Filed 10/28/09 P. v. Stoltie CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. BRIAN JOSEPH STOLTIE, Defendant and Respondent.	E048009 (Super.Ct.No. RIF113348) OPINION

APPEAL from the Superior Court of Riverside County. Edward D. Webster, Judge. Affirmed with directions.

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

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Respondent.

The People appeal from the dismissal of criminal charges against defendant, Brian Joseph Stoltie, pursuant to Penal Code,[1] section 1382, based upon the lack of available courtrooms and lack of good cause for continuance of the case on the last day for trial.

On appeal, the People contend the trial court abused its discretion (1) by failing to consider the availability of civil judges and courtrooms in order to prevent the dismissal of this last-day criminal case, (2) by misconstruing the meaning of Penal Code section 1050 relating to the precedence of criminal cases over civil matters, and (3) by finding there was no good cause to continue the case beyond the statutory period. After all the briefing was complete, the People made a request to abandon the appeal. We deny the request to voluntarily dismiss the appeal and affirm.[2]

BACKGROUND

The record does not include the original trial transcripts, so we draw some facts from our previous opinion in this case. (*People v. Brian Joseph Stoltie* (Oct. 25, 2005, E036322), [nonpub. opn.].) Other procedural facts are drawn from the subsequent federal

---

[1] All further statutory references are to the Penal Code except where otherwise indicated.

[2] On June 29, 2009, respondent filed a request that we take judicial notice of three documents. We granted the request as to Exhibit A, a minute order dated June 11, 2009 in Case No. RIF148098, *People v. Stoltie*, the refiled assault charge. We reserved as to Exhibits B and C, which pertained to cases involving two different defendants, whose cases were dismissed at the same time as Stoltie's case was dismissed. Because those documents are not relevant to our decision, we deny the request for judicial notice as to those exhibits.

decisions following that appeal. (*Stoltie v. Tilton* (9th Cir. 2008) 538 F.3d 1296; *Stoltie v. California* (C.D. Cal. 2007) 501 F.Supp.2d 1252.)

The defendant encountered the victim after she and her friend left a nightclub. A group of people including defendant and the victim then went to an after-hours party in Corona. While there, the victim's friend was informed the victim had been beaten and raped, and the victim identified defendant as the assailant. When she was taken to the hospital, the victim noticed money was missing.

According to defendant, before going into the party, the victim told defendant she was a stripper and agreed to perform a "lap dance" in the car in return for $100, which he placed on the console. After the sex act was completed, defendant's penis itched and burned, causing him to suspect he had contracted a sexually transmitted disease from her. He grabbed the money from the console and attempted to exit the car. The victim grabbed his shirt demanding return of the money, but defendant called her a name and demanded she release him. When the victim refused to let go, defendant hit her with the back of his hand. She continued to hold onto his shirt and yelled at him to give her the money so he punched her in the face and side. The victim finally let go and defendant exited the car.

In 2004, defendant was tried by a jury on multiple criminal counts, including forcible rape (§ 261, subd. (a)(2)), rape of an intoxicated victim (§ 261, subd. (a)(3)), sexual penetration with a foreign object (§ 289, subd. (a)(1)), assault by means of force likely to cause great bodily injury (§ 245, subd. (a)(1)), and robbery (§ 211). (*Stoltie v.*

California, *supra*, 501 F.Supp.2d at p. 1253.) After the prosecution rested, the court granted defendant's motion to acquit him of the charge of rape of an intoxicated victim pursuant to section 1118.1.

During deliberations on the remaining charges, the jury expressed difficulty coming to a decision on the rape and aggravated assault counts, so the trial court reinstructed the jury on the definition of reasonable doubt, and later, in response to additional questions, gave an analogy to snow skiing in Blythe in July to explain the reasonable doubt standard. Subsequently, the jury acquitted defendant of the remaining sexual offenses, but found him guilty of the aggravated assault and robbery counts, finding that he personally inflicted great bodily injury in committing both offenses. The court sentenced defendant six years on the robbery count (three years, midterm, for the substantive charge, plus a consecutive three-year enhancement for inflicting great bodily injury, and a similar term for the aggravated assault conviction, which was stayed pursuant to section 654.

On appeal, the assault conviction was affirmed, but the robbery conviction was reversed based on instructional error. On remand, the robbery count was dismissed on the People's motion without prejudice to refile the charge because the People could not locate a witness.[3] The defendant was resentenced to 6 years in prison on the aggravated assault charge and the attendant enhancement for inflicting great bodily injury.

---

[3] The robbery count was refiled under case number RIF129339 and defendant was convicted on that count on July 7, 2006.

