Court of Appeal, Sixth District, California.
The PEOPLE, Plaintiff and Respondent,
v.
Amy Marie GARVIN, Defendant and Appellant.
No. H026723.
(Santa Clara County Super. Ct. No. FF301260).

Feb. 10, 2005.

Mark S. Howell, Office of the Attorney General, San Francisco, CA, for Plaintiff-Respondent.

Lori Quick, Sixth District Appellate Program, Santa Clara, CA, for Defendant-Appellant.

BAMATTRE-MANOUKIAN, Acting P.J.

***1** Defendant Amy Marie Garvin was convicted after jury trial of grand theft by an employee (Pen.Code, § § 484, 487, subd. (b)(3)), [FN1] and petty theft with a prior (§ 666). [FN2] The trial court sentenced defendant to concurrent middle-term sentences of eight months (one-third the middle term), the sentences to be served consecutive to the term previously imposed in an unrelated case. On appeal defendant argues that, as the offenses in the two counts were committed pursuant to a single plan and intent, she can be convicted of only grand theft as a matter of law. Alternatively, defendant argues that section 654 prohibits imposing concurrent sentences on the two counts. We agree with defendant's second contention. We also find that the abstract of judgment does not reflect the actual sentence that the court imposed for the grand theft count. We will therefore order the abstract of judgment modified and affirm the judgment as so modified.

FN1. Further statutory references are to the Penal Code.

FN2. The jury found defendant guilt of petty theft and defendant admitted having committed the specified prior.

BACKGROUND

Defendant was charged by amended information filed October 3, 2003, with grand theft of money by an employee between January 21 and February 12, 2003 (§ § 484, 487, subd. (b)(3); count 1), and petty theft of store merchandise on or about January 22, 2003, with a prior theft conviction (§ 666; count 2). The information further alleged that defendant had two prior felony convictions (§ 1203, subd. (e)(4)). On October 8, 2003, outside the presence of the jury, defendant admitted the prior petty theft conviction alleged in count 2, and the court read count 2 of the information to the jury as a petty theft charge (§ § 484, 488).

Brandon Gregg testified for the prosecution that in January 2003 he was a district investigator for Ross Stores (Ross) when he received an anonymous tip that five or six employees at the store in Morgan Hill were stealing from the store. One of the named employees was defendant, who had been hired on January 12, 2003. Early in his investigation Gregg determined that it appeared that defendant was refunding cash or merchandise to herself.

Ross has a policy called "Code 50" where, whenever a sales associate leaves the

store, his or her bags, backpack, and purse are checked. A manager or supervisor looks in the bags and matches the receipt to the tags of items purchased. Associates must have another associate ring up their purchases, and are not allowed to make purchases after the store is closed. Sales receipts for employee purchases say "Employee Sale," and include the employee number of the associate that made the purchase. Defendant's employee number was 531230.

On the night of January 22, 2003, Gregg sat in his car in the parking lot of the Morgan Hill store with a night-vision camcorder and watched activity in the store. [FN3] Gregg saw defendant working at a cash register, and watched her close the store with her supervisor Corina C. and other employees. Before the other employees left, defendant left the customer service area and walked around the store looking at merchandise. Defendant returned to the customer service area with an item that had a price tag on it while rolling the item up. She walked around the customer service area, bent down, and put the item into something. She then picked up a bag from the floor of the customer service area and put it on the counter. Gregg did not see any associate ring up defendant's selection before Corina and defendant exited the store, each carrying a full bag. The bags they were carrying were not Ross bags, and neither Corina nor defendant checked the other's bag before exiting.

> FN3. An edited copy of Gregg's videotape, which included a display of the date and time, was played for the jury.

***2** Corina set the store alarm and locked the doors behind them. She and defendant then walked directly to Corina's car, got in, and drove away. Gregg did not follow them. Later that night Gregg checked the computer and found that there were no employee purchases made by either Corina or defendant that night.

