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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. ANDRE JOHNSON, JR., Defendant and Appellant.	B271147 (Los Angeles County Super. Ct. No. NA102699)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura Laesecke, Judge. Affirmed with directions.

Nadezhda M. Habinek, 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, Shawn McGahey Webb and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Andre Johnson, Jr. raises a claim of sentencing error following his conviction of selling methamphetamine and possessing methamphetamine for sale, with prior drug offense, prior prison term, and prior serious felony conviction enhancements (Health & Saf. Code, §§ 11359, 11358, 11370.2; Pen. Code, §§ 667.5, 667, subds. (b)-(i)).[1]

For the reasons discussed below, the judgment is affirmed; however, the court should address an apparent error in the abstract of judgment.

BACKGROUND

Viewed in accordance with the usual rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

John Kirkland was working as an informant for Detective David Strohman of the Long Beach Police Department as part of a sting operation aimed at local drug dealers. On July 30, 2015, at about 10:00 a.m., Strohman had Kirkland purchase drugs at Lincoln Park in Long Beach. There, Kirkland met his contact person, William Norwood, from whom he had formerly bought drugs. Kirkland testified Norwood asked what he was looking for and Kirkland said he wanted "a 40." Kirkland handed Norwood $40 and Norwood walked over to defendant Johnson. Kirkland testified that Norwood handed something to Johnson, who "[dug] into his pocket and dump[ed] something into [Norwood's] hand." Norwood then walked back to Kirkland and gave him methamphetamine. Kirkland turned the methamphetamine over to Strohman.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

Strohman testified he observed this transaction through binoculars from an elevated position. He saw Kirkland hand something to Norwood, saw Norwood hand money to Johnson, and saw Johnson reach into his pocket and make a "pouring motion" into Norwood's hand. Norwood then walked back over to Kirkland, the two disappeared behind some bathrooms, and then Kirkland returned to Strohman. Kirkland handed Strohman "a small bindle of what appeared to be methamphetamine."

Strohman returned to the police station and gave the bindle to Officer Randy Beach for processing as evidence. A test of the bindle's contents revealed that it contained 1.04 grams of methamphetamine. Strohman also asked Beach to go to the park and apprehend Johnson.

Beach arrived at Lincoln Park just after noon and found Johnson sitting near the bathrooms. Johnson was detained and searched. Beach discovered a clear plastic bindle of methamphetamine in Johnson's waistband. During the search, Johnson said this methamphetamine was for his personal use. Later testing revealed that the bindle contained 6.24 grams of methamphetamine. Testifying as an expert, Strohman opined that this was an amount intended for sale, rather than personal use because it consisted of about 124 individual doses—enough to stay high continuously for 31 days.

Johnson was convicted by a jury of two offenses: selling methamphetamine to Kirkland, and possessing for sale the methamphetamine police subsequently found in his waistband. The trial court sentenced Johnson to state prison for 12 years on count 2 (sale of methamphetamine to Kirkland). The court then sentenced Johnson to a concurrent term on count 3 (possession for sale of methamphetamine), saying: "Count 3, I am imposing

the midterm of two doubled because of the strike, but it's running concurrent. It could have been consecutive. These are two separate charges."

DISCUSSION

Johnson contends the trial court violated section 654's prohibition of multiple punishment by not staying the sentence it imposed on his conviction for possession of methamphetamine for sale. We disagree.

1. *Johnson's sentence for possession of methamphetamine for sale did not constitute impermissible multiple punishment.*

a. *Legal principles.*

Section 654, the prohibition against multiple punishment, provides in pertinent 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." " '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.' [Citation.]" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

"The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them. [Citations.] 'We must "view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of

every fact the trier could reasonably deduce from the evidence. [Citation.]" ' " (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312–1313.) This rule applies whether or not the trial court made express factual findings. (See *People v. Osband* (1996) 13 Cal.4th 622, 730 [trial court's implicit determination that defendant had more than one objective was supported by substantial evidence]; *People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585 [trial court's section 654 finding, whether explicit or implicit, may not be reversed if supported by substantial evidence].)