In the meantime, defendant petitioned for a writ of habeas corpus in the federal court, challenging the constitutionality of the assault conviction due to the erroneous reasonable doubt instructions. The federal court granted the petition, vacating the assault conviction, and the Ninth Circuit Court of Appeals affirmed that decision. (*Stoltie v. Tilton, supra,* 538 F.3d 1296.)

In November 2008, the matter came on for retrial as to the aggravated assault charges. Jury trial was scheduled for January 16, 2009, with January 26, 2009 designated the last day for trial. On January 15, 2009, the People made a motion to continue the trial to January 26, 2009,[4] citing lack of transcripts of the first trial. The court granted the motion, noting that January 26, 2009, was the last day for trial.

On the morning of January 26, 2009, all parties announced ready. However, no courtrooms were available. At 4:04 p.m., the court directed defendant to make a motion for dismissal, and read a "Dismissal Script" into the record. The script explained that there are no available courtrooms to send a criminal jury trial, that the Family Law, Juvenile Court, and Probate judges had full calendars. Although civil courtrooms are frequently available, all were conducting full loads of civil matters. There were four visiting judges assigned by the Administrative Office of the Courts to handle civil jury

---

[4] The first page of the People's motions requests that the trial be trailed from January 16, 2008 to January 22, 2008. [*sic*] However, the declaration signed by the deputy district attorney in support of the motion requests that the matter trail until January 26, 2009, because transcripts of the prior testimony would not be prepared until then. The minutes of January 16, 2009 reflect that the People made a motion to trail the trial date until January 26, 2009. We assume the date reflected on the first page of the People's motion was a clerical error.

trials in temporary facilities, but the court lacked authority to change those assignments. The calendar courts handle hundreds of cases per day and there were no spare calendar judges. The court had informed the Chair of the Judicial Council of the danger of dismissing cases pursuant to section 1050, but no courtroom was available.

The People argued that one of the judges from the temporary facility at Hawthorne Elementary School "should now be freed up to hear a case" in Corona; that the case "could be" assigned to a judge handling civil matters at a temporary courtroom established at Hawthorne Elementary School by moving Judge Trask (Supervising Judge, Civil Department, Riverside) to Corona, or one of the judges out in Hawthorne "could have come and taken a case and sat in Department C-3" (Corona), and one of the specially assigned Hawthorne judges could be moved to a courtroom in Corona. However, the court explained that Judge Trask had already started a civil trial in the Riverside courthouse and could not be reassigned, and there was inadequate security at both the Corona and Hawthorne locations that precluded sending a criminal case involving an in-custody defendant. As for the Hawthorne judges, the court noted they were specially assigned by the Chief Justice and could not be reassigned.

The next day, the court granted defendant's oral motion to dismiss pursuant to section 1382, and vacated the sentence as to the aggravated assault conviction. The People immediately refiled the charge under case number RIF148098, and on March 27, 2009, the People appealed from the order of dismissal.

DISCUSSION

The People contend that the trial court erred by dismissing the case pursuant to section 1382 because the court failed to consider the availability of civil judges and courtrooms and failed to give precedence to this case over other civil cases. We disagree.

a. Standard of Review

What constitutes good cause for the delay of a trial is a matter that lies within the discretion of the trial court. (*People v. Johnson* (1980) 26 Cal.3d 557, 570 (*Johnson*).) We review the decision to grant or deny a continuance under section 1382 for abuse of discretion. (*People v. Memro* (1995) 11 Cal.4th 786, 852.)

The People attempt to assign a *de novo* standard of review by arguing that the court committed legal error, acting in excess of his jurisdiction, by "failing to apply the common-sense meaning of Penal Code section 1050 and failing to consider the use of non-criminal departments in order to prevent the dismissal of this last-day criminal case." However, the People do not address the manner in which the court acted in excess of its authority, and they conclude by stating that the court's error was a manifest abuse of discretion. We do not find the trial court committed an error of law in this case and adhere to the abuse of discretion standard of review.

b. *The Trial Court Properly Considered the Availability of Civil Judges and Courtrooms Before Finding There Were No Courtrooms Available.*

The People argue that the court refused to consider the use of non-criminal judges and courtrooms in order to prevent the dismissal of this last-day criminal case. We

disagree. Notwithstanding the arguments made in the trial court about the manner in which the calendar court could shuffle judges between departments in different courthouse facilities in different cities, at most they presented a possibility that one judge *could be* freed up, not that any civil courtroom or judge was actually available.

