Filed 7/16/15 P. v. Duncan CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DEDRIC LANE DUNCAN, Defendant and Appellant.	B260976 (Los Angeles County Super. Ct. No. GA025814)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

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

No appearance for Plaintiff and Respondent.

Appellant Dedric Lane Duncan appeals from an order denying with prejudice his petition for a recall of sentence after the trial court sentenced him to prison for 25 years to life following his conviction by jury of petty theft with a prior theft-related conviction, with court findings he suffered seven prior felony convictions and four prior felony convictions for which he served separate prison terms. (Pen. Code, §§ 1170.126, subd. (b), 666, 667, subd. (d), 667.5, subd. (b).)[1] We affirm the order denying with prejudice appellant's petition for a recall of sentence.

FACTUAL AND PROCEDURAL BACKGROUND

On October 14, 2014, appellant filed in the present case (superior court case No. GA025814) a petition for a recall of sentence (petition) pursuant to Proposition 36. The petition contained information about, inter alia, a prior rape conviction, and the present offense, as discussed below.

1. *Appellant's 1976 Rape Conviction (Case No. A554778).*

The petition contains a transcript of appellant's guilty pleas in a prior case, i.e., superior court case No. A554778. The transcript reflects as follows. A consolidated information in case No. A554778 alleged appellant committed various offenses against Michelle S. On February 17, 1976, during the taking of appellant's pleas in case No. A554778, appellant told the court the following as the factual basis for his pleas. On December 1, 1975, appellant, Daryl Clisby, and Michelle S. were near the Athletic Club in Pasadena. Clisby pulled Michelle S. into the back of a station wagon. Clisby then, in the rear of the station wagon, engaged in sexual intercourse with Michelle S. This occurred while appellant was there, and he drove the vehicle around the city while Clisby had sexual intercourse with Michelle S. Money was taken from Michelle S.

The transcript also reflects as follows. On February 17, 1976, in case No. A554778, appellant pled guilty to kidnapping and robbing Michelle S. on or about

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[1] Concerning the facts in the above paragraph, appellant invites us to see the opinion in *People v. Dedric Lane Duncan* (May 21, 1998, B110334) [nonpub. opn.]. We treat the invitation as a request that we take judicial notice of those facts in that opinion, and we grant the request. (Evid. Code, § 451, subd. (a); Cal. Rules of Court, rule 8.1115(b)(1).)

December 1, 1975. The following then occurred regarding the rape charge: "[The Prosecutor]: Now, in Count VIII of the consolidated information, you were charged with the violation of Section 261.3 of the Penal Code [*sic*],[2] it being alleged that on or about the first day of December, 1975, you did aid and abet Daryl Clisby to accomplish an act of sexual intercourse upon a female person who was not the wife of Daryl Clisby nor yourself and that you did so and prevented – you aided Mr. Clisby in having this act of sexual intercourse by threats against Michelle [S.]. [¶] To that charge of forcible rape on the theory of aiding and abetting, how do you now plead? Guilty or not guilty? [¶] [Appellant]: Guilty." (*Sic*.) The trial court in case No. A554778 accepted the guilty pleas.

2. *The Underlying Proceedings in the Present Petty Theft Case (Case No. GA025814).*

The petition also contains a copy of the information in the present case (case No. GA025814), as amended by interlineation. Said information alleges, inter alia, the present offense, i.e., a violation of Penal Code section 666, on or about October 4, 1995, and alleges that in case No. A554778, appellant suffered a conviction for a

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[2] During the taking of the plea in case No. A554778, the prosecutor, as above indicated, referred to Penal Code section "261.3." The petition, the trial court in its written memorandum of decision (discussed below) concerning the petition, and appellant's opening brief all refer to section "261.3." No such section has ever existed in the Penal Code. Appellant committed the rape at issue in 1975, and, at that time, his act was proscribed by former Penal Code section 261, subdivision 3. That former subdivision, stated, "Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances: [¶] . . . [¶] 3. Where she is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, or by any intoxicating narcotic, or anesthetic, substance, administered by or with the privity of the accused." Hereafter, we will refer to the correct designation, i.e., former Penal Code section 261, subdivision 3, including where the record reflects the erroneous reference. Appellant's argument in his petition is based on the statutory language of former Penal Code section 261, subdivision 3. Finally, we note the threats required by former Penal Code section 261, subdivision 3 could be proved by conduct. (*People v. Hunt* (1977) 72 Cal.App.3d 190, 194.)

violation of former Penal Code section 261, subdivision 3. The prior conviction was alleged as a strike along with other alleged strikes.

