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Court of Appeal,  
Sixth District, California.

Michael MURRAY, Petitioner,

v.

The SUPERIOR COURT of Santa  
Clara County, Respondent;  
The People of the State of  
California, Real Party in Interest.

No. Ho38595

|

Filed February 7, 2013

(Santa Clara County Super. Ct. No. C1103688)

#### Attorneys and Law Firms

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#### Opinion

Márquez, J.

\*1 Petitioner Michael Murray (Murray), a criminal defendant below, seeks extraordinary relief from the trial court's order quashing a subpoena duces tecum (SDT) which defense counsel had issued and which was served upon a third party. The People filed a motion to quash the SDT, asserting the legal position that a third party individual could not be served with an SDT initiated by the defendant in a criminal case. After three hearings, on June 28, 2012, the court granted the motion to quash, concluding that Penal Code section 1326 "does not authorize the defense to issue subpoenas to individuals, non-businesses."<sup>1</sup>

<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

After Murray's filing of a petition for writ of mandate challenging that ruling, we granted a stay of all trial proceedings. Murray contends, among other things, that he, as a criminal defendant in the proceedings below, was authorized to have issued an SDT compelling a third party to produce records in the action. The People of the State of California, the real party in interest (People), now concede this point, but argue nonetheless that the court did not err in quashing the SDT. After considering the respective positions of Murray and the People, we conclude that there was no legal basis for quashing the SDT, and we will grant the petition for writ of mandate.

#### FACTUAL AND PROCEDURAL BACKGROUND

Murray was the CEO of The Forma Group, which consisted of two entities, Forma Home Systems (maker of prefabricated wall panels; FHS), and Forma Framing Systems (an entity which would contract to provide the labor to install the prefabricated walls; FFS). Brad Stimson, the alleged victim, contracted in August 2009 with FHS and FFS for the purchase and installation of homebuilding materials in Stimson's Monte Serreno home, which was being rebuilt after a fire. Shortly afterward, both FHS and FFS filed for bankruptcy protection, and another entity operated by Murray, Forma Building Systems, assumed FHS's responsibilities under its contract with Murray. A dispute thereafter arose, which concerned both a controversy as to the extent to which materials were provided for the payments made by Stimson, and Stimson's claim that he incurred losses for defective work.

The District Attorney of Santa Clara County filed criminal charges against Murray in connection with the Stimson project. Murray was charged with acting as a contractor without a license (Bus. & Prof.Code, § 7028), advertising as a contractor without a license (Bus. & Prof.Code, § 7027.1, subd. (a)), and theft by false pretenses (§§ 484/487, subd. (a)).<sup>2</sup> In March 2012 in these criminal proceedings, Murray served Stimson with an SDT for documents related to insurance claims, contracts and communications with other contractors, and information supporting Stimson's assertion that he is owed restitution. Murray used the standard Judicial Council form (form CR-125/JV-525) required for SDT's in criminal and juvenile cases. (See Cal. Rules of Court, rule

1.31(a)-(c); Gov.Code, § 68511; 23 pt. 4 West's Ann.Code, Court Rules (2012 ed.) appen. A, p. 120.)

2 The information filed by the District Attorney was not included among the exhibits to the petition for writ of mandate. There appears to be no dispute regarding the nature of the charges alleged in the information. Murray was also charged with charging an excessive down payment in a home improvement contract (Bus. & Prof.Code, § 7159.5), but that count was dismissed by the court.

\*2 The People filed a motion to quash the SDT on the ground that a third party individual could not be served with an SDT initiated by the defendant in a criminal case. After an initial hearing in May 2012, the court continued the matter and requested further briefing. At the second hearing before a different judge, the court expressed concern about the applicability of the Victim's Bill of Rights of 2008, commonly known as Marsy's Law (Cal. Const., art. I, § 28), an issue that had not been addressed by either party.<sup>3</sup> After a further continuance—and after supplemental briefing (in which Murray did, but the People did not [except by citing the law] address Marsy's Law)—the court granted the motion to quash. It did not rely on Marsy's Law. Rather, the court concluded that section 1326 is “ambiguous” and that it “does not authorize the defense to issue subpoenas to individuals, non-businesses.”

3 Marsy's Law includes provisions authorizing a crime victim to take steps to prevent disclosure of certain types of confidential records and to resist certain discovery sought by a criminal defendant. (See Cal. Const., art. I, § 28, subs. (b), (c).) The court below did not base its order on the applicability of Marsy's Law. (See fn. 7, *post*.)

