be possessed by the sender at any time after it passes the threshold into the jail. Hence, section 4573 can be committed without also committing section 4573.6, and the elements test is not satisfied.

Applying the accusatory pleading test, count two of the amended information alleged defendant violated section 4573 "in that said defendant did unlawfully and knowingly bring and send into and assist in bringing into and sending into Sacramento County Jail, a controlled substance and a device, contrivance, instrument, and paraphernalia intended to be used for injecting and consuming a controlled substance." This accusation mirrors the language of the statute, except the three ways in which the offense may be committed--bringing into, sending into, or

assisting in bringing or sending into--and the thing entering the prison or jail--a controlled substance, device, contrivance, instrument, or paraphernalia--are all stated in the conjunctive rather than the disjunctive. However, in such case, it has been determined that a conviction on the accusation is supported by proof of any one of the possibilities. (See *In re Bushman* (1970) 1 Cal.3d 767, 774-775, disapproved on another point in *People v. Lent* (1975) 15 Cal.3d 481, 486, fn. 1.)

Notwithstanding the expansive pleading of count two, the facts presented at trial support only one theory for conviction, i.e., that defendant *brought* a controlled substance into the Sacramento County Jail. There is no evidence that he sent or assisted another in sending or bringing a controlled substance into the jail. However, it is generally recognized that the determination of whether one offense is a lesser included offense of another must be based on the statutory definitions of the two offenses and the language of the accusatory pleading. The evidence actually presented at trial is not considered. (*People v. Cheaves* (2003) 113 Cal.App.4th 445, 454; *People v. Ortega* (1998) 19 Cal.4th 686, 698.)

As the state high court explained in *People v. Ortega*, *supra*, 19 Cal.4th 686: "There are several practical reasons for not considering the evidence adduced at trial in determining whether one offense is necessarily included within another. Limiting consideration to the elements of the offenses and the language of the accusatory pleading informs a defendant, prior to trial, of what included offenses he or she must be prepared

to defend against. If the foregoing determination were to be based upon the evidence adduced at trial, a defendant would not know for certain, until each party had rested its respective case, the full range of offenses of which the defendant might be convicted. Basing the determination of whether an offense is necessarily included within another offense solely upon the elements of the offenses and the language of the accusatory pleading promotes consistency in application of the rule precluding multiple convictions of necessarily included offenses, and eases the burden on both the trial courts and the reviewing courts in applying that rule. Basing this determination upon the evidence would require trial courts to consider whether the particular manner in which the charged offense allegedly was committed created a sua sponte duty to instruct that the defendant also may have committed some other offense. In order to determine whether the trial court proceeded correctly, a reviewing court, in turn, would be required to scour the record to determine which additional offenses are established by the evidence underlying the charged offenses, rather than to look simply to the elements of the offenses and the language of the accusatory pleading." (*Id.* at p. 698.)

The foregoing reasoning does not apply to the present matter, where the question presented is not whether the defendant may be convicted of both a greater and a lesser offense or whether the court was required to instruct on a lesser offense, but whether a defendant charged with one offense

may be convicted instead of a lesser offense. Under the later circumstance, the defendant is already on notice of the greater offense, so a conviction on the lesser offense alone would not increase the range of offenses on which he might be convicted. Nor does the present matter involve a duty to instruct sua sponte on lesser included offenses. The jury here was instructed on the lesser offense and the question is whether conviction on that offense is proper.

In *In re Marcus T.* (2001) 89 Cal.App.4th 468 (*Marcus T.*), the minor was found to have committed two crimes: threatening a public officer (§ 71) and making a terrorist threat (§ 422). The minor argued on appeal that he could not be found to have committed both offenses, because a terrorist threat is a lesser included offense of threatening a public officer. The Court of Appeal concluded just the opposite, that the charge of threatening a public officer was a lesser included offense of making a terrorist threat. (*Marcus T.*, at p. 470.) In reaching this conclusion, the court looked beyond the elements of the offenses and the accusatory pleading and considered the evidence presented at trial.

In *Marcus T.*, a uniformed school officer, saw the minor smoking on campus, put him in a wrist lock and walked him toward the dean’s office. However, the minor pulled away and, with clenched fists, threatened the officer. Fearing he was going to be punched, the officer grabbed the minor, tossed him to the ground and handcuffed him. (*Marcus T., supra,* 89 Cal.App.4th at pp. 470-471.)

