SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

APPELLATE DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

KEITH HENSON,

Defendant and Appellant.

Case No: APP004184

(Trial Court: HEM014371)

PER CURIAM OPINION

Appeal from a judgment of the Superior Court of Riverside County, Robert H. Wallerstein* (Retired judge of the L.A. Mun. Ct. for the L.A. Jud. Dist. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.), and Curtis R. Hinman, Judges. Motions to dismiss and to augment the record. Affirmed. Motions denied.

Law Offices of Mark J. Werksman, Mark J. Werksman and Kelly C. Quinn, for Defendant and Appellant.

Rod Pacheco, District Attorney, and Alan D. Tate, Senior Deputy District Attorney, for Plaintiff and Respondent.

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* Judge Wallerstein presided over Henson's trial and sentencing in absentia. Wallerstein passed away in April 2003, so Judge Hinman presided over the most recent hearing.

THE COURT

In an amended complaint filed on October 5, 2000, Defendant Keith Henson was charged with one count of making criminal threats (Pen. Code,[1] § 422; Count 1), one count of attempting to make criminal threats (§§ 644, 422; Count 2), and one count of interfering by force or threat of force with the free exercise of constitutional rights (§ 422.6; Count 3). On April 26, 2001, a jury convicted Henson on Count 3 but indicated it was deadlocked on Counts 1 and 2. The trial judge declared a mistrial on the deadlocked counts, denied Henson's motions for dismissal based on insufficient evidence and for a new trial, and set a hearing for sentencing on May 16, 2001.

When Henson did not appear for sentencing on May 16, 2001, the trial court issued a bench warrant and a fourth count of failure to appear was added. (§ 1320, subd. (a); Count 4.) During discussions of the probation report and recommendation, Mr. Davis – the probation officer – informed the court that he learned Henson was in Canada, apparently believing the sentencing hearing was taken off calendar, but would return soon. The court then set the matter for sentencing on July 20, 2001. Prior to the continued sentencing hearing, the parties submitted papers with the court indicating Henson was still in Canada.

On July 20, 2001, the prosecutor informed the court that, according to information he received, Henson was possibly applying for refugee status in Canada, and might never return to the United States. The prosecutor asked that Henson be sentenced in

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[1] All further statutory references are to the Penal Code.

absentia. During a discussion of Henson's status, his attorney informed the court that apparently Henson was arrested by Canadian authorities on automatic weapons charges, was detained and released pending a determination of his immigration status in that country. Mr. Abelson (he did not state his appearance on the record, so we cannot discern whether he was with the prosecution or with the defense) also told the court that what sentence was imposed here would help "crystallize the situation there," and help Henson decide "whether he wants to come back or not come back."

After hearing additional argument, the court imposed sentence.[2] "The Court sentences the defendant to 365 days in the county jail, suspended on condition that he serve 180 days in custody" straight time, and accept other conditions of probation for 3 years including payment of fines, being subject to search terms, and that he stay away from the victims in the case.

From Ontario Canada, Henson filed a timely notice of appeal on August 15, 2001. (Case No. APP003226.) On October 22, 2001, Henson applied for appointed counsel on appeal, and that same day this Court took off calendar the previously scheduled hearing in Henson's appeal, pending resolution of Henson's application.

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[2] In his brief and in oral argument before this Court, Henson implies the trial court did not really sentence him on this date, but merely left the matter open until he was once again in custody. This misrepresents the record. Both the transcript of the July 20, 2001 sentencing hearing and the minute order clearly state the court sentenced Henson to jail for 365, but that the sentence was suspended on condition that he complete probation. To the extent Henson did not wish to comply with the conditions of probation, he had a choice of merely serving his jail term, but there is no question that a suspended sentence and valid grant of probation were entered that day.

On November 29, 2001, another panel of this Court issued an order which read: "Appellant's request for appointment of counsel is denied. Further, appellant is ordered to show cause within twenty days of the date of this order as to why this appeal should not be dismissed on the grounds that appellant is a fugitive and therefore has forfeited his right to appeal. (See, e.g., People v. Perez (1991) 229 Cal.App.3d 302; People v. Brych (1988) 203 Cal.App.3d 1068; People v. Redinger (1880) 55 Cal. 290." Henson and the District Attorney responded to the OSC, and on February 27, 2002, this Court dismissed Henson's appeal.

At some point Henson returned to the United States, and on May 30, 2007, appeared and pleaded guilty to the charge of failure to appear. The court dismissed Counts 1 and 2 in the interests of justice, and granted summary probation for 3 years subject to the same fines and conditions previously ordered, including 180 days (minus credits) in county jail. On June 19, 2007, Henson, this time through counsel, filed a timely notice of appeal "from the judgement [*sic*] rendered against the Defendant on May 30, 2007, . . ."

