Filed 6/11/07 P. v. Mariani CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LENKO MARIANI, Defendant and Appellant.	B192553 (Los Angeles County Super. Ct. No. NA069368)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Affirmed in part, vacated in part, and remanded with directions.

Roderick W. Leonard, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie C. Brenan, Kathy S. Pomerantz and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Lenko Mariani appeals from the judgment entered following his convictions by jury on count 1 – possession of a flammable substance with malicious intent (Pen. Code, § 453, subd. (a)) and count 2 – unauthorized taking of a vehicle (Veh. Code, § 10851, subd. (a)). The court sentenced him to prison for four years four months, including upper terms on both counts.[1]

We accept appellant's claim that imposition of the upper terms was reversible error in violation of *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856]. There was substantial evidence that appellant entered a fuel truck parked in a San Pedro terminal and drove the truck, loaded with fuel, around the terminal. When detained, appellant said, inter alia, he had intended to blow up the terminal, get his children, and blow up the Torrance office of the Department of Child and Family Services (DCFS). The trial court imposed the upper terms based on the fact that "this conduct is particularly, since Oklahoma City and other things that have happened in this country, is just egregious[.]" However, the above fact was not found true by a jury beyond a reasonable doubt, and the error warrants reversal under a harmless-beyond-a-reasonable-doubt standard. Moreover, since reversible *Cunningham* error occurred, there is no need to reach the issue of whether the trial court abused its discretion by imposing the upper terms.

We conclude the trial court may have imposed multiple punishment on both counts in violation of Penal Code section 654. The trial court indicated the offenses "may not merge pursuant to [Penal Code section] 654," the court later imposed punishment on both counts, and there was substantial evidence upon which the trial court properly could have relied to do so. On the other hand, the court, referring to the offenses at issue in the counts, stated "it's all one and the same transaction," suggesting the court had concluded the offenses were committed as part of an indivisible transaction. However, if that was the court's conclusion, multiple punishment was error. We will remand the matter to permit the trial court to clarify its ruling and for resentencing.

---

1 This included sentences on two probation cases discussed below.

We accept respondent's concessions that appellant's sentences in his two probation cases must be served concurrently to one another, and that appellant is entitled to additional precommitment credit in those two cases.

FACTUAL SUMMARY

1. *Prosecution Evidence*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), about 8:30 a.m. on March 1, 2006, appellant entered the Evergreen Terminal in San Pedro. Appellant was a casual worker at the terminal. However, he was not employed to work at the terminal on March 1, 2006, and he had never been authorized nor qualified to drive a fuel truck.

A fuel truck was parked in the terminal. The truck was full of diesel fuel and gasoline, with each fuel in a separate compartment accessible by ports on top of the truck. Natale Fiore, a longshoreman at the terminal, testified there were about 1200 gallons of diesel fuel and 50 gallons of gasoline in the truck.

Christopher Fantz, another longshoreman at the terminal, saw appellant enter the fuel truck and drive. Appellant, still in the terminal, stopped the truck, climbed on its top, and looked inside the ports on top of the fuel truck. Appellant looked suspicious because he was not wearing customary work clothing. Appellant reentered the fuel truck and continued driving.

Fantz and Fiore entered Fiore's pickup truck and followed appellant. Appellant was driving erratically in the terminal, traveling about 20 to 40 miles per hour. The speed limit in the terminal was 10 miles per hour. Appellant drove towards an exit gate congested with other trucks. Appellant approached within perhaps 500 feet of the congestion. Appellant then backed up the fuel truck and began to drive in another direction, but Fiore blocked the fuel truck with the pickup truck. Fiore had been following the fuel truck for about three to five minutes.

Fiore opened the door of the fuel truck and removed its ignition key. Appellant was in a daze. He exited the truck and began preaching from a Bible. Appellant said he was Jesus Christ and it was judgment day.

