

RESOLUTION 08-01-2015

DIGEST

Criminal Law: Including Non-Statutory Dismissals to Two-Dismissal Rule

Amends Penal Code section 1387 to include dismissal based on denial of substantial rights, and to require that the same judge hear any relitigation of such motions.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend California Penal Code section 1387 to read as follows:

§1387. Dismissal as bar to prosecution; exceptions

1 (a) An order terminating an action pursuant to this chapter, or Section 859b, 861, 871, ~~or~~
2 995, or by a non-statutory motion to dismiss because the defendant has been denied a substantial
3 right by the prosecution or law enforcement, is a bar to any other prosecution for the same
4 offense if it is a felony or if it is a misdemeanor charged together with a felony and the action has
5 been previously terminated pursuant to this chapter, or Section 859b, 861, 871, ~~or~~995, or by a
6 non-statutory motion to dismiss because the defendant has been denied a substantial right by the
7 prosecution or law enforcement, or if it is a misdemeanor not charged together with a felony,
8 except in those felony cases, or those cases where a misdemeanor is charged with a felony,
9 where subsequent to the dismissal of the felony or misdemeanor the judge or magistrate finds
10 any of the following:

11 (1) That substantial new evidence has been discovered by the prosecution which would
12 not have been known through the exercise of due diligence at, or prior to, the time of termination
13 of the action.

14 (2) That the termination of the action was the result of the direct intimidation of a
15 material witness, as shown by a preponderance of the evidence.

16 (3) That the termination of the action was the result of the failure to appear by the
17 complaining witness, who had been personally subpoenaed in a prosecution arising under
18 subdivision (e) of Section 243 or Section 262, 273.5, or 273.6. This paragraph shall apply only
19 within six months of the original dismissal of the action, and may be invoked only once in each
20 action. Nothing in this section shall preclude a defendant from being eligible for diversion.

21 (4) That the termination of the action was the result of the complaining witness being
22 found in contempt of court as described in subdivision (b) of Section 1219 of the Code of Civil
23 Procedure. This paragraph shall apply only within six months of the original dismissal of the
24 action, and may be invoked only once in each action.

25 (b) Notwithstanding subdivision (a), an order terminating an action pursuant to this
26 chapter is not a bar to another prosecution for the same offense if it is a misdemeanor charging
27 an offense based on an act of domestic violence, as defined in subdivisions (a) and (b) of Section
28 13700, and the termination of the action was the result of the failure to appear by the
29 complaining witness, who had been personally subpoenaed. This subdivision shall apply only
30 within six months of the original dismissal of the action, and may be invoked only once in each
31 action. Nothing in this subdivision shall preclude a defendant from being eligible for diversion.

32 (c) An order terminating an action is not a bar to prosecution if a complaint is dismissed
33 before the commencement of a preliminary hearing in favor of an indictment filed pursuant to

34 Section 944 and the indictment is based upon the same subject matter as charged in the dismissed
35 complaint, information, or indictment.

36 However, if the previous termination was pursuant to Section 859b, 861, 871, or 995, the
37 subsequent order terminating an action is not a bar to prosecution if:

38 (1) Good cause is shown why the preliminary examination was not held within 60 days
39 from the date of arraignment or plea.

40 (2) The motion pursuant to Section 995 was granted because of any of the following
41 reasons:

42 (A) Present insanity of the defendant.

43 (B) A lack of counsel after the defendant elected to represent himself or herself rather
44 than being represented by appointed counsel.

45 (C) Ineffective assistance of counsel.

46 (D) Conflict of interest of defense counsel.

47 (E) Violation of time deadlines based upon unavailability of defense counsel.

48 (F) Defendant's motion to withdraw a waiver of the preliminary examination.

49 (3) The motion pursuant to Section 995 was granted after dismissal by the magistrate of
50 the action pursuant to Section 871 and was recharged pursuant to Section 739.

51 (d) Where an order has terminated an action pursuant to this chapter, or Section 859b,
52 861, 871, 995, or by a non-statutory motion to dismiss because the defendant has been denied a
53 substantial right by the prosecution or law enforcement, relitigation of the motion shall be heard
54 by the judicial officer that granted the dismissal of the charges, unless that judicial officer is
55 unavailable.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem: Current law does not provide for Penal Code section 1387's protections against multiple prosecutions for the same offense to dismissals obtained by a non-statutory motion to dismiss based upon the denial of a substantial right by the prosecution. Further, present law affords the prosecution the ability to forum shop by permitting relitigation of the motion to dismiss before any judge. Currently, there are no clear limitations to re-filing charges following even multiple dismissals for violations of the defendant's substantial rights by the prosecution at preliminary hearings. Lack of restrictions permit repeated attempts to charge an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, often keeping him in custody, as well as enhancing the possibility that even though innocent he may be found guilty. This resolution extends existing provisions of section 1387 to dismissals on non-statutory grounds for violations of a criminal defendant's state or constitutional rights by the prosecution. Further, forum shopping by the prosecution is discouraged in relitigation of multiple motions to dismiss where similar to Penal Code section 1538.5(p), the subsequent motion must be heard by the same judge if that judge is available.

