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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LUIS BARBOSA,

Petitioner,

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

B256765

(Los Angeles County
Super. Ct. No. BA414505)

ORIGINAL PROCEEDING; petition for writ of prohibition.

Craig Richman, Judge. Petition granted.

Albert J. Menaster, Lisa Zimmerman and Dylan Ford,
Deputy Public Defenders for Petitioner.

No appearance for Respondent.

Jackie Lacey, District Attorney, Roberta Schwartz and Matthew Brown, Deputy District Attorneys for Real Party in Interest.

Luis Barbosa contends that the criminal prosecution against him is an unlawful successive filing of charges and should be dismissed. He contends the third filing violates Penal Code section 1387¹ as analyzed by the Supreme Court in *People v. Juarez* (2016) 62 Cal.4th 1164 (*Juarez*). We agree and grant the petition.

BACKGROUND

Maria Canul and Barbosa have two children. On September 26, 2012, shortly after Canul and Barbosa had ended their relationship, Canul, along with the two children, was a passenger in the car of Alejandro Hernandez. Barbosa approached the car, pulled Canul's hair, and then pointed a gun at her.

The October 4, 2012 Follow-Up Investigation Report, signed by Reporting Officer McDonnell, provides a detailed scenario of what transpired. Using the services of a Spanish-language interpreter, Officer McDonnell spoke with Hernandez, who stated that he saw Barbosa pull Canul's hair while holding a chrome gun that Hernandez "was very sure" belonged to Barbosa. Hernandez pulled his car over and approached Barbosa. Barbosa pulled the same chrome gun from his waistband and pointed it at Hernandez's chest. Hernandez challenged Barbosa, saying,

¹ Unless otherwise noted, further statutory references are to the Penal Code.

“Shoot it. Shoot it.” Barbosa then stated, “I’ll kill you later. I’ll kill that bitch first!” Hernandez told the officer that Barbosa placed the gun in his waistband and then fled.

The People filed three separate complaints against Barbosa, all alleging events occurring on September 26, 2012, and all naming the same two victims, Canul and Hernandez. The only count still remaining is felony assault with a firearm committed against Canul in violation of section 245, subdivision (a)(2).

Nothing in the record discloses why the first two complaints did not set forth any charges involving the use of a firearm.

First complaint: BA403305

On October 4, 2012, the People filed the first information against Barbosa as case No. BA403305, setting forth three counts.

The information alleged one felony and two misdemeanors. Count 1 alleged that Barbosa made criminal threats against Hernandez, in violation of section 422, subdivision (a).² Count 2

² “Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family’s safety, shall be punished by

alleged that Barbosa committed a misdemeanor battery against Canul, a former cohabitant, in violation of section 243, subdivision (e)(1). Count 3 alleged Barbosa disobeyed a court order, thus committing misdemeanor contempt (§ 166, subd. (a)(4)).³ The information also set forth several prior convictions.⁴ Barbosa entered a plea of not guilty and denied the prior convictions.

On October 19, 2012, the Honorable Dorothy B. Reyes dismissed the case when subpoenaed witnesses failed to appear. The People announced that the case would be refiled.

Second complaint: BA403830

On October 19, 2012, the People refiled the case under case No. BA403830, charging the misdemeanor of cohabitant battery committed against victim Canul under section 243, subdivision (e)(1), as well as a felony against victim Hernandez.

imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.” (§ 422, subd. (a).)

³ A “person guilty of any of the following contempts of court is guilty of a misdemeanor: [¶] . . . [¶] (4) Willful disobedience of the terms as written of any process or court order . . . , lawfully issued by a court, including orders pending trial.” (§ 166, subd. (a)(4).)

⁴ Case No. BA330350, section 261.5 (child molestation) in 2008; case No. 06NF3483, section 496, subdivision (a) (receiving stolen property) in 2006; case No. BA269639, Health and Safety Code section 11350, subdivision (a) (possession of a controlled substance) in 2004; case No. BA249436, section 459 (burglary) in 2003; case No. VA072470, section 470, subdivision (d) (forgery) in 2002; and case No. BA222901, section 459 (burglary) in 2001.