On the above date, Los Angeles Port Police Sergeant Kenneth Hawkes was dispatched to the scene. Hawkes approached appellant and asked his name. Appellant replied that appellant was God. Appellant also said something to the effect that the end of the world was coming, and he was going to blow up the terminal. When appellant said the end of the world was coming, he appeared to be very serious. Hawkes later heard appellant say that appellant was going to drive to his children's school, pick them up, and take them and the truck to the Torrance office of the DCFS. Hawkes also heard appellant say that he was going to threaten to blow it up. Hawkes did not recall seeing appellant in possession of an igniting device.

Hawkes was a hazardous materials specialist. He testified gasoline was highly flammable and explosive, and the vapors were explosive. If the vehicle was involved in an accident, there would be a spill. The hazard was high depending on the quantity of gasoline in the tank. An empty tanker was more volatile than a tanker containing fuel because the vapors alone would ignite. Gasoline tankers occasionally overturned on Southern California freeways. They caused large fires and pollution, and were an extreme hazard.

Los Angeles Port Police Officer Mark Renteria testified as follows. Renteria arrived at the scene and asked appellant for his name. Appellant said his name was Jesus Christ. Renteria later began giving appellant a *Miranda* admonition. Each time Renteria asked appellant if he understood, appellant replied yes, but also said things to the effect that he was Jesus and "judgment day [is] upon us." Appellant also said "sinners beware" and similar things. Appellant talked about his children being taken from him, talked about his former wife, and talked about similar problems. Appellant made statements about blowing up the terminal and DCFS because, according to appellant, they were trying to take his children. During cross-examination, Renteria testified appellant said he was going to blow up the terminal, and "then he said that afterwards he was going to blow up Torrance [DCFS]." He appeared to be agitated about his perception of his wife and DFCS. Renteria did not see appellant in possession of any igniting device.

2. *Defense Evidence.*

In defense, appellant testified as follows. Around March 1, 2006, appellant was working as a casual longshoreman. He was dealing with a bitter divorce and with DCFS. On the above date, appellant went to the terminal. He had an issue with DCFS and his children. He was not thinking when he went to the terminal, and had no intent to do what he did. Appellant entered one of the fuel tankers and drove it around. Appellant did not want to blow up the terminal. He did not know what he was thinking that day. He was under a great deal of stress. Appellant would never do anything to harm any community.

Appellant's counsel asked appellant whether, when he took the fuel tanker, he was thinking that by taking the fuel tanker he was depriving the owner of possession of it. Appellant replied he never intended to take anything.

Appellant also testified as follows. He said he was going to blow up the terminal, then said that that was a fantasy, he was a Christian, and Christians would never do that. Immediately after appellant had said he was going to blow up the terminal, he also said that that was a delusion. If he had wanted to blow up the terminal he would have driven the fuel tanker over the pickup truck, but that was not his intention. Once inside the fuel truck, he had not locked its doors in an effort to prevent persons from entering. He drove the truck for a maximum of four minutes, then pulled over. He testified he did not remember backing up the truck and "never found the [exit], thank God." Appellant did not look for an exit from the terminal. He did not bring any igniting device. During cross-examination, appellant testified he drove around in the terminal to "vent[] . . . steam[.]"

CONTENTIONS

Appellant contends that imposition of upper terms on counts 1 and 2 was an abuse of discretion, imposition of the upper terms violated his constitutional right to a jury trial and due process, and multiple punishment on both counts violated Penal Code section 654. He also contends his sentences in two probation cases must be served concurrently, and he is entitled to precommitment credit in those two probation cases.

DISCUSSION

1. *Cunningham Error Occurred.*

Appellant contends that the trial court erred by imposing the upper terms based on a fact not found by the jury beyond a reasonable doubt, namely, that the crimes were particularly egregious.

a. *Pertinent Facts.*

The information alleged, inter alia, counts 1 and 2, in statutory language. A jury convicted appellant as previously indicated. At sentencing, appellant argued an appropriate sentence was three years in prison, and Penal Code section 654 barred multiple punishment on both counts. The People asked for the upper term. The People argued appellant's conduct was very serious and dangerous, and appellant was on probation in two cases when he committed the present offense.

