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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.

EUGENE EVERAL BAIRD,

Defendant and Appellant.

B280275

(Los Angeles County
Super. Ct. Nos. VA141348,
SA092047, YA093648)

APPEAL from a judgment of the Superior Court of Los Angeles County, Yvonne T. Sanchez, Judge. Modified and, as so modified, affirmed.

Rachel Varnell, 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, Michael C. Keller and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Eugene Everal Baird pleaded no contest to three counts of grand theft, and was sentenced to a prison term. He contends that Penal Code section 669, subdivision (b),¹ requires that his sentence be ordered to run concurrently with that imposed in a prior case. We agree, and order the judgment modified accordingly. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 19, 2015, Baird stole 10 Kate Spade handbags, valued at over \$2,000, from a Nordstrom Rack store located in Lakewood. After a preliminary hearing, he was held to answer on charges of grand theft and burglary in case No. VA141348.

The matter was thereafter consolidated with two other open cases pending against Baird, Nos. YA093648 and SA092047, under the VA141348 case number. The SA092047 case arose from Baird's alleged July 7, 2015 and December 12, 2015 thefts of designer handbags from Bloomingdale's. The YA093648 case arose from Baird's alleged December 29, 2015 theft and *Estes* robbery² of handbags from a Nordstrom store located in Torrance. Baird had been released on his own recognizance on another case, No. GA096926, at the time of the Bloomingdale's and Torrance Nordstrom offenses.

An amended information in the consolidated VA141348 case was filed on October 20, 2016, and charged Baird with burglary (§ 459, count 1); four counts of grand theft of personal

¹ All further undesignated statutory references are to the Penal Code.

² *People v. Estes* (1983) 147 Cal.App.3d 23.

property (§ 487, subd. (a), counts 2, 4, 5, and 6); and second degree robbery (§ 211, count 3). The information alleged Baird had suffered a prior conviction for a serious or violent felony (§§ 667, subds. (a)(1) & (d), 1170.12, subd. (b)), had served multiple prior prison terms within the meaning of section 667.5, subdivision (b), and had been released on bail when he committed some of the offenses (§ 12022.1).³ At the time of some or all of the offenses, Baird was on probation on another case, No. BA425387.

On October 29, 2015, Baird was convicted of grand theft and second degree commercial burglary in case No. GA096926. On July 27, 2016, he was sentenced to a term of two years in prison on that matter.⁴

On December 14, 2016, pursuant to a negotiated disposition, Baird pleaded no contest in the consolidated case, No. VA141348, pursuant to *People v. West*,⁵ to three counts of grand theft of personal property (counts 2, 4, and 6). Baird stipulated that the value of the loss in each count was greater than \$950. In accordance with the negotiated disposition, the

³ The information alleged the prior “strike” as to counts 1 and 2; the section 667, subdivision (a)(1) serious felony enhancement as to count 3; the section 12022.1 on bail enhancement as to counts 3, 4, and 5; four section 667.5, subdivision (b) prior prison term enhancements as to counts 1 and 2; and six section 667.5, subdivision (b) prior prison term enhancements as to counts 3, 4, 5, and 6.

⁴ We granted Baird’s request that we take judicial notice of the abstract of judgment in case No. GA096926. (See Evid. Code, §§ 452, 459.)

⁵ *People v. West* (1970) 3 Cal.3d 595.

trial court sentenced Baird to the upper term of three years on count 2, plus one-third the midterm (eight months), on counts 4 and 6, each to be served consecutively to the sentence on count 2, for a total sentence of 4 years 4 months. Baird admitted violating probation in case No. BA425387, and the court imposed a consecutive eight-month sentence on that matter, with credit for 248 days time served. Counts 1, 3, and 5 and the remaining allegations were dismissed pursuant to the plea agreement. The court imposed a restitution fine, a suspended parole revocation restitution fine, a court operations assessment, a criminal conviction assessment, a penalty assessment, and a crime prevention fine.

Baird timely appealed.⁶

DISCUSSION

Baird contends that, because the trial court failed to expressly state whether his sentence in the instant matter should run concurrently or consecutively to the sentence imposed in case No. GA096926, by operation of law the two sentences must run concurrently. We agree.

