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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CARA WILLIAMS COVERT,

Defendant and Appellant.

E054504

(Super.Ct.No. INF1101081)

OPINION

APPEAL from the Superior Court of Riverside County. William S. Lebov, Judge. (Retired judge of the Yolo Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and James D. Dutton and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant was charged four separate times with various charges for her involvement in the murder of a man by her boyfriend, and her first three cases were dismissed. Defendant was finally charged with being an accessory after the fact pursuant to Penal Code section 32.¹ She brought a motion to dismiss the complaint on the grounds that the charges of violating section 32 had already twice been dismissed pursuant to section 1387. Her motion was denied. She pleaded guilty and was sentenced to three years in state prison.

Defendant claims on appeal that the trial court erred by refusing to dismiss the charges under section 1387, subdivision (a).

I

PROCEDURAL BACKGROUND

Defendant was charged in a felony complaint with a violation of section 32, being an accessory after the fact, based on her actions of harboring, concealing, or aiding Dale Christopher Farquhar in the murder of Larry Roger Fisk. Her motion to dismiss the complaint pursuant to section 1387, subdivision (a) was denied by the trial court.

Defendant entered a guilty plea to the violation of section 32. She was sentenced to the upper term of three years. However, she was immediately released and ordered to report to the parole office because she had 1,104 days of custody credits.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Defendant filed a notice of appeal on September 6, 2011, and her request for a certificate of probable cause was granted.

II

FACTUAL BACKGROUND²

At 2:00 p.m., on November 14, 2009, Fisk was found dead at an apartment complex located on Ashurst Court in Palm Springs. He had been shot in the back of the head. Around the same time, a person found a duffle bag containing items belonging to Fisk in the nearby desert. Defendant's name and cellular telephone number were in the bag. The police located defendant and her boyfriend, Farquhar, in another apartment at the Ashurst Court complex. Farquhar claimed that on November 13 he had smoked marijuana and fallen asleep. He woke up when he heard someone say, "[D]on't do that." He discovered Fisk on top of defendant. Farquhar claimed he did not recall what had happened next.

Defendant told police she had met Fisk at a bar and that one afternoon he had followed her to her apartment. He tried to kiss her outside the apartment. Defendant was frightened and told Fisk not to kiss her. Farquhar emerged from their apartment and shot Fisk in the back of the head. Defendant claimed she then blacked out. She later told the police she saw Farquhar grab a sheet from their apartment and heard him drag Fisk to

² We draw the facts from the probation report as relied upon by both parties.

another apartment. Covert drove Farquhar to another location, where they disposed of Fisk's duffle bag.

III

SECTION 1385

Defendant contends that the magistrate erred in denying her motion to dismiss the case for violation of the two-dismissal rule of section 1387.

A. *Additional Factual Background*

According to the judicially noticed documents,³ defendant was charged in Riverside County case No. INF067359 with a felony violation of section 32. Defendant was arraigned on the charges on November 19, 2009. The preliminary hearing was conducted, and defendant was held to answer. On May 26, 2010, the People brought a motion to dismiss pursuant to section 1385, and the case was dismissed. The parties agree that this was the first dismissal of the section 32 charge.

On May 21, 2010, the People filed another complaint against defendant in case No. INF10001033, again for a violation of section 32, and a warrant was issued for defendant's arrest. However, prior to defendant's arraignment, the People amended the complaint to allege a violation of section 187, subdivision (a), and a principal-armed allegation (§ 12022, subd. (a)(1)). On June 10, 2010, defendant was arraigned on the

³ On May 30, 2012, we granted defendant's request to take judicial notice of the docket and minute orders from Riverside County case Nos. INF067359, INF10001033, and INF10002505.

amended complaint and taken into custody. On November 1, 2010, the magistrate “discharged” the violation of section 187. However, on the court’s own motion, it orally amended the complaint as a violation of section 32. The court found sufficient evidence to hold defendant to answer on the section 32 violation.⁴

The magistrate ordered that defendant be arraigned on the information on November 15, 2010. Defendant was remanded to custody. However, at the time of the information arraignment, the People had not filed an information on the section 32 charge. There was an oral motion by the People to file a new felony complaint, which was granted. The details of this hearing have not been provided in the record. However, the minute order states that a section 32 charge was dismissed pursuant to section 1385.