The court stated, "Mr. Mariani, this conduct is particularly, since Oklahoma City and other things that have happened in this country, is just egregious and I think it's meriting because of that of the high term. However, I agree with [appellant's counsel], they may not merge pursuant to 654 but it's all one and the same transaction." This finding of particular egregiousness was not expressly referred to during jury argument, in the court's instructions to the jury, or in the verdict forms. Nor was it disputed by appellant at sentencing. The court sentenced appellant to prison for, inter alia, concurrent three-year upper terms on counts 1 and 2.

b. *Analysis.*

We cannot conclude beyond a reasonable doubt that a reasonable jury would have found beyond a reasonable doubt that the offenses were particularly egregious.

As mentioned, the trial court's criterion for imposing the upper terms was "this conduct is particularly, since Oklahoma City and other things that have happened in this country, is just egregious[.]" "In *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*), the high court held that California's determinate sentencing law violates a defendant's Sixth and Fourteenth Amendment right to a jury trial to the extent it permits a trial court to impose an upper term based on facts found

by the court rather than by a jury beyond a reasonable doubt." (*People v. Calhoun* (2007) 40 Cal.4th 398, 406.) *Cunningham* relied on, inter alia, *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d. 403]. (*Cunningham*, *supra*, 549 U.S. at p. ___ [166 L.Ed.2d at p. 873].) "*Blakely* error is reviewed under a harmless-beyond-a-reasonable-doubt standard. (*Washington v. Recuenco* (2006) 548 U.S. ___ [165 L.Ed.2d 466].)" (*People v. Waymire* (2007) 149 Cal. App.4th 1448, 1458.)

The trial court committed *Blakely* error by imposing upper terms based on its finding that the crime was particularly egregious, a fact not found by the jury beyond a reasonable doubt. Moreover, we cannot conclude that a jury necessarily would have found true, beyond a reasonable doubt that the crimes were particularly egregious. Further, we cannot find that the trial court's error was otherwise harmless. None of respondent's arguments compel a contrary conclusion.[2]

2. *Multiple Punishment on Counts 1 and 2 May Have Violated Penal Code Section 654.*

As mentioned, the trial court effectively rejected appellant's argument that Penal Code section 654 barred multiple punishment on counts 1 and 2, when the trial court imposed concurrent terms on those counts. Appellant claims Penal Code section 654 applies to bar multiple punishment. For the reasons discussed below, we believe the trial court may have erred, and remand is appropriate to permit the trial court to clarify the basis for its ruling and to sentence appellant accordingly.

"Penal Code section 654 states in pertinent part: 'An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one. . . .' 'The proscription against double punishment in [Penal Code] section 654 is applicable where there is a course of conduct which violates more than one statute and comprises an indivisible transaction punishable under more than one statute within the meaning of [Penal Code] section 654. The divisibility of a course of conduct depends

---

2 In light of the above, there is no need to reach the issue of whether the trial abused its discretion by imposing the upper terms.

upon the intent and objective of the actor, and if all the offenses are incident to one objective, the defendant may be punished for any one of them but not for more than one.' (*People v. Bauer* (1969) 1 Cal.3d 368, 376.) 'The purpose of the protection against multiple punishment is to insure that the defendant's punishment will be commensurate with his criminal liability.' (*Neal v. State of California* (1960) 55 Cal.2d 11, 20.)

". . . 'Whether [a defendant] maintain[s] multiple criminal objectives is determined under all the circumstances and is primarily a question of fact for the trial court, whose finding will be upheld on appeal if there is any substantial evidence to support it.' [Citation.]" (*People v. Williams* (1992) 9 Cal.App.4th 1465, 1473.)