Again, Barbosa entered a plea of not guilty and denied the prior convictions. Barbosa waived his right to a preliminary hearing, and Judge Reyes held Barbosa to answer. On August 21, 2013, case No. BA403830 was called for a jury trial, but was dismissed when the People announced not ready to proceed.

Current complaint: BA414505

On November 16, 2012, the same date as the filing of the information in case No. BA403830, the People filed case No. BA414505, setting forth two counts and alleging that Barbosa had sustained multiple prior convictions. The information names the same two victims, Canul and Hernandez, but, instead of setting forth a misdemeanor offense involving Canul, count 1 alleges that Barbosa committed felony⁵ assault with a firearm against Canul in violation of section 245, subdivision (a)(2). Count 2 alleges the same felony, but as to Hernandez.

On August 7, 2013, at Barbosa's arraignment, Barbosa's counsel complained that case No. BA414505 was simply a refile of the two previous cases, BA403305 and BA403830. On August 21, 2013, after the prosecution announced that it could not proceed, the trial court dismissed case No. BA403830 in furtherance of justice. (§ 1385.)

At the October 4, 2013 preliminary hearing in case No. BA414505, Canul testified that Barbosa is the father of her two children. On September 26, 2012, after Barbosa and Canul had ended their relationship, Canul was a passenger in the car of Alejandro Hernandez, Canul's new boyfriend, with the two

⁵ Violation of section 245 can be charged as either a felony or a misdemeanor, but the information expressly states that both counts are felonies.

children. When the car stopped at a red light, Canul felt her hair being pulled. She turned and recognized Barbosa, who was pointing a gun at her head.

At the preliminary hearing in case No. BA414505, Barbosa moved to dismiss the complaint. The magistrate granted the motion as to count 2, involving victim Hernandez, but denied the motion as to count 1, involving victim Canul. On October 17, 2013, the People filed a one-count information.

On March 3, 2014, Barbosa moved to dismiss case No. BA414505 as a third, successive complaint, barred by section 1387. On March 6, 2014, the Honorable Craig Richman denied Barbosa's motion to dismiss and subsequently denied his motion for reconsideration. Barbosa sought relief in our Court, and we denied Barbosa's petition. After the Supreme Court issued *Juarez*, we again denied relief. Via order dated May 11, 2016 (S219615), the Supreme Court transferred this matter to this Court for reconsideration in light of *Juarez*.

DISCUSSION

Barbosa contends that, because the incidents underlying the charged felony offense in the current complaint arose from the same facts, with the same victims on the same date in the two previous filings, section 1387 bars the People from a third filing. Barbosa frames his challenge thusly: "The filing of a third successive felony action for the identical alleged conduct must be barred by Section 1387 in order to effect the law's established purpose."

The People counter that the test is not whether the offenses arose out of the same incident or at the same time, but whether the elements of the offenses as set forth in each information differ: "Section 1387, subdivision (a), only bars a third felony

filing for the ‘same offense,’ defined as a crime with the same elements as a previously dismissed charge”; and “The charges in Barbosa’s case shared no elements with the prior dismissed charges, and may proceed under section 1387.”

Section 1387, subdivision (a), provides, in pertinent part: “An order terminating an action . . . is a bar to any other prosecution for the same offense if it is a felony or if it is a misdemeanor charged together with a felony and the action has been previously terminated” In other words, “two prior dismissals are required before felony prosecution will be barred.” (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1015 (*Burris*).)

“Section 1387 implements a series of related public policies. It curtails prosecutorial harassment by placing limits on the number of times charges may be refiled. [Citations.] The statute also reduces the possibility that prosecutors might use the power to dismiss and refile to forum shop. [Citations.] Finally, the statute prevents the evasion of speedy trial rights through the repeated dismissal and refile of the same charges.” (*Burris, supra*, 34 Cal.4th at p. 1018.) “A primary purpose of section 1387(a) is to protect a defendant against harassment, and the denial of speedy-trial rights, that result from the repeated dismissal and refile of identical charges. In particular, the statute guards against prosecutorial ‘forum shopping’—the persistent refile of charges the evidence does not support in hopes of finding a sympathetic magistrate who will hold the defendant to answer.” (*People v. Traylor* (2009) 46 Cal.4th 1205, 1209 (*Traylor*).)

