

Filed 1/27/05
Opinion following rehearing

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY WAYNE MINOR,

Defendant and Appellant.

G031791 Consol. w/G031792

(Super. Ct. Nos. 98HF1269 &
98HF1273)

O P I N I O N

Appeals from judgments of the Superior Court of Orange County, Frank F. Fasel and Kazuharu Makino, Judges. Affirmed.

William J. Kopeny & Associates, William J. Kopeny, and Paul S. Meyer for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch, Deputy Attorney General, for Plaintiff and Respondent.

After being extradited from Italy, Jeffrey Wayne Minor was convicted of assault with a deadly weapon on a peace officer, hit and run following an injury accident, and driving under the influence of alcohol and with a blood-alcohol level above the legal limit. On appeal, he contends the trial court exceeded its jurisdiction in enhancing his sentence for these crimes based on another crime for which his extradition was also sought but denied. We conclude the trial court acted properly, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In Riverside County in July 1993, Minor caused a car accident while driving drunk. One person died and two others were injured. Following a guilty plea, Minor was convicted of one count of gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)),¹ three counts of driving under the influence of alcohol and causing serious bodily injury (Veh. Code, § 23153, subd. (a)), and various other related offenses (the Riverside case). The court suspended imposition of sentence, placed Minor on probation for 60 months, and gave him a one-year jail term. One of the conditions of his probation was abstention from alcohol.

The following incidents occurred while Minor was still on probation in the Riverside case: In August and again in October 1998, Minor was arrested in Orange County for being drunk in public. On December 11, 1998, Minor was stopped in Irvine for speeding and arrested on an outstanding warrant for the drunk in public offenses. A breath test indicated a blood-alcohol level of 0.10 or 0.12 percent. A felony complaint charged Minor with driving under the influence and with a blood-alcohol level of 0.08 percent or greater (the drunk driving case). The complaint also alleged as a sentencing enhancement the prior Riverside conviction for vehicular manslaughter.

On December 20, 1998, a police officer stopped Minor for running a red light in Newport Beach. When Minor presented an expired driver's license, the officer

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

called for backup in order to do a records check. Minor fled the scene with the backup officer partially in the car, her legs hanging out the open driver's side door and her arms wrapped around Minor in an effort to stop his escape. Minor knocked the officer out of his car by striking his open door against several parked cars. The officer fell, suffering scrapes and abrasions. Minor sped away and was arrested later that night near his home. He was charged with assault with a deadly weapon upon a police officer and hit and run with injury (the assault on an officer case).

Three days later, Minor's probation officer filed a memorandum in Riverside County Superior Court alleging various probation violations based on the offenses Minor committed in Orange County. The court ordered Minor's probation in the Riverside case revoked and issued a warrant for his arrest. Approximately a month later, Minor appeared at a Riverside County Superior Court hearing at which the probation department recommended he be sentenced to 11 years in state prison. The matter was continued and Minor was ordered to appear on February 19, 1999.

Minor did not appear at the continued Riverside County Superior Court proceeding, nor did he appear for court dates in Orange County. The two courts issued arrest warrants for Minor.

On March 18, 1999, Italian police, working with Interpol and others, provisionally arrested Minor in Perugia, Italy. The California Attorney General (on behalf of Riverside County) and the Orange County District Attorney immediately began extradition proceedings.

The Riverside County extradition request sought to extradite Minor for further proceedings in the Riverside case. The affidavit in support of extradition set forth the circumstances of the Riverside case, including the guilty plea that resulted in the convictions for vehicular manslaughter, three counts of driving under the influence of alcohol and causing bodily injury, and related offenses. The affidavit explained that

imposition of sentence had been suspended, with Minor placed on five-years probation, which probation was revoked as a result of the Orange County crimes (the drunk driving case and the assault on an officer case). The affidavit specified that under the sentencing laws of California, the maximum amount of time Minor could be sentenced to state prison in the Riverside case was 15 years, but that the Riverside County Probation Department was seeking imposition of an 11-year prison term.

