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Supreme Court of California
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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

REPLY TO DEFENDANT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

Defendant's Response to Supplemental Brief ("RSB") fails to persuasively rebut that the trial court effectively granted the defense's motion to dismiss under Penal Code section[1] 1385 and fails to demonstrate that the statute's scope should be further enlarged to countenance a dismissal based on a defense motion's contested factual assertions.

ARGUMENT

I. Defendant has failed to show that the trial court was exercising independent discretion rather than effectively granting defendant's section 1385 motion to dismiss.

Defendant argues the defense may invite trial courts to exercise discretion under section 1385 and that courts may treat a formal motion as such an invitation. (RSB 11.) Defendant similarly argues that the filing of a defense motion under section 1385 "does not affect the jurisdiction of the court" (RSB 11) and that a contrary 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'" (RSB 12-13). But these arguments do not address the error here—the trial court failed to exercise independent discretion and there was no evidentiary basis for its order. (*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'"]; *People v. Cluff* (2001) 87 Cal.App.4th 991,

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

998 [a "trial court abuses its discretion when the factual findings critical to its decision find no support in the evidence"].)[2]

While the court said it was denying the defense motion and granting the relief requested on its own motion, there was no evidentiary basis to dismiss the charges because the only information before the court were bare assertions—not evidence—from the defense motion to dismiss.[3] The defense motion was considered shortly following defendant's arraignment, there had been no preliminary hearing as there would have been in a felony proceeding, and the trial court did not hold an evidentiary hearing. (Petition for Writ of Mandate ("PWM"), Exhibit A, pp. 53, 84.)[4] There was thus no evidence regarding the defendant's background and mental state the court could have relied upon to exercise its own discretion to dismiss the offenses in the interests of justice. Under these specific circumstances, the trial court necessarily adopted the assertions and argument in the defense motion in place of any independent exercise of discretion. This was in substance an erroneous grant of the defense motion.

Defendant's contrary argument, relying heavily on *People v. Benson* (1976) 64 Cal.App.3d Supp. 10, 13, is that prohibiting trial

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[2] A further critical issue is, of course, whether the dismissal was in furtherance of justice. It was not for all the reasons stated in the People's Answer Brief on the Merits (see pages 52-61) and the People's Answer to the Public Defenders' Amicus Brief (see pages 8-17).

[3] Defendant's claims that these non-evidentiary assertions actually constituted evidence are discussed in section III, *post*.

[4] Consecutive pagination of the PWM exhibits is cited rather than the internal exhibit pagination.

courts from granting defense motions to dismiss under section 1385 "would be to exalt form over substance." (RSB 13.)[5] Yet the error here was the trial court's exaltation of form over substance. The court recognized it did not have authority to grant defendant's formal motion to dismiss. Its order thus took the form of the denial of the defense motion and grant of its own motion:

> 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.

(PWM, Exhibit B, p. 108; *People v. Andrade* (1978) 86 Cal.App.3d 963, 974 [trial court's "remarks tell us only that the trial court considered" its "own power" and not that it properly exercised that authority].) But the substance of that ruling was a grant of the defense motion without exercising independent discretion. This was error.

II. While case law has already judicially enlarged section 1385's scope, this Court should decline to extend it further.

Defendant argues that treating her motion to dismiss as an "invitation" would not "judicially enlarge the scope of Penal Code section 1385." (RSB 13.) In support of this claim, defendant argues that *Andrade, supra,* 86 Cal.App.3d 963, did not explicitly

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[5] *Benson* stated it would not reverse a trial court's grant of a defense motion to dismiss if "the reasons set forth by the trial judge demonstrate that he acted in the interests of justice." (*Benson, supra,* 64 Cal.App.3d Supp. at p. 13.) But *Benson* ultimately reversed the trial court's dismissal because it was not in furtherance of justice. (*Id.* at p. 14.) Here too the trial court's dismissal was not in furtherance of justice.

address the practice of trial courts treating a formal motion to dismiss as an invitation. (RSB 13-14.) But, as *Andrade* noted, the basis for giving any consideration to a defense 1385 motion is a judicial—not legislative—creation. (*Andrade, supra,* 86 Cal.App.3d at p. 973 [section 1385 "makes no provisions for a defendant to move for dismissal"]; *People v. Carmony* (2004) 33 Cal.4th 367, 375 [a "defendant has no right to make a motion, and the trial court has no obligation to make a ruling, under section 1385"].)[6] The question presented here is what should happen when a trial court's action takes the form of granting its own motion, but the court in substance granted the defense motion. Authorizing the substantive grant of a formal defense motion to dismiss would *further* judicially enlarge the scope of section 1385.

