

AUG 24 2009

CLERK OF THE SUPERIOR COURT  
By Jane Connelly  
Deputy

Superior Court of California, County of Alameda  
People v. Hoye #541279  
Statement of Decision  
August 24, 2009

I. Background

Every one of us, the rich and the poor, the strong and the weak, and every man, woman, ethnicity, and religion share one precious possession: our system of government. The legislative, executive, and judicial branches serve as checks and balances for each other. Although the system is not perfect, it continually evolves. While recognizing the significant moral issues in this case, the procedural history can be summarized. The legislative branch through the Oakland City Council enacted an ordinance sometimes referred to as the bubble law. The executive branch through the People represented by the Alameda County District Attorney's Office charged the defendant Walter Hoye with violations of that law. The judicial branch through a jury trial found Hoye guilty of violating that law. During sentencing, *In re Weller* 164 Cal. App. 3d 44 was quoted:

“Illegal conduct designed to influence policies cannot be considered “necessary” where lawful avenues are available. We do not mean to ignore or trivialize this country's history of civil disobedience (e.g., the Boston Tea Party, the Underground Railroad, Freedom Marches in the South, and some of the Vietnam War protests). From the perspective of history many unlawful acts may be seen as justified or even “necessary.” Some have been rendered lawful by finding constitutional defects in the prohibitory enactments. But the determination that these actions were “necessary” can only be made from a distance, and then not with legal precision. Unless the laws are held unconstitutional, those challenging or defying them must be prepared to bear the short-term consequences of their actions in the hope that society will benefit and that historians will look charitably upon them.”

Hoye was given several options. If Hoye agreed to stay away from the clinic, then there would be no jail time and no fine. If Hoye did not agree to stay away, then there would be a 30 day sentence and a fine. The 30 days could be served in jail, the Sheriff's Work Alternative Program, or volunteer work. Hoye chose 30 days in jail and a fine and has appealed.

II. Issue

The People now request a permanent injunction relying on the ordinance:

“8.52.040 Enforcement.

A. Any person who shall be convicted of a violation of Section 8.52.030 above shall be deemed guilty of a misdemeanor and shall be punishable by imprisonment in the County jail for not more than one year, or by a fine not to exceed two thousand dollars (\$2,000.00), or by both such fine and imprisonment.

B. Civil Remedies:

1. Any person providing, seeking to provide, or seeking reproductive health services who is aggrieved by conduct prohibited by this chapter may commence a civil action in the Courts of the State of California.
2. In any action commenced under subsection A of this section, the court may award appropriate relief, including temporary, preliminary, or permanent injunctive relief and compensatory and exemplary damages and reasonable fees for attorneys and expert witnesses. With respect to damages, at any time before final judgment, plaintiff may elect to recover, in lieu of compensatory damages, an award of statutory damages in the amount of five thousand dollars (\$5,000.00) per violation.”

A trial court’s jurisdiction during appeal is limited. A trial court cannot change a judgment except to correct clerical errors and set aside a void judgment.

### III. Ruling

Clerical errors have not been brought before this court. Previously, this court has reexamined legal issues in this case and ruled that it will not set aside the judgment as void.

#### A. First Amendment

Although *People v. Garziano* 230 Cal. App. 3d 241 held that there is no defense of necessity for the purpose of interfering with the exercise by others of their constitutional right to an abortion, recognized by the state and federal constitutional right to privacy, the court instructed the jury about the First Amendment:

“Nothing shall be construed to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment.”

## B. Approach

Hoye was charged with two counts of Harassment of Persons Seeking Health Care in violation of Oakland Municipal Code section 8.50.3(b). To prove that Hoye was guilty of this crime, the People were required to prove that:

1. Within 100 feet of the entrance of a reproductive health care facility, the defendant willfully and knowingly approached within eight (8) feet of any person seeking to enter such a facility or any occupied motor vehicle seeking entry,
2. Without the consent of such person or vehicle occupant,

AND

3. For the purpose of counseling, harassing, or interfering with such person or vehicle occupant.

“Approach” was not further defined and the court instructed the jury using CALCRIM 200:

“Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in these instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings.”

The court did not further define approach because the Oakland City Council relied on *Hill v. Colorado* 530 U.S. 703. The Oakland ordinance is almost identical to the Colorado statute in *Hill*. In fact, the Colorado statute is broader than the Oakland ordinance. The Colorado statute includes hospitals and the Oakland ordinance does not. The Oakland City Council found non-hospitals more vulnerable than hospitals.

