Filed 3/25/19 P. v. DeHoyos CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,	
Plaintiff and Respondent,	E068998
v.	(Super.Ct.No. RIF1502647)
RODOLFO DEHOYOS,	ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING
Defendant and Appellant.	
	NO CHANGE IN JUDGMENT

THE COURT:

The opinion herein, filed on March 18, 2019, is modified as follows: The fifth sentence on page two is deleted and replaced with:

In this appeal, defendant first argues that, with the exception of count 65, the sentences for all 84 of the concurrently imposed, nonstayed counts should be stayed under section 654, rather than run concurrently.

There is no change in the judgment.

Appellant's petition for rehearing is denied.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.

Filed 3/18/19 P. v. DeHoyos CA4/2 (unmodified opinion)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RODOLFO DEHOYOS, Defendant and Appellant.	E068998 (Super.Ct.No. RIF1502647) OPINION

APPEAL from the Superior Court of Riverside County. Thomas E. Kelly, Judge. (Retired judge of the Santa Cruz Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Arthur Martin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Rodolfo DeHoyos pled guilty to 143 fraud- and theft-related charges resulting from his efforts to obtain payments from 59 separate businesses in Riverside County.[1] Defendant threatened to sue the businesses for alleged violations of the Americans with Disabilities Act (ADA) unless they agreed to pay him. The court imposed consecutive sentences on 58 of the counts, which resulted in a term of 60 years in county jail. The court suspended 40 of those years, during which defendant will be under mandatory supervision. In this appeal, defendant first argues the court should have stayed all but one of the 143 sentences because imposing them violates Penal Code section 654. In the alternative, defendant more reasonably argues that the court should have stayed the 36 sentences imposed for multiple crimes based on a single contact (by letter or telephone call) with each victim. This echoes the People's position at trial and in this appeal. We agree and direct the trial court to stay these 36 counts.

FACTS AND PROCEDURE

Starting in December 2013 and continuing through April 2015, defendant implemented a scheme to scare numerous, mostly small, businesses throughout the state into paying him money to avoid threatened lawsuits over minor violations of the ADA. To carry out this scheme, defendant started a business called ADA Advocates and Consulting. Defendant or a person he hired would briefly enter a business for the sole purpose of finding one or more small ADA violations such as a missing sign or faded

[1] On pages 9 through 17 of the appellant's opening brief, defendant has provided a table listing each of the counts, along with the corresponding state Penal Code statute, victim, and sentence imposed. This table is reproduced at appendix A, *post*, at pages 10-18.

paint. They would then fill out a preprinted form with a checklist of ADA violations and hand it to someone at the business. The versions of the form contained in this record list defendant's business and contact information, and include headings such as "Preliminary Independent Review Of Possible ADA Access Violations & Civil Rights Discrimination," "3 day Notice of Intent to comply with the new laws," and "Property Owners Notice." The forms state that only an inspection and report by a licensed inspector would protect the business if it were sued, and that defendant's business could provide that service for a fee. None of the charges in this criminal case are based on these forms.

As relevant to this appeal, defendant or the person he hired would, during the same visit, provide a letter threatening to file a lawsuit. The letter stated the business could avoid the lawsuit by paying money directly to defendant within three business days. This initial contact with the demand letter is the basis for the 58 charges of extortion by letter (§ 523) and one count of attempted grand theft (§§ 664, 487).[2] In some cases, the People filed additional charges for attempted extortion (§§ 664, 518) and attempted grand theft (§§ 664, 487), also based on this initial contact with the demand letter. Each of these additional counts must be stayed, for the reasons discussed *post*.

Regarding many of the victims, defendant would follow up the letter with a telephone call (or the victim would call defendant at the telephone number listed in the letter), and defendant would repeat his demand for payment and threaten to file a lawsuit

[2] The letter to Stater Bros. Market generated the single charge of attempted grand theft (§§ 664, 487) at count 65. Defendant received a concurrent term of one year for this count.

that could cost $25,000 to $35,000. During these phone calls, defendant would claim that he was disabled, and the business had violated his civil rights by denying him access. These phone calls are the basis for some of the charges for attempted grand theft (§§ 664, 487), attempted extortion (§§ 664, 518), grand theft (§ 487) and misdemeanor theft (§ 487). In some cases, the People filed more than one of these charges based on a single telephone call. These additional counts based on a single telephone call are among those that must be stayed, for the reasons discussed *post*.