Gregg then did a computer investigation of every register transaction that was entered using defendant's employee number, including purchases, sales, returns, and employee purchases, looking for any fraudulent activity. He found that in one half of the same-day-return transactions that were entered between January 21 and February 12, 2003, with defendant's employee number, more money was refunded than the item's recorded purchase price and the California driver's license number listed for the customer in each of these return transactions was similar. [FN4] In addition, out of 21 returns, only one had the required customer information form.

> FN4. Shazad Contractor later testified that about two-thirds of the listed license numbers were valid California license numbers, but none were from the Morgan Hill area.

Gregg taped his interview of defendant on February 19, 2003, with defendant's permission. He showed defendant the paperwork he had developed regarding the same-day-return transactions, but she denied doing anything wrong. He then showed her the videotape he made on January 22, 2003. After viewing the videotape defendant said that she had taken a sweater or jacket worth $70. She also admitted having done the refund transactions, saying that she needed the money to pay medical bills. After defendant wrote out a statement admitting that she took merchandise worth $70, Gregg left the room and called the police. While he was on the phone, defendant ran by him in the direction of the bathroom, covering her mouth. He then heard the office door close. He ran after defendant, but she was already driving away by the time he exited the store.

Shazad Contractor testified for the defense as an expert in accounting. He reviewed the documents relating to defendant's case and determined that between February 3 and 12, 2003, 11.8 percent of purchases were returned. He determined that transactions were begun under defendant's employee number within seconds of each other on two different but nearby registers. And he determined that there was

a register transaction under defendant's employee number on January 28, 2003, during a time that defendant was not scheduled to work. Defendant did appear to work every day the questioned transactions occurred, and no other employee did so. He did not come to the conclusion, however, that the documents showed that somebody was stealing from Ross.

Louis Martinez was the store manager of the Morgan Hill Ross store when defendant started working there. He testified that as defendant's supervisor, he had an opportunity to watch her work about once a week and never saw her do any bad transactions. He did see her retain receipts that she should have given to customers. It would not be out of the ordinary for an associate to take a damaged item of merchandise from the sales floor at the end of the day, fold it and place it behind the cash register, and then take it to the stockroom the next day. Associates may also shop at nearby stores during their lunch break, bring back their purchases and store them behind the cash register until they leave for the day.

*3 **Richard Ofshe,** an emeritus professor of social psychology at the University of California at Berkeley, testified for the defense as an expert in interrogations and false confessions. He testified that a poorly done interrogation could produce a false confession. Poorly trained interrogators use false "evidence ploys" in conjunction with inappropriate psychological "motivators" to coerce false confessions without knowing that the confessions are false. These interrogators focus only on producing a confession without thinking about the guilt or innocence of the person interrogated.

Lanett Beard, district administrator for Ross, testified in rebuttal that she was present during Gregg's interview of defendant. Defendant initially denied stealing items or making false refunds. After Gregg showed defendant the surveillance tape, defendant said that she was coerced into doing the refunds. She also said that most items in the bag on the video were for Corina, and that she only kept a shirt. Gregg asked defendant to make a written statement and then left the room. Defendant told Beard that she was sorry and that she did not want to go to jail, and asked if she could just pay for the items she had taken. Gregg came back into the room and talked to defendant about her written statement. When he left the room again, defendant said that she was feeling ill and that she was going to the bathroom. After Beard heard a door close, and Gregg asked her where defendant went, Beard went into the bathroom and found defendant was not there.

