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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIE EUGENE CAMPBELL,

Defendant and Appellant.

B283615

(Los Angeles County  
Super. Ct. No. MA069921)

APPEAL from a judgment of the Superior Court of Los Angeles County, Andrew E. Cooper, Judge. Affirmed as modified, with directions.

Susan L. Ferguson, 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, Margaret E. Maxwell and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

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Willie Eugene Campbell appeals the judgment of conviction after a jury found him guilty of being a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1); count 4),<sup>1</sup> possession of ammunition by a felon (§ 30305, subd. (a)(1); count 5), possession of a stun gun by a felon (§ 22610, subd. (a); count 6), and possession of a controlled substance while armed with a loaded firearm (Health & Saf. Code, § 11370.1, subd. (a); count 12). Campbell admitted he suffered a prior prison term for purposes of section 667.5, subdivision (b).

Campbell contends the trial court was obligated to stay imposition of sentence on counts 4 and 5 pursuant to section 654. He also contends the one-year enhancement imposed pursuant to section 667.5 must be stricken because it is not supported by substantial evidence. The People concede that the sentence on count 5 should be stayed, and that the one-year enhancement should be stricken in the interest of justice. We accept these concessions. We affirm the judgment as modified.

## **FACTUAL AND PROCEDURAL SUMMARY<sup>2</sup>**

### **1. *Evidence at Trial***

At approximately 4:00 a.m., on October 12, 2016, Los Angeles County Sheriff's Deputy Kevin Bowes and his partner conducted a probation compliance search at the Knight's Inn in Palmdale. The deputies knocked on the door to room 250,

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<sup>1</sup> All undesignated section references are to the Penal Code.

<sup>2</sup> We present the facts in the light most favorable to the judgment in accord with established principles of appellate review. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

announced their identities and, after receiving no response, used a key card provided by the manager to enter the room. The deputies immediately noticed the odor of burnt marijuana. Four people were inside the room—Campbell was lying in bed, Nicole Lerma and Tierra McGowan were seated at a table, and Anthony Palmer was standing in the corner.

There was a red folder on top of the table with a debit card, a folded dollar bill, and the remnants of a white powdery substance resembling cocaine. A crystal-like substance resembling methamphetamine was found in Lerma's purse, and a methamphetamine pipe was found on Palmer's person.

On the bed next to Campbell was marijuana and a camouflage backpack. The backpack was partially open and the butt of a black pistol was visible. The backpack contained a loaded nine-millimeter semiautomatic pistol, with seven rounds in the magazine and one round in the chamber. Deputy Bowes "dry-fired" the firearm and determined that it was operable.<sup>3</sup>

Also inside the backpack were a stun gun, two digital scales, two vials, a plastic bag containing a green leafy substance resembling marijuana, a plastic baggie containing a crystal-like substance resembling methamphetamine, and a plastic bottle containing a mix of prescription pills. The backpack also contained a passport and driver's license belonging to Campbell, mail addressed to Campbell, and a birth certificate for his son.

John Bever, a senior criminalist with the sheriff's department, examined the evidence collected from the scene. The green leafy substance tested positive for marijuana and weighed 43 grams. The crystal-like substance tested positive for

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<sup>3</sup> To "dry fire" means to test whether the firearm is operable after removing the ammunition.

methamphetamine and weighed more than four grams. The prescription pills were identified as Xanax, Adderall, and Soma.

The parties stipulated that the deputies conducted a lawful search of room 250, that the deputies entered the room using a key card provided by the manager, and that Campbell had been previously convicted of a felony.

## 2. *Verdict and Sentencing*

The jury found Campbell guilty of being a felon in possession of a firearm (count 4), possession of ammunition by a felon (count 5), misdemeanor possession of a stun gun by a felon (count 6), and possession of a controlled substance while armed with a loaded firearm (count 12). In a bifurcated proceeding, Campbell waived a jury trial on the prior prison term enhancement allegation, and admitted he suffered a prior prison term for being a felon in possession of a firearm. The date of the prior conviction was June 23, 2010.

The trial court designated count 12 as the base offense and sentenced Campbell to the high term of four years. The court sentenced Campbell to a consecutive one-year term for the prior prison term enhancement, and six months for the misdemeanor possession of a stun gun. The court also imposed concurrent terms of four years on count 4 and three years on count 5. The aggregate term of imprisonment was five years and six months.

## DISCUSSION

### 1. *Section 654 Prohibited the Imposition of Sentence on Count 5, But Not on Count 4*

Campbell contends the concurrent terms on counts 4 and 5 violate section 654's proscription against multiple punishments for a single criminal act because those offenses were indivisible from the base offense for possession of a controlled substance while armed with a loaded firearm. The People argue that the concurrent term on count 4 was authorized but concede section 654 barred the concurrent term on count 5. We agree with the People's position.