Of the 59 businesses identified in the second amended complaint, 25 paid defendant amounts ranging from $363 to $5,000.

On November 29, 2016, the People filed a second amended complaint charging defendant with 143 counts, consisting of 58 counts of extortion by letter (§ 523), 36 counts of attempted grand theft (§§ 664, 487), 19 counts of grand theft (§ 487), 17 counts of extortion (§ 518), seven counts of attempted extortion (§§ 664, 518), three counts of misdemeanor theft (§ 487), one count of misdemeanor attempted theft (§§ 664, 487), one count of embezzlement (§ 503), and one count of elder abuse (§ 368). On that same date, defendant pled guilty to all charges in an open plea to the court.

Sentencing was initially set for February 3, 2017, but was postponed several times and finally held on August 14, 2017. After having read the sentencing memos and hearing argument from both parties, the court sentenced defendant to a total of 60 years—20 years in local custody and 40 years on home supervision. To get the 60 years, the court sentenced defendant to the middle term of three years for count 53, extortion by letter (§ 523), pertaining to the victim Old Town Tire Services, followed by 57

consecutive terms of one year (one-third the middle term) for the remaining counts of extortion by letter, one count for each victim.

The court imposed each of the remaining the sentences concurrently as follows: one year for each of the 36 counts of felony attempted grand theft (§§ 664, 487); two years for each of the 19 counts of grand theft (§ 487); three years for each of the 17 counts of extortion (§ 518); two years for each of the seven counts of attempted extortion (§ 664, 518); 180 days each on the three counts of misdemeanor theft (§ 487); 90 days for the one count of misdemeanor attempted theft (§§ 664, 487); a two-year term for the one count of embezzlement (§ 503); and a three-year term for the one count of elder abuse (§ 368). The court stated that, for multiple counts based on the same act under section 654, running the terms concurrently would resolve the section 654 issue.

This appeal followed.

DISCUSSION

Defendant argues that, with the exception of count 65, the sentences for all 84 of the concurrently imposed, nonstayed counts should be stayed under section 654, rather than run concurrently. This is because as to each of the 58 victims of extortion by letter there was only one continuous transaction, and defendant had only one intent and objective—to obtain payment—even regarding the victims with whom defendant made multiple contacts, including a telephone call, in pursuit of payment.

In the alternative, defendant argues the sentences for 36 of the counts should be stayed because they are based on the same specific acts (letter or telephone call) for which the court imposed another sentence. The People argued this in the trial court, and

in this appeal, and we agree that these 36 counts should be stayed, rather than run concurrently.

Section 654, subdivision (a), provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 protects against multiple punishment rather than multiple conviction. (*People v. Deloza* (1998) 18 Cal.4th 585, 591-592; *People v. Harrison* (1989) 48 Cal.3d 321, 335.) A defendant thus may not be punished for two separate crimes that arise either out of a single act or out of an indivisible transaction. (*People v. Ortega* (1998) 19 Cal.4th 686, 693; *People v. James* (1977) 19 Cal.3d 99, 119-120.)

Whether a course of conduct is indivisible for purposes of section 654 depends on the intent and objective of the actor. (*People v. Harrison*, *supra*, 48 Cal.3d at p. 335.) Thus, if all of the offenses were incident to one objective, the defendant may be punished for only one of them. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) "On the other hand, if the evidence discloses that a defendant entertained 'multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citations.]" (*In re Adams* (1975) 14 Cal.3d 629, 634.) Further, section 654 does not bar multiple punishment where temporal separation of offenses afford a

defendant an opportunity to reflect and to renew his or her intent before committing the next offense. (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.)

The defendant's intent and objective are factual questions for the trial court. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) The court's finding, whether express or implied, will be upheld on appeal if supported by substantial evidence. (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1296.) We review the trial court's determination in the light most favorable to the respondent, and we presume the existence of every fact the trial court could have reasonably deduced from the evidence. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

Here, section 654 prohibits multiple punishment on the multiple counts that involved a single contact with a single victim but does not prohibit punishment for additional contacts with each victim, nor for contacts with multiple victims. In other words, section 654 allows defendant to be separately punished for the first and each subsequent contact with each victim. This is because each time defendant contacted a victim for the first time, and each time he subsequently contacted each victim, he had time to consider that he was breaking the law and to renew his intent to break the law yet again. However, where defendant contacted a victim only a single time by letter, or a single time by telephone, defendant can be punished for only one crime based on that single contact.

