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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Appellant,

v.

JAMES HAROLD BYE,

Defendant and Respondent.

E046652

(Super.Ct.No. INF053018)

OPINION

APPEAL from the Superior Court of Riverside County. Helios (Joe) Hernandez,
Judge. Affirmed.

Rod Pacheco, District Attorney, and Alan D. Tate, Senior Deputy District
Attorney, for Plaintiff and Appellant.

Amanda F. Benedict, under appointment by the Court of Appeal, for Defendant
and Respondent.

In December 2006, defendant, James Bye, was charged by Information with embezzlement (Pen. Code, § 503),¹ during which he took property valued at over \$50,000 (§ 12022.6, subd. (a)(1)).² Following numerous continuances, on July 15, 2008, the trial court granted defendant's motion to dismiss the Information due to a violation of his right to be brought to trial within 60 days of arraignment, having concluded that court congestion did not constitute good cause to continue trial beyond the statutory period. The same day, the People recharged defendant under a new case number. The People appealed the dismissal, and, while this appeal was pending, the new case went to preliminary hearing, whereupon the magistrate dismissed it due to insufficient evidence.³ We conclude that the dismissal was not in error.⁴ The facts concerning the crime are irrelevant to this appeal.

ISSUES AND DISCUSSION

1. Mootness

Defendant claims that the dismissal of the refiled case following the preliminary hearing means that there is no longer a case or controversy between him and the People, therefore, we should dismiss the appeal as moot. However, as the People point out under

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Defendant was free on bail from before the preliminary hearing to the dismissal.

³ We hereby grant defendant's request for judicial notice, dated February 6, 2009.

⁴ This issue is currently pending before the California Supreme Court in *People v. Wagner* (review granted Oct. 1, 2009, S175794) and *People v. Hajjaj* (review granted Oct. 1, 2009, S175307).

section 1387 [the two dismissal rule], the dismissal of the second case does not bar trial on the first.

2. *Standard of Review*

The People acknowledge that the trial court's determination of good cause under section 1382 to continue trial beyond the statutory trial period is reviewed for abuse of discretion. (*People v. Memro* (1995) 11 Cal.4th 786, 852-53; *Baustert v. Superior Court* (2005) 129 Cal.App.4th 1269, 1275.) However, they assert that the trial court here made errors of law, which require de novo review. In support, they cite *People v. Hajjaj* for which review has been granted by the California Supreme Court. (See fn. 4, *ante*, p. 2.) Of course, "[a] ruling resting on a demonstrable error of law constitutes an abuse of discretion." (*People v. Cooper* (2007) 148 Cal.App.4th 731, 742.) However, that does not change the fact that the applicable standard is abuse of discretion. (*People v. Johnson* (1980) 26 Cal.3d 557, 570.)

3. *Section 1050, subdivision (a)*

Section 1050, subdivision (a) provides that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time and "given precedence over, and set for trial and hearing without regard to the pendency of, any civil matters or proceedings." The People assert that in violation of this provision, "the [trial] court refused to even *consider* determining the availability of or transferring this case to an available family law or probate courtroom, or to any of the courtrooms in Riverside County hearing general, non-designated civil matters."

What the trial court said in this regard was as follows, “Family Law courts, generally, do not have jury boxes. A very few do have jury boxes. The judges in Family Law have full calendars. In fact, they have huge calendars. . . . [O]ne of their most important jobs is to protect young children. . . . If a Family Law judge is required to handle a criminal jury trial, there is not one to replace that judge in Family Law. Taking away the judge that protects these children would be very unfortunate for the children and for society. . . . [¶] . . . [¶] . . . Probate Court handles cases where the assets of those who have passed away or are disabled are protected. We are not going to abandon those unable to tend to their own assets or those who have passed on but have relied on courts to handle their assets appropriately. If the Probate judicial officer is required to do a criminal jury trial, there’s no one to replace that person. . . . [¶] . . . The three civil judges at Hawthorne are not going to get a criminal trial. One, I’m not going to interrupt their jury trials. Two, there is not security down there and that would be unsafe for jurors, for the DA, defense counsel and for witnesses. The A[dm]inistrative O[ff]ice of the C[ourts] gave us those judges for the specific purpose of doing civil trials, and I’m not going to use them unless the Court of Appeal[] . . . tells me that I should go counter to what AOC told me to do, or AOC tells me to do something different. . . . [¶] We do have one civil judge who is available frequently, not necessarily today, and that’s Judge Tranbarger. The DA files 176.6 CCP on him every single time. . . . [R]ight now he happens to be in a civil jury trial. He’s not available anyway.⁵ [¶] We have calendar

