

IN THE SUPREME COURT OF CALIFORNIA
No. S272850

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.*

(2nd App. Dist. B310024)

(App. Div. No. BR054851)

(Los Angeles County
Superior Court No.
9CJ00315-02)

(Hon. H. Elizabeth Harris)

RESPONSE TO SUPPLEMENTAL BRIEF

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INTRODUCTION

This Court invited Real Party in Interest, hereinafter “Real Party,” to address an argument it presented in the appellate division of the Los Angeles Superior Court: that “the dismissal should be reversed because the court, in effect, granted defendant’s motion to dismiss under Penal Code ¹ section 1385.” Because the filing of a document titled “Motion to Dismiss” does not divest the trial court of its power to exercise its discretion under section 1385, this court should rule the trial court’s dismissal of the action pending against Petitioner, Emily Wheeler, should not be reversed on that ground.

SUMMARY OF FACTS

This summary of facts relates solely to the issue presented above.

On October 7, 2019, counsel for Petitioner filed a document titled “Motion to Dismiss: Due Process Violation and Pursuant to Penal Code [section] 1385.” (Petition for Writ of Mandate, Exhibit A, pp. 55-66. ²) The substance of the document indicates that counsel was “inviting” the court to exercise its discretion

¹ All further statutory references are to the Penal Code unless otherwise stated.

² All subsequent references to exhibits are to the exhibits lodged with the Petition for Writ of Mandate filed in the Court of Appeal.

under section 1385 to dismiss the action against Ms. Wheeler. Analogizing to the facts presented in *People v. S.M.* (2017) 9 Cal.App.5th 210 (*S.M.*), counsel declared in his written motion, under the penalty of perjury, the following:

...Ms. Wheeler has no prior criminal history. In fact, Ms. Wheeler is 85 years old and she has never been arrested. Ms. Wheeler is an upstanding member of the community. Ms. Wheeler did not have any direct or even indirect connection to the marijuana or had [*sic*] any idea of its presence on their property. She merely owned the property.

...Ms. Wheeler is in fact restricted in her roles [*sic*] as property owners [*sic*] in the amount of access and control they have to and over a property leased to another individual....

...[T]he pursuit of criminal charges against Ms. Wheeler for these offenses do [*sic*] not serve the interests of justice. These charges, like those in *S.M.*, are nonviolent in nature and did not serve to injure the public in any way. While the People have the right to pursue criminal charges, it does not benefit the public to criminally punish individuals who are not aware their actions are in violation of law. In this situation it actually serves to deprive the public by branding an otherwise productive member of society with a criminal record. ...

...Based upon Ms. Wheeler's lack of involvement, her lack of criminal history, and the nature of the offenses charged, the defense respectfully invites the court to dismiss the action in its entirety against Ms. Wheeler. (Exhibit A, pp. 65-66.)

On October 10, 2019, Real Party filed an "Opposition to Defendant Emily Wheeler's Motion to Dismiss in the Interest of Justice (Penal Code section 1385 and Due Process Violation)," hereinafter "Opposition." Real Party argued that because a defendant may not bring a formal motion to dismiss under section 1385, the Court must deny Defendant's request to dismiss. (Exhibit A, p. 71.) Real Party relied on the holding in *People v. Andrade* (1978) 86 Cal.App.3d 963 (*Andrade*), 973, to assert that "[t]o recognize such motion and order would judicially enlarge the scope of Penal Code section 1385 if the dismissal were intended in the furtherance of justice." (Exhibit A, p. 71.) Without lodging a specific objection or making a motion to exclude, Real Party simply proclaimed that none of the facts as presented in counsel's signed declaration under the penalty of perjury constituted evidence. (*Id.* at p. 81.)

