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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD EDWARD KAMKA,

Defendant and Appellant.

C064560

(Super. Ct. Nos.  
CM022965, CM023797,  
CM024029)

Defendant Richard Edward Kamka pleaded no contest in case No. CM022965 (case 965) to making criminal threats. In addition, a jury convicted defendant in case No. CM023797 (case 797) with failure to appear, unlawful possession of a controlled substance, and resisting an officer. The jury found on-bail enhancement and prior strike allegations true. Moreover, in case No. CM024029 (case 029), a jury convicted defendant of stalking. The trial court found on-bail enhancement and prior strike allegations true.

The trial court subsequently sentenced defendant to an aggregate prison term of 11 years 4 months.

Defendant now contends (1) the trial court abused its discretion in denying defendant's motion to withdraw his plea in case 965, because at the time the trial court denied the motion it was "reasonably aware" that defendant's mental state was questionable; and (2) the criminal threats conviction in case 965 could not serve as a prior strike conviction in case 029 and case 797 because defendant was sentenced in all three cases on the same day.

We conclude (1) defendant forfeited the issue of his mental state in connection with his plea in case 965 because he did not raise the issue as a ground for withdrawal of the plea in the trial court; and (2) consistent with this court's holding in *People v. Queen* (2006) 141 Cal.App.4th 838 (*Queen*), defendant's criminal threats conviction in case 965 could properly serve as a prior strike conviction in case 029 and case 797.

#### BACKGROUND

In July 2005 defendant pleaded no contest in case 965 to making criminal threats. (Pen. Code, § 422.)<sup>1</sup> He subsequently failed to appear for sentencing.

In September 2005 in case 797, defendant was charged with failure to appear (§ 1320, subd. (b)), possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)),

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

resisting an officer (§ 148, subd. (a)(1)), and prowling (§ 647, subd. (h)). It was also alleged that he failed to appear while released on bail or on his own recognizance. (§ 12022.1.)

On November 3, 2005, defendant filed a motion to withdraw his plea in case 965. The trial court denied the motion.

Defendant was also charged in case 029 with stalking. (§ 646.9, subd. (c)(1).)

Defendant entered pleas of not guilty by reason of insanity in case 797 and case 029. Doctors were appointed to examine defendant. Meanwhile, the People filed an information in case 797 and case 029, charging that defendant's conviction for making criminal threats in case 965 was a prior strike conviction.

The trial court ordered defendant committed to the Department of Mental Health on May 24, 2006. On September 9, 2009, the trial court found defendant competent to stand trial and reinstated criminal proceedings.

In case 797, a jury found that defendant was not insane at the time of the charged offenses, and found him guilty of failure to appear, unlawful possession of a controlled substance, and resisting an officer. The trial court found the on-bail enhancement and prior strike allegations true.

In case 029, a different jury found that defendant was not insane at the time of the charged offense and found him guilty of stalking. The trial court found the on-bail and prior strike allegations true.

On February 24, 2010, the trial court sentenced defendant to an aggregate prison term of 11 years 4 months as follows: (a) in case 029, six years for stalking (the base term of three years doubled for a prior strike conviction) plus two years for an on-bail enhancement; (b) in case 965, a subordinate term of eight months for making criminal threats; and (c) in case 797, subordinate terms of one year four months for failure to appear and for possession of a controlled substance (each consisting of eight months doubled to 16 months because of a prior strike conviction). The trial court also imposed a concurrent jail term for a misdemeanor resisting arrest conviction and stayed sentence for the on-bail enhancements attached to the felony counts.

Defendant obtained a certificate of probable cause.

#### DISCUSSION

##### I

Defendant contends the trial court abused its discretion in denying defendant's motion to withdraw his plea in case 965, because at the time the trial court denied the motion it was "reasonably aware" that defendant's mental state was questionable.

Defendant moved to withdraw his plea on the ground that it was not "knowingly, intelligently and voluntarily entered into." His motion included a declaration explaining why the plea was involuntary. He said he entered the plea because he did not want to make the victim testify. In addition, he claimed defense counsel assured him he would be granted probation and

sentenced immediately, he would be free to travel between Nevada and California without checking with probation, and he should not worry about the specifics or consequences of his plea.

The People's response to the motion included a declaration from defendant's defense counsel at the time of the plea essentially refuting defendant's assertions. The parties submitted the motion to the trial court without argument and the trial court denied the motion.

