Filed 1/20/16 P. v. Gallegos CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. FANNY STEPHANIE GALLEGOS, Defendant and Appellant.	B256252 (Los Angeles County Super. Ct. No. BA387262)

APPEAL from a judgment of the Superior Court of Los Angeles County. Clifford L. Klein, Judge. Dismissed.

Richard Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In this appeal, we granted appellant's motion for leave to file a late notice of appeal so that she could challenge a Penal Code section 1368 commitment order applicable to four separate Los Angeles Superior Court cases. In her briefs filed with this court, however, she does not contest the commitment order. Instead she argues only that the trial court erred in denying a Penal Code section 1538.5 motion to suppress in one of the four cases.[1]

Because appellant failed to file a notice of appeal that enables her to appeal the suppression motion, we do not have jurisdiction over the only error of which she now complains. Accordingly, we dismiss the appeal.

FACTS

Because of the limited nature of the appeal, we need not set forth the facts underlying the charges in the four cases filed against appellant. Instead, we describe the procedural events surrounding those matters.

A. Four Cases Filed Against Appellant

During 2011-2013, the District Attorney filed four complaints against appellant. The case with which we are principally concerned, case No. BA387262, charged her with various controlled substances and firearms violations. She was also charged in Los Angeles Superior Court cases:

1. BA380439: joy riding and driving without a license
2. BA388239: drug and gun possession
3. BA415606: second degree robbery

On December 6, 2013, while appellant was on formal probation in the joy riding case, and the other three cases were active, the trial court declared a doubt about appellant's competency in all four cases and committed her to Patton State Hospital

---

[1] All statutory references are to the Penal Code and all rule references are to the California Rules of Court.

under section 1368. Later, criminal proceedings were reinstated. At the time, appellant's exposure on all four cases was 22 years, 4 months. The parties agreed on a global plea disposition pursuant to which appellant was given a three year sentence on August 6, 2014 (the August 2014 judgment). As part of the plea bargain, various counts and case No. BA388239 were dismissed.

With this overview in mind, we turn to some of the earlier events leading up to the plea disposition.

B. The 1538.5 Motion in Case No. BA387262, the Commitment Order and In Pro Per Appeals

On September 18, 2012, appellant was represented by Attorney Patricia Fullwinder when the trial court denied appellant's section 1538.5 motion in our principal case, No. BA387262. Under section 1538.5, subdivision (i) any *pretrial* review of the order denying a suppression motion must be by extraordinary writ filed within 30 days of the order. Neither attorney Fullwinder nor appellant in pro per sought writ relief.

More than one year later, on December 6, 2013, criminal proceedings were suspended in all four cases and appellant was committed under section 1368. At that time, appellant was represented by attorney Ralph Rios in case No. BA387262. Under *People v. Fields* (1965) 62 Cal.2d 538, 540, an order under section 1368 is immediately appealable as a final judgment in a special proceeding. (See also *People v. Christiana* (2010) 190 Cal.App.4th 1040.)

While criminal proceedings remained suspended, appellant in pro per purported to challenge both the *appealable* commitment order entered in the four cases as well as the *non-appealable* section 1538.5 order entered on September 18, 2012, in case No. BA387262.

As to the commitment order, on March 14, 2014, appellant filed a habeas petition challenging that order; on April 2, 2014, she filed an amended habeas petition. On April 4, 2014, the trial court denied the petition. On April 25, 2014, appellant filed in the trial court a notice of appeal from the denial of her habeas petition, in which she

identified the denial order as an April 4, 2014, judgment. The superior court acknowledged receipt of the notice of appeal but informed appellant no further action would be taken because there was no hearing on April 4, 2014 and the habeas petition was not appealable. On May 14, 2014, appellant filed a motion in this court for relief to file an appeal from the commitment order. That motion was given the case number of the current appeal. On May 22, 2014, appellant filed another habeas petition in the trial court seeking review of the commitment order. The record does not disclose what happened to that habeas petition.