The court did not meet the requirements of section 654 by running the 36 counts concurrently. A concurrent sentence is still punishment, and so imposing concurrent sentences is not the proper way to implement section 654, which prohibits multiple

"punish[ment]" for an act or omission that violates more than one criminal provision. "Accordingly, rather than . . . imposing concurrent sentences, when a court determines that a conviction falls within the meaning of section 654, it is necessary to *impose* sentence but to stay the *execution* of the duplicate sentence." (*People v. Duff* (2010) 50 Cal.4th 787, 796.)

The specific application of these rules results in the following change to the sentence ordered by the court. Regarding the victims to whom defendant sent a single letter, or with whom he engaged in a single phone call, but was also charged with a related theft, extortion, or attempted theft or extortion count for that single letter or phone call, the punishment for the related count should be stayed. The trial court is directed to order the punishment stayed for the following counts: 10, 11, 19, 22, 25, 28, 35, 38, 43, 46, 51, 54, 58, 61, 64, 68, 73, 76, 77, 79, 81, 90, 93, 97, 112, 113, 115, 118, 120, 122, 128, 131, 133, 139, 141, and 143.

DISPOSITION

The trial court is directed to amend the abstract of judgment to stay the execution of the 36 sentences listed immediately above and to forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.

Appendix A

Victim	Count	Charge	Sentence
TR Auto Body	1	Pen. Code § 523	1-year consecutive [1/3 midterm]
	2	§ 664, 487(a)	Concurrent 1-year midterm
Cowgirl Café	3	§ 523	1-year consecutive [1/3 midterm]
	4	§ 664, 487(a)	Concurrent 1-year midterm
Kendra Chiropractic	5	§ 523	1-year consecutive [1/3 midterm]
	6	§ 664, 487(a)	Concurrent 1-year midterm
Linda's Feed	7	§ 523	1-year consecutive [1/3 midterm]
	8	§ 664, 487(a)	Concurrent 1-year midterm
Norco Rentals	9	§ 523	1-year consecutive [1/3 midterm]
	10	§ 664, 487(a)	Concurrent 1-year midterm
Norco Trailers	11	§ 664, 518	Concurrent 2 years midterm
	12	§ 523	1-year consecutive [1/3 midterm]
	13	§ 664, 487(a)	Concurrent 1-year midterm
Reidy Realty	14	§ 523	1-year consecutive [1/3 midterm]
	15	§ 368(d)	Concurrent 3 years midterm
	16	§ 664, 487(a)	Concurrent 1-year midterm

Victim	Count	Charge	Sentence
Racks Billiards & Bourbon	17	§ 518	Concurrent 3 years midterm
	18	§ 523	1-year consecutive [1/3 midterm]
	19	§ 487(a) [$900] (misdemeanor)	Concurrent 180 days in jail
Tienda Tzuluma	20	§ 664, 518	Concurrent 2 years midterm
	21	§ 523	1-year consecutive [1/3 midterm]
	22	§ 664, 487(a)	Concurrent 1-year midterm
American Inn & Suites	23	§ 518	Concurrent 3 years midterm
	24	§523	1-year consecutive [1/3 midterm]
	25	§ 487(a) [$2,500]	Concurrent 2 years midterm
Music Mike's	26	§ 664, 518	Concurrent 2 years midterm
	27	§ 523	1-year consecutive [1/3 midterm]
	28	§ 664, 487(a)	Concurrent 1-year midterm
Life Bridge Church	29	§ 523	1-year consecutive [1/3 midterm]
	30	§ 664, 487(a)	Concurrent 1-year midterm
Westwood Club	31	§ 523	1-year consecutive [1/3 midterm]
	32	§ 664, 487(a)	Concurrent 1-year midterm

