Filed 11/23/11 P. v. Chen CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. QIANG CHEN, Defendant and Respondent.	E052886 (Super.Ct.No. RIF153834) OPINION

APPEAL from the Superior Court of Riverside County. Craig Riemer, Judge. Reversed.

Paul E. Zellerbach, District Attorney, Michael B. Silverman and Matt Reilly, Deputy District Attorneys, for Plaintiff and Appellant.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Respondent.

INTRODUCTION

Alleging a violation of due process and an erroneous dismissal of the charges, the People seek reversal of the trial court's order dismissing drug and grand theft charges against Qiang Chen (defendant). We will reverse.

FACTS AND PROCEDURAL HISTORY[1]

On August or September 8, 2009,[2] Riverside County Sheriff's deputies executing a narcotics search warrant at defendant's residence discovered 470 marijuana plants growing in six different areas on the second story of the home. The operation included lights and ballasts on electric timers. The main electrical panel to the house had been bypassed and an Edison representative called to the scene estimated the value of the stolen electricity at

[1] The facts are taken from the clerk's transcript and three documents attached to the People's "Motion to Augment the Record," which was granted by this court on March 24, 2011. The attachments include a "Notice and Demand for Trial" pursuant to Penal Code section 1381, dated August 31, 2010; a "Declaration in Support of Arrest Warrant" executed on November 4, 2009, by Riverside County Sheriff's Deputy Rodriguez; and a "case print" of the trial court's file in case No. RIF153834.

[2] Deputy Rodriguez's declaration states that the narcotics search was conducted on August 8, 2009, pursuant to a warrant signed by Judge Riemer on "9/4/09." The complaint also shows that the crimes charged were committed "or or about August 8, 2009." Our separate review of the Riverside County Superior Court Web site appears to indicate that defendant was released on his own recognizance on September 9, 2009. This may be more consistent with a search warrant date of September 4, and a premises search and arrest date of September 8, 2009. It appears that either the September 4, 2009, or the August 8, 2009, date may be a clerical error.

$3,700. Defendant was "taken into custody" in the hallway next to the laundry room at the time of the search.[3]

On December 3, 2009, defendant was charged by felony complaint with cultivation of marijuana (Health & Saf. Code, § 11358), and grand theft (Pen. Code, § 487, subd. (a).)[4] He failed to appear in court on December 3, 2009. On December 24, 2009, an arrest warrant was issued.

Eight months later, on August 31, 2010, defendant sent a "Notice and Demand for Trial," pursuant to "Section 1381 of the California Penal Code," to the District Attorney of Riverside County and to the court. The demand indicated that defendant had been in federal custody in New Mexico since September 15, 2009. Attached were three items: (1) a form for the district attorney's acknowledgement of receipt of the demand for trial; (2) a handwritten "certificate of service" stating that defendant was serving the notice and demand for trial to the district attorney's office and to the clerk of the Superior Court of Riverside County by first class mail with proper postage attached; and (3) a copy of defendant's September 15, 2009, "Detainee Transfer Notification." The trial court received defendant's demand on September 9, 2010, and forwarded the "original" to the district attorney's office on that date.

---

[3] Defendant's whereabouts between September 9 and 15, 2009, are unclear. Deputy Rodriguez's declaration, filed on December 3, 2009, states that he was requesting an "out of custody filing," and defendant's Department of Homeland Security "Detainee Transfer Notification" shows that he was in federal custody by September 15, 2009, in that he was transferred to the federal detention facility in New Mexico on that date. There is, however, no information about his location before the transfer.

[4] All further statutory references are to the Penal Code unless otherwise indicated.

On December 9, 2010, in an ex parte hearing at which neither defendant nor the People were present, the trial court noted that 90 days had passed since the demand for trial "pursuant to 1381/1381.5" had been received and there had been no response from the district attorney's office. The minute order says that the trial court had read and considered defendant's ex parte correspondence regarding a request to dismiss the case pursuant to section 1381. The request was granted, the bench warrant was recalled, and defendant was released.[5]

On January 31, 2011, the People filed a notice of appeal.

DISCUSSION

Standard of Review

We review questions of law that turn on the interpretation of a statute, as well as mixed questions of law and fact, under a de novo standard. (*People v. Frausto* (2009) 180 Cal.App.4th 890, 897; *Bradley v. Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1612, 1623-1624 [a "trial court's interpretation of a statute is reviewed de novo," and the de novo standard "also applies to mixed questions of law and fact when legal issues predominate"].) In this case, the People are asking us to determine (1) whether they have a right to due process and if the right was violated here; and (2) whether defendant in this case could properly obtain a dismissal of his case under sections 1381. These are mixed questions of law and fact.

---

[5] It is unclear whether the "correspondence" to which the trial court referred was simply the "Notice and Demand for Trial" received on September 9, 2010, or to some other correspondence, which is not part of the record before this court. The September 9 document contains no request for dismissal.

