

No. S272850

In the
Supreme Court of California

EMILY WHEELER

Petitioner and Defendant,

v.

APPELLATE DIVISION OF THE
LOS ANGELES SUPERIOR COURT

Respondent.

PEOPLE OF THE STATE OF CALIFORNIA

Real Party in Interest and Plaintiff.

Court of Appeal, 2d Dist., Div. 3, No. B310024
Superior Court, Los Angeles, Appellate Division, No. BR054851
Superior Court, Los Angeles, Trial Ct. No. 9CJ00315-02
The Honorable H. Elizabeth Harris, Judge Presiding

COURT-ORDERED SUPPLEMENTAL BRIEF

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INTRODUCTION

On January 24, 2024, this Court noted that “[i]n footnote 5 on page 4 of the superior court appellate division opinion in this matter, the court wrote: ‘Given our disposition, we do not consider the People’s argument that the dismissal should be reversed because the court, in effect, granted defendant’s motion to dismiss under Penal Code section 1385.’” The Court directed the People to file a brief addressing this argument or stating that they no longer wish to pursue it.

Since the Appellate Division of the Los Angeles Superior Court issued its opinion, briefing on the Penal Code section¹ 1385 issue in the Court of Appeal and in this Court has focused on the lower appellate courts’ determinations that the trial court erred by dismissing the public welfare, strict liability charges based on defendant’s asserted lack of knowledge. But that error is directly linked to the issue raised in the order for supplemental briefing. While the trial court said it was denying defendant’s section 1385 motion and granting its own motion, the ruling merely echoed the formal defense motion’s grounds for dismissal.

The trial court had no evidence of the state of defendant’s knowledge on which it could have exercised its own discretion. It was relying only on the defense motion’s bare assertion that she had no idea of the presence of a cannabis business on her property. The assertion was made at the outset of the proceedings, bereft of any foundational facts or details establishing defendant lacked knowledge about the business operating on her property. Beyond

¹ All further undesignated section references are to the Penal Code.

the defense motion's bare assertion, the court had no information whatsoever regarding defendant's knowledge.

Effectively granting the defendant's motion under these circumstances was erroneous. To condone this procedure would further enlarge the scope of section 1385 dismissals by allowing a defendant to formally move to dismiss a case despite the statute's plain language to the contrary.

RELEVANT PROCEEDINGS

Defendant's Motion to Dismiss argued "all charges against [her]" should be dismissed in the interests of justice pursuant to section 1385 based on her age, status as "an upstanding member of the community," "lack of criminal history," and lack of knowledge that unlicensed commercial cannabis activity was occurring at her property. (Petition for Writ of Mandate ("PWM"), Exhibit A, pp. 55-56, 63-66.)² The People opposed the motion and argued, *inter alia*, that criminal defendants may not formally move to dismiss charges under section 1385. (PWM, Exhibit A, p. 71.)

During a pretrial hearing, defendant's counsel requested the trial court consider the motion. (PWM, Exhibit B, p. 107 ["[y]our honor, there was another motion that was filed".]) Counsel for co-defendant Aaron Wheeler³ stated she would "join in that motion, your honor." (*Ibid.*) Without inviting or considering argument from the parties, the trial court stated:

The motion to dismiss under Penal Code section 1385 is denied.

² Consecutive pagination of the PWM exhibits is cited rather than the internal exhibit pagination.

³ Mr. Wheeler is not a party to these appellate proceedings.

People take the position that you cannot ask for that. Okay, so your motion is denied.

But the court does grant, on its own motion, as to Ms. Wheeler, a Motion to Dismiss.

You have a woman born in 1934 who has no prior criminal history. There is nothing to suggest that she knows anything about this, other than the fact that she owns the property, and the code says, ‘in the interests of justice;’ and I think justice can only be served if a person who has lived an exemplary life for 80 plus years, and finds herself, because she owns the property, and that property is leased to another individual, and that individual is operating a dispensary, that says to this Court that justice would properly be served by dismissing the case.

(PWM, Exhibit B, p. 108.)

The People appealed. (PWM, Exhibit A, pp. 87-88.) Before the Appellate Division, the People argued that defendant improperly filed a formal motion to dismiss under Penal Code section 1385 and that “[a]ny distinction between defendant’s motion and the court’s motion [was] illusory.” (PWM, Exhibit D, p. 133.) “Since defendant made a formal motion to dismiss and the court in substance granted that motion, the trial court abused its discretion.” (*Id.* at p. 134.) Defendant argued that trial courts have authority to dismiss a case under section 1385 “after the defense has invited the court to exercise its discretion.” (PWM, Exhibit G, p. 226, emphasis omitted.) The Appellate Division did not consider the argument because it reversed the trial court’s order on other grounds. (PWM, Exhibit I, pp. 281, 286.)

This Court then ordered supplemental briefing “addressing this argument or stating that the People no longer wish to pursue it.”

ARGUMENT

The trial court erred by effectively granting defendant's formal motion to dismiss under section 1385, notwithstanding the court's disclaimer that it denied the defense motion.