Murray filed his petition for writ of mandate, prohibition, or other relief with this court on July 30, 2012. On August 15, 2012, we issued an order staying all trial court proceedings and invited the People to submit informal opposition to the petition. After receiving the People's preliminary opposition and Murray's reply, we issued a *Palma*<sup>4</sup> notice indicating that we were considering issuing a peremptory writ of mandate in the first instance. The People elected to have us treat its previously filed informal opposition as its final opposition. Likewise, Murray notified this court that his reply to the People's informal opposition should be deemed his final reply.

4 *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180. (See also *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1240–1241.)

## DISCUSSION

### I. *Standard of Review*

Discovery orders are generally reviewed for abuse of discretion. “In reviewing an order of a superior court granting discovery, we recognize at the threshold that ‘the discovery statutes vest a wide discretion on the trial court in granting or denying discovery’ and ‘such exercise (of discretion) may only be disturbed when it can be said that there has been an abuse of discretion.’ [Citation.] ... [But] on orders denying discovery appellate courts ‘should not use the trial court's discretion argument to defeat the liberal policies of the statute.’ [Citation.]” (*Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 Cal.3d 161, 171; see also *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1186.) In instances in which the relevant facts concerning the discovery order are undisputed, the order is reviewed as a question of law. (*Toshiba America Electronic Components, Inc. v. Superior Court* (2004) 124 Cal.App.4th 762, 768 (*Toshiba America* ).) And “[a]n appellate court may reverse a trial court decision for abuse of discretion where the exercise of that discretion is not based upon the applicable law. ‘Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an abuse of discretion.’ [Citation.]” (*Ibid.*; see also *Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1161.)

Writ review of discovery rulings is generally disfavored. (*O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1429 (*O'Grady* ).) Review of discovery rulings by extraordinary writ proceedings “is generally limited to ‘situations where (1) the issues presented are of first impression and of general importance to the trial courts and to the profession [citation], (2) the order denying discovery prevents a party from having a fair opportunity to litigate his or her case [citation], or (3) the ruling compelling discovery would violate a privilege [citations].’ [Citation.]” (*OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 886 (*OXY Resources* ), quoting *Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1061; see also *Toshiba America, supra*, 124 Cal.App.4th at p. 767.)

### II. *The People's Standing to Object to the SDT*

\*3 Murray argued below as a threshold matter that the People lacked standing to challenge the SDT. He does not renew that argument here.

We observe that it is unclear whether the People had standing to file the motion to quash the SDT on Stimson's behalf. As explained in *Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1078 (*Kling*), while “the court may desire briefing and argument from the People about the scope of the third party discovery [citation],” the People have the right to move to quash “ ‘so that evidentiary privileges are not sacrificed just because the subpoena recipient lacks sufficient self-interest to object’ [citation] or is otherwise unable to do so. [citation].” The victim is not a party to the case, and the People are not counsel for the victim. (See § 684; see also *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1313 (*Barrett* ).) Although the People may file a motion to quash in order to prevent prejudice to their own case (*Kling*, at p. 1078), here, they failed to explain how their case against Murray would have been compromised, or how any privileges would be violated, if Stimson were required to produce the documents sought in the SDT.

Nonetheless, Murray does not renew his standing argument here, and we deem the argument abandoned. (*People v. Combs* (2004) 34 Cal.4th 821, 845.) We will proceed by assuming without deciding that the People had standing to assert the objections to the SDT that were considered by the trial court.

### III. Order Quashing the SDT

The People asserted below that the SDT should be quashed because Murray had no legal right to subpoena a third party in the criminal proceeding. Although they now concede that this position lacks merit, they nonetheless argue that the court acted properly in quashing the SDT because Murray did not make a showing of good cause in support of the SDT. We address both positions below.

#### A. A Criminal Defendant May Issue Third Party SDT

The People argued in their motion that the SDT was “fatally flawed” because (1) “[n]o party in a criminal action can subpoena a third party in any manner other than as specified in [Evidence Code section] 1560,” and (2) that code section “only requires businesses ... to comply with an SDT.” They argued that because Stimson was “an individual homeowner,” he could not be ordered to comply with the SDT. The People

reiterated in supplemental briefing that the SDT should be quashed because Stimson was not a business entity upon which an SDT could be served by a criminal defendant. Murray, in multiple memoranda and in argument made at the third hearing, argued persuasively that the People's contention was without merit. The court nonetheless granted the motion to quash based upon its determination that section “1326 does not authorize the defense to issue subpoenas to individuals, non-businesses. I'm finding on that basis that there is no authority for the issuance of the subpoena to the individual victim in this case.”

