

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CHAD STEPHENS,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
FRANCISCO COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

A136300

(San Francisco County
Super. Ct. No. 218031; Case No.
12006457)

Petitioner Chad Stephens stands accused of felony auto burglary and receiving stolen property; in addition, the information alleges two prior strikes and seven prior prison terms. After a preliminary hearing Stephens was held to answer on May 21, 2012. His arraignment was postponed because his counsel was unavailable on the date initially set by the magistrate.¹ The district attorney's office filed the information on June 25, 2012. On July 3, 2012 the date set for Stephens' arraignment, his counsel requested that the information be dismissed on the ground that the information had not been timely filed. (Pen. Code § 1832, subd.(a)(1).) The prosecutor requested the matter be continued to allow the issue to be decided via formal motion upon submission of points and

¹ The transcript indicates that the court was going to be unavailable in June; petitioner, however, clarifies that he made the request for the delay.

authorities. The court granted the prosecution's request for a continuance. After submission of points and authorities and oral argument on the motion to dismiss, the court found good cause for the tardy filing of the information and denied defendant's motion. Stephens waived formal arraignment on July 17, 2012 and a jury trial was set for September 14, 2012.

On August 17, 2012 Stephens filed a petition for a writ of prohibition in this court, seeking dismissal of the charges against him. On August 23, 2012 we temporarily stayed the trial, requested informal briefing, and gave notice pursuant to *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171 that, if circumstances warranted, we might issue a peremptory writ in the first instance. For the reasons explained below, we now direct the superior court to vacate its order denying the motion to dismiss and to enter a new order granting the motion.

DISCUSSION

I. WRIT RELIEF IS APPROPRIATE IN THIS CASE.

A writ of prohibition is appropriate "to prevent the exercise of an unauthorized power in a matter as to which the subordinate tribunal has jurisdiction." (*City & County of San Francisco v. Superior Court* (1951) 38 Cal.2d 156, 160, superceded on other grounds *Berkeley Police Assn. v City of Berkeley* (1977) 76 Cal.App.3d 931, 940.) Here the petition claims that the trial court is precluded from hearing this case because of the prosecutor's late filing of the information. The Supreme Court has "consistently held that a defendant's preferred remedy for pretrial review of a denial of his right to speedy trial is a petition for mandate or prohibition. (See *People v. Wilson* (1963) 60 Cal.2d 139, 149-150.)" (*People v. Johnson* (1980) 26 Cal.3d 557, 573, fn. 18.) Accordingly, this issue is appropriately raised via a petition for a writ of prohibition.

II. BECAUSE THE INFORMATION WAS NOT TIMELY FILED AND THERE HAS BEEN NO SHOWING OF GOOD CAUSE, THE INFORMATION MUST BE DISMISSED.

Penal Code section 1382 requires the court to dismiss the action in situations where the defendant has been held to answer for a public offense and, absent good cause, the prosecutor fails to file an information within 15 days. (Penal Code § 1382, (subd.)(a)(1).) When a motion to dismiss based on an untimely filing is made before trial, as is the case here, the defendant need not demonstrate that he was prejudiced by the late filing. (*People v. Cory* (1984) 157 Cal.App.3d 1094, 1098; see also *Ciaccio v. Superior Court* (1984) 156 Cal.App.3d 130 [pre-trial dismissal of felony charges ordered by appellate court due to late filing of the information without any showing of prejudice].)

The prosecution failed to file the information in the time frame mandated by Penal Code section 1382. However, the prosecution asserts that defense counsel's unavailability to attend the original arraignment date proposed by the court constitutes good cause under the statute.² We disagree. The record reflects that Stephens' counsel sought and agreed to delay the date of the arraignment. However, the parties did not discuss or reference the statutory deadline for filing of the information.

The legislature set the deadline for filing a criminal information as 15 days after the magistrate commits the defendant following a preliminary hearing. (Penal Code § 739.) The defendant is uninvolved in that process from the time he is held to answer until after the prosecutor files the information. (See *Ciaccio, supra*, 156 Cal.App.3d at p. 133.) Thus, as the court in *Ciaccio* held, counsel's unavailability for the original intended arraignment date had no legal effect on the separate and distinct issue of the deadline for filing the information. *Ibid.* Moreover, while a defendant may waive his right to a timely filed information—either by doing so explicitly or by waiting an

² Other than the fact that the arraignment necessarily takes place after the filing of the accusatory pleading, there is no statutory deadline determining when the arraignment must take place. (See Penal Code §§ 976 & 977, subd. (b).)

inordinately long time to challenge the late filing (see *People v. Murray* (1967) 247 Cal.App.2d 730; *People v. McGhee* (1987) 193 Cal.App.3d 1333), no such waiver occurred here.

Simply put, the fact that Stephens is responsible for a later arraignment does not create either a stipulation to the late filing of the information or an implied waiver of his right to a timely filed information. Although we understand how, in the real world, a busy prosecutor might be lulled into filing an information later than he otherwise would have when an arraignment is postponed, the law does not join these two events (except, of course as noted, that the filing of the information must precede the arraignment). The deadline for filing the information is tied to the date the magistrate issues the holding order. Once the holding order is filed, the filing of the information is accomplished solely by the prosecutor and court clerk. Here the holding order was issued on May 21, 2012; the information was filed June 25, 2012, there is no good cause for the late filing of the information, and there was no waiver by the petitioner. Accordingly, the information must be dismissed.

DISPOSITION

The *Palma* procedure is appropriate where “petitioner’s entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue” (see *Ng v. Superior Court* (1992) 4 Cal.4th 29, 35 & *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1236-1237 & 1240-1241.)

The superior court is directed to vacate its July 17, 2012 order denying Stephens’ motion to dismiss pursuant to Penal Code section 1382, subd. (a)(1) and to enter a new and different order dismissing the action against petitioner. Our August 23, 2012 stay is dissolved.

Jenkins, J.

We concur:

McGuinness, P. J.

Siggins, J.