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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DAVIS MOORE,

Petitioner,

v.

THE SUPERIOR COURT OF
RIVERSIDE COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

E056211

(Super.Ct.No. INF066216)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. B. J. Bjork, Judge.
(Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art.
VI, § 6 of the Cal. Const.) Petition granted.

John Patrick Dolan for Petitioner.

No appearance for Respondent.

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

DISCUSSION

In this matter, we have reviewed the petition, as well as both the response and the supplemental letter brief filed by real party in interest. We have determined that resolution of the matter involves the application of settled principles of law, and that issuance of a peremptory writ in the first instance is therefore appropriate. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

Although petitioner raised numerous issues in his petition, we need rely only on one to resolve this case. Penal Code section 1387¹ sets out a general rule that if a felony charge has been twice dismissed, it may not be refiled by the People. Section 1387 specifically includes terminations pursuant to both sections 995 and 871, which were the basis respectively of the first and second terminations in this case. The “third filing” exception for excusable neglect provided for in section 1387.1 does not apply because both dismissals were based simply on a judicial evaluation of the evidence. None of the People’s struggles to prepare an information in the current proceeding *after* the case had been terminated were legally relevant, no matter how excusable any neglect may have been.

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

As the People virtually concede, there is controlling authority to the effect that when a second dismissal is rendered by a magistrate after the preliminary hearing, the People's remedy is to file a motion in the superior court to reinstate the complaint or charge pursuant to section 871.5. (See *People v. Toney* (2004) 32 Cal.4th 228; *Ramos v. Superior Court* (1982) 32 Cal.3d 26.) The People may not simply attempt to include the charge in the information under the authority of section 739, as that authority no longer exists following the second termination.

The result sought by petitioner is thus compelled by the statute. We also note that although the petition purports to rely on section 1381.5—which is not relevant to any issue and appears to be a “scrivener’s error”—petitioner *did* cite both section 871.5 and *Ramos v. Superior Court, supra*, 32 Cal.3d 26, in his motion to dismiss included as exhibit 9 in the record. There is no unfairness or “windfall” in deciding the petition on the basis of that statute and the related law.

DISPOSITION

Accordingly, the petition for writ of mandate is granted. Let a peremptory writ of mandate issue directing the Superior Court of Riverside County to vacate its order denying petitioner's motion to dismiss count 5 of the second amended complaint, and to enter a new order granting the motion on the grounds set forth above.

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

The previously ordered stay is lifted.

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MILLER
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.