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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.

MANUEL GOMEZ MACIEL,

Defendant and Appellant.

B266110

Los Angeles County

Super. Ct. No. PA078819

APPEAL from orders of the Superior Court of Los Angeles County, David W. Stuart, Judge. Reversed and remanded.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey and Scott A. Taryle, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Manuel Maciel pled no contest to one count of possession of cocaine with intent to sell (Health & Saf. Code, § 11351) and admitted the special allegation that he was personally armed with a firearm during the commission of the offense (Pen. Code, § 12022, subd. (c)).¹ In this appeal, defendant challenges postjudgment orders denying his request for return of personal property seized by law enforcement pursuant to a warrant, and ordering the destruction of 10 recovered firearms, as well as ammunition, magazines, and gun cases and boxes. We conclude the court's orders are overbroad and therefore reverse and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND²

On November 13, 2013, police responded to a 9-1-1 call at defendant's residence. The call was initiated by defendant's wife, who fled to a neighbor's house with the couple's three children after defendant pushed and hit her. When the officers arrived, defendant was inside the family's residence and initially refused to respond to the officers' attempts to contact him. Eventually, defendant left the residence and surrendered. Officers entered defendant's residence and found it to be in poor condition, and not suitable for children to live in. In addition, officers observed in plain view, and well within the reach of children, baggies of marijuana and cocaine, a prescription bottle containing white pills, assorted drug paraphernalia, a large locking blade knife

¹ Further unspecified section references are to the Penal Code.

² Facts concerning the offense are taken from the probation report.

and a loaded firearm magazine. After obtaining a search warrant, officers conducted a comprehensive search of the property and seized significant quantities of what appeared to be marijuana, cocaine, methamphetamine, heroin, and prescription drugs, as well as currency and other items indicative of a drug sales operation. In addition, officers confiscated ten firearms (handguns and AK-47 style rifles) along with ammunition, loaded firearm magazines, gun cases and other accessories. Officers also seized miscellaneous personal property, including a backpack, a shoulder bag, several cell phones, some documents and a gun holster.

On November 15, 2013, the People filed a felony complaint containing eight counts: counts 1 through 3 related to child abuse (§ 273a, subd. (a)), counts 4 through 7 related to drug possession with intent to sell (Health & Saf. Code, §§ 11351, 11378), and count 8 charged defendant with drug possession with a firearm (Health & Saf. Code, § 11370.1, subd. (a)). As to counts 4 through 7, the complaint included a special allegation that defendant was personally armed with a firearm during the commission of the offense (§ 12022, subd. (c)). Defendant pled no contest to count 4 (possession with intent to sell cocaine) and admitted the special allegation that he was personally armed with a firearm. The court sentenced defendant to the low term of two years on the base count, plus three years for the firearm sentence enhancement, to be served in county jail. The court dismissed the remaining counts.

On April 30, 2015, defendant filed a motion requesting the return of property confiscated by law enforcement pursuant to the search warrant. Mainly, defendant requested the return of firearms, ammunition, and firearm magazines. In addition,

defendant requested the return of a time sheet and video rental card, a shoulder holster, two pistol cases, a pistol box, a black shoulder bag, two rifle cases and cut locks, five cell phones, rifle parts and bullet buttons, a black backpack, and miscellaneous documents showing residency.

On May 19, 2015, at the hearing on defendant's motion for return of property, the People opposed defendant's request as to all items except the black shoulder bag and the documents showing residency. Defendant's counsel acknowledged that, as a convicted felon, defendant could not legally possess the firearms or ammunition, and stated defendant was not requesting that the weapons be returned to him, but rather that they be given to defendant's father or a licensed firearms dealer. Citing public safety concerns, the court denied defendant's request as to all items except the black shoulder bag and the documents showing residency. The court further ordered all the weapons, ammunition, and firearm boxes and cases destroyed. The court stayed the destruction order for 30 days, pending filing of a notice of appeal.

Defendant subsequently filed a motion for reconsideration of the court's order, and attached documents relating to the purchase of the firearms and ammunition. The court heard and denied the motion for reconsideration on June 29, 2015, and again stayed the destruction order pending appeal.

The court did not indicate the legal basis for its order denying the return of personal property or its order regarding destruction of firearms, ammunition and related items. At the initial hearing, the court said only that it would not return defendant's property because "I think it's a danger to public safety." At the hearing on the motion for reconsideration, the

court stated it was “denying the transfer of the weapons to the father and ordering destruction [because] I don’t believe it’s—it’s an arm’s length transaction between the father and the son.” The court went on to say, “I believe the court does have the power to order destruction. And the firearms are part of the case, and—and involved with controlled substances. So that’s my order.” The minute orders do not cite any statutory or other legal authority.