As to the purported appeal from the denial of her section 1538.5 motion, appellant submitted three documents to the superior court, all signed by herself in pro per (the April 2014 notices). Two are on Judicial Council form CR-120; the third is a drafted pleading captioned "Belayed [sic] Notice of Appeal." In a form letter dated April 22, 2014, the superior court informed appellant it had received the April 2014 notices, had marked them "received but not filed" or "inoperative," and had placed them in the case file with no further action because appellant "is appealing [from] the denial of the 1538.5 motion which was heard and denied on 09/18/12."[2]

The actions of the Los Angeles Superior Court clerk were essentially correct: (1) section 1538.5 order was not ripe for appeal because no judgment had been entered in the case, and (2) the purported appeal from the commitment order was untimely. (Cal. Rules of Court, rule 8.308, subd. (a) [time for appeal is 60 days].) The superior court rejected all of the purported notices of appeal as untimely. Appellant sought further relief in the trial court from the rejection of her untimely notice of appeal from the commitment

---

[2] The form letter sent by the clerk contains a check box preceding, "Your appeal has been presented prematurely . . . ." The box was not checked although it might have been applicable in the context of seeking review of the 1538.5 denial from the *final judgment*. As we pointed out in the text, the purported notices of appeal were filed in April 2014. The final judgment in the case was not until August 6, 2014.

order (her pro per efforts included seeking habeas relief). She did not do so as to the rejection of her notice of appeal from the section 1538.5 order.[3] No relief was granted.

C. *Proceedings in the Court of Appeal on the Appeal from the Commitment Order*

On May 14, 2014, before the eventual plea disposition, appellant in pro per moved this court for relief from her failure to file a timely notice of appeal from the *commitment order only***.** We referred the matter to the California Appellate Project (CAP) for consideration of appointment of appellate counsel. On October 31, 2014, CAP Attorney Elizabeth Courtenay filed a "Supplemental Application/Petition for Relief From Default For Failure to Timely File a Notice of Appeal" (Supplemental Application) and an accompanying Request for Judicial Notice (RJN), seeking permission to file a late notice of appeal from the commitment order. We granted the application, and on November 20, 2014, Attorney Courtenay filed a notice of appeal specifying the December 6, 2013 commitment order as the order appealed from. (See Rule 8.304(b)(4).) The Notice of Appeal stated:

"[Appellant] hereby appeals from the December 6, 2013 order committing her to Patton State Hospital after the court found [appellant] incompetent to stand trial or a probation violation hearing in Los Angeles Superior Court cases Nos. BA380439, BA387262, BA388239 and BA415606. (Pen. Code, § 1368.)"

Neither appellant, her trial attorney nor her CAP attorney took any action at that time to challenge the section 1538.5 order. None of them filed a timely notice of appeal from the judgment, CAP did not ask for leave to file a late notice of appeal from the judgment or for this court to exercise its discretion to treat the April 2014 notices as a premature (and therefore timely) notice of appeal from that judgment. (Rule 8.380(c).)

The following chronology makes it clear that, at the time the notice of appeal was

---

[3] Appellant's Petition for Habeas Corpus regarding the commitment order asserts officers testified falsely during the hearing on her motion to suppress, but the denial of the motion is not the subject of the petition.

filed, there was an intentional decision not to pursue appellate review of the section section 1538.5 order:

- On April 22, 2014, almost four months before judgment, CAP Attorney Courtenay received copies of the April 2014 notices purporting to appeal from the section 1538.5 order and the letter from the superior court rejecting those notices.
- On or about April 29, 2014, Courtenay determined that the April 2014 notices were "premature as [appellant] had not been tried, convicted or sentenced in case No. BA387262."
- On May 15, 2014, before Courtenay had communicated to appellant her conclusion regarding the April 2014 notices, Courtenay received appellant's pro per notice of appeal from the commitment order.
- On May 18, 2014, Courtenay made contact with Rios, the trial attorney then representing appellant in case No. BA387262 and who had represented appellant in the commitment proceedings.
- In letters to this court dated June 2 and 10, 2014, Courtenay recommended that appellant be allowed to file a late notice of appeal from the commitment order. Courtenay then began preparing the Supplemental Application.
- On an unspecified date, Courtenay learned appellant had entered a plea disposition covering all four cases on August 6, 2014.
- In late August 2014, Courtenay learned Rios was no longer representing appellant in case No. BA387262.
- On an unspecified date in September 2014, Courtenay obtained contact information for appellant's new trial attorney at the sentencing hearing in case No. BA387262 (Elden).

- On September 30 and October 10, 2014, at Courtenay's instruction, a CAP employee reviewed the Superior Court files in all four cases looking for documents relevant to the commitment order.
- On October 16, 2014, Courtenay received documents copied from the superior court file by the CAP employee.
- On October 31, 2014, Courtenay filed the Supplemental Application, which sought leave to file a late notice of appeal only from the commitment order.
- The Supplemental Application did not (1) ask for leave to file a late notice of appeal from the *judgment* in case No. BA387262, which had by then been entered in August 2014 pursuant to the global pea agreement, or (2) ask the court to exercise its discretion to treat the April 2014 notices as valid and timely notices of appeal from the judgment. This is so even though the April 2014 notices appellant had filed in pro per were attached as Exhibit 29 to the RJN and referred to in the Supplemental Application as "premature."
- On November 13, 2014, we granted leave to file a late notice of appeal in all four cases. We did not expressly mention the commitment order.
- On November 20, 2014, Courtenay filed a notice of appeal specifying only the commitment order as the order appealed from.

