

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
BRANDON PAUL ALGERE,  
Defendant and Appellant.

A130653  
(Contra Costa County  
Super. Ct. No. 50614743)

Defendant Brandon Paul Algere seeks reversal of the trial court’s judgment and remand of this matter back to the trial court so that he may move to withdraw his 2007 no contest plea. He argues the trial court erred when it denied his previous plea withdrawal motion as untimely made, would not consider the motion as a petition for a writ of error coram nobis, and found the motion lacked evidentiary support, and that his motion was flawed by his counsel’s purported conflict in interest.

The People urge affirmance on the merits. They also argue that we should not address the merits of the appeal and dismiss it instead because defendant did not obtain a certificate of probable cause from the trial court, although this certificate is required by Penal Code section 1237.5<sup>1</sup> for defendant to pursue this appeal. Defendant argues at length that he should not be required to do so under the circumstances of his case. After careful consideration of his arguments, we conclude the certificate is necessary for defendant to pursue his appeal, and dismiss the appeal.

---

<sup>1</sup> All statutory references herein are to the Penal Code unless otherwise stated.

## BACKGROUND

In August 2007,<sup>2</sup> pursuant to a negotiated disposition, defendant withdrew a plea of not guilty and entered a plea of no contest to violating section 187, second degree murder, and to violating sections 211, 212.5, subdivision (c), and 664, attempted second degree robbery. The court granted the prosecution's motion to amend the information to add a firearm enhancement pursuant to section 12022.5, subdivision (a), which defendant admitted.

The court sentenced defendant to an indeterminate term of 15 years to life for his second degree murder conviction and imposed a consecutive 10-year sentence for the firearm enhancement. Defendant received a concurrent term of 18 months for his attempted second degree robbery conviction. The total term of imprisonment was 25 years to life.

In our previous opinion, this court affirmed defendant's conviction, except that we agreed with defendant's assertion that the lower court imposed an unauthorized sentence for his attempted second degree robbery conviction. We remanded the matter for the limited purposes of resentencing defendant in a manner consistent with our opinion, and otherwise affirmed the judgment.

On September 10, 2010, the trial court resentenced defendant on the attempted robbery count. Defendant's total term of imprisonment remained 25 years to life.

Defendant contends that he orally requested that he be allowed to withdraw his plea at this September 10, 2010 sentencing hearing, but provides no citation to facts in the record to support this assertion; instead he merely cites to an unsubstantiated statement in a brief below. He asserts the sentencing hearing transcript has not been included in the record for "reasons unknown" and that he has "requested and hopes to

---

<sup>2</sup> Both parties refer in their papers to our previous *Algere* opinion regarding defendant. (*People v. Algere* (Sep. 17, 2009, A119853) [nonpub. opn.].) We construe these references to be requests that we take judicial notice of that opinion, which we grant for the purposes of stating the background facts. (Evid. Code, §§ 452, 453.)

obtain it,” after which he will move to augment the record. We have not received an augmentation request.

On September 21, 2010, defendant moved to withdraw his 2007 no contest plea. The People opposed the motion. On October 21, 2010, the superior court denied defendant’s motion to withdraw his plea. Defendant filed his notice of appeal on October 27, 2010, without obtaining a certificate of probable cause pursuant to section 1237.5.

### **DISCUSSION**

We conclude that we must dismiss defendant’s appeal because, given that he is appealing from a judgment of conviction based on his no contest plea, he was required to, but did not, obtain a certificate of probable cause pursuant to section 1237.5 in order to pursue his appeal. Therefore, we do not address defendant’s appeal on the merits.

Section 1237.5 states: “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 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.” (§ 1237.5.)

As the People point out and defendant concedes, well-established case law provides that a defendant who appeals from the denial of a motion to withdraw a guilty plea must obtain a certificate of probable cause pursuant to section 1237.5, even when such a motion involves a proceeding that occurred after entry of the guilty plea, and when the remedy sought was not withdrawal of the plea but a remand for a new hearing on the withdrawal motion. (*People v. Johnson* (2009) 47 Cal.4th 668, 679-680 (*Johnson*); *People v. Ribero* (1971) 4 Cal.3d 55, 63-64 (*Ribero*)). “In determining the applicability of section 1237.5, the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made.” (*Ribero*, at p. 63.)

The certificate of probable cause requirement contained in section 1237.5 also applies whether or not the challenge is directly to the merits of a trial court’s ruling on a motion to withdraw a plea or alleges defects in the proceedings involved in the motion to withdraw the plea. (*Johnson, supra*, 47 Cal.4th at pp. 681-682.) “ ‘The primary purpose of [section 1237.5 is] to prevent the taking of frivolous appeals based on the asserted invalidity of pleas of guilty . . . ,’ thereby avoiding the unnecessary expenditure of resources. [Citation.] Whether the appeal seeks a ruling by the appellate court that the guilty plea was invalid, or merely seeks an order for further proceedings aimed at obtaining a ruling by the trial court that the plea was invalid, the primary purpose of section 1237.5 is met by requiring a certificate of probable cause for an appeal whose purpose is, ultimately, to invalidate a plea of guilty or no contest.” (*Johnson*, at p. 682.)

Defendant, while acknowledging this case law, argues it should not be extended to his case because of the trial court’s “unadorned” and “blanket refusal to allow him to litigate his plea-withdrawal motion at all,” apparently based on defendant’s purported oral request to withdraw his plea at the September 10, 2010 sentencing hearing. Based on the case law we have discussed, we are inclined to disagree. However, we need not reach this issue because defendant’s argument is premised on a factual contention—that he made this request—for which there is no support in the record before us. Therefore, we may, and do, disregard it. (See, e.g., Cal. Rules of Court, rule 8.883(a)(2)(c); *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 [Cal. Rules of Court require that the opening brief provide a summary of significant facts limited to matters in the record]; *Gotschall v. Daley* (2002) 96 Cal.App.4th 479, 481, fn. 1 [disregarding a statement of facts that is not supported by citations to the record].)

Defendant was required to obtain a certificate of probable cause pursuant to section 1237.5 in order to pursue his appeal. He did not. Therefore, his appeal is dismissed pursuant to section 1237.5, *Johnson, supra*, 47 Cal.4th 668 and *Ribero, supra*, 4 Cal.3d 55.

**DISPOSITION**

The appeal is dismissed.

---

Lambden, J.

We concur:

---

Haerle, Acting P.J.

---

Richman, J.