Filed 11/17/04

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Petitioner,<br><br>v.<br><br>THE SUPERIOR COURT OF LOS ANGELES COUNTY,<br><br>Respondent;<br><br>RONALD DECKER,<br><br>Real Party in Interest. | No. B176608<br><br>(Super. Ct. No. GA054599) |

ORIGINAL PROCEEDINGS in mandate. Clifford L. Klein, Judge. Petition granted.

Steve Cooley, District Attorney, Patrick D. Moran and Matthew G. Monforton, Deputy District Attorneys for Petitioner.

No appearance for Respondent.

Roger J. Rosen and Diane E. Berley for Real Party in Interest.

A man wants his sister killed. With the specific intent of causing her death, he engages another person to murder her. He furnishes that person with specific information describing his sister, the means for gaining access to her residence, her work habits and the times she is likely to be at home. They agree on the means to commit the murder, other details, and price. The hired assassin warns that once he receives the down payment there will be no way to prevent the murder from occurring. The man reiterates his demand that there be no witnesses, and that if his sister is with her friend when the killing occurs, the friend also is to be killed. The man then hands the hired assassin the down payment. It turns out that the person engaged to kill his sister is a detective posing as a killer and that he had no intention of actually killing the sister. We hold that these circumstances are sufficient to hold the man who engaged the killer for the crime of attempted murder. In so doing, we disagree with the conclusion reached in *People v. Adami* (1973) 36 Cal.App.3d 452, where, under similar facts, the court concluded that the crime committed could be no greater than solicitation of murder.

In this case, the magistrate refused to hold the man who wanted his sister killed to answer for attempted murder, but bound him over for trial on the lesser charge of solicitation of murder. The prosecution filed an information charging attempted murder. The trial court granted a motion under Penal Code section 995, ruling that the evidence presented was sufficient for solicitation of murder but not attempted murder. (All further statutory citations are to the Penal Code.) The prosecution sought a writ of mandate from this court, directing the trial court to reinstate the charge of attempted murder. We issued an order to show cause and a temporary stay of proceedings. We now grant the writ petition.[1]

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[1] As we shall discuss, we disagree with the rationale and conclusion in *People v. Adami*, and find it inconsistent with later decisions of our Supreme Court. Nevertheless, we understand why the magistrate and the trial judge considered themselves bound to follow *Adami*, in light of its factual similarity to the present case. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Since *Adami* was decided by an intermediate court having the same jurisdiction as our own, we are not similarly bound, even apart from the decisions of other courts. We review the decision of a sister court

## FACTUAL AND PROCEDURAL SUMMARY

Ronald Decker was charged with the attempted murder of his sister. He is the real party in interest in the proceedings before this court. The factual basis of the charge was developed at the felony preliminary hearing. Following is a summary of that evidence.

Russell Wafer, a gunsmith, received a call from Decker, whom he did not then know. Decker said he was looking for someone to do some work. Decker met Wafer at the latter's place of work in Temple City, and asked that they go outside to talk. They did. Decker said he was looking for a "contractor." Decker explained that "he wanted someone taken care of." He told Wafer that it was a local job and that he wanted someone executed because that person owed him money and "he could not receive it until their demise." Wafer told Decker that he did not do that kind of work, and asked why Decker did not do the job himself. Decker responded that he would be the first one suspected. The two men then discussed what the job might cost, and Wafer told him that he might be able to get a junkie to do it for $5,000. Wafer indicated that he knew someone (John) in Detroit who might do the job. A price of $35,000 was discussed, and Decker said he would not have the money until some 30 days after the "execution was completed." Decker was to call Wafer in about a week to find out if Wafer was able to locate John in Detroit. Wafer was to receive a $3,000 finder's fee for setting it up.

