

 **COPY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.
DAVID PALMER,
Defendant and Appellant.

No. S204409
Court of Appeal
Case No. H036979

Santa Clara
County
Superior Court
Case
No.:C1094540

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CLARA

The Honorable Drew Takaichi

APPELLANT'S REPLY BRIEF ON THE MERITS

SUPREME COURT
FILED

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ARGUMENT

I.

**A CLAIM THAT THE TRIAL COURT FAILED TO ESTABLISH A
FACTUAL BASIS FOR DEFENDANT'S PLEA WITHIN THE
MEANING OF PENAL CODE SECTION 1192.5 IS COGNIZABLE ON
APPEAL WHETHER OR NOT DEFENSE COUNSEL STIPULATED TO
A FACTUAL BASIS**

Appellant has argued that the issue of whether the trial court properly established a factual basis goes to the legality of the proceedings and is therefore cognizable on appeal. (OBM 3.) Respondent counters that appellant's bare stipulation, through counsel, constitutes an admission of guilt; thus, a claim challenging the sufficiency of the stipulation is not cognizable on appeal. (ABM 5.)

Specifically, respondent contends that the court is obligated only to make an inquiry, which it did. (ABM 7.) Representation by counsel ensures that the protective purposes of Penal Code section 1192.5 (hereafter § 1192.5) are met. (ABM 4, 12.) Defendants may protect their

rights by refusing to stipulate or claiming innocence. (ABM 16-17.)

Defendants who permit counsel to stipulate on their behalf make a tactical decision to do so and should not be able to create an appealable issue by simply changing their minds. (ABM 11.) Absent a “reviewable record,” which shows mistake and/or ineffective assistance of counsel, defendants should be deemed to have “waived” the issue. (ABM 12, 20.) Respondent also claims that defendants are estopped from claiming error. (ABM 21.)

Appellant maintains that the issue of the sufficiency of a factual basis is one going to the plea process and is therefore cognizable on appeal. Respondent rationalizes that a stipulation is evidence, which proves guilt. Therefore, a challenge to the stipulation of a factual basis goes to guilt and is not cognizable on appeal. (ABM 1-2, 7, 11, 12-13.) Respondent’s position is an over-simplification of the issue which ignores the source of the rule and its purpose. Section 1192.5 is not an evidentiary statute, and the factual basis inquiry does not relate to guilt.

[I]t “should be enough that there is a factual basis for the plea, and not necessarily that the defendant is guilty.”

(*People v. Watts* (1977) 67 Cal.App.3d 173, 179, quoting (1 Wright, Federal Practice and Procedure (1969) § 174, pp. 377-378.)

Section 1192.5 dictates procedural rules designed to safeguard the rights of unsophisticated defendants who plead guilty. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1181, 1183 [“Section 1192.5 . . . concerns the procedure for taking a plea of guilty”]; *People v. French* (2008) 43 Cal.4th 36, 50-51.) The statute is not related to guilt, but rather requires that the

court follow certain procedures in taking the plea. (*Ibid*; § 1192.5.) The statute seeks to avoid pleas by innocent defendants through the court's duties in taking the plea. (*People v. French, supra*, 43 Cal.4th at pp. 50-51.) Thus, section 1192.5 is a prophylactic procedural rule, the violation of which is cognizable on appeal.

Respondent acknowledges that some claims challenging the factual basis inquiry are cognizable on appeal. (ABM 10, 16.) For example, when a defendant declines to stipulate to a factual basis, the appellate court reviews the record to determine whether the failure to inquire was harmless, or whether sufficient evidence supports the trial court's finding of a factual basis. (ABM 16; *cf. People v. Holmes* (2004) 32 Cal.4th 432, 443.) However, respondent claims that a defendant whose counsel stipulates waives the issue of sufficiency of the factual basis on appeal and cannot challenge the issue absent a record showing mistake or ineffective assistance of counsel. (ABM 12, 21.)