In his opening brief, Henson raises a number of challenges to his conviction on Count 3, including insufficient evidence that he used force or the threat of force or that he interfered with the exercise of religious rights, that he was improperly prevented from cross-examining witnesses and from presenting evidence, that the court abused its discretion by admitting prejudicial and irrelevant evidence against him, and that the prosecutor committed misconduct during closing arguments.

The District Attorney's Office responded with a motion to dismiss the appeal. It argued the current appeal is untimely and should be dismissed because of Henson's prior fugitive status, and in the alternative that we should dismiss the appeal as a sanction for Henson's failure to comply with the California Rules of Court in his opening brief. Henson opposed the motion arguing there was no final judgment in 2001, so the first notice of appeal was premature and has no impact on the current appeal. He also argued his flight from the trial court had no effect on his later notice of appeal, and that his brief substantially complies with the rules. We initially denied the motion to dismiss, but upon receipt of the District Attorney's motion for reconsideration, we withdrew the denial on our own motion and deferred a ruling until full briefing and argument.

In its respondent's brief, the District Attorney's Office again argues the appeal should be dismissed, and defends the judgment contending no reversible errors occurred below. In his reply,[3] Henson repeats his arguments against dismissal of the appeal and for reversal.

We conclude Henson's first appeal was from a final judgment for purposes of Penal Code section 1466, and properly invoked this Court's jurisdiction in 2001. We also conclude discretionary dismissal of that first appeal was proper. Because Henson

[3] On the same day he filed his reply brief, Henson filed a request that we augment the record with the reporter's transcript from a hearing conducted on April 9, 2001. His attorney states he was unaware this transcript existed until recently, but at no point in the reply brief does he rely on the transcript. Because Henson sees no need to discuss the April 9, 2001, hearing in his reply brief, we assume it will not be helpful in this appeal and deny the request.

has not sought to reinstate his first appeal, the time to challenge his conviction has long since passed. Under the current notice of appeal, we only have jurisdiction to review any errors which may have occurred when Henson was sentenced on June 19, 2007. Because Henson does not challenge his guilty plea on the count of failure to appear or otherwise claim error occurred at that hearing, we dismiss the appeal.

DISCUSSION

Appeals in misdemeanor cases by the defendant may only be brought "[f]rom a final judgment of conviction." (§ 1466, subd. (2)(A).) The phrase "final judgment of conviction" includes "[a] sentence, an order granting probation, a conviction in a case in which before final judgment the defendant is committed for insanity or is given an indeterminate commitment as a mentally disordered sex offender, or the conviction of a defendant committed for controlled substance addiction[.]" (*Ibid.*)

Henson argues the sentencing on July 20, 2001, was not a final judgment because the court indicated what would occur in the future if Henson refused probation. Therefore, because no final judgment was rendered in 2001, his notice of appeal was premature and has no effect on his notice of appeal filed in 2007.

A suspended sentence is not itself an appealable judgment because the court has not in fact pronounced sentence. However, a suspended sentence has the practical effect of granting probation, and if the suspended sentence is in fact followed by a grant of probation, that itself *is* immediately appealable by the defendant in both felony and misdemeanor cases. (§§ 1237, subd. (a), 1466, subd. (2)(A); *People v. Mower* (2002) 28 Cal.4th 457, 466, fn. 3; *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421; 6

Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Appeal, § 48, pp. 293-294.)

True, the jail sentence imposed in 2001 was suspended, and Henson had, in effect, an option upon surrendering to either serve the jail term or accept probation. (See *ante*, fn. 1.) But the grant of probation was immediately appealable at the time it was given and constituted a final judgment for purposes of section 1466, subdivision (2)(A). Henson timely appealed from the judgment, and properly invoked this court's statutory jurisdiction at that time.

Henson argues this Court should not dismiss this appeal because of his prior fugitive status. We believe the proper focus is whether Henson's first appeal (Case No. APP003226) was properly dismissed.

With respect to the fugitive dismissal rule, Henson argues it is "[p]aramount . . . that the defendant must be in front of the appellate court while he is a fugitive," and "[t]he fact a defendant was a fugitive *before* he was properly in front of the appellate court is irrelevant." (Original italics.) Henson, like the District Attorney, relies on *Ortega-Rodriguez v. United States* (1993) 527 U.S. 198. We are not persuaded that decision is determinative here.