On November 19, 2019, the court considered Petitioner's request that the court exercise its discretion to dismiss the action pursuant to section 1385. (Exhibit B, p. 107.) Noting Real Party's objection to Petitioner's filing a "motion to dismiss" pursuant to

section 1385, the court denied her “motion.” (*Id.* at p. 108.) On its own motion, however, the court dismissed all pending charges against Petitioner. (*Ibid.*) In accordance with section 1385, the court stated the reasons for the dismissal as follows:

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 interest 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 be served by dismissing the case in its entirety against Ms. Emily Wheeler, and that is what the court is prepared to do at this moment.
(Exhibit B, p. 108.)

After objection by Real Party to the court’s indicated to dismiss, the court inquired, “Your position is that all Ms. Wheeler has done is be [*sic*] the owner of the property? Is that correct?” (Exhibit B, p. 109.) Real Party answered, “Your honor, Ms. Wheeler is the owner of the property.” (*Ibid.*) The court then asked, “Okay, you’re not suggesting that she has any contact with or any business position in running this illegal dispensary; is that correct? (*Ibid.*) Real Party replied, “Right.” (*Ibid.*) The court

dismissed the case on its own motion. (*Id.* at pp. 109-110.) The court explained that the “request” by Petitioner to dismiss served to inform the court of the following: “The age of Ms. Wheeler, the fact that she has no prior criminal history, the fact that she has not been arrested, the fact that she has lived an exemplary life.” (*Id.* at p. 110.) The court commented, “I don’t see where justice requires that she be subjected to prosecution on a situation where there’s no showing she even knew anything about it.” (*Ibid.*) The court reiterated that it was dismissing the case on its own motion. (*Ibid.*) Real Party promptly filed a notice of appeal.

In Appellant’s Opening Brief, hereinafter “AOB,” filed on April 17, 2020, Real Party argued that the document titled “Motion to Dismiss” filed by Petitioner was an improper formal motion under section 1385. (AOB, p. 6.) Despite recognizing that courts have long approved the practice of defendants informally “inviting” the court to exercise its discretion to dismiss, Real Party again argued, under *Andrade*, that to recognize such a motion would judicially enlarge the scope of the statute. (*Id.* at p. 5.) Real Party also suggested that the court did not base its ruling on admissible evidence because the facts alleged by Petitioner’s counsel were “unaccompanied by an affidavit or exhibits.” (AOB, p. 11.)

In Petitioner’s Respondent’s Brief, hereinafter “RB,” filed on May 14, 2020, counsel noted that it is well-settled that a

defendant may “invite” the court to exercise its discretion under section 1385. (RB, p. 13, citing *People v. Benson* (1976) 64 Cal.App.3d Supp. 10, 13 (*Benson*); *Polansky v. Superior Court* (2009) 180 Cal.App.4th 507, 526-527; *People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*); *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 441-442 (*Rockwell*)). Counsel argued it is legally permissible to treat Petitioner’s “motion to dismiss” as an “invitation” for the court to exercise its own discretion. (RB, p. 13, citing *People v. Lopez* (1988) 198 Cal.App.3d 135; *People v. Gillispie* (1997) 60 Cal.App.4th 429 (*Gillispie*)). Counsel also argued that Real Party waived any issue regarding the propriety of the evidence received by the court by failing to state specific objections in their Opposition and at the hearing. (RB, p. 21, citing *People v. Mattson* (1990) 50 Cal.3d 826; *People v. Brewer* (2000) 81 Cal.App.4th 442.)

In Appellant’s Reply Brief, hereinafter “ARB,” filed on June 4, 2020, and in their Answer Brief on the Merits, hereinafter “ABM,” filed with this Court on October 12, 2022, Real Party proclaimed that they sufficiently preserved their objection to the evidence presented in Petitioner’s “motion to dismiss,” simply by stating “Defendant has presented no evidence.” (ARB, pp. 2-5; ABM, p. 63.) In Petitioner’s Reply Brief on the Merits, hereinafter “RBM,” filed on January 12, 2023, Petitioner again argued Real Party waived the issue.