The trial court set forth its reasons for not disturbing family, probate, and juvenile courts that were engaged in cases, and concluded the facilities at Hawthorne Elementary School lacked adequate security to try criminal cases. All civil courtrooms were hearing and conducting cases and none were shown to be actually available to hear a criminal case. Section 1050 only requires granting precedence in a criminal case over civil cases when doing so is just. (*People v. Flores* (2009) 173 Cal.App.4th Supp. 9, 22 (*Flores*).) The work performed by nontraditional civil courts such as family, probate, and juvenile is extremely important and should not, under all circumstances, make way for criminal matters. (*Id.* at pp. 20-21.)

Because all the civil departments were conducting hearings and trials and none were available, there is no evidence the court did not consider the availability of civil judges and courtrooms.

c. *The Trial Court Did Not Misconstrue Section 1050's Requirement that Criminal Cases Be Given Precedence Over Civil Cases.*

The People contend the trial court did not properly give precedence to this last-day criminal case over civil cases. We disagree.

Section 1050 provides that criminal cases are to be set for trial and heard and determined at the earliest possible time based upon a legislative finding that criminal courts are becoming increasingly congested with resulting adverse consequences to the welfare of the people and the defendant. The Legislature determined that continuances lead to longer periods of presentence confinement for defendants in custody, which in turn leads to overcrowding of and increased expenses of local jails. It also causes hardships to victims and other witnesses. The Legislature thus declared that the People, the defendant, the victims, and other witnesses have the right to an expeditious disposition. (§ 1050, subd. (a).)

In accordance with this policy, section 1050 provides that criminal cases shall be given precedence over, any civil matters or proceedings. However, the degree to which the participants have a right to expeditious disposition and the degree to which the court and counsel have a duty to expedite the proceedings is the degree "that is consistent with the ends of justice." (§ 1050, subd. (a).)

However, the precedence to which criminal cases are entitled is not so absolute and overriding in character that the system of having separate departments for civil and criminal matters must be abandoned. (*People v. Osslo* (1958) 50 Cal.2d 75, 106.) Section 1050 is directory only. (§ 1050, subd. (l); *Flores, supra,* 173 Cal.App.4th Supp. at p. 20.) The policy does not require that criminal proceedings be given precedence over civil proceedings regardless of the circumstances and without consideration of the ends of justice. (*Osslo, supra,* 50 Cal.2d at pp. 1377, 1385-1386.) "This means a trial court need

not always and automatically bump civil matters in a dedicated department to accommodate criminal matters and avoid a dismissal." (*Flores, supra,* 173 Cal.App.4th Supp. at p. 21.) Whether a particular criminal case takes precedence over civil matters is within the court's discretion. (*People v. Cole* (2008) 165 Cal.App.4th Supp.1, 15 (*Cole*).)

As to whether additional precedence must be given to last-day criminal cases, we note that in November 2005, the Riverside Superior Court suspended all civil trials to relieve criminal case backlog. The backlog was caused by the expanding caseload attributed to the increasing population of the county. While the caseload expanded, the number of judges has not kept pace. (Riverside Superior Court, News Release, Nov. 30, 2005, <http://www.riverside.courts.ca.gov> [as of August 18, 2009].) In 2007, the judicial resources still had not caught up to the judicial needs of the ever-growing county, so the Chief Justice assigned a special team of 27 judges to help ease the heavy backlog of criminal cases in Riverside County, over and above the 12-18 judges regularly assigned to assist with the criminal backlog. (http://www.courtinfo.ca.gov/presscenter/newsreleases/NR42-07.PDF [as of August 18, 2009].)

The current situation at the superior court is the same as it existed at the time of the *Flores* decision, except that it appears there is a fourth judge assigned to hear civil cases in temporary facilities. As the *Flores* court observed, even with the opening of additional courtrooms at Hawthorne Elementary School, criminal trials are still given priority over traditional civil lawsuits. Yet even civil litigants are entitled to meaningful

access to the court system. (*Flores, supra,* 173 Cal.App.4th Supp. at pp. 23-24.) It was for the court to determine, in an exercise of its broad discretion, whether any of the ongoing civil cases should be "bumped" to accommodate the last-day criminal case and avoid a dismissal. (*Cole, supra,* 165 Cal.App.4th Supp. at p. 15.)