Later, as planned, Decker called Wafer, who told him that John would be in town within the next few days. Wafer had not tried to contact John. Instead, he called the Sheriff's Department. He spoke to Detective Wayne Holston at that department, who asked Wafer to set up a meeting with Decker, and that was done. The meeting was at a golf course in Arcadia. Wafer introduced Decker to Holston, whom he referred to as John. Wafer then left them to talk alone. Later, he and Holston left the area. They returned for a second meeting two days later, and Decker had another private discussion

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with respect, but if we disagree with its conclusion, as we do in this case, we are duty bound to say so and to rule accordingly. (See Witkin, 9 Cal. Procedure (4th ed. 1997) Appeal, § 934, p. 971, where the cases are collected.)

with Holston, posing as John. Later, Wafer saw Decker open the trunk of his car. Decker apparently was pleased with the meeting; he sought to shake Wafer's hand, and said he would have a payment for him in 30-32 days.

The substance of the conversation between Detective Holston and Decker came from Holston's testimony at the felony preliminary hearing, and the transcripts of recordings made of their conversations. Holston wore an electronic device to record the discussion, and the meeting was videotaped by surveilling officers in the area.

At their first meeting, Decker told Holston that "he had a job for me, saying that he had a female, his sister, that he wanted taken out" because she owed him a lot of money. Decker explained that he could not do the job himself because he would be a prime suspect and he wanted the job done by a professional. At first he wanted the killing staged as an auto accident, but he was dissuaded from that because death would not be certain. Decker wanted "certain death, totally expired." Decker told Holston that if a firearm was used Holston "would need to use a suppressor, and shoot her once to the heart and once to the head" to "ensure death."

Decker had discussed a surveillance and a possible burglary. When Holston asked if he wanted his sister to be sexually assaulted, Decker responded "whatever it takes." Decker told Holston that the basic job "paid" $25,000, with a $10,000 bonus "if he was happy, it was a clean job." Decker promised to pay $5,000 as a down payment, and would need 30-32 days to get the rest.

Decker provided substantial information about his sister: her name, a physical description (which Decker also had written on paper towels, which he retrieved from the trunk of his vehicle), her residence, her vehicle, her place of employment, and her friend, Hermine. Decker did not like Hermine, and said that if Holston had to kill her too, he should do so. Decker said he wanted the job done as soon as possible, and Holston told him he could get it done within a week. Decker thought that was "marvelous," and seemed quite pleased.

The two men agreed to meet the next day for transmittal of the down payment. That meeting also was sound recorded and videotaped. Decker said he had the $5,000

down payment in cash. Holston asked Decker if he was sure he wanted his sister killed, "because once I received the money and I left, that I was going to go into action and that the job would be completed, and that his sister would be killed and there is no way to stop me from going forward with this." Decker responded that he was "100 percent absolutely positive that he wanted the job done. He said that he had never been surer of anything in his life . . . ." Decker added that he understood that no witnesses could be left, so that "if that's the case, to kill Hermine also." He could not pay more, "but that he didn't mind seeing her killed too." Decker then gave Holston the $5,000, in two plastic-wrapped bundles which he retrieved from the trunk of his vehicle. Decker seemed very pleased, and was not nervous at all.

Decker was charged with attempted murder as well as solicitation of murder.[2] The magistrate expressed doubt about the correctness of *People v. Adami*, but considered himself bound by that decision. He dismissed the attempted murder counts, but held Decker to answer on all other charges. In the subsequent information, the People again charged Decker with attempted murder. Decker filed a section 995 motion to dismiss the attempted murder counts, and the People filed opposition. The trial judge ruled the same way as the magistrate; he dismissed the attempted murder counts based on *People v. Adami*, while expressing the view that the time may be at hand for that case to be re-examined. The People's petition for mandate followed.

## DISCUSSION

The crime of attempt is comprised of two elements: a specific intent to commit the target offenses, and a direct but ineffectual act done toward committing them. (§ 664; *People v. Miller* (1935) 2 Cal.2d 527, 530.) Like attempt, the crime of solicitation requires that the solicitor intend that the crime be committed. It also requires that the person solicit another person to commit the crime or join in its commission. (§ 653f.)

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[2] Those were two attempted murder counts, one for Decker's sister and the other for a friend of the sister, in the event she was with the sister at the time the sister was to be killed. No issue specific to the friend is raised in this writ proceeding.

