

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN MEDINA,

Defendant and Appellant.

B171348

(Los Angeles County
Super. Ct. No. BA243462)

ORDER MODIFYING OPINION
AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT:*

It is ordered that the unpublished portion of the opinion filed herein on July 26, 2005, and ordered partially published on August 25, 2005, be modified as follows:

On page 14, delete the first full paragraph, and add the following paragraphs in its place:

We agree with the parties that this matter must be remanded for the trial court to determine whether to impose concurrently the upper, middle or low term on appellant's conviction of count 2. We disagree with respondent that the trial court

* BOREN, P.J., ASHMANN-GERST, J., NOTT, J.†

† Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

has the option of resentencing appellant to the concurrent, 25-year-to-life term on that count.

When the trial court struck appellant's prior convictions with respect to count 2, apparently believing it was required to do so in order to be able to sentence appellant concurrently on that count and avoid the mandatory consecutive sentencing required by section 667, subdivision (c)(6), respondent failed to comment on the trial court's action or to register any objection to it. By standing silently by, respondent failed to preserve this claim for appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354 ["In essence, claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner"].)

There is no change in the judgment.

Appellant's petition for rehearing is denied.