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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. ALLEN D. QUEEN, Defendant and Appellant.	C046852 (Super. Ct. Nos. SF088848A/SF088977A)

APPEAL from a judgment of the Superior Court of San Joaquin County, Thomas M. Harrington, Judge. Affirmed.

Christine Vento, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Carlos A. Martinez and Jeanne Wolfe, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant Allen D. Queen was found guilty of attempted murder of a public official (Pen. Code,

* Pursuant to California Rules of Court, rules 976(b) and 976.1, only the introduction, the Factual and Procedural Background, part II.A. of the Discussion and the Disposition are certified for publication.

§ 217.1, subd. (b)--count one)[1] with an enhancement for personal use of a deadly weapon (§ 12022, subd. (b)(1)), two counts of possession of a deadly weapon while in custody (§ 4502, subd. (a)--counts two and six), manufacture or possession of a concealable deadly weapon (§ 12020, subd. (a)(1)--count three), two counts of assault with a deadly weapon on a custodial officer (§ 245.3--counts four and five) and damaging jail property (§ 4600, subd. (a)--count seven). In a bifurcated proceeding, the jury made a special finding that defendant had been convicted of five prior serious felonies.[2] (§§ 667, subds. (a)(1) & (b)-(i), 1170.12, subds. (a)-(d)). Probation was denied and defendant was sentenced to an indeterminate state prison term of 181 years to life, consisting of a term of 45 years to life on count one (15 years to life tripled pursuant to § 667, subd. (e)(2)(A)(i)), consecutive terms of 25 years to life on counts two, four, five, six and seven (§ 667, subd. (e)(2)(A)(ii)), a consecutive term of 10 years for prior serious felony convictions and a one-year consecutive term for personal use of a weapon. The court stayed a sentence of 25 years to life on count three pursuant to section 654 and ordered defendant's sentence to be served consecutively to his sentence in a case previously affirmed by this court. (*People v. Queen*

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[1] Undesignated statutory references are to the Penal Code.

[2] Allegations that defendant had served four prior prison terms (§ 667.5, subd. (b)) were stricken by the court by stipulation.

(Jan. 26, 2006, C045498) [nonpub. opn.].) His total aggregate term is 259 years to life.

Defendant again appeals, contending he was erroneously convicted of both possession of a weapon (count three) and possession of a weapon while in custody (count two). He also asserts the trial court made several sentencing errors. Finding no error, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2003, defendant was in custody and on trial for felony charges of making criminal threats (§ 422). When all but one of the jury's verdicts were read, defendant attacked the prosecutor, Kenneth Puckett, in the courtroom with a shank, which he had constructed out of a plastic coat hanger. Defendant punched and stabbed Puckett in the chest, neck and head before he was subdued.

In a letter to a reporter, defendant admitted he carried the shank in order to kill Puckett. During an interview with a police officer regarding the incident, defendant said to tell Puckett, "Maybe next time." At his trial on the matter, defendant testified he started making the shank more than a week before the attack and that he had brought it to court every day. Defendant said he made the weapon with the intent to stab one of the investigators who had worked on the case, but she was not present when the verdicts were read.

Several weeks later, defendant again was found to be in possession of a shank, this one constructed of steel, which he held while resisting the efforts of six officers to remove him from his jail cell. Two officers were cut during the incident, and defendant admitted he tried to cut every one of the officers.

Defendant was taken to a medical unit where he was placed in five-point restraints in an observation cell. Defendant escaped from the restraints and shattered a window with one of the leather belts.

DISCUSSION*

I. Convictions for Sections 4502 and 12020

Defendant contends his convictions for possession of a concealable, deadly weapon (§ 12020, subd. (a)(1)) and for manufacture or possession of the same weapon while in custody (§ 4502, subd. (a)) were improper because such conduct "can constitute only one criminal offense." He is mistaken.

"An accusatory pleading may charge . . . different statements of the same offense . . . under separate counts . . . . The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading . . . ." (§ 954.) An exception to this rule applies when one charge is a necessarily included offense of another, i.e., if all of the elements of the lesser offense are included

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* See footnote, *ante*, page 1.

in the greater offense. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.)

Here, defendant's convictions of possession of a deadly weapon and possession of a weapon while in custody constituted different statements of one set of facts and were authorized under section 954. As section 12020 contains an element that is missing from section 4502 (the weapon must be concealable) and as section 4502 contains an element not required for section 12020 (the perpetrator must be in custody), neither offense is a lesser included offense of the other.

The trial court stayed sentence on the section 12020 conviction (count three) pursuant to section 654. However, defendant's conviction of both offenses was proper.