Such further enlargement is unwarranted. While a trial court has inherent authority to dismiss an offense under section 1385,

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[6] This Court's earliest opinion providing that "a defendant 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" appears to be *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 441. But the support for this judicial enlargement of the statute's scope beyond its plain meaning was unclear. (See Pen. Code, § 1385, subd. (a) ["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"].) The decisions *Rockwell* cites do not appear to support its conclusion that defendants may invite courts to dismiss charges under section 1385 and that courts must consider evidence submitted by defendants. (See *In re Cortez* (1971) 6 Cal.3d 78, 84-86 [discussing striking prior convictions at sentencing]; *People v. Tenorio* (1970) 3 Cal.3d 89, 91-92 [discussing nolle prosequi as it related to the history of section 1385].)

that authority is substantially narrower than when the motion is brought by the People: "when a court considers on its own motion whether to dismiss a charge or an enhancement, the scope of those interests narrow to reflect the separation of powers between the prosecution" and "the court." (*Nazir v. Superior Court* (2022) 79 Cal.App.5th 478, 498, internal citations omitted.) When a motion to dismiss is initiated by neither the People nor the court, but the defense—which has no statutory authority to make such a motion—the court's action on that motion should bear heightened scrutiny. (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"].)

Because there is no statutory authority for a defense section 1385 motion and there are inherent differences when these motions are brought by the People, the court, or the defense, giving trial courts broad authority to effectively grant formal defense motions—without any basis on which to exercise independent discretion—would constitute an unwarranted further judicial enlargement of section 1385's scope.

III. The assertions in the defense motion were not evidence requiring a formal objection; in any event, the People sufficiently contested the unsupported assertions.

Defendant argues that the defense motion's unsupported assertions regarding her background and lack of knowledge of the

offenses “were properly considered by the court because a proper objection to the evidence was not lodged by Real Party.” (RSB 15.) The argument fails because the unsupported assertions were not presented as evidence to which a formal objection should have been expected or required. The assertions were presented as argument in a motion. They were not offered as documentary or testimonial evidence in support of the motion, such as a declaration. In any event, the People contested the validity of the assertions.

In *People v. Saelee* (2018) 28 Cal.App.5th 744, 749, the defendant petitioned to redesignate a felony offense as a misdemeanor. The prosecutor filed a written opposition “contain[ing] numerous factual assertions” including that defendant had a lengthy criminal history, but “it was not supported by any evidence.” (*Ibid.*) The trial court denied the petition, finding defendant presented an unreasonable risk of danger and the defendant appealed, arguing *inter alia*, that “the prosecution offered no evidence in support of its dangerousness contention.” (*Id.* at p. 750.) The appellate court agreed, explaining that “the People’s written opposition to the petition contained factual assertions about defendant’s criminal history, but included no *evidence* supporting those assertions.” (*Id.* at p. 755, emphasis in original.) “Instead, the opposition included only statements of fact and argument made by the prosecutor, and such statements are not evidence.” (*Ibid.*) The court reversed and remanded the matter to the trial court to allow the parties “to present evidence to support their respective positions.” (*Ibid.*)

Defendant's contrary argument cites *People v. Borousk* (1972) 24 Cal.App.3d 147, 158, for the proposition that "a statement from an attorney given as an officer of the court, [is] a species of information often accepted in connection with a motion" under section 1385. (RSB 14.) But there is a difference between crediting representations that an attorney can reasonably make as an officer of the court—such as those in *Borousk* that there was "an implied [plea] bargain [that] had not been carried out," that it "would be harassment of defendant to retry count I," and that retrial would cause undue court congestion (*Borousk, supra,* 24 Cal.App.3d at pp. 161-162)[7]—and the unsupported assertions in the defense motion here regarding the defendant's background and mental state.

Moreover, *Borousk* and the case here were in vastly different procedural postures. In *Borousk*, the trial court dismissed a charge after trial when the defendant had pled guilty to one charge, had been found guilty of another, and the jury had been unable to reach a verdict on the at-issue charge. (*Borousk, supra,* 24 Cal.App.3d at pp. 151-152.) There was thus a record for the trial court to consider. Not so here, where the trial court failed to "consider whether the existing record concerning the defendant and the defendant's offense or offenses [was] adequate to make a reasoned and informed judgment." (*People v. Clancey* (2013) 56 Cal.4th 562, 575 [discussing premature use of an indicated sentence].)

