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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

DIONE LAMAR McKINNON,

Petitioner,

v.

THE SUPERIOR COURT OF  
RIVERSIDE COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

E055340

(Super.Ct.No. RIF1105474)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of prohibition. Roger A. Luebs,  
Judge. Petition granted.

Stuart V. Sachs for Petitioner.

No appearance for Respondent.

Paul Zellerbach, District Attorney, and Alan D. Tate, Deputy District Attorney, for  
Real Party in Interest.

In 2008, petitioner Dione Lamar McKinnon was convicted of six charges; various enhancements were also found true. The substantive charges related to two separate incidents: one on June 25, 2004 and the other on July 14 of the same year. The first charges were resisting/obstructing an executive officer and participation in a criminal street gang (Pen. Code, §§ 69, 186.22, subd. (a)), while the second involved two felony drug offenses, felony gun possession, and gang participation (Health & Saf. Code, §§ 11351.5, 11352, subd. (a); Pen. Code, §§ 12021, subd. (a)(1), 186.22, subd. (a)). With various enhancements, the total term was 68 years to life.

On appeal (see *People v. McKinnon* (April 1, 2011, G041019) [nonpub. opn.]),<sup>1</sup> petitioner argued that the search of his vehicle in which cocaine base was found was illegal, and that his motion to suppress (Pen. Code, § 1538.5) should have been granted. The search was made incident to the arrest of petitioner pursuant to a warrant relating to the June incident. At trial, the People had defended the search as valid under *New York v. Belton* (1981) 453 U.S. 454 (*Belton*). However, by the time the appeal was heard, the United States Supreme Court had decided *Arizona v. Gant* (2009) 556 U.S. 332, 335, which limited *Belton* by holding that a search of a vehicle incident to the driver's arrest could not extend beyond any area accessible to the arrestee. In other words, if the arrestee has been secured away from the vehicle, no warrantless search may now normally be made.

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<sup>1</sup> Although the case arose from Riverside County in this division, the appeal was handled by Division Three of this court.

As petitioner's situation fell within the new rule of *Arizona v. Gant, supra*, 556 U.S. 332 because he had already been arrested and placed in the back of a police car when his vehicle was searched, the result of his appeal was the reversal of his convictions on the charges stemming from the July incident. Furthermore, the court also found that petitioner's conviction on the June charges was tainted because "the jury was exposed to the gun and drug evidence involved in the July incident." (*People v. McKinnon* (G041019).) The disposition was "[t]he judgment is reversed and the matter is remanded for a new trial on counts one and two [the June charges]." (*Ibid.*) The remittitur issued on June 2, 2011.

On June 16, 2011, the United States Supreme Court revisited the issue and refused to apply *Arizona v. Gant, supra*, 556 U.S. 332 retroactively. Instead, noting that the police in the defendant's case had acted in "reasonable reliance on binding appellate precedent" (i.e., *Belton, supra*, 453 U.S. 454), the court held that the evidence so seized was "not subject to the exclusionary rule." (*Davis v. United States* (2011) \_\_\_ U.S. \_\_\_ [131 S.Ct. 2419, 2429].) In other words, the seizure of evidence in petitioner's case "should not" have resulted in suppression.

However, by that time, the appellate decision was final.

Undaunted or perhaps feeling understandably snakebit, the People returned to the trial court with a motion for "permission" to be allowed to proceed with counts 3 through 6

of the original information (the July counts).<sup>2</sup> The trial court denied the motion, feeling that it was “bound by the order of the court . . . . They’ve ordered me to give him a new trial on Counts 1 and 2. . . . [¶] . . . I don’t see how I can just say, well, I’m going to go ahead and do something else . . . .”

Still undaunted, a few days later the People moved to dismiss all charges “in the interest of justice.” (Pen. Code, § 1385.) Over petitioner’s objection, the motion was granted, and the People filed a *new complaint* the same day. This complaint included charges corresponding to the previous counts 3 through 6.

Petitioner then filed a plea of “once in jeopardy”<sup>3</sup> and moved to dismiss those counts based on the argument that the appellate court’s disposition “clearly contemplated an end to the case.”<sup>4</sup>

The People responded by arguing that the general rule governing refiling of charges after a motion to suppress is granted should apply. (See Pen. Code, § 1538.5, subd. (j).) They also asserted that the reversal “extinguished jeopardy” and that *Davis* supported the reinstatement of the charges.

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<sup>2</sup> The fact that the People sought “permission” to file the July counts suggests an awareness that they did not have a clear and unquestioned right to do so.

<sup>3</sup> See the Fifth Amendment to the United States Constitution, and article I, section 3, clause 5 of the California Constitution.

<sup>4</sup> The argument was also framed in terms of “collateral estoppel” and “law of the case,” but in light of our resolution of the double jeopardy question we need not address these possibilities.

This time the trial court agreed with the People and refused to dismiss the July charges.

This petition followed. After this court issued a summary denial, petitioner sought review from the Supreme Court, which transferred the matter back to this court with directions to issue an order to show cause. We have complied, have received full briefing, and now conclude that petitioner is entitled to relief.

### DISCUSSION

As we noted *ante* (see fn. 3), the problem before us was argued both below and in the briefing here on the alternative, but related, theories of double jeopardy, collateral estoppel, and “law of the case.” However, we think the case must be resolved on the simplest issue of double jeopardy, although its application here is not entirely simple.

Penal Code section 1260 authorizes an appellate court to “reverse, affirm, or modify” a judgment and also to “remand the cause to the trial court for such further proceedings as may be just under the circumstances.” However, even in the absence of an order for new trial, the “default” is simply to restore proceedings as if no trial had been had; Penal Code section 1262 sets out the general rule that “[i]f a judgment against the defendant is reversed, such reversal shall be deemed an order for a new trial, unless the appellate court shall otherwise direct.”