II. Validity of Strikes*

A. 2003 Priors

Guilty verdicts had been rendered but defendant had not been sentenced on his three convictions for criminal threats when he assaulted Puckett in June 2003. Defendant claims his three prior convictions for criminal threats cannot be considered strikes because it had not been determined whether the offenses would be treated as felonies or misdemeanors when defendant committed the new offense. Defendant is incorrect in his assertion that these prior convictions cannot be treated as strikes.

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* See footnote, *ante*, page 1.

Section 667, subdivision (d)(1) provides in relevant part that "[t]he determination of whether a prior conviction is a prior felony conviction for purposes of [the three strikes law] shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor."

Thus, a conviction occurs on the date that guilt is adjudicated for purposes of determining whether a prior constitutes a strike. However, if the offense is made a misdemeanor at the initial sentencing, this determination is retroactive to the date guilt was decided, rendering the conviction a nonstrike. (See *People v. Laino* (2004) 32 Cal.4th 878, 896; *People v. Franklin* (1997) 57 Cal.App.4th 68, 72-73; cf. *Doble v. Superior Court* (1925) 197 Cal. 556, 576-577 [wobbler "stands as a felony for every purpose up to judgment" and misdemeanor judgment is not retroactive for purposes of the statute of limitations].)

In the present matter, defendant was found guilty by a jury of three violations of section 422 (criminal threats), which may be punished as a felony or misdemeanor. (See § 17, subds. (a) & (b).) These offenses were prosecuted as felonies and, when the jury rendered guilty verdicts, they constituted strike convictions subject only to their reduction to misdemeanors at sentencing. At sentencing, defendant was ordered to serve a state prison term, leaving the convictions unchanged regarding

their status as strikes. In other words, the condition that could have transformed these convictions into nonstrike priors did not occur, and they remained strikes.

Defendant relies on dicta in *People v. Williams* (1996) 49 Cal.App.4th 1632 (*Williams*) to argue a contrary conclusion. In *Williams*, which involved a prior plea to burglary (an offense that can only be charged as a felony), the Sixth Appellate District held that, for purposes of the three strikes law, a defendant has a prior conviction "when guilt is established, either by plea or verdict." (*Id*. at p. 1638.) In dicta, however, *Williams* noted an exception to this rule when the prior offense is a "wobbler" (an offense that can be charged as a felony or a misdemeanor): "We point out that when a prior offense is a 'wobbler,' a plea or verdict does not establish whether it is a felony; rather the sentence does. Thus, when the prior offense is a 'wobbler,' the phrase 'prior convictions' must include the pronouncement of sentence because only then can it be determined whether three strikes applies." (*Id.* at p. 1639, fn. omitted.)

We disagree with this dicta, as it runs counter to the statutory language and legislative intent of the three strikes law. Section 667, subdivision (d)(1) describes a narrow exception to strike treatment for prior convictions that do not result in felony handling at sentencing. As defendant's circumstances did not place him within the exception enunciated

in this subdivision, his prior convictions for criminal threats remained strikes.

Furthermore, as noted in *Williams*, the focus of the three strikes law is on deterring and punishing recidivist conduct. (*Williams*, *supra*, 49 Cal.App.4th at p. 1638.) "When the deterrent effect of the law fails and the defendant subsequently commits another felony, he or she becomes a repeat offender and deserves harsher punishment, regardless of whether judgment and sentence have been pronounced on the initial offense." (*Ibid*.)

Here, defendant committed a new offense within moments of when his guilt was determined on his prior crimes. We do not believe the three strikes statute was intended to reward defendants for over-eagerness in committing new offenses. To the contrary, both the letter and spirit of the three strikes law is maintained when a defendant who commits a new offense after his guilt has been determined on prior conduct is punished accordingly.

We conclude that defendant's prior convictions for criminal threats were properly treated as strikes in the present matter. We disagree with language in *Williams*, *supra*, 49 Cal.App.4th 1632, to the contrary. ***(END OF PUBLISHED PART II.A.)***

B. 1996 Priors

Defendant contends the trial court was required to dismiss one of his two 1996 prior strike convictions. Defendant raised an almost identical issue in the previous appeal from his 2003

convictions for criminal threats (C045498). We again reject this claim.

In 1996, defendant pleaded guilty and was convicted of first degree burglary (§ 459) and assault with a firearm (§ 245, subd. (a)(2)) based on an incident that occurred in March of that year. The abstract of judgment from the prior convictions reflects that defendant's sentence for the burglary conviction was stayed pursuant to section 654.

