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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.

DANIEL ALLAN AITKENS,

Defendant and Appellant.

A133513

(Napa County
Super. Ct. No. CR105153)

Appellant pleaded guilty to an assault committed against a fellow inmate while appellant was in custody awaiting trial in two other cases, an attempted murder and an arson. Appellant was sentenced to a prison term to be served consecutively to the sentences in both of the other cases. However, the abstract of judgment listed only the arson case as the sentence to which the assault sentence would be consecutive.

After the conviction in the arson case was reversed, the trial court held a hearing to consider modifying the abstract of judgment in the assault case to reflect that the assault sentence was to be served consecutively to the sentence for the attempted murder. At the hearing, appellant moved to withdraw his original guilty plea to the assault. The trial court denied the motion to withdraw the plea, and ordered that the abstract of judgment be modified. We dismiss appellant's appeal from the denial of his motion to withdraw his plea, due to appellant's failure to obtain the required certificate of probable cause.

FACTUAL AND PROCEDURAL BACKGROUND

On December 19, 2000, appellant was charged in Napa County Superior Court case number CR102906 with attempted premeditated murder, arising out of his attack on

another man in October 2000. We will refer to this case as the Napa attempted murder. On February 22, 2001, appellant was convicted of the Napa attempted murder charge, together with three enhancements.

On March 3, 2001, while in custody awaiting sentencing in the Napa attempted murder case, appellant assaulted another inmate, breaking several bones in the victim's face and causing permanent injuries. As a result, on May 25, 2001, the Napa County District Attorney filed a criminal complaint, followed by an information, in Napa County Superior Court case number CR105153. This is the case from which this appeal ultimately arises. We will refer to this case as the Napa assault. The information filed in the Napa assault case charged appellant with assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)¹), with a special allegation of personal infliction of great bodily injury resulting in a serious felony (§§ 12022.7, subd. (a); 1192.7, subd. (c)(8)). The information also included special allegations that appellant had suffered a prior conviction of a serious or violent felony (§ 667, subds. (b)-(i)), and a serious felony (§ 667, subd. (a)(1)), both of which were predicated on the Napa attempted murder conviction.

While the charges were pending in the Napa assault, appellant was convicted of the Napa attempted murder, and on March 28, 2001, he was sentenced to an indeterminate term of life in prison with the possibility of parole, consecutive after a determinate term of 6 years for the enhancements. On June 20, 2002, we affirmed appellant's conviction and sentence in the Napa attempted murder. (*People v. Aitkens* (June 20, 2002, A094838) [nonpub. opn.].²)

While appellant was awaiting trial in the Napa assault, he was also awaiting trial in Placer County for arson causing great bodily injury (§ 451, subd. (a)), with an enhancement for use of an accelerant or delayed ignition device (§ 451.1, subd. (a)(5)).

¹ All further statutory references are to the Penal Code unless otherwise noted.

² On our own motion, we take judicial notice of the unpublished appellate opinion in the Napa attempted murder, and refer to it as part of the procedural history in this case. (See Evid. Code, § 451, subd. (a); Cal. Rules of Court, rule 8.1115(b).)

We will refer to this case as the Placer arson. In the Placer arson, appellant pleaded guilty, and was sentenced to 13 years in prison.

Appellant was represented in the trial court in the Napa assault by Michael H. Keeley, an employee of the Law Offices of Mervin C. Lernhart, Jr. On January 17, 2003, appellant appeared in court with Keeley and entered a plea of no contest in the Napa assault. On a written plea form, appellant indicated that he was pleading no contest to the special allegations as well as to the assault. The plea was described on the form as an “open plea w[ith the] understanding that this matter will run consecutive to Placer Co[unty case number] 62-018203,” i.e., the Placer arson. Under the terms of the plea, appellant retained his right to argue motions to strike his prior conviction and one of the enhancements under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The plea agreement did not mention whether the sentence would be consecutive or concurrent with the sentence for the Napa attempted murder. The plea form indicated that the maximum potential prison term resulting from the plea would be four years in state prison, doubled on account of the prior strike conviction, plus three years in state prison based on the great bodily injury enhancement, plus five years in state prison based on the prior serious felony allegation.

As contemplated in the plea agreement, appellant later filed a motion to strike the prior serious felony conviction. In the same motion, he also requested the court to “impose one-third the term on the enhancements,” including the enhancement alleged under section 667, subdivision (a)(1). On February 25, 2003, the court denied the motion to strike.