The Court of Appeal concluded that making a terrorist threat is not a lesser included offense of threatening a public officer under either the elements or the accusatory pleading test, because the crime of threatening a public officer may be committed whether or not the target of the threat was put in fear of his safety, whereas the crime of making a terrorist threat requires that the victim reasonably sustained fear for his safety or for the safety of his family. (*Marcus T., supra,* 89 Cal.App.4th at pp. 471-472.) In other words, the purported greater offense, threatening a public officer, could be committed without committing the lesser offense.

However, the court went on to consider whether the opposite was true, i.e., whether threatening a public officer is a lesser included offense of making a terrorist threat. A terrorist threat can be made against any person, whereas threatening a public officer requires that the victim be a public officer. Thus, because a terrorist threat can be made against someone other than a public officer without committing the crime of threatening a public officer, the latter would not be a lesser included offense of the former. (See *Marcus T., supra,* 89 Cal.App.4th at p. 471.)

Nevertheless, the accusatory pleading alleged the same victim of both offenses, a public officer. (*Marcus T., supra,* 89 Cal.App.4th at pp. 472-473.) In addition, the intent and victim reaction elements of the terrorist threat charge encompassed the corresponding elements of the threatening a

public officer charge. (*Id.* at p. 473.) That left only the threat itself.

The threat alleged on the terrorist threat charge was "the 'unequivocal, unconditional, immediate and specific' threat 'to commit a crime which would result in death and great bodily injury to [the victim]'" (*Marcus T., supra,* 89 Cal.App.4th at p. 473), whereas the threat alleged on the threatening a public officer charge was "'to inflict an unlawful injury upon the person *and property*'" of the victim (*id.* at p. 473). The court noted that, but for the allegation of injury to *property* in the threatening a public officer charge, the alleged threat of injury under the terrorist threat charge encompassed the threat of injury in the threatening a public officer charge and, hence, the latter would be a lesser included offense of the former. (*Id.* at pp. 473-474.)

In concluding the threat to a public officer charge was a lesser included offense of the terrorist threat charge, the court in *Marcus T.* went beyond the accusatory pleading and looked at the evidence presented at trial. The court explained: "The People made no attempt to prove that appellant threatened to injure the victim's property. But California's technical approach to lesser included crimes analysis does not include consideration of the evidence, as some states do. [Citation.] Thus, the question is whether appellant should be found to have committed two felonies, rather than one, simply because the People alleged, but did not prove, that he threatened to injure the victim's property. . . ." (*Marcus T., supra,* 89 Cal.App.4th

at p. 474.) In light of the state law prohibition against going beyond the terms of the accusatory pleading, the court concluded the appropriate remedy was to remand the case to the trial court to permit that court to exercise its discretion to amend the accusatory pleading to conform to proof and then strike the finding that the minor committed the lesser offense of threatening a public officer. (*Id.* at p. 475.)

We adopt this same approach here. On the section 4573 charge, the accusatory pleading alleged defendant did knowingly "bring and send into and assist in bringing into and sending into" the jail a controlled substance. As so alleged, this offense could be committed without also committing the offense of possession of a controlled substance in a jail (§ 4573.6). However, there was no evidence that defendant sent the controlled substance into the jail or assisted another in sending or bringing it in. Thus, but for the fact the People alleged but did not prove defendant sent or assisted another in bringing the controlled substance into the jail, a charge based on section 4573.6 would be a lesser included offense of section 4573.

The jury here was instructed on section 4573.6 and convicted defendant of that charge, notwithstanding the fact defendant was charged with a violation of section 4573 and the jury verdict erroneously labeled the offense as section 4573. As presented to the jury here, section 4573.6 is a lesser included offense of section 4573. Thus, while defendant's

conviction on section 4573 cannot stand, a conviction on the lesser included offense of section 4573.6 is permitted.

Under these circumstances, we conclude it is proper to remand to allow the trial court to exercise its discretion to amend the information to conform to proof and, thereafter, to reduce the section 4573 conviction to the lesser included offense of section 4573.6.

V

Section 654

Defendant contends that if we do not reverse his conviction on count two, his sentence on count one must be stayed pursuant to section 654. Because we conclude in the preceding section that defendant's conviction on count two should be reduced, we shall address defendant's section 654 argument on the revised convictions, in the event the trial court proceeds with the reduction.

