

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

YONATHAN HO,

Defendant and Appellant.

2d Crim. No. B232152
(Super. Ct. No. BA331022)
(Los Angeles County)

Yonathan Ho appeals an order of the trial court denying his motion for a finding of factual innocence. (Pen. Code, § 851.8, subd. (c).)¹ We affirm.

FACTUAL AND PROCEDURAL HISTORY

Ho, a foreign student from Hong Kong, was a freshman student at the University of Southern California. Mark Marino taught English composition in small classes to freshman students, including Ho. As the class concluded on September 24, 2007, another student informed Marino that Ho had created disturbing drawings in his notebook during the class lecture.

Four days later, on September 28, 2007, Marino asked to speak with Ho following the class. As he approached Ho, Marino saw a drawing of a figure holding a gun to his head, entitled "Fuck this world." Marino believed that Ho momentarily left the drawing on his desk for him to see.

¹ All further statutory references are to the Penal Code.

Marino commented on the drawing and asked Ho, who appeared depressed, how he felt. Ho responded that he was suffering from emotional problems that his parents did not appreciate. In response to Marino's questions, Ho stated that he had spoken with campus counselors to no avail. He added that at his prior school, the administration had responded strongly to his self-portrait that included a prison cell containing tombstones.

Marino informed Ho that he was required to inform the university administration of the violent drawing and their conversation. He also requested Ho to contact him over the weekend because he was concerned for Ho's well-being.

Two days later, on September 30, 2007, university cafeteria employees found an angry and violent message written in ketchup on a dinner plate that was signed "Yonathan." The message stated: "I'm going to kill someone soon. Then commit suicide." Employees alerted campus police who visited Ho in his dormitory room. Ho was incoherent at times but admitted writing the message on the dinner plate. His mood varied from angry to sad and he appeared depressed. Ho admitted that he wanted to harm himself.

Ho then "pointed at a backpack [and] he said he had some other messages about hurting himself." Ho consented to a search of his backpack as well as his laptop computer. Inside the backpack, campus police officers found a depiction of a stick figure committing suicide and another drawing of a severed head pierced by a bullet. The text identified the head as "Teacher's" and "Marino." A second drawing depicted a person labeled "Teacher," with a knife entering his head, and a smiling stick figure labeled "Happy Boy" and "Yonathan, butcher of U.S.C." Other drawings appeared to be related to the subject matter of the composition class that week.

In response to questioning, Ho informed officers that he created the drawings because he was "pissed . . . off" and angry at Marino following their recent conversation. Ho stated that he continued to feel angry toward Marino.

Ho's dormitory resident-advisor informed officers that Ho had spoken of his knowledge of weapons. On September 30, 2007, he sent the advisor an e-mail stating that he "want[ed] to shoot someone."

Campus police officers informed Marino of the dinner plate incident, the drawings contained in Ho's backpack, and Ho's Facebook page which stated that he intended "to break" the record of killings committed on the Virginia Polytechnic Institute campus on April 16, 2007. As a result, Marino became concerned for his safety.

Police officers arrested Ho and he was charged with making criminal threats. Following his arrest, he was detained in a psychiatric hospital. Marino requested police officers to inform him when Ho was released from the hospital.

Following a preliminary examination on November 8, 2007, the committing magistrate held Ho to answer one count of committing criminal threats. (§ 422.) On November 26, 2007, the prosecutor filed a one-count information charging Ho with making criminal threats. On February 4, 2008, the trial court granted Ho's section 995 motion and dismissed the information. The trial judge stated that "there was no evidence that [Ho] intended to show his drawings to the victim so as to threaten him."

On May 12, 2010, and again on February 4, 2011, Ho sought an order of factual innocence pursuant to section 851.8. The trial judge who ruled on the section 995 motion denied Ho's motions.

Ho appeals and contends that he established the requisite statutory showing of factual innocence.