The court then heard argument on sentencing. The prosecutor stated that it was the People’s position that the court should impose “an additional eight-year total to [appellant’s] ongoing determinate sentencing time,” including both the determinate sentence in the Placer arson “and the six years on the enhancements in our original case here,” i.e., the Napa attempted murder. The prosecutor later repeated that appellant should receive “eight years consecutive to the . . . determinate time he has to do in Placer County and the determinate time he has to do out of Napa County’s sentence.”

Appellant's counsel, Keeley, concurred that "the agreement was that this case would be run consecutive to the other matters," using the plural. The only disagreement Keeley expressed with the prosecutor's proposal was to argue, consistent with his written motion, that the consecutive term on the enhancement for the prior serious felony under section 667, subdivision (a)(1), should be one-third the five-year term (that is, one year eight months), rather than the entire five years, thus yielding a total of four years eight months rather than eight years.

After hearing the arguments of counsel, the trial judge agreed with the prosecutor that the five-year enhancement under section 667, subdivision (a)(1) had to be served in full, and accordingly ordered that appellant receive "an aggregate term of eight years." The prosecutor asked the judge to "clarify, this eight years is consecutive to our prison term?" and the judge responded, "Placer and here, it is.

Consistent with the transcript, the trial court's minute order and the abstract of judgment indicate that the court sentenced appellant to a term of eight years in state prison, consisting of the total of: (1) a base term of one-third the middle term (i.e., one year) for the assault, doubled to two years on account of the prior strike conviction; (2) one-third the middle term (i.e., one year) for the great bodily injury enhancement, to be served consecutively to the base term; and (3) five years for the prior serious felony allegation. The minute order provided that the enhancement terms were to be served consecutive to the base term, adding "and consecutive to CR102926" (i.e., the Napa attempted murder), and to the Placer County arson. In the abstract of judgment, however, in the space for listing uncompleted sentences to which the sentence on the Napa assault was to be served consecutively, only the Placer County arson was listed.

On June 30, 2003, the Third District Court of Appeal reversed appellant's conviction for the Placer County arson, holding that one of the provisions of appellant's plea agreement was invalid. The case was remanded to the Placer County Superior Court

to permit appellant to withdraw his plea if he chose to do so. (*People v. Aitkens* (June 30, 2003, C040589) [nonpub. opn.].³)

On August 8, 2003, this court filed its opinion on appellant’s direct appeal from the Napa assault. (*People v. Aitkens* (Aug. 8, 2003, A101969) [nonpub. opn.] (*Aitkens I*).⁴) In *Aitkens I*, the attorney appointed to represent appellant on appeal filed a brief raising no issues and asking this court to review the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436. In our opinion, we held that the trial court did not abuse its discretion in denying appellant’s motion for new counsel at the plea hearing, despite appellant’s contention that Keeley had misinformed him in failing to advise him that the prosecutor intended to add a five-year enhancement for a prior serious felony conviction to the information, even if appellant waived his right to a preliminary hearing. (*Aitkens I, supra*, at pp. 2-3.)

On the issue of sentencing, we noted in *Aitkens I* that “[a]ppellant entered his plea with the understanding that the sentence in this matter would be a consecutive subordinate term to the term appellant already was serving” (*Aitkens I, supra*, at p. 2, fn. omitted), adding in a footnote: “Appellant already was serving both a determinate and an indeterminate sentence.” (*Id.* at p. 2, fn. 2.) We characterized the sentence imposed by the trial court in that case as an “aggregate term . . . total[ing] eight years in state prison to be served consecutively to the determinate portion of the sentence appellant was already serving.” (*Id.* at p. 2.) We also noted that “[t]he [trial] court did not directly state how the eight-year term that it would impose was to be constructed,” but opined that it was “clear from the transcript” that the sentence was as described in our opinion. (*Id.* at p. 3.)

³ As with the Napa attempted murder, we take judicial notice of the unpublished appellate opinion in the Placer arson, and refer to it as part of the procedural history in this case.

⁴ We cite our unpublished opinion in *Aitkens I* as part of the procedural history in this case, and, to the extent applicable, as the law of the case. (See Cal. Rules of Court, rule 8.1115(b).)