The trial court did not misconstrue the statutory requirement that criminal cases be given precedence over civil cases.

d. *The Unavailability of Courtrooms Is Not Good Cause to Continue Except In Extraordinary Circumstances.*

Section 1382 implements section 15 of article I of the California Constitution, providing that every defendant in a criminal case shall have a speedy trial. (*Rhinehart v. Municipal Court* (1984) 35 Cal. 3d 772, 776, 783-784 (*Rhinehart*).) That section requires dismissal of a criminal case not brought to trial within 60 days, unless good cause to the contrary is shown. (*Batey v. Superior Court* (1977) 71 Cal.App.3d 952, 956.) What constitutes good cause for delay is a matter within the discretion of the trial court. (*Johnson, supra,* 26 Cal.3d at p. 570; *Cole, supra,* 165 Cal.App.4th Supp. at p.16.)

Delay caused by improper court administration does not constitute good cause. (*Johnson, supra,* 26 Cal.3d at p. 570.) Delay caused by congested courthouses does not constitute good cause to continue. (*Cole, supra,* 165 Cal.App.4th Supp at p.17; see also *Rhinehart, supra,* 35 Cal.3d at p. 782.) However, extraordinary, nonrecurring circumstances creating an inordinately heavy caseload may constitute good cause. (*Sanchez v. Superior Court* (1982) 131 Cal.App.3d 884, 890.)

The burden was on the prosecution to establish the exceptional circumstances needed to show good cause to continue. (*Rhinehart, supra,* 35 Cal.3d at p. 781; *Cole, supra,* 165 Cal.App.4th Supp. at p. 16.) The lack of available courtrooms due to chronic or routine court congestion caused by improper court administration or by the state's failure to provide the judges and facilities necessary to meet the foreseeable caseload is not good cause for delay (*Stroud v. Superior Court* (2000) 23 Cal.4th 952, 969) and such delays resulting from court congestion do not constitute good cause for a continuance. (*Rhinehart, supra,* 35 Cal.3d at p. 784; *Cole, supra,* 165 Cal.App.4th Supp., at p. 17.)

The People rely on the case of *People v. Yniquez* (1974) 42 Cal.App.3d Supp. 13 (*Yniquez*), to argue that court congestion is good cause to continue if the court calendars are in fact congested, if the judges and commissioners have given exclusive attention to criminal matters, and if the Judicial Council has been unable to provide assistance. Reliance upon *Yniquez* is misplaced. That decision has been questioned in later authorities because it conflicts with decisions of the California Supreme Court. (See, *Johnson, supra,* 26 Cal.3d at pp. 570-571; see also *Rhinehart, supra,* 35 Cal.3d at p. 782.)

Additionally, the holding of *Yniquez* is distinguishable. In that case, the trial judge cited only the press of business, the inability or unwillingness of the Judicial Council to provide additional judges, and the inability or unwillingness or reluctance of the parties to reach "amicable plea bargains" as the reason for dismissing 35 misdemeanor cases. (*Yniquez, supra,* 42 Cal.App.3d Supp at p. 19.) Here, the Judicial Council has provided additional judges, the court has given precedence to criminal cases, but rather than "press

of business," the unavailability of courtrooms is due to chronically inadequate judicial resources to keep up with a burgeoning criminal caseload.

Based on the record before us, the trial court did not abuse its discretion in considering the availability of civil judges and courtrooms before finding there were no courtrooms available and determining there was no good cause to delay the trial. There was no abuse of discretion in dismissing the action.

e. *We Deny the People's Motions to Dismiss the Appeal Where The People Elected to Appeal the Dismissal, after Refiling Criminal Charges, For a Count for Which Defendant Has Already Served His Sentence* .

The People immediately refiled a criminal complaint upon the dismissal of the charges. (RIF148098.) Subsequently, the People appealed from the judgment of dismissal. Defendant argues the pursuit of the appeal bars the People from refiling the case. Ordinarily, we would find that the People may pursue both remedies and elect to dismiss one or the other if a request is made at an appropriate date. However, the People have pursued trial level proceedings at a time when a fully briefed appeal was pending. Further, defendant was retried on the robbery count and has served his sentence for that charge. Since the aggravated assault count arose from the same indivisible transaction, no additional punishment may be imposed. (§ 654.) For this reason, we treat the People's filing of the notice of appeal as the election and we deny the request to abandon the appeal.

The general rule is that the filing of a valid notice of appeal vests jurisdiction of the cause in the appellate court until determination of the appeal and the issuance of the remittitur. (*Flores, supra,* 30 Cal.4th at pp. 1059, 1064.) However, concurrent jurisdiction survives where provided by law. (*People v. Superior Court (Gregory)* (2005) 129 Cal.App.4th 324, 329.) And even in situations where there is concurrent jurisdiction, the trial court does not have authority to invade the jurisdiction of an appellate court and to oust an appeal, such as by discharging an appellant on habeas corpus on any ground appearing upon the face of the record on appeal and which is raised or could be raised on appeal. (*Id*. at p. 330, citing *France v. Superior Court* (1927) 201 Cal. 122, 131-132.)