The Clerk's Transcript filed on January 23, 2015, as part of this appeal did not include a copy of a notice of appeal from the judgment in case No. BA387262. (See Cal. Rules of Court, rule 8.320(b)(10) [on appeal from a criminal conviction, the Clerk's Transcript must include the notice of appeal].) It did contain a copy of the Notice of Appeal from the commitment order.

On March 15, 2015, two months after the Clerk's Transcript was filed, CAP Attorney Richard B. Lennon filed a motion to augment the appellate record with (1) the April 2014 notices as to the 1538.5 motion and (2) the Reporter's Transcript of the

hearing on that motion. In his motion, Lennon argued the April 2014 notices "were, of course, premature, inasmuch as appellant was not sentenced until August, 2014. [Citation.] This premature notice was valid and is treated as being timely following judgment being rendered. ([Cal. Rules of Court,] rule 8.104, subd. (d).) [¶] . . . Because the suppression issue is a valid issue for appeal (Penal Code, § 1538.5, subd. (i)), a transcript of the hearing is a necessary part of the appellate record."

On April 3, 2015, we granted the motion to augment the appellate record with the Reporter's Transcript, but *not* the April 2014 notices.

On June 5, 2015, CAP Attorney Lennon filed a Second Motion to Augment the Record on Appeal, this time seeking the affidavit for the search warrant, which is required in an appeal from the denial of a section 1538.5 motion. (Cal. Rules of Court, rule 8.320(b)(13)(B).) We denied the second augmentation motion on June 8, 2015: "The request for augmentation is denied. This court will request transmission of the exhibits on an expedited basis."

Appellant's Opening Brief was filed on June 9, 2015. Although the notice of appeal had specified the commitment order as the subject of the appeal, the brief challenged only the order denying the section 1538.5 order. There is no substantive discussion of any error associated with the commitment order.[4] On November 13, 2015, we sent a Government Code letter asking whether we have appellate jurisdiction over the order denying the section 1538.5 motion in case No. BA387262 as the November 20,

---

[4] The only mention of the commitment order is at footnote 3 on page 9 of the Opening Brief, which states: "The appeals from the determination of incompetence are moot because appellant was subsequently found restored to competence. (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1186; *People v. Harris* (1993) 14 Cal.App.4th 984.)" This directly contradicts the statement on page 10 of the Supplemental Application filed by Attorney Courtney that appeal from the commitment order was *not* moot because it could be used as a factor in determining competence in later cases. (Citing *People v. De La Rosa* (2014) 229 Cal.App.4th 1233, 1235-1236, citing *Jackson v. Indiana* (1972) 406 U.S. 715 and *In re Davis* (1973) 8 Cal.3d 798.) *De La Rosa* has since been ordered depublished.

2014, notice of appeal specifies only the separately appealable commitment order (entered in all four cases) as the order from which the appeal is taken.

Defense counsel's response to the Government Code letter essentially concedes that appellate jurisdiction cannot be based on the notice of appeal from the commitment order itself. However, counsel maintains the April 2014 notices filed four months before judgment was rendered are valid notices of appeal from the judgment:

> "While the notices were premature because they were filed prior to judgment being entered, premature notices are valid and treated as being timely filed following judgment being rendered. (Cal. Rules of Court, rule 8.104(d). [¶] Thus, [appellant] has a valid, albeit premature, Notice of Appeal which established jurisdiction for this Court to consider her appeal of the denial of her suppression motion. [¶] It may have been that counsel for [appellant] should have requested that this Court assign a different case number to the premature Notice of Appeal so as not to confuse that appeal from the judgment with an appeal from the pre-judgment commitment order. But, inasmuch as the Court granted counsel's augmentation motion under this number, and ordered the record augmented with the documents and transcripts necessary to raise the suppression issue, counsel did not believe that he had to obtain a different number to continue the post judgment appeal. If counsel is mistaken about this, he apologizes to the Court for this error, and requests guidance on what, if anything, needs to be done . . . ."