On that same day, November 15, 2010, the People filed a complaint in case No. INF10002505 charging defendant with violating section 187, subdivision (a), and section 12022, subdivision (a)(1). Defendant filed a motion to dismiss pursuant to section 1387, but the motion was denied.

The preliminary hearing was held on May 11, 2011. The magistrate concluded that there was insufficient evidence of a violation of section 187 and amended the complaint to a violation of section 32. Defendant was held to answer on the section 32

⁴ The People provided in their opposition to the section 1387 motion to dismiss that defendant stated to the magistrate that she was willing to plead guilty to a violation of section 32. Thereafter the magistrate stated, “I’ll hold her to answer as an accessory after the fact, violation of 32 PC of the Penal Code.” Defendant does not dispute these facts.

violation, and she remained in custody. An information was filed on May 24, 2011, but the People charged her with a violation of section 187, subdivision (a), and she was arraigned on the information. Defendant brought a motion to dismiss pursuant to section 1387. The motion was granted. The case was dismissed pursuant to “section 871” on June 10, 2011. The complaint in this case charging a violation of section 32 was then filed on the same day.

Defendant filed her motion to dismiss in this case. The People filed their opposition. The People argued there had not been two prior dismissals of the section 32 charge. The charge of murder was not the “same offense” as an accessory after the fact, as that term is used in section 1387. Further, the People argued that the magistrate misused its authority under section 871 by ordering that defendant be held to answer under section 32, when the People did not move to amend the complaint.

On June 23, 2011, the matter was heard by the trial court. The trial court stated that in case No. INF067359, a complaint was filed charging defendant with violating section 32 and that it was dismissed. The parties agreed this was the first dismissal of the section 32 violation.

The trial court then considered that a new complaint was filed in case No. INF10001033. It initially charged a violation of section 32 but was amended to charge a violation of section 187 with a section 12022, subdivision (a)(1) allegation. The parties agreed this was accurate.

Defendant argued that in case No. INF10001033, the magistrate found insufficient evidence of a section 187 charge, and under its authority pursuant to sections 871⁵ and 872,⁶ ordered that she be held to answer under section 32. The trial court found the People did not request such an amended section 32 charge.

Defendant argued that the magistrate did not dismiss under section 871 but rather, under its authority pursuant to section 872, found a public offense had been committed and held her on that charge. Defendant referred to the preliminary hearing on November 1, 2010, that the court made the finding that there had been a violation of section 32.

The People disagreed and relied upon *People v. Traylor* (2009) 46 Cal.4th 1205 (*Traylor*). They argued that the dismissal of a violation of section 187 in case No. INF10001033 was not a dismissal of section 32. Defendant attempted to distinguish *Traylor* by indicating in that case, the issue was whether there could be filing of a lesser offense when the greater offense has been dismissed.

Defendant also argued there was a third filing in case No. 10002505, in which defendant was not held to answer on the section 187 charge, and the court amended the complaint to hold her on the section 32 charge. The People did not file an information within the required 15 days, and it was dismissed. Defendant argued that this was

⁵ Section 871 provides for the dismissal of a complaint if the evidence does not support the charge.

⁶ Section 872 is the counterpart to section 871 in that it gives a magistrate the authority to hold the defendant to answer on a complaint.

harassment and fell within section 1387. The People were harassing her to get the murder charge.

The People responded that defendant was twice charged with murder because they felt that the evidence supported the charge. The People stated, “[T]here’s no legal authority . . . that says if a defendant suggests to a magistrate to hold to a lesser offense, and the magistrate then does that, then that counts as a dismissal of the lesser offense.”

The trial court ruled as follows:

“I’m going to make the ruling, and I’m going to find that regarding case No. INF INF10001033, there’s a holding order on the PC 32. It’s not at the request of the District Attorney, and the complaint had not been amended to add a PC 32 before the holding order.