#### 1.1 Proceedings Below

Neither party submitted a sentencing memorandum. As discussed, the court selected count 12—possession of a controlled substance while armed with a loaded firearm—as the base term, and sentenced Campbell to the high term of four years.<sup>4</sup> The court also imposed concurrent terms on counts 4 and 5, but it did not address the application of section 654.

#### 1.2 Applicable Law

Section 654, subdivision (a), provides: “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.” Our Supreme Court has consistently interpreted section 654 to allow

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<sup>4</sup> In aggravation, the court relied on Campbell's extensive criminal history, including a prior prison term, the fact that he was on probation when the crimes were committed, and that he “is a threat to the peace and safety of this community.” (Cal. Rules of Court, rule 4.421(b)(2)-(5).)

multiple convictions arising out of a single act or omission, but to bar multiple punishments for those convictions. (*People v. Mesa* (2012) 54 Cal.4th 191, 195.)

The proscription under section 654 includes the imposition of concurrent terms because the defendant is deemed to be subjected to both sentences even though they are served simultaneously. (*People v. Jones* (2012) 54 Cal.4th 350, 353 (*Jones*).) Thus, although there is little practical difference between the two approaches, “the accepted ‘procedure is to sentence defendant for each count and stay execution of sentence on certain of the convictions to which section 654 is applicable.’ [Citations.]” (*Ibid.*)

The question of whether multiple convictions are based upon a single act is determined by examining the facts of the case. (*People v. Mesa, supra*, 54 Cal.4th at p. 196.) The principal inquiry in each case is whether the defendant’s criminal intent and objective were single or multiple. (*People v. Jones, supra*, 54 Cal.4th at p. 374.) “[I]f all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.” [Citation.]” (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 129.) The trial court has broad latitude in making this determination, and its findings must be upheld on appeal if there is any substantial evidence to support them. (*People v. Tarris* (2009) 180 Cal.App.4th 612, 626.) Where, as here, the trial court fails to reference section 654 during sentencing, the fact that the court did not stay the sentence is deemed to reflect an implicit determination that each crime had a separate objective. (*Ibid.*)

1.3 The Concurrent Term on Count 5 Should Have  
Been Stayed

Campbell contends that section 654 precluded multiple punishment under counts 5 and 12 because they were part of an indivisible course of conduct. We agree.

In *People v. Lopez* (2004) 119 Cal.App.4th 132 (*Lopez*), the defendant was sentenced to six years in state prison for unlawful possession of a firearm, along with a concurrent term for unlawful possession of ammunition. (*Id.* at p. 137.) The Court of Appeal held that since all of the ammunition was loaded into the firearm, both offenses comprised an indivisible course of conduct and section 654 precluded multiple punishment. (*Id.* at p. 138.) “While possession of an unloaded firearm alone can aid a person committing another crime, possession of ammunition alone will not.” (*Ibid.*)

The same rationale applies in this case. Campbell’s backpack contained a loaded semiautomatic firearm. All of the ammunition found in the room was loaded into the firearm and the attached magazine. The ammunition served no purpose apart from the gun.

The record contains no factual support for the trial court’s implied determination that Campbell’s possession of a firearm and possession of ammunition involved separate objectives. Accordingly, section 654 precludes imposition of the concurrent term on count 5.

1.4 The Concurrent Term on Count 4 Was  
Correctly Imposed

Campbell contends the concurrent sentence on count 4 (possession of a firearm by a felon) should have been stayed under section 654 because it involved the same act and objective

as count 12 (possession of a controlled substance while armed with a loaded firearm). We disagree.

Possession of a firearm by a felon (§ 29800, subd. (a)(1)) has three elements: (1) the defendant possessed a firearm, (2) the defendant knew that he possessed the firearm, and (3) the defendant had previously been convicted of a felony. (CALCRIM No. 2511.) The offense is completed once the defendant's intent to possess is perfected by possession of the firearm. (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 130; *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1411 (*Ratcliff*).)

Possession of a controlled substance while armed with a loaded firearm (Health & Saf. Code, § 11370.1, subd. (a)), has the following elements: (1) the defendant unlawfully possessed a controlled substance; (2) the defendant knew of its presence and the substance's nature or character as a controlled substance; (3) the controlled substance was in a usable amount; and (4) while possessing that controlled substance, the defendant knowingly had a loaded, operable firearm available for immediate offensive or defensive use. (CALCRIM No. 2303.)

