Filed 6/12/17 Tornow v. Superior Court CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MARK JEFFREY TORNOW, Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	B271895 (Los Angeles County Super. Ct. No. BA432035)

ORIGINAL PROCEEDING; petition for writ of mandate. Dennis J. Landin, Judge. Petition granted.

Brentford J. Ferreira for Petitioner.

No appearance by Respondent.

Jackie Lacey, District Attorney, Cassandra Thorp and Scott D. Collins, Deputy District Attorneys, for Real Party in Interest.

Prosecution for crimes involving fraud must begin within four years of the completion of the offense or the discovery of its commission, whichever is later. (Pen. Code, §§ 801.5, 803, subd. (c).)[1] "Discovery," however, does not require actual knowledge: "The crucial determination is whether law enforcement authorities or the victim had actual notice *of circumstances sufficient to make them suspicious of fraud thereby leading them to make inquiries which might have revealed the fraud*." (*People v. Zamora* (1976) 18 Cal.3d 538, 571-572 (*Zamora*).) That is, law enforcement is held to a "standard of reasonable diligence." (*Id.* at p. 572.)

Mark Jeffrey Tornow was charged with several counts of insurance fraud based on allegations that on September 19, 2010 he intentionally damaged one of his company's tow trucks and on December 1, 2010 prepared a statement to be submitted to an insurance company that attributed all the vehicle's damage to an accident. At his preliminary hearing Tornow argued the charges were time-barred because the initial felony complaint had not been filed until December 10, 2014, more than four years after those events, notwithstanding the allegation as to two counts that the crimes had not been discovered within the meaning of section 803, subdivision (c), until January 23, 2012, when California Highway Patrol Officer Joseph Pace received from an anonymous source a videotape depicting Tornow intentionally damaging the insured tow truck. Officer Pace testified at the preliminary hearing he had heard "rumors" by Turnow's

---

[1] Statutory references are to this code unless otherwise stated.

competitors regarding possible insurance fraud in late 2010, but insisted that information was insufficient to start an investigation. The magistrate agreed, ruling those generalized statements to Officer Pace were devoid of the factual specificity required under section 803, subdivision (c), and *Zamora* to start the running of the four-year statute of limitations.

Following his arraignment on the information, Tornow again moved to dismiss the remaining counts, contending he had learned for the first time during the preliminary hearing that Officer Pace interviewed two witnesses in October 2010 concerning Tornow's possible insurance fraud. Based on his post-preliminary-hearing interview of those witnesses, Tornow argued Officer Pace had conducted an investigation more than four years before the felony complaint was filed, demonstrating his constructive knowledge of the insurance fraud, and the remaining counts were time-barred as a matter of law. He requested an evidentiary hearing to present this new testimony, suggesting the People's failure to disclose the information about Officer Pace's activities before the preliminary hearing constituted a violation of their obligations under *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215]. The People opposed the motion, arguing Tornow was simply reasserting the same or substantially similar claims to those presented at the preliminary hearing. Because contested factual issues exist concerning Officer Pace's activities in October and November 2010, the People insisted the motion was properly denied pending resolution of those issues by a jury. The court agreed with the People and denied the motion, concluding Tornow had failed to demonstrate he was entitled to relief as a matter of law.

Tornow petitioned this court for a writ of mandate directing respondent superior court to hold an evidentiary hearing and to decide whether, as a matter of law based on the facts received, the charges against him under sections 550, subdivision (b)(2) (preparing an intentionally false or misleading statement in support of an insurance claim) and 548, subdivision (a) (willfully injuring insured property with the intent to defraud or prejudice the insurer), had been filed more than four years after Officer Pace had constructive knowledge those offenses may have been committed.[2] After receiving the People's preliminary opposition, we issued an order to show cause why the relief requested in the petition should not be granted.