Section 1385 authorizes courts and the People, but not defendants, to move to dismiss charges in the interests of justice. Here, defendant filed a statutorily invalid formal motion to dismiss under section 1385, and the trial court erred by effectively granting the motion. The court said it was actually denying defendant's motion and granting its own motion. But that disclaimer is belied by the record showing there was nothing other than the defense motion's assertions on which to base the ruling. To affirm the trial court's order here would further judicially enlarge the availability of section 1385 by virtually eliminating the statute's express language limiting its availability to the courts and the People.

“The judge or magistrate may, either on motion of the court or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.” (Pen. Code, § 1385, subd. (a).) This Court has determined that a “defendant has no right to make a motion, and the trial court has no obligation to make a ruling, under section 1385.” (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) Defendants may “invite the court to exercise its power by an application to strike a count or allegation of an accusatory pleading, and the court must consider evidence offered by the defendant in support of his assertion that the dismissal would be in furtherance of justice.” (*Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 441-442.) While defendants

may thus make an informal suggestion, “section 1385 does not provide for a formal defense motion to accomplish the same result.” (*People v. Superior Court (Flores)* (1989) 214 Cal.App.3d 127, 137.) “To recognize such motion and order would judicially enlarge the scope of Penal Code section 1385 if the dismissal were intended in furtherance of justice.” (*People v. Andrade* (1978) 86 Cal.App.3d 963, 973.)

Here, the trial court stated it was denying defendant’s motion to dismiss while simultaneously granting its own motion, but the justification for the court’s order reproduced the claims made in defendant’s motion. (PWM, Exhibit B, p. 108.) Both identified defendant’s age. (PWM, Exhibit A, p. 65; Exhibit B, pp. 108, 110.) Defendant’s motion argued that defendant “ha[d] no prior criminal history.” (PWM, Exhibit A, p. 65.) The trial court twice repeated, verbatim, that defendant “ha[d] no prior criminal history.” (PWM, Exhibit B, pp. 108, 110.) Defendant’s motion claimed defendant had “never been arrested.” (PWM, Exhibit A, p. 65.) The trial court echoed “the fact that she has not been arrested” as a reason to dismiss the charges. (PWM, Exhibit B, p. 110.) The motion claimed defendant had no “direct or even indirect connection to the marijuana or had any idea of its presence on their property” and “[s]he merely owned the property.” (PWM, Exhibit A, p. 65.) The trial court adopted these allegations: “[t]here is nothing to suggest that she knows anything about this, other than the fact that she owns the property.” (PWM, Exhibit B, p. 108.) The motion posited that defendant was “an upstanding member of the community.” (PWM, Exhibit A, p. 65.) The trial court, in turn, twice stated

defendant “lived an exemplary life.” (PWM, Exhibit B, pp. 108, 110.)

Yet, there was no evidence in the record supporting the defense motion’s claims. (See, e.g., *Muskan Food & Fuel, Inc. v. City of Fresno* (2021) 69 Cal.App.5th 372, 389 [“Statements by an attorney, whether made in court or in a brief, are not evidence”].) As explained in the People’s Answer Brief on the Merits (“ABM”): the “unsupported statements in the motion to dismiss were not evidence” but the “trial court nonetheless relied solely on the statement in defendant’s motion” for its factual findings. (ABM 63.) The defense motion was made at the outset of a misdemeanor proceeding—there was no preliminary hearing as there would have been in a felony proceeding and the court did not wait to obtain actual evidence regarding the defense assertions. There was thus no evidence in the record that defendant lacked knowledge of the unlicensed cannabis business on her property, that she had no prior criminal history, or that she had lived an exemplary life.⁴

Because the trial court’s factual findings were based solely on unsupported assertions in defendant’s motion, the trial court’s dismissal of the charges cannot have been a proper *independent* exercise of discretion. Put another way, the trial court did not base its order on evidence in the record—or anything other than the

⁴ The People’s opposition to the motion to dismiss filed in the trial court similarly explained: “there [was] no evidence that the Defendant has no prior criminal history; there [was] no evidence that she [was] an upstanding member of the community; there [was] no evidence that she had no connection to the illegal cannabis business; and no evidence that she did not know that the activity was occurring on her property.” (PWM, Exhibit A, p. 81.)

defense motion’s claims—that could support a section 1385 dismissal. (See *People v. Salgado* (2001) 88 Cal.App.4th 5, 15 [citing *People v. Orin* (1975) 13 Cal.3d 937, 951 for the proposition that “factual basis for section 1385 dismissal must be supported by substantial evidence”].) Instead, the trial court’s order was nothing more than the adoption—and thus grant—of defendant’s statutorily-void motion to dismiss. (*People v. Lettice* (2013) 221 Cal.App.4th 139, 147 [“it is well established that ‘[a] failure to exercise discretion is an abuse of discretion”].)

The trial court’s statement it was denying defendant’s motion but granting its own motion shows an acknowledgment that section 1385 restricts motions to dismiss in furtherance of justice to the People and the court. But the trial court’s order, nonetheless, was in-substance a grant of defendant’s motion. The court’s statement it was not doing the very thing it did was nothing other than a disclaimer attempting to circumvent section 1385’s limitations on motions to dismiss. The trial court’s words cannot disclaim its actions, especially actions in violation of statutory prohibitions. A contrary conclusion would effectively grant defendants the right to file formal motions to dismiss under section 1385 and permit trial courts to grant those motions.

