Filed 3/1/18 P. v. Budgell CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>STEPHEN MICHAEL BUDGELL,<br><br>Defendant and Appellant. | B281010<br>(Los Angeles County<br>Super. Ct. No. GA099530) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Carter, Judge. Affirmed.

Tyrone A. Sandoval, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Jaime L. Fuster and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Stephen Michael Budgell was convicted of carrying a concealed dirk or dagger in violation of Penal Code section 21310.[1] He contends that statute is constitutionally infirm. We reject his challenges and affirm.

## RELEVANT PROCEDURAL HISTORY

On September 22, 2016, an information was filed, charging appellant in count 1 with felony carrying of a concealed dirk or dagger (§ 21310), and in count 2 with misdemeanor petty theft (§ 490.1). Accompanying count 1 were allegations that appellant had served nine prior prison terms (§ 667.5, subd. (b).) After initially pleading not guilty and denying the special allegations, appellant entered a plea of nolo contendre to count 2.

A jury found appellant guilty as charged in count 1. Upon finding that appellant had served three separate prior prison terms, the trial court sentenced appellant to a total term of two years and six months.

## FACTS

A. *Prosecution Evidence*

On August 23, 2016, at approximately 11:00 p.m., South Pasadena Police Officer Gilberto Carillo responded to a call regarding a theft at a Vons store. Near the store, Carillo stopped appellant, who fit the description of the

---

[1] All further statutory citations are to the Penal Code, unless otherwise indicated.

suspected thief. Shortly after Carillo detained appellant, South Pasadena Police Officer Omar Lorenzana arrived at the scene. According to Lorenzana, appellant wore a long shirt that covered his waistband. When Carillo asked whether appellant had any weapons or drugs, he replied, "Yes, I have a knife on my waistband." Carillo lifted appellant's shirt, found a knife in a sheath on his right waistband, and handed the knife to Lorenzana for safety.

Carillo testified that the knife was eight inches long, including the three and one-quarter inch blade. He characterized it as a "six blade" knife with a blade that did not fold. The blade had a sharp point, and the knife lacked a hand guard.

B. *Defense Evidence*

Appellant testified that Officer Carillo stopped him and asked whether he "ha[d]s anything on [him]." Appellant replied, "Yes, I have my knife right here," and pointed to his hip. Carillo then removed the knife from its sheath and handcuffed appellant. According to appellant, Officer Lorenzana arrived at the scene after Carillo took possession of appellant's knife.

Appellant testified that as a homeless person, he used the knife as a tool when he searched trashcans for recyclable items. He also acknowledged that he could use it to protect himself "if [he] ha[d] to."

## DISCUSSION

Appellant challenges the constitutional soundness of section 21310, which provides that "any person in this state who carries concealed upon the person any dirk or dagger" commits an offense punishable as a felony or a misdemeanor. The terms "dirk" and "dagger" are defined in section 16470, which provides that they mean "a knife or other instrument . . . capable of ready use as a stabbing weapon that may inflict great bodily injury or death."

Appellant maintains that section 21310 is void for vagueness, overbroad, and subject to arbitrary enforcement, in view of the statutory definition of the terms "dirk" and "dagger," together with other features of the statute. As explained below, we reject appellant's contentions.

### *A. Governing Principles*

As our Supreme Court explained in *People v. Rubalcava* (2000) 23 Cal.4th 322, 332 (*Rubalcava*), a law is void for vagueness in violation of due process "only if it 'fails to provide adequate notice to those who must observe its strictures' and '"impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."'" (Quoting *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116.) Furthermore, a statute is overbroad only if it '"prohibits a '"substantial amount of constitutionally protected conduct."'" (*Rubalcava*, *supra*, 23 Cal.4th at p. 333, quoting *Tobe v. City of Santa*

*Ana* (1995) 9 Cal.4th 1069, 1095, 1096, fn. 15 (*Tobe*).)