In his petition, Murray argues (as he did below) that sections 1326 and 1327, as well as decisional authority, plainly allow a criminal defendant to subpoena records from a third party, regardless of whether that third party is a business. He is correct.

\*4 Section 1326, subdivision (a) provides in part: “The process by which the attendance of a witness before a court or magistrate is required is a subpoena. It may be signed and issued by any of the following: ... (4) The attorney of record for the defendant.” Section 1327 identifies the format of the subpoena and provides, in part: “If books, papers, or documents are required, a direction to the following effect must be contained in the subpoena: ‘And you are required, also, to bring with you the following’ (describing intelligibly the books, papers, or documents required).” Together, sections 1326, subdivision (a) and 1327 authorize a criminal defendant, through counsel, to prepare and issue a subpoena to direct a witness to appear before a court with documents. (See *Barrett, supra*, 80 Cal.App.4th at p. 1315: “Sections 1326 and 1327 set forth the procedure for either the prosecutor or the defendant to obtain discovery records possessed by third parties.”)<sup>5</sup> Specifically, these statutes “empower either party in a criminal case to serve a subpoena duces tecum requiring the person or entity in possession of the materials sought to produce the information in court for the party's inspection.” (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1045 (*Alford* ).)

<sup>5</sup> The Judicial Council Form Murray used in the SDT served upon Stimson followed the format described in section 1327.

As the high court has held: “That the defense may issue subpoenas duces tecum to private persons is implicit in statutory law (Pen.Code, §§ 1326, 1327) and has been clearly recognized by the courts for at least two decades. (*Millaud v. Superior Court* (1986) 182 Cal.App.3d 471, 475–476; *Pacific*

*Lighting Leasing Co. v. Superior Court* (1976) 60 Cal.App.3d 552, 559–566.)” (*People v. Hammon* (1997) 15 Cal.4th 1117, 1128 (*Hammon* ).) Thus, for example, in *Rubio v. Superior Court* (1988) 202 Cal.App.3d 1343, the Court of Appeal granted a criminal defendant's petition for writ of mandate compelling the trial court to uphold a subpoena duces tecum issued to the parents of the alleged victim.

In the People's informal opposition to the petition, they concede that their “position below that an SDT cannot be served on a private individual ... is incorrect, as is the trial court's holding in that regard.” Indeed, they cite *Hammon*, 15 Cal.4th at page 1128 in support of this concession.

The court erred in granting the People's motion to quash the SDT on the ground that “there [was] no authority for the issuance of the subpoena to the individual victim in this case.” We will address the additional ground asserted here by the People in support of the court's order.

#### B. Whether Murray Showed Good Cause for Issuance of the SDT

Although the People concede that the legal basis upon which they brought the motion to quash below lacks merit, they nonetheless assert in their informal opposition that the court properly quashed the SDT. They argue that Murray failed to present good cause in support of the production of the documents sought in the SDT and therefore the court properly quashed the SDT. The fact that the court's order was made on a legal basis which they concede was invalid is, they argue, of no consequence.

The People's contention lacks merit. Here, the clear reason for the court's order was its belief that a criminal defendant may not issue and serve an SDT upon a third person which is not a business. The thrust of the People's argument—and the basis of the court's ruling—was the blanket proposition that there was no legal authority supporting a criminal defendant's right to subpoena the records of a third party (non-business) witness. As we have discussed, *ante*, this legal position is erroneous.

The court did not reach the underlying point of whether there was sufficient justification for requiring Stimson to produce the records sought by Murray in the SDT. While Murray repeatedly asserted his legal position below that a criminal defendant has the right to subpoena the records of

any third party witness, he also repeatedly indicated that he was prepared to make a factual showing of good cause in support of the SDT in camera upon the court's request. But as aptly argued by Murray: “[T]he Superior Court ruled that there was no proper subpoena recipient, and so Mr. Murray had no opportunity to make such a [good cause] showing.”

