Filed 3/26/04

CERTIFIED FOR PARTIAL PUBLICATION*

# COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

---

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JONATHAN JOSEPH SHELTON,<br><br>Defendant and Appellant. | C044625<br>(Sup.Ct. No. 00F05251) |

APPEAL from a judgment of the Superior Court of Sacramento County. James L. Long, Judge. Reversed in part.

George Bond and Deborah Prucha, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, and Carlos A. Martinez, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Jonathan Joseph Shelton appeals from a judgment following a plea agreement imposing a prison term of three years

---

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of part II.

eight months on convictions of stalking (Pen. Code, § 646.9, subd. (b) [all further unspecified statutory references are to the Penal Code]), and making criminal threats (§ 422).

Defendant contends the trial court erred in imposing consecutive sentences for the two offenses (§ 654). We agree and will modify his sentence.

## ***BACKGROUND***

### ***The Charges and The Plea Agreement***

Defendant was charged in a six-count information with stalking (§ 646.9, subd. (b); burglary (§ 459); two counts of making criminal threats (§ 422); and two counts of violating a restraining order (§ 273.6, subd. (d).)

Defendant and the district attorney reached a negotiated plea agreement whereby defendant would plead no contest to count one (stalking) and count three (criminal threat). In exchange, the remaining counts would be dismissed and the maximum prison term which could be imposed would be three years eight months.

The factual basis for the stalking count as recited by the district attorney was, that between the dates of January 7, 2003, and February 2, 2003, defendant "maliciously and repeatedly followed and harassed [his ex-wife] [(the victim)] and made a credible threat with the intent she be placed in reasonable fear for her safety and the safety of her immediate family." The factual basis for the criminal threat count was that "on or about January 15th of 2003 . . . defendant willfully and unlawfully threatened to kill [the victim] with the specific intent that she take that as a threat . . . and further [the

victim] was reasonably in sustained fear of her safety and the safety of her family based on that."

***Factual Basis of the Convictions***

A presentence probation report was prepared. We summarize the facts therein relating to the two charges to which defendant pleaded no contest.

In January 2003 (all further calendar references are to 2003), defendant was on formal probation for assault and was subject to a restraining order prohibiting contact with his former wife.

On January 14, defendant called the victim at her workplace and told her he was going to her home. Upon returning from work, she found the kitchen window had been taken out of its frame. Defendant called later that night and told her he was the person who pried the window and that he did it to show her he could get into her house at any time. The next day, defendant telephoned the victim and told her "he was going to blow up her home and go to her work and shoot her." She became terrified, knowing that defendant had a violent temper and owned a handgun.

On January 31, the sheriff's department received a 911 call from the victim, who stated that defendant was at her front door. Defendant fled before deputies could apprehend him.

On the evening of February 2, defendant was seen in front of the victim's home and arrested.

***Sentencing***

At the sentencing hearing, defense counsel argued that the criminal threat count should be stayed "pursuant to [section]

654 which prohibits him from being punished for the same conduct twice." The trial court, finding that the two crimes "were committed at different times or separate places rather than being committed so close in time and place as to indicate a single period of aberrant behavior," impliedly rejected that argument by imposing a consecutive eight-month term for the criminal threat offense on top of defendant's three-year sentence for stalking.

***APPEAL***

***I***

***The Effect of Rule 4.412***

We first must determine whether defendant has waived the right to raise section 654 error under California Rules of Court, rule 4.412(b) (formerly rule 412(b)), which states: "By agreeing to a specified prison term personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654's prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record."

The California Supreme Court in *People v. Hester* (2000) 22 Cal.4th 290, 295, declared that under this rule, a defendant who plea bargains for a specified sentence may be held to waive a claim that any component of the sentence violates section 654. That rule does not obtain in this case, however, because under the express terms of the plea bargain, defendant reserved the right to argue for a term less than the "lid" or maximum.

In taking defendant's plea, the trial court described the bargain as follows: "And the lid is three years eight months[] [w]hich means that the agreement is that I cannot sentence you to more than three years and eight months *and you can argue for something less than three years and eight months*. However, the sentence that I will impose will be a Penitentiary sentence." (Italics added.) This was not an agreement for "a specified prison term" as defined by rule 4.412(b) and as construed in *People v. Hester, supra,* 22 Cal.4th 290. The italicized provision of the agreement left the door open for defendant to argue that the trial court was compelled to impose less than the maximum term by reason of applicable sentencing statutes and rules. Defendant is therefore correct that his appeal is not barred by California Rules of Court, rule 4.412(b).

***II***
***Section 654***

Defendant urges that the prison term for criminal threat must be stayed pursuant to section 654. Section 654 provides, in relevant part, "[a]n 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." The statute bars multiple punishment either for the same act or for a series of acts constituting an indivisible course of criminal conduct with a single intent and objective. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) "[S]ection 654 applies to sentencing both

for crimes flowing from a single act and for crimes resulting from an indivisible course of conduct which violates more than one statute. [Citations.]" (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.)

The elements of stalking according to section 646.9 are: (1) A person willfully, maliciously, and repeatedly followed or harassed another person; (2) The person following or harassing made a credible threat; and (3) The person who made the threat did so with the specific intent to place the other person in reasonable fear for his or her safety or the safety of the immediate family of such persons. (§ 646.9; CALJIC No. 9.16.1.)

