

NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW STUART LUSTER,

Defendant and Appellant.

2d Crim. No. B166741

(Super. Ct. No. CR49259)

(Ventura County)

OPINION ON DENIAL
OF REHEARING AND ORDER
COURT OF APPEAL-SECOND DIST.

F I L E D

JUL 2 2003

JOSEPH A. LANE, Clerk

Deputy Clerk

By order filed June 10, 2003, this Court dismissed the appeal of Andrew Stuart Luster, without opinion, because he was a fugitive from justice. He had been sentenced in absentia on February 18, 2003. We dismissed the appeal on noticed motion after considering the opposition papers. (Cal. Rules of Court, Rule 41, subs. (a) (b).) He now asks this court to grant rehearing and reinstate his appeal because he was captured on June 19, 2003, returned to California, and has commenced to serve his prison term. As we shall explain, these subsequent events do not require reinstatement of the appeal. We issue this opinion on denial of rehearing to briefly explain why this appeal should remain dismissed. (See Witkin, Cal. Procedure (4th ed. 1997) vol. 9, § 856, pp. 889-890.)

"[A]n appellate court may employ dismissal as a sanction when a defendant's flight operates as an affront to the dignity of the court's proceedings." (*Ortega-Rodriguez v. United States* (1993) 507 U.S. 234, 246 [122 L.Ed.2d 581, 595].) "It is

often said that a fugitive 'flouts' the authority of the court by escaping, and that dismissal is an appropriate sanction for this act of disrespect. (Citations.)" (*Id.*, at p. 245 [122 L.Ed.2d at p. 595]) Recapture of the fugitive before any appellate process has begun and which does not interfere with the efficient operation of the appellate court may lead to reinstatement. (*Id.*, pp. 244-246 [122 L.Ed.2d at pp. 594-595]) compare *Allen v. Georgia* (1897) 166 U.S. 138 [41 L.Ed. 949].)

Petitioner contends that "he did not flout the authority of the Court of Appeal but if the Attorney General is correct in his assertion that Luster fled intentionally then only the authority of the trial court was flouted." (Supp. to Petn. for Rehg. p. 7.) This is a myopic view of the record. Here there is the required nexus between appellant's fugitive status and the appellate process. (*Ortega-Rodriguez v. United States, supra*, 507 U.S. at pp. 249, 251 [122 L.Ed.2d at pp.597, 599.]) Petitioner was originally incarcerated with the trial court setting bail at \$10,000,000. In an unprecedented writ proceeding before this court, we were compelled to reduce bail because the court's order was a deprivation of the constitutional right to bail. We set bail at \$1,000,000 along with other terms and conditions. (B145137, nonpublished opinion by Yegan, J.; Gilbert, P.J. and Perren, J. concurring.) Petitioner posted the bail, and complied with the other terms and conditions for approximately two years, but fled during jury trial.

Had petitioner voluntarily reappeared, he would have a much stronger argument for reinstatement of the appeal. By his flight to a foreign country, the inference is compelling that but for his capture he would be a fugitive to this day. That he is now serving his prison sentence and is once again subject to the court's power does not, standing alone, provide a compelling reason for reinstatement.

Our ruling denying the petition for rehearing 1. upholds the authority of the Court of Appeal and discourages the flouting of the criminal justice system, 2. discourages felony escape, 3. encourages voluntary surrender, 4. promotes the orderly administration of justice, and 5. protects the people from prejudice by the passage of time in the event of reversal on appeal. Petitioner knew, or should have known, that his

flight could be viewed as a waiver or abandonment of a statutory right to appeal. (*Ortega-Rodriguez v. United States, supra*, 507 U.S. pp. 240 [122 L.Ed.2d at pp. 591-592].)

Petitioner places reliance on the recent per curiam opinion from division four of this court, *People v. Kang* (2003) 107 Cal.App.4th 43. The authorities relied upon by *Kang*, while instructive, do not require that the appeal be reinstated. (See *Auto Equity Sales Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Moreover, we strongly disagree with *Kang's* assumption that it is speculative that "dismissal discourages escape." (*People v. Kang, supra*, 107 Cal.App.4th at p. 52.) To the contrary, and as the Attorney General points out, the *Kang* decision gives the defendant in a case such as this the incentive to flee because by doing so he has little to lose.

The petition for rehearing is denied.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

4.
Ken W. Riley, Judge

Superior Court County of Ventura

Roger John Diamond, for Appellant.

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