

## People v. Smolkin

Decided Sep 16, 2019

A155891

09-16-2019

THE PEOPLE, Plaintiff and Respondent, v.  
ANATOLY SMOLKIN, Defendant and Appellant.

SIMONS, J.

### NOT TO BE PUBLISHED IN OFFICIAL REPORTS

[California Rules of Court, rule 8.1115\(a\)](#), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by [rule 8.1115\(b\)](#). This opinion has not been certified for publication or ordered published for purposes of [rule 8.1115](#). (Solano County Super. Ct. No. FCR328898)

In August 2018, a jury convicted defendant and appellant Anatoly Smolkin (appellant) of resisting an executive officer, in violation of [Penal Code section 69 \(Section 69\)](#). The trial court imposed a total sentence of seven years, comprised of the upper term of three years, doubled to six years due to a prior strike conviction, with an additional year due to a prior prison term. On appeal, appellant challenges the sufficiency of the evidence. We reject his claim.

The evidence at trial showed that Deputy District Attorney Andrew Horvath was employed by Solano County District Attorney Krishna Abrams. Horvath testified that, in August or September of 2016, he prosecuted appellant for parole violations. One of them involved an incident during which appellant threatened to blow up a

parole office building. Appellant was found in violation of his parole and sentenced to 180 days in county jail.

On February 28, 2017, Horvath received a letter written by appellant that had been addressed to District Attorney Abrams and routed to Horvath. The letter stated, "After [the trial court's] and Mr. Horvath's September 2016 misconduct, they were sentenced to \*2 death in Moscow for the crime of kidnapping a soldier of the armed forces of Russia." The letter continued, "I'm scheduled to be released from my current incarceration, 6MAR2017. I warn you, if charges are not dropped, all perjured restraining orders lifted, my parole cancelled, I will charge -- but effectually sentence -- the entire Solano County District Attorney's -- DA's Office with kidnapping. Punishable by death by Russian military firing squad."

Horvath testified the letter put him in fear of appellant. He did not literally believe he had been sentenced to death by a Russian military firing squad. Horvath explained that, "based on . . . [appellant's] past history, what he had done to be put on parole . . . I was concerned more along the lines that he was making these threatening statements talking about death, saying that I had been sentenced to death. My biggest concern was . . . that I was basically on his radar; that he knew who I was and . . . based on previous things he had done, I was concerned now for my safety as to what could happen to me moving forward." As a result of the letter, Horvath installed a security system in his home, warned his wife to be vigilant, and told his children not to talk to strangers. When

Horvath described his security measures at appellant's preliminary hearing, appellant said, "it won't help when my jets show up."

Section 69, subdivision (a), provides: "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment pursuant to subdivision (a) of Section 1170, or in a county jail not exceeding one year, or by both such fine and imprisonment." On appeal, appellant concedes a threat to a deputy district attorney is within the scope of the statute, and he does not dispute the sufficiency of the evidence that the February 2017 letter was intended to deter Horvath from performing his duties or that Horvath genuinely and reasonably feared violence from appellant. Instead, he argues the evidence was insufficient to sustain the conviction because "[o]nly threats that possibly could be carried out by the agency of the person making the threat can \*3 reasonably be included" within the scope of Section 69.<sup>1</sup> In support of the claim, appellant relies on *People v. Hines* (1997) 15 Cal.4th 997 (*Hines*), which states that Section 69 encompasses only a threat that " 'reasonably appears to be a serious expression of intention to inflict bodily harm [citation] and its circumstances are such that there is a reasonable tendency to produce in the victim a fear that the threat will be carried out.' " (*Hines*, at p. 1061, quoting *In re M.S.* (1995) 10 Cal.4th 698, 714.)

<sup>1</sup> Appellant also asserts that the February 2017 letter did not threaten *unlawful* violence because he "he claimed to be some sort of Russian agent, and predicted that a Russian court would try, convict, and punish those who were conspiring against him. In other words, the violence that was threatened was the lawful act of a foreign court." (See *People v. Superior Court (Anderson)* (1984) 151 Cal.App.3d 893,

895 [construing Section 69 to encompass only threats of unlawful conduct].) We reject the argument. First, it would indeed be unlawful for a Russian firing squad to execute a deputy district attorney for prosecuting parole violations. Second, Horvath testified he understood the letter to implicitly threaten some other sort of violence by appellant himself. -----

As explained in *People v. Iboa* (2012) 207 Cal.App.4th 111, *Hines* does not stand for the proposition that, to support a conviction under Section 69, the defendant must have made a specific threat that he/she could actually carry out. In *Iboa*, the defendant made vague but threatening comments to firefighters trying to put out a fire in his backyard. (*Iboa*, at pp. 113-114.) "He combined his belligerent words with aggressive conduct, albeit stopping short of threatening to 'kill' the officers and of physical violence." (*Id.* at p. 114.) The court of appeal affirmed the defendant's conviction under Section 69 and rejected the defendant's argument that the *Hines* decision required a showing he made a specific threat of violence. (*Iboa*, at pp. 114, 118-119.) *Iboa* pointed out that "*Hines's* observation that the threat must be a serious expression of intention to inflict bodily harm was . . . made in the context of rejecting a constitutional challenge to [S]ection 69 on overbreadth grounds. . . . [T]he court was addressing only the constitutional argument and refuting the notion that the consequence threatened must be immediately forthcoming. The court did not discuss the elements of the crime under [S]ection 69 or otherwise suggest that a ' 4 "serious expression of intention to inflict bodily \*4 harm" ' is an element of the crime." (*Iboa*, at p. 119, discussing *Hines, supra*, 15 Cal.4th 997.)

Declining to construe the literal language of *Hines* as deciding an issue that was not before the *Hines* court, *Iboa* stated that to sustain the defendant's conviction under Section 69 "there must be sufficient evidence he threatened unlawful violence." (*Iboa, supra*, 207 Cal.App.4th at p. 119.) *Iboa* acknowledged that the defendant "did

not utter the word 'kill' or directly and unambiguously threaten to inflict bodily harm on the firefighters or the deputies." (*Ibid.*) Nevertheless, the defendant's words were "threats of unlawful violence" within the scope of [Section 69](#). (*Iboa*, at p. 120.) "His conduct gave context to his threatening speech, which was intended to and did deter the firefighters and deputies from performing their official duties." (*Ibid.*)

Similarly, although appellant's February 2017 letter did not contain a specific threat that he was literally capable of carrying out, the context made it clear it was a threat of unlawful violence intended to deter Horvath from performing his official duties. The jury's verdict is supported by substantial evidence. (*Iboa*, *supra*, [207 Cal.App.4th at p. 117.](#))

## DISPOSITION

5 The trial court's judgment is affirmed. \*5

/s/\_\_\_\_\_

SIMONS, J. We concur. /s/\_\_\_\_\_

JONES, P.J. /s/\_\_\_\_\_

BURNS, J.

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