The elements of making criminal threats according to section 422 are: (1) A person willfully threatened to commit a crime that, if committed, would result in death or great bodily injury to another person; (2) The person who made the threat did so with the specific intent that the statement be taken as a threat; (3) The threat was contained in a statement that was made verbally, in writing, or by means of an electronic communication device; (4) The threatening statement on its face, and under the circumstances in which it was made, was so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat; and (5) The threatening statement caused the other person reasonably to be in sustained fear for his own safety or for his immediate family's safety. (§ 422; CALJIC No. 9.94.)

Both section 649.6 and section 422 clearly require the utterance of a *threat* to the physical safety of the victim or her immediate family, although the nature of a requisite threat is described somewhat differently in each statute.

The information alleged that the conduct which comprised defendant's stalking charge took place between January 7 and February 2; the criminal threat offense was committed on January 14. According to the probation report, only one threat was made by defendant during that time span: the January 15 statement that he was going to blow up the victim's house and shoot her at her workplace. That utterance violated section 422 *and* satisfied the "credible threat" element of section 646.9. Where two convictions arise from a single act, punishing defendant for both crimes is prohibited by section 654. (*People v. Latimer, supra,* 5 Cal.4th 1203, 1207-1208.)

This case is similar to that of *People v. Mendoza* (1997) 59 Cal.App.4th 1333, where the defendant was found guilty of violating section 422 (then known as making a "terrorist threat"), and dissuading a witness by force or the threat of force (§ 136.1, subd. (c)(1)). (*Id.* at p. 1337.) The court found that the concurrent sentence for the section 422 count had to be stayed under section 654 because the two charges arose from a single act and had a single primary objective. (*Id.* at p. 1346.)

Here, because defendant's single threat to kill his former wife formed the factual predicate for two convictions; under section 654 he may be punished for only one. The appropriate

remedy is to stay the sentence for the count yielding the shorter sentence, i.e., the criminal threat charge. (§ 654, subd. (a).)

The plea anticipated at least the possibility of a lawful, three year eight month sentence, which was the sentence deemed appropriate by the trial court, and in reliance on that possibility, the People dismissed other counts. Simply staying the section 422 count would unfairly rewrite the bargain struck by the parties. (Cf. *People v. Haney* (1989) 207 Cal.App.3d 1034, 1037-1038 [plea bargains generally analyzed like contracts].) Instead, we will restore the parties to the status quo ante. (Cf. *People v. Bean* (1989) 213 Cal.App.3d 639, 645 [unfair to reduce a conviction by plea to comport with law; the parties misunderstood the law, and reducing conviction to comply with the law would in effect rewrite plea].)

DISPOSITION

The judgment is reversed and the cause is remanded to the trial court. If within 30 days of the issuance of the remittitur the district attorney so requests, the trial court shall vacate defendant's guilty plea and reinstate the dismissed charges. Otherwise the judgment shall be modified to impose a section 654 stay of the eight month sentence for violating section 422, and as so modified the judgment will be affirmed.

MORRISON, J.

I concur:

SIMS, Acting P.J.

RAYE, J.

I respectfully dissent.

In return for dismissal of four counts of a six count information and the promise that his prison term would not exceed three years eight months, defendant pled no contest to the remaining two counts. Having received a sentence of three years eight months, defendant now, in effect, cries "gotcha" and yelps that the court was without authority to impose the maximum term contemplated by the agreement.

Regrettably, the majority agrees; I do not.

*People v. Hester* (2000) 22 Cal.4th 290 (*Hester*), the principal case cited by the majority, involved an application of California Rules of Court, rule 4.412(b) (former rule 412(b)), which expressly provides that a defendant who agrees to a "specified prison term" abandons any right to assert a violation of Penal Code section 654. The majority reads "specified" to mean a "specific," "explicit," or "particular" prison term. I will accept the majority's reading and, for purposes of argument, will agree the punishment here under review does not fall within rule 4.412(b).

However, rule 4.412(b) of the California Rules of Court "merely applied the long-standing rule that 'defendants are estopped from complaining of sentences to which they agreed.'" (*People v. Buttram* (2003) 30 Cal.4th 773, 783 (*Buttram*).) As explained in *Hester*, "The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better

the bargain through the appellate process." (*Hester*, *supra*, 22 Cal.4th at p. 295.) The rule is "one application of a principle long recognized by California cases." (*Buttram*, *supra*, 30 Cal.4th at p. 783.) It is not, however, the exclusive expression of the policy which antedates the rule.

Defendant has received the benefit of this bargain. His maximum punishment exposure was greatly reduced by his plea bargain. In return, he agreed that the court was empowered to impose a prison sentence of up to three years eight months. He presumably reserved the right to attempt to persuade the court to exercise its discretion and impose a lower sentence. He did not reserve the right to assert the court was without authority, by virtue of Penal Code section 654, to impose the agreed-upon lid. (See *People v. Cole* (2001) 88 Cal.App.4th 850, 872-873.) I would affirm the judgment.

RAYE, J.