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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

REYES ANTONIO BEJARANO, JR.,

Defendant and Appellant.

H038444

(Santa Clara County

Super. Ct. No. C1101471)

Defendant Reyes Antonio Bejarano, Jr. was convicted by plea of five counts of second degree robbery (Pen. Code, § 211-212.5, subd. (c))<sup>1</sup> arising out of the robberies of a restaurant, two markets, and two liquor stores. Defendant also admitted enhancement allegations that he personally used a handgun in four of the robberies (§ 12022.53, subd. (b)) and that he was armed with a handgun during the fifth robbery (§ 12022, subd. (a)(1)). Pursuant to a negotiated plea, the court sentenced defendant to 14 years in prison. At sentencing, the court ordered victim restitution, imposed fines and fees, and ordered that defendant “have no contact with any of the victims in this case.” On the merits, defendant argues that the court lacked statutory authority to impose the no-contact order since it sentenced defendant to state prison and that the order is not justified by the court’s inherent powers. The People concede that the no-contact order must be stricken as unauthorized. For the reasons stated below, we find the People’s concession

<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise stated.

appropriate. We shall therefore strike the no-contact order and affirm the judgment as modified.

## **FACTS**

### ***Count One***

On February 15, 2011 at about 10:20 p.m., two masked men with handguns walked into a Taco Bell restaurant in San Jose. They told employees Modesto Hernandez-Garcia and Maria Padilla to lie on the floor and ordered the manager, Martha Avila, to open the safe. According to the police report, the men took \$1,200 from the safe and Avila's cell phone, which was provided by her employer. A witness saw the two men run to a green SUV that was parked nearby; the witness provided the SUV's license plate number to police. The SUV was registered to defendant and his wife. The owners of the Taco Bell claimed losses of \$1,944.74. Hernandez-Garcia was nervous and fearful after the incident and had trouble sleeping; he told the probation officer he would like some counseling.

### ***Count Four***

On February 19, 2011 at about 11:10 p.m., three masked men walked into Guru's Empire Market in San Jose. One of them pointed a handgun at Gurmeet Singh while another took \$500 to \$600 from the cash register. The third man took two or three bottles of Hennessy cognac from a shelf behind the counter. The men ordered Singh to lie on the ground and fled the store. Approximately 30 minutes later, a citizen called police and reported seeing a suspicious, green Toyota 4-Runner or similar vehicle parked about four miles from Guru's Empire Market. The vehicle's interior light was on and the citizen saw three occupants counting a large amount of cash and passing it around. By the time police arrived, the vehicle was gone.

### ***Count Five***

On February 22, 2011 at about 10:30 p.m., three masked men walked into Express Liquors in San Jose. Two of them pointed guns at Rinkdo Singh. The third man took

\$500 out of the cash register, grabbed Singh's laptop, took some lottery tickets, and grabbed two bottles of Hennessy cognac. The culprits then left the store. The probation department recommended \$500 in victim restitution for Singh.

### ***Count Seven***

On February 24, 2011 at about 11:13 p.m., Sukhdev Sandhu was counting the money in the register at Guru's Market in San Jose when three masked men, each armed with a revolver, entered the store. One of the men told Sandhu to get on the ground, and took all of the money and three checks that were on the counter. Another pushed Sandhu's minor son (Son) to the ground, put a gun to his head, went through Son's pockets, and took his cell phone, wallet, and \$61 in cash. The men took about \$1,400 in all; they told Sandhu and Son to stay on the ground or they would be shot, and left the store. The owners of Guru's Market and Guru's Empire Market did not request restitution because they feared retaliation. Their employee, Sandhu, claimed \$410 for lost wages, Son's cell phone, and the cash stolen from Son.