Section 654, subdivision (a) reads in pertinent part: "An 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. . . ." Although section 654 speaks in terms of "an act or omission," it has been judicially interpreted to include situations in which several offenses are committed during a course of conduct deemed indivisible in time. (*People v. Beamon* (1973) 8 Cal.3d 625,

639.) The key inquiry is whether the objective and intent attending more than one crime committed during a continuous course of conduct was the same. (*People v. Brown* (1991) 234 Cal.App.3d 918, 933.) "[I]f all of the offenses were merely incident to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

The question whether a defendant entertained multiple criminal objectives is one of fact for the trial court. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.) "A trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence." (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

In *People v. Solo* (1970) 8 Cal.App.3d 201 (*Solo*), disapproved on other grounds in *People v. Rogers* (1971) 5 Cal.3d 129, 134, footnote 4, the defendant was observed throwing a laundry bag full of marijuana out of his vehicle. He was convicted and sentenced for both possession of marijuana for sale (Health & Saf. Code, § 11530.5) and transporting marijuana

(Health & Saf. Code, § 11531). (*Solo*, *supra*, 8 Cal.App.3d at p. 204.) On appeal, the court concluded imposition of sentence on both offenses violated section 654, because there was no evidence the defendant's possession of the marijuana preceded or extended beyond the transportation of it. (*Id.* at p. 208.) According to the court: "Solo's conduct violated two penal statutes, but his possession and transportation of marijuana was an indivisible course of conduct with a single objective." (*Ibid.*)

The People contend there is sufficient evidence from which the trial court could conclude defendant harbored multiple objectives. In particular, the People argue defendant had the objective before he was arrested of possessing the drugs. After his arrest, defendant's failure to inform the officers of the presence of the drugs in his sock revealed a second objective of smuggling the drugs into the jail. However, inasmuch as we conclude the smuggling conviction should be reduced to one for possession of a controlled substance in a jail, the smuggling objective is irrelevant. Nevertheless, by a parity of reasoning, it may be argued the defendant's failure to inform the officers of the presence of the drugs after his arrest reveals a separate intent to possess the drugs in the jail.

The problem with the People's contention is that it directly contradicts the prosecutor's argument to the jury. In his opening argument, the prosecutor asserted the same conduct established the elements of both offenses except for the additional requirement under section 4573.6 that the possession

was in a jail. In other words, it was the possession of the drugs in the jail that satisfied both convictions. Although it may reasonably be inferred defendant possessed the drugs before he was arrested, the prosecutor told the jury it did not need to know when defendant put the drugs in his sock. All it needed to find was that defendant possessed the drugs in the jail.

At any rate, the case presented to the jury involved a continuous and indivisible possession of a controlled substance. Because that possession supported defendant's conviction on two separate offenses, he may be punished only for the one providing the greater potential punishment. (See *People v. Kramer* (2002) 29 Cal.4th 720, 723-724.) In this case, that would be the offense of possession of a controlled substance in a jail, carrying a potential sentence of four years. (§ 4573.6.)

VI

Abstract of Judgment

At sentencing, the trial court calculated defendant's presentence custody and arrived at a figure of 400 days. The prosecutor indicated defendant would be entitled to an additional 200 days of conduct credits, for a total of 600 days. However, the abstract of judgment lists actual credits of 400, but conduct credits of 600 and total credits of 200. Defendant contends the abstract must be corrected.

Inasmuch as this matter must be remanded for resentencing, with a new calculation of credits, the problem with the abstract has become moot.

DISPOSITION

The trial court's post-conviction order dismissing count two is vacated for lack of subject matter jurisdiction.

The conviction on count two for smuggling a controlled substance into a prison or jail (Pen. Code, § 4573) is reversed. The conviction on count one for possession of a controlled substance (Health & Saf. Code, § 11350) is affirmed. The matter is remanded to the trial court with directions to determine whether to exercise its discretion to amend the information to conform to proof and, thereafter, to enter a new conviction on the lesser included offense of possession of a controlled substance in a prison or jail (Pen. Code, § 4573.6). If the court chooses to amend the information and enter the new conviction, the sentence imposed on count one must be stayed, with the stay to become permanent upon completion of the term imposed on the revised count two. If the court chooses not to amend the information and enter a new conviction, defendant must be resentenced on count one alone. In either event, presentence credits must be recalculated. The trial court shall prepare a new abstract of judgment reflecting the changes made and forward a copy to the Department of Corrections and Rehabilitation.

HULL, J.

We concur:

BLEASE, Acting P.J.

DAVIS, J.