The Solution: Would extend protections against repeated attempts to charge a defendant where the same charges were dismissed on the basis of a non-statutory motion to dismiss for violations of a criminal defendant's state or constitutional rights by the prosecution. The changes also adopt Penal Code section 1538.5's requirement that multiple motions to dismiss on those grounds provided by section 1387 be heard by the same judge if that judge is available.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

CURRENT OR PRIOR RELATED LEGISLATION

Not known.

AUTHOR AND/OR PERMANENT CONTACT: Doreen Boxer, 19200 Von Karman Avenue, Suite 900, Irvine, CA 92612, voice (949) 261 – 2700, fax (949) 266 – 0330, e-mail doreen@doreenboxer.com

RESPONSIBLE FLOOR DELEGATE: Doreen Boxer

RESOLUTIONS COMMITTEE RECOMMENDATION APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

Amends Penal Code section 1387 to include dismissal based on denial of substantial rights, and to require that the same judge hear any relitigation of such motions. This resolution should be approved in principle because it is consistent with the purposes of the statute and current law is not clear.

Section 1387, often described as the 'two-dismissal rule,' establishes that 'two dismissals pursuant to sections 1385, 859b, 861, 871 or 995, bar retrial on felony charges except in limited situations.' (*People v. Hatch* (2000) 22 Cal.4th 260, 270.) It is meant to curtail prosecutorial harassment by limiting the number of times charges may be refiled, thus reducing the possibility prosecutors might use the power to dismiss and refile to forum shop or evade speedy trial rights. (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1018.) However, not every dismissal implicates the 'two-dismissal rule' because not every defect in a prosecution may be raised under one of the enumerated statutes. For example, where the deprivation of a substantial right is not shown in the preliminary hearing transcript, a section 995 motion does not lie and the issue is properly raised in a nonstatutory motion to dismiss. (*Stanton v. Superior Court* (1987) 193 Cal.App.3d 265, 271.) There is no reason such a dismissal should not have the same preclusive effect for purposes of refileing of charges as a statutory motion.

This resolution would further protect against possible forum shopping by requiring any relitigation of the dismissal motion be heard by the same judge, if available. Because this resolution relates to procedural motions rather than those based on factual determinations,

the need for consistency in rulings served by returning to the same bench officer is of less significance than, for example, where a motion to suppress is being relitigated. However, there remains some benefit to having one judge rule on successive motions.

Related to Resolutions 08-04-2015 and 08-09-2015, which are limited to the requirement that the matter be heard by the same judge—albeit under different statutes—and Resolution 08-07-2015, which changes the ‘two-dismissal’ rule without adding the requirement that the matter be heard by the same judge.

COUNTERARGUMENTS TO RESOLUTION 08-01-2015

SACRAMENTO COUNTY BAR ASSOCIATION

Resolution 8-01-2015 proposes adding the phrase “non-statutory motion to dismiss” to Penal Code section 1387, and adding paragraph (d), which would require that, after an action has been terminated and refiled, “relitigation of the motion” would be heard by the same judge. The proposed addition misunderstands the effect of a dismissal and refiling, and fails to appreciate that a magistrate ruling on a motion to suppress evidence employs a different standard than a judge ruling on a motion to dismiss.

The dismissals contemplated in section 1387 relate to the probable cause determination. Three grounds listed go to procedural irregularities: where the preliminary examination is not held within statutory time (§859b); where it is not conducted within one session (§861); or where after examination the magistrate declines to hold the defendant to answer (§871). In ruling on a section 995 motion, the reviewing court grants the motion only where there is a total absence of evidence to support a necessary element of the offense charged. (See *Salazar v. Superior Court* (2000) 83 Cal.App.4th 840, 842.) This deferential standard also applies to so-called non-statutory or common law motions to dismiss. (*Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 740.) “‘Upon review of a motion to set aside an information, [an appellate court] disregards the superior court's ruling and directly examines that of the magistrate. [The court] must draw every legitimate inference in favor of the magistrate's ruling and cannot substitute [its] judgment on the credibility of witnesses or weight of the evidence.’” (*Id.*, quoting *People v. Eid* (1994) 31 Cal.App.4th 114, 125.)

The issue under section 1538.5 involves a specific examination of whether the police acted with probable cause [if no warrant], or whether the defendant can traverse or quash the warrant. By requiring that the same judge who grants a suppression motion also hear any relitigation of that motion in a refiled action, the law ensures a measure of consistency in how the same facts will be evaluated and prevents the prosecutor from forum shopping. (See *Barnes v. Superior Court* (2002) 96 Cal.App.4th 631, 641.)

In contrast, motions to dismiss do not involve weighing of facts or credibility determinations. (See *Miller, supra*, 101 Cal.App.4th at pp. 740-741.) The reviewing court must defer to the magistrate and deny the motion to dismiss unless the preliminary hearing transcript contains no evidence to support the ruling. Because a motion to dismiss involves no factual determinations,

the policy considerations behind section 1538.5(p) are not applicable and need not be replicated. Further, requiring that a judge who previously granted a motion to dismiss also hear any new motion to dismiss [based on a new probable cause determination] only creates case management problems for the court without promoting any interest in the fair administration of justice.