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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
CENTRAL DIVISION, KEARNY MESA BRANCH

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,
vs.

DOUG BUCKLEY,

Defendant.

)
) Case No: 20T1279735C
)
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **COMMON LAW MOTION TO DISMISS**
) **DUE TO LACK OF PROSECUTION**
)
) **DATE:**
) **TIME: 9:00 AM**
) **DEPT: A**
)
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The Defendant DOUG BUCKLEY, by and through his attorney COLEEN M. CUSACK, hereby submits the following memorandum of points and authorities in support of his common law motion to dismiss due to lack of prosecution.

STATEMENT OF FACTS

On or about August 1, 2020, California Highway Patrol issued a Notice to Appear to Doug Buckley charging a violation of Vehicle Code § 22349(a), which states:

Except as provided in Section 22356, no person may drive a vehicle upon a highway at a speed greater than 65 miles per hour.

STATEMENT OF CASE

1 Doug Buckley was released pursuant to his promise to appear. [Vehicle Code
2 40500.] and was directed to appear before the Superior Court at 8950 Clairemont Mesa
3 Blvd on or before October 7, 2020. Thereafter, the defendant, by and through counsel,
4 pled not guilty to the charge and waiving time in which to do so, set the matter for trial.
5 Due to the global COVID-19 pandemic and the related health concerns of Mr. Buckley
6 and his attorney, the matter was continued for trial until May 14, 2021 at 9:30 AM.

7 The Defendant though his counsel served an eight-page Informal Discovery
8 Request upon the Office of the City Attorney on April 7, 2012 via U.S. Mail. (Lodgment
9 of Exhibits, Exhibit A). In a one-page response dated April 14, 2021, the City Attorney
10 through its Senior Clerk Typist, Julia Ulloa, replied,

11 The San Diego City Attorney's Office does not appear on nor
12 participate in any infraction case tried in Kearny Mesa Traffic Court. This
13 citation was directly filed with Kearny Mesa Traffic Court and we are not in
14 receipt of any discovery on this matter.

15 Any discovery that you are seeking must be obtained from the law
16 enforcement agency that issued the citation. On the reverse of this letter
17 is a list of the contact information for the law enforcement agencies that
18 regularly submit cases to Kearny Mesa Traffic Court.
19 (Exhibit C.)

20 To date, no response has been received from the California Highway
21 Patrol. (See proof of services, Exhibit B.)

22 On May 11, 2021, when asked to explain their offices refusal to provide
23 discovery in counsel's infraction matters, City Attorney Mara Elliott and Assistant
24 City Attorney John Hemmerling told San Diego City Council that the City
25 Attorney's office does not appear on infractions in Kearny Mesa Traffic Court,
26 does not handle infractions and does not prosecute infractions.¹ (Exhibit D.)
27 Thereafter, on May 12, 2021, counsel for the Defendant issued letters to City
28 Attorney Mara Elliott, Assistant City Attorney John Hemmerling, District Attorney
Summer Stephan and California Attorney General asking if the San Diego City

¹ Budget Review Committee Archived Videos. (May 11, 2021). *Budget Review Committee May 11, 2021* (3 hr 45 min). Retrieved on May 12, 2021 from: http://sandiego.granicus.com/ViewPublisher.php?view_id=54

1 Attorney is not the prosecutor of infractions in City of San Diego, then who is?
2 (Exhibit E.) No responses have yet been received.

3 **I.**

4 **A DEFENDANT IN A CRIMINAL ACTION IS ENTITLED**
5 **TO MAKE A COMMON LAW MOTION TO DISMISS**

6 The California Supreme Court has recognized a defendant's right to make
7 a motion to dismiss that is not limited to the requirements of Penal Code § 1385.
8 (*People v. McGee* (1977) 19 Cal.3d 948, 968, fn. 9.) The California Supreme
9 Court in *People v. Sims* (1982) 82 Cal.3d 468, 474, fn. 3 recognized the
10 defendant's right to make a common law pretrial motion to dismiss holding that
11 "[w]hen a statutory provision bars the prosecution of a criminal action, such
12 statute cannot be given its proper effect unless it too is recognized as a proper
13 basis for quashing an indictment or setting aside an information." (*People v.*
14 *McGee, supra*, 19 Cal.3d at 968, fn. 9.)

15 **II.**

16 **A CRIMINAL ACTION REQUIRES A PROSECUTOR**

17 A criminal action is prosecuted in the name of the people of the State of
18 California, as a party, against the person charged with the offense. Penal Code § 684
19 while the law allows law enforcement to file the Notice to Appear as a complaint (Penal
20 Code 853.9), as nonattorneys, law enforcement officers are witnesses. As such, they
21 are prohibited from the unauthorized practice of law and cannot act as prosecutor. (Bus
22 & Prof. Code §§ 6125, 6126.) To permit the instant matter to proceed without a
23 prosecutor would be to deny the proper effect of Penal Code §§684 and 853.9 and
24 Business and Professions Code §§ 6125 and 6126.

