

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SIX

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ANDREW STUART LUSTER,

Defendant and Appellant.

B166741

Ventura County Superior Court No. CR 49259
The Honorable Ken W. Riley, Judge

MOTION TO DISMISS APPEAL

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TO THE HONORABLE ARTHUR GILBERT, PRESIDING JUSTICE
AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA
COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SIX:

The People of the State of California respectfully move this Court for an order dismissing this appeal. Appellant absconded during trial and was convicted and sentenced in absentia. In a notice of appeal filed April 17, 2003, appellant sought review of the judgment entered against him. Since appellant remains a fugitive from justice, this Court must dismiss his appeal.

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This motion is based on the accompanying memorandum of points and authorities, the court files and transcripts in appellant's trial,^{1/} and all pleadings and other documents before this Court.

Dated: June 20, 2003

Respectfully submitted,

BILL LOCKYER

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1. Respondent has concurrently filed a request for judicial notice of these records under separate cover.

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

An 87-count information filed by the District Attorney of Ventura County charged appellant with, inter alia, multiple counts of rape, sodomy, drug and weapons possession, and poisoning. Trial commenced on December 3, 2002. During a recess in the trial in early January, appellant, who was out of custody on \$1 million bail, absconded from California.^{2/} Trial proceeded against him in absentia, and on January 21, 2003, the jury convicted appellant on all but one count. On February 18, 2003, the trial court sentenced appellant to 124 years in state prison. On April 17, 2003, appellant, through his attorney, filed a notice of appeal from the judgment.

2. On January 6, 2003, the trial court found that appellant had voluntarily absented himself from the trial and declared him a fugitive. On February 18, 2003, the trial court found that on January 4, 2003, appellant had willfully absented himself from the trial and the state. For this Court's convenience, respondent has attached, as Exhibit A to this motion, copies of the trial court's docket for these two dates, as well as for January 21, 2003, the date the jury convicted appellant.

ARGUMENT

BECAUSE APPELLANT IS A FUGITIVE, THE INSTANT APPEAL MUST BE DISMISSED

A convicted fugitive has no right to an appeal. (*People v. Kubby* (2002) 97 Cal.App.4th 619, 622, citing *People v. Perez* (1991) 229 Cal.App.3d 302, 308; see also *Ortega-Rodriguez v. United States* (1993) 507 U.S. 234, 239 [113 S.Ct. 1119, 122 L.Ed.2d 581] [“It has been settled for well over a century that an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal”].) In *People v. Redinger* (1880) 55 Cal. 290, the defendant was convicted of murder and sentenced to hang. After he filed a notice of appeal and the matter was set for argument, the Attorney General moved to dismiss the appeal on the ground that the defendant had escaped while his appeal was pending and was therefore no longer in custody. (*Id.* at p. 291.) The California Supreme Court granted the motion to dismiss unless the defendant returned to custody within 30 days, noting:

[C]ourts have no jurisdiction over persons charged with crime, unless in custody actual or constructive. It would be a farce to proceed in a criminal cause, unless the Court had control over the person charged, so that its judgment might be made effective. . . .

. . .

For the reasons here given, . . . we think the defendant has no longer a right to appear by counsel, when he has escaped from custody, until he has returned into custody. By breaking jail and escaping, he had waived the right to have counsel appear for him. [Citation.] In fact, his right to constitute counsel and invest him with authority no longer exists while his absence from custody continues.

(*Id.* at pp. 298-299; see also *People v. Elkins* (1898) 122 Cal. 654; *People v. Fuhr* (1926) 198 Cal. 593; *People v. Clark* (1926) 198 Cal. 453.)

How the person comes to be at large is unimportant: “The crucial fact is [that he] is not in either actual or constructive custody and is a fugitive.” (*People v. Buffalo* (1975) 49 Cal.App.3d 838, 839.) Dismissal of an appeal due to escape or fugitivity does not constitute a denial of due process. (*People v. Clark* (1927) 201 Cal. 474, 477.) Moreover, a judgment of contempt is not required prior to a court exercising its power to dismiss an appeal. (*TMS, Inc. v. Aihara* (1999) 71 Cal.App.4th 377, 379.)

The rationale for a court’s power to dismiss the criminal appeal, although variously stated, devolves to “the proposition that a fugitive has no right to ask the courts to review the very judgment that the fugitive flouts.” (*People v. Kubby, supra*, 97 Cal.App.4th at p. 623, citing, inter alia, *Molinaro v. New Jersey* (1970) 396 U.S. 365, 366 [90 S.Ct. 498, 24 L.Ed.2d 586]; *People v. Redinger, supra*, 44 Cal. at p. 298.) Fugitives frustrate and insult the appellate process, because appellate courts have no way of enforcing any judgment on a fugitive defendant. (See *Ortega-Rodriguez v. United States, supra*, 507 U.S. at pp. 239-240; see also *Smith v. United States* (1876) 94 U.S. 97 [24 L.Ed. 32] ([declining to hear a writ petition brought by a fugitive, noting that if the judgment were affirmed, the defendant would likely not appear to submit to his sentence, and if the judgment were reversed and a new trial ordered, the defendant would “appear or not, as he may consider most for his interest”]; *People v. Kang* (2003) 107 Cal.App.4th 43, 51; *People v. Brych* (1988) 203 Cal.App.3d 1068, 1077 [similar].) Furthermore, dismissal of an appeal discourages escape and promotes the efficient operation of the appellate courts; flight, moreover, “may prejudice the prosecution should a new trial be ordered. (*Katz v. United States* ([9th Cir.] 1990) 920 F.2d 610, 612.)” (*People v. Kang, supra*, 107 Cal.App.4th at p. 51.)

Here, although appellant’s trial counsel filed a notice of appeal on his behalf, it is undisputed that appellant is a fugitive from justice. (See *People v. Kubby, supra*, 97 Cal.App.4th at p. 624 [“Defendant does not deny that he has

knowingly absented himself from the state’s jurisdiction. . . .”].) Accordingly, appellant “has forfeited his right to appeal [his conviction] while he flouts it.” (*Id.* at p. 624.)

While the courts of this State have customarily extended fugitive appellants a 30-day period in which to return to custody, such judicial grace should not lie here. The cases in which courts have held their dismissal orders in abeyance have all involved defendants who appeared for trial and sentencing. (E.g. *People v. Redinger*, *supra*, 55 Cal. at pp. 298-299; *People v. Clark*, *supra*, 201 Cal. at p. 477; *People v. Fuhr*, *supra*, 198 Cal. at p. 594; *People v. Buffalo*, *supra*, 49 Cal.App.3d at p. 839; *People v. Sitz* (1913) 21 Cal.App. 54, 55.) This appellant, however, chose to absent himself from the proceedings before the jury rendered a verdict – an act that derided the criminal justice system and, thus, rendered appellant undeserving of its leniency. To the extent courts have provided the 30-day grace period as an incentive for defendants to return to the jurisdiction, it has no application here: If the potential for jury acquittal and the threat of a \$1 million bail forfeiture could not ensure appellant’s presence at trial, the mere possibility of reversal on appeal will not cause him to return to the jurisdiction.

Accordingly, this Court should enter an order dismissing this appeal forthwith.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court dismiss appellant's appeal.

Dated: June 20, 2003

Respectfully submitted,

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