Based on the People's evidence, there was substantial evidence that appellant committed the offense alleged in count 1 to blow up the terminal and/or DCFS office. Based on the defense evidence, there was substantial evidence that appellant committed the offense alleged in count 2 with the criminal objective of depriving the owner of possession of the truck, merely to "vent[] . . . steam[.]" In sum, there was substantial evidence that appellant had independent criminal objectives when he committed the offenses alleged in counts 1 and 2. If so, the trial court could impose multiple punishment on those counts without violating Penal Code section 654. Such a disposition would be consistent with the trial court's comments that "they [counts 1 and 2] may not merge pursuant to 654," and the court's ultimate imposition of multiple punishment.

On the other hand, the trial court stated "it's all one and the same transaction." If the court meant "it's all one course of conduct but the course of conduct is divisible," multiple punishment could be upheld for the reasons discussed in the preceding paragraph. If, on the other hand, the court meant "it's all one and the same [*indivisible*] transaction," multiple punishment was error, and the court imposed an unauthorized sentence. An unauthorized sentence may be corrected at any time. (Cf. *People v. Huff* (1990) 223 Cal.App.3d 1100, 1106.) We will remand the matter to permit the trial court to clarify the basis for its ruling as to whether Penal Code section 654 applied, and to sentence appellant accordingly. (*People v. Garcia* (1997) 59 Cal.App.4th 834, 839;

Pen. Code, § 1260.) We express no opinion as to whether the trial court should conclude that Penal Code section 654 applies.

3. *Consecutive Sentencing on Appellant's Probation Violation Cases Was Error.*

Appellant was convicted of possessing a controlled substance (case No. NA060721) and possession of a firearm by a felon (case No. NA063375). In each of those cases, the trial court, in December 2004, sentenced appellant to prison for the middle term of two years, suspended execution of sentence, and placed him on formal probation for three years. The court also ordered that appellant serve the sentences concurrently. On June 9, 2006, the trial court in the present case found appellant in violation of probation in each of the above two cases based on the evidence presented at trial in the present case.

On June 12, 2006, the court sentenced appellant to prison for concurrent terms on counts 1 and 2 in the present case. Moreover, in each of the probation cases, the court lifted the stay of execution and ordered that appellant serve an eight-month term. The court ordered that appellant serve each eight-month term consecutively to the sentence in the present case and consecutively to each other. Respondent concedes the trial court erred on June 12, 2006, to the extent it ordered that appellant serve the eight-month terms consecutively *to each other*. (*In re Reeves* (2005) 35 Cal.4th 765, 773; Cal. Rules of Court, rule 4.452(3).) We agree.

4. *Appellant is Entitled to Additional Precommitment Credit.*

The record reflects that at sentencing in December 2004 in one of appellant's two probation cases (case No. NA063375), appellant and the court agreed that appellant was entitled to 92 days of precommitment credit, consisting of 62 days of custody credit and 30 days of conduct credit. The court sentenced appellant in December 2004 in case No. NA063375 as previously indicated (suspending execution of sentence) and awarded him 92 days of precommitment credit. Later that day, during sentencing in the other probation case (case No. NA060721), the court sentenced appellant as previously indicated (suspending execution of sentence) but did not award precommitment credit.

As mentioned, appellant violated probation in the two probation cases and, on June 12, 2006, the trial court sentenced appellant to prison in the present case and lifted the stays of execution in the two probation cases. In the present case, as well as in each of the probation cases, the trial court awarded 104 days of precommitment credit, but failed to award the above mentioned 92 days of precommitment credit in either probation case.

Respondent concedes the trial court erred to the extent it failed to award, in the two probation violation cases, 92 days precommitment credit. (*People v. Bravo* (1990) 219 Cal.App.3d 729, 731; *People v. Smith* (1989) 211 Cal.App.3d 523, 527.) We accept the concession. Moreover, since we are remanding for other reasons, we are confident the trial court will, following remand, award appellant the appropriate precommitment credit.

DISPOSITION

The judgment is affirmed, except that appellant's sentence is vacated and the matter is remanded for resentencing and an award of precommitment credit consistent with this opinion. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.