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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Date: February 23, 2007
Time: 8:30 a.m.
Dept: SE "M"

DEFENDANT JOVIE DELACRUZ respectfully submits the following MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PEOPLE’S MOTION TO INTRODUCE EVIDENCE PURSUANT TO EVIDENCE CODE SECTION 1108.

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I.

INTRODUCTION

The Defendant has been charged in a five-count information with one violation of Penal Code section 288.5, subdivision (a), and four counts of violation of Penal Code section 647.6, subdivision (a). The felony charge alleges acts which supposedly occurred between 1996 and 1999, but which was not reported until December 10, 2003. The misdemeanor charges allege acts which supposedly occurred on December 7, 2003. None of the alleged victims is the same. Upon a motion by the Defendant, the Court, the Honorable Phillip Hickok, Judge, presiding, granted severance of the misdemeanor counts from the felony count. Judge Hickok also granted the Defendant's motion to exclude the testimony of Chloe S., the alleged victim in the instant felony case, from the trial on the remaining misdemeanor charges.

II.

THE DISTRICT ATTORNEY IS IMPROPERLY FORUM SHOPPING BECAUSE THE COURT
HAS ALREADY RULED THE EVIDENCE INADMISSIBLE

Penal Code section 1538.5 sets forth the procedure for challenging the legality of a search or seizure. If the evidence seized is suppressed and the case dismissed, the people may refile case, but the issue of search and seizure must be relitigated before "the same judge who granted the motion at the first hearing if the judge is available." Penal Code § 1538.5, subd. (p). The Court of Appeal in the case *Soli v. Superior Court (The People)*, 55 Cal.App.4th 872, 878-880, discussed the legislative history of this sentence. It is relevant by analogy to the instant case.

According to the People, the Legislature, in amending section 1538.5, intended the People to have "the right to two hearings without limitation, i.e., de novo." The People conclude that the second hearing will not be truly de novo unless it is heard by a different judge than the one who heard the first motion. This analysis of the statute's legislative history, and the conclusion reached by the People, is faulty.

Senate Bill No. 933 was sponsored by the Los Angeles County District Attorney. (Sen. Bill No. 933 (1993-1994 Reg. Sess.) 1st reading Mar. 4, 1993.) When first introduced, the bill contained no language limiting the ability of the prosecutor to refile a case after the granting of two motions to suppress evidence. Nor did it contain language describing which judge or judges could hear second or third motions to suppress evidence.

The bill analysis prepared by the Senate Committee on the Judiciary noted that the bill, as introduced, would allow the People at least four suppression hearings. The analysis concluded that the described "ability to relitigate suppression motions is undoubtedly not intended by the sponsor." (Sen. Com. on Judiciary, Analysis of Sen.

1 Bill No. 933 (1993-1994 Reg. Sess.) May 11, 1993.) The analysis also noted that
2 California Attorneys for Criminal Justice (CACJ) opposed the bill "because it would
3 allow prosecutors to 'take another shot' with another judge after losing a suppression
motion in superior court. CACJ believes that the bill would encourage forum
shopping" (*Ibid.*)

4 The bill was then amended to specify "that the intent of the Legislature,
through this legislation, shall not be construed as a means to forum shop." (Sen. Com.
5 on Judiciary, 3d reading analysis of Sen. Bill No. 933 (1993-1994 Reg. Sess.) May
20, 1993.) Section 1 of Senate Bill No. 933 was then amended to read: "It is the intent
6 of the Legislature, in amending Section 1538.5 of the Penal Code, that this act shall
not be construed or used by a party as a means to forum shop." (Sen. Bill No. 933
(1993-1994 Reg. Sess.) as amended May 20, 1993.)

7 The amended version of Senate Bill No. 933 also contained, for the first time,
8 specific language limiting the ability of the People to refile a third time after two
previous motions to suppress had been granted. This language was added to the bill as
9 section 1538.5, subdivision (p). The bill did not, however, contain any language in
subdivision (p) or anywhere else specifying that a relitigated motion to suppress
10 would return to the judge who granted the original motion. (Sen. Bill No. 933 (1993-
1994 Reg. Sess.) as amended May 20, 1993.)

11 The bill continued on its journey through the legislative process and, after
being amended in the Assembly, returned to the Senate for concurrence in the
12 Assembly amendments. The bill now contained specific language restricting the
ability to forum shop. "Relitigation of the motion shall be heard by the same judge
13 who granted the motion at the first hearing if the judge is available." (Sen. Bill No.
933 (1993-1994 Reg. Sess.) as amended Aug. 16, 1993.) This sentence was placed
14 next to the limitation on multiple refilings contained in section 1538.5, subdivision
(p). The People have failed to track the changes made to the bill between the time it
15 was first introduced and finally chaptered in response to legislative concerns. The bill,
as first introduced, would have given the People exactly what they now claim to have,
16 i.e., the ability to have two de novo hearings in front of two different judges. In
response to legislative concerns that this ability would lead to forum shopping, the
17 Legislature included the last sentence of section 1538.5, subdivision (p) which, we
conclude, means that the second suppression motion is required to be heard by the
18 judge who heard the first suppression motion, if the judge is available to hear the
motion.

19 Our conclusion is consistent with the statement of need advanced by the
People in support of the bill. The Los Angeles County District Attorney, which
20 sponsored the bill, did not ask the Legislature to enact the 1993 amendments to allow
the district attorney a second chance at a motion to suppress evidence (before a
different judge) just because the People disagreed with the ruling made in connection
21 with the first motion. The district attorney told the Legislature the reason the
amendment was needed was because trial deputies were overworked and might lose
22 the first suppression motion simply because they did a poor job of presenting the
evidence. Given this statement of need, it makes sense that the same judge who heard
23 the first motion, and granted it, should hear the second motion. When the same judge
hears the evidence which was previously omitted, or the argument that the previously
24 unprepared prosecutor forgot to make, then the judge will once again make the correct
ruling, which this time will be to deny the suppression motion.

