

AMENDED IN ASSEMBLY MAY 17, 2006

CALIFORNIA LEGISLATURE—2005—06 REGULAR SESSION

ASSEMBLY BILL

No. 2952

Introduced by Assembly Member Niello

February 24, 2006

An act to amend ~~Sections 871.5 and 1238~~ *Section 871.5* of the Penal Code, relating to criminal procedure.

LEGISLATIVE COUNSEL'S DIGEST

AB 2952, as amended, Niello. Criminal procedure: appeals.

Existing law authorizes the prosecutor to make a motion in the superior court to compel a magistrate to reinstate a complaint or a portion thereof ~~that the magistrate dismissed, as specified when the magistrate dismisses the complaint or a portion thereof pursuant to specified code sections.~~

This bill would authorize the prosecutor to make a motion to reinstate the complaint as charged ~~when the magistrate makes an order that a crime, that is punishable, in the discretion of the court, by imprisonment in the state prison or by a fine or imprisonment in a county jail, is a misdemeanor for all purposes on the grounds that the magistrate erroneously dismissed the action or a portion thereof regardless of the code section the magistrate used to dismiss the action, or a portion thereof.~~

Existing law defines the situations in which the people may appeal a decision by the superior court.

This bill would allow the people to appeal an order by the court that ~~makes a crime, that is punishable, in the discretion of the court, by imprisonment in the state prison or by a fine or imprisonment in a county jail, a misdemeanor for all purposes.~~

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 871.5 of the Penal Code is amended to
 2 read:

3 871.5. (a) When an action, or a portion thereof is dismissed
 4 or otherwise terminated by a magistrate and the portion
 5 dismissed may not be charged by information under Section 739,
 6 ~~or the magistrate orders that a crime that is punishable, in the~~
 7 ~~discretion of the court, by imprisonment in the state prison or by~~
 8 ~~a fine or imprisonment in a county jail, is a misdemeanor for all~~
 9 ~~purposes pursuant to subdivision (b) of Section 17, the~~
 10 prosecutor may make a motion in the superior court within 15
 11 days to compel the magistrate to reinstate the complaint or a
 12 portion thereof as originally charged and to reinstate the custodial
 13 status of the defendant under the same terms and conditions as
 14 when the defendant last appeared before the magistrate.

15 (b) Notice of the motion shall be made to the defendant and
 16 the magistrate. The only grounds for the motion shall be that, as
 17 a matter of law, the magistrate erroneously dismissed the action
 18 or a portion thereof ~~or that the magistrate abused his or her~~
 19 ~~discretion in ordering that a crime that is punishable, in the~~
 20 ~~discretion of the court, by imprisonment in the state prison or by~~
 21 ~~a fine or imprisonment in a county jail, is a misdemeanor for all~~
 22 ~~purposes pursuant to subdivision (b) of Section 17.~~

23 (c) The superior court shall hear and determine the motion on
 24 the basis of the record of the proceedings before the magistrate.
 25 If the motion is litigated to decision by the prosecutor, the
 26 prosecution is prohibited from refileing the dismissed action, or
 27 portion thereof.

28 (d) Within 10 days after the magistrate has dismissed the
 29 action or a portion thereof, the prosecuting attorney may file a
 30 written request for a transcript of the proceedings with the clerk
 31 of the magistrate. The reporter shall immediately transcribe his or
 32 her shorthand notes pursuant to Section 869 and file with the
 33 clerk of the superior court an original plus one copy, and as many
 34 copies as there are defendants (other than a fictitious defendant).
 35 The reporter shall be entitled to compensation in accordance with

1 Section 869. The clerk of the superior court shall deliver a copy
2 of the transcript to the prosecuting attorney immediately upon its
3 receipt and shall deliver a copy of the transcript to each
4 defendant (other than a fictitious defendant) upon his or her
5 demand without cost.

6 (e) When a court has ordered the resumption of proceedings
7 before the magistrate, the magistrate shall resume the
8 proceedings and when so ordered, issue an order of commitment
9 for the reinstated offense or offenses within 10 days after the
10 superior court has entered an order to that effect or within 10
11 days after the remittitur is filed in the superior court. Upon
12 receipt of the remittitur, the superior court shall forward a copy
13 to the magistrate.

14 (f) Pursuant to paragraph (9) of subdivision (a) of Section
15 1238 the people may take an appeal from the denial of the
16 motion by the superior court to reinstate the complaint or a
17 portion thereof. If the motion to reinstate the complaint is
18 granted, the defendant may seek review thereof only pursuant to
19 Sections 995 and 999a. That review may only be sought in the
20 event the defendant is held to answer pursuant to Section 872.