We find guidance on appellant's contentions from *Rubalcava,* which addressed similar challenges to the offense set forth in section 21310.[2] There, police officers arrested the defendant on an outstanding warrant. (*Rubalcava*, *supra*, 23 Cal.4th at p. 325.) In the course of the arrest, the defendant said that he had a knife. (*Ibid*.) Inside a pants pocket covered by the defendant's long shirt, the officers found a six-inch knife with a three-inch blade. (*Ibid*.) The blade's tip was chipped and the blade's sides were blunt or dull. (*Ibid*.) Although the defendant testified that the knife was a letter opener rather than a weapon, he was convicted of carrying a concealed dirk or dagger. (*Id*. at pp. 326-327.)

Before the Supreme Court, the defendant contended the offense required a specific intent relevant to the determination whether an instrument was a dirk or dagger, namely, the intent to use it "as a stabbing instrument." (*Rubalcava*, *supra*, 23 Cal.4th at p. 331.) Additionally, the defendant contended the statute establishing the offense was void for vagueness, overbroad, and subject to arbitrary

---

[2] *Rubalcava* examined the offense as specified in former section 12020, subdivision (a), and the related definition of "dirk" and "dagger," in former section 12020, subdivision (c)(24). (*Rubalcava*, *supra*, 23 Cal.4th at pp. 327-328.) Effective 2012, those sections were renumbered as sections 21310 and 16470 with no substantive change. (*People v. Mitchell* (2012) 209 Cal.App.4th 1364, 1369, fn. 1 (*Mitchell*).)

enforcement. (*Id*. at pp. 332-334.)

In rejecting the contention that the statute created a specific intent offense, the court examined the history of the statute. (*Rubalcava*, *supra*, 23 Cal.4th at pp. 327-330.) Prior to 1994, the statute lacked a definition of the terms "dirk" and "dagger." (*Id*. at pp. 328-329.) As a result, the courts of appeal were divided over whether the defendant's subjective intent regarding an instrument's use was relevant to its classification as a dirk or dagger. (*Id*. at pp. 329-330.) In order to resolve inconsistencies in the case law and to craft a statute suitable for addressing gang crime, the Legislature enacted and amended the definitions of the terms "dirk" and "dagger," a process that culminated in 1997 with the current definitions. (*Id*. at pp. 329-330 & fn. 5.)

In view of the statute's legislative history, the court concluded that "the intent to use the concealed instrument as a stabbing instrument is not an element of the crime of carrying a concealed dirk or dagger. Indeed, the offense has never had such an intent requirement, and we find nothing suggesting an intent by the Legislature to alter this established rule." (*Rubalcava*, *supra*, 23 Cal.4th at p. 331, italics deleted.) The court nonetheless held that the offense has a mens rea requirement: "[T]o commit the offense, a defendant must still have the requisite guilty mind: that is, the defendant must knowingly and intentionally carry concealed upon his or her person an instrument 'that is capable of ready use as a stabbing weapon.' [Citation.] A defendant who does not know that he is carrying the weapon

or that the concealed instrument may be used as a stabbing weapon is therefore not guilty of violating [the statute]." (*Id.* at p. 332, italics deleted.)

Turning to the defendant's constitutional challenges, the court concluded that the statute was not void for vagueness: "[The defendant] identifies *no* vague terms in the statute that may be open to multiple interpretations. Instead, he claims the resulting criminalization of 'otherwise wholly innocent conduct' would make [the statute] unconstitutionally vague. [Citation.] The mere fact that a statute may criminalize previously legal conduct does not, however, make a statute unconstitutionally vague especially where, as here, the statutory language and legislative history indicate the Legislature intended such a result." (*Rubalcava*, *supra*, 23 Cal.4th at p. 332.)

The court further rejected the challenge based on overbreadth, notwithstanding the defendant's reference to "general examples" of the statute's possible infringement of rights guaranteed under the First and Fourth Amendments to the United State Constitution. (*Rubalcava*, *supra*, 23 Cal.4th at pp. 333-334.) The court stated: "[The defendant] describes *no* instances where the statute actually infringes on constitutionally protected conduct, and we can think of none. Even though [the statute] may seem overbroad as a matter of common sense, we will not find it *unconstitutionally* overbroad without some concrete impairment of constitutionally protected conduct." (*Id.* at p. 333.)

