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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS JOSE SANCHEZ,

Defendant and Appellant.

F063030

(Super. Ct. No. CRM008288)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

Jeff Cunan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Larenda R. Delaini, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Poochigian, J. and Franson, J.

Defendant Jesus Jose Sanchez was charged with felony evading arrest (Veh. Code, § 2800.2, subd. (a); count 1), and misdemeanor driving on a suspended license (Veh. Code, § 14601.1, subd. (a); count 2). A jury convicted Sanchez on count 2, but the jury could not reach a verdict on count 1 and the trial court declared a mistrial on that count. Sanchez was immediately sentenced on count 2; the court placed him on 36 months summary probation.

The People thereafter filed a motion to amend the information to add one count of misdemeanor reckless driving (Veh. Code, § 23103, subd. (a)) as new count 2. The trial court granted the motion after defense counsel submitted on it without objection. A second jury trial on the amended information ended in a mistrial after the jury was unable to reach a verdict on both counts. A third jury convicted Sanchez on both counts. The trial court suspended imposition of sentence and admitted Sanchez to 36 months' probation upon specified terms and conditions, including a jail sentence of 180 days with 12 days' custody and conduct credits, and payment of various fines and fees.

Initially, Sanchez's appointed appellate counsel filed an opening brief which summarized the pertinent facts, with citations to the record, raised no issues, and asked that this court independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) Thereafter, this court invited the parties to submit briefing on the issue of whether the prosecution of reckless driving violated the rule against multiple prosecutions of transactionally related crimes committed at the same time as stated in *People v. Kellett* (1966) 63 Cal.2d 822, 827 (*Kellett*).

In his letter brief, Sanchez contends *Kellett* does indeed bar his reckless driving conviction. Under the longstanding rule of *Kellett, supra*, 63 Cal.2d at p. 827, and Penal Code section 654 (section 654), ordinarily a conviction and sentence bars a prosecutor from pursuing new charges in successive prosecutions based on the same acts and course of conduct. The question framed by this appeal is whether a door for an amended information with new charges otherwise banned under *Kellett* is nevertheless opened

because there was a mistrial on another count in the first trial, the evading arrest count, which was properly subject to a second prosecution. We conclude that in this case, *Kellett* and section 654 did not preclude the subsequent prosecution for reckless driving.

FACTS

On the afternoon of February 25, 2010, California Highway Patrol (CHP) Officer John Moran pursued a black sedan after he saw the vehicle traveling northbound on State Route 99 at a high rate of speed he estimated to be 85 miles per hour. The vehicle made a U-turn across the center median and accelerated southbound. Moran activated his red light and followed the vehicle. When he was unable to catch up to the vehicle, he radioed other CHP units for assistance. A short time later, Moran saw the vehicle ahead of him passing several other vehicles by driving in the center median at a speed of 80 to 90 miles per hour. Moran lost sight of the vehicle after it returned to the fast lane.

CHP Officer Gregory Houser, responding to Moran's call, saw a black Pontiac Grand Am tailgating dangerously close to another car. Houser tried to catch up to the vehicle; he activated his lights and sirens. Houser saw the vehicle pass big-rig trucks and other vehicles by driving on the right shoulder. Moran caught up to Houser and saw the vehicle change lanes erratically, and use both the center median and the right-hand shoulder to pass other vehicles.

The vehicle eventually slowed and stopped after Houser drove next to the vehicle and attempted to overtake it. Both Moran and Houser pulled over to make an enforcement stop on the right hand shoulder. The driver, Sanchez, was arrested without incident. After Sanchez was read a *Miranda*¹ warning, Moran asked Sanchez why he was driving recklessly and trying to flee. Sanchez replied that his license was suspended, his car had been impounded once, and he did not want it to be impounded again. Moran

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

recalled asking Sanchez if that was why he made a U-turn across the freeway and Sanchez responded, “oh, that was you,” and said he saw Moran on the overcrossing.