The People counter that (1) the order granting appellant permission to file a late notice of appeal from the December 6, 2013, commitment order cannot reasonably be understood as allowing appellant to appeal from the August 6, 2014, judgment and (2) the April 2014 notices are not valid notices of appeal from the subsequent judgment. Both sides appear to have overlooked that rule 8.104, cited by the defense (see citation in quoted portion of appellant's opening brief above), applies only to civil not criminal cases. (Rule 8.104 is found in California Rules of Court, Title 8, Division 1, Chapter 2 entitled "Civil Appeals.")

DISCUSSION

A. General Appellate Jurisdiction Cannot be Based on the Notice of Appeal From the Commitment Order

A notice of appeal is sufficient if it identifies the judgment or order being appealed. (Rule 8.304, subd. (b)(4).) The commitment order was a separately appealable order. (*People v. Fields, supra,* 62 Cal.2d at p. 540.) The notice of appeal appellant filed through counsel on November 20, 2014, specifies that it is from the commitment order. Because that notice of appeal does not refer to the judgment entered in case No. BA387262, it does not satisfy rule 8.304, subd. (b)(4), and is not a valid notice of appeal from that judgment.

Defendant does not seem to dispute this.

B. The Augmentation Order Is Not a Substitute for a Notice of Appeal

In response to the Government Code letter, CAP Attorney Lennon states that, "inasmuch as this Court granted counsel's augmentation motion under this [case] number, and ordered the record augmented with the documents and transcripts necessary to raise the suppression issue, counsel did not believe that he had to obtain a different number to continue the post judgment appeal." Counsel seems to be suggesting that the augmentation order is tantamount to a finding that the April 2014 notices were valid notices of appeal from the judgment. Not so.

An appellate decision, of course, " 'does not stand for a proposition not considered by the court.' [Citation.]" (*Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284, 1299.) By analogy, a ruling on an augmentation motion does not stand for permission to file a late notice of appeal or to treat a premature notice of appeal as timely filed, where those issues were not expressly presented to the court in the augmentation motion.

C. The April 2014 Notices Are Not "Valid" Premature Notices of Appeal From the Judgment; Defendant Is Relying on the Rule Applicable to Civil Cases

Separate from his argument on the augmentation order, appellant's counsel also relies on rule 8.104, subd. (d) for the proposition that the April 2014 notices are "valid" and must be "treated as being timely filed . . . ." But that rule does not govern premature notices of appeal in criminal cases. In criminal cases, the applicable rule is rule 8.308, subd. (c), which reads:

> "A notice of appeal filed before the judgment is rendered or the order is made is premature, but the reviewing court *may* treat the notice as filed immediately after the rendition of the judgment or the making of the order." (Italics added.)

Thus, in criminal cases, the appellate court has discretion to treat a premature notice of appeal as timely, but is not required to do so. Defendant has never asked this court to exercise its discretion to treat the April 2014 notices as timely notices of appeal from the judgment. Rather, appellant has consistently maintained the April 2014 notices constitute a per se valid notice of appeal under the inapplicable rule 8.104(d).

Even if we were to graft rule 8.104(d) principles onto this case, the April 2014 notices would not necessarily be deemed valid notices of appeal. This is because the appellate court has discretion whether to treat a premature notice of appeal as timely under the circumstances of this case. Rule 8.104, subd. (d) distinguishes premature notices based on when they are filed:

> "**(d) Premature notice of appeal**
>
> (1) A notice of appeal filed *after judgment is rendered but before it is entered* is valid and is treated as filed immediately after entry of judgment.
> (2) The reviewing court may treat a notice of appeal *filed after the superior court has announced its intended ruling, but before it has rendered judgment*, as filed immediately after entry of judgment." (Italics added.)

Under subparagraph (1), a premature notice of appeal filed *after* judgment is rendered but before entry is valid; but under subparagraph (2), the appellate court has discretion to

treat as timely filed a notice of appeal filed *before* judgment is rendered. This case would fall in the discretionary category because the April 2014 notices were filed before August 2014 judgment was rendered.[5]

D. Defendant Has Not Shown Good Cause to Treat April 2014 Notices as Timely under Rule 8.308(c) Applicable to Criminal Cases

Defendant has not shown good cause for the court to exercise its discretion to treat the April 2014 notices as timely notices of appeal from the judgment under rule 8.308(c). The relevant law is as follows.

- A notice of appeal is sufficient if it identifies the judgment or order being appealed. (Rule 8.304(b)(4).)