Thus, where an indictment (or information) has been dismissed pursuant to a motion pursuant to section 995, the People may file an appeal of that ruling and may file a second accusatory pleading in the lower court, without running afoul of the rule prohibiting trial courts to act while a perfected appeal is pending. However, this exception is conditioned upon the People making a timely election: whether to proceed with the appeal to decision, or whether to proceed in the trial court. (*Anderson v. Superior Court* (1967) 66 Cal.2d 863, 867 (*Anderson*).)

If we assume that *Anderson* can be interpreted to mean that the People have a right to initiate an appeal and refile a case that has been dismissed for reasons other than a defect in the pleading, the People must elect as soon as feasible between maintaining the appeal and proceeding under the new accusatory pleading. (*Anderson, supra,* 66 Cal.2d at pp. 863, 867.) An appeal by the People is an election of remedies. (*People v. Chacon*

(2007) 40 Cal.4th 558, 565; see also *People v. Dewberry* (1974) 40 Cal.App.3d 175, 183.) If, pursuant to section 1238, paragraph (8) of subdivision (a), the people prosecute an appeal to decision, or any review of such decision, it shall be binding upon them and they shall be prohibited from refiling the case which was appealed. (*People v. Chacon, supra,* 40 Cal.4th at p. 565.)

In *Anderson, supra,* 66 Cal.2d at page 867, the California Supreme Court suggests that the People may both appeal and refile charges. (*Id.* at p. 867.) However, that case involved the dismissal of an indictment. Significantly, while the Supreme Court allowed the People to refile the indictment while the appeal was pending, it did not hold that both parallel proceedings may be maintained until the desired result is reached. Instead, it held that the People should elect as soon as feasible, either when the new accusatory pleading withstands a motion under section 995, or at the time of arraignment for plea, whichever occurs first. (*Id.* at p. 867.)

Later cases have interpreted *Anderson* to permit the People to proceed to conclusion on those parts of an information not affected by the trial court's ruling (e.g., a 995 motion), while permitting an appeal on the counts affected by the ruling. (*People v. Franc* (1990) 218 Cal.App.3d 588, 592.) *Franc* clarifies the holding of *Anderson* in stating, "In other words, *Anderson* prevents the People from pursuing its right to appeal and proceeding to trial on the same charges simultaneously, and requires the People to make an election. The People may nonetheless pursue their remedies as to different parts of the information successively, which avoids the problem of the accused having to

defend against a trial and an appeal that concerned the *Anderson* court. [Citation.]" (*Ibid.*)

Here, the appeal was perfected and has been fully briefed and submitted for decision. The aggravated assault charges in Case No. RIF148098, the refiled case number, are well past the arraignment stage on the information and no 995 motion was filed in that matter. (<http://public-access.riverside.courts.ca.gov/OpenAccess, as of September 14, 2009.) By not dismissing the appeal in a timely manner, the People elected to be bound by our decision. The superior court lacks jurisdiction to entertain any proceedings in that case number because jurisdiction is vested with the Court of Appeal.

More significant is the fact that any conviction arising from the refiled assault charges will be merely a paper commitment, since defendant was reconvicted and resentenced separately on the robbery count (RIF129339) while postconviction review of the assault charge continued in the Federal Court. While the robbery charges were pending in RIF129339, defendant continued to serve time on the sentence imposed on the aggravated assault charge in RIF113348 (the present case number). Because the robbery and the aggravated assault charges arose from the same incident, the original term for the aggravated assault was ordered stayed pursuant to section 654. That sentence, originally imposed in 2004, has been served in full and no additional time may be imposed. (See *People v. Beamon* (1973) 8 Cal 3d 625, 637.)

A great deal of public resources have been expended both in this court and in the superior court pursuing the potential of a second strike from this single incident, in the

event the defendant is prosecuted in the future for a new felony. Because this appeal should have been dismissed after the defendant had been rearraigned on the information alleging the aggravated assault in RIF148098 (*Anderson, supra,* 66 Cal.2d at p. 865), the failure to do so is treated as an election to pursue the appeal, divesting the trial court of jurisdiction. We deny the motion to dismiss the appeal and direct the superior court to dismiss RIF148098, the refiled assault charges.

DISPOSITION

The judgment is affirmed. The superior court is directed to dismiss RIF148098.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P.J.

We concur:

GAUT
J.

KING
J.