At sentencing on the current offenses, defendant asked the trial court to exercise its discretion to dismiss his strike convictions, although not on the basis now urged. The trial court declined to dismiss any of defendant's prior strikes. The prosecutor asked the trial court to make a finding as to whether it would treat defendant any differently if it were later determined that the 2003 priors did not constitute valid strikes. In response, the trial court noted that the Sacramento convictions from 1996 constituted two strikes "separate and distinct from the three [section] 422 priors in San Joaquin County" in 2003.

Defendant relies on *People v. Benson* (1998) 18 Cal.4th 24 (*Benson*) and *People v. Burgos* (2004) 117 Cal.App.4th 1209 (*Burgos*) to support his position that the trial court was required to dismiss one of the 1996 strikes. In *Benson*, the California Supreme Court held that, even when sentence has been stayed on an offense under section 654, the offense may be treated as a prior strike conviction. (*Benson*, *supra*, at

p. 36.) The court reasoned: "In our view, the electorate and the Legislature rationally could--and did--conclude that a person who committed additional violence in the course of a prior serious felony (e.g., shooting or pistol-whipping a victim during a robbery, or assaulting a victim during a burglary) should be treated more harshly than an individual who committed the same initial felony, but whose criminal conduct did not include such additional violence." (*Id*. at p. 35.)

Similar to defendant's prior convictions in the matter before us, the defendant's priors in *Benson* were for residential burglary and assault with intent to commit murder. (*Benson, supra,* 18 Cal.4th at p. 26.) The court noted in a footnote that it was not deciding "whether there are some circumstances in which two prior felony convictions are so closely connected--*for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct*--that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors." (*Id*. at p. 36, fn. 8, italics added.) Subsequently, in *Burgos*, *supra*, 117 Cal.App.4th at pages 1215-1217, the Court of Appeal, Second Appellate District, Division Two, relied on footnote 8 in *Benson* in holding it was an abuse of discretion for the trial court to refuse to dismiss one of the defendant's two prior strike convictions--for attempted carjacking and attempted robbery--when they were based on the same single act.

Defendant contends he was entitled to have one of his strikes dismissed because both priors arose from a single act. However, there is nothing in the record to suggest that the two offenses stem from a single act. To the contrary, defendant's 1996 convictions were for first degree burglary--which entails entering a residence with the intent to commit theft or a felony--and for assault with a firearm. The very nature of these charges supports the conclusion that they pertained to separate acts because "burglary is completed when entry is made with the requisite intent" regardless of whether the act intended upon entry is accomplished. (*People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1769.) Thus, even if defendant harbored the intent to commit an assault with a firearm while entering the residence, the "act" of committing the burglary was complete once entry was made. Any offense committed after such entry was a separate "act."

Defendant also suggests the trial court abused its discretion "when it ruled without knowing the facts behind [his] two [1996] prior convictions." However, it is defendant's burden to show that the trial court abused its discretion by failing to strike one of his prior convictions. (*People v. Carmony* (2004) 33 Cal.4th 367, 374, 376-377.) Defendant does not point to anything in the record to indicate that the same act was the basis for both offenses. Consequently, we conclude the trial court did not abuse its discretion by declining to dismiss one of defendant's 1996 prior strikes.

Furthermore, "even if the prior was invalid for purposes of the three strikes law, defendant's sentence remains the same since he has [at least] two other strikes which require his sentence to be 25 years to life." (*People v. Alvarez* (1996) 49 Cal.App.4th 679, 692.)

Accordingly, we reject defendant's claim.

III. Consecutive Sentencing

A. Application of Section 654

Defendant claims the trial court was required to stay his sentence on counts two, six and seven pursuant to section 654 because these offenses were each part of "'a course of conduct undertaken with a single intent and objective.'" (Quoting *People v. Stewart* (1986) 185 Cal.App.3d 197, 203, fn. 2.) We do not agree.

Section 654, subdivision (a) provides in 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." Section 654 also proscribes multiple punishment for offenses arising out of "a course of conduct which violate[s] more than one statute but nevertheless constitute[s] an indivisible transaction." (*People v. Perez* (1979) 23 Cal.3d 545, 551 (*Perez*); *People v. Britt* (2004) 32 Cal.4th 944, 951-952 (*Britt*); see *Neal v. State of California* (1960) 55 Cal.2d 11, 19 (*Neal*).)

"'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'" (*Britt*, *supra*, 32 Cal.4th at pp. 951-952.) However, "a defendant may be punished for separate crimes, if he is deemed to have entertained multiple criminal objectives which were independent of and not merely incident to each other." (*People v. Coleman* (1973) 32 Cal.App.3d 853, 858 (*Coleman*).) That the offenses "share common acts or were simultaneously committed is not determinative." (*Ibid*.)