Solicitation applies only to specified target offenses, listed in the statute. Murder is one of them. (§ 653f, subd. (b).) An attempt requires an overt act that goes beyond preparation; it must be such that, unless interrupted, it would ordinarily result in the completed crime. (*People v. Miller, supra,* 2 Cal.2d 527, 530.) For solicitation, the crime is complete when the request is made; the harm is in the asking, and no further acts toward commission of the target crime need occur. (*People v. Miley* (1984) 158 Cal.App.3d 25, 33.) "The essence of criminal solicitation is an attempt to *induce another to commit* a criminal offense." (*People v. Herman* (2002) 97 Cal.App.4th 1369, 1381.) The punishment for an attempted murder that is willful, deliberate, and premeditated, is 15 years to life in state prison. (§ 664, subd. (f).) For solicitation of murder the punishment is considerably less, a triad of 3, 6, or 9 years. (§ 653f, subd. (b).)

Most of the disputed jurisprudence on the law of attempt focuses on the point at which the acts move beyond "mere preparation" and into the active phase, toward accomplishment of the object crime. This topic has bedeviled courts, law professors, attorneys and law students for decades. (See discussion of the general subject in LaFave & Scott, Handbook on Criminal Law (1972) Attempt–Acts & Mental State, § 59, p. 431 et seq., where the various theories and often conflicting state decisions are set out.) It is the focus of the present proceeding. Fortunately, the subject has had substantial development in California law.

"One of the purposes of the criminal law is to protect society from those who intend to injure it. When it is established that the defendant intended to commit a specific crime and that in carrying out this intention he committed an act that caused harm or sufficient danger of harm, it is immaterial that for some collateral reason he could not complete the intended crime." (*People v. Camodeca* (1959) 52 Cal.2d 142, 147, quoted with approval in *People v. Dillon* (1983) 34 Cal.3d 441, 453.) It is not necessary that the overt act satisfy any element of the target crime. (*Id.* at p. 454.) Thus, the overt act necessary for attempt need not be the last proximate or ultimate step toward completing the crime. "Applying criminal culpability to acts directly moving toward commission of crime . . . is an obvious safeguard to society because it makes it unnecessary for police to

wait before intervening until the actor has done the substantive evil sought to be prevented. It allows such criminal conduct to be stopped or intercepted when it becomes clear what the actor's intention is and when the acts done show that the perpetrator is actually putting his plan into action." (*People v. Staples* (1970) 6 Cal.App.3d 61, 67, also quoted with approval in *People v. Dillon*, *supra*, 34 Cal.3d at p. 453.)

The fact that the attempt occurs in the context of a sting operation, where the person importuned to commit the crime is an undercover officer with no intention of doing so, does not impede the existence of an attempt. (See *People v. Reed* (1996) 53 Cal.App.4th 389, 399 [sting case]; *People v. Siu* (1954) 126 Cal.App.2d 41, 44 [rejecting factual impossibility doctrine; "'[i]f there is an apparent ability to commit the crime in the way attempted, the attempt is indictable, although, unknown to the person making the attempt, the crime cannot be committed, because the means employed are in fact unsuitable, or because of extrinsic facts, such as the nonexistence of some essential object, or an obstruction by the intended victim, or by a third person.' [Citation.]"]; *People v. Meyer* (1985) 169 Cal.App.3d 496, 505 [prosecution for sale of methylamine with knowledge user will use it to unlawfully manufacture controlled substance; sale was to police informant who had no intention of using substance in that way, but case presented factual, not legal impossibility; attempt conviction affirmed]; Perkins & Boyce, Criminal Law (3d ed. 1982) *Attempt and Kindred Problems*, § 3, pp. 627 et seq.)