For similar reasons, the court rejected the challenge

based on the statute's potential for arbitrary enforcement: "[T]he statute may invite arbitrary and discriminatory enforcement not due to any vagueness in the statutory language but due to the wide range of otherwise innocent conduct it proscribes. . . . While the wisdom of this solution to the gang problem may certainly be questioned [citation], '[t]he role of the judiciary is not to rewrite legislation to satisfy the court's, rather than the Legislature's, sense of balance and order.'" (*Rubalcava*, *supra*, 23 Cal.4th at p. 333, quoting *People v. Carter* (1997) 58 Cal.App.4th 128, 134.)

B. *Vagueness*

Appellant contends the statute is void for vagueness due to the use of the term "capable" in the definition of "dirk" and "dagger." He argues that "[b]ecause a knife or other instrument is not itself 'capable' of use as a stabbing weapon or causing great bodily injury, it is clear that the . . . statute . . . requires consideration of factors other than the knife itself in determining whether the knife is capable of use as a stabbing weapon. [¶] However, the statute is vague because it does not provide for what factors, such as the circumstances surrounding possession and the defendant's intent, are to be considered." As discussed below, appellant lacks standing to assert this challenge.

"'The rule is well established . . . that one will not be heard to attack a statute on grounds that are not shown to be applicable to himself and that a court will not consider every conceivable situation which might arise under the

language of the statute and will not consider the question of constitutionality with reference to hypothetical situations.' [Citation.] If the statute clearly applies to a criminal defendant's conduct, the defendant may not challenge it on grounds of vagueness." (*Tobe*, *supra*, 9 Cal.4th at p. 1095, quoting *In re Cregler* (1961) 56 Cal.2d 308, 313.) When arrested, appellant had an eight-inch long knife with a fixed three and one-quarter-inch pointed blade concealed under his shirt; at trial he acknowledged that it was usable as a weapon. Under *Rubalcava*, the statute clearly applies to appellant, regardless of his intent in possessing the knife, and he has suggested no explanation why the ambiguity he discerns in the statute could apply to him. Accordingly, appellant may not attack the statute as void for vagueness.

Moreover, were we to address the contention, we would reject it. In interpreting the statutory definition, we seek the legislative intent, looking first to the plain meaning of the words, with an eye to their context and other statutes relating to the same subject matter. (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437.) Section 16470 provides: "'[D]irk" 'or dagger' means a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death. A nonlocking folding knife, a folding knife that is not prohibited by [s]ection 21510, or a pocketknife is capable of ready use as a stabbing weapon that may inflict great bodily injury or death only if the blade of the knife is exposed and

locked into position."[3]

We conclude that the phrase "capable of ready use" is subject to no ambiguity rendering the statute void. Because an instrument does not use itself, the phrase must be regarded as referring to the instrument's capacity for use as a stabbing weapon by its possessor. Furthermore, in view of the word "ready," the phrase designates a requirement regarding the instrument's condition and relation to the possessor, namely, that it can quickly be used as weapon.

That interpretation of the phrase is reflected in *People v. Sisneros* (1997) 57 Cal.App.4th 1454. There, the defendant possessed a cylindrical device that could be transformed into a knife with a two and one-half-inch blade. (*Id.* at p. 1455.) In order to convert the device into a knife, it was necessary to unscrew one end of the device, remove the blade from inside the device, turn the blade around, and screw the blade into the device. (*Ibid.*) The appellate court concluded that the device was not "capable of ready use" as a stabbing weapon within the meaning of the statutory definition: "The most deft of individuals will require several seconds to convert the gizmo from a benign cylinder into an instrument of death. For the entire period of time necessary for assembly, the device is useless as a stabbing weapon. . . . Were we to consider this device capable of ready use, we would be left to wonder what kind of knife, concealed on the

---

[3] Section 21510 establishes that certain uses of a switchblade knife with a blade two or more inches in length constitute misdemeanors.

person, is not so capable." (*Id.* at p. 1457.)