The first two complaints alleged Barbosa committed misdemeanor battery against Canul, the mother of his children; section 243, subdivision (e)(1) provides: “When a battery is

committed against . . . a person who is the parent of the defendant's child, . . . the battery is punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in a county jail for a period of not more than one year, or by both that fine and imprisonment."

The current case differs from the first two in that, instead of charging Barbosa with committing a misdemeanor against Canul, it takes the same basic facts to increase the punishment against Barbosa by alleging that he committed a felony assault with a firearm against Canul; section 245, subdivision (a)(2) provides: "Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars (\$10,000) and imprisonment." This felony charge alleges the use of a firearm, a significant element missing from the misdemeanor charges in the first two complaints.⁶

In *Burris, supra*, 34 Cal.4th 1012, Burris was charged with misdemeanor counts of driving under the influence of alcohol and driving with a blood-alcohol level of at least 0.08 percent. (Veh. Code, § 23152, subds. (a), (b).) The complaint alleged two prior DUI convictions. Before trial, the prosecutor discovered a third DUI prior. Under Vehicle Code section 23550, subdivision (a), driving under the influence within seven years of three or more DUI convictions is a wobbler and may be prosecuted either as a misdemeanor or a felony. The judge granted the People's motion to dismiss the misdemeanor, and the People refiled the case as a

⁶ Sections 243 and 245 were enacted in 1872.

felony. (*Burris* at pp. 1015-1016.) *Burris* moved to dismiss under section 1387. The trial court and the appellate court held that the refiling was permissible. So did the California Supreme Court, explaining that the purpose of the statute would not be satisfied by barring a new filing based on information that takes time to gather, which shows that the defendant has a history of DUI convictions.

The Supreme Court stated in a footnote: “The parties agree that the identical criminal act, DUI (Veh. Code, § 23152, subds. (a), (b)), underlies both the initial misdemeanor charge and the subsequent felony charge against *Burris*. The two charged crimes have the same elements: Vehicle Code section 23152 defines the elements of the substantive offense for each, while Vehicle Code sections 23546 and 23550 define not elements but conditions for imposition of sentencing enhancements. [Citations.] When two crimes have the same elements, they are the same offense for purposes of Penal Code section 1387.” (*Burris*, *supra*, 34 Cal.4th at p. 1016, fn. 3.)

In *Traylor*, *supra*, 46 Cal.4th 1205, the People filed a felony complaint alleging vehicular manslaughter with gross negligence. (*Id.* at pp. 1209-1210.) After the preliminary hearing, the magistrate determined that there was not enough evidence for a felony charge and ordered the People to file a misdemeanor complaint. The People did not file a misdemeanor complaint, and the trial court dismissed the case pursuant to section 871.⁷ (*Id.*

⁷ Section 871 provides, in pertinent part: “If, after hearing the proofs, it appears either that no public offense has been committed or that there is not sufficient cause to believe the

at pp. 1210-1211.) Subsequently, after consulting with the California Highway Patrol Multidisciplinary Accident Investigation Team, the prosecution filed a new misdemeanor complaint charging negligent vehicular manslaughter. (*Id.* at pp. 1210-1211.) The Supreme Court held that the current prosecution could proceed, explaining, “the misdemeanor prosecution in this case was not ‘for the same offense’ as that charged in the prior felony complaint.” (*Id.* at p. 1208.) The felony and misdemeanor charges did not include the identical elements; the misdemeanor charge lacked the felony charge’s requirement of proof that defendant operated his vehicle with gross negligence. (*Ibid.*) Moreover, the filing of a misdemeanor after the dismissal of a felony promotes the purpose of section 1387 as such a filing “does not indicate a prosecutorial attempt to delay or harass, or to ‘forum shop’ the same weak charges until a receptive magistrate is found. Instead, it represents an ameliorative effort to charge a different offense that conforms to the actual evidence.” (*Traylor, supra*, 46 Cal.4th at pp. 1214-1215.)

