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SUPREME COURT
FILED

The Honorable Chief Justice and Associate Justices
California Supreme Court
350 McAllister St., Room 1295
San Francisco, California 94102

APR 24 2014

Frank A. McGuire Clerk
CFE
Deputy

Re: *Steen v. Appellate Division*, S174773
Real Party's Supplemental Letter Brief

To the Honorable Tani Cantil-Sakauye, Chief Justice, and to the Associate Justices of the Supreme Court:

One issue, in the above entitled matter, is whether Penal Code section 959.1, subdivision (c)(1),¹ violates the separation of powers doctrine by providing that a court clerk can issue and transmit a complaint for failure to appear, pay a fine, or comply with a court order. On March 6, 2014, petitioner filed a supplemental letter brief (hereinafter Pet. Supp. Ltr. Brf.), in which she argued that the recent Appellate Division decision in *People v. Simpson* (2014) 223 Cal.App.4th Supp. 6 (*Simpson*), supported her argument that section 959.1, subdivision (c), violates the separation of powers doctrine. Respondent, Appellate Division, filed a letter brief (hereinafter Resp. Supp. Ltr. Brf.) on March 14, 2014, challenging petitioner's reliance on *Simpson*. Real party submits this response and asks the Court to consider it with petitioner's and respondent's letter briefs.

¹ Subsequently statutory references are to the Penal Code, unless otherwise indicated.

Introduction

In his letter brief, petitioner brought to this Court's attention the recent decision in *Simpson*. But *Simpson* does aid petitioner because it does not address the issue before this Court. And, while respondent contends that *Simpson* is inapplicable to this case, it relies on a court's civil contempt powers to support its analysis. It is real party's position that the statutorily circumscribed act by a court clerk under section 959.1, subdivision (c), of issuing and transmitting a complaint, as complainant, for three limited offenses, does not violate the separation of powers doctrine.

People v. Simpson

In *Simpson*, an officer issued to the defendant a traffic infraction citation for crossing double yellow lines into a high-occupancy vehicle (HOV) lane, in violation of Vehicle Code section 21655.8, subdivision (a). At trial, the officer testified that he observed the defendant change lanes in front of the officer into the HOV lane while crossing clearly marked double yellow lines. The defendant's lane change caused the officer to brake suddenly in order to avoid a traffic collision. At the conclusion of the trial, the court told the defendant that it was going to find her guilty and asked the officer if the defendant's lane change was unsafe. When the officer responded "Yes," the trial court added the charge of making an unsafe lane change (Veh. Code, § 21658, subd. (a)). The trial court proceeded to find the defendant guilty of both improperly crossing into the HOV lane and making an unsafe lane change. (*Simpson, supra*, 223 Cal.App.4th Supp. at pp. 8-9.)

The Appellate Division held that the trial court's sua sponte amendment of the complaint to add the unsafe lane change violation was not authorized by statute and was unconstitutional under the separation of powers doctrine. The Appellate Division found that section 1009 "only allows a court to 'order or permit . . . the filing of an amended complaint,' meaning that only a prosecutor may amend a complaint." Thus, the Appellate Division ruled that the trial court exceeded its statutory authority under section 1009 because "the court did not grant a motion to amend by the prosecution, but rather *itself* amended the complaint" by adding the unsafe lane change violation. (*Id.* at pp. 9-10, italics in original.)

The Appellate Division further ruled that "permitting a court *itself* to amend a

notice to appear or a complaint would be unconstitutional based on a violation of separation of powers.” (*Id.* at p. 10, italics in original.) To support its ruling, the Appellate Division cited to *Birks* – a case in which this Court found that the California’s constitutional separation of powers cannot be construed to grant a defendant the right to insist that a trial court add a lesser-related offense “without the prosecution’s consent” (*Birks, supra*, 19 Cal.4th at p. 136). And, relying on *People v. Municipal Court (Pellegrino)* 27 Cal.App.3d 193 (*Pellegrino*), the Appellate Division stated, “[a] court cannot authorize the institution of a criminal prosecution without the approval of the prosecutor.” (*Simpson, supra*, 223 Cal.App.4th Supp. at p. 10.) Thus, the Appellate Division concluded in *Simpson* that “the trial court usurped the prosecutor’s discretionary power to control the institution of criminal proceedings and violated the separation of powers by sua sponte adding a charge to the complaint.” (*Ibid.*)

Argument

Petitioner argues that *Simpson* supports her contention that section 959.1, subdivision (c), violates the separation of powers because it permits a court clerk, “a judicial functionary, rather than the authorized prosecutor, to file criminal charges” (Pet. Supp. Ltr. Brf., p. 1.) Petitioner’s argument is without merit.

