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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

KHALIS PHILIP PERKINS,

Defendant and Appellant.

A127886

(Solano County
Super. Ct. No. VCR201444)

I.

INTRODUCTION

Appellant Khalis Philip Perkins appeals from a four-year state prison sentence imposed after he pleaded guilty and no contest to the charges, and admitted one special allegation brought against him by the Solano County District Attorney's Office. Appellant contends the court improperly sentenced him to one year more than the maximum called for in his plea agreement when he failed to appear for sentencing. He claims he was not informed at the time his plea was entered that: (1) he could receive a greater sentence than that stated in the plea if he failed to appear at sentencing, and (2) he was waiving his right to withdraw his plea in that event. (*People v. Cruz* (1988) 44 Cal.3d 1247 (*Cruz*).) Additionally, he claims the written plea form he signed contained an inadequate *Cruz* waiver. Appellant seeks "specific performance" of the three-year maximum sentence he was promised or, alternatively, a finding that he is entitled to a remand to allow him to appear in pro per and present a motion to withdraw his plea.

We agree with respondent that the substance of the issues raised by this appeal goes to the validity of appellant's plea bargain. Thus, appellant has failed to comply with Penal Code section 1237.5 (section 1237.5), which requires that he first obtain a certificate of probable cause before filing his appeal. For this reason, we dismiss appellant's appeal.

II.

PROCEDURAL HISTORY

A two-count felony complaint was filed by the Solano County District Attorney's Office on January 26, 2009, charging appellant with one felony count of sale of a controlled substance (Health & Saf. Code, § 11352, subd. (a)), and one misdemeanor count of possession of a smoking device (Health & Saf. Code, § 11364). The complaint also alleged two special allegations, including that appellant had suffered a prior prison term, within the meaning of Penal Code section 667.5.

On April 13, 2009, appellant accepted a plea agreement, which was put on the record in open court, by which he would plead guilty to count one of the complaint, and no contest to count two. He also admitted the prior prison term special allegation. In return, it was agreed that appellant would be sentenced to no more than three years in state prison, with consideration being given by Judge Robert Bowers¹ to sentencing appellant to probation and a drug program.

That same day, appellant also initialed and signed a written "Waiver of Constitutional Rights And Declaration In Support of Defendant's Motion to Change Plea." The written plea form included the above terms of the negotiated plea, and an admonition not discussed by the court when the plea was taken. That admonition appeared at the bottom of page two and stated in all capital letters, underlined, and in bold type, the following: "**I UNDERSTAND THE ABOVE PROMISES ARE NOT BINDING IF I FAIL TO APPEAR AT ANY SUBSEQUENT HEARING, COMMIT**

¹ The plea was taken by Judge Julie Conger, but appellant agreed he could be sentenced by Judge Bowers in her absence. (*People v. Arbuckle* (1978) 22 Cal.3d 749.)

ANY CRIME PRIOR TO MY JUDGMENT AND SENTENCING, VIOLATE ANY TERMS OF MY RELEASE, OR IF PLACED ON PROBATION, VIOLATE ANY PROBATION TERMS.” (Original capitalization and underscoring.)

The matter was continued to May 27, 2009, for sentencing. Appellant failed to appear on that date, and a bench warrant was issued. Appellant was subsequently taken into custody on October 5, 2009, and at a hearing on November 3, 2009, made motions to represent himself, to have substitute counsel appointed, and to withdraw his plea. The request to represent himself was “reserve[d],” and the *Marsden* motion² was denied, but the court appointed conflict counsel to evaluate appellant’s motion to withdraw his plea. Appellant thereafter filed written motions to represent himself (*Faretta*),³ and another motion for substitute counsel (*Marsden*).

At a hearing held on February 23, 2010,⁴ conflict counsel advised the court that counsel could not find any basis upon which to move to withdraw appellant’s plea. However, counsel noted that appellant was not satisfied with this advice, and wanted to proceed in pro per in connection with his request to withdraw his plea. Upon receipt of conflict counsel’s report, the court ordered that appellant’s previous counsel be reappointed to represent him. The matter was continued to March 9 for judgment and sentencing.