⁵ Later, the trial court added, “I could interrupt him, but the People would paper
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courts each of whom handle hundreds of cases every day. If the judicial officer is not there, cases would be dismissed. We have no spare calendar judges. . . . [¶] . . . It is 4:11 [on the last day for trial to commence] right now, and no courts are going to become available. They're all in jury trial and at some stage of their jury trial. [¶] . . . [¶] I . . . [got] . . . an extra judge, but he was here to do an eight-defendant civil case, that was his only purpose for being here, and he's engaged in that trial. . . . I won't interrupt the trial." The trial court also noted that there were no civil judges available who were in training or on vacation that could be recalled and pro tems were being used to free judges to do trials, but there was still no one available. The trial court also pointed out that the lone administrative judge could not do trial work because he had "a huge load of everyday duties as the one and only administrative person in our courts . . . [and] . . . everybody is ordering [him] up [to San Francisco] to a meeting every five minutes. [He's] never here for a long length of time to do a trial." Finally, the trial court noted that additional visiting judges had been requested.

We further note that *People v. Flores* (2009) 173 Cal.App.4th Supp. 9,⁶ states, "The record shows that Riverside Superior Court has already given extraordinary precedence to criminal trials over traditional civil matters, and still does not have the available resources to try all criminal cases in a timely fashion. . . . [¶] . . . [¶]

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him anyway. That would be a waste of time."

⁶ We hereby grant defendant's request, dated April 21, 2009, for judicial notice of this opinion.

. . . [O]nly recently, with the opening of three courtrooms at the Hawthorne School, have traditional civil trials taken place in any significant numbers. . . . [A]lmost all traditional civil courtrooms and judges are only conducting criminal trials.” (*Id.* at pp. 23-24.)

Further, the Administrative Office of the Courts has appointed judges to sit in Riverside County to conduct criminal trials and help alleviate court congestion.⁷ (See Judicial Council of California, Administrative Office of the Courts, Press Release Number 42 (July 26, 2007) (available at <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR42-07.PDF> as of July 16, 2009).)⁸

The People’s assertion that the trial court did not “even consider” determining the availability of or transferring this case to family law, probate or non-designated civil courtrooms is belied by the record. Moreover, the People’s suggestion that section 1050 mandated that the trial court consider utilizing every civil and criminal courtroom asset and resource⁹ to handle this trial is unsupported.

⁷ On our own motion, we hereby take judicial notice of this. (§§ 452, 459.)

⁸ Although the trial court did not expressly state that it was considering these matters, it is clear from the comments of the prosecutor (see text following section 4, “Denial of Continuance”, p. 9, *post*) that these facts were well known to the trial court and counsel.

⁹ As to the criminal courtroom asset and resource, we note that the trial court informed the prosecutor that there were no criminal courtrooms available and in response to the prosecutor’s question whether there were any cases sent to criminal trial courts with remaining statutory trailing time that could be recalled, the trial court said, “No, they’re all actually in trial.” The trial court added that the ones it had assigned that day were all last-day cases. The trial court also noted that a pre preliminary calendar department was converted to a vertical calendar department, but the judge who occupied it was on vacation that week. It further noted that no criminal judges who were in

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In *People v. Osslo* (1958) 50 Cal.2d 75, 104, 105, the defendants complained that their trial was continued while there were other courtrooms available and civil trials were begun in them. The trial court responded that preference was given to defendants who were in custody (these defendants were not), one courtroom was being used to try a person confined as mentally ill and the juvenile calendar was very congested. (*Id.* at pp. 105-106.) The California Supreme Court held, “It does not appear that the policy of section . . . 1050 was disregarded. . . . [D]efendants were not being deprived of precedence over civil cases for any arbitrary reason. . . . [T]he orderly administration of a crowded calendar required the continuances to enable trial of the case in a proper department. The precedence to which criminal cases are entitled is not of such an absolute and overriding character that the system of having separate departments for civil and criminal matters must be abandoned. (*Id.* at p. 106.)