### ***Count Eight***

On February 25, 2011 at about 11:20 p.m., three masked men entered Charlie's Liquors in San Jose. Two of them pointed handguns at Hung Minh Le and ordered him and his wife onto the floor. One of the men told Le to open the cash register and to hand over his wallet and any money in his pockets. According to the police report, the men took \$200 to \$300 from the register, two cell phones, five bottles of Hennessy cognac, and an orange coin box. After the men left, a witness saw them run from the direction of the store, enter a dark-colored Chevrolet Suburban, and leave the area. Le claimed \$2,055 in losses: \$400 stolen from him, \$300 in the coin box, \$500 from the register, \$400 for the two phones, \$275 for the cognac, and \$180 for two boxes of cigars.

### ***Arrest***

On February 26, 2011 at about 10:32 a.m., police stopped defendant's green Chevrolet Suburban, which had been reported at the scene of the first robbery; defendant,

Lucas Merrill, and a third man were in the vehicle. Defendant denied being involved in any robberies, but admitted that he drank Hennessy cognac. The officers searched the Suburban and found Avila's cell phone, two checks that had been stolen from Guru's Market, a bottle of Hennessy cognac, a ski-mask, an orange coin box, and some of the lottery tickets that were stolen from Express Liquors. The phone contained photos of defendant and Merrill posing with a pistol, of defendant and his family, and of Avila. Defendant, Merrill, and Julian Gamaza were arrested and charged with the robberies.

### **PROCEDURAL HISTORY**

Defendant was charged by information with nine counts of second degree robbery (§ 211-212.5, subd. (c)). Merrill and Gamaza were charged in the same case. Although there were five robberies, there were nine counts against defendant because some of the robberies involved more than one victim. The information contained enhancement allegations that defendant personally used a handgun in four of the robberies (§ 12022.53, subd. (b)) and that he was armed with a handgun during one of the robberies (§ 12022, subd. (a)(1)).

Pursuant to a negotiated plea, defendant pleaded no contest to counts 1, 4, 5, 7 and 8 and admitted the enhancement allegations attached to those counts in exchange for a sentence of 14 years "top/bottom." The agreement provided that the remaining counts would be dismissed at sentencing and was contingent on all three defendants accepting plea agreements.

The court sentenced defendant to the three-year middle term on count 1, plus 10 years for the gun enhancement. The court imposed the same sentence on counts 4, 7, and 8 and ordered those sentences served concurrently. On count 5, the court imposed one year (one-third the middle term) consecutive and ordered the punishment for the gun enhancement stricken (§ 1385). The total sentence was 14 years. The court dismissed the remaining counts, imposed various fines and fees, and ordered victim restitution: \$1,944.74 for Taco Bell, \$500 for Rinkdo Singh, \$410 for Sandhu, and \$2,055 for Le.

Based on the probation officer's recommendation, the court also ordered defendant "to have no contact with any of the victims in this case."

## **DISCUSSION**

Defendant contends that the court lacked both statutory and inherent authority to impose the no-contact order and that the issue has not been waived. The Attorney General concedes that the no-contact order must be stricken.

### ***Waiver***

Citing *People v. Ponce* (2009) 173 Cal.App.4th 378 (*Ponce*), defendant argues that although he failed to object to the no-contact order in the trial court, his claim is cognizable on appeal because imposition of the no-contact order resulted in an unauthorized sentence in excess of the trial court's jurisdiction. The Attorney General agrees that there has been no waiver.

As a general rule, the appellant waives issues on appeal that he or she did not raise in the trial court. (*Ponce, supra*, 173 Cal.App.4th at p. 381, citing *People v. Smith* (2001) 24 Cal.4th 849, 852.) "But there are exceptions to this rule for unauthorized sentences and sentencing decisions that are in excess of the trial court's jurisdiction." (*Ponce*, at p. 381.) Because this case involves the jurisdictional validity of the trial court's decision to issue a no-contact order when imposing a prison sentence, we will consider defendant's claim on the merits. (*Id.* at pp. 381-382 [validity of order imposing protective order at sentencing].)