Real Party filed a Supplemental Brief on February 7, 2024. Real Party affirms that the court denied Petitioner’s “motion to dismiss” pursuant to section 1385, and that the court subsequently granted its own motion to dismiss under the same section. (Supp. Brief, pp. 6-7, 9, citing Exhibit B, p. 108.) Real Party now concedes that a defendant may “invite” the court to exercise its discretion to dismiss an action. (Supp. Brief, p. 8.) Real Party posits, however, that the court erred in dismissing the criminal action against Petitioner because the court adopted the facts as presented by Petitioner as the basis for its dismissal in the furtherance of justice. (*Id.* at p. 8.) In effect, Real Party’s assertion is that the court improperly granted Petitioner’s formal “motion to dismiss.” (*Ibid.*) Real party maintains that under *Andrade*, recognizing such a motion would judicially enlarge the scope of the statute. (*Id.* at p. 9.) Real Party also maintains that there was “no evidence” presented to the court upon which it could have exercised its discretion. (Supp. Brief, p. 10-11.)

ARGUMENT

IT WAS NOT ERROR FOR THE COURT TO DISMISS THE ACTION AGAINST PETITIONER SUBSEQUENT TO HER REQUEST FOR THE COURT TO EXERCISE ITS DISCRETION UNDER PENAL CODE SECTION 1385

I. It is Well-Settled That a Defendant May “Invite” The Court to Exercise Its Discretion Under Section 1385

In *Benson*, the appellate division of the Los Angeles Superior Court specifically contemplated whether, “assuming that the trial court granted the defendant’s motion, if the reasons set forth are in the interests of justice, should we reverse the order for the sole reason that the trial court did not purport to do so on its own motion?” (*Id.* at p. 13.) The *Benson* court “concluded that to so construe section 1385 of the Penal Code would be to exalt form over substance.” (*Ibid.*) The court went on to state, “it is our view that where the reasons set forth by the trial judge demonstrate that he acted in the interests of justice, we will sustain the order and treat it as an indication that the same facts would have motivated the court to make such an order on its own motion in the absence of a formal motion by the defendant. *The fact that a defendant notices a motion for dismissal and presents evidence and argument in support thereof does not affect the jurisdiction of the court to dismiss if the order is made in the furtherance of justice.*” (*Ibid.*, internal footnotes omitted, emphasis added.)

The principle that a defendant may “invite” a court to exercise its discretion has remained steadfast. “A defendant may invite the court to exercise its power by an application to strike a count or an 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, supra*, 18 Cal.3d. at pp. 441-442.) *Carmony* re-affirmed this principle eighteen years later. Lower courts have held that this principle is not lost simply because the document is termed a “motion,” and a court may treat a defendant’s “motion” as an “invitation.” (*Polansky v. Superior Court, supra*, 180 Cal.App.4th at p. 528; *People v. Lopez, supra*, 198 Cal.App.3d 135, 140.) The *Gillispie* court “recognize[d] that requests of this kind are commonly made in the conventional form of a motion...” (*People v. Gillispie, supra*, 60 Cal.App.4th 429, 432-433, fn. 1.)

It is clear from the record that the court chose to treat Petitioner’s “motion to dismiss” as an “invitation.” The court explicitly denied Petitioner’s “motion” and repeatedly indicated that it was granting its own motion. Overwhelming precedent indicates it was not error for the court to do so.

Adopting Real Party’s argument would foreclose any possibility that a court could exercise its own discretion under section 1385 after a defendant improperly titles an “invitation”

for the court to exercise its discretion as a “motion to dismiss.” Such a stringent rule would lead to absurd results. To echo the *Benton* court, “to so construe section 1385 of the Penal Code would be to exalt form over substance....” (*People v. Benson, supra*, 64 Cal.App.3d Supp. 10, 13.)

