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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

AHARON ELEAZAR MOALLEM,

Defendant and Appellant.

B277632

(Los Angeles County
Super. Ct. No. VA140195)

APPEAL from a judgment of the Superior Court of Los Angeles County, Olivia Rosales, Judge. Affirmed and remanded with directions.

Katharine Eileen Greenebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie C. Brenan and Abtin Amir, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Aharon Eleazar Moallem appeals his sentence for criminal threats with the use of a knife and assault with a deadly weapon. Moallem contends the trial court should have stayed his sentence on one of those two counts under Penal Code section 654. We agree. We therefore remand the case for the correction of Moallem's sentence.

BACKGROUND

The People charged Moallem with criminal threats, assault with a deadly weapon (a knife), and vandalism. The People alleged Moallem had used a deadly weapon (the knife) in the commission of the criminal threats within the meaning of Penal Code section 12022, subdivision (b)(1). As the evidence at trial is not at issue in this appeal, we summarize it briefly.

On September 25, 2015, Steve Mullen was at the restaurant he owns, Joe K's Deli. Mullen is Moallem's father. Mullen and three of his employees were moving a metal canopy. Moallem showed up at the restaurant and ate some food. Moallem came outside and told his father he needed money. Moallem said his father owed him money for a typewriter. Moallem was very aggressive; he was yelling. Mullen asked Moallem to "[p]lease get out of the way." Moallem refused and "an exchange" of "F words" ensued. Moallem was threatening Mullen: "[s]omething about hurting me or killing me or all this stuff." Moallem then pulled out a folding knife. Moallem told Mullen, "I will stab you' or something. 'I will kill you,' F words, and all that stuff." Moallem tried to hit or stab Mullen with the knife. Moallem pointed the knife at Mullen's left side. Mullen thought Moallem "look[ed] pretty serious about going through with it," "stabbing [him]." The knife came within two or three

inches of Mullen's torso. Mullen's employees restrained Moallem. Moallem ran to Mullen's car, slashed the tires, and ran away.

The case proceeded to trial in July 2016. On August 1, 2016, the jury acquitted Moallem on the vandalism charge and found him guilty of the criminal threats and assault charges. The jury also found true the knife use allegation on the criminal threats count. At the sentencing hearing on August 23, 2016, the trial court imposed sentence but suspended execution of that sentence. On the criminal threats count, the court selected the middle term of two years plus one year for Moallem's use of the knife. On the assault with a deadly weapon charge, the court sentenced Moallem to the middle term of three years. The court placed Moallem on five years of formal felony probation and ordered him to serve 210 days in the county jail and to stay away from the victim, his father. Neither defense counsel nor the prosecution raised any issue regarding Penal Code section 654.

ISSUE

Moallem's sole contention on appeal is that the trial court should have stayed his sentence on one of the two counts under Penal Code section 654. The Attorney General implicitly concedes Moallem cannot be punished for both the criminal threats and the assault, but argues the court did not err because Moallem was granted probation. Moallem's contention has merit. The Attorney General's argument fails to recognize the difference between (1) the suspension of *execution* of a sentence the court has *imposed* and (2) a grant of probation in which the court suspends *imposition* of sentence.

DISCUSSION

Under Penal Code section 954,¹ a person may be convicted of more than one crime arising out of the same act or course of conduct. (*People v. Sloan* (2007) 42 Cal.4th 110, 116.) Its counterpart, section 654, prohibits multiple punishment for the same act or indivisible course of conduct. (*Sloan*, at p. 116; see also *Neal v. California* (1960) 55 Cal.2d 11, 19.) “When section 954 permits multiple conviction, but section 654 prohibits multiple punishment, the trial court must stay execution of sentence on the conviction for which multiple punishment is prohibited.” (*Sloan*, at p. 116; see also *People v. Ortega* (1998) 19 Cal.4th 686, 692.)

Moallem contends section 654 applies to his two convictions here.² He notes his verbal threats against his father and his stabbing motions toward his father with the knife were part of one indivisible transaction. The Attorney General does not dispute this contention. Instead, the Attorney General argues that Moallem’s sentence does not contravene section 654 because the statute “is violated only when double punishment from multiple sentences are actually imposed, and not when imposition of the additional sentences is stayed in favor of granting probation.”

¹ All statutory references are to the Penal Code.

² As noted, Moallem’s attorney did not raise this issue at his sentencing. But Moallem has not forfeited this argument. “It is well settled . . . that the court acts ‘in excess of its jurisdiction’ and imposes an ‘unauthorized’ sentence when it erroneously stays or fails to stay execution of a sentence under section 654.” (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17; see also *People v. Perez* (1979) 23 Cal.3d 545, 549-550, fn. 3.)

The Attorney General cites *People v. Wittig* (1984) 158 Cal.App.3d 124, 137. In that case, Wittig and his codefendant were convicted of assault with a deadly weapon, a firearm, as well as discharging a firearm at an occupied motor vehicle. (*Id.* at p. 126.) The court suspended imposition of sentence and placed the defendants on probation. The issue on appeal concerned jury instructions. At the end of the opinion, the appellate court stated: “Finally, Wittig contends he has been subjected to double punishment in violation of section 654, in receiving concurrent sentences for assault with a deadly weapon and shooting at an occupied motor vehicle. Imposition of sentence was suspended; each defendant was granted probation as to each offense. *Because sentence was not imposed* on either defendant, there is no double punishment issue. The section 654 issue should be presented to a court upon any future attempt to *impose* a double punishment upon either of these defendants in the event of a probation violation.” (*Id.* at p. 137, italics added.)

Here, by contrast, the trial court *did* sentence Moallem. It pronounced judgment. The court suspended *execution* of the sentence it imposed. If Moallem were to violate his probation, the court then would execute the suspended sentence. Generally, when that happens, the court is “without jurisdiction to modify or change [the] final judgment and is required to order into execution that judgment after revocation of probation.” (*People v. Martinez* (2015) 240 Cal.App.4th 1006, 1012; see also *People v. Howard* (1997) 16 Cal.4th 1081, 1095; *People v. Chagolla* (1984) 151 Cal.App.3d 1045, 1049.) However, if the previously imposed but suspended sentence was unlawful, revocation of probation does not remove the court’s power to correct it. (See *In re Renfrow* (2008) 164 Cal.App.4th 1251, 1254.)

As the Attorney General implicitly concedes, Moallem cannot be punished twice for the same conduct. The sentence the court imposed was erroneous, even though execution of that sentence was suspended. If Moallem violates his probation, the court at that juncture will have to correct the sentence. The trial court should have imposed a sentence for each of the two counts, but then stayed the section 654-barred count. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1466.) The error should be corrected now; there is no reason to wait.³

³ Section 654, subdivision (a), specifies the defendant “shall be punished under the provision that provides for the longest potential term of imprisonment.” Here, the longest potential term for each of the two counts—criminal threats, with the knife use enhancement, and assault with a deadly weapon—is four years. Accordingly, the trial court may choose either count as the count on which it sentences Moallem.

DISPOSITION

Moallem's conviction is affirmed. The case is remanded to the trial court for correction of Moallem's sentence. The court is to impose sentence on both counts and then stay the sentence on the second count (count 1 or 4, as it chooses) under Penal Code section 654.

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EGERTON, J.

We concur:

LAVIN, Acting P. J.

CURREY, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.