Defendant admits that a doctor who conducted his psychological examination concluded that as of July 28, 2005 (the day after defendant entered his plea in case 965) defendant "did not suffer from a mental disease or defect such that he was incapable of knowing or understanding the nature and quality of his acts or to distinguish right from wrong." Nonetheless, defendant focuses on the doctor's comment that defendant's history suggests he was "spiraling downward in his psychological state prior to August 2005, but the psychosis did not seem to appear until August 2005."

However, defendant asserts this particular factual question regarding his mental state as a basis for withdrawal of the plea for the first time on appeal. His contention is thus forfeited.

"It is well settled that ordinarily an appellate court will not consider a theory not raised at trial. [Citations.] 'The general rule confining the parties on appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that "contemplates a *factual* situation the

consequences of which are open to controversy and were not put in issue or presented at the trial." [Citation.]' . . . [Citations.]" (*People v. Johnson* (2003) 30 Cal.4th 1302, 1330, italics added, reversed on other grounds in *Johnson v. California* (2005) 545 U.S. 162, 173 [162 L.Ed.2d 129, 141].)

Defendant did not assert his mental competence in his motion to withdraw his plea in case 965, even though, on the same day the trial court denied the motion, defendant entered pleas of not guilty by reason of insanity in case 797 and case 029. As a result, the People and the trial court were never given the opportunity to address the issue of defendant's mental state in connection with his plea in case 965. Consequently, the issue is forfeited for appellate review.

## II

Defendant also contends the criminal threats conviction in case 965 could not serve as a prior strike conviction in cases 029 and 797 because he was sentenced in all three cases on the same day. He relies on language in *People v. Williams* (1996) 49 Cal.App.4th 1632 (*Williams*), but that case does not assist him here.

In *Williams*, the defendant pleaded guilty to residential burglary in a prior case, but before judgment was pronounced he committed a second residential burglary. (*Williams, supra*, 49 Cal.App.4th at p. 1637.) A subsequent criminal case charged the defendant with the second burglary and asserted the first burglary as a prior strike conviction. (*Ibid.*) The defendant argued that because the second burglary was committed before

judgment was pronounced for the first burglary, the trial court could not treat the first burglary as a prior strike conviction. The defendant claimed "conviction" under the three strikes law meant guilty by plea and judgment. (*Williams, supra*, 49 Cal.App.4th at pp. 1637-1638.)

The Court of Appeal in *Williams* disagreed, observing that "when guilt is established, either by plea or verdict, the defendant stands convicted and thereafter has a prior conviction." (*Williams, supra*, 49 Cal.App.4th at p. 1638.)

The court in *Williams* then noted, however, "that when a prior offense is a 'wobbler,' a plea or verdict does not establish whether it is a felony; rather the sentence does. Thus, when the prior offense is a 'wobbler,' the phrase 'prior convictions' must include the pronouncement of sentence because only then can it be determined whether three strikes applies." (*Williams, supra*, 49 Cal.App.4th at p. 1639, fn. omitted.) Defendant quotes this statement in *Williams* and relies on it because his criminal threats charge was a wobbler. But he acknowledges that this court deemed that particular statement in *Williams* to be dicta and disagreed with it. (*Queen, supra*, 141 Cal.App.4th at p. 843.)

In *Queen*, the defendant assaulted the prosecutor after the jury found him guilty of making criminal threats, but before sentencing. (*Queen, supra*, 141 Cal.App.4th at p. 842.) Defendant was then charged with offenses arising out of the assault and with the prior criminal threat convictions alleged as strikes. Relying on the dictum in *Williams*, the defendant

contended the criminal threats convictions could not be considered strikes because sentence had not been imposed for them at the time he assaulted the prosecutor; the convictions, being wobblers, were still subject to being treated as misdemeanors. (*Queen, supra*, 141 Cal.App.4th at p. 842.)

This court rejected the *Williams* dictum because it ran counter to the legislative intent behind the three strikes law as set forth in section 667, subdivision (d)(1). (*Queen, supra*, 141 Cal.App.4th at p. 843.) Section 667, subdivision (d)(1) provides in relevant part: "The determination of whether a prior conviction is a prior felony conviction for purposes of [the three strikes law] shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor."

Here, we follow this court's holding in *Queen*. Defendant stood convicted of a felony for purposes of the three strikes law at the time of his plea. The trial court could only reverse this determination by converting the crime to a misdemeanor at initial sentencing. It did not. Accordingly, defendant's

conviction under case 965 was a strike for purposes of the three strikes law.

DISPOSITION

The judgment is affirmed.

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MAURO, J.

We concur:

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ROBIE, Acting P. J.

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BUTZ, J.