On October 16, 2003, the jury found defendant guilty of grand theft by an employee (§ 487, subd. (b)(3)), and petty theft (§ 488). The probation officer's report recommended that defendant be sentenced to eight months (one-third the middle term) on each count, the sentences to be served consecutive to the two-year term imposed on September 3, 2003, in an unrelated matter (case No. FF197888). On November 10, 2003, the trial court sentenced defendant to the middle term of two years for the grand theft by an employee, with a concurrent middle-term sentence of two years for the petty theft with a prior. It also ordered that the sentences were to be served consecutive to any other sentence defendant may be serving, "specifically FF197888." "I think by operation of law, that means she'll be doing eight months consecutive to her two years on the drug case." After the court imposed various fines, defense counsel asked: "Your Honor, just so we're clear: So in addition to the two years on the docket ending in 88, she would be serving eight more months consecutive to that case?" The court responded: "I believe that's true, one-third the midterm. Midterm is 24 months, and I think that means eight months consec." Defendant filed a notice of appeal the same day.

DISCUSSION

At sentencing, the trial court stated: "I am aware that I have the ability to run

the sentences concurrent or consecutively and although--well, it is my view that they, in essence, are part of one continuing criminal enterprise. [¶] Count 1 is based on a number of thefts that collectively were grand theft, and they overlapped the period of time in which Count 2, a discreet theft of the merchandise, apparently occurred. Accordingly, I find that the objectives were essentially the same, to steal from Ross. And although they were committed at separate times and places, it was one continuing course of conduct that involved a number of thefts from her employer who, quite unfortunately, trusted her. [¶] Accordingly, the sentences will be served concurrently."

***4** Defendant first argues that because the two offenses, grand theft by an employee and petty theft with a prior, were committed pursuant to a single intent and plan, as a matter of law she can only be convicted of one count of grand theft. In support of this argument defendant relies primarily on *People v. Bailey* (1961) 55 Cal.2d 514 (*Bailey*). Alternatively defendant argues that, assuming that she could be lawfully convicted of both offenses, section 654 prohibits imposing a concurrent sentence for the petty theft with a prior offense.

The Attorney General argues that the information charged two distinct theft offenses: count 1 alleged a theft of money by an employee in an amount over $400 over a period of approximately three weeks, and count 2 alleged a theft of store merchandise implicitly worth less than $400 on a specific date. The Attorney General also argues that before and during trial the parties clearly understood that the prosecutor's theories for the two counts rested on different facts and evidence, and points out that at the conclusion of the prosecution's case defendant moved for a judgment of acquittal (§ 1118.1) only as to count 2. In addition, during argument the prosecutor told the jury that the petty theft offense was based on the videotape showing defendant picked up an item of merchandise, put it in a bag and walked out of the store with it, while the grand theft offense was based on evidence that defendant took money through a series of same-day-return register transactions.

In *Bailey,* the defendant was convicted of grand theft based on evidence that she had unlawfully obtained a number of welfare payments, each less than $200 but aggregating more than that sum, by false pretenses. [FN5] (*Bailey, supra,* 55 Cal.2d at pp. 515, 518 .) The trial court had instructed the jury that if several thefts are done pursuant to an initial design or plan to take more than $200, and if more than that amount is taken, there is a single crime of grand theft. On the other hand, if there is no such initial design or plan, then the taking of less than $200 is petty theft. (*Id.* a pp. 518-520.) In approving this instruction, our Supreme Court stated: "Whether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan. [Citation.]" (*Id.* at p. 519.)

> FN5. At the time, grand theft involved, among other things, theft of money exceeding $200. (See former § 487; Stats.1957, ch. 1794, § 1 .)

As this court noted in *People v. Washington* (1996) 50 Cal.App .4th 568, at page 575, "The single-intent-and-plan doctrine or test articulated in *Bailey* has been consistently applied in *theft* cases. (See, e.g., *People v. Sullivan* (1978) 80 Cal.App.3d 16 ... [error not to give *Bailey* instruction where evidence supports finding one intent and plan concerning multiple misappropriations]; *People v. Packard* (1982) 131 Cal.App.3d 622 ... [affirming one count of grand theft and reversing others where no evidence of separate intents and plans]; *People v. Kronemyer* (1987) 189 Cal.App.3d 314 ... [following *Packard*]; ...)"