Following further briefing and oral argument, we now grant the petition. Tornow and the People certainly disagree on the ultimate question when the limitations period started to run, and the additional evidence Tornow seeks to introduce concerning the nature and scope of Officer Pace's activities in 2010 may well be inconsistent with the People's characterization of the extent of his knowledge concerning Tornow's alleged insurance fraud in 2010. Nonetheless, the proffered evidence appears to supplement, rather than contradict, Officer Pace's testimony regarding what he had heard about the alleged fraud and what he did in response at that time, which was based on his admittedly faulty memory. The testimony Tornow proposes to introduce is intended to fill those gaps. Thus, there remains a reasonable likelihood the uncontradicted evidence will compel the

---

[2] The superior court stayed all criminal proceedings pending resolution of Tornow's writ petition.

conclusion as a matter of law that a prudent person apprised of the information known to Officer Pace in 2010 would have conducted a more vigorous inquiry. Tornow is entitled to a pretrial hearing to pursue that claim.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Felony Complaint and Preliminary Hearing*

Tornow was charged by felony complaint on December 10, 2014 with insurance fraud in violation of section 550, subdivisions (a)(1), (b)(1), (b)(2) and (b)(3). An amended complaint filed July 28, 2015 added an additional count, defrauding an insurer in violation of section 548, subdivision (a).

The tow truck (a 2007 Ford 550) owed by Tornow's company, Finish Line Towing, was apparently damaged in a collision on September 18, 2010. An initial insurance claim was submitted on that date. The amended complaint alleged Tornow intentionally caused damage to the truck on September 19, 2010 (in order to have it declared an unrepairable total loss) and submitted a sworn statement to the insurer on December 1, 2010 that the loss or damage identified in the claim did not originate by act, design or procurement on the part of the insured. The claim was settled by payment of $30,432.

The amended complaint further alleged "as to count(s) 2 and 6, offenses described in Penal Code section 803(c), that the above violation was not discovered until 1/23/12 by CHP Officer J. Pace by viewing an anonymous video depicting intentional damage to the insured tow truck, and that no victim of said violation and no law enforcement agency chargeable with the investigation and prosecution of said violation had actual and constructive knowledge of said violation prior to said date

because of defendant Tornow's failure to disclose the intentional damage, within the meaning of Penal Code section 803(c)."

At the preliminary hearing Officer Pace testified he had previously served as a rotational tow coordinator and knew Tornow, whose company had a contract with the CHP to provide towing services and was in the rotation. About January 23, 2012 Officer Pace reviewed a videotape that had been dropped off at the front desk of his station "of what appeared to be Mr. Tornow in his garage with his truck, one of his tow trucks." "It appeared that one of the tow trucks was being lifted and then dropped down upon an object." It looked to Officer Pace as if Tornow was intentionally damaging his truck, so he forwarded the videotape to a task force that worked with the Department of Insurance.

Officer Pace testified that, prior to receiving the videotape, he had "heard rumors that a videotape like that existed. When I received it, I forwarded it to our insurance [investigators] because it appeared to me that had corroborated a rumor that I had heard about [Tornow] damaging his truck for insurance purposes." Officer Pace initially recalled he had heard the rumors of Tornow's insurance fraud six or seven months before receiving the videotape, that is, sometime in 2011.

Officer Pace explained that, when he had heard the rumors, he did not believe they warranted conducting an investigation: "It had been my experience that Mr. Tornow in the industry he has been, he has been very cooperative with me as an officer and as a member of our department. He is very well liked by me and our other subsequent officers. He is not overly popular with some of his other competitors, and they would accuse him of various things. And this was, just in my estimation at the time, just one of the things they would say or have said." Once Officer Pace saw

the videotape, however, "it appeared to corroborate this rumor, and I couldn't just sit on it."

On cross-examination Officer Pace acknowledged it was his duty to investigate when someone told him a crime had been committed, especially if more than one person had reported the crime. In this case, however, he chose not to investigate until he received the videotape even though he had heard the rumors of the insurance fraud and the videotape evidence from "a few people." Officer Pace identified as the source of the rumors the owner of Long Beach Tow, a competitor of Tornow's who had an adversarial relationship with Finish Line Towing, and also Joseph Gonzalez, the owner of Kruger Tow and perhaps several of Gonzalez's drivers. Officer Pace testified he knew Andy Garcia, a former employee of Finish Line Towing who subsequently went to work for one of Tornow's competitors. He said he might also have heard the rumor about Tornow damaging his own truck from Garcia.

Officer Pace was concerned enough about the rumor to talk to Tornow about it in a "cursory investigation." In late November or early December 2010 he told Tornow "that there are rumors of a video that was either being circulated or someone had known about this. And that if it came into [Officer Pace's] possession, then . . . [he] would have no alternative but to forward it to our investigator." Tornow denied the existence of such a videotape.

