

SUPERIOR COURT OF THE STATE OF CALIFORNIA - COUNTY OF ORANGE - HARBOR JUSTICE CENTER
People of the State of California, Plaintiff, V. [] Tho[], Defendant. LW022PEA (Names & Case Nos. Partially Redacted)
Notice of Decision Hon. Com. Max B. De Liema Dept. H14

The court having received evidence and hearing the common arguments in each case, took the matters under submission and now rules as follows:

For the reasons discussed below, the two matters entitled People v. [] Mor[], LW024PEB and LW024PEB, and the matter entitled People v. [] Mis[], LW024PEB, are dismissed in the furtherance of justice pursuant to Penal Code Section 1385(a). The court declines to dismiss the matters entitled People v. [] Red[], LW025PEA and People v. [] Tho[], LW022PEA. Defendants in those cases are found to be guilty, beyond a reasonable doubt, and are each fined \$100 plus penalty assessments.

Pursuant to Vehicle Code § 40513 (a) (b), a Notice to Appear shall constitute a "complaint" to which the defendant in a criminal action may enter a plea. It is well established that a complaint in a criminal action must be based upon probable cause, and a prosecutor may not institute or cause to be instituted criminal charges against a person, when the prosecutor knows or should know that the charges are not supported by probable cause. (See, E.g. California State Bar Rules of Professional Conduct, Rule 5-110.) In the dismissed cases, the evidence establishes that police officers, with the blessing of the City Attorney, have done just that.

"Probable cause" has been defined generally as, "such a state of facts as would lead a man of ordinary caution and prudence to believe and consciously entertain a strong suspicion of the guilt of the accused." (See, E.g., People v. Uhlemann (1973) 9 Cal.3d 662, 667.)

According to the testimony at trial, deputies reviewing photo enforcement evidence for the City of Laguna Woods routinely do not obtain or view a Department of Motor Vehicles Soundex photograph of the registered owner of the vehicle depicted in the photographs, and do not compare that photograph against the photographs obtained from the automated enforcement system, prior to issuing a Notice to Appear to the registered owner. The People justify this practice by contending that the requirement of probable cause otherwise applicable to issuance of a Notice to Appear conflicts with and/or is contradictory to Vehicle Code § 40518 (a). That statute provides that the Notice to Appear shall constitute a complaint to which the defendant may enter a plea, whenever the Notice to Appear, "has been issued by a peace officer or by a qualified employee of a law enforcement agency on a form approved by the Judicial Council . . . based on an alleged violation of Section 21453, 21455, or 22101 recorded by an automated traffic enforcement system pursuant to Section 21455.5 or 22451, and delivered by mail within 15 days of the alleged violation to the current address of the registered owner of the vehicle." (Vehicle Code § 40518 (a).) Essentially, the People contend that because it is impractical for police officers to investigate and determine whether the registered owner is, in fact, the driver of the vehicle within the 15-day period, the statute requires that instead, the Notice to Appear be both issued and delivered to the registered owner, regardless of whether probable cause exists to believe that the registered owner is, in fact, the driver of the vehicle. That is not what the statute requires.

Contrary to the People's contention, Vehicle Code § 40518 (a) does not require that the Notice to Appear be issued to the registered owner, only that the notice be "delivered ... to the current address of the registered owner of the vehicle." Section 40518 (a) contains no requirement that the registered owner be named as the defendant. To the contrary, it is the driver, not the registered owner, who is the proper defendant. Vehicle Code § 21453 (a) requires a "driver" facing a steady red circular signal to stop and remain stopped until an indication to proceed is shown, while Vehicle Code § 21453 (b) permits a "driver" to turn after stopping under certain circumstances.

This conclusion is supported by section 40518 (a)'s reference to a complaint to which "the defendant" may enter a plea, and the requirement of Vehicle Code § 40518 (b) (2) (A) that the Notice to Appear contain the "methods by which the registered owner of the vehicle or the alleged violator may view and discuss with the issuing agency ... the evidence used to substantiate the violation." (Emphasis added.) It is clear from the statutory language that the cited person, the "defendant" or "alleged violator" need not be the registered owner of the vehicle, and the registered owner should not be so named unless he or she is "the driver." Further support for the conclusion that the Notice to Appear need not be issued to the registered owner is found in Vehicle Code § 40518 (c), which provides that nothing in section 40518, or 40520, precludes the issuing agency from mailing a "notice of non-liability," or what has been referred to in these cases as a "courtesy notice," prior to issuing the Notice to Appear, in order to permit the agency to determine whether the registered owner is in fact the driver. Finally, support for this conclusion is found in Vehicle Code § 21455.5 (c) (2) (F) which provides that a governmental agency that operates an automated traffic enforcement system "shall," among other things, maintain "controls necessary to ensure that only those citations that have been reviewed and approved by law enforcement are delivered to violators." (Emphasis added.) It should also be noted that while Vehicle Code § 21455.5 permits certain functions of the automated system to be contracted out by the governmental agency, maintenance of control necessary to ensure that only those citations reviewed and approved by law enforcement are delivered to "violators" may not be contracted out. (See, Vehicle Code § 21455.5 (d).) That is, it is the responsibility of the governmental agency to ensure that Notices to Appear are issued only to those persons against whom probable cause exists to believe such person is the offending driver.

