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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL RAY THOMAS, Defendant and Appellant.	B177775 (Los Angeles County Super. Ct. No. MA029140)

APPEAL from a judgment of the Superior Court of Los Angeles County, Randolph A. Rogers, Judge. Dismissed.

Cheryl Barnes Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven E. Mercer, Deputy Attorney General, for Plaintiff and Respondent.

Defendant, Daniel Ray Thomas, purports to appeal from his conviction of felony possession of a counterfeit seal in violation of Penal Code[1] section 472. We noted defendant had failed to secure a probable cause certificate as required by section 1237.5 which applies to appeals after no contest, nolo contendere, or guilty pleas. We have the duty to raise issues concerning our jurisdiction on our own motion. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126; *Olson v. Cory* (1983) 35 Cal.3d 390, 398.) Hence, we issued an order to show cause concerning possible dismissal of the appeal and provided the parties the option of oral argument. We conclude defendant has failed to fully and timely comply with the statutory and rule promulgated requirements for a notice of appeal. Hence, the appeal must be dismissed.

On July 28, 2004, defendant pled no contest to the counterfeit seal charge. On August 16, 2004, defendant filed a pro se notice of appeal. The four and one-half page handwritten notice of appeal began: "Please take notice I hereby appeal from the judg[]ment entered on July 28, 2004." The notice of appeal claimed that: defendant was misadvised prior to pleading no contest of his maximum exposure; defendant's parole officer and a detective had made misrepresentations concerning expungement and a parole hold; there was no factual basis for the plea; and the plea was not knowingly and intelligently entered. Finally, the notice of appeal indicates defendant is appealing the sentence. Although it is not entirely clear what defendant was appealing in terms of the disposition, the notice of appeal makes reference to a probation condition. Further, reference is made to the duration of the time served in custody prior to the probation and sentence hearing.

Before proceeding to a discussion of the controlling law, we note that material parts of the California Rules of Court[2] concerning appeals from guilty, no contest, and

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1 All future statutory references are to the Penal Code.

2 All future references to a rule are to the California Rules of Court.

nolo contendre pleas were amended effective January 1, 2004. (Advisory Com. com, Deering's Ann. Codes, Rules (2004 ed.) foll. rule 30, pp. 327-328.) The Supreme Court authority cited in this opinion discussed former rule 31 in its various iterations over the years. What was in former rule 31 concerning appeals from guilty, no contest, and nolo contendre pleas is now in rule 30. The January 1, 2004, amendments to the court rules do not affect the Supreme Court authority cited in this opinion construing former rule 31.

Pursuant to section 1237.5, a defendant may not appeal from a judgment of conviction entered on a no contest plea unless: "(a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing 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." (*In re Chavez* (2003) 30 Cal.4th 643, 646-647, 650; *People v. Panizzon* (1996) 13 Cal.4th 68, 74.) Effective January 1, 2004, the relevant portions of rule 30(b) state: "(1) Except as provided in (4), to appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must file in that superior court—in addition to the notice of appeal required by (a)—the statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause. [¶] (2) Within 20 days after the defendant files a statement under (1), the superior court must sign and file either a certificate of probable cause or an order denying the certificate. [¶] (3) If the defendant does not file the statement required by (1) or if the superior court denies a certificate of probable cause, the superior court clerk must mark the notice of appeal 'Inoperative,' notify the defendant, and send a copy of the marked notice of appeal to the district appellate project. [¶] (4) The defendant need not comply with (1) if the notice of appeal states that the appeal is based on: [¶] (A) the denial of a motion to suppress evidence under Penal Code section 1538.5, or [¶] (B) grounds that arose after entry of the plea and do not affect the plea's validity." A defendant seeking appellate review following a no contest plea must fully and timely comply with both section 1237.5 and rule 30(b).

(*In re Chavez*, *supra*, 30 Cal.4th at p. 651; *People v. Mendez* (1999) 19 Cal.4th 1084, 1099.) Absent such full and timely compliance, the appeal must be dismissed. (*In re Chavez*, *supra*, 30 Cal.4th at p. 651; *People v. Mendez*, *supra*, 19 Cal.4th at pp. 1096, 1099; *People v. Panizzon*, *supra*, 13 Cal.4th at p. 75.)