Orange County requested extradition of Minor for prosecution of the drunk driving case and the assault on an officer case (collectively, the Orange County cases). The affidavit in support of the extradition request set forth the details of the crimes in each case. The affidavit explained the offenses in the drunk driving case were charged as felonies because of Minor's previous conviction in the Riverside case of "felony Driving Under the Influence of Alcohol and Manslaughter" and enhancements were added based on that prior serious felony conviction. Likewise, the affidavit explained the offenses in the assault on an officer case were filed as felonies and subject to enhancements because of Minor's prior serious felony conviction in the Riverside case. The affidavit went on to quote relevant provisions of the applicable Penal and Vehicle Code sections, including provisions of the "Three Strikes" law set forth at sections 667 and 1170.

On November 17, 1999, the Court of Appeals of Perugia, Italy, issued an order denying the Riverside County extradition request. In the same order, the Italian court granted the Orange County extradition request, stating that extradition of Minor to the United States "is to be granted for the following crimes: a) 'Case no. 98HF1269': crime of assaulting a peace officer with a deadly weapon and failure to provide assistance [hit and run] . . . ; b) 'Case n[o]. 98HF1273': crime of driving while intoxicated" The extradition order specified as a "condition" of extradition that Minor not be subjected to prosecution or "any other measure restricting his personal freedom . . . for facts prior to the delivery [of Minor], other than those for which extradition has been granted."

On January 17, 2000, the Italian court issued a lengthy statement of its reasons for the judgment. Essentially, the court based its denial of Riverside County's extradition request on due process concerns and on the "harshness" of the sentence sought in the Riverside case. For one thing, the court was disturbed at the thought of returning Minor to Riverside County only for sentencing rather than trial. The court noted that, given his guilty plea, Minor had not had the benefit of cross-examining witnesses or of presenting "an adequate legal defense" to the charges. Moreover, the court expressed outrage at the penal consequence of probation revocation in the United States: the fact Minor could be sentenced to the maximum 15-year prison term in the Riverside case without any credit given for the nearly five years of incident-free probation (with "severe constraints" on personal liberty) Minor had already served before committing the unhappy string of Orange County offenses.

The court concluded the American procedure of denying credit for time served on probation violated the Italian Constitution. The court stated, "Probation is, in effect, a criminal sentence albeit an alternative way of serving a sentence. It follows, then, undeniably, that any system or law that does not take into account, in case of revocation, the already-endured subjection to such limitations during the preceding period of custody, constitutes an open violation of the principles enunciated in Art. 13 of the [Italian] Constitution since the non-recognition of the custody period in case of probation failure is the same as the application of an additional sanction[.]" Because of the application of this "additional sanction," the court determined the 11-year prison term sought by the Riverside County Probation Department "clearly represents an excessive sentence entirely disproportionate to the crime charged," and therefore violative of yet another provision of the Italian Constitution ("Art. 27, Paragraph 3").

As for the Orange County cases, the court based its decision to grant extradition for these crimes on the existence of parallel Italian criminal statutes

concerning the substantive crimes charged, as well as the “serious evidence of guilt” in the record.

Upon extradition of Minor to Orange County, the People filed two informations against him. The first information (Case No. NB 98 HF 1269) charged him with assault with a deadly weapon on a peace officer (count 1) and hit and run from an injury accident (count 2). The second information charged Minor with driving under the influence of alcohol and with a blood-alcohol level over 0.08 percent. Both informations alleged as an enhancement Minor’s previous felony conviction for vehicular manslaughter in the Riverside case.

The assault on an officer case proceeded to trial and a jury convicted Minor of hit and run but deadlocked on the assault charge. Minor then waived jury trial on that charge and the court found him guilty. Minor admitted the prior serious felony conviction allegation but objected to its use against him on the ground the extradition order barred any punishment based on the facts of the Riverside case. In the drunk driving case, Minor pled guilty to both Vehicle Code violations and admitted the prior conviction allegation, again under protest.

The court sentenced Minor to prison for the aggravated term of five years for his assault on a peace officer, then doubled that sentence pursuant to section 667, subdivisions (d) and (e)(1) based on Minor’s prior “strike” in the Riverside case. The court stayed the sentence for the hit-and-run conviction. In the drunk driving case, the court sentenced Minor to three years in prison, concurrent with the 10-year term already imposed. Absent the prior Vehicle Code conviction in the Riverside case, the maximum term for the drunk driving conviction would have been one year. At sentencing, Minor renewed his objection to the use of his Riverside felony to enhance his sentence, arguing again that the extradition order protected him from any punishment arising from the facts of the Riverside case.