“In INF 10002505, again, a preliminary hearing was held, was on 187. Again, the PC 32 indication from the court, not this court but a different court, as to a holding order was not at the request of the District Attorney. I find that there was only one dismissal, and that prosecution can go forward.

“Going back to INF10001033, . . . it was not a dismissal. It was an elimination or deletion of a count at the discretion of the District Attorney. Did not involve the judicial decision to dismiss on the motion of the District Attorney because of some failure to bring the case in a timely hearing or for lack of evidence presented at preliminary hearing. In this court’s judgment, there was only one dismissal, and that the PC 32 filing that’s present before the court is an appropriate filing. So motion to dismiss is denied.”

B. *Analysis*

Under section 1387, subdivision (a), “[m]isdemeanor prosecutions are subject to a one-dismissal rule; one previous dismissal of a charge for the same offense will bar a new misdemeanor charge. Felony prosecutions, in contrast, are subject to a two-dismissal rule; two previous dismissals of charges for the same offense will bar a new felony charge.” (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1019.) “Section 1387 implements a series of related public policies. It curtails prosecutorial harassment by placing limits on the number of times charges may be refiled. [Citations.] The statute also reduces the possibility that prosecutors might use the power to dismiss and refile to forum shop. [Citations.] Finally, the statute prevents the evasion of speedy trial rights through the repeated dismissal and refiling of the same charges. [Citations.]” (*Id.* at p. 1018.)

In *Traylor, supra*, 46 Cal.4th 1205, the People filed a complaint against the defendant for a felony violation of vehicular manslaughter with gross negligence for hitting a nine-year-old boy with his vehicle. (*Id.* at pp. 1209-1210.) At the preliminary hearing, the magistrate determined that there was not enough evidence for the charge but found there would be enough evidence to charge defendant with a misdemeanor violation of negligent vehicular manslaughter. The People were ordered by the magistrate to file a misdemeanor complaint, but they failed to do so. As such, the case was dismissed pursuant to section 871. (*Traylor*, at pp. 1210-1211.) A second complaint was filed charging the misdemeanor, and the magistrate dismissed it pursuant to section 1387,

subdivision (a). The Court of Appeal upheld the dismissal, finding that “the prior dismissal of a felony complaint bars further prosecution for the same conduct as a misdemeanor.” (*Traylor*, at p. 1211.)

The California Supreme Court granted review. It approved of language in two of its prior cases that when two crimes have the same elements, they are the “same offense” for purposes of section 1387. (*Traylor, supra*, 46 Cal.4th at p. 1212.) It noted that “[s]ection 1387 limits, in most instances, the number of times prosecution ‘for the same offense’ may occur after prior complaints have been dismissed. Dismissals under section 871 are among those that count against later prosecutions. Thus under section 1387(a), as applicable to the facts of this case, ‘[a]n order terminating an action pursuant to . . . Section . . . 871 . . . is a bar to any other prosecution for the same offense if it is a felony or . . . a misdemeanor charged together with a felony and the action has been previously terminated . . . or if it is a misdemeanor not charged together with a felony’” (*Id.* at pp. 1211-1212.)

The court concluded section 1387 did not apply to bar the charging of the lesser included offense in that case after the magistrate determined that there was insufficient evidence of the charged felony. It held, “[W]hen the People initially file a felony complaint, which is then dismissed by a magistrate on grounds there is sufficient evidence only to support a lesser included offense, the subsequent filing of a second complaint containing such a reduced misdemeanor charge, comprising fewer than all the

elements of the previously dismissed offense, is not barred by section 1387(a).” (*Traylor, supra*, 46 Cal.4th at p. 1219, fn. omitted.)

The importance of *Traylor* here is that it strictly construed section 1387’s use of the language “same offense.” It rejected that “section 1387(a) should apply to all charges arising from the *same conduct or behavior* of the defendant,” finding that the statutory language “belies such a necessarily broad construction.” (*Taylor, supra*, 46 Cal.4th at p. 1213, fn. 6.)

