Filed 5/3/12 P. v. Marquez CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JAMES MARQUEZ, Defendant and Appellant.	B232650 (Los Angeles County Super. Ct. No. VA117019)

APPEAL from a judgment of the Superior Court of Los Angeles County. John A. Torribio, Judge. Affirmed.

Ann Krausz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant James Marquez was convicted, following a jury trial, of one count of grand theft auto in violation of Penal Code section 487, subdivision (d)(1) and one count of unlawful driving or taking of a vehicle in violation of Vehicle Code section 10851, subdivision (a). The trial court found true the allegations that appellant had suffered two prior serious or violent felony convictions within the meaning of Penal Code sections 667, subdivisions (b) through (i) and 1170.12 (the "Three Strikes" law). Appellant also pled no contest to four misdemeanor counts related to driving under the influence and to the attached enhancements. The trial court sentenced appellant to the upper term of three years for the grand theft conviction, doubled pursuant to the Three Strikes law.[1] The court also imposed a concurrent one-year term for the misdemeanor Vehicle Code section 23152 driving under the influence conviction. Sentence on the unlawful driving conviction and the three other misdemeanor convictions was stayed pursuant to section 654.

Appellant appeals from the judgment of conviction, contending that the conviction for driving or taking a vehicle must be stricken because it is a lesser included offense of grand theft auto. We affirm the judgment of conviction.

Facts

On August 16, 2010, in the morning, appellant came to the Cerritos Dodge Chrysler Jeep dealership and met with Phillip Hahn, the dealership's sales manager for pre-owned vehicles. Hahn showed appellant a 2006 Chevrolet Tahoe. Appellant asked to see the "book sheet" on the Tahoe, made several phone calls and then offered $14,000 for the vehicle on behalf of MK Smith Chevrolet. Appellant and Hahn filled out a sales draft (a form of promissory note). Hahn asked appellant to have MK Smith fax over its dealership information. Appellant called someone, then told Hahn that he could not figure out how to fax the info. They agreed that appellant would supply the information later. Appellant left with the Tahoe.

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[1] The prosecutor elected not to proceed on one of the strike priors.

A few weeks later a clerk from Cerritos Dodge called MK Smith for payment and learned that they did not know anything about the transaction for the Tahoe. Hahn spoke with the general manager of MK Smith as well as the manager for pre-owned vehicle sales. They both said that appellant did not work for them and they knew nothing about the Tahoe transaction. They had not authorized it.

Hahn called appellant's cell phone numerous times and left messages but never heard from appellant. Hahn called police and reported the Tahoe stolen.

On February 28, 2010, about 2:00 a.m., California Highway Patrol Officer Romero and his partner observed appellant getting out of a Chevrolet Tahoe on the shoulder of the 56 freeway. They spoke with appellant, who told the officers that he was out of gas. Officer Romero ran the Vehicle Identification Number and license plate of the Tahoe and learned that it had been reported stolen. He arrested appellant.

Appellant later admitted to Los Angeles County Sheriff's Detective Robert Manning that he did not work for MK Smith and did not have their permission to buy the Tahoe. He said that he obtained vehicles and sold them to private parties. Appellant also said that he had made a deal "on the side" to sell the Tahoe, but the deal had fallen through and he decided to keep the car until he could find another buyer.

In his defense, appellant called Alex Bitar, who worked for MK Smith and had his own company call Rice Auto Wholesale. Appellant brokered cars for Bitar on behalf of Rice Auto. Bitar would often give appellant a blank draft authorizing appellant to buy a car for Rice if he saw one at a good price. Between August 16 and September 22, 2010, appellant did broker cars for Rice Auto. Bitar did not authorize appellant to buy the Tahoe or to use the name MK Smith.

Lonniere Suchanek, the president and general manager of Glendora Chrysler Dodge testified that appellant had bought cars from Suchanek on behalf of both Rice Auto and MK Smith. Suchanek stopped doing business with Rice Auto because its checks bounced.

Discussion

Appellant contends that Vehicle Code section 10851 is a lesser included offense of grand theft auto as set forth in Penal Code section 487, and that double jeopardy bars conviction for both offenses. He concludes that the lesser offense must be stricken. We do not agree.[2]

"The double jeopardy clauses of the Fifth Amendment to the United States Constitution and article I, section 15, of the California Constitution provide that a person may not be twice placed 'in jeopardy' for the 'same offense.' 'The double jeopardy bar protects against a second prosecution for the same offense following an acquittal or conviction, and also protects against multiple punishment for the same offense. [Citations.]' ([*People v.*] *Bright* [(1996)] 12 Cal.4th [652,] 660.) Although some differences in application arise, both federal and California law generally treat greater and lesser included offenses as the 'same offense' for purposes of double jeopardy. [Citations.]" (*People v. Anderson* (2009) 47 Cal.4th 92, 103-104.)