Victim	Count	Charge	Sentence
Z Performance Auto Repair & Muffler	33	§ 518	Concurrent 3 years midterm
	34	§ 523	1-year consecutive [1/3 midterm]
	35	§ 487(a) [$363] (misdemeanor)	Concurrent 180 days in jail
Pro Tires & Wheel	36	§ 518	Concurrent 3 years midterm
	37	§ 523	1-year consecutive [1/3 midterm]
	38	§ 487(a) [$1,000]	Concurrent 2 years midterm
CJJ Enterprises- KFC	39	§ 523	1-year consecutive [1/3 midterm]
	40	§ 664, 487(a)	Concurrent 1-year midterm
Gables Residential Services	41	§ 518	Concurrent 3 years midterm
	42	§ 523	1-year consecutive [1/3 midterm]
	43	§ 487(a) [$2,000]	Concurrent 2 years midterm
Murrieta Valley Funeral Home	44	§ 518	Concurrent 3 years midterm
	45	§ 523	1-year consecutive [1/3 midterm]
	46	§ 487(a) [$2,500]	Concurrent 2 years midterm
Precision Auto Import	47	§ 523	1-year consecutive [1/3 midterm]
	48	§ 487(a) [$898] (misdemeanor)	Concurrent 180 days in jail

Victim	Count	Charge	Sentence
Quality Nissan	49	§ 518	Concurrent 3 years midterm
	50	§ 523	1-year consecutive [1/3 midterm]
	51	§ 487(a) [$2,495]	Concurrent 2 years midterm
Old Town Tire Services	52	§ 664, 518	Concurrent 2 years midterm
	53	§ 523	**3 years [midterm] PRINCIPAL**
	54	§ 664, 487(a)	Concurrent 1-year midterm
KSY Investments	55	§ 503	Concurrent 2 years midterm
	56	§ 518	Concurrent 3 years midterm
	57	§ 523	1-year consecutive [1/3 midterm]
	58	§ 487(a) [$1,895]	Concurrent 2 years midterm
Western Exterminator	59	§ 518	Concurrent 3 years midterm
	60	§ 523	1-year consecutive [1/3 midterm]
	61	§ 487(a) [$3,000]	Concurrent 2 years midterm
Walnut Grove Medical Center	62	§ 518	Concurrent 3 years midterm
	63	§ 523	1-year consecutive [1/3 midterm]
	64	§ 487(a) [$4,750]	Concurrent 2 years midterm
Stater Bros. Market	65	§ 664, 487(a)	Concurrent 1-year midterm

Victim	Count	Charge	Sentence
America's Best Value Inn	66	§ 518	Concurrent 3 years midterm
	67	§ 523	1-year consecutive [1/3 midterm]
	68	§487(a) [$2,000]	Concurrent 2 years midterm
Yankee Investments	69	§ 523	1-year consecutive [1/3 midterm]
	70	§ 664, 487(a)	Concurrent 1-year midterm
Don Jose's Mexican Restaurant	71	§ 518	Concurrent 3 years midterm
	72	§ 523	1-year consecutive [1/3 midterm]
	73	§ 487(a) [$2,500]	Concurrent 2 years midterm
Wendy's	74	§ 518	Concurrent 3 years midterm
	75	§ 523	1-year consecutive [1/3 midterm]
	76	§ 487(a) [$5,000]	Concurrent 2 years midterm
Cougar Winery	77	§ 664, 518	Concurrent 2 years midterm
	78	§ 523	1-year consecutive [1/3 midterm]
	79	§ 664, 487(a)	Concurrent 1-year midterm
Frangipani Winery	80	§ 523	1-year consecutive [1/3 midterm]
	81	§ 664, 487(a)	Concurrent 1-year midterm
Sunstate Equipment Company	82	§ 523	1-year consecutive [1/3 midterm]
	83	§ 664, 487(a)	Concurrent 1-year midterm