Defendants should not bear the burden to produce a record showing mistake or ineffective assistance of counsel. (ABM 12, 21.) One of the purposes of the factual basis requirement is to create a record for review. (*People v. Hoffard, supra*, 10 Cal.4th at p. 1183.) By failing to satisfy the statute, the court eliminated a proper record. The people cannot use the absence of a record to deflect a claim of error. To do so would insulate the error by using its very consequences as protection.

In attempting to distinguish appellant's claim challenging a bare stipulation from factual bases claims which are cognizable,

respondent relies on a quote from *People v. Voit* (2011) 200 Cal.App.4th 1353, 1365-1366, in which the court of appeal stated that section 1192.5 required a factual inquiry of the trial court, not the appellate court. (ABM 13.) Respondent claims that an “appellate court’s substantive review of the contents of” police reports or preliminary hearing transcripts “demonstrates that the claim . . . [is] ‘essentially a challenge not to the trial court’s process, but to its ultimate conclusion.’” (ABM 15, quoting *People v. Voit, supra*, 200 Cal.App.4th at p. 1370.)

Respondent’s distinction is inapt. In both circumstances the appellate court examines the contents of the record to determine whether the trial court’s factual basis determination is supported. If sufficiency of a factual basis after the defendant’s refusal to stipulate is cognizable on appeal, then sufficiency of a stipulation to support the finding is equally cognizable on appeal. The only difference in the case of a bare stipulation is that there may be no record to examine to determine harmless error. Therefore, an examination of the record does not render the issue non-cognizable.

Respondent cites a number of authorities which she claims support application of the forfeiture rule. (ABM 17-19; *People v. Holmes, supra*, 32 Cal.4th 432; *People v. Hoffard, supra*, 10 Cal.4th 1170; *People v. French, supra*, 43 Cal.4th 36; *People v. Watts, supra*, 67 Cal.App.3d 173; *People v. Tigner* (1982) 133 Cal.App.3d 430; *People v. Enright* (1982) 132 Cal.App.3d 631; *People v. Coulter* (2008) 163 Cal.App.4th 1117.) Respondent dismisses a number of cases which reached the merits as wrongly decided. (ABM 19-

20; *People v. Willard* (2007) 154 Cal.App.4th 1329; *People v. Mickens* (1995) 38 Cal.App.4th 1557; *People v. Gonzales* (1993) 13 Cal.App.4th 707; *People v. Wilkerson* (1992) 6 Cal.App.4th 1571.)

Although respondent claims that *Holmes* addressed the nature of the inquiry and not the court's ultimate conclusion, this Court's decision reflects an analysis of the sufficiency of the content. (*People v. Holmes, supra*, 32 Cal.4th at pp. 437, 443 [Court analyzed sufficiency of complaint to which trial court referred].) Neither of this Court's other cases cited are on point. In *Hoffard*, this Court held section 1192.5 was inapplicable because the defendant's plea was unconditional. (*People v. Hoffard, supra*, 10 Cal.4th at p. 1174.) In *French*, this Court held that the factual basis does not constitute an admission by the defendant and therefore cannot support imposition of an aggravating circumstance which increases the punishment beyond the statutory maximum. (*People v. French, supra*, 43 Cal.4th at pp. 50-51.)

The Court of Appeal cases do not support respondent's position. In each case, the reviewing court made a substantive analysis of the court's express or implied conclusion. In *Watts*, there was no inquiry by the trial court, so the Court of Appeal examined the grand jury transcript to find the error harmless. (*People v. Watts, supra*, 67 Cal.App.3d at pp. 180-181.) Similarly, in *Tigner*, the trial court made no inquiry and simply stated that there was a factual basis. (*People v. Tigner, supra*, 133 Cal.App.3d at p. 435.) However, the court had only the presentence report recitation of the facts, which is found insufficient to render the error harmless. (*Ibid.*)

In *Enright*, the Court of Appeal upheld the plea because the parties stipulated to the police reports, which supplied a sufficient factual basis. (*People v. Endright, supra*, 132 Cal.App.3d at p. 634.) In *Coulter*, the trial court made the inquiry based on the probation report at sentencing. (*People v. Coulter, supra*, 163 Cal.App.4th at pp. 1122.) The Court of Appeal upheld the procedure, and held any error harmless in any event because the record supplied a sufficient factual basis. (*Ibid.*) Therefore, in each case, the Court of Appeal addressed the factual basis issue as cognizable and made a substantive review of the facts in the record.

