

CERTIFIED FOR PARTIAL PUBLICATION\*

**COPY**

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

(Sacramento)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
TASAUNA DANIELLE MURPHY,  
  
Defendant and Appellant.

C046923  
  
(Super. Ct. No. 03F10757)  
  
**ORDER MODIFYING OPINION  
ON REMAND  
[NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the opinion on remand, filed herein on August 29, 2007, be modified as follows:

Section 3 of the Discussion, entitled "Multiple Convictions," which begins on page 12 of the opinion and ends on page 15, is deleted. The following section 3 is substituted in its place:

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\* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts 1, 2, 4 and 5 of the Discussion.

### 3. *Multiple Convictions*

Defendant contends she was improperly convicted for both selling the cocaine rock in count one and possessing that same rock for sale in count two, a necessarily included offense. We disagree.

Our state high court has long held that multiple convictions may not be based on necessarily included offenses. (*People v. Pearson* (1986) 42 Cal.3d 351, 355.) Here the prosecutor argued, and the trial court in effect instructed, that the offense of possession of cocaine with the intent to sell (count two) could be based not only on the second cocaine rock found in defendant's car after the chase, but also, alternatively, on the first cocaine rock sold to the undercover officer. Defendant contends, correctly, that the record does not show upon which rock the jury founded the count two conviction. If the jury relied upon the first cocaine rock, defendant argues, she was improperly subjected to multiple convictions. This is because she was convicted of *both* selling the first rock in count one and possessing that same rock for sale in count two, a necessarily included offense to count one as shown by the evidence adduced at trial.

The information in this case charged defendant with selling cocaine base in count one and with possessing cocaine base for sale in count two. In applying the rule prohibiting multiple convictions in the context of necessarily included *charged* offenses, a lesser offense is

deemed necessarily included in a greater offense only if the statutory elements of the greater offense include all of the statutory elements of the lesser offense. (*People v. Reed* (2006) 38 Cal.4th 1224, 1230-1231 [in applying the rule prohibiting multiple convictions of necessarily included offenses, "[c]ourts should consider [both] the statutory elements and [the] accusatory pleading [tests of necessarily included offenses] in deciding whether a defendant received [adequate] notice, and therefore may be convicted, of an *uncharged* crime [so as to satisfy due process], but only the statutory elements [test] in deciding whether a defendant may be convicted of multiple *charged* crimes" (*id.* at p. 1331) because "[c]oncerns about notice are irrelevant when [the multiple offenses] are separately charged'" (*id.* at p. 1330)].) As we shall explain, the applicable test here of a necessarily included offense, the statutory elements test--a much narrower test than the outdated test set forth in cases upon which defendant relies--was not met, and defendant's convictions for selling and possessing for sale are proper. (See e.g., *People v. Francis* (1969) 71 Cal.2d 66, 73 (*Francis*).)

The outdated test of a necessarily included offense upon which defendant relies encompasses an offense in which the *facts* established by the evidence at trial make it impossible to commit one offense without also committing another. (See *People v. Thomas* (1991) 231 Cal.App.3d 299, 304-306 (*Thomas*) [discussing the tests of a necessarily

included offense and the decisions embodying them, including the outdated test decision of *Francis, supra*, 71 Cal.2d at p. 73, upon which defendant primarily relies]; see also *People v. Ortega* (1998) 19 Cal.4th 686, 698 ["There are several practical reasons for not considering the evidence adduced at trial in determining whether one offense is necessarily included within another"--i.e., providing notice to defendant up front of all possible offenses, promoting consistency in applying the multiple conviction proscription, and easing the burden on trial and appellate courts in applying that proscription].)

Applying the statutory elements test here, a conviction for the greater offense of selling the cocaine (count one) does not require, as one of its statutory elements, the lesser offense of possessing the cocaine for sale (count two); possession is not an essential element of the sale offense. For example, one can broker a sale of a controlled substance that is within the exclusive possession of another. (*People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524; *People v. Rogers* (1971) 5 Cal.3d 129, 134 [in fn. 3, however, *Rogers* applies the outdated test; see discussion of this at *Thomas, supra*, 231 Cal.App.3d at pp. 304-305]; see also CALJIC No. 12.02 [elements of offense of selling a controlled substance are (i) sale of the substance, and (ii) knowledge of the presence and nature of the substance].)

Under the statutory elements test that applies here, then, defendant was properly convicted of the sale and the possession offenses, both of which were charged. (In line with Pen. Code, § 654, which prohibits multiple *punishment*, the trial court properly stayed the sentence for the possession conviction.)

There is no change in the judgment.

FOR THE COURT:

\_\_\_\_\_ SIMS \_\_\_\_\_, Acting P.J.

\_\_\_\_\_ DAVIS \_\_\_\_\_, J.