25 In supporting Senate Bill No. 933, the Los Angeles County District Attorney
told the Legislature "courts are aware of the problems caused by forum shopping and
26 have devised procedures to prevent it. Moreover, cases are usually assigned by court
clerks or by random assignment so that there is no way a prosecutor could direct a
27 case into a particular court." (Assem. Com. on Public Safety, Analysis of Sen. Bill
No. 933, as amended May 20, 1993, for hearing on July 13, 1993.) In other words,
28 prosecutors would not, if given an opportunity to relitigate, attempt to direct a case

1 into a particular court. Ironically, what the People now appear to want is the
2 opportunity to direct a case away from a particular court. This can only be described
3 as the very forum shopping the Legislature recognized as a problem and attempted to
remedy by inserting a prohibition against the evil within section 1538.5, subdivision
(p).

4 Nothing contained within the legislative history suggests that the Legislature
5 intended to allow, in connection with the relitigation of a suppression motion, the type
6 of forum shopping urged by the People. In fact, just the opposite is true. *We conclude,*
therefore, that the language in question must be construed as applying to all
relitigations, not just to suppression motions which have been heard two times.

7 (Footnotes omitted. Emphasis added.) The California Supreme Court has affirmed this conclusion,
8 “This legislative history makes it clear the Legislature intended these amendments to prohibit
9 prosecutors from forum shopping.” *People v. Superior Court (Jimenez)*, 28 Cal.4th 798, 808
10 (Internal quotation marks and citation omitted.) *See also, Barns v. Superior Court (The People)*, 96
11 Cal.App.4th 631, 640.

12 A motion under Evidence Code section 1108 a mirror image is an evidence suppression
13 motion; rather than asking the court to exclude evidence, it asks the court to admit evidence. In both
14 instances, the court, in the exercise of its discretion and in the interests of justice, must rule on the
15 evidence. Sometimes these rulings go against the People. In those instances, the People might want
16 to get a second bite at the apple, and from a more favorable judge. For that reason, the Legislature
17 has explicitly barred forum shopping by requiring the motion to suppress be heard by the same judge
18 as heard it before. By analogy, when a motion under Evidence Code section 1108 has been heard
19 and ruled on, the same judge should hear any relitigation of the motion.

20 In the instant case, Judge Hickok ruled that the misdemeanor charges must be severed from
21 the felony charge, and that evidence of the felony charge was inadmissible in the misdemeanor trial.
22 The misdemeanor trial has concluded, but the defendant’s appeal rights have not yet expired, and the
23 conviction may be appealed. Now that the felony charge is being tried before another judge, the
24 People are trying to relitigate before another judge in the hope of getting a more favorable ruling.
25 This is improper forum shopping of the kind forbidden by the Supreme Court in *Jimenez*.

26 If the People believe that the earlier ruling is incorrect, their remedy is appeal, or a writ of
27 mandate. *See e.g.* Penal Code § 1538.5, subd. (j).

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1 III.

2 THE EVIDENCE IS NOT ADMISSIBLE UNDER EVIDENCE CODE 1108

3 Evidence Code section 1108, subdivision (a) states, in relevant part, “In a criminal action in
4 which the defendant is accused of a sexual offense, evidence of the defendant's commission of
5 another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not
6 inadmissible pursuant to [Evidence] Section 352.” Evidence Code section 352 states, “The court in
7 its discretion may exclude evidence if its probative value is substantially outweighed by the
8 probability that its admission will (a) necessitate undue consumption of time or (b) create substantial
9 danger of undue prejudice, of confusing the issues, or of misleading the jury.” “The ‘prejudice’
10 referred to in section 352 applies to evidence that uniquely tends to evoke an emotional bias against
11 the defendant as an individual and that has very little effect on the issues.” *People v Gionis*, 9 Cal.
12 4th 1196, 40 Cal Rptr 2d 456, 892 P2d 1199 (1995).

13 In the instant case, Judge Hickok has already ruled on this issue and found the testimony of
14 Renea Q. and Christina R. is more prejudicial than probative. In the instant case, not admitting this
15 testimony is clearly called for in the in the interests of justice and to guarantee the defendant a fair
16 trial. The nature of the crime of continuous sexual abuse and are such that jurors would likely be
17 inflamed thereby and not be able to fairly judge the facts on the single charge before them now. The
18 alleged acts which constitute the felony charge are of a different character, *id.*, than the alleged acts
19 which constitute the misdemeanor charges, RT: 11-46. Specifically, the alleged acts which
20 constitute felony charges involve touching the chest and vaginal area of the victim, RT: 60-65, while
21 alleged acts which constitute the misdemeanor charges involve a single kiss, RT: 11-46. The alleged
22 acts which give rise to the felony charge occurred over a three-year period, RT: 60-65, while the
23 alleged acts which constitute the misdemeanor charges occurred only on one occasion, RT: 11-46.
24 The potential for spillover is obvious. Further, the evidence of the alleged misdemeanor acts is not
25 probative of the alleged felony acts and therefore should be excluded and the charges severed.

26 IV.

27 CONCLUSION

28 The Defendant is facing a very serious charge and, in the interests of justice, should be

1 afforded every opportunity to have a fair trial. Because the testimony from the Ranea Q.'s and
2 Christina R.'s testimony might inflame and prejudice the jury against the Defendant, that testimony
3 should be excluded from the instant trial.

4 Respectfully submitted,

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Patrick K. Brown, Attorney at Law

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