Respondent acknowledges that the purpose of the statute is to protect unsophisticated defendants from pleading to a crime when their acts do not actually constitute the offense. (ABM 4, 9, 11.) Another purpose is to create a record for appellate or collateral review. (*People v. Hoffard, supra*, 10 Cal.4th at p. 1183.) These purposes are not fulfilled by precluding review of the sufficiency of a factual basis. The trial court's duty goes beyond collection of a stipulation. The rule states that the court must "satisfy itself . . . that there is a factual basis for the plea." (§ 1192.5.) A bare stipulation by defense counsel does not reflect the court's reasoned analysis of the issue. It also does not protect the record for review.

Representation by counsel does not satisfy the requirements of section 1192.5. The statute does not exempt cases in which the defendant is represented by counsel from the court's duty to inquire. Had the Legislature intended to put the burden on counsel and not the court, it would have applied the rule only in cases involving unrepresented

defendants. The statute makes no such distinction. Nothing in the statute suggests that representation by counsel relieves the court of its duty to elicit facts to satisfy itself that there is a factual basis.

Nor does the defendant's right to decline a stipulation satisfy the statute. Since the purpose of the statute is to protect unsophisticated defendants, we cannot presume those same defendants are sophisticated enough to assert their right in the face of their counsel's stipulation. To do so would directly contravene one of the statute's purposes. The statute places the burden on the court to make the inquiry, not on the defendant to demand the inquiry. This is true because the defendant is presumed unsophisticated while the trial court has expertise. Shifting the burden to defendants would gut the purpose of the rule.

Respondent asserts that counsel's stipulation "waives" the issue for appeal. (ABM 7, 20.) Appellant disagrees. Cognizability is determined by issues waived by the *plea*, not by stipulation to a factual basis. (Pen. Code, § 1237.5; *People v. Hoffard, supra*, 10 Cal.4th at pp. 1177-1178.) All factual basis issues are either cognizable or not, regardless of whether they are established by a bare stipulation or stipulation to reports or other facts.

The plea does not waive review of the court's determination that there is a sufficient factual basis under section 1192.5. (*People v. Marlin* (2004) 124 Cal.App.4th 559, 571; ABM 10, 16.) This Court has reviewed the issue of whether the trial court established a sufficient factual basis under section 1192.5. (*People v. Holmes, supra*, 32 Cal.4th at pp. 435-436.) Therefore,

the plea does not waive review of whether a bare stipulation provides a sufficient factual basis under section 1192.5.

Respondent's position more accurately proposes that a defendant "forfeits" the statutory right in section 1192.5 to have the court satisfy itself that there is a factual basis by failing to object to counsel's bare stipulation. (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.) Certain statutory and even constitutional rights may be forfeited. (*Id.*, at p. 590 [defendant forfeited statutory right to have same jury which decided guilt decide prior conviction allegations].) However, some rights may be forfeited only if the court gives the defendant the proper advisements. For example, a defendant does not forfeit significant deviations from the plea agreement unless the court has given the proper advisement under section 1192.5, i.e., that he may withdraw his plea. (*People v. Villalobos* (2012) 54 Cal.4th 177, 182.)