Numerous cases have addressed the application of section 654 where a defendant is convicted of both possessing a weapon and using it to carry out an additional crime. In this context, "the modern rule [is] that a defendant may not be punished both for possession of a weapon and for another offense in which the weapon is used, where the evidence does not show possession for any other purpose." (*People v. Jurado* (1972) 25 Cal.App.3d 1027, 1033.) Cases uniformly have held that where the evidence fails to establish the defendant possessed the weapon before the offense with an independent intent, section 654 prohibits multiple punishment for possession of the weapon and for the offense it is used to carry out. (See, e.g., *People v. Bradford* (1976) 17 Cal.3d 8, 13 [the defendant obtained officer's gun during traffic stop and shot at him]; *People v. Hays* (1983)

147 Cal.App.3d 534, 552-553 [no evidence of possession of weapon prior to offense]; *Jurado*, *supra*, 25 Cal.App.3d at p. 1033 [no evidence the defendant possessed gun before or after burglary]; *People v. Venegas* (1970) 10 Cal.App.3d 814, 821 [evidence at trial indicated that the defendant obtained gun during struggle at bar immediately before shooting]; cf. *People v. Jones* (2002) 103 Cal.App.4th 1139, 1149, fn. 4 [distinguishing violations for felon in possession from other weapons offenses].) On the other hand, when the evidence supports a determination that the weapon was possessed prior to the offense during which it was used and with an independent intent, multiple punishment is not barred. (See, e.g., *People v. Flores* (2005) 129 Cal.App.4th 174, 186-187 [the defendant armed himself before making the determination to use the weapon]; *Coleman*, *supra*, 32 Cal.App.3d at pp. 858-859 [incarcerated defendant possessed weapon for protection against other inmates but used it against correctional staff].)

We conclude that defendant's offenses fall into this latter category. With regard to the courtroom stabbing incident, defendant admitted that he made the shank with the intent to stab an investigator for the district attorney's office who had worked on the criminal threats case. Defendant had the weapon in his possession for over a week before using it to stab Puckett. Thus, the evidence established both that defendant possessed the weapon for a substantial period of time prior to the offense in which he used it and that he had an independent intent--to stab the investigator--during this period of time.

The same is true for the stabbings that occurred during the attempt to remove defendant from his jail cell. Defendant testified he knew there would be retribution against him for the courtroom stabbing incident. According to defendant, he had two weapons in his cell, which he kept in order to protect himself from "the cops." The Second Appellate District, Division Five, addressed similar circumstances in *Coleman*, *supra*, 32 Cal.App.3d 853, involving convictions for possession of a deadly weapon while in custody (§ 4502) and assault with a deadly weapon by a state prisoner (§ 4501). In that case, the defendant, a state prison inmate, stabbed at a correctional officer with half of a sharpened pair of scissors during a scuffle. It appeared the defendant's initial intent in possessing the weapon was to use it to assault or defend against another inmate. The appellate court noted that, even if the defendant might have also anticipated using the weapon on a prison guard, he committed two isolated criminal acts by first possessing the weapon as a prisoner and then using it to assault a correctional officer. (*Coleman*, at p. 859.) The court held that punishment for both offenses was proper. (*Ibid*.) We reach the same conclusion here.

Moreover, we deem defendant's intent to protect himself from "the cops" to be "too broad and amorphous to determine the applicability of section 654." (*Perez*, *supra*, 23 Cal.3d at p. 552 [multiple punishment not prohibited for multiple sex offenses committed with shared objective of sexual

gratification]; see *People v. Gangemi* (1993) 13 Cal.App.4th 1790, 1800-1801 [filing of forged instruments separately punishable despite single intent to protect property from creditors]; *People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585 [intent to "'hav[e] sole custody of his children'" too broad to preclude multiple punishment for the defendant charged with three counts of absconding with his children].) If such broad pronouncements of intent were sufficient to invoke the protection of section 654, a defendant possessing a weapon could declare simply that his intent was to hurt someone and thereby avoid multiple punishment for any future assaults. A statutory construction of this sort would circumvent "[t]he purpose of the protection against multiple punishment[, which] is to insure that the defendant's punishment will be commensurate with his criminal liability." (*Neal*, *supra*, 55 Cal.2d at p. 20; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 268.)