Defendant timely appeals.

CONTENTIONS

Defendant contends the court erred by refusing to either return his personal property or allow him to transfer the property to a third party, and further erred by ordering all firearms, ammunition and firearm boxes and cases destroyed.

DISCUSSION

1. Appealability

The court denied defendant’s motion to return his personal property, and further ordered destruction of defendant’s firearms, ammunition and gun cases. Because the People contend the order denying the motion to return defendant’s property is not appealable, we must address at the outset our jurisdiction to consider the issues raised by the parties in this appeal.

In felony cases, postjudgment orders are appealable only if they affect a defendant’s substantial rights. (§ 1237, subd. (b) [providing statutory right to appeal “[f]rom any order made after judgment, affecting the substantial rights of the party”].) Here, although the court did not specify the legal basis for its orders, the parties agree the court had the authority to act under

section 18000 [destruction of firearms deemed to be a nuisance] and/or sections 1417.5 and 1417.6 [return of property retained by court after judgment].

Our courts have held that a firearm destruction order issued pursuant to section 18000 affects a defendant's substantial rights, and is therefore appealable, where the order is predicated upon a factual finding or admission that the firearm was involved in the offense of conviction. (See *People v. Beck* (1994) 25 Cal.App.4th 1095, 1104 (*Beck*) ["The deprivation of firearms used in the commission of a convicted offense is one of the rights of the defendant automatically 'affected by [the] charge.' It would appear, therefore, that an erroneous ruling under Penal Code section 12028³ is appealable as an order after judgment"].) Here, defendant's admission of the firearm allegation could provide the basis for at least a portion of the court's order. Accordingly, to the extent the destruction order falls within the ambit of section 18000, it is reviewable on appeal.

By contrast, our courts have held that an order denying a defendant's nonstatutory motion for return of property does not affect a defendant's substantial rights, and therefore must be reviewed by way of a petition for writ of mandate. (See *People v. Hopkins* (2009) 171 Cal.App.4th 305, 308; *People v. Gershenhorn* (1964) 225 Cal.App.2d 122, 125.) Thus, the People contend defendant cannot challenge the denial of his motion for return of property in this appeal. For his part, defendant requests that we exercise our discretion to treat any invalid portion of his appeal as a petition for writ of mandate and address the merits of the

³ Former Penal Code section 12028, as amended by Statutes 2004, chapter 602, section 2, was repealed and reenacted as Penal Code section 18000 by Statutes 2010, chapter 711, section 6.

interlocking issues affecting the disposition of his property. We choose to do so because we conclude, *post*, that the court’s destruction order is overbroad and we must therefore remand for further proceedings. In the interest of judicial economy and in order to provide guidance to the court upon remand, we address all the issues briefed by the parties. (See, e.g., *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 745 [noting issues of judicial economy may, in appropriate cases, counsel in favor of treating defective appeal as a writ]; *Mon Chong Loong Trading Corp. v. Superior Court* (2013) 218 Cal.App.4th 87, 92 [same].)

2. The court’s orders are overbroad.

2.1. General legal principles

We begin with the general proposition that “persons may not be deprived of property without due process of law, nor may the Legislature expropriate private property by mere legislative enactment. (Cal. Const., art. I, § 15; *Beck, supra*, 25 Cal.App.4th 1095.) “ ‘The right to regain possession of one’s property is a substantial right which may not be dependent upon the whim and caprice of a court. . . .’ [Citation.] Continued official retention of legal property with no further criminal action pending violates the owner’s due process rights. [Citation.]” (*People v. Lamonte* (1997) 53 Cal.App.4th 544, 549 (*Lamonte*).)

It appears the court issued its orders either under section 18000 or sections 1417.5 and 1417.6. In either case, due process requires that the court conduct a hearing and make factual determinations before depriving a defendant of his or her personal property. (See *Beck, supra*, 25 Cal.App.4th at pp. 1102-1103; *Lamonte, supra*, 53 Cal.App.4th at p. 551.)

2.2. Penal Code section 18000

Section 18000 is a broadly applicable statute which requires the surrender of weapons, including firearms, to law enforcement.⁴ Pertinent here, section 18000 provides that any weapon described in section 29300 is deemed a nuisance, and must be surrendered to law enforcement. (§ 18000, subd. (a).) Section 29300, in turn, declares any firearm owned or possessed by a convicted felon, as well as any firearm used in the commission of any felony, to be a nuisance subject to surrender under section 18000.