25 **III.**

26 **CITY ATTORNEY OF SAN DIEGO HAS PUBLICLY STATED**
27 **IN A PUBLICLY HELD LEGISLATIVE PROCEEDING**
28 **IT IS NOT PROSECUTING THIS INFRACTION PROSECUTION**

When asked to address counsel's concerns in struggling to get routine discovery
in infractions, City Attorney Mara Elliott told San Diego City Council, en banc and

1 publicly, stated “we do not handle infractions” and then she invited Assistant City
2 Attorney and Criminal Division Chief John Hemmerling to speak who added,

3 ... the cases that she is referring to are not cases that this office
4 prosecutes. We do not appear in, um, Kearny Mesa Traffic Court. Those
5 are citations for infractions that are submitted by not - not only all the local
6 um, uh, City of San Diego jurisdiction agencies, but also, uh, might be
7 something like a park ranger writes a citation for an infraction or
8 something like that. Those go to um, that court that is not – is not
9 something that our office, uh, participates in.²

10 (Lodgment of Exhibits, Exhibit D.)

11 The public declaration by the City Attorney and its Criminal Division Chief that the
12 City Attorney is not the prosecutor of infractions in Kearny Mesa means that the court
13 lacks jurisdiction to proceed until it ascertains which agency, if any, is the prosecutor of
14 the instant proceeding. (See, e.g., Exhibit E, letters to prosecuting agencies.) The
15 public declaration also acts as a nolle prosequi declaration, seeking to terminate
16 proceedings in which it holds no prosecutorial interest.

17 **IV.**
18 **THE PROSECUTOR CANNOT**
19 **UNILATERALLY ABANDON A PROSECUTION**

20 Because nolle prosequi is abolished in California, the prosecutor may not
21 unilaterally abandon a prosecution, and only the court may dismiss a criminal charge.
22 (*Steen v. Appellate Division of Superior Court* (2014) 59 Cal.4th 1045.) In *Taliaferro v.*
23 *Locke*, 182 Cal.App.2d 752, at pp. 755—756, at 816, the court stated: ‘As concerns the
24 enforcement of the criminal law the [prosecutor] is charged with grave responsibilities to
25 the public. These responsibilities demand integrity, zeal and conscientious effort in the
26 administration of justice under the criminal law. . . . Nothing could be more demoralizing
27 to that effort or to efficient administration of the criminal law in our system of justice than
28 requiring a [prosecutor’s] office to dissipate its effort on personal grievance, fanciful
charges and idle prosecution.

The one major safeguard against frivolous prosecutions is the function of the
prosecutor in screening criminal cases. Due process of law requires that criminal

² Budget Review Committee Archived Videos, *supra*.

1 prosecutions be instituted and maintained through the regular processes of law. These
2 regular processes include the requirement that the prosecutor prosecute. (*See People*
3 *v. Municipal Court* (1972) 27 Cal. App. 3d 193, 207.) Put another way, the court has
4 no jurisdiction to proceed against a criminal defendant in a prosecution without a
5 prosecutor.

6 In 1972 the California Supreme Court recognized that the prosecutor could not
7 be compelled to attend its own prosecutions. *People v. Carlucci*, 23 Cal.3d 249 (1979).
8 Holding that the traffic court at a traffic infraction hearing may call and question
9 witnesses under Evidence Code 775, as it is “the right and duty of a judge to conduct a
10 trial in such a manner that the truth will be established in accordance with the rules of
11 evidence.” *People v. Rigney* (1961) 55 Cal.2d 236, 241.

12 Government Code § 26500 was enacted, codifying the prosecutor’s right not to
13 appear. The prosecutor’s right. It’s axiomatic that if it’s the right of the prosecutor not to
14 appear that by exercising that right, the prosecutor is conceding to be the prosecutor.
15 Be that as it may, it remains that the elected City Attorney and the Assistant overseeing
16 the Criminal Division have both avowed their office of any prosecutorial authority over
17 infractions in Kearny Mesa. Counsel for the Defendant would be derelict in her duty to
18 not seek dismissal or clarification of who the prosecutor is in this case.

19 V.

20 COURT HAS INHERENT POWERS TO CONTROL AND 21 MANAGE THE PROCEEDINGS BEFORE IT

22 The inherent powers of the court to control and manage the proceedings before it
23 should be exercised by the courts in order to insure the orderly administration of
24 justice.” (*Hays v. Superior Court* (1940) 16 Cal.2d 260.) In the unusual infraction case
25 warranting the prosecution’s participation, the court may continue the hearing and
26 request the prosecutor’s appearance. (*People v. Cotsirilos et. al.* (2020) 50 Cal.App.5th
27 1023 citing *Kottmeier* at pp. 610, 612.) If the instant matter isn’t immediately dismissed,
28 the San Diego City Attorney and its Criminal Division Chief should be directed by this
Court to appear and indicate on the record it’s desire to no longer prosecute the matter
or indicate on the record what prosecutorial agency, will be prosecuting the matter going
forward.

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CONCLUSION

For the foregoing reasons, the Court must dismiss the instant case as it is not now being prosecuted by the City Attorney of San Diego and because no other prosecuting agency has stepped forward to claim the prosecution. In the alternative, the court should continue the proceedings and require the attendance of the San Diego City Attorney and its Criminal Division Chief to state their intention to either abandon the prosecution or to transfer the prosecution to another prosecutorial agency.

Respectfully submitted,

Dated this ____ day of May, 2021:

COLEEN M. CUSACK
Attorney for Defendant
Doug Buckley