\*5 The court may order an in camera review of the documents produced in response to a defendant's SDT, and while the People or any person or entity objecting to release of the documents should be given notice of the hearing, the defense is not required to provide the prosecution with its theory of why the documents are relevant. (See *Kling*, *supra*, 50 Cal.4th at pp. 1079–1080; *Alford*, *supra*, 29 Cal.4th at pp. 1045–1046.) Under limited circumstances, the court “may conduct some or all of the hearing concerning the defendant's entitlement to those records ex parte in order to safeguard privileged information or attorney work product.” (*Kling*, at pp. 1079–1080.) As noted, Murray below indicated repeatedly that he was prepared make a factual showing in support of his SDT, should the court ask him to. The court never got that far, instead concluding that Murray had no right to issue the SDT.

The People argue that “only after Petitioner declined to make a showing of relevance” did the court order the SDT quashed. This is an inaccurate representation of what transpired at the third hearing on the motion. The court stated clearly that its reason for granting the People's motion was its view that a criminal defendant was not authorized to issue and serve an SDT on a (non-business) third party. While the court indicated that a criminal defendant would be entitled to have an in camera hearing to determine whether it would be appropriate to have *the court* issue a subpoena, it is clear that it was proposing a procedure different from one in which a criminal defendant presents in camera its justification for production of records *the defendant* subpoenas (assuming there is an appropriate objection lodged on grounds of relevance, privilege, privacy, etc.). Defense counsel indicated during the third hearing that he did not object to a procedure by which Murray, consistently with *Kling*, *supra*, 50 Cal.4th at pages 1079–1080, would make an in camera showing in support of an SDT *he* had issued and served; however, he objected to the procedure suggested by the trial court under which (based upon the erroneous theory that a criminal defendant may not issue and serve an SDT upon a third party) the defendant would have to make a threshold showing in order for the court itself to issue a subpoena.

The People's position here that the court properly granted the motion to quash the SDT because Murray failed to make a showing of good cause is without merit.<sup>6</sup>

<sup>6</sup> Our conclusion that the trial court erred in quashing the SDT does not preclude the court, on remand, from considering in the first instance any specific objections to the SDT, such as relevance and privilege objections, or from requiring Murray to make a showing of good cause.

### C. Conclusion

Although writ review of discovery rulings is generally disfavored (*O'Grady, supra*, 139 Cal.App.4th at p. 1429), the petition here challenges a trial court order which blocked any attempt by Murray to conduct discovery to which he is statutorily entitled. In short, (1) the People have conceded that the legal basis upon which they moved to quash the subpoena (and which was the ground relied on by the trial court) lacks merit; and (2) the People's position asserted here that the court properly quashed the SDT because Murray failed to make a good cause showing also lacks merit.<sup>7</sup>

<sup>7</sup> The court below expressed concern about the rights of crime victims to be free from harassment, and it requested briefing on the potential applicability of the Victims' Bill of Rights Act of 2008, Marsy's Law. We need not address here any potential conflicts between the application of Marsy's Law and the rights of a criminal defendant. This issue was raised by neither party. The People never asserted Marsy's Law as a ground for quashing the SDT. And the court did not base its order on the applicability of Marsy's Law.

\*<sup>6</sup> In this instance, mandamus is appropriate. The court's ruling deprives Murray of the ability to subpoena third

parties. As such, “ ‘the order denying discovery [potentially] prevent[ed] a party from having a fair opportunity to litigate his ... case [citation] ...’ ” (*OXY Resources, supra*, 115 Cal.App.4th at p. 886.) Because the order was based upon an erroneous legal conclusion—i.e., that a criminal defendant was not permitted to issue and serve subpoenas duces tecum on third party witnesses—it constituted an abuse of discretion. (*Toshiba America, supra*, 124 Cal.App.4th at p. 768; cf. *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 746, 755 [because trial court's order recusing a number of prosecutors was founded on erroneous legal position, order constituted abuse of discretion requiring reversal].) Accordingly, we will grant Murray's petition for writ of mandamus.

### DISPOSITION

Respondent superior court erred in its order quashing the subpoena duces tecum issued and served by Murray directing the third party witness Stimson to produce specified documents. Accordingly, let a peremptory writ of mandate issue commanding respondent superior court to vacate its order and enter a new order denying the People's motion to quash. Upon finality of this opinion, the temporary stay issued by this court is vacated.

WE CONCUR:

Premo, Acting, P.J.

Mihara, J.

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