Campbell relies on *People v. Williams* (2009) 170 Cal.App.4th 587 (*Williams*) in support of his contention that the concurrent sentence on count 4 violated section 654.<sup>5</sup> In *Williams*, the defendant was convicted of possession of a firearm by a felon and possession of a controlled substance while armed. (*Id.* at p. 595.) The trial court imposed sentence on the controlled substance violation along with a concurrent term on the felon in

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<sup>5</sup> Campbell's one-sentence argument does not satisfy his burden to present *meaningful* legal analysis. (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.) Nevertheless, we will address the merits of his claim.



possession of a firearm offense, noting the two crimes involved the same act and intent. (*Id.* at p. 645.) The Court of Appeal held the defendant's concurrent term should have been stayed under section 654 because the trial court expressly found that both counts "involved the same act and intent," which was supported by substantial evidence. (*Id.* at p. 646.)

Unlike *Williams*, the trial court here did not make a finding that Campbell's unlawful possession of a firearm and possession of a controlled substance while armed with a loaded firearm offenses involved the same act and intent. Indeed, such a finding would not be supported by the evidence.

We believe *Ratcliff*, *supra*, 223 Cal.App.3d 1401 is more instructive. In *Ratcliff*, the defendant was convicted of robbery with use of a firearm and being a felon in possession of a handgun. (*Id.* at p. 1404.) He contended that under section 654, the trial court improperly sentenced him on the felon in possession offense and then enhanced his sentence for the use of the same firearm. (*Id.* at p. 1405.) The Court of Appeal disagreed, concluding the crime of felon in possession of a firearm "is complete once the intent to possess is perfected by possession. What the ex-felon does with the weapon later is another separate and distinct transaction undertaken with an additional intent which necessarily is something more than the mere intent to possess the proscribed weapon." (*Id.* at p. 1414.)

Citing *Ratcliff*, the court in *Jones*, *supra*, 103 Cal.App.4th 1139 found that implicit in the trial court's imposition of concurrent sentences for the defendant's felon in possession of a firearm and shooting at an inhabited dwelling offenses was a determination that the former was a separate and distinct offense from the latter. (*Jones*, at p. 1147.) The appellate court

concluded: “the evidence was sufficient to allow the inference that [defendant’s] possession of the firearm was antecedent to and separate from the primary offense of shooting at an inhabited dwelling. It strains reason to assume that [defendant] did not have possession for some period of time before firing shots . . . . Any other interpretation would be patently absurd.” (*Ibid.*)

The court continued: “prohibiting multiple punishment under the circumstances presented here would not further the policies underlying sections 654 and 12021. Section 654’s purpose is to ensure that punishment is commensurate with a defendant’s culpability. [Citations.] This concept ‘works both ways. It is just as undesirable to apply the statute to lighten a just punishment as it is to ignore the statute and impose an oppressive sentence.’ [Citation.] . . . . We see no reason why a felon who chooses to arm himself or herself in violation of section 12021 should escape punishment for that offense because he or she uses the firearm to commit a second offense. . . .” (*Jones, supra*, 103 Cal.App.4th at p. 1148.)

In this case, Campbell completed the unlawful possession of a firearm offense once he took possession of the firearm. (*People v. Spirlin, supra*, 81 Cal.App.4th at p. 130; *Ratcliff, supra*, 223 Cal.App.3d at p. 1411.) However, he did not complete the Health and Safety Code section 11370.1 violation until he possessed the methamphetamine at the same time he possessed a loaded firearm available for immediate offensive or defensive use. (CALCRIM No. 2303.) There is no evidence that Campbell obtained the methamphetamine and the loaded firearm during the same course of conduct.

Thus, the record supports the trial court’s implied finding that Campbell’s possession of the firearm was separate from the

Health and Safety Code section 11370.1 violation, and that Campbell harbored a separate intent and objective for each offense.<sup>6</sup> We, therefore, conclude the trial court did not violate section 654 by imposing a concurrent sentence on count 4.

*2. The One-Year Enhancement Under Section 667.5 Was an Unauthorized Sentence*

Campbell contends the one-year enhancement imposed pursuant to section 667.5, subdivision (b), must be stricken because it is not supported by substantial evidence. Specifically, Campbell asserts that although he waived jury trial and admitted the prior conviction, “there was no admission, evidence, or true finding that [he] did not remain free of prison custody for five years before committing the instant offense.” Alternatively, Campbell contends he was deprived of the effective assistance of counsel based on counsel’s failure to object to the unlawful sentence.

The People concede that, based on evidence outside the appellate record, Campbell remained free from custody and other felony convictions for five years after his release from prison. The People request that this court strike the enhancement in the interest of justice, rather than ordering additional proceedings on habeas corpus or remand.

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<sup>6</sup> Presumably, Campbell possessed the methamphetamine with the intent to either use or sell it, whereas he possessed the firearm for offensive or defensive use.

## 2.1 Proceedings Below

The information alleged that, pursuant to section 667.5, subdivision (b), Campbell suffered a prior conviction for being a felon in possession of a firearm in case No. MA048695, and that he did not remain free of prison custody during a period of five years after the conclusion of said term. At the sentencing hearing, the court asked if Campbell wished to waive his right to a jury trial on the alleged prior conviction allegation. Campbell answered in the affirmative, and counsel joined in the waiver.