Minor obtained a certificate of probable cause to appeal his sentence in the drunk driving case. He appealed in both cases, asserting the court violated the extradition order by using his conviction in the Riverside case as a sentencing enhancement. At Minor's request, we consolidated the two appeals.

We note that the United States Department of State, at our invitation, filed an amicus brief addressing the issue raised in this appeal. The State Department's brief maintains, consistent with our discussion post, that use of the Riverside conviction to enhance Minor's sentence did not violate the extradition order.

DISCUSSION

Minor's sole argument on appeal is that the trial court exceeded its jurisdiction by enhancing his sentence based on the vehicular manslaughter conviction in the Riverside case. Minor contends the extradition order barred any use of that conviction for punishment purposes. He asserts this conclusion flows from the internationally recognized "doctrine of specialty" and the specific terms of the extradition order involved here. He is wrong.

The doctrine of specialty is a fundamental underpinning of extradition law. It is a simple proposition: "The doctrine of 'specialty' prohibits the requesting nation from prosecuting the extradited individual for any offense other than that for which the surrendering state agreed to extradite." (*United States v. Van Cauwenberghe* [(9th Cir. 1987)] 827 F.2d 424, 428.) The doctrine is based on principles of international comity: to protect its own citizens in prosecutions abroad, the United States guarantees that it will honor limitations placed on prosecutions in the United States. (*United States v. Cuevas* [(9th Cir. 1988)] 847 F.2d 1417, 1426.)" (*U.S. v. Andonian* (9th Cir. 1994) 29 F.3d 1432, 1434-1435.)

On appeal, we review de novo the trial court's determination that the use of the Riverside felony conviction as an enhancement did not violate the doctrine of specialty. (*U.S. v. Andonian, supra*, 29 F.3d at p. 1434; *U.S. v. Khan* (9th Cir. 1993)

993 F.2d 1368, 1372.)

In essence, Minor argues that because Italy agreed to extradite him only for prosecution of the assault on an officer case and the drunk driving case, and specifically prohibited prosecution or punishment for “facts . . . other than those facts for which extradition has been granted,” the People were barred from using the facts of the Riverside case to enhance the sentence in the Orange County cases. Thus, according to Minor, “the trial court’s ruling allowing Orange County officials to punish [him] for the very Riverside offenses specifically excluded from the Italian extradition decree” violated the rule of speciality and the limitations in the extradition decree.

Minor’s argument is based on a false premise: that use of the vehicular manslaughter conviction as an enhancing allegation punishes him for *that* crime. To the contrary, the United States Supreme Court has long made clear that enhanced punishment for recidivism does not punish the earlier offense. “[E]nhancement statutes, whether in the nature of criminal history provisions such as those contained in the [federal] Sentencing Guidelines, or recidivist statutes which are common place in state criminal laws, do not change the penalty imposed for the earlier conviction.’ [Citation.] In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense ‘is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes,’ but instead as ‘a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.’ [Citations.]” (*Witte v. U.S.* (1995) 515 U.S. 389, 400; see also *Ewing v. California* (2003) 123 S.Ct. 1179, 1188 [citing same authority in upholding California’s Three Strikes law].)

Because use of the manslaughter conviction as an enhancing allegation did not punish Minor for that earlier crime, this use did not violate the extradition order’s stricture against punishing Minor for “facts . . . other than those facts for which extradition has been granted.”

The trial court reached this same conclusion by relying on the persuasive authority of a federal Ninth Circuit decision, *United States v. Lazarevich* (9th Cir. 1998) 147 F.3d 1061 (*Lazarevich*). In *Lazarevich*, the defendant was extradited from the Netherlands to face federal charges of passport fraud. Years earlier, he had kidnapped his six children from his wife's custody, lying on their passport applications to accomplish the flight abroad. The United States sought to extradite Lazarevich for both the kidnapping and passport fraud charges, but, as in the present case, the Netherlands only partially granted the application. The Netherlands refused to extradite him for kidnapping because he had already been tried and convicted of that charge in Belgrade. He was extradited only for passport fraud and was convicted of that crime upon his return to America.