Nor do we agree that defendant's conviction for damaging jail property falls within the proscription in section 654 against multiple punishment. When offenses are "committed at different locations [and] separated by time, . . . [they are] not subject to section 654." (*People v. Akins* (1997) 56 Cal.App.4th 331, 340.) Such was the case here. The incident in which defendant shattered a window at the jail occurred in a different location and more than two hours after correctional officers began the process of removing defendant from his jail

cell. Consequently, section 654 did not preclude multiple punishment for this offense.

B. Trial Court's Exercise of Discretion

Defendant maintains the trial court abused its discretion by imposing consecutive three strikes sentences on counts one, two, four, five and six. This argument is without merit.

At sentencing, defendant asked the trial court to impose concurrent sentences on counts two (possession of a deadly weapon while in custody) and three (possession of a concealable, deadly weapon) because the underlying offenses occurred during the same course of conduct as count one (attempted murder of a public official). Defendant made the same request as to counts four (assault with a deadly weapon on a custodial officer), five (same charge) and six (possession of a deadly weapon while in custody), arguing that these counts occurred during a separate single course of conduct. The prosecutor agreed that the court had discretion to impose concurrent sentences but urged the court to sentence defendant consecutively based on his escalating violent conduct.

The trial court stated it had considered the two guard "stabbings" that occurred while defendant was being removed from his jail cell and was aware of its authority to order concurrent sentences but declined to do so. The court said it had a "philosophical concern" that running sentences concurrently failed to acknowledge each separate victim. The court noted

that “to say that each separate victim--that crime, is cheaper by the dozen, to me, is offensive.”

Defendant maintains the trial court abused its discretion because it did not “conduct an analysis as [defendant] has done.” However, defendant’s “analysis” addressed only the reasons why the trial court had discretion to impose concurrent sentences. There is nothing to indicate that the trial court was unaware of its discretion in this regard. To the contrary, defendant argued for concurrent sentences; the prosecutor conceded the trial court had discretion in this regard; and the trial court did nothing to suggest it was unaware of its discretion.

Defendant also complains the trial court “failed to address all the relevant counts” prior to imposing consecutive sentences. However, with no affirmative showing to the contrary, “we presume the court properly performed its duty.” (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1141.)

Finally, defendant maintains “the [trial] court’s exercise of its discretion was not grounded in reasoned judgment or guided by legal principles and policies” when it determined that defendant should receive separate punishment for each victim. But the commission of separate acts of violence is an appropriate basis for imposing consecutive sentences. (Cal. Rules of Court, rule 4.425(a)(2).) Defendant fails to cite any authority to the contrary.

Instead, as evidence that the court did not appropriately exercise discretion, defendant points to the fact that the trial court indicated at a pretrial stage of the proceedings that a determinate sentence would be an appropriate plea bargain. However, a trial court's pretrial comments regarding possible dispositions of a criminal matter have little bearing on the appropriate sentence once a defendant stands convicted of all charges. As the record does not contain any indication that defendant was being penalized for taking this matter to trial, the trial court acted well within its discretion in sentencing defendant as it did. (See *People v. Edwards* (1991) 54 Cal.3d 787, 848; *People v. Szeto* (1981) 29 Cal.3d 20, 35.)

C. Blakely v. Washington

Defendant claims he is entitled to resentencing because the trial court's imposition of consecutive sentences violated the United States Supreme Court's holding in *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*). We disagree.

In *Blakely*, the United States Supreme Court held that any fact other than a prior conviction that is relied on by a trial court to increase the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Blakely*, *supra*, 542 U.S. at p. 301 [159 L.Ed.2d at p. 412].) The statutory maximum is the greatest sentence the court may impose based on facts reflected in the jury's verdict or admitted by the defendant. (*Id.* at pp. 303-304 [159 L.Ed.2d at pp. 413-414].)

However, there is no statutory presumption or other entitlement to concurrent sentencing. (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923; see § 669.) The absence of a legal right to concurrent sentencing "makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely*, *supra*, 542 U.S. at p. 309 [159 L.Ed.2d at p. 417].) The California Supreme Court has held that the analysis engaged in by a trial court when determining whether to run terms consecutively or concurrently is "'[j]udicial factfinding in the course of selecting a sentence within the authorized range'" and does not implicate the concerns addressed in *Blakely*. (*People v. Black* (2005) 35 Cal.4th 1238, 1262.) Accordingly, we reject defendant's claim.

DISPOSITION[*]

The judgment is affirmed. **(*CERTIFIED FOR PARTIAL PUBLICATION*.)**

BUTZ, J.

We concur:

NICHOLSON, Acting P. J.

MORRISON, J.

[*] See footnote, *ante*, page 1.