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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**THE PEOPLE,**

**Plaintiff and Respondent,**

**v.**

**JOSE ALBERTO MONTANO,**

**Defendant and Appellant.**

**A132246**

**(Contra Costa County  
Super. Ct. No. 9202904)**

Jose Alberto Montano (appellant) appeals from a trial court order denying his nonstatutory motion to vacate his guilty plea to two counts of sale or transportation of cocaine. He contends the motion should have been granted on the ground that his trial counsel provided constitutionally ineffective assistance by failing to fully advise him of the immigration consequences of his plea. We dismiss the appeal because appellant did not obtain a certificate of probable cause as required by Penal Code<sup>1</sup> section 1237.5. (Cal. Rules of Court, rule 8.304(b)(1).)<sup>2</sup>

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<sup>1</sup> All undesignated section references are to the Penal Code.

<sup>2</sup> All further rule references are to the California Rules of Court.

## BACKGROUND<sup>3</sup>

In May 1992 appellant, a citizen of Mexico, pled guilty to two counts of sale or transportation of a narcotic (cocaine) in violation of Health and Safety Code section 11352, subdivision (a). Imposition of sentence was suspended and he was placed on three years' probation. In June 2007, appellant filed a motion to vacate his conviction pursuant to section 1016.5<sup>4</sup>, which he later alternatively styled a petition for writ of error *coram nobis*. In December 2008, this court affirmed the trial court's denial of that motion. (*People v. Montano* (Dec. 23, 2008, A119967) [nonpub. opn.] )

On April 27, 2011, appellant filed a nonstatutory motion to vacate his May 1992 guilty plea on the ground that under *Padilla v. Kentucky* (2010) 559 U.S. \_\_\_\_ [130 S.Ct. 1473] (*Padilla*), he should be entitled to vacate his guilty plea based on the incompetence of his prior counsel. His supporting declaration asserted that prior to entering his plea, his prior counsel failed to properly advise him that a guilty plea in this case would affect his immigration status or any future immigration applications he might file. He declared that had he known his plea would prohibit him from any immigration relief in the future, he would not have entered his guilty plea.

In reliance on *People v. Kim* (2009) 45 Cal.4th 1078, 1104 (*Kim*), the trial court denied the motion on the ground that appellant's nonstatutory motion was the legal

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<sup>3</sup> The People correctly note that the factual statement contained in appellant's opening brief fails to cite to the appellate record in violation of rule 8.204(a)(1)(C). We disregard the lack of compliance in light of our decision to dismiss the appeal due to appellant's failure to obtain a certificate of probable cause.

<sup>4</sup> Section 1016.5, subdivision (a) provides: "Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: [¶] If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." "Subdivision (b) directs the court to vacate any plea taken without the advisement when the defendant shows that the plea may have the adverse consequences described by the statute." (*People v. Gutierrez* (2003) 106 Cal.App.4th 169, 173.)

equivalent of a petition for a writ of error *coram nobis*, and a claim of ineffective assistance of counsel is an inappropriate ground for relief on *coram nobis*.

Appellant filed a timely notice of appeal. The notice of appeal checked the box stating in part, “This appeal challenges the validity of the plea or admission.” Appellant’s request for a certificate of probable cause stated, “[Appellant’s] guilt[ty] plea of May 1992 was constitutionally invalid due to ineffective assistance of counsel. On May 23, 2011, the Superior Court erred in ruling that [appellant’s] motion to vacate his plea was barred by *People v. Kim*.”

The “court order” section of the request for a certificate of probable cause form is blank; the court checked neither the “granted” nor “denied” box. Because the court did not execute and file a certificate of probable cause for the instant appeal with the clerk of the court (§ 1237.5, subd. (b)), appellant failed to obtain a certificate of probable cause.

#### DISCUSSION

Appellant contends that pursuant to *Padilla*, his attorney’s failure to advise him of the consequences of his guilty plea and to consult with an immigration attorney constituted ineffective assistance of counsel, and, therefore, the trial court erroneously denied his nonstatutory motion to vacate his guilty plea.

We first address the People’s argument that the appeal should be dismissed because appellant failed to obtain a certificate of probable cause pursuant to section 1237.5.<sup>5</sup> In reliance on *People v. Placencia* (2011) 194 Cal.App.4th 489 (*Placencia*), the People argue the appeal challenges the validity of appellant’s plea and, therefore, requires a certificate of probable cause.

Section 1237.5 provides: “No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, . . . 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,

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<sup>5</sup> Appellant did not address the lack of a certificate of probable cause in his opening appellate brief and filed no reply brief.

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.” The purpose of the certificate of probable cause requirement is to prevent frivolous appeals challenging convictions following guilty and nolo contendere pleas. (*People v. Johnson* (2009) 47 Cal.4th 668, 676 (*Johnson*); *People v. Brown* (2010) 181 Cal.App.4th 356, 359 (*Brown*).