On February 14, 2005, following the reversal and remand in the Placer arson, the trial court dismissed that case.⁵ On April 27, 2005, the attorney who represented appellant on appeal in the Napa assault sent a memorandum to the Napa County Superior Court informing it that the Placer County arson conviction had been “overturned on appeal and dismissed.” The memorandum indicated that appellant needed to be resentenced as a result, because appellant’s plea in the Napa assault was “pursuant to an understanding that sentence would run consecutive” to the sentences imposed on the Placer County arson and the Napa County attempted murder.

Apparently in response to this memorandum, the Napa County Superior Court held a hearing on May 18, 2005. Appellant was not present, but counsel appeared on his behalf, including both attorney Greg Galeste, who had represented appellant in the Napa attempted murder, and attorney Mervin C. Lernhart, Jr., the employer and supervisor of appellant’s trial attorney in the Napa assault. The prosecutor and Galeste agreed that no change was necessary in appellant’s sentence in the Napa attempted murder, and the matter was dropped from the calendar. With respect to the Napa assault, Lernhart reported that appellate counsel was concerned that appellant could lose the benefit of his plea bargain, under which he received a subordinate term consecutive to the Placer arson, due to the reversal of the latter. Both the prosecutor and Lernhart agreed, however, that despite the reversal, appellant’s sentence in the Napa assault would still run consecutively to his sentence in the Napa attempted murder, and the result would be the same. The court expressed the view that appellant might “wish to do something with this case now that [the] Placer [arson] no longer exists as a term of imprisonment,” but indicated that it would be “up to [appellant] to initiate those proceedings.” Accordingly, the court reappointed Lernhart and suggested that he consult with appellant and determine whether to put the matter on the court’s calendar for further proceedings, with appellant present. Lernhart agreed to do so. The prosecutor reiterated that the sentence for the Napa assault should be served consecutive to the Napa attempted murder, but the court indicated that it

⁵ Our record does not reflect why the Placer arson case was dismissed.

would “leave it up to [appellant]” and that it was “up to him whether he thinks something needs to be done now.”

Our record does not reveal whether Lernhart or appellant took any action in the wake of the May 18, 2005 hearing. Almost six years later, however, on April 8, 2011, an employee of the California Department of Corrections and Rehabilitation sent a letter to the trial judge in the Napa assault case indicating that the abstract of judgment and/or minute order in the case might be incomplete or in error. The letter acknowledged that appellant had been given a base term of one-third the middle term (doubled) for the Napa assault, and one-third the term for one of the enhancements, because appellant’s sentence was consecutive to the sentences in the Placer arson and the Napa attempted murder. In the wake of the dismissal of the Placer arson, the letter opined that under California Rules of Court, rule 4.451, the court should impose the *full* terms for the Napa assault and for its enhancement, to be served consecutive to the indeterminate term imposed in the Napa attempted murder.

The trial court held a hearing on the resentencing issue in the Napa assault on September 23, 2011 (the resentencing hearing). At the resentencing hearing, appellant was again represented by Lernhart. Lernhart reported to the court that he had examined the files in the Napa assault and the Napa attempted murder, and expressed the opinion that “when the Placer [arson] case went away, that did not undo the order that the [Napa assault] case run consecutive with the other Napa case” (that is, the Napa attempted murder). Lernhart concluded that he did not see any basis for a modification of appellant’s sentence, but informed the court that appellant wished to withdraw his plea, which appellant confirmed.

Appellant raised three reasons for seeking to withdraw his plea: (1) the plea waiver form appellant signed did not state that his sentence in the Napa assault would be consecutive to the Napa attempted murder, but only to the Placer arson; (2) the form did not have a check in the box notifying appellant that he would not be eligible for probation based on the plea (although the form did indicate appellant’s admission of strike enhancements which had that effect); and (3) appellant contended Keeley told him his

violent felony prior under section 667, subdivision (a)(1) would result in an additional term of one-third of five years, when in fact it resulted in an additional term of the full five years.⁶ Appellant contended that as a result of these errors, he did not enter a knowing and intelligent plea, and was deprived of the benefit of his plea bargain. Appellant also contended that at the time of sentencing, “he didn’t really understand what was going on,” and that was why he failed to object at the time.

