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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JAMES E. MOORE, Defendant and Appellant.	B269464 (Los Angeles County Super. Ct. No. MA066811)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Affirmed as modified.

Susan S. Bauguess, 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, Assistant Attorney General, William H. Shin and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant James E. Moore appeals from the judgment after his convictions for grand theft and unlawful taking or driving a vehicle. We correct a sentencing error but otherwise affirm.

FACTUAL BACKGROUND

Appellant moved into Diane Meza's Palmdale apartment in January 2015, in response to her Craigslist posting for a roommate. After two months, he stopped paying the agreed rent, and Meza gave him 30 days to move out.

On March 28, 2015, while appellant was still living in the apartment, Meza returned home from shopping around 1:00 p.m., parked her white Honda Civic,[1] and went inside to take a nap. When she awoke, she discovered her car was missing. She called the sheriff's department, and a deputy came to her apartment and took her report. Appellant was present when the report was taken.

Appellant moved out of the apartment approximately three weeks later.

On August 25, 2015, Deputy Sheriffs Paul Mendez and Arnold Camacho came upon a white Honda Civic parked in an undeveloped housing tract. Appellant was "slumped over" in the driver's seat and smelled of alcohol. Mendez placed him in the back of the patrol car. Mendez returned to the Civic and discovered the front and rear license plates did not match, and the registration stickers on the rear plate appeared to have been applied with wood glue. Camacho entered the license plate

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[1] It was a question at trial whether Meza was the legal owner of the Honda Civic. The issue has not been raised in this appeal, nor is it relevant to our holding. For purposes of this opinion, we assume without deciding that Meza was the legal owner of the vehicle.

numbers into the computer in the patrol car and determined that neither belonged to the Civic. Appellant spontaneously told Camacho that he had taken the front plate from a Cadillac at a car dealership to avoid tickets for not having a front plate.

The computer system revealed that the Civic had been stolen. Mendez saw no signs of forced entry into the Civic or that the ignition or key had been tampered with.

Mendez returned to the patrol car, placed appellant in handcuffs, and read him his *Miranda*[2] rights. At trial, Mendez testified that appellant told him that he had stolen the car from Meza after copying her key. Appellant said he had been living in the car since he moved out of Meza's apartment, and "occasionally drove the vehicle as needed." Camacho similarly testified that he overheard appellant tell Mendez about stealing a car from a roommate.

PROCEDURAL BACKGROUND

The information charged appellant with grand theft of an automobile with a prior felony vehicle theft conviction (Pen. Code, § 666.5) and driving or taking a vehicle without consent with a prior felony vehicle theft conviction (Veh. Code, § 10851; Pen. Code, § 666.5.)[3] As to both counts, it was further alleged that appellant previously had been convicted of and incarcerated for six felonies, all involving grand theft of an automobile or unlawful taking or driving a vehicle.

The jury convicted appellant on both counts. Appellant admitted to the prior convictions. The court sentenced appellant

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

[3] All further statutory references are to the Penal Code unless otherwise indicated.

to nine years, including four years for the grand theft, one year for the unlawful taking or driving, and four years for the prior convictions. The court also imposed various fines and awarded credits. Appellant timely appealed.

DISCUSSION

1. Denial of Motion for Continuance

Appellant argues that the trial court erred in denying his motion for a continuance after he relinquished pro. per. status and counsel was appointed. We reject this argument.

a. Relevant Proceedings Below

On November 2, 2015, appellant requested to represent himself at trial. The court attempted to dissuade appellant: "I cannot discourage you enough and tell you what a bad decision this would be for you. But if you want this and you're doing this, you're going to go [to] trial in about a week and a half." The court explained that appellant would be provided with a *Faretta* waiver form,[4] and admonished appellant to read it carefully "[b]ecause when you come back and you want to ask me [f]or a continuance, you'll understand that you may not be granted that continuance. You're going to tell me ['B]ut I haven't had time[']and I'm going to tell you that you understood that going in."

Appellant completed and signed the *Faretta* waiver form, initialing each item, including the following: "I understand that no continuance of the trial will be allowed without a showing of good cause, and that such requests made just before trial will

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[4] The *Faretta* waiver form, inter alia, advised appellant of his constitutional rights, listed the risks and consequences of self-representation, and recommended that he accept appointed counsel. (See *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).)

most likely be denied." The court granted appellant pro. per. status and appointed standby counsel.

On November 13 and again on November 16 the court asked appellant to reconsider his decision to proceed pro. per., and appellant declined to do so. The court stated that trial would commence the next day, on November 17, with jury selection and possibly opening statements and examination of the first two witnesses.