II. Treating a Defendant’s “Motion to Dismiss” as an “Invitation” Does Not Judicially Enlarge the Scope of Section 1385

Recognizing a defendant’s “motion to dismiss” as an “invitation” does not “judicially enlarge the scope of Penal Code section 1385.” Real Party excerpted this language from *Andrade* out of context. In *Andrade*, respondent’s motion to the trial court was based on the prohibition against multiple punishments under section 654. (*People v. Andrade, supra*, 86 Cal.App.3d at p. 968.) Based on arguments first raised in the Court of Appeal, the opinion addressed the power of a court to dismiss an action in the furtherance of justice under section 1385. (*Ibid.*) The Court observed that the trial court explicitly granted the defendant’s motion and indicated that there was nothing in the record to show that the court was dismissing on its own motion pursuant to section 1385. (*Id.* at pp. 973-974.) *Andrade* is not a cautionary tale of the perils that would result from treating a defendant’s “motion to dismiss” as an “invitation” for the court to exercise its discretion under section 1385. In fact, the *Andrade* court never addressed the practice of trial courts treating a

“motion to dismiss” as an “invitation.” Rather, *Andrade* simply holds that unless a court explicitly indicates that it is dismissing an action on its own motion, a dismissal pursuant to section 1385 cannot stand.

III. Proffered Evidence is Admissible When No Proper Objection is Made

“Evidence’ means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.” (Evid. Code, § 140.) “The definition includes anything offered in evidence whether or not it is technically inadmissible.... ...Thus, when inadmissible hearsay or opinion testimony is admitted without objection, this definition makes it clear that it constitutes evidence that may be considered by the trier of fact.” (Law Revision Com. com., Evid. Code, § 140.) “[A] statement from an attorney given as an officer of the court [is] a species of information often accepted in connection with a motion [made pursuant to Penal Code section 1385].” (*People v. Borousk* (1972) 24 Cal.App.3d 147, 158.)

“A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and (b) The court which passes upon the effect of the error or errors is of the

opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.” (Evid. Code, § 353; see also *People v. S.M.*, *supra*, 9 Cal.App.5th at pp. 218-219, fn. 9.) Real Party’s proclamation that the “defendant provided no admissible evidence” is neither a specific ground for an objection nor a motion to exclude the evidence. This Court has consistently held that the failure to make a timely and specific objection on the ground asserted on appeal makes that ground not cognizable. (*People v. Partida* (2005) 37 Cal.4th 428, 433-434.)

In this case, Petitioner’s counsel declared under the penalty of perjury that the facts presented in the “motion to dismiss” were true and correct. (Exhibit A, p. 66.) The facts asserted by Petitioner were properly considered by the court because a proper objection to the evidence was not lodged by Real Party in its Opposition or during the hearing. (Evid. Code, § 140; *People v. Borousk*, *supra*, 24 Cal.App.3d at p. 160.) It follows from this Court’s precedent that Real Party has waived this issue.

CONCLUSION

For the reasons discussed above, this Court should find that the court's granting of its own motion to dismiss subsequent to Petitioner filing a document titled "motion to dismiss" is not a ground for reversal.

Respectfully Submitted,

ERIKA ANZOATEGUI
Alternate Public Defender
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Dated: February 21, 2024

By: _____
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CERTIFICATE OF COMPLIANCE

This brief is set using 13-pt Century Schoolbook. This brief contains 2,736 words according to Microsoft Word, the computer program used to prepare this brief. The word count excludes the cover, tables, signature blocks, proof of service, and this certificate.

The undersigned certifies that this brief complies with the form requirements set forth by California Rules of Court, rules 8.74, 8.204, and 8.504.

Dated: February 21, 2024

By: _____

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I, the undersigned, declare:

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I declare under penalty of perjury that the above is true and correct and that I have signed an original, printed paper copy of this declaration and it is available for inspection per California Rules of Court, rule 8.75. Executed on February 21, 2024, at Los Angeles, California.

Noemi Luquin

NOEMI LUQUIN

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S272850**

Lower Court Case Number: **B310024**

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2/21/2024

Date

/s/Noemi Luquin

Signature

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