The petition also contains copies of court documents reflecting the following occurred on February 7, 1997. A jury convicted appellant of committing, in 1995, the present offense, i.e., a violation of Penal Code section 666. The trial court in the present case found true four strike allegations, including the one based on the rape conviction in case No. A554778. The trial court, pursuant to the "Three Strikes" law, sentenced appellant to prison for 25 years to life for the present offense.

3. *Appellant's Petition.*

As mentioned, on October 14, 2014, appellant filed his petition. In the petition, appellant argued, inter alia, his 1976 rape conviction in case No. A554778 did not render him ineligible for Proposition 36 relief. Appellant acknowledged a conviction for aiding and abetting rape "committed by force, violence, duress, menace, [or] fear of immediate and unlawful bodily injury on the victim" within the meaning of Welfare and Institutions Code section 6600, subdivision (b), was a conviction for a " '[s]exually violent offense' " within the meaning of that subdivision with the result such a conviction would render a defendant ineligible for Proposition 36 relief. (Pen. Code, §§ 1170.126, subds. (e)(3) & (f), 667, subd. (e)(2)(C)(iv)(I), 1170.12, subd. (c)(2)(C)(iv)(I); Welf. & Inst. Code, § 6600, subd. (b).)

However, appellant argued, inter alia, that given the statutory language of former Penal Code section 261, subdivision 3, viewed in the abstract, the rape at issue could have been an act of sexual intercourse where Michelle S. was simply "prevented from resisting . . . by any intoxicating narcotic, or anesthetic, substance, administered by or with the privity of the accused" within the meaning of former Penal Code section 261, subdivision 3. If so, appellant further argued, the resulting rape was not necessarily a rape "committed by force, violence, duress, menace, [or] fear of immediate and unlawful bodily injury on the victim" within the meaning of Welfare and Institutions Code section 6600, subdivision (b); therefore, appellant was not, within the meaning of that

subdivision, convicted of a " '[s]exually violent offense' " rendering him ineligible for Proposition 36 relief.

However, the trial court in the present case, in a written memorandum of decision filed on December 8, 2014, concluded it was not governed merely by the statutory language of former Penal Code section 261, subdivision 3, in the abstract. Instead, the trial court, relying on, inter alia, *People v. Manning* (2014) 226 Cal.App.4th 1133, concluded it could look to the record of conviction in case No. A554778, and, in particular, to the transcript of the guilty plea in that case, to determine the substance and circumstances of the conduct underlying the rape conviction when evaluating whether it rendered appellant ineligible for Proposition 36 relief.

The trial court in the present case ruled the guilty plea transcript in case No. A554778 "*clearly* establishes Defendant was convicted of rape by force or duress." The court relied on the following colloquy that occurred during the taking of the guilty plea: "[The Prosecutor]: . . . [count VIII of the consolidated information alleged] . . . you did aid and abet Daryl Clisby to accomplish an act of sexual intercourse . . . and that you did so and prevented – you aided Mr. Clisby in having this act of sexual intercourse by *threats* against Michelle [S.]. [¶] To *that* charge of *forcible* rape on the theory of aiding and abetting, how do you now plead? . . . [¶] [Appellant]: Guilty." (Second, third, and fourth italics added.)

The trial court in the present case stated, "The record of conviction in this case demonstrates Defendant was convicted of aiding and abetting a rape by threatening the victim, which necessarily constitutes force or duress based on the definition of a sexually violent offense pursuant to Welfare and Institutions Code section 6600, subdivision (b). Indeed, rape by duress includes an act that is accomplished by a direct or implied threat. ([Pen. Code,] § 261, subd. (b).)" Accordingly, the trial court denied the petition with prejudice on the ground appellant's 1976 rape conviction rendered him ineligible for relief under Proposition 36. On December 22, 2014, appellant filed a notice of appeal.

CONTENTIONS

After examination of the record, appointed appellate counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed March 20, 2015, the clerk of this court advised appellant to submit within 30 days any contentions, grounds of appeal, or arguments he wished this court to consider. No response has been received to date.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The order denying with prejudice appellant's petition for a recall of sentence is affirmed.

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KITCHING, Acting P. J.

We concur:

ALDRICH, J.

EGERTON, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.