On November 17, before jury selection began, the prosecution provided appellant with some car insurance documents provided by Meza, the person from whom it was alleged appellant stole the car. The court again encouraged appellant to relinquish pro. per. status and allow the court to appoint counsel, and appellant agreed to allow standby counsel to represent him. Standby counsel mentioned the possibility of taking a "dark day" for the sake of additional preparation, and the court said it would not do so, stating that appellant "understood when he went pro per" that he would not be entitled to continuances to allow standby counsel to "catch up."

Standby counsel then formally moved for a continuance to make a *Pitchess* motion[5] to seek discovery as to any history of dishonesty by Mendez, the deputy to whom appellant allegedly admitted stealing the car. Standby counsel noted that the

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[5] A criminal defendant may file a *Pitchess* motion to request discovery of information in the confidential personnel records of a peace officer. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); *People v. Gaines* (2009) 46 Cal.4th 172, 176.)

incident underlying appellant's arrest was relatively recent and appellant had not previously waived time.[6]

The court declined to grant a continuance, finding the request untimely. The court noted that it had repeatedly asked appellant to allow counsel to represent him, and that appellant had acknowledged in his *Faretta* wavier form that a continuance would only be granted for good cause, and if made just before trial would likely be denied. The court also stated that appellant's prior counsel had discussed with him the possibility of asking for a continuance "so he could investigate those issues," and that appellant's disagreement with his prior counsel was a reason appellant chose to represent himself.[7]

b. Analysis

"[T]he decision whether or not to grant a continuance of a matter rests within the sound discretion of the trial court. [Citations.] The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked." (*People v. Beames* (2007) 40 Cal.4th 907, 920.) "[D]iscretion is abused only when the court exceeds the bounds of reason, all circumstances being considered." (*Ibid.*)

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[6] Standby counsel also argued that a continuance was justified to investigate Meza's insurance documents provided that day by the prosecution. The court said that standby counsel could interview Meza before she testified. Appellant does not contend there was any error below as to the documents.

[7] Discussions between appellant and his prior counsel regarding a *Pitchess* motion or seeking a continuance do not appear in the record, and we have not considered them in reaching our holding.

In conducting our analysis, the Supreme Court has directed us to consider (1) whether the moving party has demonstrated due diligence in preparing for trial; (2) the benefit anticipated by the moving party, and whether that benefit is likely to result; (3) the burden on the court, the jurors, and the witnesses; and (4) whether granting the continuance will accomplish substantial justice. (*People v. Doolin* (2009) 45 Cal.4th 390, 450 (*Doolin*).)[8]

Under these factors, we conclude that the trial court did not abuse its discretion. On the issue of diligence, although we have no basis to question appellant's efforts in preparing to represent himself, he voluntarily chose to forgo the support of a trained and experienced attorney until the morning of trial. To the extent he believed an attorney could help him, he was not diligent in obtaining that assistance. The court had warned him repeatedly that he could not rely on a continuance, especially if requested just before trial. Appellant thus had fair warning of the consequences of representing himself, including that he could not count on extra time to prepare his case. The court reasonably did not wish to reward appellant for his last-minute decision by giving him more time to prepare for trial.

As to the potential benefit of the continuance, it was entirely speculative on the part of appellant that, were he given time to make a *Pitchess* motion (and were that motion successful), the motion would result in useful evidence that could

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[8] Appellant cites *U.S. v. Flynt* (9th Cir. 1985) 756 F.2d 1352 (*Flynt*) in support of his argument that the trial court abused its discretion. *Flynt* considers four factors essentially identical to those in *Doolin*. (See *Flynt*, at pp. 1358-1361). Therefore our analysis under *Doolin* adequately addresses appellant's arguments under *Flynt*.

undercut the testimony of the prosecution's witnesses. Appellant had no particular basis on which to believe the motion was likely to produce anything useful—counsel presumably was seeking it as a matter of routine, given that much of the evidence against appellant was the testimony of the arresting deputies. While this may have been sufficient justification had appellant made a *Pitchess* motion in advance of trial, the court did not abuse its discretion in finding it insufficient reason to halt the trial set to start that very morning.

The speculative nature of appellant's request similarly undercuts any claim that he was unduly prejudiced by the denial of the continuance. Without some indication, beyond what might have been offered in making a normal and timely *Pitchess* motion, that the request was likely to bear fruit, we cannot fault the court for choosing to hold appellant to the consequences of his choices rather than grant him favorable treatment.