DISCUSSION

Ho argues that his factual innocence is established by his showing and the trial court's ruling in the section 995 motion that he did not intend to convey the criminal threats to Marino. (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 864 [minor did not specifically intend that drawing depicting shooting of a police officer be conveyed to her].) Ho relies on *People v. Laiwala* (2006) 143 Cal.App.4th 1065, 1072 [defendant entitled to finding of factual innocence of crime of theft of trade secret where information taken was not in fact a trade secret] and *People v. McCann* (2006) 141 Cal.App.4th 347, 357-358 [defendant entitled to finding of factual innocence of crime of practicing medicine without a license where he was in fact a licensed physician].

Section 851.8, subdivision (c) provides: "In any case where a person has been arrested, and an accusatory pleading has been filed, but where no conviction has occurred, the defendant may, at any time after dismissal of the action, petition the court that dismissed the action for a finding that the defendant is factually innocent of the charges for which the arrest was made."

Section 851.8 benefits those defendants who have not committed a crime. (*People v. Adair* (2003) 29 Cal.4th 895, 905.) "It permits those petitioners who can show that the state should never have subjected them to the compulsion of the criminal law – because no objective factors justified official action – to purge the official records of any reference to such action." (*Ibid.*) To establish factual innocence, petitioner must establish that there was no reasonable cause to believe he committed the crime. (*Ibid.*) Reasonable cause is a well-settled legal standard that is defined as circumstances that would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that a person is guilty of a crime. (*Id.* at p. 904.) The petitioner bears the initial burden to establish the absence of reasonable cause. (*Id.* at p. 905.)

In sum, "the record must exonerate, not merely raise a substantial question as to guilt." (*People v. Adair, supra*, 29 Cal.4th 895, 909.) Legal defenses may be so related to the defendant's conduct, however, that his defense negates a requisite element of the offense, thereby establishing a lack of reasonable cause and factual innocence within the meaning of section 851.8. (*People v. Laiwala, supra*, 143 Cal.App.4th 1065, 1072; *People v. Matthews* (1992) 7 Cal.App.4th 1052, 1056-1057.)

On appeal, the reviewing court independently reviews the record to determine whether appellant sustained his burden of showing no reasonable cause exists to believe that he committed the charged crime. (*People v. Adair, supra*, 29 Cal.4th 895, 905; *People v. Medlin* (2009) 178 Cal.App.4th 1092, 1101 ["We apply an independent standard of review and consider the record de novo to decide whether reasonable cause exists to believe that the person arrested committed the crime charged"]; *People v. Bleich* (2009) 178 Cal.App.4th 292, 300.) This stringent standard of review is necessitated by a legislative "intent to limit

substantially the scope of relief under section 851.8" (*People v. Adair*, *supra*, 29 Cal.4th 895, 905.)

In our independent review of the record, we determine that there was reasonable cause to believe Ho committed the crime of making criminal threats. (§ 851.8, subd. (b) ["A finding of factual innocence and an order for the sealing and destruction of records pursuant to this section shall not be made unless the court finds that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made"].) Circumstantial evidence exists that Ho intended that his drawings be understood as threats of death and that they be communicated to Marino. Ho permitted Marino to view his initial stick-figure drawing and Marino informed him that he would report the incident to the University administration. Several days later, Ho left a message on a dinner plate in the University cafeteria indicating that he would "kill someone soon." He spoke of weapons to the dormitory advisor and stated on his Facebook page that he intended "to break" the record for mass murder on a university campus. When confronted in his dormitory room, Ho informed police officers that his backpack contained additional drawings and he freely consented to a search of the backpack. Ho also informed Marino that a self-portrait at his previous school resulted in strong negative reaction by the school administration. In sum, under all the factual circumstances, Ho could not have reasonably expected his backpack drawings would remain private and not be conveyed to Marino.

The order is affirmed.

NOT TO BE PUBLISHED

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.*

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Michael A. Tynan, Judge
Superior Court County of Los Angeles

Harland W. Braun; Steven Graff Levine for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, Robert M. Snider, Deputy Attorney General, for Plaintiff and Respondent.