## C. Unanimity

The court did not give CALCRIM 3500 and relied on the bench notes specifically the 3<sup>rd</sup> and 4<sup>th</sup> paragraphs:

“The Court has no sua sponte duty to instruct on unanimity if the offense constitutes a “continuous course of conduct.” (*People v. Maury* (2003) 30 Cal.4th 342, 423 [133 Cal.Rptr.2d 561, 68 P.3d 1]; *People v. Madden, supra*, 116 Cal.App.3d at p. 218.) “This exception arises in two contexts. The first is when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. The second is when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time.” (*People v. Napoles* (2002) 104 Cal.App.4th 108, 115–116 [127 Cal.Rptr.2d 777], quoting

People v. Avina (1993) 14 Cal.App.4th 1303, 1309 [18 Cal.Rptr.2d 511]; internal quotation marks and citations omitted].) The court should carefully examine the statute under which the defendant is charged, the pleadings, and the evidence presented to determine whether the offense constitutes a continuous course of conduct. (Ibid. [noting that child abuse may be a continuous course of conduct or a single, isolated incident]; see also People v. Madden, supra, 116 Cal.App.3d at p. 218 [distinguishing “continuous crime spree” and finding repeated sexual offenses did not constitute continuous course of conduct]; People v. Wolfe (2003) 114 Cal.App.4th 177, 185 [7 Cal.Rptr.3d 483] [unanimity instruction required where acts fragmented in time or space]; People v. Rae (2002) 102 Cal.App.4th 116, 123 [125 Cal.Rptr.2d 312] [elder abuse offense did constitute continuous course of conduct]; People v. Cortez (1992) 6 Cal.App.4th 1202, 1209 [8 Cal.Rptr.2d 580] [kidnapping is a continuous course of conduct].)

In addition, “where the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the [unanimity] instruction is not necessary to the jury’s understanding of the case.” (People v. Beardslee (1991) 53 Cal.3d 68, 93 [279 Cal.Rptr. 276, 806 P.2d 1311]); see also People v. Champion (1995) 9 Cal.4th 879, 932 [39 Cal.Rptr. 2d 547, 891 P.2d 93], questioned on unrelated issue in People v. Ray (1996) 13 Cal.4th 313, 369, fn. 2 [52 Cal.Rptr.2d 296, 914 P.2d 846].) However, the court should use caution in applying this exception. (See People v. Brown (1996) 42 Cal.App.4th 1493, 1500–1501 [50 Cal.Rptr.2d 407]; People v. Wolfe, supra, 114 Cal.App.4th at p. 185.) The better practice is to provide a unanimity instruction to the jury when evidence has been admitted of separate acts that could form the basis for one charge.”

OMC 850.3(a) and (b) contemplate a continuous course of conduct:

OMC 850.3(a) and (b) are titled Prohibited Harassment of ***Individuals*** Seeking Access to Health Care Facilities. The jury was instructed that the defendant is charged in Counts 1 and 3 with Harassment of ***Persons*** Seeking Health Care in violation of Oakland Municipal Code section 8.50.3(b).

The Oakland ordinance defines counseling as follows: ““Counseling” means engaging in conversation with, displaying signs to, and/or distributing literature to ***individuals*** seeking access to, passage from, or services within the reproductive health care facility.”

Finally, People v. Lopez 129 Cal. App. 4<sup>th</sup> 1508 involving a PC 148 with multiple officers is analogous.

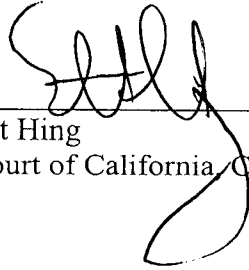
#### D. Attempt

Although this court dismissed two counts pursuant to PC 1118.1, this court will not disturb the jury verdicts on the two remaining counts because the jury was instructed on

attempted violations of OMC 8.50.3(b). At a minimum, there is legally sufficient evidence of attempted violations even assuming there were errors of law.

E. Change

The People's request does involve a change of the judgment. No probation violation has been filed, an evidentiary hearing would be necessary, and the requested permanent injunction is longer than the existing stay away. Although the previously-addressed legal issues are not routine, there are additional legal issues even less common which await further clarification in the county, state, and federal appellate courts. For all of these reasons, this court lacks jurisdiction over the People's request.

A handwritten signature in black ink, appearing to read 'S. Hing', is written over a horizontal line. The signature is stylized and cursive.

Judge Stuart Hing  
Superior Court of California, County of Alameda

Superior Court of California, County of Alameda  
WILEY W. MANUEL

Case Number: 541279  
Statement of Decision

**DECLARATION OF SERVICE BY MAIL**

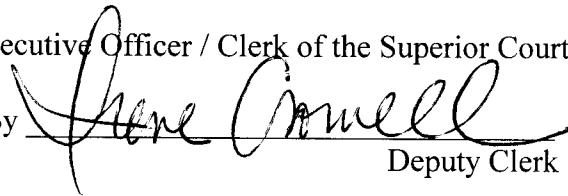
I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown below and that the mailing of the foregoing document and execution of this certificate occurred at 661 Washington Street Oakland, California:

Michael Millen  
Attorney at Law  
119 Calle Marguerita Suite 100  
Los Gatos, CA 95032

Executed on 08/24/09.

Executive Officer / Clerk of the Superior Court

By

  
Deputy Clerk