Victim	Count	Charge	Sentence
De La Pena Eye Clinic	84	§ 523	1-year consecutive [1/3 midterm]
	85	§ 664, 487(a)	Concurrent 1-year midterm
IHOP No. 834	86	§ 523	1-year consecutive [1/3 midterm]
	87	§ 487(a) [$3,000]	Concurrent 2 years midterm
Econo Lube	88	§ 518	Concurrent 3 years midterm
	89	§ 523	1-year consecutive [1/3 midterm]
	90	§ 487(a) [$1,200]	Concurrent 2 years midterm
City Center Motel/ Deluxe Inn	91	§ 518	Concurrent 3 years midterm
	92	§ 523	1-year consecutive [1/3 midterm]
	93	§ 487(a) [$5,000]	Concurrent 2 years midterm
Tax Solutions	94	§ 523	1-year consecutive [1/3 midterm]
	95	§ 664, 487(a) (misdemeanor)	Concurrent 90 days in jail
Shakey's Pizza	96	§ 523	1-year consecutive [1/3 midterm]
	97	§ 664, 487(a)	Concurrent 1-year midterm
GT Imports	98	§ 523	1-year consecutive [1/3 midterm]
	99	§ 664, 487(a)	Concurrent 1-year midterm

Victim	Count	Charge	Sentence
Sun City Hardware	100	§ 523	1-year consecutive [1/3 midterm]
	101	§ 664, 487(a)	Concurrent 1-year midterm
Riverside Truck & Equipment	102	§ 523	1-year consecutive [1/3 midterm]
	103	§ 487(a) [$5,000]	Concurrent 2 years midterm
Blanchard Signs & Banners	104	§ 523	1-year consecutive [1/3 midterm]
	105	§ 664, 487(a)	Concurrent 1-year midterm
Flexsteel	106	§ 523	1-year consecutive [1/3 midterm]
	107	§ 664, 487(a)	Concurrent 1-year midterm
World Liquor	108	§ 523	1-year consecutive [1/3 midterm]
	109	§ 664, 487(a)	Concurrent 1-year midterm
Aero Tech Surveys	110	§ 518	Concurrent 3 years midterm
	111	§ 523	1-year consecutive [1/3 midterm]
	112	§ 487(a) [$3,500]	Concurrent 2 years midterm
Marcello's Pizza	113	§ 664, 518	Concurrent 2 years midterm
	114	§ 523	1-year consecutive [1/3 midterm]
	115	§487(a) [$—] (exceeding $950)	Concurrent 2 years midterm

Victim	Count	Charge	Sentence
Antone's Italian Food	116	§ 523	1-year consecutive [1/3 midterm]
	117	§ 664, 487(a)	Concurrent 1-year midterm
Brockton Physical Therapy	118	§ 664, 518	Concurrent 2 years midterm
	119	§ 523	1-year consecutive [1/3 midterm]
	120	§ 487(a) [$—] (exceeding $950)	Concurrent 2 years midterm
Michael P. Taylor CPA	121	§ 523	1-year consecutive [1/3 midterm]
	122	§ 664, 487(a)	Concurrent 1-year midterm
1st Choice Property Management	123	§ 523	1-year consecutive [1/3 midterm]
	124	§ 664, 487(a)	Concurrent 1-year midterm
Wylie Center	125	§ 523	1-year consecutive [1/3 midterm]
	126	§ 664, 487(a)	Concurrent 1-year midterm
Nat R. Shain, DDS	127	§ 523	1-year consecutive [1/3 midterm]
	128	§ 664, 487(a)	Concurrent 1-year midterm
Econo Lodge	129	§ 518	Concurrent 3 years midterm
	130	§ 523	1-year consecutive [1/3 midterm]
	131	§ 487(a) [$2,500]	Concurrent 2 years midterm

Victim	Count	Charge	Sentence
Allen Properties-Concord Place Apts.	132	§ 523	1-year consecutive [1/3 midterm]
	133	§ 664, 487(a)	Concurrent 1-year midterm
Jurupa Royal Apts.	134	§ 523	1-year consecutive [1/3 midterm]
	135	§ 664, 487(a)	Concurrent 1-year midterm
Western Dental	136	§ 523	1-year consecutive [1/3 midterm]
	137	§ 664, 487(a)	Concurrent 1-year midterm
Casa Loma College	138	§ 523	1-year consecutive [1/3 midterm]
	139	§ 664, 487(a)	Concurrent 1-year midterm
Orchard Parks Apts.	140	§ 523	1-year consecutive [1/3 midterm]
	141	§ 664, 487(a)	Concurrent 1-year midterm
King Arthur's Mobile Home Estates	142	§ 523	1-year consecutive [1/3 midterm]
	143	§ 664, 487(a)	Concurrent 1-year midterm