Clearly, under *Traylor* the People did not charge the same offense (a violation of section 32) more than once. The crime of murder and accessory after the fact are separate felony crimes. The People filed the first complaint as a section 32 charge, and it was dismissed. In the next two cases, defendant was charged with violations of section 187, a separate and distinct charge from section 32. The magistrate in both those cases found insufficient evidence of the section 187 charges. As will be discussed, *post*, at that point, under section 871, the magistrate should have dismissed the charges and did not have the authority to force the People to file an information under section 32 without the People’s consent. Hence, the filing of the complaint in this case charging defendant with a violation of section 32 constituted the second filing of the “same offense,” and the magistrate did not err by refusing to grant defendant’s section 1387 motion to dismiss.

As for the filing of the complaint in case No. INF10001033, defendant argues, without citation to proper authority, that since the People originally filed the complaint against her as a section 32 charge, that the charge does not “disappear” and is counted as

a dismissal when they amended the complaint to charge a violation of section 187.⁷

Defendant also refers to *Ramos v. Superior Court* (1982) 32 Cal.3d 26 (*Ramos*) for the proposition that the *filing* of the complaint in case No. INF10001033, charging defendant with a violation of section 32 constituted an action, and the People's amendment of the complaint to eliminate the charge, constituted a *dismissal* of the section 32 charge.

Ramos involved two prior dismissals of a special circumstance allegation by two separate magistrate judges. (*Ramos, supra*, 32 Cal.3d at p. 29.) The prosecution, after the second dismissal, filed an information in the superior court alleging the special circumstance allegation. (*Ibid.*) The California Supreme Court concluded that there two dismissals pursuant to section 1387. The People tried to argue that filing the information under its authority pursuant to section 739 (which allows the People to file charges in an information based on the evidence shown at the preliminary hearing but not necessarily named in the commitment order) does not constitute another prosecution under section 1387. (*Ramos*, at pp. 34-35; § 739.)

The California Supreme Court rejected that the claim. It concluded, “[T]he district attorney’s reinstatement of the special circumstance allegation pursuant to section 739

⁷ At oral argument, defendant claimed that she had cited authority for this proposition: *Marler v. Municipal Court* (1980) 110 Cal.App.3d 155, 160-161. The cited portion of *Marler* stands for the proposition that a prosecution is “sufficiently comprehensive so as to include every step in an action from its commencement to its final determination. [Citations.]” (*Id.* at p. 161.) The issue in section 1387 is *dismissal* of a previously charged felony. The fact that *Marler* states that a prosecution begins with the complaint being filed does not support defendant’s claim that an amended complaint dismisses the originally filed charge within the meaning of section 1387.

was an ‘other prosecution for the same offense’ which was barred under section 1387 because the allegation had already been dismissed twice under section 871.” (*Ramos, supra*, 32 Cal.3d at p. 36.)

Defendant asks us to expand this reasoning to the situation in this case, where the People file a complaint alleging the same allegation that had already been dismissed once, here the violation of section 32, and that the amendment of the complaint removing the charge constitutes a dismissal of the original charge of section 32.

Ramos involved a significantly different factual scenario. We reject that the reasoning in *Ramos* is applicable here. At the time the People filed the complaint in case No. INF10001033, an action pursuant to section 32 was not barred under section 1387 and was therefore not subject to dismissal under that section, unlike the situation in *Ramos*. Further, in *Ramos*, the prosecution sought to have the filing of the information not considered a “prosecution” under the meaning of section 1387 to avoid dismissal of the action. Essentially, the prosecution argued that section 739 was exempt from section 1387. (*Ramos, supra*, 32 Cal.3d at pp. 34-35.) No such circumstances exist in this case.

Moreover, as set forth, *ante*, section 1387 forbids the refiling of a charge when it has already been twice *dismissed*. The action of the People filing a complaint and then amending the complaint to eliminate that charge (prior to the defendant being arraigned on the charge and prior to the defendant seeking to dismiss the charge) simply cannot be considered a dismissal within the meaning of section 1387, and *Ramos* does not so hold.

Defendant also appears to contend that the magistrate had the authority to amend the complaint to hold her to answer on the section 32 violation, and the People’s failure to file an information in case No. INF10001033, and the dismissal in case No. 10002505, constituted dismissals of the section 32 charge. Defendant has provided no authority on appeal to support her claim that the magistrate had the power to amend the complaint, rather than dismiss it, and then force the People to file an information on this new crime.