In the context of the court's duty to satisfy itself of a sufficient factual basis for the plea, a forfeiture rule would defeat the purpose of the statute to protect unsophisticated defendants. Unsophisticated defendants would not know to assert their right to a substantive factual basis. Therefore, a forfeiture rule would directly contravene the primary purpose of the statute. The requirement of a factual basis inquiry is intended to support a defendant's constitutional rights. (*People v. Holmes, supra*, 32 Cal.4th at p. 438.) Counsel may not plead guilty for the defendant, or waive his constitutional rights. Counsel should also not be able to bind the

defendant to an unintelligent plea by stipulating away this important inquiry.

Respondent also seeks application of estoppel principles to the claim at issue. (ABM 21.) The estoppel doctrine precludes a party from taking one position and then seeking a second advantage by taking an incompatible position. (*People v. Castillo* (2010) 49 Cal.4th 145, 155.) In *Castillo*, the district attorney was estopped from seeking an indeterminate commitment under the sexually violent predator laws after signing a stipulation, upon which the defendant relied, that he would proceed on pending cases under the two-year limit of the previous law. (*Id.*, at pp. 148-150, 154-155.)

Estoppel blocks a defendant's appeal only when he receives a benefit from a bargain to which he intelligently agrees. (*People v. Couch* (1996) 48 Cal.4th 1053, 1056-1057.) For example, in *Couch*, the defendant pled no contest to the charge and admitted a strike prior in exchange for a 32-month sentence. (*Id.*, at p. 1055.) The defendant then appealed application of the three strikes law on various grounds. (*Ibid.*) The Court of Appeal held that he was estopped from seeking to gain an additional advantage after accepting a reduced sentence by agreeing to application of the three strikes law. (*Id.*, at pp. 1056-1057.)

Here, appellant does not seek to gain an additional advantage by reneging on a promise relating to the plea bargain. He merely seeks to remedy a defect in the procedure of his plea. Appellant's claim challenges the legality of the plea procedure and is therefore cognizable on appeal.

II.

DEFENSE COUNSEL'S BARE STIPULATION TO A FACTUAL BASIS, WITHOUT REFERENCE TO ANY DOCUMENT DESCRIBING THE FACTS, FAILS TO ESTABLISH A FACTUAL BASIS WITHIN THE MEANING OF PENAL CODE SECTION 1192.5

Appellant has argued that a bare stipulation that a factual basis exists fails to satisfy the requirements of section 1192.5. (OBM 13.) Respondent counters that "a stipulation by counsel satisfies the policy goals of the statute." (ABM 22.) Respondent asserts that a stipulation to a factual basis is no different than any other evidentiary stipulation, which counsel is authorized to make on a defendant's behalf. (ABM 24-27.) Counsel may stipulate to protect the defendant from details of the offense biasing the judge. (ABM 27.) Absent a claim of ineffective assistance, there is no basis to fear absence of a factual basis. (ABM 24.) Appellant disagrees.

Respondent relies on the majority opinion in *People v. McGuire* (1991) 1 Cal.App.4th 281, 282-283, which held that a bare stipulation is sufficient to establish a factual basis under section 1192.5. (ABM 22-23.) Appellant maintains that the majority decision in *McGuire* is not persuasive in light of the purpose of the statute and this Court's subsequent decision in *Holmes*. (See OBM 14-17.)

Respondent states that, "[w]hen the defendant is represented by counsel when entering his plea, the policy concerns reflected in the statute are adequately addressed." (ABM 23.) Appellant disagrees. The statute seeks to protect unsophisticated defendants by requiring the court

to garner information sufficient to establish a prima facie evidence of the charge and to create an adequate record for review. (*People v. Hoffard, supra*, 10 Cal.4th at p. 1183.) Both purposes are derailed by the court's acceptance of a bare stipulation from counsel.

The statute does not limit review to cases in which the defendant is represented by counsel. Therefore, it is clear that the Legislature intended the court, not counsel, be the point of protection. By accepting a bare stipulation from counsel, the court makes no reasoned analysis of the facts. In short, it exercises no discretion. Rather, the court delegates that duty to counsel. In addition, it leaves no record for the reviewing court to determine whether that duty was properly exercised. This action contravenes the purposes of the statute.

