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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

THE SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO,

Respondent;

SAM KAZZOUH,

Real Parties in Interest.

A134366

(Super. Ct. of the City & County of San Francisco, No. 11004257)

BY THE COURT:<sup>1</sup>

The People of the State of California filed a petition for writ of mandate with a stay request following the trial court's granting of real party's motion to dismiss under Penal Code section 995. We stayed proceedings in the trial court, requested informal opposition and reply, stayed the trial, and gave notice that we may issue a peremptory writ in the first instance. (See Code Civ. Proc., § 1088; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180.) We have received and reviewed the informal opposition and reply, and now grant petitioner's request for a peremptory writ of mandate.

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<sup>1</sup> Before Haerle, Acting P.J., Lambden, J., and Richman, J.

Real party was charged with several counts, including attempted murder. At the conclusion of the preliminary hearing the magistrate held the defendant to answer on some charges, but not the attempted murder. In doing so, the magistrate did not make any factual findings. When the prosecution filed the information following the preliminary hearing, the attempted murder charge was included. Real party brought a motion to dismiss that charge under Penal Code section 995, arguing that the attempted murder charge should be dismissed because there was insufficient evidence of intent to kill. The trial court granted the motion, finding that the magistrate made an implicit finding of fact that there was not intent to kill and that the court was bound by that finding.

Petitioner argues that because the magistrate did not make an explicit finding of fact in declining to hold real party to answer on the attempted murder charge, the trial court was not bound by any findings and, because there was sufficient evidence presented at the preliminary hearing, the People had a right to include the attempted murder charge in the information. We agree.

The case of *People v. Superior Court (Day)* (1985) 174 Cal.App.3d 1008, is instructive. There, a wife shot her husband and was charged with murder. At the preliminary hearing, the wife argued she was acting in self-defense. The magistrate explained that there was sufficient evidence for the issue of self-defense to be decided by the jury, but not enough “to prevent a holding order on the homicide given the level of proof that applies to [a] preliminary hearing.” (*Id.* at p. 1014.) The court then held her to answer on manslaughter, but not murder. (*Ibid.*) The district attorney filed murder charges in the information, but the trial court granted Day’s motion to dismiss under Penal Code section 995. (*Id.* at pp. 1014-1015.)

The Court of Appeal observed that the prosecution is bound by the magistrate’s factual findings, but not legal findings. (*People v. Superior Court (Day)*, *supra*, 174 Cal.App.3d 1008 at p. 1015.) Since there were no explicit factual findings by the magistrate and “nothing in the record of the preliminary hearing from which an ‘implied’ finding of fact may be inferred,” (*Id.* at p. 1017) the *Day* court held that the murder

charge should be reinstated. The court also stated that even if there was an implied finding by the magistrate it “should be afforded no judicial recognition” because determining the basis for a magistrate’s ruling should be reduced to “guesswork.” (*Id.* at p. 1019.)

Here, the magistrate made no explicit factual findings and the trial judge was not bound by any implicit findings, even if there was one. Indeed, because the attempted murder charge was supported by the evidence at the preliminary hearing and the magistrate made no explicit finding to contrary, petitioner had the right to include it in the information. Dismissal of that charge was error.

The only argument made by real party in his opposition is that the petition was not timely. We disagree. This petition is governed by the usual 60-day filing period and the People filed it 51 days after the superior court ruling. Real party attempts to analogize to Penal Code section 999a, which requires a defendant to bring a challenge to a Penal Code section 995 denial within 15 days, but that section applies only to petitions brought by the defendant following the denial of a motion to dismiss. Moreover, even if real party’s equity argument was considered, he points to no prejudice caused by the delay.

Let a peremptory writ of mandate issue commanding respondent to withdraw its order granting real party in interest’s motion to dismiss the attempted murder charge and enter a new and different order denying the motion. The stay previously imposed is dissolved upon filing of the remittitur. (See Cal. Rules of Court, rule 8.490.)