- "A notice of appeal filed before the judgment is rendered or the order is made is premature, but the reviewing court may treat the notice as filed immediately after the rendition of the judgment or the making of the order." (Rule 8.308(c); see *People v. Breckenridge* (1992) 5 Cal.App.4th 1096 [for good cause, trial court may treat a notice of appeal filed before rendition of judgment as being filed immediately thereafter]; *People v. Gregg* (1968) 267 Cal.App.2d 567 [exercising discretion to treat appeal from order denying § 1538.5 motion as premature appeal from the judgment of conviction]; *People v. Jasso* (1969) 2 Cal.App.3d 955, 966 [belated review of order denying § 1538.5 motion by writ of habeas corpus depends on whether trial counsel was ineffective in failing to seek review in the trial court].)

We find no good cause to exercise our discretion for several reasons. First, we observe there is doubtful benefit to defendant if ultimately we were to reverse the conviction in case No. BA387262. The August 2014 judgment in that case was part of a global plea disposition in four cases, the product of which was very favorable to appellant considering she faced over 22 years imprisonment in all four cases. Presumably if we were to treat the April 2014 notices as valid notices of appeal from the judgment in case

---

5 An example of a notice of appeal falling within the mandatory category in a criminal case might be a notice of appeal filed after a verdict was entered but before the appellant was sentenced.

No. BA387262 and if we were also to reverse the conviction in that case, the People would argue that the entire plea bargain should be undone because they would not have received the full benefit of the deal. (See *People v. Collins* (1996) 45 Cal.App.4th 849, 862-863 [when prosecution is deprived of benefits for which it bargained, it is entitled to relief from concessions it made].) In that situation, excluding case No. BA387262, and assuming application of typical sentencing rules (consecutive/concurrent/ § 654), appellant's sentence exposure would be approximately 11 years, 6 months. Under such circumstances it strikes us incongruous to treat the earlier notices of appeal as a premature notice of appeal from a subsequent judgment that was the product of appellant's global plea agreement.

Second, there are procedural reasons why the April 2024 notices should not be treated as premature notices of appeal from the judgment in case No. BA387262. The two form notices that partially comprise the April 2014 notices do not satisfy rule 8.304, subd. (b)(4) because they do not identify the section 1538.5 order as the order appealed from.[6] Although the pleading captioned "Belayed [*sic*] Notice of Appeal" refers to the section 1538.5 order, its content is actually a request for appointment of counsel to assist appellant in filing a "belayed notice of appeal," based on appellant 's erroneous belief that her trial counsel had been ineffective in failing to file a timely notice of appeal. Defendant was granted the relief she requested with the appointment of CAP attorney Courtenay.

Third, we see no good cause to treat the premature "Belayed [*sic*]Notice of Appeal" as a timely notice of appeal from the judgment because there has been no express request to do so under the applicable Rules of Court for criminal cases. When CAP Attorney Courtenay filed the Supplemental Application on October 31, 2014,

---

6 One of the form notices identifies the order appealed from as the order made on or about "6/11/12." The minute order dated June 11, 2012 in case No. BA387262, reflects only the transfer to another department. The other form notice identifies the order made on or about "June 19, 2013" as the order appealed from. The minute order dated June 19, 2013, in case No. BA387262, reflects that hearing on appellant 's section 1538.5 motion was trailed to July 8, 2013.

Courtenay had been in contact with appellant's former and then current attorneys in case No. BA387262 and she knew that, in relation to an appeal from a judgment (as opposed to earlier orders), the April 2014 notices had been premature because there had been no judgment in the case in April. She knew judgment had been entered on August 6, 2014. All of those facts were included in the Supplemental Application. Even so, the Supplemental Application sought neither permission to file a late notice of appeal from the judgment nor that this court exercise its discretion to treat the April 2014 notices as timely notices of appeal from the judgment. Attorney Courtney asked that we grant relief to allow appellant to appeal from the commitment order and that is what we did.

Fourth, in response to our Government Code letter, appellant did not file a declaration from her trial attorney in case No. BA387262 at the time judgment was entered (Elden) stating that he did not file a notice of appeal from the judgment because he did not know about the section 1538.5 order (entered when appellant was represented by another attorney) or because he believed the April 2014 notices were valid notices of appeal from the judgment. Nor is there a declaration from CAP Attorney Courtenay stating that, although she knew the April 2014 notices were premature, she did not cause a timely notice of appeal to be filed because she presumed trial counsel had done so, or because she believed the April 2014 notices were per se valid under the Court Rules. The absence of such declarations suggests that the decision not to challenge the section 1538.5 motion was deliberate, only to be reversed later on.

DISPOSITION

The court dismisses this appeal for lack of jurisdiction.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.