As real party explained in its prior briefings, section 959.1, subdivision (c)(1), does not grant a clerk independent authority to prosecute criminal charges. Rather, subdivision (c)(1) of section 959.1, means precisely what it says, that a court may “receive and file” an accusatory pleading in electronic form “issued in the name of” a clerk for the three limited offenses of failure to appear, pay a fine, or obey a court order. The clerk is the best possible complainant to issue a complaint supportive of those allegations because the clerk has personal knowledge or is in possession of credible information of the commission of those offenses. (Real party’s Supp. Return, p. 2.) This legislatively confined procedure does not violate the separation of powers because, when “viewed from a realistic and practical perspective,” it does not “operate to defeat or materially impair the executive branch’s exercise of its constitutional functions.” (*Marine Forests Society v. California Coastal Commission* (2005) 36 Cal.4th 1 (*Marine Forests*); *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 58-59.) Section 959.1 simply allows the clerk, as a complainant, to issue and transmit a complaint. It does not grant a clerk any discretionary decisionmaking authority. The statute does not impede the prosecution from performing its duty of exercising independent prosecutorial discretion. The power to prosecute resides solely in the prosecution’s core zone of executive power. (See *Esteybar v. Municipal Court* (1971) 5 Cal.3d 119, 127; Govt. Code, §§ 100, 26500.)

Under the analysis that was correctly set forth in *Pellegrino, supra*, 27 Cal.App.3d at pp. 203-206, the prosecutor can choose to approve, authorize, or concur in the complaint by carrying forward a prosecution based on the clerk's pleading. Or, if the prosecutor decides that the prosecution is not authorized or warranted and refuses to approve it, then the complaint is a nullity and the trial court must dismiss it. And, even if the prosecution cannot unilaterally obtain a dismissal of charges, a violation of the separation of powers does not necessarily arise, because the prosecution still retains discretion to request a dismissal pursuant to section 1385. In the unlikely event that a court refused a prosecution request to dismiss when society as represented by the People did not have a legitimate interest in the prosecution of the offense, the court's ruling would be reviewable for abuse of discretion. Therefore, section 959.1 does not give the judicial branch undue control over the executive branch's ability to perform its prosecutorial function. (Real party's Return, pp. 11-30; Real party's Reply to Amicus, pp. 1-7; Real party's Supplemental Return, pp. 2-3, 15-25.)

Petitioner's attempt to rely on *Simpson* to support her arguments is erroneous because *Simpson* has no application to the statute and facts at bar. In petitioner's case, the clerk complainant, who possessed knowledge of the petitioner's offense, issued and transmitted the complaint for the offense of failure to appear. The record shows that the prosecution expressly approved and concurred in the clerk's pleading in petitioner's case, and, thereafter, carried forward the prosecution of that complaint. Thus, there was no violation of the separation of powers. *Simpson* did not involve a complaint issued and transmitted by a clerk complainant in conformance with the procedure under section 959.1. Rather, the trial judge sua sponte amended the complaint to add traffic violation based on evidence the trial judge heard at trial.

Respondent argues that *Simpson* is inapplicable, using an analysis that differs from that used in its 2009 memorandum judgment in the instant case. In its memorandum judgment, just as in *Simpson*, respondent relied on *Pellegrino* to decide whether the separation of powers had been violated. Citing *Pellegrino* and *Salcido v. Superior Court* (1980) 112 Cal.App.3d 994, 1001-1002, respondent ruled that a court clerk's action of filing a complaint for failure to appear in accordance with section 959.1 did not violate the separation of powers because the prosecution retained its discretion to either approve of and proceed with the complaint or to nullify the complaint by refusing to approve the clerk's pleading and prosecute the matter. The Appellate Division stated,

. . . . [A]rticle III, section 3 of the California Constitution . . . provides as follows: "The powers of the state government are legislative, executive,

and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.” The judiciary may not impinge on the authority of the prosecuting attorney in its exercise of prosecutorial discretion. (*Salcido v. Superior Court* (1980) 112 Cal.App.3d 994, 1001^[2]; see Gov. Code, § 26500.)

The filing of the criminal complaint by the court clerk did not infringe on the city attorney's exercise of prosecutorial discretion so as to violate the separation of powers doctrine. The city attorney's office at all times retained the ultimate discretion on whether to proceed on the criminal complaint. If the city attorney's office decided not to prosecute the matter, it could then alert the court that it did not consent to the filing of the complaint. Upon doing so, the complaint is nullified, and the court must dismiss it upon request. (See *People v. Municipal Court (Pellegrino)*, *supra*, 27 Cal.App.3d at p. 206.)

(Petition, Ex. F, pp. 3-4.)