After placing these issues before the court, Lernhart explained to the court that he himself was actually the attorney appointed to represent appellant in the Napa assault case. Lernhart had assigned the case to Keeley, his associate, and worked with him on it. Thus, Lernhart believed he “would have a conflict of interest that would amount to an impairment of [appellant’s] right to have an objective review of . . . whether or not he should be able to withdraw his plea.” Accordingly, he asked that if the court were “inclined to proceed along those lines,” he be relieved of the representation. Appellant agreed with him, adding that he believed he “should probably be appointed different counsel, somebody that could be more objective,” because he felt he had been improperly represented due to the difference between the eight-year sentence he received for the Napa assault, and the sentence of four years eight months that he had expected.

The trial judge denied the motion to withdraw the plea, opining that he no longer had jurisdiction to entertain such a motion, given the passage of time. He added that even if he did have jurisdiction, he did not see any basis to grant the motion on any of the grounds that had been stated, nor did he see any basis to appoint counsel to investigate further.

On the issue of modifying the sentence, the trial judge concluded that “to effectuate the plea agreement,” which involved a base term of one-third the middle term, the sentence in the Napa assault would “still have to be consecutive to something.”

⁶ The reporter’s transcript indicates that these reasons were articulated by the court, but this appears on its face to be an error. The content of the statement was based on conversations with appellant to which Lernhart, not the trial judge, would have been privy.

Lernhart agreed, and pointed out that the minute order in the Napa assault expressly provided that the sentence on the enhancements would be consecutive to the Napa attempted murder. Accordingly, the trial court ordered the abstract of judgment modified to delete the reference to the Placer arson, and in its place, to indicate that the sentence in the Napa attempted murder would be the one to which the sentence in the Napa assault was to be served consecutively. The court did not change the base or enhancement terms originally imposed for the Napa assault. Lernhart stated he did not object to this ruling.

The amended abstract of judgment was filed on September 23, 2011. Appellant filed a notice of appeal on October 19, 2011, but neither sought nor obtained a certificate of probable cause under section 1237.5.

DISCUSSION

Appellant raises only one issue on this appeal. He contends that at the resentencing hearing, the trial court violated his federal and California constitutional rights to effective assistance of counsel by failing to relieve Lernhart and appoint substitute counsel to represent appellant in connection with his motion to withdraw his plea. He argues that at a minimum, the court was obligated to hold a *Marsden* hearing (*People v. Marsden* (1970) 2 Cal.3d 118) to determine whether the appointment of new counsel was required. Respondent counters that: (1) appellant is precluded from raising this issue, because a certificate of probable cause was required under section 1237.5, and appellant did not obtain one; (2) in any event, Lernhart did not have a conflict requiring substitution of counsel; and (3) on its merits, appellant's motion to withdraw his plea was properly denied.

A. Certificate of Probable Cause Requirement

In response to the contention that a certificate of probable cause was required for this appeal, appellant cites *People v. Ward* (1967) 66 Cal.2d 571 (*Ward*). *Ward* held that a defendant is not required to obtain a certificate of probable cause if 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.” (*Id.* at p. 574.)

Appellant contends in his reply brief that *Ward, supra*, 66 Cal.2d 571 is controlling, because he “is not challenging his guilty plea. He is challenging his sentence as not complying with his plea.” This argument mischaracterizes the record, however. At the resentencing hearing, appellant did not move to modify his sentence. Rather, he moved to *withdraw his plea*. Moreover, the relief he seeks in this court is a remand to the trial court so that he can renew that motion with the assistance of new counsel.

“A defendant must obtain a certificate of probable cause in order to appeal from the denial of a motion to withdraw a guilty plea, even though such a motion involves a proceeding that occurs after the guilty plea. [Citation.]” (*People v. Johnson* (2009) 47 Cal.4th 668, 679, italics omitted.) Even when the appeal is based on “trial counsel’s alleged refusal to assist defendant in moving to withdraw his plea,” this “does not warrant creation of a new exception to the certificate requirement.” (*Id.* at p. 683.) “In determining whether an appeal is cognizable without a certificate of probable cause, ‘the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made.’ [Citation.]’ [Citation.] If the challenge is in substance an attack on the validity of the plea, defendant must obtain a certificate of probable cause. [Citation.]” (*People v. Emery* (2006) 140 Cal.App.4th 560, 564-565.) Where, as here, a defendant whose motion to withdraw a plea was denied “seeks remand for the opportunity to bring a motion to withdraw his plea[, and t]he further proceedings he seeks are ultimately aimed at obtaining a ruling by the trial court that his plea was invalid[, a] certificate of probable cause is required in order to pursue th[e] appeal.” (*People v. Brown* (2010) 181 Cal.App.4th 356, 361.)