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[7] *Borousk* refers to attorney statements as "information" not "evidence." (*Borousk, supra,* 24 Cal.App.3d at p. 158.)

Defendant also contends that the assertions in the motion were part of "counsel's signed declaration." (RSB 6; see also Petitioner's Brief on the Merits 13 ["petitioner's trial counsel attached a declaration . . ."].) But no declaration was attached or filed. (See PWM, Exhibit A, pp. 65-67.) The defense merely appended language at the end of the motion "declar[ing] under penalty of perjury that the foregoing is true and correct." (PWM, Exhibit A, p. 66.) Defendant has cited no authority, and the People are aware of none, permitting such a procedure. To submit evidence, the defense should have filed a declaration in support of the motion. (See *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 224 [in context of civil "law and motion practice, factual evidence is supplied to the court by way of declarations"]; *People v. Mani* (2022) 74 Cal.App.5th 343, 368, fn. 8 [counsel's representation regarding his client's knowledge of a restraining order was not evidence].)

Following the standard procedure—separating the motion, containing legal argument, from declarations, containing evidence—provides the other party with context and notice for how they should respond. The responding party thus knows if they do not formally oppose a declaration, they risk matters contained therein becoming admissible evidence. In contrast, allowing a party to transform non-evidentiary assertions in a motion into evidence by appending a single sentence to the end of the motion would require the other party to parse those motions and attempt to discern legal arguments from factual claims. (*Saelee, supra,* 28 Cal.App.5th at p. 755 [factual assertions in a motion are not

evidence].) Permitting such a practice would be particularly problematic here because the assertions the defense relied upon were not even in the motion's factual summary but were instead intertwined with the motion's legal argument. (PWM, Exhibit A, pp. 56, 65-66.) It would also dramatically, and unnecessarily, increase the number of formal objections parties would need to file to trial court motions or risk having unsupported assertions in those motions transformed into evidence.

But contrary to defendant's argument that the People did not sufficiently object, the People did consistently challenge the assertions in the defense motion. Evidence Code section 353's objection requirement "does not exalt form over substance" and "does not require any particular form of objection." (*People v. Holman* (2013) 214 Cal.App.4th 1438, 1449.) The "requirement must be interpreted reasonably, not formalistically." (*People v. Partida* (2005) 37 Cal.4th 428, 434.) Indeed, the "critical point for preservation of claims on appeal is that the asserted error must have been brought to the attention of the trial court." (*Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 649.) And, courts "view the matter in context" to determine the validity of the challenge. (*Holman, supra,* 214 Cal.App.4th at p. 1449.)

Defendant misconstrues an exchange between the court and the prosecutor at oral argument where the prosecutor said "[r]ight" when asked, "Okay, you're not suggesting that she has any contact with or any business position in running this illegal dispensary; is that correct?" (RSB 7, citing PWM, Exhibit B, p. 109.) Read fairly in the context of this proceeding, the prosecutor was not conceding

defendant had no knowledge of the illegal business but merely acknowledging that that the prosecution had no such evidence—not at all surprising at the outset of a case charging strict liability offenses.

The People contested the motion's unsupported assertions and brought the specific nature of that challenge to the trial court's attention. (PWM, Exhibit A, p. 81 [explaining there was "no evidence" supporting the motion].) In the specific context here, the People's opposition was sufficient not only to determine the merits of the issue—that a trial court's dismissal of an offense in furtherance of justice must be based on evidence—but also to provide the defense with the opportunity to present evidence to the court. (*Partida, supra,* 37 Cal.4th at p. 434 [the purpose of the objection requirement is to allow "the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps designed to minimize the prospect of reversal"].) The People never "waived this issue." (RSB 15.)

CONCLUSION

The trial court erred by failing to independently exercise its discretion and by granting defendant's formal motion to dismiss based on unsupported—non-evidentiary—assertions in that motion. The Court of Appeal's opinion should be affirmed.

DATED: February 28, 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(d)(2), that this Reply to Defendant's Supplemental Brief, including footnotes, contains 2,597 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 900l2.

On **February 28, 2024,** I served the foregoing **REPLY TO DEFENDANT'S SUPPLEMENTAL BRIEF** as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on **February 28, 2024**, at Los Angeles, California.

/s/

ZACHARY T. FANSELOW

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STATE OF CALIFORNIA
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