DISCUSSION

Sanchez contends that when he was convicted and sentenced in his first trial for driving on a suspended license, the *Kellett* rule barred future prosecution for any transactionally related crimes not originally charged. He reasons that because the reckless driving charge he was convicted of in the third trial was “unquestionably transactionally related” to his conviction for driving on a suspended license, the reckless driving charge and conviction should have been barred by *Kellett* as that charge was not alleged in the first trial. Recognizing that the issue may be forfeited because defense counsel did not object to the amendment below, Sanchez asserts he was denied effective assistance of counsel when his attorney failed to make this argument on the motion to amend. He also asks us to exercise our discretion to consider the issue. (*People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6.)

Section 654, subdivision (a) provides: “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. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.”

Nearly 50 years ago, our Supreme Court reiterated that section 654’s ban on multiple prosecution ““is a procedural safeguard against harassment and is not necessarily related to the punishment to be imposed; double prosecution may be precluded even when double punishment is permissible.”” (*Kellett, supra*, 63 Cal.2d at p. 825.) Thus, “[i]f needless harassment and the waste of public funds are to be avoided, some acts that are divisible for the purpose of punishment must be regarded as being too interrelated to permit their being prosecuted successively. . . . When . . . the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a

significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted *if the initial proceedings culminate in either acquittal or conviction and sentence.*” (*Id.* at p. 827, fn. omitted, italics added.)

Section 654’s preclusion of *multiple punishment* for an act or course of criminal conduct has the same effect: “[I]f an act or course of criminal conduct can be punished only once under section 654, either *an acquittal or conviction and sentence* under one penal statute will preclude subsequent prosecution in a separate proceeding under any other penal statute.” (*Kellett, supra*, 63 Cal.2d at p. 828, italics added.)

Here, the jury in the first trial convicted Sanchez of driving on a suspended license. If this were the only charge upon which Sanchez was tried, we might agree with his contention that *Kellett* bars his subsequent trial and conviction for reckless driving. Sanchez, however, was also charged with evading arrest; on that count, the trial court declared a mistrial after the jury could not reach a verdict on it. As the Attorney General points out, the *Kellett* rule does not prohibit the amendment of an information to add new charges after a mistrial. (See *People v. Flowers* (1971) 14 Cal.App.3d 107, 1019-1021 (*Flowers*) [amendment to add new charges after mistrial was within court’s discretion; mistrial means a case’s status is the same as if no trial had occurred and thus the prosecutor’s right to amend is the same as at any other time after plea or demurrer is sustained]; *People v. Brown* (1973) 35 Cal.App.3d 317, 323 [where prosecutor adds new charges in amended information following total mistrial, *Flowers*, not *Kellett*, controls; there is no issue of multiple prosecutions because first trial resulted in mistrial, not acquittal or conviction; status of case is the same as if there had been no trial; therefore the defendant is not the victim of harassment or successive prosecution]; *People v. Williams* (1997) 56 Cal.App.4th 927, 933 [following mistrial, district attorney properly

may amend information to bring additional charges despite section 654's prohibition against multiple punishment for single course of conduct].)

Nevertheless, Sanchez argues the *Kellett* rule should apply here because his first trial did result in a conviction and sentence on one count, which is necessary to trigger *Kellett*'s protections against multiple prosecutions. We are not persuaded. Although a conviction was obtained against Sanchez on one of the original counts, the conviction did not result in the culmination of the proceeding within the meaning of *Kellett*. (*Brown, supra*, 35 Cal.App.3d at p. 323.) Because the evading arrest charged in count 1 resulted in a mistrial due to the jury's inability to agree on a verdict, the "status of [that count] was the same as if there had been no trial." (*Ibid*; see also *People v. Crooms* (1949) 66 Cal.App.2d 491, 499 [where a jury convicted the defendant of one count and could not reach a decision on a second count, resulting in a mistrial on that count, status of second count was the same as if there had been no trial].) Hence, it was proper to amend the information, and Sanchez "was not the victim of harassment or successive prosecution." (*Brown, supra*, 35 Cal.App.3d at p. 323.)

Accordingly, had Sanchez's trial counsel opposed the motion to amend by arguing *Kellett* applied, his argument would have been properly rejected, and thus his counsel was not ineffective for failing to make it. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [to prevail on ineffective assistance of counsel claim, defendant must establish prejudice by showing there is a reasonable probability that but for trial counsel's errors, the result of the proceeding would have been different].)

DISPOSITION

The judgment is affirmed.