21 (g) Nothing contained herein shall preclude a magistrate, upon
22 the resumption of proceedings, from considering a motion made
23 pursuant to Section 1318.

24 If the superior court grants the motion for reinstatement and
25 orders the magistrate to issue an order of commitment, the
26 defendant, in lieu of resumed proceedings before the magistrate,
27 may elect to waive his or her right to be committed by a
28 magistrate, and consent to the filing of an amended or initial
29 information containing the reinstated charge or charges. After
30 arraignment thereon, he or she may adopt as a motion pursuant to
31 Section 995, the record and proceedings of the motion taken
32 pursuant to this section and the order issued pursuant thereto, and
33 may seek review of the order in the manner prescribed in Section
34 999a.

35 ~~SEC. 2. Section 1238 of the Penal Code is amended to read:~~

36 ~~1238. (a) An appeal may be taken by the people from any of~~
37 ~~the following:~~

38 ~~(1) An order setting aside all or any portion of the indictment,~~
39 ~~information, or complaint.~~

- 1 ~~(2) An order sustaining a demurrer to all or any portion of the~~
2 ~~indictment, accusation, or information.~~
- 3 ~~(3) An order granting a new trial.~~
- 4 ~~(4) An order arresting judgment.~~
- 5 ~~(5) An order made after judgment, affecting the substantial~~
6 ~~rights of the people.~~
- 7 ~~(6) An order modifying the verdict or finding by reducing the~~
8 ~~degree of the offense or the punishment imposed or modifying~~
9 ~~the offense to a lesser offense.~~
- 10 ~~(7) An order dismissing a case prior to trial made upon motion~~
11 ~~of the court pursuant to Section 1385 whenever such order is~~
12 ~~based upon an order granting the defendant's motion to return or~~
13 ~~suppress property or evidence made at a special hearing as~~
14 ~~provided in this code.~~
- 15 ~~(8) An order or judgment dismissing or otherwise terminating~~
16 ~~all or any portion of the action including such an order or~~
17 ~~judgment after a verdict or finding of guilty or an order or~~
18 ~~judgment entered before the defendant has been placed in~~
19 ~~jeopardy or where the defendant has waived jeopardy.~~
- 20 ~~(9) An order denying the motion of the people to reinstate the~~
21 ~~complaint or a portion thereof pursuant to Section 871.5.~~
- 22 ~~(10) The imposition of an unlawful sentence, whether or not~~
23 ~~the court suspends the execution of the sentence, except that~~
24 ~~portion of a sentence imposing a prison term which is based upon~~
25 ~~a court's choice that a term of imprisonment (A) be the upper,~~
26 ~~middle, or lower term, unless the term selected is not set forth in~~
27 ~~an applicable statute, or (B) be consecutive or concurrent to~~
28 ~~another term of imprisonment, unless an applicable statute~~
29 ~~requires that the term be consecutive. As used in this paragraph,~~
30 ~~"unlawful sentence" means the imposition of a sentence not~~
31 ~~authorized by law or the imposition of a sentence based upon an~~
32 ~~unlawful order of the court which strikes or otherwise modifies~~
33 ~~the effect of an enhancement or prior conviction.~~
- 34 ~~(11) An order recusing the district attorney pursuant to Section~~
35 ~~1424.~~
- 36 ~~(12) An order or judgment making a crime that is punishable,~~
37 ~~in the discretion of the court, by imprisonment in the state prison~~
38 ~~or by a fine or imprisonment in a county jail, a misdemeanor for~~
39 ~~all purposes pursuant to subdivision (b) of Section 17.~~

1 (b) If, pursuant to paragraph (8) of subdivision (a), the people
2 prosecute an appeal to decision, or any review of such decision,
3 it shall be binding upon them and they shall be prohibited from
4 refiling the case which was appealed.

5 (c) ~~When an appeal is taken pursuant to paragraph (7) of~~
6 ~~subdivision (a), the court may review the order granting the~~
7 ~~defendant's motion to return or suppress property or evidence~~
8 ~~made at a special hearing as provided in this code.~~

9 (d) ~~Nothing contained in this section shall be construed to~~
10 ~~authorize an appeal from an order granting probation. Instead, the~~
11 ~~people may seek appellate review of any grant of probation,~~
12 ~~whether or not the court imposes sentence, by means of a petition~~
13 ~~for a writ of mandate or prohibition which is filed within 60 days~~
14 ~~after probation is granted. The review of any grant of probation~~
15 ~~shall include review of any order underlying the grant of~~
16 ~~probation.~~