"[A] course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment." (*People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 11, disapproved on other grounds by *People v. Mendoza* (2000) 23 Cal.4th 896; see *People v. Felix* (2001) 92 Cal.App.4th 905, 915 ["multiple crimes are not one transaction where the defendant had a chance to reflect between offenses and each offense created a new risk of harm"].) Thus, in *People v. Trotter* (1992) 7 Cal.App.4th 363, multiple assault sentences were proper where the defendant fired three gunshots in slightly more than a minute at a pursuing police officer during a freeway chase: "[T]his was not a case where only one volitional act gave rise to multiple offenses. Each shot required a separate trigger pull. All three assaults were volitional and calculated, and were separated by periods of time during which reflection was possible," and "[d]efendant's conduct became more egregious with each successive shot." (*Id*. at p. 368.)

b. *Discussion*.

By imposing a concurrent term on count 3, the trial court impliedly found that Johnson had entertained separate criminal

intents and objectives when he first sold Kirkland 1.04 grams of methamphetamine and then, two hours later, was found to be in possession of 6.24 grams of methamphetamine. Citing such cases as *In re Adams* (1975) 14 Cal.3d 629 (*Adams*), Johnson argues this sentence violated section 654 and that it should have been stayed. For the reasons that follow, we disagree.

In *Adams*, the defendant was convicted on five transportation counts for making a single delivery of various drugs (benzedrine, seconal, marijuana, heroin and opium) to his accomplice Gregory. Our Supreme Court ruled that multiple punishment in these circumstances would violate section 654, reasoning: "[P]etitioner simultaneously transported a variety of illegal drugs with the single intent and objective of delivering them to codefendant Gregory. Our analysis leads us to the conclusion that it would be unreasonable to fragment that single objective into five separate objectives, namely, to transport benzedrine, to transport heroin, to transport seconal, etc. Instead, the entire transaction should reasonably be viewed as constituting an indivisible course of conduct analogous to the theft of several articles of personal property which . . . results in the commission of a single punishable offense." (*Adams*, *supra*, 14 Cal.3d at p. 635.) *Adams* concluded "that where . . . different kinds of drugs are simultaneously transported in one, indivisible transaction, with the single intent and objective of delivering them to another person, only one act of illegal transportation occurs." (*Id.* at p. 632.)

In other drug trafficking situations, however, courts have held that the defendant had multiple intents and objectives. For instance, in *People v. Blake* (1998) 68 Cal.App.4th 509 (*Blake*), the defendant had been convicted of transporting both

methamphetamine and marijuana. On appeal, he claimed multiple punishment was barred under the reasoning of *Adams* because he had been transporting both drugs in his car simultaneously. The Court of Appeal disagreed: "[T]he evidence supports a reasonable inference that defendant had separate objectives in transporting the methamphetamine and marijuana in that he intended to sell them to different customers." (*Id.* at p. 511.) "[T]he record supports an inference that defendant intended multiple sales to different customers: (1) the marijuana and methamphetamine were stored in separate containers in different concealed compartments of the car; (2) the marijuana was packaged in a manner consistent with multiple, individual sales; (3) the amounts of marijuana and methamphetamine were consistent with delivery to more than one individual; (4) the difference between the drugs suggests they were 'directed at different buyers' [citation]; and (5) the presence of a 'pay-owe' sheet with multiple entries, a police scanner, baby wipes, and a scale indicates defendant was engaged in an elaborate drug trafficking operation involving multiple sales to different individuals, rather than one single delivery." (*Id.* at p. 512.)