Appellant contends that the California Supreme Court held in *People v. Kehoe* (1949) 33 Cal.2d 711 that a predecessor version of Vehicle Code section 10851 is a lesser included offense of grand theft auto, and that double convictions are therefore precluded.

The Court in *Kehoe* did say that "[s]ince [the defendant] was found guilty of grand theft, the lesser crime of violation of [unlawful driving or taking of a vehicle] may be said to have merged into that conviction." (*Id.* at p. 716.) The Court reversed the unlawful driving and taking conviction. (*Ibid.*) However, the reasoning of *Kehoe* does not preclude dual convictions for unlawful driving and grand theft auto in every case.

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[2] Respondent contends that appellant has forfeited this claim by failing to object in the trial court. We do not agree. Respondent relies on *People v. Saunders* (1993) 5 Cal.4th 580 to support its claim. Respondent's reliance is misplaced. In *Saunders*, the Supreme Court wrote that "defendant's failure to object precludes his obtaining appellate relief on the basis of the statutory error committed by the trial court." (*Id*. at p. 589.) The Court then adds in footnote five: "Defendant's failure to object does not preclude his arguing on appeal that he was placed twice in jeopardy. [Citation.]" (*Id*. at p. 589, fn. 5; see also *People v. Shabtay* (2006) 138 Cal.App.4th 1184, 1191-1192 [failure to demur on double jeopardy grounds did not waive any objection to an unwarranted multiple conviction].)

In *Kehoe*, the Court noted that the two offenses occurred a week apart and in different counties and that the defendant might have been prosecuted for the theft in Humboldt County and the later unlawful driving in Monterey County. (*Id.* at p. 715.) The prosecutor did not charge the offenses that way however. He charged both offenses as being committed on the same day in Humboldt County and thus "in the absence of any evidence showing a substantial break between Kehoe's taking and his use of the automobile in that county, only the conviction for one offense may be sustained." (*Ibid*.)

Here, the prosecutor charged that the grand theft occurred on August 16, 2010 and the unlawful driving occurred on September 28, 2010, both in Los Angeles County. The question is thus whether a substantial enough break occurred between the two events to warrant two convictions.

This Court has found that convictions for both grand theft auto and unlawful driving were permissible where 62 days elapsed between the offenses and "[t]he driving charge was in an entirely different location and obviously for purposes unconnected with the original taking." (*People v. Malamut* (1971) 16 Cal.App.3d 237, 242.) Our colleagues in the Fourth District Court of Appeal have found convictions for both theft and unlawful driving permissible where four days elapsed between the two crimes, the crimes were committed in different locations, and the owner's personal property was removed from the vehicle and other personal property was placed in the vehicle. (*People v. Strong* (1994) 30 Cal.App.4th 366, 372, 375.)

Here, the time between the two offenses was 43 days, a substantial period of time. Appellant's purpose apparently changed during this time as well. The evidence showed that appellant initially stole the car in order to sell it to a third party. When that sale fell through, appellant decided to drive the car himself, at least until he could find another buyer. This is a sufficient enough break to permit convictions for both grand theft and unlawful driving. (See *People v. Malamut, supra*, 16 Cal.App.3d at p. 242; *People v. Strong, supra*, 30 Cal.App.4th at pp. 372, 375; see also *People v. Garza* (2005) 35 Cal.4th 866, 880 [noting in dicta that "a defendant who steals a vehicle and then

continues to drive it after the theft is complete commits separate and distinct violations of [Veh. Code] section 10851(a)"].)

To the extent that appellant contends that *People v. Pater* (1968) 267 Cal.App.2d 923 compels a different result, we do not agree. The Court in *Pater* did state that "[n]either clocks, calendars nor county boundaries convert one continuing course of conduct into a series of criminal acts." (*Id*. at p. 926.) As we have previously explained, however, the proof of the grand theft and unlawful driving convictions in *Pater* consisted of the "same identical evidence." (*People v. Malamut, supra*, 16 Cal.App.3d at p. 242.) Therefore, "[w]e would agree [with *Pater*] if the quoted language is confined to the facts of that case. If this distinction be deemed to be one without substantial difference, then we must decline to follow *Pater* until such time as our Supreme Court overrules *Cuevas* [18 Cal.App.2d 151] and disclaims the portions of *Kehoe* which we have quoted." (*Ibid*.)

Disposition

The judgment is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.