In *People v. Kang* (2003) 107 Cal.App.4th 43 (*Kang*), the defendant, like Henson, became a fugitive from justice and was sentenced in absentia. He then appealed, but upon being notified the defendant was a fugitive, the Court of Appeal dismissed the appeal. (*Id.* at pp. 46-47.) After being extradited and sentenced anew, the defendant filed another notice of appeal and moved the Court of Appeal to recall the remittitur and

reinstate the first appeal, and to consolidate it with the current notice of appeal. (*Id.* at p. 47.) The Court of Appeal granted the motion, and the Attorney General thereafter filed a motion to dismiss the appeal. (*Ibid.*)

The question before the court was whether the defendant was "entitled to pursue an appeal anew after he was apprehended and in the custody and control of the state." (*Kang*, *supra*, 107 Cal.App.4th at p. 48.) The Court of Appeal discussed the extant authorities on dismissal of appeals by fugitives, and found no authorities directly on point. The court looked to federal authorities on fugitive dismissals, which the court recognized are not binding on state appeals, but are "instructive" nonetheless. (*Id.* at pp. 49-50.) Those federal authorities, especially *Ortega-Rodriguez*, provide that an appellate court may, in its discretion, dismiss an appeal when the defendant becomes a fugitive after invoking appellate jurisdiction because of problems with enforcing its judgment and because the defendant is disentitled to pursue the appeal having flouted the court's authority. (*Id.* at pp. 50-51.) Because the defendant was no longer a fugitive, and there was no question the appellate court could enforce its judgment, the Court of Appeal denied the Attorney General's motion to dismiss. (*Id.* at p. 53.)

Neither *Kang* nor any published California decision has directly held that dismissal in California is *only* warranted when the defendant becomes a fugitive after filing his appeal. Instead, the courts have held that dismissal of a fugitive's appeal is discretionary. (*People v. Buffalo* (1975) 45 Cal.App.3d 838, 839.) Because Henson was a fugitive when he filed his first notice of appeal, flouting the trial court's authority, and remained a fugitive even when this Court issued an OSC, he was not

entitled to consideration of his appeal and we decline to find the dismissal was an abuse of discretion. At no time has Henson requested that we recall the remittitur and reinstate his first appeal, and it is far too late to do so now.

Because Henson's first timely appeal was properly dismissed and he never requested that we reinstate it, he may no longer challenge the underlying judgment. Therefore, the District Attorney's motion to dismiss the appeal is moot. Instead, this appeal is limited to what occurred at his 2007 sentencing.

Henson has briefed no issues of reversible error with respect to his plea to the count of failure to appear. We therefore affirm.

DISPOSITION

The judgment is affirmed.

Michele D. Levine
Acting Presiding Judge of the Appellate Division

Randall D. White
Judge of the Appellate Division

Judith C. Clark
Judge of the Appellate Division

Superior Court of California
COUNTY OF RIVERSIDE
Minute Order/Judgment

Case No.: 004184 Date: 04/14/09 Dept: 64
Case Name: PEOPLE VS. KEITH HENSON
Case Category: Appeal from Judgment-Misdemeanor
Hearing: Courts Subsequent Ruling on 04/10/09 @ 1:30 for Department 64

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Honorable Judge Michele D Levine, Presiding

Honorable Judge Randall D White, Presiding

Honorable Judge Judith C Clark, Presiding

Clerk: L. Serrano

Court Reporter: None

Court having taken APPELLATE HEARING under submission on 04/10/09
Rules as follows: THE JUDGMENT IS AFFIRMED.

Court Orders PER CURIAM OPINION Filed

Notice to be given by CLERK

Clerk's Certificate of Mailing re: OPINION

Notice sent to MARK J. WERKSMAN on 4/14/09

Notice sent to MT SAN JACINTO JUDICIAL DIST - BANNING on 4/14/09

Notice sent to DISTRICT ATTORNEY -RIVERSIDE on 4/14/09

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CLERKS CERTIFICATE OF MAILING

APPELLANT: KEITH HENSON
VS.
RESPONDENT: PEOPLE OF THE STATE OF CALIFORNIA
Case No. APP004184

TO:

I, clerk of the above entitled court, do hereby certify I am not a party to the within action or proceeding; that on the date below indicated, I served a copy of the attached 04/10/09 by depositing said copy enclosed in a sealed envelope with postage thereon fully prepaid in the mail at [ ] Riverside [ ] Indio, California, addressed as above.

CLERK OF THE COURT

Dated: 04/14/09

By: _____
LETICIA G SERRANO

Notice 'CCM' has been printed for the following Attorneys/Firms or Parties for Case Number APP004184 on 4/14/09:

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