### ***Lack of Statutory Authority to Impose No-contact Order***

Defendant contends that while several Penal Code sections mandate or permit no-contact orders at the time of sentencing, none of those statutes apply here. For example, section 1202.05, subdivision (a) requires the court to prohibit visitation between persons convicted of enumerated sex crimes and their minor victims. Section 646.9, subdivision (k) authorizes the court to issue a no-contact order that is valid for up to 10 years in stalking cases. Section 3053.2 provides that at the request of the victim, the

parole authority must impose a form of no-contact order as a condition of parole in domestic violence cases. And under section 1203.1, subdivision (j), the trial court may impose a no-contact order as a condition of probation. As defendant observes, none of these provisions apply in this case, since defendant was not convicted of any sex offenses, domestic violence, or stalking, and the court found him ineligible for probation.

The only statute that could reasonably justify the no-contact order is section 136.2,<sup>2</sup> which permits the trial court in a criminal case to protect a witness or a victim by issuing a protective order. (*People v. Selga* (2008) 162 Cal.App.4th 113, 118 (*Selga*), citing *People v. Stone* (2004) 123 Cal.App.4th 153, 159 (*Stone*), superseded by statute on another ground as stated in *Babalola v. Superior Court* (2011) 192 Cal.App.4th 948, 951 [Legislature amended § 136.2, creating an exception to rule stated in *Stone* for domestic violence cases].)<sup>3</sup> But protective orders issued under section 136.2 are of limited duration; they apply only “during the pendency of a criminal proceeding.” (*Ponce, supra*, 173 Cal.App.4th at p. 382.)

As the Court of Appeal stated in *Stone*, “Although section 136.2 does not indicate on its face that the restraining orders it authorizes are limited to the pendency of the criminal action in which they are issued or to probation conditions, it is properly so construed.” (*Stone, supra*, 123 Cal.App.4th at p. 159.) The court reasoned that “the absence of any express time limitation on the duration of a restraining order issued under

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<sup>2</sup> Section 136.2 provides in part: “(a) Except as provided in subdivision (c), upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur, any court with jurisdiction over a criminal matter may issue orders including, but not limited to, the following: [¶] . . . [¶] (4) An order that any person described in this section shall have no communication whatsoever with any specified witness or any victim, except through an attorney under any reasonable restrictions that the court may impose.”

<sup>3</sup> Unlike *Selga* and *Ponce*, where the court used Judicial Council forms that indicated the statutory basis for the no-contact orders in those cases, the court did not cite any statutory authority for imposing the no-contact order in this case. (*Ponce, supra*, 173 Cal.App.4th at p. 382; *Selga, supra*, 162 Cal.App.4th at p. 119.)

section 136.2 suggests that its duration is limited by the purposes it seeks to accomplish in the criminal proceeding” and concluded that “its only purpose is to protect victims and witnesses in connection with the criminal proceeding in which the restraining order is issued in order to allow participation without fear of reprisal.” (*Ibid.*) “If not so limited, restraining orders under section 136.2 would usurp the similar restraining orders obtainable under Code of Civil Procedure section 527.6, and undermine the numerous procedural protections for the restrainee afforded by that section.” (*Stone*, at pp. 159-160, fn. omitted.)

The defendant in *Stone* was sentenced to state prison. (*Stone*, *supra*, 123 Cal.App.4th at p. 156.) The court held that since the restraining orders in that case were issued for three years, were not limited to the pendency of the criminal proceeding, and were not a condition of probation, they “transcended the authorization of section 136.2 and must be reversed.” (*Id.* at p. 160, fn. omitted.) In this case, since the no-contact order was imposed at sentencing at the conclusion of the proceedings and defendant was not granted probation, we hold that the no-contact order was not authorized by section 136.2. (*Stone*, at p. 160; *Ponce*, *supra*, 173 Cal.App.4th at pp. 380, 383.)