As to the burden on the court and others, we cannot say the court abused its discretion in choosing to proceed with the trial scheduled for that day rather than delay further based on a last-minute request for a continuance, especially in light of the clear warnings the court had given appellant.

In sum, the trial court did not abuse its discretion in denying appellant's motion for a continuance.

2. Conviction for Both Grand Theft and Unlawful Taking or Driving a Vehicle

Appellant claims that the second count for which he was convicted, unlawful taking or driving a vehicle, is a lesser included offense of the first count for which he was convicted, grand theft. Therefore, he argues, he cannot lawfully be convicted for both crimes. We reject this argument.

Vehicle Code section 10851 states in relevant part that "[a]ny person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, . . . is guilty of a public offense . . . ." (*Id.*, subd. (a).) As our Supreme Court has made clear, this language prohibits two separate acts: taking and driving. (*People v. Garza* (2005) 35 Cal.4th 866, 880 (*Garza*) ["a defendant who steals a vehicle and then continues to drive it after the theft is complete commits separate and distinct violations of [Vehicle Code] section 10851(a)"]; *People v. Jaramillo* (1976) 16 Cal.3d 752, 759, fn. 6 ["the section prohibits driving as separate and distinct from the act of taking"].) Therefore, ". . . Vehicle Code section 10851 covers more criminal conduct than just what qualifies as a lesser included offense to grand theft auto." (*People v. Sauceda* (2016) 3 Cal.App.5th 635, 651.)

The Court of Appeal has found that a defendant may be convicted for both grand theft and for a violation of Vehicle Code section 10851 when those convictions arise from two separate transactions: the initial taking, and the subsequent driving once the theft is complete. (See *People v. Malamut* (1971) 16 Cal.App.3d 237, 241-242 (*Malamut*).) In *Malamut*, the defendant was arrested while driving a car stolen approximately two months earlier. (*Id.* at pp. 239-240.) The information charged the defendant for grand theft occurring on the day the owner discovered his car was missing, and for violation of Vehicle Code section 10851 occurring on the day some two months later when the defendant was arrested driving the vehicle. (*Malamut*, at p. 241.) The court held that the defendant lawfully could be

convicted for both crimes, given the "lapse of a substantial period of time" and the fact "that the vehicle was not being driven in one continuous journey away from the *locus* of the theft." (*Id*. at p. 242.)

The Supreme Court's holding in *Garza*, *supra*, 35 Cal.4th 866, while addressing different circumstances, supports *Malamut*. *Garza* considered whether a defendant could be convicted both under Vehicle Code section 10851 and Penal Code section 496, which concerns receipt of stolen property. (*Garza*, at p. 871.) Section 496 bars dual convictions for theft and receipt of the same property. (*Garza*, at p. 871.) The court held that a defendant could be convicted for both so long as the conviction under Vehicle Code section 10851 was based not on taking the vehicle, but on driving it after the theft was complete. (*Garza*, at p. 881.) In that particular case, because the defendant was arrested in the car six days after the theft, the court held that the taking was "long since complete" and the subsequent driving "constituted a separate, distinct, and complete violation of section 10851(a)." (*Id.* at p. 882.)

Under *Malamut* and *Garza*, it is clear that appellant lawfully could be convicted for both grand theft and a violation of Vehicle Code section 10851. The uncontroverted evidence showed that the theft took place on March 28, 2015. Appellant was discovered in the car nearly five months later, on August 25, 2015. Mendez testified that appellant admitted to "occasionally dr[iving] the vehicle as needed," which indicated he drove it more than once for purposes other than simply moving "away from the *locus* of the theft" (*Malamut, supra*, 16 Cal.App.3d at p. 242). In other words, appellant both stole the vehicle and subsequently

drove it for purposes unrelated to completing the theft, and thus could be convicted for the two separate acts.

Appellant cites *People v. Pater* (1968) 267 Cal.App.2d 921, which held that the defendant could not be convicted for both grand theft and a violation of Vehicle Code section 10851, even when the two events took place days apart and were not alleged as the same offense. (*Pater*, at p. 924.) The court held that "[t]here was just one continuous, indivisible, inseverable act or course of conduct which, as we see it, would have retained its indivisible status so long as defendant retained the original dominion over the property obtained by the original theft. Neither clocks, calendars nor county boundaries convert one continuing course of conduct into a series of criminal acts." (*Id.* at p. 926.) The court rejected "a rule permitting continuous cumulative actions against the thief under [Vehicle Code section 10851]." (*Id.* at p. 928.)