It is well settled, however, that a defendant may appeal from a judgment of conviction entered on a no contest plea without complying with the section 1237.5 probable cause certificate requirement if the accused asserts only "noncertificate" grounds. (*People v. Lloyd* (1998) 17 Cal.4th 658, 664; *People v. Panizzon*, *supra*, 13 Cal.4th at pp. 74-75; *People v. Jones* (1995) 10 Cal.4th 1102, 1106; disapproved on a different point by *In re Chavez*, *supra*, 30 Cal.4th at p. 656; *People v. Ward* (1967) 66 Cal.2d 571, 574.) As noted previously, rule 30(b)(4), which describes in pertinent part what the accused must insert in a notice of appeal in order to assert noncertificate grounds for reversal or modification of a judgment, provides, "The defendant need not comply with (1) if the notice of appeal states that the appeal is based on: [¶] (A) the denial of a motion to suppress evidence under Penal Code section 1538.5, or [¶] (B) grounds that arose after entry of the plea and do not affect the plea's validity." Under rule 30(b)(4), a notice of appeal on noncertificate grounds must state it is based upon such a basis; i.e., matters "'occurring after entry of the plea which do not challenge its validity.'" (*People v. Lloyd*, *supra*, 17 Cal.4th at pp. 664-665; see *People v. Panizzon*, *supra*, 13 Cal.4th at p. 75.)

Defendant agrees no probable cause certificate was secured. Further, defendant agrees he may not pursue any issue concerning the validity of his no contest plea. In order for the notice of appeal to be operative, it is therefore necessary that it be based on noncertificate grounds. As to the first noncertificate ground in rule 30(b)(4)(A), there was no pre-plea section 1538.5 suppression of evidence motion and such an issue is not mentioned in the notice of appeal. Quite reasonably, defendant does not suggest the notice of appeal is operative because of the presence of the first noncertificate ground—the denial of section 1538.5 motion. But defendant cites to the aforementioned

references: sentencing, a probation condition, and the duration of presentence custody. Defendant argues that the notice of appeal is operative because the appeal is based on grounds that arose after entry of the plea that do not affect the plea's validity within the meaning of rule 30(b)(4)(B).

Defendant relies on *People v. Lloyd*, *supra*, 17 Cal.4th at pages 660-666. In *Lloyd*, the defendant pled nolo contendre and admitted the truth of several prior felony conviction allegations. Because of the defendant's plea and prior violent or serious felony conviction admissions, he was subject to an indeterminate life sentence. Further, the Supreme Court had not issued its opinion in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504 concerning the authority to strike a prior violent or serious felony conviction pursuant to section 1385, subdivision (a). As a result, the probation and sentence hearing was continued for six months in hope that appellate courts would conclusively resolve the issue of a trial judge's authority to strike violent or serious prior felony conviction findings. The Supreme Court explained what transpired at the probation and sentence hearing: "[T]he superior court expressed a belief to the effect that, except as to the prior-prison-term findings, it did not have authority to vacate. Lloyd expressed a desire to preserve the issue in the event that we should hold favorably. At his urging, the superior court indicated for the record that it would have considered vacating one or more of the other findings, on its own motion, in furtherance of justice. Rendering a judgment of conviction, it proceeded to impose sentence, including a term of forty-six years to life in prison: an indeterminate term of twenty-five years to life for second degree robbery because there was more than one finding of a prior serious and/or violent felony conviction under the Three Strikes law; a term of one year additional and consecutive for the weapon-use finding; and a term of five years additional and consecutive for each of the four findings of a prior serious felony conviction on charges brought and tried separately. It vacated the four prior-prison-term findings. Lloyd expressed an intent to appeal as to sentence. [¶] In conformity with his expressed intent,

Lloyd filed a notice of appeal from the judgment of conviction as to sentence." (*People v. Lloyd*, *supra*, 17 Cal.4th at p. 662, fn. omitted.)

In *Lloyd*, the Supreme Court described the defendant's notice of appeal thusly: "The notice of appeal was drafted on a form. It bears the handwritten notation: 'Rule 31(d).' It contains the printed sentence: 'Defendant hereby appeals from the judgment . . . .' The printed word 'judgment' is crossed out and the handwritten word 'sentence' appears above its place." (*People v. Lloyd*, *supra*, 17 Cal.4th at pp. 664-665.) *The notice of appeal made no reference to the validity of the defendant's no contest plea.* The Attorney General moved to dismiss the defendant's appeal arguing that the notice of appeal was inoperative because it did not comply with the then existing provisions of rule 31(d).