The no-contact order must be stricken for another reason. (*Stone*, *supra*, 123 Cal.App.4th at p. 160.) Section 136.2 authorizes the use of a protective order only when the court “has a ‘good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur.’ ” (*Stone*, at pp. 158-159.) Since “the restraining orders authorized by section 136.2 are those aimed at preserving the integrity of the administration of criminal court proceedings and protecting those involved in them,” the required good cause “must show a threat, or likely threat to criminal proceedings or participation in them.” (*Stone*, at p. 160.) In *Stone*, there was no evidence that the defendant “or anyone on his behalf and at his behest, made any efforts by threat or force to dissuade [his victims] from testifying against him or proceeding with the prosecution.” (*Id.* at pp. 160-161.) The fact that the defendant had assaulted his

victims before there were any criminal proceedings, without intent to interfere with those proceedings, was insufficient to justify a restraining order. (*Id.* at p. 161.)

In this case, there was no basis for a good cause belief defendant had attempted either during or after the commission of the robberies to intimidate or dissuade any of his victims from reporting the crimes or testifying against him and no evidence of any likelihood of future intimidation or harm to the victims. The owners of the Guru's markets said they feared retaliation, but there is nothing to suggest that their fear was based on anything done by defendant or on his behalf other than the robberies at their two stores. This lack of evidence supports our conclusion that the no-contact order was not authorized by section 136.2.

***The Court's Inherent Authority Did Not Justify Imposition of the Order***

Citing *Wheeler v. United States* (9th Cir. 1981) 640 F.2d 1116, 1123 (*Wheeler*) and *United States v. Morris* (7th Cir. 2001) 259 F.3d 894 (*Morris*), defendant argues that the inherent power of the court to protect the administration of justice from “ ‘abuses, oppression and injustice’ ” did not justify issuing the no-contact order in this case.

In *Ponce*, the Attorney General argued that trial courts, independent of statute, have inherent authority to issue appropriate protective orders to protect trial participants. (*Ponce, supra*, 173 Cal.App.4th at pp. 383-384.) The court rejected that contention, citing both California and federal court cases, and held that even if the trial court had “relied on ‘inherent judicial authority’ to issue its order, the result would not change. An existing body of statutory law regulates restraining orders. ‘ “[I]nherent powers should never be exercised in such a manner as to nullify existing legislation . . . .” ’ [Citation.] Where the Legislature authorizes a specific variety of available procedures, the courts should use them and should normally refrain from exercising their inherent powers to invent alternatives.” (*Id.* at p. 384.)

In *Wheeler*, the Ninth Circuit observed that, using its inherent power, “[i]t is possible, in a particular situation, that a [federal] trial court would be warranted in issuing

an order to protect a witness . . . even though the trial was over.” (*Wheeler*, 640 F.2d at p. 1124.) But the court stressed that “post-trial orders to protect witnesses are extraordinary in character and to be issued only in rare instances.” (*Id.* at p. 1124, fn. 15.) Even when a defendant has previously harassed a witness at trial, the trial court must still determine “the necessity of protecting [the witness] under the facts as they presently exist” before issuing a posttrial witness protection order. (*Id.* at p. 1126.) To obtain such an order, the prosecution must make a strong showing of “ ‘a clear and present danger or a serious and imminent threat,’ ” and must demonstrate that there are no other available alternatives. (*Id.* at p. 1124.) Similarly, *Morris* concluded that the exercise of such inherent authority must be very limited. “[T]he use of no-contact orders must be reserved for rare and compelling circumstances . . . .” (*Morris, supra*, 259 F.3d at p. 901.)

Here, as in both *Ponce* and *Stone*, there was no evidence that, after being charged in this case, defendant or anyone on his behalf made any efforts by threat or force to dissuade any of the victims from testifying against him or proceeding with the prosecution, or that he had tried to unlawfully interfere with the criminal proceedings. (*Ponce, supra*, 173 Cal.App.4th at pp. 384-385; *Stone, supra*, 123 Cal.App.4th at pp. 160-161.) The prosecutor did not make an offer of proof or any argument to justify the need for a no-contact order and it appears the court merely followed the probation officer’s suggestion, in the probation report, that it impose a no-contact order.

For these reasons, we accept the Attorney General’s concession and will strike the no-contact order.

**DISPOSITION**

The no-contact order is stricken. As so modified, the judgment is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MÁRQUEZ, J.