Detective Jacob Svoboda with the California Department of Insurance, Fraud Division, testified he received the case file on November 7, 2013. After the videotape had been forwarded by Officer Pace, the case file had been given to Officer Roy Garcia, who "transferred out of the task force and it wasn't until a new officer came in and went into his cubicle they found that file was

sitting there and had not been worked." Detective Svoboda explained there was nothing in the case file regarding the rumors Officer Pace had heard, but Officer Pace told him about them when the two men spoke. Detective Svoboda did not ask Officer Pace for the names of the people who had told him about the video. Detective Svoboda also learned that Officer Pace had spoken to Tornow about the matter. In July 2014 Detective Svoboda gave the case to the district attorney's office for filing.

At some point during the preliminary hearing the People dismissed two of the five fraud counts with which Tornow had been charged in the amended complaint. Two of the remaining counts included the section 803, subdivision (c), delayed discovery allegation. The magistrate denied the People's motion to amend the third count (count 3) to add that allegation and granted defense counsel's motion to dismiss count 3 as time-barred.

As to the final two counts (counts 2 and 6), however, the magistrate denied the defense motion to dismiss, agreeing with the People that, looking at the totality of the circumstances, "Officer Pace was presented with rumors and with statements by competitors of Mr. Turnow. Officer Pace indicated that Mr. Turnow may not have been well liked by competitors in the community. Mr. Turnow had a good relationship with Officer Pace, a professional relationship which was grounded upon Mr. Turnow's [company] being an official tow yard and interacting on a regular basis with law enforcement. Law enforcement was not presented with any specifics as to any particular truck, any particular time, any particular location, or any particular claim. There were statements and, yes, there were four of them. . . . But they were, in essence, generalized statements. And as far as I'm concerned, they were devoid of

[the] facts required by [section 803, subdivision (c),] of the Penal Code and *Zamora* and its progeny. Officer Pace undertook an investigation, and I do not believe that the production of statements started the clock, as it were, under *Zamora* in view of my overall determinations of lack of fact specificity."

2. *The Information and Second Motion To Dismiss*

The People filed an information on November 5, 2015 charging only counts 2 and 6, insurance fraud and defrauding and insurer (§§ 550, subd. (b)(2), 548, subd. (a)). The information alleged those crimes fell within section 803, subdivision (c), in "that the above violation[s were] not discovered until 1/23/12 by CHP Officer J. Pace by viewing an anonymous video depicting intentional damage to the 2007 Ford 550 . . . because of the defendant's representations in insurance claim #SA2331 that the damage was caused by an accident . . . ."

On February 16, 2016 Tornow moved to dismiss the information as time-barred. The motion was heard on March 1, 2016. Defense counsel represented he had not been aware until the preliminary hearing of the facts regarding Officer Pace's investigation, "who he talked to and how he found out information, that he took action based upon that. We have witnesses now subpoenaed who he talked to that ties in the date." He added that those witnesses, Francisco (Andy) Garcia and William Heinz, were prepared to testify at the hearing. As for the People's characterization of the information initially available to Officer Pace as "basically just a rumor," counsel asserted his witnesses would show Officer Pace "wasn't doing it on rumor. He actually indicated he was there to investigate, and he asked them questions about it. That's beyond rumor. That's actually assertively leaving his office, going to the location, having

conversations with people, going to other people." Tornow's counsel added, "Our witnesses are going to say exactly what [Officer Pace] was told, that there were actually complaints made, not just rumor . . . ."

Citing CALCRIM No. 3410, the defense instruction on the statute of limitations, the trial court indicated that resolving the factual dispute as to when Officer Pace should have discovered a crime had been committed was an issue for trial, "If there was a concession by the parties as to the facts, then I can rule as a matter of law that the crime should have been discovered. But here it sounds like the officer would say, if he was here, 'well, they told me A, B and C, but that wasn't enough for me to initiate an investigation.'"