Due Process

As a party, the People have a right to due process, including notice of the date and place of a hearing, in criminal proceedings. (Cal. Const., art. I, § 29; *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1044.) "As a general matter, ex parte proceedings are disfavored. [Citations.]" (*People v. Ayala* (2000) 24 Cal.4th 243, 262.) "'Two basic defects are typical of ex parte proceedings. The first is a shortage of factual and legal contentions. Not only are facts and law . . . lacking, but the moving party's own presentation is often abbreviated because no challenge . . . is anticipated at this point in the proceeding. The deficiency is frequently crucial, as reasonably adequate factual and legal contentions from diverse perspectives can be essential to the court's initial decision . . . .' [Citation.]" (*Ibid.*)

In this case, the notice deficiency and the court's decision to conduct an ex parte hearing were crucial. The trial court clearly needed more factual and legal information to help it reach a correct decision. Had it had such information, it doubtless would not have dismissed the charges against a defendant imprisoned in another state when only half the statutory time period for bringing him to trial had expired. Defendant argues that the People's right to notice was satisfied by the defective demand for trial pursuant to section 1381, which was sent to the district attorney's office and to the trial court on August 31, 2010. Like the trial court, defendant does not seem to realize that the relevant statute for an out-of-state defendant is section 1389, not section 1381. There was no reason for the district attorney to think that the trial court would not recognize that the demand was legally deficient and that the time period for bringing defendant to trial was only half over.

Sections 1381, 1381.5, and 1389

Both the United States and California Constitutions guarantee criminal defendants the right to a speedy trial. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.)

The right to a speedy trial for incarcerated defendants is implemented in part through the provisions of sections 1381, 1381.5, and 1389. Section 1381 applies to persons incarcerated in state prison; its companion statute, section 1381.5, applies to persons incarcerated in a federal prison located within California. Both require trial or a grant of continuance within 90 days of the district attorney's receipt of a defendant's demand for trial. If the 90-day period is exceeded without either the commencement of trial or a continuance, the court in which the case is pending is required to dismiss the charges, on motion of either party, or on its own motion. (§§ 1381, 1381.5; *People v. Wagner* (2009) 45 Cal.4th 1039, 1049-1051, fn. 6.) Cases where a prisoner is being held outside this state are governed by section 1389, which allows for a period of 180 days between the trial court's receipt of the prisoner's demand for trial and the date trial must be held or a continuance obtained. (§ 1389, art. III, subd. (a).)

Defendant's demand for trial stated in the first sentence on the first page that he was imprisoned in a federal detention center in New Mexico. Accordingly, the trial court's ex parte dismissal of the case on the 92nd day after receipt of defendant's demand for trial pursuant to section 1381 was error. Neither sections 1381 nor 1381.5 applied to him. There were 88 days remaining in the relevant statutory time period.

Defendant argues that the trial court's ruling amounted to an "invited error" that the People "created" by their failure to appear within 90 days of their receipt of defendant's

defective demand. Defendant misunderstands the concept. "The doctrine of invited error applies to estop a party from asserting an error when 'his own conduct *induces the commission of error*.' [Citations.]" (*People v. Perez* (1979) 23 Cal.3d 545, 549, fn. 3.) That is not what happened here. The People's "conduct" in failing to appear at an ex parte hearing on a defective demand for trial did not in any way "induce" the erroneous dismissal of the case. If anyone induced or invited the error here, it was defendant, who did so by filing an invalid demand for trial under an inapplicable code section.

It is true that the district attorney's office was on "some kind of notice" that defendant was seeking trial. But, under the correct statutory time frame, the district attorney had 180 days in which to respond. As we have stated, there was no reason for the district attorney to believe that the trial court would not recognize that the demand was defective, that the relevant statute was section 1389, not 1381 or 1381.5, and that the relevant time period for response was 180 days, not 90 days. (§ 1389, art. III, subd. (a).) When the document was so obviously defective on its face, the district attorney was not required to show up at a premature hearing to prevent the trial court from erroneously deciding to dismiss the charges.

In any case, defendant has not demonstrated that he was harmed by the event. The purpose of sections 1381 and 1381.5, which did not apply to him anyway, is to allow a prisoner to serve concurrent sentences wherever possible. Since defendant had not yet

been convicted or sentenced for any crime of which we are aware,[6] he was deprived of nothing to which he was entitled. (*People v. Wagner* (2009) 45 Cal.4th 1039; § 669.) Similarly, the purpose of section 1389 is "to encourage expeditious disposition of criminal charges through cooperative procedures among the member jurisdictions." (*People v. Brooks* (1987) 189 Cal.App.3d 866, 872; see also § 1389, art. I.) Assuming defendant is still in the United States, this can still be accomplished.

In sum, the People do have a due process right to notice and a hearing; the right was violated in this case; and the trial court had no power to dismiss the charges under sections 1381, 1381.5, or 1389.

DISPOSITION

The judgment is reversed and the matter remanded to the trial court for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P.J.

We concur:

HOLLENHORST
J.

RICHLI
J.

[6] At least that appears to be the case as of August 31, 2010. Defendant's "Notice and Demand for Trial" indicates that he was in New Mexico awaiting deportation to China. It is unclear if he had actually been "convicted" of a violation of federal immigration law.