As the People correctly argue, the reversal of a criminal judgment normally results in a retrial and double jeopardy is not implicated. (See *United States v. DiFrancesco* (1980) 449 U.S. 117, 131; *People v. Wilson* (1996) 43 Cal.App.4th 839, 848.) We have no quarrel with this general proposition or the authorities cited by the People, and we

agree that if the first appellate proceedings had resulted merely in an order reversing all the convictions, the People would have been free to prosecute both the June and July charges anew. However, where the reversal is based on insufficiency of the evidence, retrial *is* prohibited by the double jeopardy clause because the People cannot be given a second chance to prove their case. (*Burks v. United States* (1978) 437 U.S. 1, 18; *Sanders v. Superior Court* (1999) 76 Cal.App.4th 609, 616.) In such a case, the proper remedy is to dismiss the charge and/or discharge the defendant. (See *People v. Trevino* (1985) 39 Cal.3d 667, 697-699, overruled on other grounds in *People v. Johnson* (1989) 47 Cal.3d 1194, 1221.)

In this case, the appellate court expressly remanded *only* for retrial on the June counts. Although we understand that Penal Code section 1262 effectively turns a *silent* reversal into a de facto order for new trial on all charges affected by the reversal, in this case, the conclusion is inescapable that the appellate court intended that the July charges *not* be retried. Under the principle *inclusio unius est exclusio alterius*, the explicit direction that the June charges be the subject of a new trial must be taken as an implicit direction that the July charges could not further be prosecuted.

The latter conclusion stems from the necessary reasoning behind the appellate court's decision not to order retrial of the July charges. As we must assume that the appellate court was familiar with the rules on retrial and Penal Code section 1262 discussed *ante*, the court must have reasoned that once the "illegally" obtained evidence was taken out of the equation, the result was "insufficient evidence" to support the

conviction. Thus, the appellate court's disposition must have reflected the belief that retrial was impossible because the conviction was based on insufficient evidence.

Unfortunately, this belief was incorrect. Double jeopardy does *not* prohibit a retrial when a conviction is reversed because evidence should have been suppressed as illegally obtained. The reason is that in such a case, the prosecuting agency did not fail to prove its case so that the defendant should have been acquitted; rather, the reversal is based on judicial error and not the fault of the prosecutor or the inadequacy of the proof. (*Lockhart v. Nelson* (1988) 488 U.S. 33, 34, 40; see also *People v. Llamas* (1997) 51 Cal.App.4th 1729, 1741.)

Nevertheless, the decision of the appellate court in the appeal following the first trial<sup>5</sup> is final. The People did not object to the disposition or seek to modify it through a petition for rehearing.<sup>6</sup> As we have explained *ante*, the disposition necessarily reflected the appellate court's understanding that the July charges could not be retried under the double jeopardy clause. As it correctly recognized when it dealt with the People's request to be allowed to reallege the July charges, the trial court was obliged to follow the appellate court's direction that *only* the June charges be set for new trial.

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<sup>5</sup> We realize that there has not yet been a second trial.

<sup>6</sup> Of course, we also realize that this was probably due to the fact that the People, at the time, accepted the apparent reality that the July charges were essentially dead, not being blessed with the psychic ability to predict that the charges would rise like Lazarus from the grave when the United States Supreme Court issued its decision in *Arizona v. Gant*, *supra*, 556 U.S. 332 a few weeks later.

It is immaterial that the People asked for, and obtained, a dismissal of the July charges (along with the June charges) under Penal Code section 1385 “in the interest of justice.” Petitioner objected to this dismissal, which should have included an express discharge from any future criminal liability with respect to the July charges. The critical fact is not that the charges were dismissed, but that they were dismissed *after jeopardy had attached* and had not been “cancelled” by a general reversal on appeal. The refiling rules (e.g., Pen. Code, § 1387), which permit renewed prosecution as a matter of state procedural law, have no application when the constitutional prohibitions against double jeopardy govern the case. The People’s attempt to invoke Penal Code section 1385 could not erase the attachment of jeopardy where the appellate court’s disposition had left the legal effect of jeopardy intact.

Petitioner, in addition to arguing the matter as one of collateral estoppel and law of the case, argues that *Davis v. United States, supra*, 131 S.Ct. 2419, cannot be applied to cases that are final. While it is not necessary to discuss this in any detail, we may comment that there is not a great deal of difference between the People’s attempt to use *Davis* to revive the July charges and the situation in which petitioner would have found himself if *Arizona v. Gant, supra*, 556 U.S. 332, had not been decided until after his appeal had reached a final disposition—that is, out of luck. However, we acknowledge that if petitioner’s conviction had been reversed on some other ground—a ground clearly permitting retrial and where retrial was *not* prohibited by the appellate court—the People would have been able to use *Arizona v. Gant* to argue for admission of the evidence in the

retrial. But that is not this case. In this case, jeopardy was not erased by the reversal as ordered by the appellate court.

In summary, the arguably unfortunate result is that further prosecution of the July charges is barred by the appellate order and the implicit holding that retrial was prohibited because the conviction failed on the basis of insufficient evidence. Defendant's plea of once in jeopardy must prevail as a matter of law, and the motion to dismiss the July charges should have been granted.

DISPOSITION

The petition for writ of prohibition is granted. Let a peremptory writ of prohibition issue, prohibiting the Superior Court of Riverside County to take any further action with respect to counts 3 through 6 other than to dismiss them.

Petitioner is directed to prepare and have the peremptory writ of prohibition issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

Upon the finality of this opinion, the previously ordered stay by this court shall be lifted.

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HOLLENHORST  
J.

We concur:

RAMIREZ  
P. J.

KING  
J.