Repeating that he was not aware Officer Pace had interviewed potential witnesses in late 2010 until the preliminary hearing, defense counsel argued "this is *Brady*, and we weren't given *Brady* information that goes to guilt or innocence or ability to prosecute until in the prelim by the witness on the stand."[3] Because of that omission, defense counsel insisted, he could not have effectively raised the statute of limitations defense any earlier. He added that there was no time

---

[3] The motion to dismiss filed on February 16, 2016 did not cite *Brady v. Maryland*, *supra*, 373 U.S. 83 or argue the information should be dismissed because the prosecution had failed to disclose exculpatory evidence to the defense. Contrary to Tornow's contention during argument on this writ petition, no oral motion under *Brady* was made at the March 1, 2016 hearing. In fact, the statement quoted in the text is the only reference to *Brady* made by defense counsel.

limit on when the defense could make a motion to dismiss based on the statute of limitations. According to his offer of proof, Garcia would testify Officer Pace spoke to him at Garcia's work place approximately two weeks before Halloween 2010 and said he was investigating complaints made by individuals that Tornow had intentionally damaged his Ford F550 tow truck. Heinz would testify he had been interviewed in October 2010, at a different location by Officer Pace, who asked him questions about complaints that Tornow had damaged the property. Defense counsel noted Finish Line Towing had only one such vehicle.

The court asked the prosecutor to respond, pointing out that "[h]ad they known of the timing and had these witnesses, arguably [the magistrate] would have had more information on which to make his decision." The prosecutor agreed a defendant could make the motion to dismiss on limitations grounds at any time but argued, given Officer Pace's testimony, the defense could not meet its burden of showing as a matter of law the statute of limitations had run: The magistrate correctly ruled, he urged, that rumors alone are not enough to trigger the statute of limitations. The prosecutor added that the defense had Garcia and Heinz in the courtroom for the preliminary hearing (although apparently to be available to address the merits of the criminal charges, not to discuss Officer Pace's investigation) but did not call them as witnesses.[4]

---

[4] In a declaration submitted with the reply brief in support of Tornow's petition for writ of mandate, defense counsel conceded he had interviewed Heinz prior to the preliminary hearing and had, in fact, turned over a recording of that interview to the

Footnote 5 continued on next page

At the conclusion of argument the court agreed with the People and denied the motion to dismiss, finding "a substantial triable issue of fact regarding whether or not the crime should have been discovered sooner rather than later." The court made no ruling regarding a possible *Brady* violation, which had not been expressly addressed in defense counsel's motion.

DISCUSSION

1. *Governing Law*

As discussed, prosecution for crimes involving fraud, as charged here, must begin within four years of the completion of the offense or discovery of its commission, whichever is later. (§§ 801.5, 803, subd. (c).)[5] A crime is discovered for purposes of section 803, subdivision (c), when the victim or law enforcement learns of the crime or "learns of facts which, when investigated with reasonable diligence, would make the person aware a crime

---

prosecution; but he did not ask Heinz if he had been interviewed by Officer Pace, and Heinz did not volunteer that information. Counsel explained he had no reason to ask that question: "[T]he information I had was that Officer Pace had only confronted Mr. Tornow and told him that there would be no investigation unless the video surfaced."

Defense counsel also acknowledged he was aware of Garcia's identity, but had not questioned him prior to the preliminary hearing about any conversations Garcia may have had with Officer Pace.

[5] The four-year limitations period of section 801.5 applies to "any offense described in subdivision (c) of Section 803." Section 803, subdivision (c)(6), applies to "[f]elony insurance fraud in violation of Section 548 or 550 of this code or former Section 1871.1 or Section 1871.4 of the Insurance Code."

had occurred." (*People v. Bell* (1996) 45 Cal.App.4th 1030, 1061; see *Zamora*, *supra*, 18 Cal.3d at pp. 571-572.)

In *Zamora*, *supra*, 18 Cal.3d 538 the Supreme Court held the statute of limitations for grand theft, then three years from "discovery," as set forth in former section 800 (Stats. 1969, ch. 1171, § 1, p. 2266), was not extended until the actual discovery of the theft but only until such time as "reasonable diligence" should have resulted in the discovery of the theft—the same requirement courts had read into the discovery provision of the statute of limitations for tort actions based on fraud in former section 338, subdivision 4 (now subdivision (d)) of the Code of Civil Procedure. (*Zamora*, at p. 561.) In that context, the Court explained, "the word 'discovery' is not synonymous with actual knowledge." (*Id.* at pp. 561-562.) "'The statute commences to run . . . after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry. Section 19 of the Civil Code provides: "Every person who has actual notice of circumstances *sufficient to put a prudent man upon inquiry* as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he *might* have learned such fact."'" (*Zamora*, at p. 562.) Thus, in addressing the issue of discovery, "[t]he crucial determination is whether law enforcement authorities or the victim had actual notice *of circumstances sufficient to make them suspicious of fraud thereby leading them to make inquiries which might have revealed the fraud*." (*Id.* at pp. 571-572.)