A subsequent written petition to proceed in pro per was submitted by appellant with a letter to the court on February 26. In the meantime, on March 3 reappointed defense counsel filed a written motion to withdraw appellant’s plea, in the event the court deviated from the plea agreement in sentencing appellant. The motion was made on the ground that appellant did not validly waive his right to withdraw his plea in the event the trial court did not sentence him in accordance with the plea agreement.

² *People v. Marsden* (1970) 2 Cal.3d 118.

³ *Faretta v. California* (1975) 422 U.S. 806.

⁴ All further dates occurred in calendar year 2010.

In advance of sentencing, appointed counsel filed a statement in mitigation and in support of probation. Attached to the statement was a psychological report dated April 30 authored by Dr. Kathleen O'Meara concerning her evaluation of appellant. The evaluation was performed, and the report prepared, at the request of the public defender's office.

On March 9, the court denied appellant's request to represent himself. The request was denied based upon Dr. O'Meara's evaluation of appellant's mental state. The court also denied defense counsel's motion to withdraw appellant's plea, made on the basis that there was no valid *Cruz* waiver.

The court then proceeded to sentence appellant. The court denied probation and sentenced appellant to the low term of three years on count one, and added one consecutive year for the prior prison term allegation which appellant had admitted, for a total aggregate state prison term of four years.⁵ The court then dismissed the remaining special allegation and count two in the interests of justice. Local custody credits of 526 days were awarded.

III.

LEGAL DISCUSSION

A. Certificate of Probable Cause Was Necessary In Order for Appellant to Raise These Issues On Appeal

Respondent contends appellant's claims are not reviewable on appeal because he failed to comply with section 1237.5 by not obtaining a certificate of probable cause from the trial court before filing his appeal. That section provides as follows:

"No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing

⁵ The probation report recommended the maximum of nine years be imposed, which the prosecutor found to be "a bit extreme." Instead, the prosecutor asked the court to impose a seven-year term.

reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.”

Appellant replies that no certificate of probable cause is required where his appeal is based upon grounds that arose after his plea was entered, and which do not affect the validity of the plea. We agree with respondent that appellant is, in substance, attacking the validity of the underlying plea, and therefore a certificate of probable cause was necessary before he could pursue this appeal.

“Notwithstanding the broad language of section 1237.5, it is settled that two types of issues may be raised in a guilty or nolo contendere plea appeal without issuance of a certificate: (1) search and seizure issues for which an appeal is provided under section 1538.5, subdivision (m); and (2) issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed. [Citations.]” (*People v Panizzon* (1996) 13 Cal.4th 68, 74-75 (*Panizzon*).)

However, “[i]n determining whether section 1237.5 applies to a challenge of a sentence imposed after a plea of guilty or no contest, courts must look to the substance of the appeal: ‘the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made.’” (*People v. Ribero* (1971) 4 Cal.3d 55, 63) Hence, the critical inquiry is whether a challenge to the sentence is in substance a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5. [Citation.]” (*Panizzon, supra*, 13 Cal.4th at p. 76.)

In *People v. Puente* (2008) 165 Cal.App.4th 1143 (*Puente*), the defendant appealed, in part claiming that the trial court violated his right to due process by (a) not notifying him that he allegedly violated the terms of the *Vargas* waiver, and (b) not

specifying a reason why defendant was found in violation of the *Vargas* waiver.⁶ The court concluded that the issue raised went to the validity of defendant's plea, and thus required a certificate of probable cause to seek appellate review: "The waiver of defendant's right to be properly charged and convicted with 'any subsequent failure to appear' is an explicit and integral part of defendant's plea. Defendant's contention that a petition should have been filed giving him notice of his alleged failure to appear is a direct challenge to the validity of the terms of defendant's plea, because he waived his right to be charged; therefore such a challenge requires a certificate of probable cause. Due to defendant's failure to obtain a certificate of probable cause, this contention must be dismissed." (*Puente, supra*, 165 Cal.App.4th 1143 at p. 1150, fn. omitted.)