“The provisions [of Penal Code section 1050] merely establish a policy [citation]; are not absolute [citation]; and do not require that criminal proceedings be given precedence over civil proceedings regardless of the circumstances.” (*People v. McFarland* (1962) 209 Cal.App.2d 772, 777.)

Moreover, the portion of section 1050 on which the People rely is proceeded by the following, “[T]he [P]eople, the defendant, and the victims and other witnesses have the right to an expeditious disposition, and to that end it shall be the duty of all courts and

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training or on a vacation could be recalled. The court recalled that it had asked the previous prosecutor if he would stipulate to Judge Tranbarger doing calendar to free up another judge and the former refused.

judicial officers . . . to expedite these proceedings *to the greatest degree that is consistent with the ends of justice.*” (§ 1050, italics added.)

The People, themselves, concede that “a certain amount of discretion in addressing the Legislature’s mandate is necessary to avoid absurd results.” However, the People fault the trial court for not “comparing the seriousness of actual matters pending in [civil] court[rooms] with the seriousness of the charges pending in this case[.]” Such an undertaking, however, would have been astronomical and would have taken the parties beyond the statutory period. The trial court did not abuse its discretion in determining that there were sound reasons for not using civil courtrooms for defendant’s trial.

4. *Denial of Continuance*

The People correctly state that congested calendars are not good cause for continuances beyond the statutory limit, except under exceptional circumstances. (*Rhinehart v. Municipal Court* (1984) 35 Cal.3d 772, 782 (*Rhinehart*)). Below, the People said, “[A]ssuming that the Court has done everything possible and has diverted all civil resources to criminal matters, our position would be that [that] is good cause to continue cases beyond the statutory period.” The trial court responded, “[C]ourt congestion is not an unexpected circumstance. . . . [I]f there’s an unusual circumstance, for example, a [natural disaster] . . . that would be grounds for continuance. But ordinary court congestion is not a grounds.”

Citing only *People v. Yniquez* (1974) 42 Cal.App.3d Supp. 13 (*Yniquez*)), the People assert that, despite *Rhinehart*’s clear language to the contrary, court congestion is a good cause for continuing a case beyond the statutory period. However, *Yniquez*’s

conclusion was based on *In re Lopez* (1952) 39 Cal.2d 118, 120. (*Yniquez, supra*, 42 Cal.App.3d Supp. at p. 19.) *Rhinehart* said the following of both decisions, “The court in *Johnson* specifically questioned ‘those decisions which assume that court congestion . . . necessarily [constitutes] good cause to deny dismissal.’ [Citation.]” (*Rhinehart, supra*, 35 Cal.3d at p.782, fn.16.) The People seek to avoid the conclusion that *Yniquez* is not reliable authority by pointing out that *Johnson*’s discussion of good cause “was expressly limited to ‘the case of an incarcerated defendant.’” However, *Rhinehart* said the following of that, “Although the court in *Johnson* expressly limited its discussion of the ‘good cause’ provision of section 1382 to cases involving individuals who are incarcerated while awaiting trial [citation], there is no sound reason why its reasoning should not apply to individuals who are not in custody. The constitutional and statutory guarantees to a speedy trial are not limited to incarcerated individuals.” (*Rhinehart, supra*, 35 Cal.3d at p. 782.)

DISPOSITION

The order of dismissal is affirmed.

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RAMIREZ
P.J.

We concur:

GAUT
J.

KING
J.