After articulating this standard of reasonable diligence, the *Zamora* Court noted "the limitation question is a basic jurisdictional issue and the bar thereof is aimed as much at the prevention of untimely prosecutions as it is at the prevention of

untimely convictions." (*Zamora*, *supra*, 18 Cal.3d at pp. 563-564, fn. 25; accord, *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371 [statute of limitations in criminal cases is jurisdictional]; see *People v. Lopez* (1997) 52 Cal.App.4th 233, 244 (*Lopez*) [same].) The Court then concluded a nonstatutory pretrial motion to dismiss could be made by a defendant on the ground the prosecution was barred by the statute of limitations as a matter of law. The Court explained, "If it appears possible that the evidence will establish as a matter of law that the period of limitation has run, then judicial economy may be far better served if the issue is resolved at the earliest possible stage of the proceedings rather than waiting until an entire trial on multiple issues is completed. . . . [A] trial court has within its discretion the power to hold an evidentiary hearing for purposes of determining whether as a matter of law the statute of limitations bars the prosecution. At such a hearing, it may properly be considered whether the reasonable diligence requirement of section [803, subdivision (c)] has been complied with." (*Zamora*, at pp. 563-564, fn. 25; see *People v. Williams* (1999) 21 Cal.4th 335, 337 [statute of limitations is not an affirmative defense subject to forfeiture if not raised before or during trial; "'this court and the Courts of Appeal have repeatedly held that a defendant may assert the statute of limitations at any time'"].)

The Court cautioned, however, "there is no right to such a preliminary determination of the limitation issue. In each case the court should, before granting a hearing on the issue, consider such factors as the likelihood that the People will be unable to meet their burden of proof on the question . . . and the potential length of both the hearing and a full trial on the merits. If the People prevail after such a hearing, then the limitation issue

must still be resolved by the jury if it remains disputed by the defendant." (*Zamora*, *supra*, 18 Cal.3d at pp. 563-564, fn. 25.)

In *Lopez*, *supra*, 52 Cal.App.4th 233, our colleagues in the Third District, relying on the Supreme Court's analysis in *Zamora*, held at a special pretrial hearing on a motion to dismiss the indictment as time-barred the defendant bears the burden to establish the statute of limitations has run as a matter of law. (*Lopez*, at p. 239.) Generally, if the indictment or information adequately pleads the elements of delayed discovery, the bar of the statute of limitations will be an evidentiary question of fact. (*Id*. at p. 250.) However, "if the evidence is uncontradicted at the special hearing the issue then becomes a question of law. [Citation.] In such a case, the trial court may then decide the issue." (*Ibid*.; see *id.* at p. 251 [a pretrial motion to dismiss on the ground of the statute of limitations "is the functional equivalent of a motion for summary judgment in the civil context"]; cf. *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112 ["[w]hile resolution of the statute of limitations issue is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper"].)

2. *Respondent Superior Court Abused Its Discretion in Denying Tornow an Evidentiary Hearing To Present Evidence Concerning Officer Pace's Investigative Activities in October and November 2010*

Although the decision whether to hold an evidentiary hearing on a defendant's pretrial motion to dismiss a criminal case as time-barred is committed to the sound discretion of the trial court (*Zamora*, *supra*, 18 Cal.3d at pp. 563-564, fn. 25), the court abuses its discretion when it applies the wrong legal standard to the issue before it. (*Costco Wholesale Corp. v.*

Superior Court (2009) 47 Cal.4th 725, 733 ["[a]n abuse of discretion is shown when the trial court applies the wrong legal standard"]; *People v. Financial Casualty & Surety, Inc.* (2017) 10 Cal.App.5th 369, 386 ["a court abuses its discretion when it applies the wrong legal standard"].) Whether a trial court applied the correct legal standard to an issue in exercising its discretion is a question of law subject to our independent review. (*Perez v. Torres-Hernandez* (2016) 1 Cal.App.5th 389, 397; *Eneaji v. Ubboe* (2014) 229 Cal.App.4th 1457, 1463; see *KB Home v. Superior Court* (2003) 112 Cal.App.4th 1076, 1083 ["even when a decision by the trial court is generally reviewed for abuse of discretion, we must determine at the outset whether the court applied the correct legal standard to the issue in exercising its discretion, which determination is also a question of law for this court"].)