Although Campbell admitted he “sustained this conviction,” he did not admit, he was not asked, and there was no evidence that he remained free of custody for the five-year period prior to committing the current offenses. The trial court found the prior conviction true based upon his admission.

## 2.2 Applicable Law

“Section 667.5, subdivision (b), provides for a one-year sentence enhancement on a new felony conviction resulting in a prison sentence where the defendant has previously been convicted of a felony and served a prison term. The enhancement is imposed for ‘each prior separate prison term . . . for any felony.’ Under the washout provision, however, the enhancement is *not* imposed if the defendant is free of both felony convictions and incarceration in prison for five years following release from the previous incarceration.” (*People v. Warren* (2018) 24 Cal.App.5th 899, 909; citing § 667.5, subd. (b).)

Put simply, the enhancement does not apply if the defendant had an unbroken five-year period during which he was free of both felony offenses and incarceration in prison. (*People v. Warren, supra*, 24 Cal.App.5th at p. 915.) The five-year period starts once the defendant is released from custody. (*Id.* at

p. 916.) The failure to strike an unlawful enhancement is a legally unauthorized sentence subject to correction on appeal, notwithstanding trial counsel's failure to object. (*People v. Franz* (2001) 88 Cal.App.4th 1426, 1450; *People v. Bradley* (1998) 64 Cal.App.4th 386, 391.)

### 2.3 Analysis

As noted above, Campbell did not admit, and there was no evidence or true finding that he did not remain free of custody for a felony conviction for the five-year period before he committed the instant offenses. Both parties agree the enhancement must be stricken, but disagree as to the rationale.

Campbell contends the record does not contain sufficient evidence supporting the true finding on the enhancement, and asks this court to strike it based on the release date set forth in the probation report. The People maintain that Campbell's reliance on the probation officer's report is improper because it is inadmissible to prove a prior conviction for sentence enhancement purposes. (*People v. Reed* (1996) 13 Cal.4th 217, 230–231.) According to the People, Campbell's prison records, which are not appropriate to introduce into the appellate record, confirm that he remained free from custody for a felony conviction during the five years after his prior release from prison. The People request that we strike the enhancement in the interest of justice without citing any authority supporting our authority to do so.

The probation report confirms that Campbell was released from prison on December 6, 2010.<sup>7</sup> Campbell did

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<sup>7</sup> The probation report must include the end date of each period of custody. (Cal. Rules of Court, rule 4.411.5(a)(11).)

not sustain any other felony offenses until he committed the instant offenses on October 12, 2016. Although the probation report is inadmissible to prove the truth of a prior conviction, we find no authority prohibiting its use as evidence of the defendant's release date. (See *People v. Jacobs* (2013) 220 Cal.App.4th 67, 74 [relying on dates in probation report to calculate custody credits].)

Ordinarily, a defendant's admission regarding a prior offense is sufficient to encompass all the elements of the enhancement set forth in the information. (*People v. Carrasco* (2012) 209 Cal.App.4th 715, 725, overruled on other grounds as recognized in *People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1518.) But unlike the defendant in *Carrasco*, both parties agree that Campbell remained free of prison custody for a period of five years before he committed the current offenses.

In *People v. Epperson* (1985) 168 Cal.App.3d 856, the defendant admitted two prior felony convictions, but he did not admit he had not remained free of prison custody for five years. (*Id.* at pp. 858–859.) The People conceded that the defendant satisfied the five-year washout requirement and that the court should modify his sentence by striking the prison prior enhancements. (*Id.* at pp. 864–865.) Accordingly, the appellate court struck the enhancements, noting that the defendant's affirmative responses to the court's questions regarding his prior conviction did “not represent admissions to all the allegations, including the five-year ‘washout’ allegations, pertaining to the . . . section 667.5, subdivision (b), priors charged in the information.” (*Ibid.*)

*Epperson* is applicable to this case. Campbell's admission that he sustained a conviction for violating section 12021 did not

represent an admission to the five-year “washout” requirement of section 667.5, subdivision (b). (*People v. Epperson*, *supra*, 168 Cal.App.3d at p. 864–865.) In light of the evidence in the probation report and the People’s concession that Campbell remained free of custody during the period in question, we strike the section 667.5, subdivision (b) enhancement.

### **DISPOSITION**

The judgment is modified by staying the concurrent sentence on count 5 (§ 30305, subd. (a)(1)), and by striking the one-year enhancement imposed for the prior prison term (§ 667.5, subd. (b)). The trial court is directed to prepare an amended abstract of judgment in accordance with this opinion, and to forward a certified copy thereof to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

MICON, J.\*

We concur:

WILLHITE, Acting P. J.

COLLINS, J.

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