Here, the evidence unequivocally showed that appellant possessed a knife "capable of ready use," as Officer Carillo testified that upon arresting appellant, he found appellant's knife in a sheath attached to his waistband. Accordingly, we decline to find that the statute is void for vagueness.

C. *Overbreadth*

Appellant contends the statute is overbroad because it prohibits a substantial amount of conduct protected under the United States Constitution, specifically, under the right to travel, the right against excessively intrusive governmental surveillance established in the Fourth Amendment, and the right to privacy of personal relationships (*Griswold v. Connecticut* (1965) 381 U.S. 479, 485). The crux of his challenge is that the statute potentially criminalizes innocent activity, such as carrying a knife in a paper towel to a PTA potluck dinner, taking mumblety-peg knives home in a pocket after practicing that game, or walking in public after placing scissors or knitting needles in a pocket or purse. He argues that there is a right "to carry concealed on the person items designed and carried for an innocent purpose" rooted in the right to travel and the privacy rights. Additionally, he argues that the right in question concerns conduct akin to taking a walk or loafing, which the United States Supreme Court has characterized as among "the amenities of life as we have known them," even though they

are not mentioned in the Constitution or in the Bill of Rights. (*Papachristou v. City of Jacksonville* (1972) 405 U.S. 156, 164 (*Papachristou*).)

At the outset, we observe that appellant has standing to assert his contention because he raises only a facial challenge to the statute, that is, argues that the statute generally prohibits a substantial amount of protected activity, not that it specifically operated to deny his rights.[4] As our Supreme Court has explained, defendants may contend that a statute is facially overbroad without showing that the statute infringed on their own constitutionally protected activity. (*Tobe*, *supra*, 9 Cal.4th at pp. 1095-1096.)

In our view, the contention fails. In *Rubalcava*, our Supreme Court took note of the otherwise innocent activity proscribed by the statute, but held that it was not overbroad with respect to the rights protected under the First and Fourth Amendments. (*Rubalcava*, *supra*, 23 Cal.4th at pp. 330, 333.) We are bound by that determination. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450,

---

[4] "A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual." (*Tobe*, *supra*, 9 Cal.4th at p. 1084.) In contrast, an "as applied" challenge "contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right." (*Ibid.*)

455 (*Auto Equity*).)

The remaining considerations appellant offers demonstrate no overbreadth. In *Mitchell*, the appellate court rejected an overbreadth challenge to the statute based on the Second Amendment right to bear arms, concluding that the statute "serves the important governmental interest of allowing third parties to protect themselves from exposure to the risk of a surprise attack from a bearer of a weapon." (*Mitchell*, *supra*, 209 Cal.App.4th at p. 1375.) In view of *Mitchell*, the activity that the statute targets is not reasonably regarded as an "amenit[y] of life" (*Papachristou*, *supra*, 405 U.S. at p. 164). Furthermore, *Mitchell* implies that the statute does not forbid a substantial amount of conduct protected by the right to travel or the right to privacy regarding personal relationships. Generally, the right to travel is not impermissibly infringed by a law such as section 21310, even though it may have an incidental impact on travel, as it serves a purpose other than restricting travel in a nondiscriminatory manner. (*Tobe*, *supra*, 9 Cal.4th at p. 1100.) Section 21310 also does not infringe the privacy right relied upon by appellant, as that right relates primarily to marriage, procreation, contraception, family relationships, child rearing, and education. (*People v. Privitera* (1979) 23 Cal.3d 697, 702.) In sum, appellant has not shown that the statute is unconstitutionally overbroad.

D. *Enforcement*

Appellant contends the statute invites arbitrary enforcement. *Rubalcava* expressly considered and rejected that challenge. (*Rubalcava*, *supra*, 23 Cal.4th at p. 333; *Auto Equity*, *supra*, 57 Cal.2d at p. 455.)

## DISPOSITION

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.