However, despite this previous application of *Pellegrino* to the matter at bar, respondent now claims *Simpson's* reliance on *Pellegrino's* holding – that a prosecution cannot be effectively instituted without the approval or concurrence of the prosecution – does not apply to complaints filed under section 959.1. Relying on a court's civil contempt authority, respondent suggests that section 959.1 does not violate the separation of powers because courts have an independent power to bring criminal charges of contempt, for which they do not need the prosecution's approval or concurrence. (Resp. Supp. Ltr. Brf., p. 8, including n. 1; Resp. Supp. Return, pp. 16-18, 31-34, including fn. 4.)

2 In *Salcido*, the trial court granted the district attorney's motion to dismiss involuntary commitment proceedings for drug addiction under Welfare and Institutions Code section 3051, when the district attorney determined that he could not proceed because he could not establish the defendant's addiction beyond a reasonable doubt. The Court of Appeal rejected the defendant's writ petition seeking to compel the trial court to hold a hearing. Citing *Pellegrino*, the Court of Appeal held that because the district attorney had the responsibility for prosecuting the commitment proceedings, under the separation of powers the judiciary could not invade the prerogative of the executive branch by compelling the district attorney to prosecute a proceeding that he did not find meritorious. (*Salcido, supra*, 112 Cal.App.3d at pp. 997-998, 1001-1002.)

Respondent's reliance on civil contempt is misplaced. The Legislature created two separate and distinct classifications of contempt, which serve different interests. One classification is found in the Code of Civil Procedure and it covers both "direct" and "indirect" contempts of court. (*Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1239-1241 (*Mitchell*)). This classification of contempt is "directed primarily to the maintenance of the dignity and authority of the court" and "the protection of the private rights of parties litigant." (*In re Morris* (1924) 194 Cal. 63, 66-67 (*Morris*)). The other classification of contempt are those acts enumerated as crimes and "are to be regarded as *offenses against the peace and dignity of the people of the state of California*." (*Id.* at p. 69, italics added; *Mitchell, supra*, at pp. 1239-1241.) In upholding the ability of the People to separately prosecute a person for the crime of contempt, this Court in *Morris* underscored how these two classifications – and the proceedings for each – are wholly separate from one another because of the important different interests to be served by each classification.

It was the plain intent of the legislature expressed in the cited code sections to give a double aspect to the wrongful acts there enumerated. In one aspect they are to be regarded as offenses against the dignity and authority of the court, remediable in accordance with the rules prescribed in the Code of Civil Procedure. In the other aspect they are to be regarded as *offenses against the peace and dignity of the people of the state of California*, and remediable as such in accordance with the rules prescribed in the Penal Code.

(*Morris, supra*, at p. 69, italics added.)

The two proceedings are wholly independent of each other. One who disobeys the lawful order of a court not only offends against the dignity of the particular tribunal, but also against the public law. The particular court may pass over the contempt and suffer its order to be spurned, but the offense against the public remains. Their authority has been contemned, the administration of public justice assailed, and its power despised. For such an offense the guilty party may be punished by indictment, although the court whose order has been disobeyed may take the indignity in silence. The statute has made such disobedience, when willful in its character, *an offense against the people*, and not left it *dependent upon the action or nonaction of the specific judge or court*. The statute contemplates that both

remedies or either may be pursued.

(*Id.* at p. 71, internal quotes omitted, italics added.)

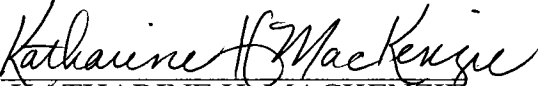
Like section 166, Vehicle Code section 40508 sets forth a misdemeanor *crime* by one who fails to appear. Thus, a wilful violation is against the peace and dignity of the People of the State of California. Section 959.1 merely provides a streamlined procedure for complaints for certain limited crimes to be issued and transmitted in the name of the clerk complainant who has knowledge of those criminal offenses. It does nothing to change the criminal nature of those charges or the prosecutor's role in the proceedings.

Conclusion

For all the foregoing reasons, and those set forth in real party's previous briefing, real party submits that real party's analysis should be followed as it is consistent with this Court's well-established separation of powers jurisprudence.

Sincerely,


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CERTIFICATE OF WORD COUNT

Counsel of record for real party, People of the State of California, hereby certifies that pursuant to the California Rules of Court, rule 8.520(d)(2), this Supplemental Letter Brief contains 2,394 words, excluding the salutation, the signature block, and this certificate. Counsel relies on the word count of the Word 2013 program used to prepare this brief.


Katharine H. MacKenzie

PROOF OF SERVICE BY MAIL
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Steen v. Appellate Division, Case No. S174773
(Ct. of App. No. B217263, App. Div. Sup. Ct. No. BR046020,
Trial Court No. 6200307)

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 200 North Main Street, 500 City Hall East, Los Angeles, California 90012.

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On **April 23, 2014**, I served the following document

Real Party's Supplemental Letter Brief

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I declare under penalty of perjury that the foregoing is true and correct. Executed on **April 23, 2014**, at Los Angeles, California.


TRACIE NGO, Secretary