In sentencing Lazarevich, the trial court selected an aggravated term, departing upward based on the finding that Lazarevich committed the crime to facilitate another: child abduction. The court also considered as an aggravating factor Lazarevich's prior conviction in Belgrade for child abduction. Echoing Minor's claim here, Lazarevich argued on appeal that the court's sentencing use of the prior offense for which extradition was denied violated the extradition order and the doctrine of speciality. The Ninth Circuit disagreed.

The court noted, initially, that the extradition treaty between the United States and the Netherlands protected an extradited person from being “detained, tried, or punished in . . . the Requesting State for an offense other than that for which extradition has been granted.” (*Lazarevich, supra*, 147 F.3d at p. 1063.) The court further noted child abduction was not an offense for which Lazarevich was extradited. The court thus framed the issue on appeal as follows: “Lazarevich was neither detained nor tried on child abduction charges. The question here is whether he was punished for child abduction.” (*Ibid.*)

Acknowledging that Lazarevich's sentence for passport fraud was lengthened because of his child abduction conviction, the court nonetheless concluded he was not *punished* for the child abduction. Quoting language from the Supreme Court's decision in *Witte v. United States*, *supra*, 515 U.S. at page 399, the court stated that "use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime within the authorized statutory limits does not constitute punishment." (*Lazarevich*, *supra*, 147 F.3d at p. 1064.) The court concluded the trial court's enhancement of the sentence based on the child abduction violated neither the extradition order nor the doctrine of speciality.

Minor tries to distinguish *Lazarevich* on the ground the extradition order there lacked the "specific limiting language" found in his own extradition order — language which, Minor claims, barred sentence enhancement based on the Riverside crimes. In making this argument, Minor relies on the written opinion of Professor M. Cherif Bassiouni, an expert on international extradition law and Italian law, "who is also a Native Italian." In the affidavit, Bassiouni expresses the opinion that the Italian extradition order "excludes *anything* related to the Riverside conviction," including sentence enhancement of the Orange County crimes. (Italics added.) He bases that opinion on the "specific limiting language" of the extradition order, which he identifies as the sentence in which the court "conditions" extradition on the requirement that Minor suffer no restriction on his liberty for "*facts occurring prior to [his] surrender, other than those facts for which extradition has been granted.*"

The professor's opinion of the effect of that language is curious, given that this "specific, limiting language" is nothing more than a restatement of the doctrine of speciality itself. Bassiouni states that "the Italian Extradition Order . . . explicitly rejects the extradition of Mr. Minor for the Riverside County conviction, which includes the revocation of probation *and sentence enhancement*. This Court cannot derogate from the explicit order of the Republic of Italy[.]" (Italics added.) We think the professor's

opinion overreaches. While the Italian extradition order barred prosecution and punishment for the Riverside crimes, that prohibition did not extend to sentence enhancement. As already explained, sentence enhancement based on a prior crime does not punish that crime.

As for Minor's suggestion the Italian court specifically intended to bar sentence enhancement for the Riverside crimes, the contention lacks any support. The court's own explanation of its reasons for denying extradition in the Riverside case made clear that its concern was only for what it deemed to be the unjust consequences of *probation revocation* in America. The court said nothing about sentence enhancement in the Orange County cases for which extradition was granted.

Significantly, the Italian court was explicitly informed of the Orange County District Attorney's intent to use the Riverside manslaughter conviction as a sentencing enhancement. The affidavit in support of the Orange County extradition request stated that the crimes in the assault on an officer case and the drunk driving case were charged as felonies because of the prior Riverside manslaughter conviction, and that sentencing enhancements were added to each case based on that conviction. Moreover, the affidavit set forth the penal consequences of the prior serious felony enhancement, if found true. Having been advised of these facts, the Italian court did not object to the use of the Riverside manslaughter conviction as an enhancing allegation.

We conclude that neither the extradition order nor the doctrine of speciality barred use of the manslaughter conviction as a sentence enhancement in the two cases before us. Consequently, the court acted within its authority in sentencing Minor based on the prior conviction enhancements.

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.