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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL DUANE BOGGESS,

Defendant and Appellant.

C069170

(Super. Ct. No. P02CRF0403)

In this case, defendant Daniel Duane Boggess is trying to work the system. He did not say one word when present at a state court appearance where the court, the prosecutor, and his newly appointed attorney agreed to set his resentencing hearing for a date past the 30-day deadline imposed by a federal court within which to resentence defendant. The next day following the state court appearance (which was now the 31st day), defendant wrote to the federal court that the state court had not complied with the deadline.

On defendant's appeal in this court from the state court resentencing that took place on the 38th day (which was the day

the state court first learned of the federal court's deadline), we hold defendant forfeited his argument that the state court had no jurisdiction to resentence him. He had the chance to object on the 30th day but chose not to.

FACTUAL AND PROCEDURAL BACKGROUND

On June 20, 2011, a federal court granted defendant's petition for writ of habeas corpus because the 10-year upper term sentence imposed by a state court based on factors not found true by a jury violated the Sixth Amendment. The federal court ordered the state court to resentence defendant within 30 days of the federal court's order. The federal court further stated that if the state court failed to do so, then defendant's sentence would be reduced to eight years.

Defendant was brought to state court on July 20, which was the 30th day. At that court appearance, defendant said nothing when the state court, the prosecutor, and his attorney set his resentencing for August 3. The court and the parties stated they needed to review the lengthy case file.¹

¹ At that hearing, nobody mentioned the federal court order that required resentencing by July 20. The state court was unaware of the order because the federal court never served the state court with the notice. The defense had not been served with the order either. The prosecutor was a different prosecutor than the one who had made the motion for removal of defendant for resentencing. The motion for removal simply mentioned that removal was necessary for resentencing proceedings. The motion did not mention the federal court order. Therefore, at the July 20 appearance, only defendant was aware of the 30-day deadline.

On July 21, defendant on his own wrote the federal court that the state court had failed to comply with the 30-day deadline.

On the morning of July 28, the state court and defense counsel learned of the deadline when they received from the district attorney's office a copy of the federal court order. That afternoon, with defendant present, the state court held the resentencing hearing and reimposed the 10-year sentence. Defendant filed a timely appeal from the resentencing hearing.

Thereafter, defendant filed on his own in federal court a motion for reconsideration of the state court sentence, claiming the state court's resentencing was untimely.²

DISCUSSION

In this court, defendant contends his sentence must be reduced to eight years because the state court failed to resentence him within the 30-day deadline. This contention is forfeited. "In essence, claims deemed [forfeited] on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) "[T]he 'unauthorized sentence' concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal. [Citations.]" (*Ibid.*) "[A] sentence is generally 'unauthorized' where it could not

² We grant respondent's request for judicial notice of the federal court proceedings, which are still ongoing.

lawfully be imposed under any circumstance in the particular case." (*Ibid.*)

Here, the 10-year sentence could have lawfully been imposed within the 30-day deadline. Defendant was present in court on the 30th day when the parties selected a date for the resentencing hearing. Despite knowing the deadline, defendant said nothing in state court. Instead, in an attempt to play "gotcha" with the state court, he wrote to the federal court the next day that the state court had not complied with the federal court order. By not objecting in state court when he had the chance to do so, defendant has forfeited his contention on appeal.

DISPOSITION

The judgment is affirmed.

ROBIE, Acting P. J.

We concur:

MURRAY, J.

HOCH, J.