***5** In *People v. Neder* (1971) 16 Cal.App.3d 846, in declining to extend the *Bailey* doctrine to forgery, the appellate court stated: "That doctrine was developed for the crime of theft to allow, where there is a common plan, the accumulation of receipts from takings, each less than $200, so that the taker may be prosecuted for grand theft as opposed to several petty thefts. The essential act in all types of theft is taking. If a certain amount of money or property has been taken pursuant to one plan, it is most reasonable to consider the whole plan rather than to differentiate each component part. [Citation.]" (*Id.* at p. 852, fn. omitted.)

The above cases support a finding that the *Bailey* doctrine was appropriately applied to the facts of this case to allow defendant to be convicted of grand theft for the multiple same-day-return register transactions, each of which totaled less than $400. However, the *Bailey* doctrine does not preclude defendant from being separately convicted of petty theft for the single act of taking an item of store merchandise. Although the single theft of the store merchandise occurred during the same time frame that the theft of cash was occurring, the facts, circumstances and evidence supporting the two theft counts were distinct and, had defendant been acquitted of either count, it would not have affected a conviction on the other count. The conviction of petty theft with a prior will not be stricken.

Defendant next contends that the two thefts for which she was convicted were committed with the same objective and intent. Thus, she argues that under section 654 she may not be separately punished for the petty theft with a prior offense. We agree.

Section 654, subdivision (a), states in relevant 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." Under section 654, courts are generally precluded from imposing separate punishment were a defendant engages in a course of conduct which violates more than one statute and comprises an indivisible transaction punishable under more than one statute. (*In re Adams* (1975) 14 Cal.3d 629, 634; *People v. Bauer* (1969) 1 Cal.3d 368, 376.) The focus of this rule is whether the defendant acted pursuant to a single intent and objective. (*People v. Perez* (1979) 23 Cal.3d 545, 551-552.) The resolution of this question is one of fact, and the trial court's finding will be upheld on appeal if it is supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730.)

In this case, the trial court specifically found that the two separate theft offenses were part of one continuing course of conduct, the central objective of which was to steal from Ross. The evidence supports such a finding. Accordingly, the concurrent term imposed for count 2, petty theft with a prior, must be stayed. (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 420 [the proper procedure for disposing of a term banned by § 654 is to impose and stay sentence].)

***6** We note that the clerk's minutes and the abstract of judgment both state that the court imposed concurrent middle term sentences of two years on the two counts. The clerk's minutes include a notation that the terms are to be served consecutive to the term imposed in case No. FF197888. [FN6] The abstract of judgment states that the sentences imposed in this case are to be served consecutive to the term imposed in case No. FF197888, that the sentence imposed for the grand theft by an employee is a consecutive full-term sentence of two years, that the sentence imposed for the petty theft with a prior is a concurrent term of two years, and that the total term imposed for the two cases is four years. We will order the abstract of judgment modified to state that the sentence imposed by the trial court for count 1, grand theft by an employee, was eight months, one-third the middle

term, and that the sentence imposed for count 2, petty theft with a prior, is stayed under section 654. The total term for both this case and case No. FF197888 is therefore two years, eight months.

FN6. The minutes erroneously list the case number as FF197188.

DISPOSITION

The abstract of judgment is ordered modified to state that the sentence imposed for count 1, grand theft by an employee, is a consecutive term of eight months, one-third the middle term; that the sentence imposed for count 2 is stayed under section 654; and that the total sentence imposed in this case and case No. FF197888 is two years, eight months. The superior court is ordered to prepare an amended abstract of judgment and to send it to the Department of Corrections. As so modified, the judgment is affirmed.

WE CONCUR: MIHARA and McADAMS, JJ.

2005 WL 318818 (Cal.App. 6 Dist.) Not Officially Published, (Cal. Rules of Court, Rules 976, 977)

Briefs and Other Related Documents **(Back to top)**

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