In *Puente*, the defendant also claimed his due process rights were violated because the trial court failed to state a reason that he was found in violation of the terms of his *Cruz* waiver. The court held that this claim also required a certificate of probable cause in order to be reviewed on appeal: "Defendant is essentially contending that the trial court followed improper procedures when it found he violated the terms of the *Cruz* waiver. Defendant's challenge to the process by which the court found him in violation of the terms of his *Cruz* waiver is a direct challenge to the validity of his waiver of his rights to be properly charged and convicted. Accordingly, defendant is challenging the validity of his plea and such a challenge requires a certificate of probable cause. Due to defendant's failure to obtain a certificate of probable cause, this portion of his appeal must be dismissed." (*Puente, supra*, 165 Cal.App.4th 1143 at p. 1150.)

Appellant's claim that he was inadequately admonished, or "canvassed," concerning the *Cruz* waiver at the time his plea was entered is similarly an attack on the

⁶ The *Puente* court explained that the term "'*Vargas* waiver' is derived from the case of *People v. Vargas* (1990) 223 Cal.App.3d 1107, 1113 . . . , where the defendant agreed in a plea bargain to be sentenced to a two-year term if he appeared for sentencing and a five-year term if he failed to appear for sentencing. The defendant failed to appear for sentencing and the court sentenced the defendant to a five-year term, which the appellate court deemed proper. (*Id.* at pp. 1113-1114.)" (*Puente, supra*, 165 Cal.App.4th at p. 1145, fn. 2.)

validity of the plea he entered. Challenges to the adequacy of admonitions have been held to be within the scope of section 1237.5, and require a certificate of probable cause in order to raise on appeal. For example, the Supreme Court in *Panizzon* pointed out that where the defendant claims he was inadequately admonished regarding the waiver of appellate rights contained in the plea agreement, “[u]nder *People v. Kaanehe* [(1977) 19 Cal.3d 1], such a claim is clearly subject to section 1237.5. (19 Cal.3d at p. 8.)” (*Panizzon, supra*, 13 Cal.4th at p. 76, fn. 6.) By the same token, appellant’s attack on the sufficiency or adequacy of the waiver contained in the written “Waiver of Constitutional Rights And Declaration In Support of Defendant’s Motion to Change Plea,” is an attack on the validity of his plea.

In an attempt to evade the requirements of section 1237.5, appellant argues that “no valid *Cruz* waiver was ever taken” at the time his plea was entered, and he is simply now seeking “to enforce the plea agreement,” including asking this court to specifically enforce it. But, appellant’s attempt to recast the issues on appeal ignores his contentions that the *Cruz* waiver was invalid because he was improperly admonished about it when his plea was entered, and it was inadequately set out in the written plea form he signed. Also, appellant challenges on appeal the trial court’s denial of his motion to withdraw his guilty plea which was premised on the assertion that appellant did not “knowingly and intelligently waive his rights under Penal Code section 1192.5.” The Supreme Court has expressly disapproved of the practice of applying the rule requiring a certificate of probable cause too loosely in order to reach issues that would otherwise be precluded. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1098-1099.) Therefore, we reject appellant’s effort to characterize his appeal as simply one seeking the specific performance of his plea agreement, and not one seeking to invalidate it.

Even if this appeal involved solely the question of whether appellant is entitled to specific performance of the plea agreement, it would necessarily call upon this court to scrutinize the events leading up to the entry of plea, and interpret the scope and sufficiency the plea’s terms which were hotly disputed below. It must be remembered that “[a] negotiated plea agreement is a form of contract, and it is interpreted according to

general contract principles. [Citations.] ‘The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. [Citation.]’ . . .” (*People v. Shelton* (2006) 37 Cal.4th 759, 767.) In order to specifically enforce a contract, the party seeking enforcement must prove all of the following elements: (1) the contract is sufficiently definite and certain in its terms to be enforced; (2) the contract was just and reasonable; (3) the party seeking enforcement has performed his side of the bargain; (4) the promisor has failed to perform; (5) the contract was supported by adequate consideration; and (6) the available remedy at law is inadequate. (*Porporato v. Devincenzi* (1968) 261 Cal.App.2d 670, 674.) Given the nature of the review required of the plea agreement to determine if it should be specifically enforced, we would necessarily be moved far from a simple examination of the “proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed. [Citations.]” (*Panizzon, supra*, 13 Cal.4th at pp. 74-75.)

For all of these reasons, we must dismiss the appeal based on appellant’s failure to obtain a certificate of probable cause, as required by Penal Code section 1237.5.

IV.
DISPOSITION

The appeal is dismissed.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.