While the overt act must go beyond mere preparation -- there must be "'some appreciable fragment of the crime . . . accomplished,' [citations]" "'[a]n overt act need not be the ultimate step toward the consummation of the design; it is sufficient if it is the first or some subsequent act directed towards that end after the preparations are made.' [Citations.]" (*People v. Memro* (1985) 38 Cal.3d 658, 698.) In *Memro*, the Supreme Court cited several Court of Appeal decisions focusing on the accused's intent rather than the degree to which the acts went beyond "'mere preparation.'" These cases suggest that "'[w]henever the design of a person to commit a crime is clearly shown, slight acts done in furtherance of that design will constitute an attempt, and the courts should not destroy the practical and common-sense administration of the law with subtleties as to what

constitutes preparation and what constitutes an act done toward the commission of a crime.'" (*Ibid.*) The *Memro* court pointed out that in *People v. Dillon*, *supra*, 34 Cal.3d at page 455, a majority of the Supreme Court recently approved of this line of cases. (*People v. Memro, supra*, 38 Cal.3d at p. 699.)

The *Dillon* court also pointed out that its reference to an "appreciable fragment of the crime" as necessary to satisfy the overt act requirement, "is simply a restatement of the requirement of an overt act directed towards immediate consummation . . . . [O]ur reference to interruption by independent circumstances rather than the will of the offender merely clarifies the requirement *that the act be unequivocal*. It is obviously impossible to be certain that a person will not lose his resolve to commit the crime until he completes the last act necessary for its accomplishment. But the law of attempts would be largely without function if it could not be invoked until the trigger was pulled, the blow struck, or the money seized. If it is not clear from a suspect's acts what he intends to do, an observer cannot reasonably conclude that a crime will be committed; but when the acts are such that any rational person would believe a crime is about to be consummated absent an intervening force, the attempt is underway, . . ." (*People v. Dillon, supra,* 34 Cal.3d at pp. 454-455, applied in *People v. Herman, supra,* 97 Cal.App.4th at pp. 1389-1390 in finding a completed attempt to violate section 288, the lewd conduct statute.)

There is a continuum from the formation of a purpose to commit a crime to its actual commission. The formation of intent by itself is not a crime, since our law requires the joint operation of an act with criminal intent or negligence. (§ 20.) Solicitation, as we have seen, is merely the effort to persuade another person to commit or to join in the commission of the intended crime. No more is required. It may not be the beginning of the end, but it is the end of the beginning.[3] Attempt requires something

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[3] See W. S. Churchill: "Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning." (Speech at Mansion House, London, November 10, 1942.)

more than mere preparation. Simply asking another person to commit the crime may come close, but the mere "asking" is not enough.

That takes us to the present case, and *People v. Adami*. That decision bears a close resemblance to our case. In each, the defendant solicited another person to commit murder. In each, it was a sting operation, since the person solicited was an undercover officer. In each, the person solicited agreed to commit the crime in exchange for the payment of money. In *Adami* the court held this was not enough. It said that no previous California decision had been found with facts closely approximate to the situation just described. (*People v. Adami, supra*, 36 Cal.App.3d at p. 455.) It proceeded to examine four out-of-state precedents that were similar. An Arizona decision found this kind of showing sufficient for attempt. (*State v. Mandel* (1954) 78 Ariz. 226 [278 P.2d 413].) Three other cases were cited as holding that it was not. (*State v. Davis* (1928) 319 Mo. 1222 [6 S.W.2d 609], *Hicks v. Commonwealth* (1889) 86 Va. 223 [9 S.E. 1024] and *Stabler v. Commonwealth* (1880) 95 Pa. 318.) In addition, two "and see" cases were cited, *State v. Lowrie* (1952) 237 Minn. 240 [54 N.W.2d 265], and *State v. Lampe* (1915) 131 Minn. 65 [154 N.W. 737]. From this, the court concluded that the "weight of authority is that solicitation alone is not an attempt, . . ." (36 Cal.App.3d at p. 457.)