The real problem is that as a practical matter, the 15-day deadline set by Vehicle Code § 40518 (a) does not permit sufficient time for law enforcement officers to obtain and review the DMV Soundex photograph of the registered owner, and/or to conduct other investigation to determine whether the registered owner, or someone else, is the driver depicted committing the

alleged violation. At a minimum, it imposes a time limitation which would require municipalities to devote more police resources to the investigation and initiation of photo enforcement proceedings than is practical. However, such impracticalities cannot override the imperative that the power of the People to initiate criminal proceedings be based on probable cause to believe the accused has committed the offense.

It should additionally be noted that the Notices to Appear at issue are signed by the issuing officer, who declares under penalty of perjury that the "foregoing" is true and correct. The "foregoing" information identifies the named person as the "violation" or proper defendant. Although the verification is qualified by the statement that it is declared "on information and belief and is based on photographic evidence," it is unclear how the officer can have "information and belief" that the named defendant is the driver, when he or she has not reviewed the DMV Soundex photo of the registered owner, or any other evidence which demonstrates that the named person is the driver. The City's practice of having officers sign the Notice to Appear without reviewing a photograph of the registered owner is arguably a routine practice of perjury by the officers.

Having determined that the City's practice of issuing Notices to Appear without probable cause constitutes abuse of prosecutorial authority, the remaining issue is the remedy. The People contend the court lacks discretion to dismiss, in reliance on *People v. Superior Court (Montano)* (1972) 26 Cal.App.3d 668. *Montano* is inapposite. There, the court dismissed despite evidence of guilt, based on the court's subjective concern for the defendant's rehabilitation and family relations. The court observed, "[F]urtherance of justice" [means] justice to society [the People] as well as to a criminal defendant ... ((Citation)) "[A] dismissal which arbitrarily cuts those rights without a showing of detriment to the defendant is an abuse of discretion." (*Montano*, supra, 26 Cal.App.3d at 670-671.) Here, dismissal is appropriate not based on this court's subjective conclusions concerning any particular defendant, but based on what the evidence suggests is a pervasive pattern of issuance of criminal complaints in the absence of probable cause to support them. Such a practice invades not only the rights of the named defendants, but the right of society as a whole to security in the knowledge that criminal charges are brought only on a showing of probable cause.

As the People's brief points out, dismissal of charges is an extraordinary remedy which is not warranted unless the defendant can show that he or she suffered prejudice as a result of the misconduct. However, in the *Mor[]* and *Mis[]* cases, such prejudice is shown. Based on this court's review of the evidence, it should have been obvious that those defendants were not the registered owners of the vehicles identified in the Notices to Appear. In the *Mor[]* matters, the registered owner is 64 years old, and is so identified in the Notice to Appear, while it is plainly evident from the photographs that the driver is not a person of that age. Similarly, the named defendant in the case leading to *Mis[]* prosecution was a corporation, clearly not the "driver" of the vehicle. Those citations should never have been issued. Had those citations not been issued, there is a reasonable probability charges would not have been brought against the younger *Mor[]*, or against *Mis[]*. As the People point out, in such cases filing of the Notice to Appear within the 15-day limitation of Vehicle Code § 40518 (a) is not reasonably practical, and it is likely these defendants would not have been charged.

For the same reason, the court declines to dismiss the charges in *People v. Red[]* and *People v. Tho[]*. In those cases, it is only coincidental that the cited parties were in fact the proper defendants. Nonetheless, it is undisputed the named defendants are in fact the registered owners of the vehicles. As such, there is no reasonable probability that the officer's review of their DMV photographs would have resulted in no citation being issued. Defendants' counsel argues that these cases should also be dismissed because they represent the issuance of a citation without probable cause, albeit that the appropriate defendant was, in fact, prosecuted. After due consideration, this court disagrees with that analysis.

This court recognizes that its ruling will present an obstacle to the prosecution of photo enforcement cases, and the possibility that some violators will not be identified and prosecuted. However, that practicality does not overcome the requirement that criminal charges be based only on probable cause, or the ethical miasma resulting from the City's practice. Judicial officers presiding over traffic arraignments are frequently faced with individuals claiming that they have been falsely accused based on obvious misidentifications based on race, gender, ethnicity or age. Some courts may be inclined to dismiss such cases at arraignment in the interest of justice. Courts have also been faced with related conflict issues when the "true" driver appears in court to accept responsibility for the violation for which that person was never charged.

It is not the Courts responsibility to give legal advice to the accused nor is it the Courts place to assist the people in prosecution on an ex parte basis. None of the above issues would be presented if the prosecution had not issued a citation without probable cause. Moreover, the costs associated with the issuing, reissuing, scheduling appearances for arraignment and trials wastes valuable court time. It deprives the accused of due process and involves the court's participation in prosecution of the innocent in hopes of obtaining information to identify the correct violators. It creates a negative public impression of the court as a co-participant in these efforts. The scarce resources of the court should not be exploited by such prosecutions.. None of the above choices leave this court with a feeling that justice was done.

It is to the credit of the city attorney and the deputy sheriffs who testified truthfully in these cases that the fiction of a legitimate examination for probable cause never occurred. If they believed the statute justified the issuance of the citation without probable cause, dismissal of cases resulting from such prosecution should correct that belief.

A solution to the problem created by the time limitation of Vehicle Code § 40518 (a) is left to the Legislature.

For the above reasons, the Notice of Decision is hereby entered.

Dated: May 8, 2014 Max B. De Liema Commissioner