The Supreme Court explained the competing arguments posited by the parties. As to the argument of the Attorney General, the Supreme Court stated: "It can be argued that the notice of appeal is insufficient because it does not state expressly, in the words of the rule itself, that the appeal is based 'on grounds . . . occurring after entry of the plea which do not challenge its validity.'" (*People v. Lloyd*, *supra*, 17 Cal.4th at p. 665.) On the other hand, the Supreme Court explained the defendant's position thusly: "But it can also be argued that the notice of appeal is in fact sufficient because it so states impliedly—that is to say, through its combined reference to 'sentence,' which is imposed after the entry of a plea, and 'Rule 31(d),' which allows an appeal to be taken without a statement of grounds by the defendant and a certificate of probable cause by the trial court only if it does not challenge its validity." (*Ibid*.) Additionally, at the time *Lloyd* was decided, former rule 31(b) required that a notice of appeal be liberally construed in favor of its sufficiency.

Since *Lloyd* was decided, the provisions in former rule 31(d) relating to appeals after guilty, nolo contendre, and no contest pleas has been redrafted and placed in current rule 30(b) effective January 1, 2004. For our purposes, none of the January 1, 2004, drafting changes to former rule 31(d) now contained in rule 30(b) are of any relevancy to

the issues raised by defendant. The liberal construction requirement, previously in former rule 31(b), is now found effective January 1, 2004, in rule 30(a)(4). Further, nothing in new rule 30(b) affects the continued validity of *Lloyd*. Defendant relies on *Lloyd* for the following propositions. The notice of appeal refers to sentencing, a probation condition, and the duration of presentence custody. Defendant argues this is akin to the references in *Lloyd* to former "rule 31(d)," crossing out the word judgment, and inserting in its place the word "sentence." Coupled with the liberal construction requirement in current rule 30(a)(4), defendant contends *Lloyd* requires we find the present notice of appeal is operative.

We respectfully disagree. The notice of appeal in this case differs materially from that filed in *Lloyd.* Unlike the notice of appeal filed in *Lloyd,* it does not impliedly state the appeal is solely on noncertificate grounds. The present notice of appeal is "from the judg[]ment" not, as in *Lloyd,* from the "sentence." Also, the notice of appeal does not contain any reference to present rule 30(b)(4) which is the successor to former rule 31(d). Former rule 31(d) was handwritten on the notice of appeal in *Lloyd*. The Attorney General does not concede that the notice of appeal relates only to post plea matters as was the case in *Lloyd*. Further, the present notice of appeal asserts there are issues pertinent to the validity of defendant's no contest plea: incorrect advice given as to defendant's maximum sentence exposure; misrepresentations by defendant's parole officer and a detective concerning expungement and a parole hold; the absence of a factual basis for the plea; and whether the plea was knowingly and intelligently entered. Rule 30(b)(4)(B) requires that the "notice of appeal *states* the appeal is based on . . . grounds that arose after the entry of the plea *and do not affect the plea's validity*." (Italics added.) The notice of appeal alleges both certificate and noncertificate grounds. The notice of appeal fails to state it is based on grounds which "do not affect the plea's validity" as required by rule 30(b)(4)(B). The present notice of appeal cannot be liberally construed as impliedly based *solely* on noncertificate grounds when: issues concerning the validity of the plea are explicitly mentioned; no reference is made to rule 30(b)(4); and there is no

factually and legally based concession by the Attorney General that the appeal only involves post plea matters as was the case in *Lloyd*. (*People v. Way* (2003) 113 Cal.App.4th 733, 736.) Because defendant failed to fully and timely comply with section 1237.5 and rule 30(b)(4), we cannot proceed to the merits of the appeal, and it must be dismissed. (*In re Chavez, supra,* 30 Cal.4th at p. 651; *People v. Mendez, supra,* 19 Cal.4th at pp. 1096, 1099; *People v. Panizzon, supra,* 13 Cal.4th at p. 75.)

The appeal is dismissed.

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TURNER, P.J.

We concur:

GRIGNON, J.

ARMSTRONG, J.