In the present case, Johnson asserts the sale of methamphetamine in count 2 "is precisely the same conduct with which he was convicted in Count Three" and, by "not staying Count Three under Penal Code section 654, the Court made the implicit finding that two separate acts were committed, with separate intents, which were not part of the same indivisible course of conduct. But the evidence adduced supports one conclusion: Appellant possessed a quantity of methamphetamine in order to sell it, which he did when he provided a small quantity to Norwood. This all took place on one occasion, in a

single transaction observed by Kirkland and Strohman. The fact that Appellant was apprehended perhaps one hour after the transaction—in the same location—is of no con[s]equence."

We disagree. As the Attorney General properly notes, in the present case, as in *Blake*, there was substantial evidence that Johnson had separate objectives for each crime: initially, to provide methamphetamine to his middleman (Norwood) in order to make a sale to Kirkland; then, to remain in the park in order to engage in further sales to different customers. (See *People v. Briones* (2008) 167 Cal.App.4th 524, 529–530 [defendant properly sentenced on two counts of possessing drugs for sale where his room contained 100 grams of methamphetamine and 260 grams of heroin: "There were two types of drugs in large amounts. This supports the inference Briones intended multiple sales to different customers. Under the circumstances, section 654 does not prohibit punishment for each drug offense."]; *People v. Monarrez* (1998) 66 Cal.App.4th 710, 715 [section 654 not violated by multiple punishment for possessing both cocaine and heroin for sale where "evidence supported a finding that defendant had been engaged in multiple sales and intended to make multiple sales of the narcotics which he possessed"].)

Moreover, as the Attorney General argues, the time lapse between the two crimes here—which the evidence demonstrated occurred more than *two* hours apart—demonstrates that the crimes "were not part of an indivisible course of conduct" because Johnson "had ample time to reflect on his actions and renew his intent to commit a drug-related crime. Therefore, even if [Johnson] harbored the same intent and objective during both crimes, multiple violations occurred and increased punishment was warranted." (See *People v. Gaio* (2000) 81 Cal.App.4th 919,

935–936 ["Under section 654, 'a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]' [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken. [Citation.]".)

Thus, the evidence here demonstrated not only that there was a sufficient lapse of time between the two crimes for Johnson to have given consideration to what he was doing, but the large amount of methamphetamine found in his possession two hours after making the sale to Kirkland showed that his intention was to continue making methamphetamine sales to other customers. Hence, the trial court did not err by imposing a concurrent prison term on the possession for sale conviction.

2. *Possible error in the abstract of judgment.*

Both parties, as well as the abstract of judgment, state that on Johnson's count 3 conviction for possession of methamphetamine for sale the trial court sentenced him to a concurrent term of three years. However, at the sentencing hearing, the trial court stated: "Count 3, I am imposing the midterm of two doubled because of the strike, but it's running concurrent." We read this as saying the court was sentencing Johnson to the midterm of two years on his conviction of possession of methamphetamine for sale (see § 1170, subd. (h); Health & Saf. Code, § 11378, subd. (5)), which was then doubled as a second strike under the Three Strikes law. If that reading is correct, then the trial court apparently intended to impose a four-

year concurrent term on count 3, not a three-year concurrent term.

" 'It is not open to question that a court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts. [Citations.] The power exists independently of statute and may be exercised in criminal as well as in civil cases. [Citation.] The power is unaffected by the pendency of an appeal or a habeas corpus proceeding. [Citation.] The court may correct such errors on its own motion or upon the application of the parties.' [Citation.] Courts may correct clerical errors at any time, and appellate courts (including this one) that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts. [Citations.] [¶] It is, of course, important that courts correct errors and omissions in abstracts of judgment. An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize. [Citation.]" (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

Here, the abstract of judgment apparently contains the error we have described. If so, it should be corrected.

DISPOSITION

The judgment is affirmed. If, in fact, the trial court intended to impose a four-year concurrent term on count 3, it is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

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EDMON, P. J.

We concur:

ALDRICH, J.

JOHNSON (MICHAEL), J.*

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