Given the Supreme Court's holding in *Garza*, we must adopt *Malamut*'s holding over *Pater*'s. *Garza* made clear that a violation for driving a vehicle six days after it was stolen is not a continuation of the theft, which at that point has been completed. (*Garza, supra*, 35 Cal.4th at pp. 880-881.) The act of taking and the act of driving are "legally separable" once the theft is complete. (*Id.* at p. 880, fn. 2.)

Thus, appellant was lawfully convicted of both grand theft and violation of Vehicle Code section 10851.

3. Application of Section 654

Appellant argues that even if he was properly convicted for both grand theft and violation of Vehicle Code section 10851, his sentence for the latter conviction should have been stayed pursuant to Penal Code section 654. We reject this argument.

Section 654 prohibits punishment for two crimes arising from a single, indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) "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." (*People v. Beamon* (1973) 8 Cal.3d 625, 637 (*Beamon*), italics omitted.) "But even if a course of conduct is 'directed to one objective,' it may 'give rise to multiple violations and punishment' if it is 'divisible in time.' " (*People v. Deegan* (2016) 247 Cal.App.4th 532, 542, quoting *Beamon*, at p. 639, fn. 11.) One factor often considered in determining whether multiple offenses are "divisible in time" is whether the defendant had an opportunity to reflect upon and renew his or her intent before committing the next offense. (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1255.)

We need not decide whether appellant's conduct was directed to one objective because the two offenses for which he was convicted were clearly "divisible in time." Indeed, the trial court justified its decision not to apply section 654 in part because of "the length of time that the defendant did in fact have the vehicle." Appellant had possession of the stolen vehicle for five months after taking it, and admitted that he drove it as needed during that period. This was plenty of time to reflect upon and renew his intent to continue to drive the car without consent.[9]

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[9] The trial court, in concluding that section 654 did not apply, also found that appellant initially had stolen the car for transportation, and later decided to live in it. Respondent argues that this was evidence that appellant had two different objectives

Appellant cites to *Malamut*, which advocated application of section 654 in cases where a defendant was convicted both for stealing and driving a vehicle. (*Malamut*, *supra*, 16 Cal.App.3d at pp. 242-243.) Indeed, the trial court in *Malamut* stayed the execution of the lesser count under section 654, an action approved of in the appellate opinion. (*Malamut*, at pp. 239, 243-244.) But *Malamut* was decided before *Beamon*, the Supreme Court case stating that a course of conduct divisible in time could "give rise to multiple violations and punishment." (*Beamon*, *supra*, 8 Cal.3d at p. 639, fn. 11.) *Malamut* therefore does not support a finding of error by the trial court.[10]

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in committing his unlawful acts. We would note that *living* in a stolen vehicle is not a violation of Vehicle Code section 10851, which only prohibits the taking or driving of a vehicle without the owner's consent. (See 2 Witkin, Cal. Criminal Law (4th ed. 2012) Crimes Against Property, § 109, p. 150 [element of "driv[ing] or tak[ing]" under Veh. Code, § 10851 "necessarily involves proof of something more than the defendant was in the automobile at some time or even had possession of it when arrested"].) In this case, however, there was uncontroverted evidence that appellant admitted to driving the vehicle after taking it.

[10] The other cases cited by appellant in which section 654 applied involve multiple offenses either committed within seconds of one another, or arising from the same act. (*People v. Logan* (1953) 41 Cal.2d 279, 283-284 [defendant hit woman with baseball bat and immediately stole her purse]; *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1346 ["The parties agree appellant's two convictions arose from a single act."].) They are inapposite to this case, where the two offenses took place at substantially different times.

For the above reasons, we hold that the trial court did not err in declining to apply section 654 when determining appellant's sentence.

4. Sentencing Error

The trial court enhanced appellant's sentence by one additional year for each of six prior convictions, pursuant to section 667.5, subdivision (b). The court then stayed the sentence as to two of those six enhancements, case Nos. MA019049 and MA023723, thus effectively adding only four years. Appellant argues, and respondent concedes, that the court should have stricken, rather than stayed, the two enhancements. Appellant is correct: "Once the prior prison term is found true within the meaning of section 667.5(b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken." (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) Thus, the enhancements based on case Nos. MA019049 and MA023723 must be stricken.

DISPOSITION

We modify appellant's judgment as set forth in part 4 of this opinion. The trial court is directed to forward a corrected abstract of judgment to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J. GRIMES, J.