Respondent's analogy to an evidentiary stipulation is inapt. The factual basis is not related to guilt and does not involve tactical decisions. (*People v. Watts, supra*, 67 Cal.App.3d at p. 179 [the facts need only support a factual basis, not necessarily the defendant's guilt].)¹ It is a prophylactic tool to support voluntariness of the plea by ensuring that the defendant is not pleading to a crime which is not indicated by his actions. A bare stipulation eliminates the prophylactic content. Therefore, a stipulation by counsel would be counterproductive to the purpose of the rule.

¹ If analyzed as a factual inquiry relating to guilt, a stipulation to a factual basis would require express advisements and waivers because it would constitute an admission to every element. (*People v. Newman* (1999) 21 Cal.4th 413, 420, quoting *People v. Adams* (1993) 6 Cal.4th 570, 577.)

A more apt analogy would be the other prophylactic advisements involved in the plea, such as waivers of the right to trial and silence. The *Boykin-Tahl* advisements are also “prophylactic” procedural requirements. (*People v. Adams* (1993) 6 Cal.4th 570, 576.) Counsel has no authority to stipulate that the defendant understands and waives his rights. (Cf. *McCarthy v. United States* (1969) 394 U.S. 459, 461-462, 467, 89 S.Ct. 1166 [counsel’s statement that he advised defendant of consequences of plea did not satisfy rule 11 [federal equivalent to § 1192.5]].) Nor can a stipulation satisfy the factual basis inquiry.

A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be ‘an intentional relinquishment or abandonment of a known right or privilege.’ *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

(*McCarthy v. United States, supra*, 394 U.S. at p. 466, footnotes omitted.)

Waiver of constitutional rights may not be presumed on a silent record, even where a defendant is represented by counsel. (*Ibid*; *Boykin v. Alabama* (1969) 395 U.S. 238, 239, 242-243, 89 S.Ct. 1709; *People v. Little* (2004) 115

Cal.App.4th 766, 772-773, 778.) Nor should counsel be able to stipulate to a factual basis and eliminate that issue for review.

Finally, respondent contends that a bare stipulation protects a defendant from exposing details of the offense which may influence the court to reject the plea or aggravate the sentence. (ABM 27.) A factual basis does not require recitation of detailed facts describing the crime. Only a prima facie showing of all the basic elements is required. (*People v. Holmes, supra*, 32 Cal.4th at p. 441.) Counsel may avoid damaging facts by reciting only facts which support a prima facie case. Acceptance of a bare stipulation in place of a factual basis, rather than protecting a defendant, would hide facts the Legislature deemed important to ascertain the voluntariness of a plea. It should not be permitted.

CONCLUSION

Appellant requests that this Court reverse and remand because (1) the claim challenging the factual basis of the plea is cognizable, and (2) a bare stipulation to a factual basis is insufficient to satisfy the requirements of section 1192.5

Dated: February 13, 2013

Respectfully submitted,

Jean M. Marinovich
Attorney at Law
Attorney for Appellant

CERTIFICATE OF COMPLIANCE
(Cal.Rules of Ct., rule 8.520(c)(1))

Case Name: David Palmer

No.: S204409

I, Jean M. Marinovich, certify pursuant to rule 8.520(c)(1) and (2) of the California Rules of Court that this brief was produced on a computer and contains 3,220 words, as calculated by the word count of the Word program. This brief therefore complies with the rule, which limits a brief produced on a computer to 4,200 words and does not exceed 15 pages.

Dated: February 13, 2013

Jean M. Marinovich
Attorney for Appellant

DECLARATION OF SERVICE

Case Name: *People v. David Palmer*

No.: S204409

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is P.O. Box 2079 Aptos, California, 95001-2079.

On February 13, 2013, I served the attached

APPELLANT'S REPLY BRIEF ON THE MERITS

By placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing the envelope in the United States Mail at Aptos, California, with postage thereon fully prepaid.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 13, 2013, at Aptos, California.

Declarant

Signature