Section 871 provides in pertinent part: “If, after hearing the proofs, it appears either that no public offense has been committed or that there is not sufficient cause to believe the defendant guilty of a public offense, the magistrate shall order the complaint dismissed and the defendant to be discharged”⁸

In *People v. Superior Court (Feinstein)* (1994) 29 Cal.App.4th 323, a magistrate reduced a straight felony (not a wobbler offense) to a similar misdemeanor violation, which was a different crime. The prosecution petitioned the appellate court for a writ of mandate, allowing it to challenge the magistrate’s authority to change a straight felony to a different misdemeanor. (*Id.* at pp. 327-328.) The Court of Appeal held that the magistrate did not have the authority to reduce the felony to a different misdemeanor offense on a straight felony. (*Id.* at p. 330.) It held, as a consequence, that “[i]f the magistrate concludes the evidence is insufficient to hold the defendant for trial in the

⁸ In the lower court defendant also referred to section 872 but does not rely upon that section on appeal.

superior court as charged, he or she must dismiss the complaint pursuant to section 871. [Citation.]” (*Id.* at p. 332, fn. omitted.)

In *People v. Williams* (2005) 35 Cal.4th 817, the California Supreme Court interpreted *Feinstein*'s holding as follows: “. . . *Feinstein* stands only for the rule that a magistrate's order purporting to 'reduce' a straight felony charge to a misdemeanor is not authorized by section 17(b)(5)^[9] and, thus, constitutes a dismissal of the felony charge within the meaning of section 871.” (*Id.* at p. 829.) In *Traylor*, the court, citing to *Feinstein*, noted that there was a serious question whether the magistrate could hold the defendant and require the prosecution to file a complaint on the lesser misdemeanor charge before dismissing the felony complaint. It noted, “After the magistrate determined that probable cause for felony charges was lacking, the People were entitled to evaluate the evidence for themselves to determine whether they should exercise their statutory right to file a *second felony* complaint.” (*Traylor, supra*, 46 Cal.4th at p. 1215, fn. 8.)

Here, the magistrate lacked the authority on his own motion to force the People to file a section 32 charge against defendant once he concluded that the evidence did not support a violation of section 187. Once he found that the murder charge was not supported by the evidence, he should have dismissed the action. Hence, any action by the People after the dismissal -- failing to file an information in case No. INF10001033 or

⁹ Section 17, subdivision (b)(5) grants the magistrate the authority to reduce a felony wobbler offense to a misdemeanor offense at the time of the preliminary hearing.

filing an information charging him with section 187 in case No. 10002505 and having it dismissed -- did not constitute a dismissal of a section 32 charge.¹⁰ The People should not be penalized for the actions of the magistrate, as the proper course of action was dismissal of the charge of violating section 187. Even though the magistrate found the evidence supported a violation of section 32, the People were not bound by that determination, and it should not be counted as a dismissal within the meaning of section 1387. It must be remembered that the charging function in a criminal case is within the sole province of the executive branch, which includes the state's district attorneys. (*People v. Mikhail* (1993) 13 Cal.App.4th 846, 854-855.)

Defendant additionally contends that if the People were displeased with the magistrate's decision, they should have filed a request in the superior court to reinstate the complaint on the murder charge pursuant to section 871.5.¹¹ While we may agree with this proposition, it did not foreclose the People from refileing the section 187 charge or impact the determination under section 1387.

Based on the foregoing, the People could file a section 32 charge against defendant in this case. Therefore, the trial court properly denied defendant's section 1387 motion.

¹⁰ We note that defendant has not provided the reporter's transcripts for the proceedings in the three prior cases. As such, there is no evidence that at any time the People agreed with the magistrate's decision in case Nos. 10001033 and 10002505 to file a section 32 charge.

¹¹ Section 871.5, subdivision (a) provides for the People to seek review of the magistrate's decision under section 871 in the superior court.

IV

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

HOLLENHORST
Acting P. J.

McKINSTER
J.