Although the trial court recognized under *Zamora*, *supra*, 18 Cal.3d 538, and *Lopez*, *supra*, 52 Cal.App.4th 233, Tornow's burden on his motion to dismiss was similar to the moving party's burden on a motion for summary judgment in a civil case, the court misunderstood that legal standard. That is, the court did not evaluate whether there were actually disputed factual issues as to what Officer Pace was told in October and November 2010 during his conversations with Gonzalez, Garcia and the owner and drivers of Long Beach Tow or whether, if undisputed, the underlying facts known to Officer Pace were susceptible to opposing inferences on the ultimate question to be addressed—would a reasonably prudent person with that information have been suspicious a fraud had been committed and made further inquiry. Instead, the court denied an evidentiary hearing because Officer Pace testified he had heard only a rumor of

Tornow's fraudulent activity, which in his view was not enough to initiate an investigation, and evidence contradicting that characterization of the information created a factual issue to be resolved at trial. That was error: If the underlying facts are undisputed, even though the parties contest whether an action has been timely filed, the court may grant summary judgment if those facts permit only one reasonable inference. (See *Jolly v. Eli Lilly & Co.*, *supra*, 44 Cal.3d at p. 1112; see also *Cleveland v. Internet Specialties West, Inc.* (2009) 171 Cal.App.4th 24, 31 ["[i]n this summary judgment case, the issue is whether the *only* reasonable inference to be drawn from those facts that are undisputed is that Cleveland should have learned the facts essential to his claims by mid-1966"]; *Ralph Andrews Productions, Inc. v. Paramount Pictures Corp.* (1990) 222 Cal.App.3d 676, 682.) Similarly, if the evidence as to what was known to an officer is uncontradicted, the trial court may decide whether the prosecution is time-barred as a matter of law. (*Lopez*, *supra*, 52 Cal.App.4th at p. 250.)

Here, based on his counsel's offer of proof, Tornow's witnesses would have provided details of conversations alluded to, but not described, by Officer Pace in his preliminary hearing testimony. At least at this point, it does not appear likely there will be any conflict in those witnesses' recollection of their discussions with Officer Pace and the officer's own vague memory of them. And because we do not know what information Gonzalez, Garcia and other interviewees provided Officer Pace or what facts Officer Pace already possessed and may have disclosed to those individuals (for example, the specific make of the tow truck that was allegedly involved in the fraudulent scheme), it is impossible to determine whether the only reasonable inference

from the undisputed facts is that Officer Pace was on inquiry notice and the four-year limitations period of sections 801.5 and 803, subdivision (c), began to run at that time. At the very least, it appears possible the evidence will establish as a matter of law that the period of limitations had already run before the criminal complaint was filed. (See *Zamora*, *supra*, 18 Cal.3d at pp. 563-564, fn. 25.)

In general, mandate is not available to compel the court to exercise its discretion in a particular manner. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442; *Schmidt v. California Highway Patrol* (2016) 1 Cal.App.5th 1287, 1298; *People v. Karriker* (2007) 149 Cal.App.4th 763, 774.) However, it is available to correct an abuse of discretion. (*In re Stier* (2007) 152 Cal.App.4th 63, 84; *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 101 Cal.App.4th 1317, 1325-1326.) Under the circumstances here, respondent superior court abused its discretion in denying Tornow's motion to dismiss the information on statute of limitations grounds without conducting an evidentiary hearing.[6]

---

[6] Like the superior court, we do not address Tornow's contention a *Brady* violation has occurred, which was not properly raised by defense counsel in the proceedings under review.

DISPOSITION

The petition is granted. Let a peremptory writ of mandate issue directing the superior court to vacate its order denying Tornow's motion to dismiss the information on statute of limitations grounds without conducting an evidentiary hearing and to enter a new order scheduling an evidentiary hearing after which the court is to decide whether the uncontradicted evidence establishes, as a matter of law, that the governing four-year limitations period has been exceeded.

PERLUSS, P. J.

We concur:

SEGAL, J.

SMALL, J.*

---

* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.