In *Andrade, supra*, 86 Cal.App.3d at pp. 967-968, the defendant “moved the trial court to dismiss” a manslaughter charge on multiple grounds, including delay in trial, harassment, and the prohibition against multiple prosecution. On appeal, the reviewing court first noted that none of the trial court’s proffered reasons justified dismissal. (*Id.* at pp. 969-972.) It then also

determined the trial court could not have dismissed the matter under section 1385. (*Id.* at p. 973.) Section 1385 “does not provide for a defendant’s motion.” (*Ibid.*) While the court stated it considered its “own power” those “remarks tell us only that the trial court considered that authority” not that it properly exercised the authority. (*Id.* at pp. 973-974.) The court ultimately determined the trial court’s order granting the defendant’s motion “cannot be regarded as proper under section 1385.” (*Id.* at p. 974.)

By stating it was denying defendant’s motion and then granting its own motion, the trial court thus recognized defendant had no authority to move to dismiss the charges in the interests of justice. Nonetheless, because the trial court’s reasoning duplicated the arguments made in defendant’s motion and its order adopted the unsubstantiated allegations in that motion as its factual findings, the court’s *actions* illustrate it was doing nothing more than granting the formal motion to dismiss initiated by defendant. (See *People v. Smith* (1975) 53 Cal.App.3d 655, 657-658 [trial court “action cannot properly be characterized as a dismissal of charges ‘in furtherance of justice’ as authorized by Penal Code section 1385” when “the entire transaction was initiated by [the defendant]’s motion to the court”].) The trial court thus identified the general rule that defendants cannot move to dismiss charges under section 1385, but it did not properly apply that rule. Appending a disclaimer—a statement by the trial court that it was not doing the very thing it did—cannot cure the court’s error.

A contrary conclusion, accepting the trial court’s attempt to disclaim its actions, would effectively eliminate section 1385’s

provision that motions to dismiss in the interests of justice may only be made by the People and the court. (Pen. Code, § 1385, subd. (a), [courts may “either on motion of the court or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed”].) When courts interpret a statute, they examine “the statute's words, giving them a plain and commonsense meaning.” (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) Courts should not rewrite statutes (*Drouet v. Superior Court* (2003) 31 Cal.4th 583, 593) or “insert what has been omitted” from them (*People v. Guzman* (2005) 35 Cal.4th 577, 587). Where, as here, “the Legislature makes express statutory distinctions, we must presume it did so deliberately, giving effect to the distinctions.” (*Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 502.) And “significance must be given to every word in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage.” (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 330.)

Permitting a trial court to grant an otherwise statutorily void defense motion simply by appending an erroneous disclaimer to its ruling “would judicially enlarge the scope of Penal Code section 1385” beyond the terms of the statute. (*Andrade, supra*, 86 Cal.App.3d at p. 973.) “The Legislature limited the right to initiate the use of the authority of section 1385 to the People and to the court.” (*Ibid.*) Expanding the proposition that defendants may invite a trial court to consider a section 1385 dismissal to the facts and ruling in this case would effectively re-write the statute to allow formal motions to dismiss by the defense and to allow courts

to grant those motions. (*People v. Fontenot* (2019) 8 Cal.5th 57, 73 [“whenever reasonably possible, courts avoid reading statutes in a way that renders ‘meaningless’ language the Legislature has chosen to enact”].)

CONCLUSION

The trial court erroneously granted defendant’s formal motion to dismiss under section 1385, exacerbating its error in dismissing public welfare, strict liability offenses at the outset of the proceedings based on the defense motion’s assertion that defendant lacked knowledge of the unlicensed commercial cannabis business on her property. The Court of Appeal’s opinion should be affirmed.

DATED: February 7, 2024

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Counsel of record hereby certifies, pursuant to California Rules of Court, rule 8.520(c)(1), that this Court-Ordered Supplemental Brief, including footnotes, contains 2,542 words. I have relied on the word count of the Microsoft Word program used to prepare the brief.

/s

Zachary T. Fanselow

PROOF OF SERVICE

I, the undersigned, am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the above-referenced action. My business address is James K. Hahn City Hall East, 200 North Main Street, Suite 916, Los Angeles, California 90012.

On **February 7, 2024**, I served the foregoing **COURT-ORDERED SUPPLEMENTAL BRIEF** as follows:

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I placed a true copy of the foregoing COURT-ORDERED SUPPLEMENTAL BRIEF in a sealed envelope(s) for collection and mailing, following ordinary business practice, at James K. Hahn

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I declare under penalty of perjury that the foregoing is true
and correct. Executed on **February 7, 2024**, at Los Angeles,
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/s/

ZACHARY T. FANSELOW

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **WHEELER v. APPELLATE DIVISION (PEOPLE)**

Case Number: **S272850**

Lower Court Case Number: **B310024**

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