The People, as petitioner, cite a number of recent cases that favor its position. (*State v. Burd* (1991) 187 W.Va. 415 [419 S.E.3d 676, 680]; *State v. Group* (2002) 98 Ohio St.3d 248 [781 N.E.2d 980]; *State v. Urcinoli* (1999) 321 N.J.Super. 519 [729 A.2d 507]; *State v. Kilgus* (1986) 128 N.H. 577 [519 A.2d 231, 237]; *State v. Manchester* (1983) 213 Neb. 670 [331 N.W.2d 776, 780]; *Howell v. State* (1981) 157 Ga.App. 451 [278 S.E.2d 43, 46]; *Braham v. State* (Alaska 1977) 571 P.2d 631; *State v. Gay* (1971) 4 Wash.App. 834 [486 P.2d 341, 344]); and *United States v. Martinez* (2d Cir. 1985) 775 F.2d 31, 35.) Petitioner cites a single case supporting Decker's position, *State v. Otto* (1981) 102 Idaho 250 [629 P.2d 646], a 3-2 decision. From this, petitioner argues that the majority view now favors its position. This may, or may not be the case. (See, besides authorities already cited, *United States v. Church* (1989) 29 M.J. 679, 684 [similar]; *State v. Disanto* (2004) 2004 S.D. 112 [___N.W.2d ___] [not enough]; Model

Pen. Code, § 5.01, subd. (1)(c) [act or omission constituting substantial step required]; and see Ann., What Constitutes Attempted Murder (1973) 54 A.L.R.3d 612.) However it may be, our focus is on California precedent and the logic of the arguments presented.

We have no quarrel with the conclusion that solicitation alone is not enough for an attempted crime. Of course, the *Adami* court had far more than that, as do we. In each case, the defendant (according to the charges) not only had solicited but had done so successfully. In our case, according to the preliminary hearing evidence, the circumstances were such that the defendant unquestionably intended that the crime be committed: he provided instructions and great detail about how it was to be done; and he understood that once the down payment was made there could be no turning back. Knowing that, he made the down payment.

*Adami* appears to focus on the fact that the case arose in the context of a sting operation: the undercover officer had no intention of carrying out the crime. It pointed out that the Arizona court, in *State v. Mandel*, had said in justification of its decision that but for the subterfuge used by police, the intended victim would have been murdered. "In our opinion" says *Adami* "this is the very circumstance that caused the defendant's conduct to remain within the sphere of solicitation and preparation because there was no direct movement towards the commission of the offense. The 'agent' had no intent to commit the offense and he did nothing towards the accomplishment of the desired result other than to enter into an agreement to commit the murder, an agreement the 'agent' had no intent of performing." And the defendant did no more toward that objective than to engage the "agent." (*People v. Adami, supra,* 36 Cal.App.3d at p. 458.) It appears that the *Adami* court was not inclined to find an attempt where the person importuned is an undercover operative. That, of course, is against firm precedent recognizing that an attempt can occur in the context of a sting operation.

We conclude that the crime of attempt is committed if the defendant has a specific intent to cause the attempted crime and does an act, or acts, which, based on the facts as understood by the defendant, would ordinarily result in accomplishment of the crime unless interrupted. A person who mails poisoned candy to a victim with the intent and

expectation that the recipient will consume the candy and die, is thus guilty of attempted murder, even though, due to misadventure, the package is not delivered or the recipient decides not to eat its contents. Our case is no different; in fact, it is stronger. Assuming for these purposes that the prosecution is able to prove in trial what it presented at the preliminary hearing, Decker unleashed an instrument aimed at the murder of his sister just as surely as he would have done had he mailed her poisoned candy. His specific intent to cause her death could not have been more unequivocal or emphatic. He persuaded the assailant with money and armed him with extensive information about how to commit the crime and how to gain access to his sister. This evidence demonstrates his unequivocal intent to have her killed, even if it meant killing a witness in the process, and his understanding that once he made the down payment, as he did, there was no turning back. There was nothing more for Decker to do to bring about the murder of his sister. Were John whom he pretended to be, the sister surely would have been killed unless saved by some unpredictable interruption. Under these facts, Decker attempted her murder.

## DISPOSITION

Let a writ of mandate issue commanding the respondent court to vacate its ruling dismissing the counts of attempted murder and to reinstate those counts. The stay of proceedings, previously issued by this court, is dissolved.

**CERTIFIED FOR PUBLICATION.**

EPSTEIN, P.J.

We concur:

HASTINGS, J.

CURRY, J.