In *Juarez*, the first complaint alleged two felony counts of attempted murder against Gerardo Juarez and Emmanuel Juarez. After they were held to answer, the People filed an information alleging two counts of attempted murder (§§ 664, subd. (a), 187, subd. (a)) against both defendants, and one count of possession of a firearm by a felon (former § 12021, subd. (a)(1)) against Gerardo. Nearly eight months later, in June of 2012, the People filed an amended information that added counts for assault with a firearm (§ 245, subd. (b)). In July 2012, the court

defendant guilty of a public offense, the magistrate shall order the complaint dismissed and the defendant to be discharged”

granted the People's motion to dismiss the case. That same day, the People refiled the same charges. The court dismissed this second case when the People were not ready to proceed. The People then filed a third case against defendants, but modified the offenses to two counts of conspiracy to commit murder, based on the same incident as the two earlier complaints. (*Juarez, supra*, 62 Cal.4th at p. 1168.)

The Supreme Court held that the trial court should have granted defendants' motion to dismiss under section 1387. The Supreme Court commented, "What the Legislature means by 'same offense' is far from clear. Obviously, if the new matter charges precisely the same offense as the twice-terminated action, section 1387 would bar further prosecution. But what if the new charge is slightly different? Is it still the same offense? Can the prosecution continually refile felony charges (twice each) as long as it finds different penal provisions to charge? If not, how different must the new charge be to not be the same offense?" (*Juarez, supra*, 62 Cal.4th at p. 1169.)

Of course, sections 243 and 245 differ. The elements of spousal battery and assault with a firearm differ in that the misdemeanor focuses on the relationship between the parties and the felony requires a deadly weapon. Superficially, these two offenses have no real commonality. As set out in CALCRIM No. 841, the elements of spousal battery, section 243, subdivision (e)(1), are:

"1. The defendant willfully . . . touched [the victim] in a harmful or offensive manner; [¶] [AND] [¶]

"2. [The victim] is (the/a) (defendant's [former] spouse/defendant's cohabitant/defendant's fiancé[e]/person with whom the defendant currently has, or previously had, a (dating/

[or] engagement) relationship/(mother/father) of the defendant's child)."

As set forth in CALCRIM No. 875, the elements of assault with a firearm, section 245, subdivision (a)(2), which must all be present, are:

"1A. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and [¶] . . . [¶]

"2. The defendant did that act willfully;

"3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone; [¶] [AND] [¶]

"4. When the defendant acted, (he/she) had the present ability to apply force . . . with a firearm . . . to a person."

Nevertheless, battery and assault share the same basic elements in punishing violent crimes of differing degrees, with battery on the milder side of the spectrum. Superficial differences between them are insufficient to a determination of whether a refiling violates section 1387 where the refiling defeats the purpose of section 1387.

The Supreme Court made clear in *Burris* and reiterated in *Juarez* that whether a refiling violates section 1387 must include a determination as to whether the ruling satisfies the purpose of the statute—to protect a defendant against harassment and the denial of speedy-trial rights.

In the case at bar, the counts arise out of the same incident that occurred on the same day and involved the same people. Officer McDonnell's October 4, 2012 report, dated the same day as the first complaint, clearly gave notice to the People that the incident involved a firearm. Nevertheless (and the record does

not disclose why), the People did not charge Barbosa with the most serious charge, felonious assault with a firearm, until the third complaint. In fact, until the third filing, the People did not file any charges involving a firearm. Section 1387 is not, and cannot be used as, a way to save deficient pleadings. Section 1387 gives the People the opportunity to save deficient pleadings, but does not allow the People to file and refile charges.

Invalidating the third filing comports with the public policy underlying *Burris*, *Traylor*, and *Juarez*.

DISPOSITION

THEREFORE, let a peremptory writ issue, commanding respondent superior court to vacate its order of March 6, 2014, denying Petitioner's motion to dismiss, and to issue a new and different order granting same, in Los Angeles Superior Court case No. BA414505, entitled *People v. Luis Barbosa*.

NOT TO BE PUBLISHED.

CHANNEY, Acting P. J.

We concur:

JOHNSON, J.

LUI, J.