Having failed to obtain a certificate of probable cause, appellant cannot argue that the trial court erred in denying his motion to withdraw his plea, even if the error asserted is failure to provide effective assistance of counsel. Accordingly, this appeal must be dismissed.

B. Merits of Motion to Withdraw Plea

Even if we were to reach the merits, we would affirm. We explain our reasoning here in order to forestall any future effort to raise the same claims, which have already been fully briefed in this court, on the ground that Lernhart's failure to seek a certificate of probable cause, or advise appellant to do so, constituted ineffective assistance of counsel.

Obtaining a certificate of probable cause would not have led to a reversal of the trial court's denial of appellant's motion to withdraw his plea. A motion to withdraw a guilty plea can no longer be made after the trial court has entered judgment on the plea and the judgment has been affirmed on appeal. (See *People v. Stanworth* (1974) 11 Cal.3d 588, 594-595, fn. 5, overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 237; *People v. Grgurevich* (1957) 153 Cal.App.2d 806, 810.) For that reason, the trial court here was correct in surmising that it no longer had jurisdiction to entertain the motion – not because of the mere passage of time, but because the motion was made after the affirmance of the original judgment.

Moreover, two of the three grounds on which appellant relied in support of the motion were without merit, and the third could not be raised by a motion to withdraw the plea. First, appellant contended that his plea was involuntary because he was not warned that the plea would render him ineligible for probation. At the time he entered his plea in the Napa assault, however, appellant was serving an indeterminate life term for the Napa attempted murder. Under the circumstances, appellant could not reasonably have believed he would be placed on probation for the Napa assault.

Second, appellant argued the plea was involuntary because he was not warned that the sentence for the Napa assault would be consecutive not only to the Placer arson, but also to the Napa attempted murder. Nothing on the plea form indicates appellant was promised anything in this regard one way or the other. It is clear from the transcript and minute order of the original sentence, however, that both appellant's trial counsel and the trial court understood that the Napa assault sentence would run consecutively to both of the other cases. Any claim appellant may have that this provision of his *original* sentence

did not comply with the plea agreement could and should have been raised in his direct appeal. (See *People v. Johnson*, *supra*, 47 Cal.4th at p. 679, fn. 5 [“if a defendant claims on appeal that the sentence imposed violated a plea agreement, no certificate of probable cause is required even though the result of a successful appeal could be the withdrawal of the defendant’s plea” (italics omitted)].) On this point, our holding in *Aitkens I* that “[t]here was no sentencing error” (*Aitkens I*, *supra*, at p. 3) constitutes the law of the case. (See generally *People v. Barragan* (2004) 32 Cal.4th 236, 246.) Appellant thus cannot now argue that it was a violation of his plea agreement when, after the Placer arson was dismissed, the trial court corrected the abstract of judgment to conform to the intent of the original sentence. For the same reason, appellant cannot now argue that the sentence on the enhancement under section 667, subdivision (a)(1) should have been one-third of five years instead of the full five-year term.

Appellant’s third ground for seeking to withdraw his plea was his contention that Keeley *told* him he would receive one-third of five years on the enhancement under section 667, subdivision (a)(1), when in fact he received the full five years. Appellant contends that Keeley’s advice on this point constituted ineffective assistance of counsel, and rendered his plea involuntary. This claim relies on facts outside the record of the proceedings leading to appellant’s conviction for the Napa assault. When a postjudgment claim that a guilty or no contest plea was the product of ineffective assistance of counsel is based on facts outside the record, it must be raised by a petition for collateral relief rather than a motion made in the underlying proceeding. (See generally *People v. Witcraft* (2011) 201 Cal.App.4th 659, 664-665; *People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1616-1618; *People v. Cunningham* (2001) 25 Cal.4th 926, 1003.) Accordingly, appellant’s claim of ineffective assistance of counsel did not constitute grounds for granting his motion to withdraw his plea.⁷

⁷ For that reason, we need not and do not reach the issue whether Lernhart’s supervision of Keeley during the prejudgment phase of the Napa assault case gave rise to a conflict of interest on Lernhart’s part in representing appellant during the post-judgment proceedings that resulted in the order from which this appeal was taken.

DISPOSITION

The appeal is dismissed due to appellant's failure to obtain a certificate of probable cause.

RUVOLO, P. J.

We concur:

RIVERA, J.

SEPULVEDA, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.