2.2.1. Firearms with which defendant was armed during commission of offense

As just noted, firearms used in the commission of a crime are subject to the surrender provisions of section 18000. However, in order to satisfy due process concerns, the court must make a factual finding regarding firearm use before ordering the surrender of a weapon. (See *Beck, supra*, 25 Cal.App.4th at p. 1103 [“In the absence of a necessary factual determination encompassed within defendant’s guilty plea—owing to the nature of the charges, or to the admission of a factual basis showing use of a weapon in the commission of the offense, or to the admission of a firearm enhancement—there was no basis for declaring defendant’s firearms a nuisance”].) In many instances, the factual findings necessary to the conviction provide a sufficient factual basis for a firearm surrender order. “If the charges necessarily involve use of a firearm in their commission, or if the

⁴ Section 18005 authorizes law enforcement to sell or destroy surrendered weapons. (§ 18005, subds. (a) [sale at public auction], (c) [destruction].)

defendant expressly admits the use of a firearm (either in establishing the factual basis for the plea or through admitting accompanying firearm enhancement allegations), then the factual predicate that the firearm was ‘used in the commission of’ the crime will be properly established. The firearm involved clearly would qualify as a confiscable nuisance.” (*Id.* at pp. 1101-1102 [applying former section 12028].)

Here, defendant’s crime of conviction (possession with intent to sell cocaine) did not necessarily involve the use of a firearm. However, defendant admitted the special allegation set forth in the felony complaint, namely that “in the commission and attempted commission of the . . . offense the defendant . . . [was] personally armed with a firearm within the meaning of Penal Code section 12022(c).” Importantly for our purposes, defendant’s admission is limited: he admitted he was armed with “a” firearm, i.e., a single firearm. At most, defendant’s admission provided a foundation for the court to order the surrender of one of the firearms recovered from defendant’s residence.

The People suggest the court made an implied finding that defendant was armed with *all* the weapons confiscated by law enforcement during the commission of the offense. We disagree. In order to find that a defendant was armed during the commission of a crime, a court or a jury must determine that “the defendant [had] the specified weapon available for use, either offensively or defensively” during the commission of the offense. (*People v. Bland* (1995) 10 Cal.4th 991, 997.) Here, according to the People, the firearms at issue were discovered in several rooms of defendant’s house, as well as in a gun safe in the garage, and in the trunk of a car which was parked outside the residence. However, the court received no evidence and heard no argument

regarding the location of the weapons. Accordingly, the court did not have sufficient evidence before it to make a finding—implied or express—as to whether all the weapons confiscated by law enforcement were “available for use” by the defendant during the commission of the crime. On remand, the court should conduct a hearing and make particularized findings as to which firearms defendant had “available for use” during the commission of the crime of conviction. The court may then order those firearms to be surrendered under section 18000. If any of defendant’s firearms remain, the court may consider whether any other statute authorizes their surrender.

2.2.2. Firearms in possession of a convicted felon⁵

As an alternative, the People assert that the court was authorized to issue its retention and destruction orders because, as a convicted felon, defendant is now prohibited from owning or possessing firearms and ammunition. (§§ 29800 [felon in possession of firearm], 30305 [felon barred from owning or possessing firearm also barred from owning ammunition or reloaded ammunition].) While this is true, it does not necessarily mean, as the People suggest, that the court was authorized to order the retention and destruction of the weapons and ammunition confiscated by law enforcement in this case.

Section 29300, subdivision (a), provides that upon conviction of a felony, any firearm owned or possessed by

⁵ In the event that the court does not, on remand, determine that defendant was armed with all ten firearms during the commission of the offense, the People may request surrender of the firearms on alternative grounds. We consider the scope of the court’s authority to order the surrender of firearms possessed by a felon in order to provide guidance to the court on remand.

a defendant is deemed to be a nuisance subject to surrender to law enforcement under section 18000. The People contend this provision authorizes the court's destruction order in this case. Defendant disagrees, and argues that he was entitled to transfer his lawfully owned firearms to a third party. We agree with defendant.

As noted *ante*, section 18000 requires the surrender of all firearms deemed to be a nuisance, and section 29300, subdivision (a), states that any weapon possessed, owned or controlled by a convicted felon is a nuisance. Under prior law, persons convicted of a felony were automatically required to surrender all weapons to law enforcement following their conviction. (See, e.g., *Beck, supra*, 25 Cal.App.4th at pp. 1104-1105.) However, the Legislature modified the statute in 2003 to provide an alternative to automatic surrender. (Legis. Counsel's Dig., Sen. Bill No. 238 (2003-2004 Reg. Sess.) 5 Stats. 2003, Summary Dig., p. 230.) Specifically, section 29300, subdivision (c), provides: "[a] firearm is not a nuisance pursuant to this section if the firearm owner disposes of the firearm pursuant to Section 29810." Section 29810 provides that in a felony case, a defendant must be advised at the time judgment is rendered of the prohibition against owning firearms, and must be given a form to facilitate transfer of any firearms he or she owns or possesses.⁶ In other words, when a defendant is convicted of a