“[A] defendant who has pleaded guilty . . . to a charge in the superior court, and who seeks to take an appeal from a judgment of conviction entered thereon, may not obtain review of so-called ‘certificate’ issues, that is, questions going to the legality of the proceedings, including the validity of his plea” unless he has complied with section 1237.5 and rule 8.304(b)(1)<sup>6</sup>. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1088, fn. omitted (*Mendez*)). We are required to enforce the requirement of a certificate of probable cause in a “strict manner” to promote the goal of judicial economy. (*Id.* at p. 1098.) Where a certificate of probable cause is required but has not been obtained, we “may not proceed to the merits of the appeal, but must order dismissal thereof[.]” (*Id.* at p. 1096.)

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<sup>6</sup> Rule 8.304(b) provides: “(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 with 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. [¶] (5) If the defendant’s notice of appeal contains a statement under (4), the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1).”

The requirements of section 1237.5 do not generally bar appellate review where the defendant “is not attempting to challenge the validity of his plea of guilty but is asserting only that errors occurred in the subsequent adversary hearings conducted by the trial court for the purpose of determining the degree of the crime and the penalty to be imposed’ [Citation.]” (*Johnson, supra*, 47 Cal.4th 677, fn. omitted.)

In determining whether a certificate of probable cause is required courts look to the substance of the error being challenged, not the time at which the hearing was conducted or the manner in which the challenge is made. (*Johnson, supra*, 47 Cal.4th at p. 679; *People v. Panizzon* (1996) 13 Cal.4th 68, 73; *Placencia, supra*, 194 Cal.App.4th at pp. 493-494.)

In *Placencia*, Division Six of the Second District held, “An appeal from a denial of a section 1016.5 motion is technically from an ‘order made after judgment’ [citation] and not ‘from a judgment of conviction upon a plea’ of guilty or nolo contendere. [Citation.] But a section 1016.5 motion follows a claimed failure by the trial court to advise the defendant of the immigration consequences of a plea of guilty or nolo contendere which necessarily precedes the entry of the plea and affects the validity of the plea. [Citations.]” (*Placencia, supra*, 194 Cal.App.4th at p. 494.)

*Placencia* first discussed *People v. Totari* (2002) 28 Cal.4th 876, 879 (*Totari*), which considered the appealability of an order denying a section 1016.5 motion to vacate. (*Placencia, supra*, 194 Cal.App.4th 493-494.) In *Totari* the defendant moved to vacate his guilty plea pursuant to section 1016.5, arguing the trial court failed to inform him of the potential immigration consequences of his plea. The Supreme Court concluded that the denial of a section 1016.5 motion to vacate is an appealable order under section 1237, subdivision (b). (*Totari, supra*, at pp. 881-882.)

*Placencia* noted that *Totari* did not consider the issue of whether a certificate of probable cause was required for the appeal. (*Placencia, supra*, 194 Cal.App.4th at pp. 493-494.) *Placencia* further noted that in his appellate briefs and request for a certificate of probable cause, the defendant acknowledged his appeal was a direct challenge to the validity of his plea. (*Ibid.*) The Court of Appeal concluded that because the motion

constituted an attack on the validity of a plea, the appeal from the denial of the motion required a certificate of probable cause. (*Id.* at p. 492.)<sup>7</sup>

Although an appeal from a writ of error *coram nobis* is technically from an “order made after judgment” (§ 1237, subd. (b)) and not “from a judgment or conviction upon a plea of guilty. . .” (§ 1237.5), an alleged failure to warn of the consequences of a plea is a matter occurring before entry of the plea and affects the plea’s validity. (*People v. Kaanehe* (1977) 19 Cal.3d 1, 8; *Placencia, supra*, 194 Cal.App.4th at p. 494.) The fact that appellant claims he entered his plea as the result of the ineffective assistance of counsel does not change that result. (*Johnson, supra*, 27 Cal.4th at pp. 683-685 [certificate of probable cause required for appeal on ground that counsel rendered ineffective assistance of counsel regarding defendant’s request to withdraw plea.]

It is undisputed that appellant’s nonstatutory motion to vacate was a challenge to the validity of his plea, and he was required to obtain a certificate of probable cause. His failure to do so compels dismissal of his appeal.<sup>8</sup> (*In re Chavez* (2003) 30 Cal.4th 643, 651.)

#### DISPOSITION

The appeal is dismissed.

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<sup>7</sup> Recently, in *People v. Arriaga* (2011) 201 Cal.App.4th 429, review granted February 22, 2012, S199339, Division 2 of the Second District disagreed with *Placencia* and concluded no certificate of probable cause is required in order to appeal the denial of a section 1016.5 motion to withdraw a guilty plea for failure by the court or counsel to advise the defendant of the immigration consequences of the plea.

<sup>8</sup> Notwithstanding appellant’s failure to obtain a certificate of probable cause, the Supreme Court has held that a noncitizen criminal defendant who was not advised by counsel of the immigration consequences of his guilty plea may not seek to vacate the judgment by means of a petition for a writ of *coram nobis*. (*Kim, supra*, 45 Cal.4th at pp. 1108-1109.)

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SIMONS, J.

We concur.

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JONES, P.J.

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NEEDHAM, J.