Section 669 requires the trial court to specify whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively. It provides in pertinent part: “(a) When a person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by

⁶ The trial court denied Baird’s request for a certificate of probable cause. However, a certificate was not required here because Baird’s appeal concerns an issue not covered by the plea agreement, and does not attack the validity of the plea. (See § 1237.5; *People v. Shelton* (2006) 37 Cal.4th 759, 766; *People v. Williams* (2007) 156 Cal.App.4th 898, 910.)

different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively. . . . [¶] (b) In the event that the court at the time of pronouncing the second or other judgment upon that person had no knowledge of a prior existing judgment or judgments, or having knowledge, fails to determine how the terms of imprisonment shall run in relation to each other, then, upon that failure to determine, or upon that prior judgment or judgments being brought to the attention of the court at any time prior to the expiration of 60 days from and after the actual commencement of imprisonment upon the second or other subsequent judgments, the court shall, in the absence of the defendant and within 60 days of the notice, determine how the term of imprisonment upon the second or other subsequent judgment shall run with reference to the prior incomplete term or terms of imprisonment. Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently.” Section 669 thus “requires that when a person has been convicted of two or more offenses (whether in the same or separate proceedings), the court must decide whether the terms are to run concurrently or consecutively. If the court fails to direct how the terms are to run, they must be served concurrently.” (*People v. Black* (2007) 41 Cal.4th 799, 820-821.) The requirement that concurrent sentences be imposed is a default in the event the court fails to exercise its discretion. (*Id.* at p. 822.)

Here, the trial court failed to specify whether the sentence in the instant matter, case No. VA141348, was to run

consecutively or concurrently to that in case No. GA096926. Neither the court's comments at sentencing, nor the minute order or abstract of judgment, referenced case No. GA096926. The record does not suggest that the omission was brought to the court's attention thereafter, or that the court ever exercised its discretion on the question. Therefore, the new term "became a concurrent sentence by operation of law." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1181-1182; *In re Joyner* (1989) 48 Cal.3d 487, 490; *People v. Kading* (1988) 204 Cal.App.3d 1500, 1503, fn. 2; *People v. Lepe* (1987) 195 Cal.App.3d 1347, 1350 [trial court has discretion to determine whether multiple sentences are to run concurrently or consecutively, but a "concurrent sentence . . . will be imposed as a matter of law if the court fails to determine how the terms of imprisonment will run in relation to each other"]; *In re Jiminez* (1985) 166 Cal.App.3d 686, 690 [subsequent judgments are deemed to run concurrently if the court neglects to state the manner in which the sentences are to be served at the time it pronounces the second judgment].)

The People argue that "because the trial court was unaware of [the] prior case, appellant is not entitled to invoke the concurrent sentence default disposition under section 669." The People's argument is both factually and legally incorrect.

The record suggests the trial court was indeed aware of the other case. The information stated that at the time of the commission of three of the charged offenses, Baird "was released from custody on bail or Own Recognizance in Case Number GA096926 within the meaning of Penal Code section 12022.1." At a June 22, 2016, hearing, the trial court stated, during a discussion regarding scheduling, "That reminds me. People, this gentleman is – has a public defender on one case that's case

[No.] GA096926[.]” Two days before Baird entered his plea, when discussing Baird’s credits the trial court observed that “[a]ny court will calculate your credit, *they will say he was a sentenced prisoner. That time is gone.*” (Italics added.) When taking Baird’s plea, the deputy district attorney told Baird, “You will get credit in this case for – from January 14th through July 14th, because that’s the period of time before you were sentenced in the GA case that is not before us today.”

In any event, section 669 applies where a trial court is unaware of the earlier case. “Section 669 mandates the sentencing court to specify at the time of judgment whether a defendant convicted of two or more crimes will serve his terms concurrently or consecutively. That decision . . . may be rendered ‘at any time prior’ to 60 days after judgment *if either* (1) *the sentencing courts did not know of a prior existing judgment* or (2) the court, ‘having knowledge [of the prior existing judgment],’ fails to determine how the terms of imprisonment shall run. If no decision is made, the terms run concurrently.” (*In re Calhoun* (1976) 17 Cal.3d 75, 79-80, fns. omitted, italics added.) Thus, assuming arguendo the trial court was unaware Baird had been sentenced in the earlier case, that circumstance is of no moment.

In sum, because the trial court did not specify whether the terms in case Nos. VA141348 and GA096926 were to be served concurrently or consecutively, the sentences must run concurrently by operation of law. We order the abstract of judgment modified accordingly.

DISPOSITION

The trial court is directed to correct the minute order and abstract of judgment to indicate that the sentence in the instant matter is to run concurrently with the sentence in case No. GA096926. The clerk of the superior court is directed to forward a copy of the modified abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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DHANIDINA, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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