⁶ The full text of section 29810, subdivision (a), is: "For any person who is subject to Section 29800 [felony convictions] or 29805 [specified misdemeanor convictions], the court shall, at the time judgment is imposed, provide on a form supplied by the Department of Justice, a notice to the defendant prohibited by this chapter from owning, purchasing, receiving, possessing, or having under custody or control, any firearm. The notice shall inform the defendant of the

felony and is, going forward, prohibited from owning firearms, he or she must be given the opportunity to avoid violating section 29300, subdivision (a), by transferring the firearms to a third person at the time judgment is rendered. That person, as an agent for the defendant, may then transfer title to the firearms or facilitate their sale.

The court did not follow section 29300 in this case. At sentencing, the court advised defendant that, as a convicted felon, he was permanently barred from owning or possessing firearms. However, the court did not provide defendant with the opportunity to transfer his firearms as required under section 28910. Further, when defendant subsequently requested to transfer his lawfully owned firearms to a third party—either his father, or a licensed firearms dealer—the court denied his request.

The People argue that the option to transfer weapons is only available where the prohibition on owning or possessing weapons is for a specified term—as opposed to the permanent ban applicable to defendant. No such restriction appears on the face of the statute, and we decline the People’s invitation to create one.

2.3. Penal Code sections 1417.5 and 1417.6

The People also contend sections 1417.5 and 1417.6 support the court’s forfeiture and destruction orders. We disagree.

prohibition regarding firearms and include a form to facilitate the transfer of firearms. If the prohibition on owning or possessing a firearm will expire on a date specified in the court order, the form shall inform the defendant that he or she may elect to have his or her firearm transferred to a firearms dealer licensed pursuant to Section 29830.” (§ 29810, subd. (a).)

Section 1417.5 governs the disposal of exhibits introduced or filed in a criminal matter, and which remain in the possession of the clerk of the court 60 days after the final disposition of the case. Although section 1417.5 expressly applies to exhibits, several cases have extended the scope of the statute to include, as pertinent here, items confiscated pursuant to a warrant, but which were not filed or introduced into evidence as exhibits because the defendant entered a plea, rather than proceeding to trial. (See *Lamonte, supra*, 53 Cal.App.4th 544 [noting defendant who pled guilty to charge should be given same due process opportunity as defendant convicted of charge after trial].)

Generally speaking, section 1417.5 requires the clerk to release exhibits to their lawful owners or dispose of them as provided in that section. (§ 1417.5.) A substantial exception to this rule is found in section 1417.6, which states: “The provisions of Section 1417.5 shall not apply to any dangerous or deadly weapons, narcotic or poisonous drugs, explosives, or any property of any kind or character whatsoever the possession of which is prohibited by law and that was used by a defendant in the commission of the crime of which the defendant was convicted, or with which the defendant was armed or that the defendant had upon his or her person at the time of the defendant’s arrest. [¶] Any of this property introduced or filed as an exhibit shall be, by order of the trial court, destroyed or otherwise disposed of under the conditions provided in the order no sooner than 60 days following the final determination of the criminal action or proceeding.” (§ 1417.6, subd. (a).)

Our courts have emphasized the dual requirements of section 1417.6: property must be both dangerous, explosive or illegal to possess, *and* must have been used in the commission of

the crime, or the defendant must have been armed with it during the commission of the crime. (*Lamonte, supra*, 53 Cal.App.4th at p. 553.) Accordingly, as with section 18000, a destruction order issued pursuant to sections 1417.5 and 1417.6 must be predicated upon a factual finding that defendant was armed with the weapons at issue during the commission of the offense. At most, then, defendant's admission that he was armed with a firearm during the commission of the offense provides a factual predicate for the destruction of one firearm.

3. Disposition of property other than firearms

The court's destruction order applies not only to firearms, but also to ammunition (and presumably the magazines which hold the ammunition) as well as firearm cases and boxes. However, neither section 18000 nor section 1415.6 provides authority for the court to order the surrender and destruction of those items, if they were lawfully possessed by defendant. In addition, the court refused to return a number of defendant's personal items, namely a time sheet and video rental card, a shoulder holster, five cell phones, rifle parts and bullet buttons, and a black backpack. The People have not cited any authority which would allow a court to deny defendant's request for return of these items. On remand, the court should determine whether any provision of law permits the court to order defendant to surrender these items of personal property. In the absence of such authority, the court should issue an order returning defendant's property to him.

DISPOSITION

The orders denying defendant's motion for return of property and ordering the destruction of defendant's firearms, ammunition and firearm cases and boxes are reversed. On remand, the court is to conduct further proceedings consistent with this opinion.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

GOSWAMI, J.*

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