

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 TWO

DIANE E. MATTHEWS,

Petitioner,

v.

THE SUPERIOR COURT OF LAKE
COUNTY,

Respondent;

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Real Party in Interest.

A138436

(Lake County
Superior Court No. CR-929952)

BY THE COURT:¹

Petitioner filed a petition for writ of mandate with a stay request following the trial court's denial of her motion to dismiss under Penal Code sections 656 and 793. We stayed proceedings in the trial court, requested informal opposition and reply, 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 also asked the parties to address certain additional questions. We have received and reviewed the informal opposition, reply, and answers to our additional questions and now partially grant petitioner's request for a peremptory writ of mandate.

¹ Before Kline, P.J., Lambden, J., and Richman, J.

Petitioner is charged in Lake County Superior Court with possession of vicodin with intent to sell and offer to sell vicodin. In federal court she was charged with possession with intent to sell arising from the same incident, but the charges were dismissed after she completed drug diversion. Based on the dismissal in federal court, petitioner brought a motion to dismiss the state charges, which was denied. She renews that claim here.

California Penal Code sections 656 and 793 provides a defense where the charged event resulted in a conviction or acquittal in another court. Specifically, Penal Code section 793 provides that “[w]henver on the trial of an accused person it appears that upon a criminal prosecution under the laws of the United States, or of another state or territory of the United States based upon the act or omission in respect to which he or she is on trial, he or she has been acquitted or convicted, it is a sufficient defense.” Thus, the questions here are whether the two prosecutions are based on the same “act” and whether the drug diversion resulted in a petitioner being “acquitted or convicted.”

The answer to the first question, whether the two prosecutions are based on the same act, is mixed. The law on whether the state and federal prosecution is based on the same act focuses on whether the state prosecution requires any additional elements not necessary in the federal. (*People v. Belcher* (1974) 11 Cal.3d 91, 99-101.) Thus, Penal Code sections 656 and 793 do not bar a state prosecution for burglary (entering the bank with intent to rob) following a federal prosecution for bank robbery, as the state charges has additional elements. (*People v. Candelaria* (1956) 139 Cal.App.2d 432.) Here, petitioner faces two state charges, one identical to the federal (possession with intent to sell) and the second with different elements (offer to sell). Offering to sell drugs requires more than mere possession (and indeed does not necessarily involve possession); proof of it necessarily includes an act distinct from possession, the act of offering to sell the drugs. Under *Belcher* and subsequent cases, that distinction is sufficient to take this case out of the ambit of Penal Code sections 656 and 793. But, those sections do provide a defense to charge of possession with intent to sell, as it is identical to the federal charge petitioner faced.

The second question, whether petitioner was convicted or acquitted in federal court, was answered by the answers to our additional questions. Both parties pointed to the minutes from the federal prosecution, which state that the resolution in that case was “dismissed/acquitted” pursuant to a plea bargain. These plain words control, leaving no doubt that petitioner was acquitted, thus satisfying the second requirement under sections 656 and 793.

Let a peremptory writ of mandate issue commanding respondent to withdraw its order denying petitioner’s motion to dismiss and enter a new and different order dismissing the possession with intent to sell charge. The stay previously imposed is dissolved upon filing of the remittitur. (See rule 8.490 of the California Rules of Court.)