No. 11
The People &c.,
Respondent,
v.
Herbert Aponte,
Appellant.

Jonathan Garelick, for appellant.
Daniel Bresnahan, for respondent.

PIGOTT, J.:

We are asked on this appeal to decide whether attempted stalking in the third degree (Penal Law §§ 110.00, 120.50 [3]) is a legally cognizable offense. Because stalking proscribes the performance of certain acts, we hold that the attempt to commit those acts is punishable as a criminal offense.

Defendant was charged by a misdemeanor complaint with the crimes of stalking in the third degree (Penal Law § 120.50 [3]), harassment in the first degree (Penal Law § 240.25) and harassment in the second degree (Penal Law § 240.26). The complaint alleged that defendant followed the complainant for approximately three blocks in his vehicle as she walked from her residence towards her church. After the complainant returned home to contact a friend for a ride to her church, defendant followed the complainant and her friend approximately five blocks, exited his vehicle and confronted the complainant while she was sitting in her friend's vehicle. Defendant then told the complainant: "I am going to kill you." The complaint further alleged that defendant had followed the complainant approximately 25 times over the past three years, at various locations.

Criminal Court granted the prosecutor's motion to reduce the charged count of stalking in the third degree to attempted stalking in the third degree and, as a result, defendant was tried without a jury. He was found guilty of all charges.

Defendant appealed arguing, as relevant here, that attempted stalking in the third degree is not a legally cognizable offense and the allegations in the complaint are too conclusory to provide prima facie evidence of either a course of conduct, as required for the stalking charge, or repeated acts of harassment, as required for one of the harassment counts.

The Appellate Term affirmed the judgment of conviction, finding that the factual allegations of the complaint adequately established every element of the charged offenses. On the issue of whether attempted stalking in the third degree is a legally cognizable offense, the court concluded that it is.

A Judge of this Court granted defendant leave to appeal and we now affirm.

A person commits stalking in the third degree when he or she:

> ". . .
>
> 3. With intent to harass, annoy or alarm a specific person, intentionally engages in a course of conduct directed at such person which is likely to cause such person to reasonably fear physical injury or serious physical injury, the commission of a sex offense against, or the kidnaping, unlawful imprisonment or death of such person or a member of such person's immediate family" (Penal Law § 120.50 [3]).

Defendant argues that a person may not attempt to commit this crime because the statute already encompasses actions in the nature of an attempt. He points out that a defendant may be guilty of the offense even if, for whatever reason, the conduct in fact fails to result in any harm to the intended target.

Under the Penal Law, "a person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime" (Penal Law § 110.00). An attempt exists as an identifiable,

separate offense from the crime that is being attempted (see People v Campbell, 72 NY2d 602, 605 [1988]). To prove an attempt, the People must show that the defendant acted for a particular criminal purpose, i.e. with intent to commit a specific crime (id.).

We have previously held that "where a penal statute imposes strict liability for committing certain conduct, an attempt is legally cognizable, since one can attempt to engage in conduct" (People v Prescott, 95 NY2d 655, 659 [2001]). For example, in People v Saunders (85 NY2d 339 [1995]), the viability of attempted criminal possession of a weapon in the third degree was at issue (Penal Law § 265.02 [1]). This crime, we noted, contained no "result" component; rather, the underlying weapons possession crime proscribed particular conduct. We held that the defendant "may legally and logically attempt to act in the manner proscribed by this penal statute--namely, to attempt to possess a weapon" (id. at 341).

Similarly here, the relevant portions of the penal statute for stalking penalize behavior that is likely to cause harm, and do not require proof of actual harm to establish guilt. While the conduct penalized is defined as engaging in "a course of conduct . . . likely to cause" certain consequences, there is nothing impossible about attempting to engage in such a course of conduct. Thus, if a telephone call or e-mail were "likely to cause" the consequences referred to, an attempt to make such a

phone call or send such an e-mail - even if the communication never reached its intended recipient - would be an attempt. In short, the statute strictly penalizes conduct and an attempt to engage in that conduct is not a legal impossibility.

We further agree with the appellate court that the factual allegations of the complaint established every element of stalking in the third degree (Penal Law § 120.50 [3]) and harassment in the first degree (Penal Law § 240.25).

Accordingly, the order of the Appellate Term should be affirmed.

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Order affirmed. Opinion by Judge Pigott. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith and Jones concur.

Decided February 10, 2011